



**MULTISTATE TAX COMMISSION**

*Working Together Since 1967 to Preserve Federalism and Tax Fairness*

**Multistate Tax Commission  
 Uniformity Committee Meeting  
 Hilton Santa Fe  
 100 Sandoval Street  
 Santa Fe, NM 87501  
 July 27 and 28, 2008  
 Minutes of Meeting**

The following persons attended one or more sessions of the Uniformity Committee Meeting:

Name	Affiliation	Name	Affiliation
Ted Spangler, Chair Uniformity Committee	ID DOR	Christine Mesirow	OH DOR
Wood Miller, Chair Income/Franchise Tax Subcommittee	MO DOR	Guy L. Hurst	OK DOR
Richard Cram, Chair Sales/Use Tax Subcommittee	KS DOR	Eric Smith	OR DOR
Robynn Wilson	AK DOR	Janielle Lipscomb	
Christy Vandevender	AL DOR	Brandin Seibel	SD DOR
Michael Mason		Gary Johnson	TX CPA
Danny Walker	AR DOR	Clark Snelson	UT DOR
Tom Atchley		Frank Hales	
Ben Miller	CA FTB	Rod Marelli	WA DOR
Selvi Stanislaus		Chris Coffman	
Phil Horwitz	CO DOR	Jan Bianchi	WV DOR
Tim Weber		Andrew Glancy	
Charles Wilson	DC DOR	Jan Mudrinich	
Ed Many	GA DOR	Private Sector	
Reva Tisdale	ID DOR	Jim Hall	ACLI
Pat Verschelden	KS DOR	Allan Stein	AIA
Jennifer Hays	KY Leg.	Deborah Bierbaum	AT&T
Christina Loftus	LA DOR	Jana Malone	COST
Earl J. Millett		Todd Lard	
Leonore Heavey		Karen Boucher	Deloitte Tax, LLP
Michael Fatale	MA DOR	Dan Robillard	Expedia
Cathy Wicks	MN DOR	John Allan	Jones Day
Keith Getschel		Tracy Williams	PCI/Sidley Austin
Alice Gorman	MS DOR	Ferdinand Hargroian	PWC
Brenda Gilmer	MT DOR	Jamie Fenwick	Time Warner Cable

		MTC Staff	
Eugene Walborn		Joe Huddleston	
Lee Baerlocher		Bruce Fort	
Lennie Collins	NC DOR	Elliott Dubin	
Donnita Wald	ND DOR	Harold Jennings	
Mary Loftsgard		Ken Beier	
Myles Vosberg		Les Koenig	
Andrew Cora	NM DOR	Roxanne Bland	
Charles Langston		Shirley Sicilian	
Dan Azmer			
David Fergesen			
Heidi Chowning			
Louie Joe Gomez			
Rebecca Abbo			
Charlie Rhilinger	OH DOR		

***Sales and Use Tax Uniformity Subcommittee***

***July 27, 2008***

***1:00 P.M. to 5:00 P.M.***

**I. Welcome and Introductions**

Richard Cram, Subcommittee Chair, welcomed the attendees.

**II Public Comment**

There was no public comment at this time.

**III Reports and Updates**

*A. Report on Commission Action on Uniformity Projects*

1. Model Sampling Authorization Statute

Roxanne Bland, MTC Counsel informed the members of the Subcommittee that the model statute passed the require Bylaw 7 survey and has been forwarded to the full Commission to be voted on as a Uniformity recommendation.

2. Federal Legislative Activity

Ms. Bland relayed the information that most probably no major legislation which would have a major impact on states would pass this year. The Streamlined Sales and Use Tax Act (SSUTA) picked up some more co-sponsors this year. One major stumbling block—the small business exemption definition—would be developed by the Governing Board. Other pieces of federal legislation still working their way through Congress include: (1) Automobile Renters Act of 2007; (2) Cell Phone Tax Moratorium; and (3) State Video Tax Fairness Act.

Ms Bland also informed the members of the Subcommittee that U.S. State Department's Office of Foreign Missions has issued ID cards for foreign diplomats.

### 3. Hotel Intermediaries Project

Ms. Bland informed the members of the Subcommittee that the Drafting Group did not provide a definition of Tour Operator because the definitions would not have been significantly different from that of intermediary. The Drafting Group used the Internal Revenue Service's definition of a Controlled Group in order to allow the intermediary to use the safe harbor.

