MULTISTATE TAX COMMISSION

Working Together Since 1967 to Preserve Federalism and Tax Fairness

Minutes
Income/Franchise Tax Subcommittee Meeting
Intercontinental Hotel, Kansas City, MO
March 2, 2011

I. Welcome and Introductions

Subcommittee Chair Robynn Willson called the meeting to order at 8:30 A.M. The following persons attended the meeting either in person or by telephone.

Name	Affiliation	Name	Affiliation
Robynn Wilson	AK DOR	Rebecca Abbo	NM DOR
Christy Vandervender Chris Sherlock	AL DOR	Gary Humphrey Janielle Lipscomb	OR DOR
Ben Miller	CA FTB	Brandon Seibel	SD DOR
Phil Horwitz	CO DOR		
Anita DeGumbia	GA DOR	Private Sector	
Randy Tilley	ID DOR	Todd Lard	COST
Brian Fliflet Laurie Riva	IL DOR	Jim Zenk Terry Frederick	Ernst & Young Sprint
Bryan Vargas	KS DOR	Amy Hamilton	State Tax Notes
Michael Fatale	MA DOR	Diann Smith	Sutherland
		Karen Boucher	Deloitte
Stewart Binke	MI DOR	MTC Staff	
Keith Getschel Ellen Auger	MN DOR	Roxanne Bland Elliott Dubin	Greg Matson Ken Beier
Brenda Gilmer	MT DOR	Shirley Sicilian	Joe Huddleston
Lennie Collins	NC DOR	Bruce Fort	Jeff Silver
Mary Loftsgard	ND DOR	Sheldon Laskin	Cathy Felix
Louie Gomez	NM DOR		

II. Public Comment Period

Diann Smith of Sutherland stated that she appreciated the efforts of the MTC to accept public comment, though she believes that MTC is moving away from its traditional openness because drafting groups are not noticed and open to the public. She stated that the early drafting and policy development phase needed input from the public.

Shirley Sicilian, MTC General Counsel, explained the MTC takes the public participation policy very seriously and appreciates hearing of any concerns. The policy is posted on MTC's homepage. She explained that drafting groups have a narrow responsibility. They do not deliberate or make policy decisions. Rather they help identify policy questions and list possible options for the subcommittee to deliberate and decide in open meeting. Joe Huddleston, MTC Executive Director, emphasized that the public is encouraged to give its opinions in those open discussions early in the process. Ms. Sicilian explained that the drafting group produces a draft, in accordance with the subcommittee's direction, for the subcommittee to deliberate and consider in open meeting. Again, Mr. Huddleston emphasized that the public is encouraged to give its thoughts on drafts during the open meetings early in the process. Phil Horwitz (CO) noted that the MTC open subcommittee meetings provide a convenient forum for states to hear from taxpayers as it develops policy. Joe Huddleston, MTC Executive Director, noted that training sessions may also be closed because they do not involve deliberation and policy making.

III. Reports and Updates

A. Federal Issues Affecting State Taxation

Roxanne Bland, MTC Counsel, explained the changes in the structure of the Congressional subcommittees and the make-up of the House Judiciary Committee that resulted from the recent elections. She noted that at this time, there was no legislation that directly affects state taxes but that this situation would likely change in the future.

B. Report on Commission Action on Uniformity Projects

Bruce Fort, MTC Counsel, reported that the proposed Model Statute on Captive REITs will be sent to the affected states via a Bylaw 7 Survey for their responses. Sheldon Laskin, MTC Counsel, informed the subcommittee that the Executive Committee will address the issue of receipt of affiliate pass-through income by non-taxed entities. Ms. Sicilian reported that the Executive Committee will consider whether to recommend approval of the Model Mobile Workforce Act, and that, if approval is recommended, the model will advance to a Bylaw 7 survey.

IV. Project to Amend MTC Model Financial Institutions Apportionment Rule

A. Report from the Working Group

Ms. Sicilian informed the members of the Subcommittee that the working group had finished their work on the receipts factor and was now working on the property factor. Ms Sicilian noted that the work group is considering whether "solicitation" activity should continue to be considered for sourcing loans in the property factor numerator. "Solicitation" is the "S" in the the acronym "SINAA." The working group is also working on specifying how the remaining four activities – investigation, negotiation, approval, and administration – should be identified, sourced, and/or weighted. And, the working group is drafting proposed language to clarify that transfer of a loan, or a group of loans, to related parties does not represent a "material change" necessary to justify re-attributing the loan or group of loans.

