MULTISTATE TAX COMMISSION

MINUTES of

Uniformity Subcommittee on Sales & Use Tax

Wednesday, December 11, 2013

8:30 a.m. Central Time

I. Welcome and Introductions

Richard Cram, Chair of the Uniformity Subcommittee on Sales & Use Tax, (KS) opened the meeting. The following persons were in attendance:

Pamela Hill	Alabama Department of Revenue	Roxanne Bland	Multistate Tax Commission
Michael E. Mason		Bruce Fort	
Chris Sherlock		Ben Abalos	
Walter Anger	Arkansas Department of Finance and Administration	Lila Disque	
Deanna Munds-Smith		Joe Huddleston	
Phillip Horwitz	Colorado Department of Revenue	Harold Jennings	
Helen Hecht	Federation of Tax Administrators	Sheldon Laskin	
Karl Frieden	Council on State Taxation	Shirley Sicilian	
Maria Johnson	Florida Department of Revenue	Lennie Collins	North Carolina Department of Revenue
Richard Jackson	Idaho State Tax Commission		North Dakota Office of State Tax Commissioner
Steve Wynn		Matt Peyerl	
Richard Cram	Kansas Department of Revenue	Myles Vosberg	
Jennifer Hays	Kentucky Legislative Research Commission	Donnita Wald	

Michael Fatale	Massachusetts DOR	Gary Humphrey	Oregon Department of Revenue
Keith Getschel	Minnesota Department of Revenue	Lizzy Vedamanikam	State of New Mexico Taxation and Revenue Department
Lee Baerlocher	Montana Department of Revenue	Rebecca Abbo	
Gene Walborn		Jamie Fenwick	Time Warner Cable
Phil Skinner	Idaho Attorney General	Frank Hales	Utah State Tax Commission
Charlie Kearns	Sutherland Asbill & Brennan	Bruce Johnson	
Antonio Ferachi	Louisiana Department of Revenue	Tim Jennrich	Washington State Department of Revenue
Kimberly Doley		Gil Brewer	
J. A. Cline, Jr.		John Ryser	

Amy Hamilton (State Tax Notes) and Pat Calore (MI) appeared by phone.

II. Approval of Minutes of In-person Meeting, July 22, 2013

Myles Vosberg (ND) moved that the minutes of the July 22nd meeting be accepted as corrected. The motion carried unanimously.

III. Public Comment Period

There were no public comments at this time.

IV. Reports and Updates

a. Federal Issues Affecting State Taxation

i. 1. S. 31, H.R. 434, Permanent Internet Tax Freedom Act

Roxanne Bland, MTC Counsel, provided the report. S. 31 would make the moratorium on Internet access taxes and multiple and discriminatory taxes on electronic commerce permanent. It would repeal the grandfather clause currently in place for states to impose their tax on internet sales. The bill was introduced in January, and the prognosis is that they will try to attach it to the Marketplace Fairness Act.

ii. S. 743, H.R. 684, Marketplace Fairness Act

This is a bill that passed overwhelmingly in the Senate and is now in the House. It ratifies Streamlined and, for those states not in Streamlined, sets forth a list of criteria they must adhere to before they're allowed to collect on remote sales. Congress has now reached a budget deal, but it may be some time before they begin hearing state tax bills. Advocates are still a ways away from satisfying the seven criteria introduced by Rep. Goodlatte.

iii. S.1235, Wireless Tax Fairness Act, H.R. 2309, Cell Phone Tax Fairness Act

This bill has been introduced in both the House and the Senate. Last year there was overwhelming support in the House but it ended up in the Senate Finance

Committee, where it did not proceed. It is likely to pass the House again this year.

iv. H.R. 2543, End Discriminatory Sales Tax on Automobile Renters Act of 2013 (EDSTAR)

There has been no progress on this bill.

v. S. 1364, Digital Goods and Services Tax Fairness Act

Even with new language incorporated, questions are still being raised regarding unintended consequences the bill might have.

b. Report on Commission Action on Uniformity Projects

i. Model Sales & Use Tax Notice and Reporting Statute

Shirley Sicilian, MTC General Counsel, provided an update. This model statute is currently at the executive committee stage. It went to public hearing but did not pass the Bylaw 7 survey. It went back to the Executive Committee, where it remains; it appears the issue was the litigation in Colorado (DMA v. Brohl). The 10th Circuit recently ruled in favor of the state, but only on a jurisdictional basis – the court did not make a ruling on the Commerce Clause issue. Mr. Horwitz (CO) reported that the district court dissolved the injunction; in the meantime, DMA has filed in state court. The department filed its response brief on December 9th, and argument is set for January 7th.

ii. Communications Sourcing and Definitions Resolution

Ms. Bland reported on the resolution, which would recognize SSUTA's efforts in the area of communications sourcing and definitions. The resolution went to the executive committee, from which it was referred to the resolutions committee and to the Commission for a vote. The resolution passed the full Commission in July.

V. Sales and Use Tax Nexus Model Statute

a. Workgroup Report

This model statute has evolved into a project that would encompass click-through and other nexus. In July, Ms. Bland presented a policy checklist and some research via Staff Memo, as requested by the committee. Since then, the workgroup met in September, October, and November.

b. Public Comment

There were no comments at this time.

c. Committee Discussion

Mr. Cram pointed out there has been some litigation activity on this recently. The US Supreme Court denied certiorari on the Amazon case, and a similar case in Illinois was decided against the state.

