MULTISTATE TAX COMMISSION

MINUTES
Income & Franchise Tax Uniformity Subcommittee Meeting
Wednesday, October 7, 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:
Andrew Glancy	West Virginia DOR	Eric Smith Janelle Lipscomb Deborah Buchanan	Oregon DOR
Scott Mezistrano	Am. Payroll Assoc.	Bob Montellione	Prudential Financial
Cotsukas (?)	CT DOR	Helen Hecht	Fed. Tax Admin.
Joe Crosby Todd Lard Jim Eads	COST	Wood Miller	Missouri DOR
Brian Meister	PWC	Shirley Sicilian Sheldon Laskin Bruce Fort Ken Beier	MTC
Jennifer Hays	Ky. Legislature	Reva Tisdale Ted Spangler	Idaho Tax. Comm.
Richard Cram	Kansas DOR	Dan Young	TEI
Donita Wald Miles ? Mary Loftsgard	North Dakota DOR	Stuart Binke	Michigan Treasury Dep't.
Dianne Smith Steve Krantz	Sutherland	Dan Armer	New Mexico TRD
Lili Crane	Wisconsin DOR	???	PCI
Tom Atchley	Arkansas DFA	Terri Frederick	Sprint
Valery Newsom Kim Ferrell	Utah State Tax Commission	Bruce Langston	CA FTB

Jamie Fenwick	Time Warner Cable	Bruce Fatale	MA

II. Public Comment Period

There were no public comments during the public comment period.

III. October 7, 2009

A. Model Mobile Workforce Withholding Statute

Policy Checklist Item IIA (Should the threshold for withholding be stated in terms of days instate or income of the employee?).[1]

The Committee continued its discussion on this issue from the September 9, 2010 teleconference. Mr. Spangler expressed the view that a threshold based on days in state, however defined, is preferable to an income threshold, provided that the Item IIB exception provisions are retained requiring withholding for professional entertainers, professional sports teams and certain public figures irrespective of whether the time threshold has been exceeded. Mr. Crosby stated that COST would support Mr. Spangler's position. The Chair asked how employees with multiple employers, or who work in multiple states, would be treated. In general, however, the Chair concurred with Mr. Spangler's position. Mr. Cram asked whether the IIB exceptions could be based on an income threshold, notwithstanding that the basic withholding threshold would be based on days instate. Ms. Sicilian asked whether the income threshold for the exceptions would be applicable only to the withholding requirement or also to the threshold for filing an income tax return. The Chair suggested that the income threshold should only apply to the employee's liability. Bruce Langston concurred. Mr. Spangler would place the income threshold language in Item IIB (the exceptions) and would apply them to both withholding and income tax filing. Mr. Cram would prefer a default income threshold for high income workers. Mr. Cram stated that initially he felt the income threshold should be in IIA not IIB. But that he would not object to them being placed in the IIB exceptions, as long as the listed exceptions were comprehensive. Mr. Crosby expressed the concern that a high income threshold would lead to political pressure to lower the threshold which would therefore become non-uniform over time. Ms. Sicilian expressed that the IIA threshold could be drafted to be based on time instate, with an enumerated exception in IIB based on an income threshold. Mr. Spangler asked whether the reference to "certain public figures" in the federal bill would work for most cases without setting a specific income threshold. Mr. Cram said this option would be worth exploring. Mr. Crosby said that Mr. Spangler's approach is preferable to an income threshold. He asked whether there were certain categories of high income workers who are generally in compliance with state income tax reporting rules and could therefore be exempt from the model statute. Ms. Sicilian asked whether the time threshold could be reduced as the employee's wage income rises above a specified amounts. Mr. Mezistrano stated that the APA had considered this. The employers responded that they preferred a single standard

[1] A copy of the policy checklist is attached hereto.

because payroll rules work best with a single standard. Mr. Mezistrano pointed out that an employee's income could change mid-year and a mixed time and income threshold would not function well in such cases.

The Chair asked whether it was the subcommittee's intention to direct staff to draft a time threshold for withholding, with the exceptions and definitions as discussed at this meeting. Ms. Sicilian clarified that the time threshold would be subject to the Item IIB listed exceptions. She further noted that she would work on modifying the public figures type exception to a broader exception applicable to highly compensated employees. The subcommittee concurred that these were the directions it was giving.

The subcommittee then discussed how time should be defined for purposes of establishing the employee's filing requirement for income tax. The basic question is whether the threshold should be based on the number of whole days instate, or on partial days. Mr. Crosby noted that setting the days filing threshold too low will increase the number of employees who are required to file in multiple states and therefore will increase the employer's withholding burden. For that reason, the federal bill would set the minimum threshold for state income tax filing at 30 days instate. Mr. Spangler wondered whether the filing threshold for non-residents is a zero sum game, in that any income not taxed in a non-residence state is subject to tax in the employee's state of residence. Mr. Crosby agreed, and stated that the overall revenue impact in most states would be zero if non-residents below the 30 day threshold were not required to file. Oregon points out that for income tax states such as Oregon that are adjacent to a state such as Washington that does not impose an income tax, the net effect is not zero because any income earned in Oregon by a Washington resident will not be subject to tax in Washington. Nevertheless, Mr. Crosby feels that the overall effect of a higher filing threshold is small, because the effect would not be for those employees who regularly work in another state but only for the short-term out-of-state employment.