Wood Miller asked if the documents are available and was informed that the documents are on the MTC website. Phil Horwitz asked whether the working group had considered excluding the property factor from the apportionment formula. He opined that inclusion of the property factor in apportionment made more sense in manufacturing or retailing. Karen Boucher of the AICPA noted that the industry opposes exclusion of the property factor from the apportionment formula. She also noted that a property factor for an industry like banking should include intangible property, like loans, under the reasoning of Crocker Leasing v. Oregon, which held that intangible property should be included in that financial institution's property denominator to properly reflect income generation in the state. Ben Miller (CA FTB) said that the original Model Statute was compromise between the money center states and the market states. Ms. Sicilian noted that SINAA or INAA is similar to the "greater cost of performance" approach that has been used in the general formula for sourcing receipts from intangibles and replicated the payroll factor to a large extent. Karen Boucher noted the industry believes that the application SINAA or INAA is the best method for locating the loan receivables.

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

A. *Presentation of Staff Memorandum*:

Ms. Sicilian explained that UDITPA defines "sales" as "all gross receipts of the taxpayer" But "gross receipts" is not defined in the statute. There were questions of whether "gross receipts" includes receipts from certain investments and payments that do not necessarily reflect the taxpayer's market for its product. Examples were receipts from the sale of assets, such as plant or equipment, used to produce the taxpayer's product, receipts from treasury function activities, or receipts from pension reversions, damages awards, and other non-sale events. Because the purpose of the sales factor is to reflect the contributions of the taxpayer's market state, all states include receipts from sale of the taxpayer's product in the definition of sales. Some states, and the MTC's regulations, take the position receipts from sale of taxpayer's production assets should not be included. And, with respect to treasury function receipts, all states either exclude these receipts because they are not sales of the taxpayer's product and don't reflect its market – unless the taxpayer is in that business, or take the position that treasury function receipts may be sales, but produce distortion if included. MTC regulations exclude most treasury function and non-sales receipts, and limit any other treasury receipts to net rather than gross, if not completely excluded. On the other hand, some have taken the position that if an item of income is included in the pool of income to be apportioned, then the receipt that is the basis for that income should be included in the sales factor. It was the potential for a clearer statutory exclusion that led executive committee to set the definition of "sales" as one of the provisions to review. Ms. Sicilian referred the subcommittee to the policy checklist attached to her memo. Also included are two examples of how sales could be defined: a broad approach and narrow approach.

B. Public Comment:

Diann Smith of Sutherland stated, that her clients had no preferences regarding sourcing of sales; but that sales of intangibles and sales of large tangibles such as a subsidiary or a division of the company should be included in the sales factor. Todd Lard of COST had the same opinion.

C. Committee Discussion:

Ben Miller (CA FTB) said he preferred the narrower definition of sales if the sales factor is to reflect the market approach, as the subcommittee determined early on in the project. Sales of short-term assets, such as those included in the Treasury function, should not be included. Mr. Miller further noted that the sales factor should deal with streams of income such as leasing of intangibles; the sale of the stock of a subsidiary is not a stream of income. Bruce Fort, MTC Counsel, noted that exclusion of capital gains from the sales factor could mean that such gains could escape taxation if the asset is dropped into another entity prior to sale – separate entity states would be the most affected. Ms. Sicilian noted the current model regulation excludes dividends, interest, and receipts from sales of large intangibles, such as capital gain. Wood Miller opined that good will is represented through the sale of taxpayer’s goods and services.

Phil Horwitz argued for the narrow approach for the definition of gross receipts. He stated that the examples on page 5 should be included in the narrow definition. He would leave unusual items for Section 18 to take up. Michael Fatale noted that by taking a much broader approach any exclusion could be taken care of by regulation; but, a narrow approach implied that additions would have to be dealt with by legislation. Gary Humphrey (OR) told the subcommittee that an issue is whether the the model statute itself must include items by legislation or whether that is possible by regulation. Brenda Gilmer (MT) noted that the broad approach or the narrow definition of sales depends on each state regarding their use of regulations and legislation.

CO moved to adopt the narrow approach as the general rule (transactional-type sales) and to direct staff to provide a policy checklist that lists transactions that the subcommittee could consider as possible additions or subtractions from the general rule. For example, treasury function receipts could be listed as a possible subtraction, receipts from sales of tangible and intangible assets could be listed as possible additions. MA abstained but there were no negative votes and the motion carried.

