



Minutes of the Multistate Tax Commission Executive Committee Meeting
May 12, 2016
Washington, D.C.

I. Welcome and Introductions

The chair called the meeting to order at 8:30 a.m. The following persons attended the meeting either in person or via telephone:

STATES	PRACTITIONERS, ASSOCIATIONS, AND PRESS	MTC
Ala. – Julie P. Magee	Bloomberg BNA – Jennifer McLoughlin	Bruce Fort (phone)
D.C. – Stephen Cordi	COST – Karl Frieden (phone)	Gregory S. Matson
Id. – Rich Jackson	EY – Joe Huddleston	Helen Hecht
Kan. – Kathleen Smith (phone)		
Mo. – Wood Miller	FIST Coalition – Karen Boucher	Keith Getschel (phone)
Mont. – Gene Walborn	KPMG – Shirley Sicilian	Marshall Stranburg
Mont. – Mike Kadas	Sutherland – Todd Lard	William Six
N.D. - Ryan Rauschenberger (phone)	Tax Analysts – Amy Hamilton (phone)	Wendy Margolis
N.M. – Demesia Padilla (chair)	TEI – Pilar Mata	Thomas Shimkin
Ore. – Julie R. Anderson (phone)	TEI / Maxim Healthcare Services – Richard O’Connor	Richard Cram
Texas – Nancy Prosser		Patuxent Consulting – Jim Rosapepe
Wash. – Drew Shirk		Patuxent Consulting – Len Lucchi

II. Public Comment Period

Ms. Padilla opened the public comment period. There were no public comments.

III. Liaison Discussion with Tax Executives Institute

Members of the Tax Executives Institute (TEI) then offered their comments on two items.

Ms. Pilar Mata of TEI addressed state amendments as a result of federal revenue adjustment reports (RARs). She said that adjusting state returns on account of RARs is burdensome for three principal reasons: (a) states differ regarding timing, (b) they differ regarding what triggers action based on an RAR, and (c) they differ regarding the format in which the adjustment must be reported.

Continuing, she said that the Commission's Model Uniform Statute for Reporting Federal Tax Adjustments has not been widely adopted and the current lack of uniformity is causing confusion and inefficient complexity for taxpayers. She directed the committee's attention to TEI's policy statement and an accompanying, simple spreadsheet that TEI recommends the Commission and states adopt. She noted that the Commission's model statute is already close to the TEI's policy statement but suggested that RAR adjustments should be reported on a form similar to the federal Form 1120X rather than a full amended state return. She said that states should request more information during an ensuing audit if they need more information regarding the RAR adjustment.

She also noted that the 180-day window (often less in many states) for filing RAR information with states is burdensome to comply with unless the states adopt an abbreviated report, especially when years at issue go back many years. She said that timeliness of reporting could be greatly improved if the report were on a uniform and simple form similar to the federal Form 1120X. She concluded by inviting feedback on her proposals.

Ms. Boucher commented that an important issue is that the 180-day window could start during the season when tax professionals are working hardest to prepare returns on time. Any model statute should allow the states to choose when the reporting period starts.

Mr. Frieden stated that making changes to the Commission's model statute in line with TEI's model and Ms. Mata's statement would be a good project for the Commission's Uniformity Committee. He explained that the Council on State Taxation (COST) is working on a fifty-state survey of the differences between states with respect to RAR reporting that Bloomberg BNA will publish within about six months. He opined that the Commission had not addressed issues with its 2003 model statute because few states had adopted it. But Mr. Frieden suggested that it is a good time to pick up the issue again because interest in it has grown substantially.

Ms. Hecht noted the problem that some states by law cannot accept anything other than a full amended return. She said that the Federation of Tax Administrators (FTA) should be involved in the project to provide technical guidance if the project is adopted.

Ms. Mata said that she would be happy to coordinate and assist COST with any survey of state practices regarding RAR reporting.