Mr. Horowitz thought a 30 day threshold was too high and asked whether a 20 business day threshold would work. Mr. Crosby noted that existing reciprocity agreements are based on a 365 day year. Mr. Spangler suggested that the first draft should contain a 30 calendar day threshold. Mr. Cram and Ms. Wald supported his proposal. Mr. Mezistrano pointed out that the rule should be based on working days, and that the federal bill is based on working days. The Chair suggested a working day threshold, as long as working day was defined as any day in which the employee worked, and not limited to Monday through Friday. Mr. Mezistrano concurred. Mr. Spangler urged the subcommittee to come to the December meeting prepared to discuss and vote on the "number of days" issue. The subcommittee decided to go with a 30 calendar day threshold in the first draft, rather than leave the space blank.

B. **Project on Income Earned by Non Corporate Income Taxpayers Derived from an Ownership Interest in a Partnership or LLC**

Sheldon Laskin, MTC counsel, briefed the subcommittee on project background and status. At the last in-person meeting, this subcommittee asked the work group to recommend a prioritization of possible solutions to that had been identified. The workgroup recommends the subcommittee begin with the development of a draft model based on Massachusetts legislative proposal. That proposal would revoke passthrough allowance for passthrough and disregarded entities that are primarily owned by entities

that are exempt from corporate income tax. The workgroup also recommends that the subcommittee focus on developing a broad proposal to address over capitalization for entities not subject to corporate income tax. This could be accomplished through explicit combined reporting inclusion or through a more targeted approach that applies only in cases of "overcapitalization."

The Chair asked for public comment on these recommendations and there was none.

Michael Fatale explained that ultimately the passthrough question is a tax equity issue, similar to taxing non-profits on unrelated business income. The subcommittee spoke in terms of fairness early on, but then the discussion went off on abusive type situations. This is not abusive issue, necessarily, but a tax equity issue. A number of changes over the last few years that have impacted the tax structure: convergence between industries, increased use of passthroughs and LLC's, etc. This issue now is more important than it would have been years ago.

The chair asked the subcommittee if it wished to direct the workgroup to draft a statute consistent with the Massachusetts legislative proposal. The subcommittee concurred. There were no objections.

The subcommittee then discussed the second part of the proposal, i.e. to prepare a draft on over capitalized insurers. Mr. Laskin pointed out that the first difficult question encountered with this effort would be to define "overcapitalization." Mr. Spangler asked whether we are in a position to draft anything that is meaningful until that question is answered. Mr. Laskin suggested the direction to the work group might be to explore possible definitions. The Chair pointed out that from an insurance regulation standpoint you want an insurance company to be not only solvent but comfortably so. Mr. Spangler asked if there are any states, maybe larger states, that have attempted to define overcapitalization. Mr. Laskin answered that there were. California has defined the term for certain discreet purposes, in order to resolve issues created as a result of a court decision. In developing that definition, California and industry representatives negotiated a formula to determine over capitalization. Mr. Fatale noted that New York has a definition also. Phil Horwitz noted it is important to focus on the issues that caused us to put this on the list to begin with. Mr. Spangler suggested we proceed to draft number 1 and continue work on the over capitalization issue next. The Chair asked the subcommittee if it would like to direct the workgroup to draft a statute in accordance with recommendation number 1 and proceed with recommendation number 2. The subcommittee concurred. There were no objections.

C. Compact Article IV Amendments

Ms. Sicilian informed the Subcommittee that it would begin its Compact Art. IV amendment project in December. The project will start with an educational presentation by Prentiss Wilson, former Ernst & Young National Director of State and Local Tax Practice and Procedure; Michael McIntyre, Professor of Law, Wayne State University Law School; and Charles McClure, Herbert Hoover Business School, Stanford University. Staff suggests the 4 documents attached to the agenda for today's meeting

may be useful background for the December meeting. Steve Kranz, Sutherland, asked about obtaining a copy of the draft proposals that a small group had been working on. Ms. Sicilian explained that there is no “draft proposal” in the sense of a finished draft. The document Mr. Kranz referred to had been being prepared as part of the ULC effort and was not posted for our committee because it has no relevance to the MTC process. Under the MTC process, the Uniformity Committee itself will drive all the drafting. The unfinished draft amendments which Mr. Kranz referred to were to be used only as a starting point for discussion and reworking by an MTC executive committee work group, then by the MTC executive committee, and then hopefully by all our member states, in developing a recommendation for the ULC. That starting point never came, of course. So the document was never finalized, never went beyond our drafters, and never provided to the MTC executive committee work group. Ms. Sicilian believes the document can be provided, but would like to first make sure it is a public document.