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

Shirley Sicilian walked the committee through the draft model attached to the memo, and described how the language reflected the subcommittee’s prior policy choices.

The subcommittee discussed its choice of using throwout rather than throwback into section [c]. The sense of the subcommittee was to maintain the throwout rule—and not switch to the throwback rule.

Mr. Horwitz asked whether the items in Section 17(a)(5) should be excluded from both the numerator and the denominator.

After discussion, CO made two motions, which carried, such that the original language of section 17(a)(5) and 17(b) was accepted, and the language of the draft was accepted as a whole, although the drafting group should try to shorten, if possible, by adding the words “if and to the extent” after the words “in this state” and to remove the phrase “if and to the extent’ from all the other sections.

VII. New Business

A question was raised regarding the “subject to tax” definition of the Compact. The subcommittee discussed issues related to this phrase and asked staff to produce a White Paper researching the issues so that the subcommittee could consider whether a project or projects should be initiated.

VIII. Adjournment

The meeting was adjourned at 12:05 P.M.

MULTISTATE TAX COMMISSION

Working Together Since 1967 to Preserve Federalism and Tax Fairness

Minutes
Sales/Use Tax Subcommittee Meeting
Intercontinental Hotel, Kansas City, MO
March 1, 2011

I. Welcome and Introductions

Richard Cram, Chair of the Subcommittee, called the meeting to order at 1:00 P.M. The following persons attended the meeting either in person or by telephone.

Name	Affiliation	Name	Affiliation
Phil Horwitz	CO DOR	Private Sector	
Anita DeGumbia	GA DOR	Deborah Bierbaum	AT&T
Randy Tilley	ID DOR	Todd Lard	COST
Laurie Riva	IL DOR	John Kroll	HRWK, Inc.
Richard Cram	KS DOR	John Allan	Jones-Day
Pat Verschelden		Karen Nakamura	PwC
Bob Carter	KY DOR	Terry Frederick	Sprint
Michael Fatale	MA DOR	Amy Hamilton	State Tax Notes
Stewart Binke	MI DOR	Jamie Fenwick	Time Warner Cable
Ellen Auger	MN DOR	Warren Townsend	Wal Mart Stores
Wood Miller	MO DOR	MTC Staff	
Lennie Collins	NC DOR	Bruce Fort	Les Koenig
Myles Vosberg	ND DOR	Elliott Dubin	Roxanne Bland
Louie Gomez	NM DOR	Greg Matson	Shirley Sicilian
Rebecca Abbo		Joe Huddleston	
Brian Seibel	SD DOR		

II. Public Comment Period

There was no public comment.

III. Reports and Updates

A. Federal Issues Affecting State Taxation

Roxanne Bland, MTC Counsel, reported that there was no legislation introduced thus far that would affect State taxes. Ms. Bland explained the changes in the composition of the House and Senate Committees that have jurisdiction over State taxes.

IV. Telecommunications Transactions Tax Centralized Administration Project

A. Presentation of Staff Memorandum and Draft Model Statute

Ms. Bland summarized the provisions in the current draft of model legislation for Local-Level Administration/Local Imposition of Telecommunications Services Transaction Taxes. She informed the subcommittee members that this model was patterned after the South Carolina law. The Subcommittee then reviewed and discussed the draft.

One provision in the draft allows local taxing jurisdictions to decide by majority vote who is to be selected as the centralized tax administrator. John Kroll of HRWK, Inc. of Austin, TX made a public comment that he was representing an organization that would like to offer services as a centralized tax administrator and indicated he would suggest language to the drafting group for a mechanism that would provide for weighting the voting process to reflect population distribution, rather than simply "one vote for one taxing jurisdiction," when there may be large differences in the sizes of those jurisdictions.

In discussing the registration and returns portion of the draft, the suggestion was made that this should apply only to sellers, not to purchasers.

A new rates and boundaries section was added to this draft, modeled after Streamlined Sales and Use Tax Agreement provisions, and it was suggested this also included in the State Administration/Local Imposition of Telecommunications Transaction Taxes model statute as well. Debra Bierbaum of AT&T suggested that language be added to provide that the rates and boundaries database for telecommunications services transaction taxes be required to be consistent with other state and local databases.

The drafting group was directed to continue finalizing this draft, in accordance with the suggestions made, and the revised draft will be brought back to the Subcommittee for further discussion and consideration at the next meeting.

