MULTISTATE TAX COMMISSION

Working Together Since 1967 to Preserve Federalism and Tax Fairness

Uniformity Committee Meeting Minutes
Full Committee
Grouse Mountain Lodge
Whitefish, MT
July 25, 2011
1:00 P.M. – 4:40 P.M.

I. Welcome and Introductions

The Chair called the meeting to order at 1:00 P.M. MST and welcomed the attendees. The following persons attended the meeting either in person or by telephone.

Name	Affiliation	Name	Affiliation
Robynn Wilson	Alaska	Mary Loftsgard	North Dakota
Scott Taylor		Tonya Herring	New Mexico
Joe Garrett	Alabama	Rebecca Abbo	
Michael Mason		Janielle Lipscomb	Oregon
John Theis	Arkansas	Gary Humphrey	
Walter Anger		Melisse Cunningham	
Ben Miller	CA FTB	Brian Seibel	South Dakota
Phil Horwitz	Colorado	Andy Gerlach	
Marshall Stranburg	Florida	Nancy Prosser	Texas
Randy Tilley	Idaho	Gil Brewer	Washington
Bob Geddes		Jeff Oakes	West Virginia
Richard Cram	Kansas	Private Sector	
Rob Carter	Kentucky	Diann L. Smith	Sutherland
Jennifer Hays		Tripp Baltz	BNA
Stewart Binke	Michigan	Todd Lard	COST
Wood Miller	Missouri	Greg Turner	
Mark Schoenfeld	Montana	Karen Boucher	Deloitte
Shelly Bradford		Nancy Schlepp	MT Taxpayers Assn.
Eugene Walborn		Terry Frederick	Sprint
Lee Baerlocher		Jamie Fenwick	Time Warner
Brenda Gilmer		Michael McLoughlin	Verizon
Marla Larson		Warren Townsend	Wal Mart Stores
Lennie Collins	North Carolina	MTC Staff	
Matt Peyerl	North Dakota	Roxanne Bland	Ken Beier
Name	Affiliation	Name	Affiliation
Myles Vosberg	North Dakota	MTC Staff	
Emily Thompson		Bruce Fort	Thomas Shimkin
Dee Wald		Elliott Dubin	Shirley Sicilian

II. Approval of Minutes of March 1-2, 2011 (in-person); April 26, 2011 (teleconference); May 24, 2011 (teleconference); and June 21, 2011 (teleconference)

CA moved that the minutes of four previous meetings be accepted and approved. The motion carried unanimously.

III. Public Comment Period

There was no public comment at this time.

IV. Sales/Use Tax Segment

Richard Cram, Chair of the Subcommittee presented the subcommittee's report. Mr. Cram reported that the working group of the Accommodations Intermediaries project will be working on a single remittance model and a dual remittance model. For the Model Associate Nexus project, the subcommittee is developing a model statute that will be based on New York State's associate nexus law with de minimis thresholds for the remote seller. Mr. Cram informed the committee members that the subcommittee had voted not to take on the digital goods project but is considering how they might coordinate with the Streamlined Sales Tax and other groups as they work on this subject.

Mr. Cram moved that the uniformity committee suggest the Executive Committee discuss possible cooperation between the MTC and the Streamlined Sales Tax Project on the subject of taxation of digital goods and then provide guidance for the sales/use tax subcommittee. The motion carried by 14 affirmative votes, 0 negative votes, and 2 abstentions.

V. Income/Franchise Tax Segment

Robyn Wilson, Chair of the subcommittee gave the subcommittee's report. Ms. Wilson informed the committee that the subcommittee devoted time to understanding the implications and learning of the Congressional activity related to H.R. 1439 "The Business Activity Tax Simplification Act of 2011." The Model Statute on the Apportionment of Financial was also discussed. This project is now in the process of developing sourcing for the property factor in the apportionment formula.

Ms. Wilson noted that the subcommittee was working on amending UDITPA. The staff prepared a policy issue memoranda on factor weighting in the apportionment formula. The staff will develop a policy issue memorandum for a potential new project – model MTC Regulation IV.3, "taxable in another state." Staff memoranda were also received on Article IV.17, sales factor sourcing for services and intangibles, and Article IV.1(g), definition of "sales." Those two memoranda each contained the latest drafts from the drafting group, and the subcommittee approved a version of each and is recommending them to the uniformity committee.

Diann Smith, attorney with Sutherland, commented that states frequently amend the Compact language. Her questions to the committee were: what is the role of the Multistate Tax Compact; and, are states bound by the Compact? Ms. Sicilian answered that the role of the Compact is stated in Article I; and that states are not locked-in to the language of Article IV, rather there is some flexibility. The degree of flexibility is a matter for the executive committee and the Commission itself, not the uniformity committee of the Commission.