Joe Huddleston asked the industry representatives to clarify the current state of litigation. The reply was that there were motions to dismiss but they were denied. The only litigation now is for municipalities; there is no state litigation.

The definition of Accommodation Charge is now defined as the total amount the customer pays and the Discount Room Charge is the price the accommodations provider charges the intermediary. Under the safe harbor provision, the accommodations intermediary would not be responsible for incorrect remittances if they use the same rate as the accommodations provider – if the parties not interrelated.

Utah moved that the amended draft be recommended favorably to the full Uniformity Committee; Minnesota seconded the motion. The motion carried: 13 aye votes, 0 no votes, and 1 abstention.

### 4. Telecommunications Transaction Tax Administration

Roxanne Bland reviewed the three models for centralizing the administration of telecommunications transaction taxes:

1. For states where there is State administration only and revenues are distributed to local governments by formula.
2. For states where there is State administration of locally imposed taxes either through state revenue agency or a new agency established just for this purpose.
3. For states where there is local administration of locally imposed taxes.

Ms. Bland explained to the subcommittee members that the Committee recommended starting first with model 2 – state administration of locally imposed taxes. Shirley Sicilian, MTC General Counsel, noted that any proposed model administrative regulation could conform to the Streamlined Project; and, that the subcommittee had determined at earlier meetings that it would eventually draft each of the models, but would start with model 2. The subcommittee decided to invite local groups such as GFOA, NLC, NACo and others into the deliberations.

Richard Cram (KS) directed the Work Group to focus first on Model #2, state administration of locally imposed taxes. MN asked whether the industry representatives have knowledge of which states administer some or all of the telecommunications transaction taxes. Todd Lard of COST volunteered to electronically forward COST's latest study of the subject.

#### **IV. New Business**

The Chair asked for ideas for new projects. Shirley Sicilian recommended that the staff could undertake a comprehensive review of all MTC Model Sales and Use Tax Regulations and Guidelines to see if they conform to SSUTA. The Committee directed staff to proceed with that research. WA is undertaking a study to see what digital products that are not currently taxed under SSUTA can be taxed.

#### ***Income and Franchise Tax Uniformity Subcommittee***

***July 28, 2008***

***8:30 A.M. to 12:00 P.M.***

#### **I Welcome and Introductions**

Wood Miller, Subcommittee Chair, welcomed the attendees.

#### **II Public Comment**

There was no public comment at this time.

#### **III Reports and Updates**

##### ***A. Report on Uniformity Projects in Process***

1. Proposed Model Regulation for Apportionment of Income from the Sale of Telecommunications and Ancillary Services

Sheldon Laskin, MTC Counsel, was the Hearing Officer for this project. Mr. Laskin informed the members of the Subcommittee that he wrote a supplemental hearing officer's report to address oral and written testimony that was submitted after the initial report. The additional materials are included in the supplemental hearing officer's report. This model regulation passed the Bylaw 7 survey and will be voted on at the Commission Business meeting.

2. Proposed Model Statute for Taxation of Captive Real Estate Investment Trusts (REITs)

Bruce Fort, MTC Counsel, informed the members of the Subcommittee that Utah and West Virginia have adopted the MTC language in their statutes. WI has adopted an add-back statute which includes rents paid to a captive REIT. Mr. Fort also noted that the Australian Property Council has asked states to be mindful of the carve-out for foreign property trusts; these trusts provide a conduit for foreign investment into the U.S. commercial property market, and a tax imposed on such trusts might interfere with their operations. The federal government imposes a 15% withholding tax on REIT dividends paid to a foreign entity but no states follow that policy. This Model Statute passed the Bylaw 7 survey and will be voted on at the Commission Business meeting.

### 3. Model Amendments to Multistate Tax Compact Article IV and NCCUSL UDITPA Effort

Shirley Sicilian discussed the results of the April 2008 survey with the members of the Subcommittee. She noted that there was unanimity among the respondents on most of the questions on the survey. Not all responses were unanimous, though. She noted that 86 percent of the respondents answered that NCCUSL should consider factor weighting. Eighty-six percent responded that additional issues should not be considered. Of the fourteen percent that suggested additional issues be considered, the suggested additional issues were: (1) consideration of including financial institutions; (2) consideration of including public utilities; (3) Definition of non-business income; and (4) consideration of leased employees in the payroll factor.