V. Model Sales and Use tax Reporting Statute

A. Public Comment:

Shirley Sicilian, MTC General Counsel, reported to the Subcommittee on the status of the Model Sales and Use Tax Notice and Reporting Statute project, as well as recent litigation in federal district court in Colorado, where the court granted the Direct Marketing Association’s (DMA) request for a preliminary injunction against enforcement of the Colorado sales and use tax notice and reporting statute. Ms. Sicilian’s report also noted other states that have either already enacted notice statutes, or in which legislation has been introduced to require such notices, reports or both.

B. Subcommittee Discussion:

The Subcommittee discussed whether to proceed with the Model Statute or whether it needed to be revised in view of the recent Colorado court decision. Michael Fatale said that in his opinion, the Colorado federal court decision was wrong. Warren Townsend, of Wal-Mart Stores, Inc., made a public comment encouraging states to move in this direction in an effort to "level the playing field" between bricks and mortars retailers, who are legally required to collect state and local sales taxes, and the remote retailers, who do not if they lack physical presence. Mr. Townsend also noted that there is a need to educate the public on the fact that if they purchase items from remote sellers who do not collect and remit the sales tax, they are responsible for the tax. The Subcommittee decided to move forward with the Model Statute.

Phil Horwitz suggested an amendment to the penalty provision in (e)(1)(A)(i) of the draft on page 6, to strike the language "within X days of the date such notice was required to be provided" and insert in its place "by the end of the calendar year when such transaction took place" or similar language, and motion was made and approved to make that amendment.

A motion was then made to move the draft, as amended, forward to the Uniformity Committee for consideration, and that motion was voted on and passed unanimously by the Subcommittee. In view of passage of that motion, we therefore have an action item for the Uniformity Committee: to consider moving favorably the proposed Model Sales and Use Tax Notice and Reporting Statute forward to the Executive Committee.

The drafting group will now begin work on the second aspect of the project: to develop and bring to the subcommittee for review and discussion a model statute to address representational/affiliate sales and use tax nexus, such as New York and North Carolina have recently enacted, and other states are currently considering. Joe Huddleston, MTC Executive Director cited a BNA report in which BNA reported that 12 states have already passed such legislation.

VI. Model Statute on Tax Collection Procedures for Accommodation Intermediaries

A. *Presentation of Staff Memorandum and Materials*:

Ms. Bland provided the Subcommittee a report on the Accommodations Intermediaries draft model statute, which had been sent to the affected states for a Bylaw 7 Survey. An insufficient number of states had responded that they were willing to consider the proposal for adoption. The Executive Committee referred the matter back to the Subcommittee for further consideration as to whether the project should continue, and if so, what revisions should be made in response to states' concerns. Ms. Bland discussed in her report the various reasons why the proposal, in its current form, presented difficulties for a number of the states. Ms. Bland had done a follow-up survey of states to draw out the specific concerns that the current draft presented.

B. Subcommittee Discussion and Public Comment:

Ms. Bland provided copies of North Carolina and South Carolina statutes that allow the imposition of sales/ transactions tax on the accommodations intermediaries' charges. She also presented a copy of the pending federal district court complaint filed by Orbitz regarding the North Carolina statute, and a copy of the recent South Carolina Supreme Court decision upholding the imposition of tax on the accommodations intermediaries' charges.

The subcommittee discussed whether to undertake further work to revise the draft model statute in response to states' comments, so that it would be workable for a larger number of states. The subcommittee decided that based on the importance of this issue, the project should continue and gave direction to the drafting group to look at other state statutes and to prepare draft language consistent with comments from the states that raised concerns with the draft, including a single remittance model, with those revisions to be discussed and considered by the subcommittee.

Additional volunteers were solicited for participation in the drafting group, Stewart Binke and Richard Cram volunteered to serve on the drafting group.

VII. New Business

No new business was brought before the subcommittee.

VIII. Adjournment

The meeting adjourned.

MULTISTATE TAX COMMISSION

Working Together Since 1967 to Preserve Federalism and Tax Fairness

Minutes
Full Uniformity Committee Meeting
Intercontinental Hotel, Kansas City, MO
March 2, 2011

I. Welcome and Introductions

The Chair called the meeting to order at 3:30 P.M. The following persons attended the meeting either in person or by telephone.