CA (FTB) moved that the proposed amended language for Article IV.1 (g), as read by Ms. Sicilian be approved by the Committee and sent to the Executive Committee. The motion carried by 13 yes votes, 0 no votes, and 4 abstentions.

CA (FTB) moved that the proposed amended language for Article IV.17 be approved and sent to the Executive Committee. The motion carried by 13 yeas, 0 nays, and 4 abstentions.

VI. Roundtable Discussion

There was a lively discussion concerning the legislative and judicial activities in the states. Some notable actions were: the adoption of MTC's Model Mobile Workforce Statute in ND; enactment of a New York State type "Amazon" law in AR and CA; the Direct Marketing Association's challenge to legislation requiring out-of-state vendors to report sales is pending in federal court in CO: AL changed its UDITPA rule on sourcing sales of services – went from cost-of-performance to a market-based sourcing of sales; an affiliate nexus provision was included in the funding bill in TX; MI replaced its Single Business Tax (SBT) with a corporate income tax; and local governments in FL are litigating with hotel intermediaries so that the hotel tax is based on the full price of the room.

VII. Strategic Planning Session

This was a joint meeting with the Litigation Committee.

Elizabeth Harchenko, former director of the OR DOR, and Cory Fong, Tax Commissioner of North Dakota lead the discussion. The attendees were asked to focus of the goals and mission of the MTC and to think about the strengths and weaknesses of the Commission:

- Strengths: characteristics and qualities of the Commission that make it successful in achieving its purpose;
- Weaknesses: What are the internal challenges and barriers that impair the Commission's ability to achieve it purpose;
- Opportunities: What is happening in world of state tax administration that the MTC can take advantage of to help it achieve its purpose;
- Threats: What is happening in world of state tax administration that can undermine the MTC's ability to achieve its purpose?

VIII. New Business

There was no new business.

IX. Adjourn

The meeting was adjourned at approximately 5:27 P.M. MST.

MULTISTATE TAX COMMISSION

Working Together Since 1967 to Preserve Federalism and Tax Fairness

Uniformity Committee Meeting
Income/Franchise Tax Subcommittee
Grouse Mountain Lodge
Whitefish, MT
July 24, 2011
1:00 P.M. – 5:00 P.M.
Minutes of the Meeting

I. Welcome and Introductions

The Chair called the meeting to order at 1:00 P.M. MST and welcomed the attendees. The following persons attended the meeting either in person or by telephone.

Name	Affiliation	Name	Affiliation
Robynn Wilson	Alaska	Marla Larson	Montana
Michael Mason	Alabama	Dee Wald	North Dakota
Joe Garrett		Mary Loftsgard	
Ben Miller	CA FTB	Myles Vosberg	
Phillip Horwitz	Colorado	Matt Peyerl	
Marshall Stranburg	Florida	Rebecca Abbo	New Mexico
Bob Geddes	Idaho	Tony N. Herring	
Paul Skinner		Janielle Lipscomb	Oregon
Gil Brewer		Gary Humphrey	
Richard Cram	Kansas	Melisse Cunningham	
Jennifer Hays	Kentucky	Private Sector	
Earl Millett Jr.	Louisiana	Diann L. Smith	Sutherland
Jason DeCuir		Greg Turner	COST
Michael Fatale	Massachusetts	Karen Boucher	Deloitte
Glenn White	Michigan	John Allan	Jones Day
Wood Miller	Missouri	Terry Frederick	Sprint
Shelly Bradford	Montana	Amy Hamilton	State Tax Notes
Mark Schoenfeld		Jamie Fenwick	Time Warner
Brenda Gilmer		Michael McLoughlin	Verizon
Lee Baerlocher		MTC Staff	
Eugene Walborn		Shirley Sicilian	Bruce Fort
Emily Thompson		Roxanne Bland	Elliott Dubin
Courtney Jenkins		Les Koenig	Joe Huddleston
Derek Bell			

II. Public Comment Period

The Chair asked if any person attending wished to make a comment. There were no comments.

