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January 26, 2023

House Revenue & Taxation Committee
Arkansas Legislature
Via E-mail

Re: Support of H.B. 1045 – Repeal of Throwback Rule

Dear Chair Eaves, Vice-Chair Beaty, Jr., and Members of the Committee:

I am writing on behalf of the Council On State Taxation (“COST”) to support the provisions of H.B. 1045 that repeal the throwback rule in Arkansas.

About COST

COST is a nonprofit trade association based in Washington, DC. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce and today has an independent membership of over 500 major corporations engaged in interstate and international business, many of which directly conduct business in Arkansas. COST’s objective is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities.

COST’s Position on Throwback Provisions

The COST Board of Directors has adopted a formal policy statement on Throwback provisions.¹ COST’s specific position on a state’s use of a throwback provision is:

Throwback laws seek to require companies to pay tax in one state on income that another state has chosen not to tax or is legally unable to tax. A company’s tax liability in one state should not be measured by its tax in another state. Throwback rules also discourage investment in a state. Such rules must not be adopted and must be repealed where they presently exist.

The repeal of the throwback provision will result in Arkansas’s corporate income tax appropriately measuring multijurisdictional businesses’ activity in the State based on their operations in Arkansas, and not those occurring in other states. It also removes the murky issue of determining when a taxpayer is taxable in another state.² Importantly, this repeal should

¹ The COST policy statement covers both throwback provisions (sourcing a sale to the origin state if a taxpayer is not taxable in another state) and throwout provisions (disregarding a sale for apportionment purposes when a taxpayer is not taxable in another state).

² See *Whirlpool Properties, Inc. v. Director*, 208 N.J. 141 (NJ 2011) and *Lorillard Licensing Co. v. Director*, NJ Tax Court (1/14/2014). Addressing Commerce Clause concerns, the New Jersey courts held the taxing state was required to use its substantial nexus standard (e.g., economic nexus) and it was not material whether the destination state imposed an income tax in order to satisfy the fair apportionment prong of *Complete Auto* (430 U.S. 274).

apply to all taxpayers; it is also not appropriate to create “winners and losers” by limiting the repeal of the throwback rule to select industries.

Conclusion

For the reasons discussed above, COST urges this Committee to pass H.B. 1045. Please let me know if you have any questions.

Sincerely,



Patrick Reynolds

cc: COST Board of Directors

Douglas L. Lindholm, COST President & Executive Director