MULTISTATE TAX COMMISSION

Working Together Since 1967 to Preserve Federalism and Tax Fairness

To: **Wood Miller, Chair**
Members of MTC Uniformity Committee

From: **Shirley Sicilian, General Counsel**

Date: **July 17, 2009**

Subject: **Executive Committee Direction to Initiate an Expedited Project for Model Mobile Workforce Statute**

As you know, a fundamental policy of both state and federal taxation is that income is taxable in the jurisdiction where it is earned. And standard administrative practice is to require a business to withhold individual income tax if an employee earns wage income there. Many states recognize that standard withholding requirements have posed some challenges for businesses when their employees earn wage income in multiple jurisdictions.

At its May 2009 meeting, the Executive Committee asked the Uniformity Committee to initiate a project to address these challenges with a model state withholding statute for multistate employees. The project is expedited because the model is intended as an alternative to federal legislation, H.R. 2110 (See introduced legislation, attached.) The problem with H.R. 2110 is that it would work by creating a federal pre-emption of state taxing jurisdiction. (See FTA resolution, attached.) Our MTC Uniformity Committee is charged with developing a model state-level solution to these challenges that does not involve federal preemption. (See draft policy checklist, attached.)

Multistate Tax Commission
Income & Franchise Tax Uniformity Subcommittee

Mobile Workforce Withholding Model Statute

Draft Policy Checklist
July 17, 2009

I. Should the rule address (1) the employee's underlying income tax liability, and thus obviate the employer's responsibility to withhold, or (2) the employer's responsibility to withhold, and thus leave open the employee's underlying income tax liability?

II. Should the rule be stated in terms of:

   A. Time: The number of days the employee is present in the state – 10, 30, 60?
   B. Income: The annual wage – in total or attributable to the state? or
   C. Some combination of both (e.g., no requirement to withhold if employee is in the state for less than 10 days AND has/had a wage rate below $100,000/year)

III. Does the rule need to address income sourcing?

IV. Should the rule address local, as well as state, income tax withholding?

V. Exemptions? (e.g., entertainers, sports teams)

111TH CONGRESS
1ST SESSION

H. R. 2110

To limit the authority of States to tax certain income of employees for employment duties performed in other States.

IN THE HOUSE OF REPRESENTATIVES

APRIL 27, 2009

Mr. JOHNSON of Georgia (for himself, Mr. JORDAN of Ohio, Mr. GOODLATTE, Mr. BUTTERFIELD, and Ms. FOXX) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To limit the authority of States to tax certain income of employees for employment duties performed in other States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Mobile Workforce State Income Tax Fairness and Simplification Act".

SEC. 2. LIMITATIONS ON STATE WITHHOLDING AND TAXATION OF EMPLOYEE INCOME.

(a) IN GENERAL.—No part of the wages or other remuneration earned by an employee who performs employ-

ment duties in more than one State shall be subject to income tax in any State other than—

(1) the State of the employee's residence; and

(2) the State within which the employee is present and performing employment duties for more than 30 days during the calendar year in which the income is earned.

(b) WAGES OR OTHER REMUNERATION.—Wages or other remuneration earned in any calendar year are not subject to State income tax withholding and reporting unless the employee is subject to income tax under subsection (a). Income tax withholding and reporting under subsection (a)(2) shall apply to wages or other remuneration earned as of the commencement date of duties in the State during the calendar year.

(c) OPERATING RULES.—For purposes of determining an employer's State income tax withholding and information return obligations—

(1) an employer may rely on an employee's determination of the time expected to be spent by such employee in the States in which the employee will perform duties absent—

(A) actual knowledge of fraud by the employee in making the estimate; or

(B) collusion between the employer and the employee to evade tax;

(2) if records are maintained by an employer recording the location of an employee for other business purposes, such records shall not preclude an employer's ability to rely on an employee's determination as set forth in paragraph (1); and

(3) notwithstanding paragraph (2), if an employer, at its sole discretion, maintains a time and attendance system which tracks where the employee performs duties on a daily basis, data from the time and attendance system shall be used instead of the employee's determination as set forth in paragraph (1).