Separately, Mr. O'Connor of TEI and Maxim Healthcare Services commented on the Commission's audit manual and related matters. He supports TEI's policy statement regarding audit procedures. He focused on section 3.11 of the Commission's audit manual that is in particular need

of harmonization with TEI's proposal, he asserted. He said that a problem with the Commission's manual is that it allows an auditor to "start with specific audit issues" (without taxpayer input necessarily). He proposed that following the IRS procedure would be easier and more efficient for states and taxpayers: agree in writing on the issues from the onset of the audit. In contrast, he said, the Commission's manual lacks focus; it advises that general information be collected first, which is more burdensome for both state and taxpayers than agreeing in advance what the issues are. He said that the U.S. Internal Revenue Service (IRS) conformed its audit procedure to some elements of TEI's policy statement recently.

Continuing, Mr. O'Connor said that two other issues should be addressed in a revised Commission manual. First, he requests that the Commission's manual be amended to require that the auditor and taxpayer agree on a timeline to reach specified milestones in the audit, such as resolution of identified issues, so that the audit can be completed on time and according to a predictable schedule. Second, he requests that the manual be amended to require the auditor to disclose the facts and law that he relies on when making a recommendation for adjustment, and that the taxpayer have an opportunity to correct or provide additional facts and law. Ms. Mata said that she agrees with Mr. O'Connor and the TEI policy statement on audit procedures.

Mr. Matson responded that the Commission would be happy to have information from him or others to allow the Commission to consider tweaks to the Commission's audit manual. He also stated that in practice, contrary to the static procedure of the manual, Commission audits usually do proceed in a manner close to what Mr. O'Connor requests.

Mr. Getschel said that because taxpayers generally do not sign waivers of statutes of limitation auditors are under tight schedules to complete audits. He said that auditors who have identified no significant issues complete audits quickly. He said that some states have mandatory requirements that the Commission cannot waive. He further noted that the Commission and states generally consider an audit to be an examination of a "compliance period", which differs from how the IRS views its audits. He invited Mr. O'Connor and others to contact him; he will be delighted to work with taxpayers and their representatives who have concerns about an audit.

Mr. Matson said that it would be appropriate for the Uniformity Committee to consider these issues and to listen to concerned taxpayers and their representatives further so that the Commission understands all the facts and issues.

IV. Approval of Minutes

The committee approved each set of minutes of the December 11, 2015 and January 29, 2016 meetings of the Executive Committee by voice vote without amendment.

V. Report of the Chair

Ms. Padilla said that the Commission's legal staff needs a volunteer to recommend and help with resolutions; representatives of Compact and Sovereignty states are eligible. Ms. Prosser volunteered.

Ms. Padilla then solicited assistance for Mr. Matson on the nominating committee. Ms. Magee volunteered.

VI. Report of the Treasurer

Mr. Rauschenberger delivered the report via telephone. He reported that:

Ending March 1, 2016, the FY 2015-2016 budget has generally followed what the committee approved at its meeting in Spokane in July 2015. However, there have been savings in general operations, Audit, and Nexus due to unfilled positions: deputy executive director, counsel in the Legal Division, vacancy in the National Nexus Program, and an empty auditor slot. Training is designed to be revenue neutral. It has been this year, in contrast to last year when costs were not fully recovered by tuition. The Audit budget was dealt a blow by the departure of Massachusetts from the program, but the loss was quickly made up through the additions of Delaware and New Hampshire. The committee approved the report of the treasurer by voice vote.

Mr. Rauschenberger reviewed the proposed budget for FY 2016-2017 and the approval process, noting that changes can be made to the proposed budget before being approved by the Commission at its July meeting. The budget proposes fee increases of two percent for the general membership assessment and for the Audit Program. The budget proposes no increase for the Nexus Program. Audit fees for Pennsylvania, Delaware, and New Hampshire as new members are being phased in over two years. The budget contemplates a 5% increase in healthcare premiums, and a 2% increase in salaries with a corresponding increase in the Commission's deferred compensation plan. Other expenses are budgeted for a 3% increase.

Mr. Matson followed Mr. Rauschenberger's report by noting that the increase in health premiums is hard to predict. He said that the Commission staff will modify the budget around that amount when it is known, but will inform the Executive Committee if the increase is substantial.

