MULTISTATE TAX COMMISSION

MINUTES

Income and Franchise Tax Uniformity Subcommittee Meeting
Sales and Use Tax Uniformity Subcommittee Meeting
Via Teleconference
Tuesday, February 8, 2011
3:00pm to 4:30pm Eastern Time

I. Welcome and Introductions:

Uniformity Committee Chairman Wood Miller welcomed the attendees and introduced the agenda topics for the meetings of the two subcommittees. The following persons were in attendance:

Name:	Organization:	Name:	Organization:
Michael Fatale	Mass. DOR	Gary Humphrey Janielle Lipscomb	Oregon DOR
Lennie Collins	North Carolina DOR	Robynn Wilson	Alaska DOR
Ethan Milar	Amer. Bar Assoc.	Dan Shibley	CCH
Kevin ___	West Virginia DOR	Richard Cram	Kansas DOR
Diann Smith	Southerland Law Firm	Ben Miller Melissa Potter	California FTB
Todd Lard Feed Nicely	COST	Wood Miller	Missouri DOR
Jo Garrett	Alabama DOR	Phil Horwtiz	Colorado DOR
Brenda Gilmer	Montana DOR	Shirley Sicilian Roxanne Bland Bruce Fort	MTC
Rebecca Abbo Louie Gomez	New Mexico	Bill Von Tagan Phil Skinner	Idaho Tax. Comm.
Stewart Binke Brian Kurtz	Michigan DOR	Brian Fliflet	Illinois
Mary Loftsgard	North Dakota DOR	Lily Crane	Wisconsin DOR
Jamie Fenwick	Time-Warner Cable	Warren Townsend	Wal-Mart Stores
		Ferdinand Hergroian Karen Nakamura	PriceWatershouseCoopers

II. Public Comment Period. None at this time.

III. Meeting of Income and Franchise Tax Subcommittee to Discuss Project to Amend Multistate Tax Compact Article IV.17.

Chairman Robynn Wilson announced the start of the Income and Franchise Tax Subcommittee meeting and asked Shirley Sicilian, MTC General Counsel, to go through the current draft of the new proposed Compact Article IV, Section 17 and her accompanying memorandum dated January 31, 2011. Ms. Sicilian noted that Subcommittee has been addressing the last of three remaining policy questions: how to source receipts from Intangibles. The Subcommittee is taking on that third question in two parts. The first part is to determine sourcing for receipts from intangibles that were held as the taxpayer's inventory for sale or license to its customers (e.g., license of trademarks, patents, or copyrights). The second part is to determine sourcing for receipts from intangibles that are or were used by the taxpayer as an asset in its unitary business. (e.g., good will, working capital, treasury function related investment assets, or patents that had previously been used by the taxpayer to manufacture its own product for sale to its customers).

The draft for consideration today reflects the Subcommittee's direction, given at its December, 2010 meeting in Atlanta, on the first part - sourcing receipts from intangibles that were the taxpayer's product sold or licensed to its customers. That direction was to differentiate between licenses and sales of the intangibles. Also, the drafting group was to differentiate between license of "marketing" intangibles and license of other types of intangibles, treating "mixed" intangibles as "marketing" intangibles. Licensing intangibles are to be sourced to place of use, where "use" of marketing intangibles is the location of the consumer. The intent was to follow the Massachusetts approach. Michael Fatale explained the difference between marketing intangibles and other intangibles followed in Massachusetts. Ms. Sicilian then described the operation of Subsection 17(a)(4) and (5) under the current draft.

Brenda Gilmer and Robynn Wilson both expressed concern regarding sales included with licenses in (a)(4) and asked if those sales might be better included with other sales in subsection (a)(5). Ms. Sicilian explained that the types of sales described in (a)(4) are treated as licenses for federal purposes, so the idea was to source receipts from those types of sales the same as receipts from licenses for our apportionment purposes. Mr. Fatale confirmed this intention. Ms. Sicilian suggested that the sale addressed in (a)(4) could be moved to (a)(5), but Ms. Gilmer responded that the explanation made sense and the provision should remain where it was.

A committee member expressed concern that the rule might not work well in the case of software for download to customers over the internet. Mr. Fatale answered that software classification is an issue, but that non-custom software is often treated as a tangible and sourced as such. Ms. Sicilian added that software would likely be sourced to the location of the customer whether it's treated as TPP, and thus sourced to the customer location because it's delivered there, or treated as an intangible and thus sourced to the customer location because it's used there.

Ms. Sicilian noted that the U.S. Supreme Court had recently issued an opinion in *Mayo Clinic v. Commissioner*, US SC No. 09-837, which upheld a broadly deferential approach to the

IRS's regulatory authority in tax contexts. The Court found no reason to give less deference to regulations promulgated pursuant to the IRS's general regulatory authority than to regulations promulgated pursuant to authority contained in specific provisions. She suggested that opinion may bear on the Subcommittee's earlier decision to put explicit regulatory authority in section 17. The downside of including it is that it might incorrectly imply less regulatory authority with respect to other UDITPA sections that don't include explicit authority. And the US Supreme Court's opinion indicates this sort of specific authority may not be necessary.

Mr. Miller asked the group to reconsider whether a modifier is necessary for the phrase "cannot be determined" as the standard for reasonable approximation. He also asked the subcommittee to reconsider whether it makes sense for "reasonable approximation" of the state of assignment to be mandatory given that the statute goes on to make allowance for situations where the approximation cannot be made.

The subcommittee decided that it would continue to discuss this draft in March.
The Income and Franchise Tax Subcommittee adjourned at 3:50 p.m. EST.

IV. Meeting of the Sales and Use Tax Uniformity Subcommittee to Discuss Model Sales and Use Tax Reporting Statute.

Chairman Richard Cram welcomed the attendees and asked Ms. Sicilian to go over the current draft of the model statute and note recent changes. Ms. Sicilian first noted that the prior draft required the seller to "describe" the purchaser's purchases in the report to the purchaser. That has been changed to require only a statement of "the total dollar amount of the purchaser's purchases." The current draft statute was also amended, in accordance with Subcommittee direction at its December meeting, to (a) require that e-mail notifications could be sent electronically to the last known e-mail address where a mailing address was unknown; (b) move the interest provision after the protest procedure provision and clarify that penalty must be final before interest applies; (c) add an exception for vendors already registered with the state who were complying in good faith, and (d) extended the protest period to 90 days from 20 days.

Ms. Sicilian noted that the statute is similar to Colorado's notice and reporting statute which had recently been the subject of an order staying its implementation in a Colorado federal district court. Ms. Sicilian suggested the subcommittee consider whether the reporting exception for registered vendors was appropriate given the concerns raised regarding the Colorado statute that it would disproportionately affect "out of state" vendors.

Brenda Gilmer asked why the statute contained a separate protest procedure that might conflict with other administrative protest remedies. Ms. Sicilian responded that there is a protest section because this is a stand–alone Act and not a tax statute, and so tax administrative protest procures would not automatically apply. It would be appropriate for states to apply their tax protest procedures by reference, and that is the intent of the language in this draft.

The chairman asked committee members be prepared to further discuss the model statute, and possibly take action on it, at the upcoming meeting of the subcommittee in March.
The meeting was adjourned at 4:10 pm EST.