MINUTES
Income & Franchise Tax Uniformity Subcommittee Meeting
Via Teleconference

Wednesday, February 3, 2010
2:00 – 3:30 Eastern Time

I. Welcome and Introductions

Wood Miller, Chair of the Income & Franchise Tax Uniformity Subcommittee, called the teleconference to order at 2:00 p.m. Eastern Time. The following participated:

Name	Affiliation	Name	Affiliation
Wood Miller	MO		
Diane Lubring	MO	**Private Sector/Other**	
Axel Candelaria	WI		
Stewart Binke	MI	Joe Crosby	COST
Danny Walker, David Alexander, and Joe Ellis	AR	Diann Smith	Sutherland
Mary Loftsgard	ND	Dara Bernstein	NAREIT
Gary Johnson	TX	Ethan Millar	Alston + Bird
Ted Spangler, Reva Tisdale	ID	Jamie Fenwick	Time Warner Cable
Frank Hales	UT	Dan DeJong	TEI
Lee Baerlocher, Brian Staley	MT	Terry Fredrick	Sprint
Rebecca Abbo, Louie Gomez and Dan Armer	NM	Dave Clark	ABA California
Ben Miller, Melissa Potter	CA-FTB		
Chris Coffman	WA	**MTC Staff**	
Eric Smith, Janielle Lipscomb and Associates	OR	Ken Beier	Bruce Fort
Michael Fatale	MA	Greg Matson	Shirley Sicilian
Richard Cram	KS	Elliott Dubin	

II. Public Comment Period

No public comment was provided at this time.

III. A. Captive REIT Add-Back Statute

1. Staff Summary of Draft Model

Bruce Fort, MTC Counsel and Staff for this project, explained that the draft model statute before the Subcommittee had been prepared by a working group that included Frank O'Connell (GA), Joe Garrett (AL), and Wood Miller (MO). Mr. Fort explained the purpose of the model and then walked the Subcommittee through each of its provisions.

2. Public Comment

Dara Bernstein, NAREIT, suggested the model's distinction between a non-abusive REIT and captive REIT is not sufficient and that this could be rectified using the language from the Commission's existing model REIT statute. She pointed out there could be a situation where a captive REIT is itself owned by a legitimate, publicly-traded REIT, and suggested the captive should not become a taxable entity in that case. Ms. Bernstein also suggested language should be added to specifically recognize Australian property trusts are not true captive REITs – similar to language in the Commission's existing approved model REIT statute. Ms. Bernstein also recommended adding back some language that may be inadvertently missing from a portion of the draft that was intended to follow the Georgia statute. Mr. Fort agreed that the draft model had inadvertently omitted a critical phrase in the definitional section and that the workgroup would make sure to follow the definitions in both the Georgia statute and current MTC model to address these concerns.

Ms. Bernstein noted that the draft's definition of a REIT requires this structure to have made an election for Federal income tax purposes, and that this requirement could cause confusion in cases where the election is not made until the return is filed in the following tax year (as allowed under federal law). She suggested rectifying this using language from the existing MTC model REIT statute that defines a REIT by reference to IRC §856. Mr. Fort stated the drafting group would consider changing the REIT definition to match the existing MTC model statute.

3. Committee discussion

The Chair asked if NAREIT's recommendations could be considered by the work group before the March meetings. Mr. Fort responded that they could. He noted that correcting the drafting error distinguishing captive REITs held by publically-traded REITs would be easily done. But changing the definition of a REIT to reference IRC § 856 rather than tying the definition to an entity which had made the federal election is not such an easy choice. Mr. Fort explained that state returns are generally due on or after the due date for the federal return, so perhaps this is not a great concern. There could be a situation where the operating company got an extension, but the REIT did not, and there might be a problem in that situation. The drafting group will discuss the issues and provide another draft to the Subcommittee before the March meetings.

III. B. Compact Article IV Amendments

1. Staff Review and Update.

Shirley Sicilian, General Counsel for the MTC and Staff for this project, referred the Committee to the January 12, 2010 memorandum posted on the MTC's web site. The memorandum explains the Uniformity Committee's assignment to consider amendments

to Article IV of the Compact, summarizes the current Compact language, lists foundational policy questions the subcommittee must answer to guide the drafting, and provides a short survey of amendments that have already been enacted in several states. Section III of the memorandum lists the four policy questions that will guide the drafting of Compact Art. IV.17. In the Subcommittee's previous teleconference on January 22, the participating states answered the first two of these policy questions by expressing their consensus that Section 17's sourcing rules should reflect the taxpayer's market and that Section 17 often does not achieve that result. The third policy question, which is the topic for this teleconference, asks how to amend Section 17 to reflect the contributions of the market states in sourcing receipts from (1) sale of services, (2) sale or licensing of intangible property, (3) lease of tangible personal property, (4) sale or lease of real property.

2. Public Comment.

The chair asked for public comment on the summary and heard none at this time. The Chair noted that public comment on individual aspects of Question III would be welcome.

3. Committee Discussion.

The subcommittee determined it would start with the questions regarding sourcing for each of the four individual transaction types covered by section 17. After it has made these determinations, it will decide whether all four transaction types can be covered by a single rule, and whether section 16 and section 17 should be merged.

The subcommittee began with the question of how to source receipts from the lease of tangible property, noting that many current state regulations, and the current model MTC regulations, source such receipts to the location of the property. After further discussion, the subcommittee agreed that it would like the first draft of the amendments to reflect this rule.

Next, the subcommittee discussed sourcing for receipts from the sale or lease of real property and noted the rule provided by current model MTC regulations. The subcommittee agreed that the first draft amendments should show these receipts sourced to the location of the real property.

The subcommittee then turned to sourcing receipts from sale or licensing of intangible property. Several subcommittee members described the current statutory and regulatory provisions in their state. Ms. Sicilian and Mr. Miller noted the treatment under current model MTC regulations and under the current Compact provisions for allocating non-business income. After discussion, the subcommittee agreed that "location of use" would be an appropriate standard for the first draft amendments, and agreed that future model regulations could identify the location more specifically. Members of the subcommittee suggested that regulations could employ a "cascading" approach, such as sourcing to the customer's residence or domicile if the location of use cannot be determined, and sourcing to the customer's billing address if the customer's residence or domicile is unknown.

The subcommittee then discussed sourcing receipts from the sale of services, including the merits of using "location of the benefits received" versus "location of the customer"

or some cascading approach that would incorporate both. Several specific situations were discussed, including the sale of legal, engineering, construction, accounting and advertising services. Members of the subcommittee noted that whichever standard was chosen, model regulations could identify the standard more specifically, possibly by using proxies (such as customer domicile or billing address) and a cascading approach.

Melissa Potter reported that the FTB is holding an Interested Parties meeting on February 10, 2010 to discuss regulations for its new "benefits received" statutory sourcing rule. There is dial-in capability. As part of its regulatory effort, the FTB has been working on a summary of all 50 states' sourcing rules for services and intangible property and she will share that research as soon as it's completed.

The Chair announced that the discussion of sourcing rules had been productive. The subcommittee agreed to meet on February 17 at 2:00 p.m. Eastern to continue discussion of the proper standard for sourcing service receipts and to decide whether to include a throwout or throwback rule.

IV. New Business

There was no new business for the subcommittee.

V. Adjourn

The meeting was adjourned at 3:40 p.m. Eastern Time.