(d) DEFINITIONS AND SPECIAL RULES.—For purposes of this Act:

(1) DAY.—

(A) An employee will be considered present and performing employment duties within a State for a day if the employee performs the preponderance of the employee's employment duties within such State for such day.

(B) Notwithstanding subsection (d)(1)(A), if an employee performs material employment duties in a resident state and one nonresident

state during one day, such employee will be considered to have performed the preponderance of the employee's employment duties in the nonresident state for such day.

(C) For purposes of subsection (d)(1), the portion of the day the employee is in transit shall not apply in determining the location of an employee's performance of employment duties.

(2) EMPLOYEE.—The term "employee" shall be defined by the State in which the duties are performed, except that the term ''employee'' shall not include a professional athlete, professional entertainer, or certain public figures.

(3) PROFESSIONAL ATHLETE.—The term ''professional athlete'' means a person who performs services in a professional athletic event, provided that the wages or other remuneration are paid to such person for performing services in his or her capacity as a professional athlete.

(4) PROFESSIONAL ENTERTAINER.—The term "professional entertainer" means a person who performs services in the professional performing arts for wages or other remuneration on a per-event basis, provided that the wages or other remuneration

are paid to such person for performing services in his or her capacity as a professional entertainer.

(5) CERTAIN PUBLIC FIGURES.—The term "certain public figures" means persons of prominence who perform services for wages or other remuneration on a per-event basis, provided that the wages or other remuneration are paid to such person for services provided at a discrete event in the form of a speech, similar presentation or personal appearance.

(6) EMPLOYER.—The term "employer" has the meaning given such term in section 3401(d) of the Internal Revenue Code of 1986 (26 U.S.C. 3401(d)) or shall be defined by the State in which the duties are performed.

(7) STATE.—The term "State" means each of the several States of the United States.

(8) TIME AND ATTENDANCE SYSTEM.—The term "time and attendance system" means a system where the employee is required on a contemporaneous basis to record his work location for every day worked outside of the state in which the employee's duties are primarily preformed and the employer uses this data to allocate the employee's wages be-

tween all taxing jurisdictions in which the employee performs duties.

(9) WAGES OR OTHER REMUNERATION.—The term "wages or other remuneration" shall be defined by the State in which the employment duties are performed.

SEC. 3. EFFECTIVE DATE.

This Act shall be effective on January 1, 2011.

○

Resolution Four
Taxation and Withholding of Wages Earned in Multiple States

Background

The fundamental principle of individual income taxation is that income is taxable where it is earned or where the services giving rise to the income are performed. In addition, the state of a taxpayer's residence may tax all income regardless of where earned, but is generally required to offer a credit for taxes paid to other states to assure that income is not subject to multiple taxation. This is the same tax policy embraced by the U.S. government and by all other income-taxing governments.

As U.S. work patterns shift to increasingly include interstate commuting, telecommuting and multistate travel, more workers find themselves with tax obligations to more than one jurisdiction. Likewise, employers are faced with an increased responsibility for withholding income taxes for multiple jurisdictions. State and local laws and practices vary with respect to de minimis thresholds for withholding. There also is variance in enforcement programs aimed at compliance among persons (and their employers) who are temporarily in the jurisdiction.

As introduced in the 110th Congress, H.R. 3359, the Mobile Workforce State Income Tax Fairness and Simplification Act, would authorize a state or locality to impose an income tax liability and a withholding requirement only when a nonresident has performed services in the jurisdiction for at least 60 days in a calendar year. The bill contains an exception for professional athletes and entertainers.

In its review of H.R. 3359 and in various discussions with proponents of the bill, FTA made several points.

- H.R. 3359 represents a substantial preemption and intrusion into state tax authority;
- While FTA recognizes concerns regarding the administrative burdens imposed by current practices, the 60-day threshold is well beyond a level necessary to deal with the vast majority of individuals who would be temporarily in a jurisdiction.
- H.R. 3359 would substantially disrupt the current tax system in favor of a system based on taxation by the resident jurisdiction.
- H.R. 3359 would substantially disrupt the revenue flows in certain states, particularly New York State because of its economy and its previous and current compliance programs in the area.
- A simple "days threshold" will expose some jurisdictions to substantial revenue disruptions; a "dollar threshold" that would limit the exposure of the states should also be applied.
- Independent state action is a viable and preferred substitute for federal legislation.