Ms. Padilla announced that the committee approved the report.

VII. Report of the Executive Director

Mr. Matson said that the Audit program had recommended assessments of \$59 million since December.

Mr. Matson welcomed Richard Cram to his position as director of the National Nexus Program, which he assumed on February 29th. The voluntary disclosure program has collected \$14

million so far this fiscal year. He noted that this amount includes a small amount from former members of the program whose disclosures are just now being completed. The Nexus Program continues to work with two states who want to join the program.

Mr. Matson said that he is pleased with the Litigation Committee's semiannual trainings. He noted that assistance to states with legal issues has been increasing. The Commission has filed five amicus briefs so far this fiscal year.

He said that the Policy Research Division is a great resource for states and staff. It routinely offers meaningful training to undergraduate and graduate interns.

The Commission's training program has been quite active; there will be a corporate income tax training class in Rhode Island in two weeks. He invited states to contact Mr. Stranburg if they would like to have training scheduled. Ken Beier, who managed the training program, has retired and will not be replaced; the Commission's events manager will manage all Commission events, including training.

Continuing to discuss personnel changes, he said that Marshall Stranburg joined the Commission staff as deputy executive director on April 1st. He further noted that Tom Shimkin, former director of the National Nexus Program, joined the Legal Division as legislative counsel and director; he is focusing on federal legislation with consequences for the states, as well as some of the most important state legislation.

He complimented Helen Hecht on having been selected by Tax Analysts to be among its ten most outstanding women in taxation, one of only three in the field of state and local taxation. He added that Tax Analysts received over 300 nominations for this award.

Mr. Matson listed outside events and presentations at which he or other members of the Commission staff represented the MTC, most often through being a presenter. He reported that there are no problems with technology or the website. He said that the Commission tries to post as much information on its website as it can.

VIII. Committee Reports

A. Arm's-Length Adjustment Service Committee

Mr. Stranburg reported on the Arm's-Length Adjustment Service (ALAS) Committee. Its members – Alabama, Iowa, New Jersey, North Carolina, and Pennsylvania – held their first meeting in April.

B. Audit Committee

Mr. Getschel said that staff is working on a manual regarding waivers and statutes of limitation. The program recently hired sales tax and income tax auditors

C. Litigation Committee

Open sessions have focused on educational presentations. Closed sessions have focused on attorney education.

D. Nexus Committee

Mr. Cram said that the committee has been working on strategic planning projects: increasing state participation and improving the layout and type of information on the Nexus portion of the website.

E. Strategic Planning Steering Committee

The committee chartered a project to learn how feedback and suggestions regarding multistate issues are currently received by states and the Commission, and how the process could be improved. Mr. Matson informed the committee that the Commission's strategic-planning consultant, Elizabeth Harchenko, will end her work with the Commission after its annual meetings in July 2016. Mr. Matson said that he and Mr. Stranburg will develop a procedure to continue strategic planning in-house.

F. Uniformity Committee

Ms. Hecht said that the committee is working on a project to study state impacts from the upcoming federal changes to partnership audits. Regarding the model sales and use tax notice and reporting statute, she reported that the U.S. Tenth Circuit Court of Appeals decided that Colorado's law is constitutional and that there is no burden on interstate commerce. The dissent saw the law as an inappropriate attempt to get around *Quill*. She said that the court denied a motion to hear the case *en banc* and that the plaintiffs have until the end of summer to file a petition for certiorari with the U.S. Supreme Court.

IX. Uniformity

Ms. Hecht reported on the work of drafting regulations to implement changes to Article IV of UDITPA. She also reported that the model nexus statute received a favorable bylaw VII review and that the Compact members will consider this model at the Commission's July meeting.

The Executive Committee took up discussion of the hearing officer's report on the proposed draft amendments to the Commission's Model Allocation and Apportionment Regulations. The written report of the hearing officer from the public hearing was presented to the Executive Committee. Hearing Officer Brian Hamer had extended the comment period for one week after the public hearing and a few comments were received. The hearing officer considered all comments, but did not embrace all. Additional comments were presented at the meeting.