III. Reports and Updates

A. Federal Issues Affecting State Taxation: Roxanne Bland, MTC Counsel gave the report.

1. H.R 1439, Business Activity Simplification Act of 2011. Ms. Bland reported that this bill is basically a revised version of previous bills -- physical presence would be required for nexus for sales of intangibles and services, but carve-outs would allow for physical presence in some instances without incurring nexus. Ms. Bland noted that the Congressional Budget Office (CBO) Report to Congress estimated the near-term annual revenue impact at $2.0 billion, but growing in subsequent years – far in excess of the $71 million required to come under the Unfunded Mandates Reform Act (UMRA). Phil Horwitz noted that this version of the bill prohibited states from using the Finnegan method of apportioning income for combined reporting states.
2. H.R. 1864, Mobile Workforce State Income Tax Simplification Act of 2011. Ms. Bland informed the committee that the bill is being considered in the House.
3. H.R. 1416, Crime Victim Restitution and Court Intercept Fee Act. Directs the U.S. Secretary of the Treasury to deduct a legally enforceable state debt from a person's federal tax refund, if there is a refund due.

B. Report on Commission Action on Uniformity Projects:

1. Model Statute for Disallowance of Deductions for Payments to Captive Real Estate Investment Trusts: Bruce Fort, MTC Counsel gave the report. He noted that captive REIT's are still a large problem. Mr. Fort informed the Committee that the required Bylaw 7 survey had been completed and that this model statute will be voted upon by the Commission at this annual meeting.
2. Model Mobile Workforce Statute: Shirley Sicilian, MTC General Counsel informed the members of the committee that the Executive Committee had approved a bylaw 7 survey and it passed. The model is on the agenda for a vote of the Commission.
3. Model Statute for Combined Reporting: Definition of "Tax Haven" for Purposes of Water's Edge Election: Mr. Fort explained that the revised model statute will eliminate references to the OECD lists of tax havens which are no longer produced.

IV. Project Amend MTC Model Financial Institutions Apportionment Rule

Ms. Sicilian related the origins of the project to the members of the Committee. She explained that the working group is currently dealing with the property factor of the apportionment formula; and, the question of how loans should be sourced to states in particular. Some of the problems or questions include:

- Weights of the elements of Solicitation, Investigation, Negotiation, Approval, and Administration (SINAA) in sourcing;

- How should the SINAA elements be combined;
- How should loans be counted; i.e., loan-by-loan; or, loan bundles of similar types.

V. Project to Amend Multistate Tax Compact Article IV. 9 (Factor Weighting)

Ms. Sicilian summarized her memorandum to the subcommittee of July 15, 2011. She noted that only nine states, seven of them Compact members, were still using the equally weighted three factor formula. Thirty-nine states now at least double-weight the sales factor. Ms. Sicilian summarized the legal and policy considerations for the subcommittee, and four preliminary options as illustrations of the issues:

1. Equally weighted factors
2. Double-weighted sales factor
3. Single sales factor
4. Allow options for states

Ben Miller (CA FTB) noted that the MTC regulations include special industry apportionment formulas. One of the considerations for choosing an apportionment formula is whether the location of the factors can be readily determined. For example, the property factor has a uniform system based on historical cost; and, the payroll factor is based on unemployment insurance data and does not include contract employees. Phil Horwitz (CO) stated that the Compact should lay out broad uniform standards. Wood Miller described a possible approach that would allow for taxpayer election of weighting.

After some discussion, CO moved that the drafting group should look at three issues or options: (1) add an option to illustrate weighting at taxpayer election; (2) invite industry participation; and (3) obtain input from the Executive Committee. The motion carried by a vote of 9 yeas and 3 negative votes.

VI. Project to Amend Multistate Tax Compact Article IV.1 (g) Definition of Sales

Ms. Sicilian summarized her memorandum to the subcommittee of July 14, 2011. She informed the subcommittee that while the current definition of sales in section 1(g) includes “all gross receipts,” the current model regulations does not include receipts associated with functional test income, treasury functions, and non-sales transactions (e.g. damages awards). The current draft amendment is consistent with the statute and regulations by reflecting the “narrow approach.” Robynn Wilson, chair of the subcommittee, reminded the group that the subcommittee had voted for a narrow definition of sales. After some discussion on the merits of various approaches, specifically, (a) narrow definition but adds some items; (b) broad definition but excludes some items; or, (c) an intermediate definition, CO moved to defer discussion of the definition of sales. The motion did not carry because of a tie (6 affirmative and 6 negative votes).

Ms. Sicilian then recapped the issues for the subcommittee. After reviewing the alternatives and options, CO moved that the definition of sales should exclude hedging and treasury functions. This motion carried unanimously.

CO then moved that the working group should continue working on a narrow definition of sales but one that included certain functional receipts, at net, and for which there is an identifiable buyer. This motion failed to carry by a vote of 7 negative votes, 2 affirmative votes.