Name	Affiliation	Name	Affiliation
Robynn Wilson	AK DOR	Rebecca Abbo	NM DOR
Christy Vandervender	AL DOR	Gary Humphrey	OR DOR
Chris Sherlock		Janielle Lipscomb	
Ben Miller	CA FTB	Brandon Seibel	SD DOR
Anita DeGumbia	GA DOR	Private Sector	
Randy Tilley	ID DOR	Todd Lard	COST
Brian Fliflet	IL DOR	Jim Zenk	Ernst & Young
Laurie Riva		Terry Frederick	Sprint
Bryan Vargas	KS DOR	Amy Hamilton	State Tax Notes
Michael Fatale	MA DOR	Diann Smith	Sutherland
Stewart Binke	MI DOR	MTC Staff	
Keith Getschel	MN DOR	Roxanne Bland	Greg Matson
Ellen Auger		Elliott Dubin	Ken Beier
Brenda Gilmer	MT DOR	Shirley Sicilian	Joe Huddleston
Lennie Collins	NC DOR	Bruce Fort	Jeff Silver
Mary Loftsgard	ND DOR	Sheldon Laskin	Cathy Felix
Louie Gomez	NM DOR		

II. Approval of Minutes of December 7-8, 2010 and February 8, 2011

The minutes of the above mentioned meetings were approved unanimously.

III. Public Comment Period

Diann Smith of Sutherland asked whether the UDITPA-related models will be proposed as amendments to the Compact, and if so, whether the process for amendment to the Compact is different from other uniformity recommendations. Mr. Huddleston replied that the Executive Committee will decide the nature of the proposals and the process.

Ms. Smith then noted that some MTC proposals have not been adopted by states, or have been adopted with changes. She told the Committee members that it is frustrating for business to work on these projects if they are not adopted by states. Mr. Huddleston replied that one very helpful factor in how the MTC models are received is active participation in the process by taxpayers, taxpayer groups, and business coalitions such as the one represented by Ms. Smith. He noted was dismayed recently when the coalition represented by Ms. Smith took the position that they are not in favor of uniformity. Taxpayer and taxpayer group participation in developing the proposals is important and appreciated.

Sales/Use Tax Segment

IV. Reports and Possible Action Items

- *Telecommunications Transactions Tax Centralized Administration Project*

A new "rates and boundaries" section was added to this draft, modeled after Streamlined Sales and Use Tax Agreement provisions, consistent with other state and local databases.

In discussing the "registration and returns" portion of the draft, the suggestion was made that this should apply only to sellers, not to purchasers.

The drafting group will continue finalizing this draft, in accordance with the suggestions made, and the revised draft will be brought back to the Subcommittee for further discussion and consideration at the next meeting.

- *Model Sales and Use Tax Reporting Statute*

Warren Townsend, Wal-Mart Stores, Inc., reiterated his desire for an "even playing field" between bricks and mortar retailers and on-line retailers.

After some discussion, Alaska moved to recommend the proposal favorably to the executive committee, with amendments that removed the changes to section (e) (1) (A) that had been made by the subcommittee. The motion carried: 8 affirmative votes; 0 no votes; and 4 abstentions.

Income/Franchise Tax Segment

V. Reports and Possible Action Items

- *Financial Institutions Working Group*

The Work Group had finished their work on the receipts factor and was now working on the property factor. The work group is discussing whether "solicitation" should be dropped from the

"SINAA" factors. Industry is working on its proposal for source the four factors. The group is considering management reports as a basis for measuring the factor.

- *UDITPA*

There are three provisions being worked on: (1) the definition of sales; (2) the weights of the apportionment factors: (3) sales sourcing.

VI. Roundtable Discussion

Most of states reported that they are still dealing with severe budget problems. GA said that although they have a budget gap, the trend appears to be downward. MI is replacing its Single Business Tax with a 6 percent corporate income tax. NC reduced its corporate income tax rate from 6.9 percent to 4.9 percent but will allow the Secretary of Revenue to enforce combined reporting. The CAFTB reported three significant court cases: General Mills, Microsoft, and Gillette. IL reported that its New York State style "Amazon" law is awaiting the Governor's signature. MN will include insurance companies in its general corporation income tax but provide a credit for premiums taxes paid. KS is considering phasing out the sales tax on food and eliminating the corporate income tax. MA said its combined reporting revenue projection is near the mark and they have an addback case against Kimberly-Clark. AL reported on its CSX case.

VII. New Business

There was no new business.

VIII. Adjournment

The meeting was adjourned at 5:25 P.M.