Mr. Huddleston of E&Y said that items needing closer review include the definition of receipts. He advocated that receipts from hedging and lending of cash and securities are normal business activities and should not be excluded completely. He said that their inclusion as apportionable income without factor representation might violate the Constitution and the Commission's purpose by deviating from UDITPA and distorting income. He was concerned that exclusion of such receipts creates different treatment of taxpayers based on their type of business. He concluded by saying that exclusion is inconsistent with current state definitions, for example Illinois, California, Montana, and Florida.

Ms. Boucher on behalf of the Financial Institutions State Tax Coalition provided written and verbal comments to the Executive Committee which argued that the draft amendments to the Model General Allocation and Apportionment Regulations do not reflect the intent of the revised UDITPA provisions. She requested that the Commission not finalize Section 17 regulations until issues with respect to receipts from hedging and securities can be addressed.

Mr. Frieden of the Council on State Taxation (COST) also provided written comments to the Executive Committee. He stated that COST appreciated that Hearing Officer Hamer agreed with COST's views regarding changes in the method of reasonable approximation on a prospective basis. However, COST requests that the Commission reject the hearing officer's failure to allow taxpayers to amend a method used or to raise the percentage thresholds for sourcing based on customer mailing addresses. He referred the Executive Committee to his written testimony for more detail and specific recommendations.

Ms. Hecht explained reasoning for staff's decisions regarding the issues that Mr. Huddleston, Mr. Frieden, and Ms. Boucher raised. She noted that there had originally been an exception in the definition of receipts (found in Section I of Article IV) that would have allowed securities dealers to include receipts from hedging and securities, but that this exception was removed after the hearing process and that change was also approved by the Executive Committee.

Ms. Sicilian on behalf of the American Bar Association (ABA) requested that the regulations add a paragraph regarding nonbinding mediation if the taxpayer requests it as a result of conflicting sourcing rules. She pointed out that the fourth purpose of the Compact is to facilitate avoidance of double taxation. She said that we are at the apex of double taxation now because approximately half of the states have changed to market sourcing, and among market sourcing states there are several ways to determine the market - e.g., benefits received, where customer located, where delivered.

Ms. Magee recommended that the Executive Committee return the proposal to the Uniformity Committee so that it would have a chance to digest the new information received. She asked that the Uniformity Committee report back to the Executive Committee at its July meeting. She expressed hope that the project can be brought to conclusion soon thereafter. Ms. Padilla asked for and received a motion for the Uniformity Committee to consider the issues raised by the public

comments and report its recommendations to the Executive Committee at its July meeting. The committee approved the motion by voice vote.

X. Federal Issues with State Tax Implications

Mr. Rosapepe gave an overview of the current political environment. He said that there are no more than 30 legislative days left in this Congress. He spoke about federal tax reform – Speaker Ryan is interested and has put forth ideas; if he remains speaker, he will push for comprehensive tax reform. But the Presidential candidates - Mr. Trump and Ms. Clinton - have not made tax reform part of their campaigns.

Mr. Lucchi reviewed specific legislation. He said that S. 2555, a bill otherwise about allocation of wireless spectrum, sprouted an amendment to that could preempt state taxation of prepaid cell phone service. He said that there is a hold on it due to a FCC nomination issue. He said that the three main approaches to authorizing remote collection of use tax continue to languish. He pointed out that some states have begun to move on their own to attack Quill in the judicial system. Mr. Lucchi concluded by saying that none of the other bills concerning preemption will move this Congress, e.g., BATSA, preemption of rental car taxes, digital goods.

XI. Upcoming Meetings and Events

Mr. Matson gave a preview of the annual meetings in Kansas City, Missouri and reminded the committee that the fall meeting will be in Houston, Texas on December 13 – 15.

XII. Closed Session

The committee went into closed session at 11:45 a.m. Minutes of the closed sessions are confidential and recorded separately.

XIII. Resumption of Public Session and Reports from Closed Session (if any)

The open session resumed at 12:05 p.m. There were no reports from the closed session.

XIV. Adjournment

The meeting was adjourned at 12:08 p.m.