CA FTB moved to recommend the following language to the full Uniformity Committee. This motion carried by a vote of 10 affirmative and 1 negative:

> 1(g) "Sales" means gross receipts for the taxpayer that are not allocated under paragraphs of this article, and that are received from transactions and activity in the regular course of the taxpayer's trade or business; except that receipts of a taxpayer, other than a securities dealer from hedging transactions, and from the maturity, redemption, sale, exchange, loan, or other disposition of cash or securities and hedging transactions shall be excluded.

VII. Project to Amend Multistate Tax Compact Article IV.17 (Sales Factor – Sourcing for Services and Intangibles).

Ms. Sicilian summarized her memorandum to the subcommittee of July 14, 2011. After nearly 2 years of development, the subcommittee did not make any further changes to the draft model at the last meeting during which it was considered. The subcommittee considered some slight technical changes to the draft. Joe Garratt announced that the Governor of Alabama has signed the current draft model contained in the attachment to Ms. Sicilian's memorandum into law. CA moved to approve the version contained in the attachment to Ms. Sicilian's memorandum exactly as is. This motion carried unanimously.

VIII. Possible New Project Regarding Interpretation of Article IV.3 (Taxable in Another State)

Mr. Fort summarized his memorandum of July 14, 2011. The discussion centered around the application of "throwback' rules when a corporation is not "subject to tax" in the destination state. One question addressed was whether a taxpayer should be required to provide proof of having filed a tax return in the destination state in order to avoid throw-back of sales. Second, the committee discussed whether additional clarification was necessary as to which taxes constitute franchise taxes measured by income earned in the state. The subcommittee also discussed whether other criteria should be used to determine if a tax qualifies as subjecting the taxpayer to tax in the destination state. Finally, the subcommittee considered whether application of the throw-back rules for sales to foreign countries should be clarified.
CO moved that the Subcommittee begin a study project to see if changes to the model regulations are warranted. The motion carried.

IX. New Business

There was no new business.

X. Adjournment
The meeting was adjourned at 4:57 P.M. MST.

MULTISTATE TAX COMMISSION

Working Together Since 1967 to Preserve Federalism and Tax Fairness

Uniformity Committee Meeting
Sales/Use Tax Subcommittee
Grouse Mountain Lodge
Whitefish, MT
July 25, 2011
8:30 A.M. – 12:00 P.M.
Minutes of the Meeting

I. Welcome and Introductions

The Chair called the meeting to order at 1:00 P.M. MST and welcomed the attendees. The following persons attended the meeting either in person or by telephone.

Name	Affiliation	Name	Affiliation
Joe Garrett	Alabama	Tonya N. Herring	New Mexico
Michael Mason		Brian Seibel	South Dakota
John Theis	Arkansas	Nancy Prosser	Texas
Walter Anger		Gil Brewer	Washington
Roxy Huber	Colorado	Jeff Oakes	West Virginia
Phil Horwitz		Craig Griffith	
Marshall Stranburg	Florida	Private Sector	
Bob Geddes	Idaho	Diann L. Smith	Sutherland
Randy Tilley		Deborah Bierbaum	AT & T
Richard Cram	Kansas	Greg Turner	COST
Rob Carter	Kentucky	Todd Lard	
Jennifer Hays		Michael Fannon, Laurie Powers	Hilton Hotels
Earl Millett Jr.	Louisiana	John Allan	Jones Day
Jason DeCuir		Terry Frederick	Sprint
Glenn White	Michigan	Mitchell Bryk	Starwood Hotels
Stewart Binke		Amy Hamilton	State Tax Notes
Wood Miller	Missouri	Jamie Fenwick	Time Warner
Eugene Walborn	Montana	Michael McLoughlin	Verizon
Lee Baerlocher		Warren Townsend	Wal Mart Stores
Lennie Collins	North Carolina	MTC Staff	
Myles Vosberg	North Dakota	Roxanne Bland	Bruce Fort
Rebecca Abbo	New Mexico	Shirley Sicilian	Elliott Dubin

II. Public Comment Period

There was no public comment at this time.

III. Reports and Updates

A. Federal Issues Affecting State Taxation: Roxanne Bland, MTC Counsel reported on pending federal legislation relevant to state taxation.

- S. 43, H.R. 1002 Wireless Tax Fairness Act of 2011

This Act prohibits states or local governments from imposing new discriminatory taxes on mobile telecommunications services.

- H.R. 1860 Digital Goods and Services Tax Fairness Act of 2011

Prohibits multiple or discriminatory taxes on sale or use of digital goods and services. No Congressional action at this time.

- End Discriminatory State taxes for Automobile Renters Act of 2011

No action at this time.

