MULTISTATE TAX COMMISSION

MINUTES
Income & Franchise Tax Uniformity Subcommittee Meeting
Wednesday, November 4, 2009
2:00 – 3:30 Eastern Time
Via Teleconference

I. Welcome and Introductions:

Chairman Wood Miller convened the meeting. The following persons were in attendance via conference call:

Name:	Organization:	Name:	Organization:
Rob Plattner	New York Tax Dept.	Eric Smith Janelle Lipscomb Deborah Buchanan	Oregon DOR
Scott Mezistrano	Am. Payroll Assoc.	Dee Nelson	Kodiak Develop. Corp., Anchorage, AK
Jim Roemer Nick Phillips	UTC, Windsor Conn.	Helen Hecht	Fed. Tax Admin.
Joe Crosby Fred Nicely	COST	Wood Miller	Missouri DOR
Brian Meister	PWC	Shirley Sicilian Sheldon Laskin Bruce Fort	MTC
Jennifer Hays	Ky. Legislature	Reva Tisdale Ted Spangler	Idaho Tax. Comm.
Richard Cram	Kansas DOR	Phil Horwitz	Colorado DOR
Donita Wald Mary Loftsgard	North Dakota DOR	Brenda Gilmer Larry Sullivan Derek Bell	Montana DOR
Bonnie Smith	Ky. DOR	Dan Armer	New Mexico TRD

II. Public Comment Period:

There were no public comments during the public comment period.

III. Continuation of Review of Model Mobile Workforce Withholding Statute:

- Policy Checklist Item II A (Should the threshold for withholding be stated in terms of days in-state or income of the employee?):[1]

The Committee continued its discussion on this issue from the October 7, 2009 teleconference, having decided in that meeting that the initial draft should only employ a time standard (of thirty days) and no income threshold, with an exception to the rule for high-income athletes, public figures and entertainers. Some discussion was held as to how to define public figures and entertainers.

Before the Committee turned its attention to how a "day" should be calculated, a discussion was held regarding the 30-day threshold established in the October meeting. A representative from New York stated that 30 days would be considered a "non-starter" in that state and requested more background on how that limit was arrived at. He also asked for clarification of whether the 30 day limit would include all days, including vacation days. Shirley Sicilian, MTC General Counsel, stated that 30 day threshold was a placeholder for discussion at the December meeting. It would cover only working days. Phil Horwitz of Colorado had suggested in October that in light of the non-working day exclusion, a 20-day threshold would be preferable. The committee wants to discuss this option, and any others, in December.

- Item II A(i)(b) (What is a day?):

The Committee then turned its attention to Policy Checklist Item IIA(1)(b), treatment of partial days and travel days. Scott Mezistrano of the American Payroll Association suggested that any partial day in a non-resident state should count towards the threshold, and if the employee is in two non-resident states during the same day, a preponderance rule should apply so only a single day would count.

Joe Crosby of the Council on State Taxation (COST) suggested that states through which an employee simply travels should not count as a day in that state; only the destination state should count.

Shirley Sicilian of the MTC then summarized the results of the discussion: a partial "day" for travel to "non-resident states" in a multi-state trip should be assigned to the state of destination. "Non-resident state", for purposes of applying the preponderance rule to travel days, means the employee neither resides in the state nor regularly works there.

The committee further discussed using unemployment insurance standards, which defines a home state as where work is localized. The committee agreed with using unemployment insurance standards.

- Item III (Scope of Rule):

The committee then discussed whether evidentiary rules would be appropriate, as outlined in Section III B of the Policy Checklist.

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[1] A copy of the Policy Checklist was attached to the committee's notes for October 7, 2009.

Joe Crosby suggested that a reasonable reliance rule for avoiding penalties would be very important to employers. Ted Spangler of Idaho stated that a reliance rule for purposes of avoiding penalties would be appropriate, but not for purposes of avoiding liability for withholding.

The Committee then discussed what records should constitute sufficient evidence for reliance purposes. Shirley Sicilian summarized the committee's conclusions as follows: employers should be able to rely on any one of three different types of evidence, with priority in the event of conflict determined in the following order:

1. regularly maintained time and attendance systems;
2. reimbursement records;
3. employee records of travel.

The Committee then returned to its discussion of Item III A of the policy checklist: wage income sourcing. The committee agreed that since no income threshold would be used, rules for sourcing of wage income would be unnecessary and overly complex.

The Committee then discussed Item III C of the policy checklist, whether the model should include standards for employer nexus. There was no immediate discussion from members of the public. Several state agency representatives argued that the model statute should explicitly provide that the statute is not intended to address nexus for any business tax. Representatives from North Dakota and Colorado argued that rule should go further and state there are no nexus implications for any purpose, and that rule is limited to individual income tax filing responsibilities and withholding tax exceptions.

Scott Mezistrano suggested that if the statute provides it doesn't apply to any other *business* tax, an implication arises that the rule would provide a safe-harbor for the *personal* income tax liability of the employee.

Shirley Sicilian suggested that the drafting of the non-nexus statement could avoid creating any implications for personal income tax liability.

IV. Adjournment.

The meeting was adjourned at approximately 3:30 EST.