Ms. Sicilian told the members that some industry representatives do not want NCCUSL to proceed with the project because they believe uniformity is either not desirable, not practicable, or both. Ben Miller, CA FTB, told the members of the subcommittee the state legislators who attended the conference in Big Sky, MT, said the project should not go forward. The three are members of ALEC and/or the NCSL task force on telecommunications and electronic commerce. An ABA SALT Committee poll showed some support for the project.

#### *B. Federal Issues Affecting the States*

Roxanne Bland discussed 3 pieces of pending Federal legislation that could negatively affect state revenues:

1. H.R. 5267 Business Activity Tax Simplification Act of 2007
2. H.R. 3359 the Mobile Workforce State Income tax Fairness and Simplification Act of 2007
3. H.R. 1360/S. 785 Telecommuter Tax Fairness Act

Ms. Bland informed the members of the subcommittee that in May, the House Subcommittee on Commercial and Administrative Law held hearings on BATSA. Congressman Delahunt of MA told all parties to come back with a compromise. If H.R. 3359 were to become law, states would be allowed to impose their income tax on an out-of-state employee unless that employee was in the state for more than 60 days during the tax year. There are no negotiations at this time.

#### **IV. Report on the Project to Amend MTC Model for Financial Institutions Apportionment**

Lennie Collins (NC) informed the members of the subcommittee that they had divided into three groups: definitions, property, and receipts. Mr. Collins thanked the participating states and organizations.

#### **V. Amendment of MTC Model Regulation IV.18**

Bruce Fort described the project to the subcommittee; he noted that the reason for this project was a CA Supreme Court case – CA vs Microsoft – where the Supreme Court agreed that Section 18 could be invoked to avoid distortion of the sales factor even though the challenged

activity was not a rare or unusual occurrence. The potential exists that other courts could reach opposite results. Some of the issues involved are:

- Should the use of an alternative apportionment formula be proposed on an amended return?
- Who is the decision maker – the tax administrator, the court, or the revenue officer?
- Which party seeking to use Section 18 has the burden of proof?
- Should there be any quantitative restrictions on using Section 18?

The subcommittee decided that the staff should survey the states on these questions and discuss the survey results by means of teleconferences.

#### **VI. Regulated Investment Companies**

CA moved that this project be dropped – the motion carried by a vote of 18 yes votes, 0 no votes, and 0 abstentions.

#### **VII. Income Earned by Non-Corporate Income Taxpayers Derived from an Ownership Interest in a Partnership or LLC**

Sheldon Laskin, MTC Counsel, introduced the project and the speakers from the insurance industry. Jim Hall of the American Council of Life Insurance (ACLI) presented the history of insurance taxation in the U.S. from the early 19<sup>th</sup> century to the present day. Tracy Williams of PCI/Sidley Austin explained that a 2% rate of tax on gross premiums translated into an effective income tax rate of 13% to 20%; and, that some states impose both a gross premiums tax and an income tax on insurance companies. He noted that the industry would prefer income taxation to gross premiums taxes. Mr. Williams was questioned as to how insurance company income is determined; and, whether the IRS could challenge a captive insurance company's claim that it was a real insurance company.

TX remarked that insurance companies file inconsistently in TX because NAIC guidelines do not require consistency. Each company's filings are consistent across states, but the companies are not consistent among each other.

Michael Fatale said that MA had introduced a bill (MA HB 3756) under which pass-through entity income would be taxed at the non-insurance affiliate pass-through entity level to the extent the shareholders or partners are not subject to tax. The insurance company representatives expressed concern that the MA proposal to tax that income could subject Massachusetts insurance companies to retaliatory tax in some states, even if the tax is imposed on the non-insurance affiliates. This could result in an increase in premiums for Massachusetts policyholders.

#### Committee Discussion:

Mr. Laskin informed the subcommittee that the project is still in the educational phase.

CO noted combined reporting states have a problem if non-corporate income tax companies are excluded from the unitary group and significant income shifting occurs from the unitary group to the non-corporate tax company. MA noted that they had seen revenue losses due to restructuring, such as insurance companies owning REITs or other pass-through entities

Ted Spangler (ID) remarked that the project could consider 3 parts:

1. Potential for “stuffing” of captive insurance companies or other entities not subject to corporate income tax.
2. Investment in pass-through entities by entities that are not subject to corporate tax.
3. Uses of intangible holding companies to shift income.

After further discussion, the subcommittee directed staff to prepare an issue paper on these topics.

### **VIII. New Business**

The Chair noted subcommittee appreciation of the MTC staff work.