Mr. Laskin had two suggestions regarding language. The first concerns 2(h). As written, establishing and maintaining a market is listed as one of the activities that raises a rebuttable presumption of nexus. But establishing and maintaining a market is

the Constitutional nexus standard. He found this to be circular and confusing. He recommends putting establishing and maintaining the market ati the beginning as the Constitutional nexus standard and eliminating it as an activity that merely raises a rebuttable presumption. Mr. Vosberg noted this is the bright-line test from Quill, and a physical presence is not rebuttable.

Mr. Laskin also addressed the phrasing in the advertising portion. As written, it seems to define protected vs. unprotected advertising. It might be better to define "compensation that is linked to sales" as not being advertising at all. Mr. Horwitz agreed. He would prefer not to delineate among different types of advertising. Pat Calore (MI) said that in the work group there was tension between wanting to talk about the three groups of parties (seller, entity, related parties), so maybe structurally they should think about them as three different groups. The real tension is to address those three actors and do so in a way that is possible to administer in a way that will minimize litigation. On the advertising issue, that language was inserted based on the tax advertising argument from a recent case. They might want to state there's no intention to catch passive advertising. She feels the language can be scripted better, but shouldn't be eliminated. Michael Fatale (MA) said that, going through the list, some of the activities apply to a seller or a person who's not the seller, and some apply only to the seller. He thinks this should be broken into two. Mr. Horwitz agreed, but would divide it into three, as Ms. Calore proposed: the seller, the related party, and the unrelated party. Mr. Fort noted a "laundry list" which doesn't differentiate between parties might be subject to litigation.

The project was referred back to the group to incorporate the suggestions and come up with a final product by the next meeting.

VI. Model Provisions Concerning Class Actions and False Claims

a. Presentation of Staff Memorandum

i. Class Action and FCA Survey

Sheldon Laskin, MTC Counsel, presented a Staff Memorandum. Industry had previously asked the MTC to take on these two issues, regarding class actions and the False Claims act. At the July meeting, they decided to move this forward as a project and establish a work group. A work group meeting is scheduled, and they have prepared a draft issues checklist.

b. Public Comment

There were no comments.

c. Committee Discussion

Mike Mason (AL) proposed adding a provision regarding the filing of frivolous liens against tax administrators. Mr. Cram asked what the group plans to do about the ABA proposal. Mr. Laski noted that industry had only requested an endorsement of that model statute, and that may be the appropriate thing to do. But the group needs to decide whether the model will work or whether it will create more problems . That will likely be the workgroup's first order of business. Mr. Cram asked to be added to the workgroup and solicited other volunteers. Gil Brewer (WA) offered a volunteer,

although the actual person is to be determined. Carl Friedman and Greg Turner (COST) also volunteered.

VII. Project on State Requirements Under The Marketplace Fairness Act

a. Presentation by Craig Johnson, Executive Director Streamlined Sales Tax Governing Board

The Marketplace Fairness Act (MFA) would allow collection of taxes from out of state sellers, as long as the state enacts certain simplification measures. Not all states are interested in joining Streamlined, and Mr. Johnson would like to know what is keeping states from joining. The MFA passed by the Senate offers states two options for remote taxation: be a Streamlined state, or enact minimum simplifications (as laid out in the handout). Non-Streamlined states need central administration of taxes; single audit for all state and local taxing jurisdictions; and a single return for remote sellers. Out-of-state sellers cannot be required to file more often than in-state sellers. The requirements are optional to the state; they can choose not to enact them and continue not collecting from out of state sellers. States must also provide taxability and exemption information to remote sellers. Most states can accomplish this by putting together either a 5-digit or a 9-digit zip code database. They must also provide free software that calculates the tax due and files the returns on behalf of the sellers. The MFA also requires 90-day notice for state and local tax changes. There's a small seller exception for sellers that have less than $1 million in total remote sales.

The MFA does not create nexus; it does not encourage adoption of any new tax by the states; does not subject sellers to non-sales-and-use tax types; and does not affect intrastate sales. Regarding its current status, the exact same bill was introduced in the House and the Senate. The Senate passed it 69-27. The Bill is in the House, and Rep. Goodlatte's committee has jurisdiction over it. Representative Goodlatte released his 7 principles for an acceptable bill in mid-september. Nothing has happened in the House so far. Anything coming out of the House will likely be a new bill, and it is unknown how much of the original material it will contain. Dee Wald (ND) asked about tribal organizations –it appears based on the language that they will be treated as separate states. Mr. Johnson is unsure how that would be handled.

b. Public Comment

There were no public comments.

c. Committee Discussion

Lila Disque, MTC Counsel, presented a Staff Memo regarding the options for the Committee. Since the bill had slowed in the House, the MTC's Marketplace Fairness Act project had been put on hold. The Committee could choose to keep it on hold; could form a workgroup and put them on hold; form a workgroup and proceed; or terminate the project.

Mr. Cram, Richard Jackson (ID), and Tim Jennrich (WA) recommended proceeding with Option 3: form a work group and proceed. Mr. Jackson so moved, and the motion passed with 14 in favor, 0 opposed, and 0 abstentions. The following people volunteered for the work group: Tim Jennrich, Myles Vosberg, Richard Jackson, Alabama

staff, Rebecca Abbo, Pat Calore, Streamlined. Craig Johnson asked to be added to the group's e-mail list.

VIII. New Business

There was no new business

IX. Adjourn

The meeting adjourned on motion.