- H.R. 1804 State Video Tax Fairness Act

No action at this time.

B. Report on Commission Action on Uniformity Projects

- Model Sales and Use Tax Reporting Statute

Shirley Sicilian, MTC General Counsel, informed the members of the committee that the public hearing was held in May; the Hearing Officer's Report was accepted by the Executive Committee, and the Executive Committee voted to submit this Model Statute to a Bylaw 7 Survey. The 17 affected states reported 8 affirmative; 4 negative; 3 abstention; and 4 no report. Because there were an insufficient number of states indicating they would consider adoption of the model statute, this model statute will not be voted upon by the Commission at its July 2011 meeting. Ms. Bland noted that the Executive Committee can send this back to the Uniformity Committee for further work; or, the Executive Committee can hold the model statute.

IV. Telecommunications Transactions Tax Centralized Administration Project

The discussion focused on Proposal III: local administration of locally-imposed taxes. Ms. Bland commented that the proposal needed definitions of telecommunications services and noted that the definitions contained in the model of state administration of locally imposed taxes (Proposal II) would also be used here. Also noted was the fact that the definitions are already contained in the Streamlined Sales Tax Project. The sense of the committee was to put all definitions in the introductory material so that there would be no need to repeat them for each proposal.

The members further discussed the Proposal. WA asked whether the 9-1-1 tax on prepaid phone cards could be imposed on retailers. Deborah Bierbaum of AT&T opined that that this was fine, as long as this was consistent with the treatment of 9-1-1 fees in the general sales tax.

ND moved to direct the drafting group to remove definitions from each proposal and place all definitions in the introductory material. The motion carried with 11 yes votes and 2 abstentions.

MO moved that the drafting group begin work on Proposal I, state imposition, state administration. This motion carried with 10 yes votes and 3 abstentions.

V. Model Associate Nexus Statute

Ms. Bland outlined the project to the members of the subcommittee. She noted that several states have enacted some form of associate nexus statute. Mr. Cram noted that voters in California, in a recent referendum, opposed an "Amazon" law.

Mr. Cram outlined the four policy choices for the committee: (1) should the committee develop a model prior to final litigation in NYS; (2) should the model statute include a presumption that the seller is obligated to collect and remit sales/use tax; (3) should the presumption be rebuttable; and (4) what are the proper de minimis thresholds?
CO opined that there was no reason to wait for impending court decisions and the answers to policy choices (2) and (3) should be yes.

There was considerable discussion concerning the proper level of thresholds for sales generated by in-state associates (approximately $10,000) and the aggregate threshold for the out-of-state vendor. It was noted that New York's statute defines an associate as one who is engaged in active solicitation, not just maintaining a website click-through icon. Ms. Sicilian suggested the subcommittee get input from New York State on their statute.

Alabama moved that the subcommittee develop a New York State styled "associate nexus" law with appropriate thresholds; and, that the subcommittee should consult with NY state. The motion carried with 10 affirmative votes; 0 negative votes; and 5 abstentions.

VI. Model Statute on Tax Collection Procedures for Accommodation Intermediaries

Mitchell Bryk and Laurie Powers of Hilton Hotels and Starwood Hotels respectively, presented the hoteliers business model to the committee in support of their case for a dual remittance model. Their point was that a single remittance model might work with the traditional travel agents model but the modern, online system presents major compliance problems because both the travel intermediaries and the hotels must be audited.

Most of the questions posed by the attendees focused on the business model used by the on-line travel companies (OTC). The representatives of the hotel chains informed the group that the OTC do not bear any risk of loss and that their rates and the rates posted on hotel websites are fairly close. The representatives of the hotel industry stated that the hotel industry favors a dual remittance model and suggested that all relevant regulations be included in the model legislation.

It became clear that the states did not have a strong preference for either a single remittance or a dual remittance system.

TX moved that the subcommittee should direct the drafting group to continue working with both a single remittance model and a dual remittance model but include an allowance for vendor compensation. The motion carried by a vote of 10 affirmative votes 0 negative votes, and 2 abstentions.

VII. Possible Project on Model Digital Goods Sourcing Statute

The group decided not to take this project on in consideration of the Streamlined Sales Tax Project (SST)'s current work on a similar project. Mr. Brewer encouraged the MTC to continue dialogue with State and Local Advisory Committee (SLAC). CO wants a designated MTC staff member to report to the subcommittee on the SST efforts.

The consensus of the subcommittee was to cooperate with the SLAC.

VIII. New Business

There was no new business.

IX. Adjournment

ID moved to adjourn. The motion carried unanimously. The meeting was adjourned at 11:48 A.M. MST.