The impact of H.R. 3359 will undoubtedly fall most heavily on New York State because of its economy and its tax compliance programs. As with the FTA at large, New York is mindful of the issues involved in complying with the current law. It will be undertaking a review and analysis of the issue with a view toward recommending a state-level solution to the issue.

Policy

The ability to tax income where it is earned is fundamental to state tax sovereignty and state and local income tax systems. Moreover, this ability is absolutely necessary in our federal system, where a state may choose to not employ an income tax. FTA, however, recognizes the administrative and compliance burdens imposed on individuals and employers under current arrangements and are willing to explore options for addressing those burdens for employees who are in a jurisdiction for limited periods of time. In short, the issue comes down to arriving at an appropriate balance between administrative simplification and adherence to standard tax policies and avoiding the disruption of state and local revenue flows. FTA does not support H.R. 3359 as introduced.

FTA will assess any federal legislative measures in this area against the following criteria: (1) Recognizing that the benefits of federalism will impose administrative burdens on commerce, is there disinterested evidence that the administrative burden and complexity posed by current state and local practices is impeding the growth of commerce? (2) Does the proposed preemption address issues of simplification and complexity? (3) Can meaningful simplifications and uniformity be achieved through state action? (4) Would preemption disrupt state and local revenue flows and tax systems? (5) Would preemption cause similarly situated taxpayers to be taxed differently; specifically, does the proposal create advantages for multistate and multinational businesses over local business? (6) Does the preemption support sound tax policy? (7) Does the preemption create unknown or potential unintended consequences? (8) Have state and local tax authorities and taxpayer representatives together agreed to a beneficial change in federal law?

In addition, FTA makes the following specific comments on H.R. 3359 and similar legislation.

- Since New York State is the most significantly affected state and since it is undertaking a review of the issue, federal legislation should not proceed until proponents of H.R. 3359 have worked with New York State officials to resolve the issue at the state level. Further, Congress should also take account of constructive action by other states on this issue before proceeding with legislation.
- Based on its review and analysis, FTA believes an appropriate resolution of the issue should, at a minimum, meet the following criteria:
  - The action should be clearly limited to wages and related remuneration earned by nonresident employees. FTA believes it is not inappropriate to use presence and time in a taxing jurisdiction to govern the taxation of wages and related remuneration earned by a nonresident in a taxing jurisdiction. However, the legislation must also be clear that it is not intended to impair the ability of states and localities to tax non-wage income earned from the conduct of other economic activities in the taxing jurisdiction.
  - The action should provide that a state or locality may impose income tax liability on and a withholding obligation with respect to the wage and related remuneration of a nonresident if the nonresident is present and performing services in the jurisdiction for 20 or more days in a calendar year.
  - Alternatively, the threshold could be formulated as limiting state and local income taxation (and withholding) to those nonresidents present and performing services in

the jurisdiction for 30 days or more in a calendar year, unless the individual earned in excess of $250,000 in wages and related remuneration in the prior year in which case the threshold would be 15 days in the jurisdiction.

- The action should provide that all persons paid on a "per event basis" are excluded form the coverage of the bill.
- The action should provide for the allocation of a day to a nonresident jurisdiction when services are performed in the resident jurisdiction and another jurisdiction in a single day.
- The action should cover wages and remuneration earned within a jurisdiction in a calendar year so as to not disrupt taxation of any deferred amounts. It should not, however, impair the ability of states and localities to tax income arising from the conduct of other economic activities in the taxing jurisdiction.
- The effective date of any action should be delayed until the beginning of the 2nd calendar year following enactment to allow sufficient time for implementation by state and local governments and affected employers.

Acceptance of a standard that a nonresident be present and performing services in a jurisdiction for the purposes outlined above should not be interpreted to imply that FTA considers that a physical presence standard is in any way an appropriate standard for establishing jurisdiction to tax in other contexts, particularly for the imposition of business activity taxes on entities doing business in a state. As outlined in Resolution No. 3 (2008), FTA is firmly opposed to federal legislation that would establish a physical presence nexus standard for the imposition of business activity taxes.