### **IX. The meeting was adjourned at 12:16 P.M.**

#### ***Full Uniformity Committee***

***July 28, 2008***

***1:00 P.M. to 3:00 P.M.***

### **I. Welcome and Introductions**

Ted Spangler, Committee Chair, welcomed the attendees.

### **II. Approval of the Minutes of March 28, 2008 Meetings; Approval of Minutes of November 2007 Meetings**

The minutes of these meetings were approved unanimously.

### **III. Public Comment**

None at this time.

### **IV. Executive Director’s Report**

Joe Huddleston, MTC Executive Director, gave a wide - ranging report to the Committee. The first item was the UDITPA project. Mr. Huddleston informed the members of the Committee that NCCUSL is studying UDITPA now.

Mr. Huddleston then discussed pending Federal legislation that can affect the states. He noted that the Federal government is now using moratoria to affect state and local taxation rather than outright bans. For example, (1) the Cell Phone Tax Moratorium; and (2) the Direct Broadcast Moratorium. The impact of this legislation would be greater for local governments; and, companies would be able to ask federal courts to address problems – similar to 4R Act legislation. Other pending federal legislation includes BATSA and the Streamlined Sales Tax Project. Mr. Huddleston told the Committee members that there would be an imminent mark-up of the House version of the Streamlined Sales Tax legislation..

Mr. Huddleston then described operational activities within the MTC. He informed the Committee members that the Voluntary Disclosure program as an unmitigated success – no taxpayer has been turned down. The Nexus program is moving forward towards obtaining a secure communications platform for the states in a web-based environment. The Joint Audit program is also successful; and, they also need a secure communications platform so that auditors can communicate with the state tax audit departments directly. The audit program is in the process of developing audit manuals so that taxpayers can become familiar with audit procedures and policies. This knowledge will benefit both auditors and taxpayers. Mr. Huddleston commended the efforts of the legal team and their amicus briefs on multistate tax issues. Michael Mason (AL) commended the legal team's amicus brief in VFJ v. Alabama.

### **Sales Tax Segment**

Richard Cram (KS) Subcommittee Chair presented the Subcommittee's report. Mr. Cram presented a detailed history of the Accommodations Intermediaries project. He informed the members of the Committee that the Subcommittee had approved the dual remittance method with added safeguards for both the accommodations providers and the intermediaries. Ted Spangler, Chair of the Uniformity Committee, moved that no action be taken at this meeting, but hold all until the Fall meetings to allow for local input. There were no objections to holding off further discussions until the next meeting.

Mr. Cram informed the Committee members that the Subcommittee will be drafting three (3) models for the telecommunications transactions tax administration. The first model is for states that completely centralize the administration of all telecommunications transactions taxes within a single state agency – either an existing agency or a completely new agency. The other models include: centralized local administration of locally imposed taxes and state administration of locally imposed taxes. The subcommittee is focusing first on the last model.

The staff will examine existing MTC model sales and use tax statutes, regulations and guidelines to see how they conform to the Streamlined Sales and Use Tax Act.

### **Income/Franchise Tax Segment**

Wood Miller (MO), Income/Franchise Tax Subcommittee Chair presented the subcommittee report. Mr. Miller informed the Committee that the subcommittee members voted unanimously to drop the RIC's project. As for the Financial Institutions project, Mr. Miller told the members of the Committee that the states and industry representatives are holding educational meetings

via teleconference. Staff will survey states regarding items on the agenda of the Section 18 project and follow up with teleconferences. Mr. Miller said that there were no items to bring before the full Committee at this time.

## **VII. Roundtable Discussion**

The roundtable discussion included the following items of interest: **CA** reported that they are trying to adopt the “on behalf of” model regulation; and they are reviewing their Section 18 regulations. **MN** passed conforming legislation for the Streamlined Sales Tax Project. **MT** lauded the MTC staff on their amicus briefs; and **AL** noted that the VFJ case was the first test of their add-back statute. **NC** is exploring legislation on captive REIT’s. Sheldon Laskin, MTC Counsel, wrote the Capital One amicus brief in **MA**. **KY** prevailed in the Davis case before the U.S. Supreme Court. Captive REIT’s will be included in the combined report in **UT**. **WV** is working on regulations to accompany combined reporting which goes into effect in 2009. A combined reporting bill did not make it out of the General Assembly.

## **VIII. New Business**

There was no new business.

## **IX. Adjournment**

The meeting was adjourned at 3:00 P.M.