



MULTISTATE TAX COMMISSION

Uniformity Committee Meeting

Monday, July 27, 2020
2:00 P.M. – 5:00 P.M. Eastern
(Held via Video Conference)

Report on Uniformity Developments

Helen Hecht, Uniformity Counsel

NOTE: Developments related to *Wayfair*/marketplace implementation and to the MTC's Model for Reporting Federal Adjustments will be provided with those separate agenda items. In addition, we invite state representatives to provide information on any developments of interest in their states as part of the committee's roundtable.

Combined Filing

The Commission has had a recommended model statute for combined filing since 2006. That model follows the so-called Joyce method. An alternative model following the Finnigan method was approved by this committee in April. That model was submitted to a public hearing on June 9. The hearing officer, Bruce Fort, MTC Senior Counsel, has provided his report to the Executive Committee for consideration at its upcoming July 30th meeting.¹ The hearing officer recommends adoption of the model with the addition of two drafters' notes. The hearing officer's report also contains useful analysis and a history of the Joyce/Finnigan issue.

In related developments, two states, Kentucky and New Mexico are currently implementing mandatory combined filing.

Practices under P.L. 86-272

The proposed revisions to the Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States under Public Law 86-272, approved by this committee, will be submitted to a public hearing to be held via video conference on August 5. Information on this hearing is on the MTC website home page. The hearing officer is Robert Desiderio, Esq., whose bio is also available on our website. Written comments on the proposed revisions are still being accepted.

¹ Available on the Executive Committee meeting agenda on the MTC website, here:
<http://www.mtc.gov/getattachment/The-Commission/Committees/Executive-Committee/Executive-Committee-Agenda-7-2020/Hearing-Officer-Report-Finnigan-Combined-Filing-2020-with-Exhibits.pdf.aspx>.

Factor Presence Nexus Standard for Business Activity Taxes

The Commission adopted a model Factor Presence Nexus Standard for Business Activity Taxes in 2002.² This standard is of renewed interest in light of the proposed revisions to the statement of practices under P.L. 86-272, which apply the language of the federal statute to Internet and other modern forms of commerce. A criticism of these revisions is that their application could provide less protection for small businesses or subject businesses to filing requirements in states where they have only minimal activities.

But the problem is that P.L. 86-272, enacted in 1959, was not designed to protect smaller businesses, nor were its protections geared to economic activity a business might otherwise have in a state. Instead, P.L. 86-272 merely responded to a particular factual scenario (solicitation by employee or independent salesmen) widely viewed as having been protected from state taxation prior to the U.S. Supreme Court’s ruling in *Northwestern States Portland Cement*.

In contrast, the MTC model factor presence nexus statute would protect those businesses that have a relatively small economic footprint in a state. The model was meant to act as a minimum threshold (defining “substantial nexus”) for income and similar taxes imposed on multistate businesses. Business interests widely opposed the model, however, arguing that *Quill’s* physical presence requirement applied to state income taxes and any economic nexus standard was therefore unconstitutional. The Supreme Court’s decision in *Wayfair* has put that argument to rest.

No doubt due in part to this opposition, states did not begin to adopt the factor presence nexus model for a decade and then only a handful of states did so. Today, about a dozen states have some form of factor-presence in their statutory imposition statutes. It is important to note, however, that some of those states have only a sales threshold and would subject a business to tax if that business had minimal physical presence in the state. In those states, the sales threshold alone does *not* function as a minimum threshold in the way the MTC model does, since the MTC model contains minimum thresholds for property and payroll as well as sales.

The Commission continues to recommend its factor presence nexus model for the purpose of providing a minimum threshold for business taxes. Indeed, that was the intention of the model’s primary creator, Charles McLure, who proposed it in an article he authored in 2000 in the National Tax Journal entitled, presciently, “Implementing State Corporate Income Taxes in the Digital Age.”³ The article argued, and the Commission concurred, that a factor presence standard is far better at reducing filing burdens where there would otherwise be insubstantial taxes owed, and in creating a level playing field for multistate businesses.

Therefore, as the discussions concerning the revisions to the statement on P.L. 86-272 proceed, we would ask that states also continue to consider adopting the MTC’s factor presence nexus model as a corporate income tax minimum threshold.

² Available on the MTC website here: http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Uniformity_Projects/A_-_Z/FactorPresenceNexusStandardBusinessActTaxes.pdf.

³ National Tax Journal, Vol. 53, No. 4, Part 3: (December, 2000), pp. 1287-1305.

Market-Based Sourcing

The MTC adopted a market-based sourcing model statute as part of its revisions to Art. IV (UDITPA), Section 17, in 2014. The following states are currently implementing market-based sourcing:

- North Carolina – S.B. 557 – incorporating some detailed industry rules
- Hawaii – S.B. 394
- Vermont – H. 514
- New Mexico – H.B. 6

This brings the total to 32 states that have adopted some form of market-based sourcing. In addition, New Hampshire is continuing an official study of market sourcing (see S.B. 190.) Recent adopters of market-based sourcing have also been in the process of issuing regulations in the last year. The Commission is currently in the process of putting together a training for the states that are implementing market-based sourcing and we will be providing information on this training shortly.