



**MULTISTATE TAX COMMISSION**

*Working Together Since 1967 to Preserve Federalism and Tax Fairness*

**Income and Franchise Use Tax Subcommittee  
 March 7, 2012  
 Doubletree by Hilton Hotel  
 Nashville, TN  
 Minutes of the Meeting**

**I. Welcome and Introductions**

The Chair called the meeting to order at 8:30 A.M. The following persons attended the meeting.

Name	Affiliation	Name	Affiliation
Robynn Wilson	AK DOR	Rebecca Abbo	NM DOR
Michael Mason	AL DOR	Don Jones	OR DOR
Tom Atchley	AR DOR	Gary Humphrey	
Ben Miller	CA FTB	Janielle Lipscomb	
Phillip Horwitz	CO DOR	Tim Donovan	SC DOR
Marshall Stranburg	FL DOR	Frank Hales	UT Tax Comm.
Phil Skinner	ID DOR	Andrew Glancy	WV DOR
Randy Tilley		Jeff Oakes	WV DOR
Richard W. Jackson		Private Sector	
Richard Cram		KS DOR	Jean Russell
Michael Fatale	MA DOR	Todd Lard	COST
Stewart Binke	MI DOR	Karen Boucher	Deloitte Tax
Keith Getschel	MN DOR	John Allan	Jones Day
Pam Evans		Amy Hamilton	State Tax Notes
Wood Miller	MO DOR	Diann Smith	Sutherland
Lennie Collins	NC DOR	MTC Staff	
Matt Peyerl	ND DOR	Bruce Fort	Roxanne Bland
Myles Vosberg		Elliott Dubin	Sheldon Laskin
Emily Thompson		Jeff Silver	Shirley Sicilian
Louie Joe Gomez	NM DOR		

**II. Public Comment Period**

There was no public comment at this time.

**III. Approval of Minutes of In-Person Meeting November 29-30, 2011; January 31, 2012 Teleconference; and February 21, 2012 Teleconference**

California moved approval of all minutes. The motion carried unanimously.

#### **IV. Reports and Updates**

##### *A. Federal Issues Affecting State Taxation*

Roxanne Bland, MTC Counsel, gave this report

1. H.R. 1439, Business Activity Tax Simplification Act of 2011 – still in House Judiciary Committee
2. H.R. 1864, Mobile Workforce State Income tax Simplification Act of 2011 – awaiting action in full House.
3. H.R. 1416, Crime Victim Restitution and Court Intercept Fee Act – No action to date.

##### *B. Report on Commission Action of Uniformity Projects*

Shirley Sicilian, MTC General Counsel, gave the report.

Three amendments of the Multistate Tax Compact were moved to the Executive Committee; and, are awaiting that Committee's action at their next meeting on May10th: (1) Article IV.1 (g) [Definition of Sales]; (2) Article IV.9 [Factor Weighting]; and (3) Article IV.17 [Sales Factor Sourcing for Services and Intangibles].

The states want Section 17: Sales Factor Sourcing of Services and Intangibles to be the main focus of the work of the subcommittee; and, the Executive Committee wants further clarification on this subject.

#### **V. Project to Amend MTC Model Financial Institutions Apportionment Rule**

Lennie Collins (NC) is the Chair of the Work Group for this project and he gave a report. Mr. Collins told the subcommittee members that the focus is now on property factor. Issues have been identified in an issues list. Industry will report on the use of the five factors: (1) solicitation; (2) investigation; (3) negotiation; (4) approval; and (5) administration {SINAA} to approximate the location of loans and loan bundles for purposes of the property factor.

#### **VI. Project to Amend Multistate Tax Compact Article IV.1 (a) [Definition of Business Income]**

Ms. Sicilian walked the subcommittee through the draft definition of "business income." She highlighted the policy issues and identified the policy choices reflected in the draft. The Subcommittee then discussed question 3(d) on the policy issue list regarding "integral." The subcommittee decided that the term integral should be replaced with "is or was related to the operation of."

CO moved that subcommittee adopt all proposed changes provided by the drafting group on page 4 of the memo.

YES: OR, ND, ID, NM, CO, CA FTB, MI, AL, NC, UT, MA, AK, MO, KS

NO: none

ABSTAIN: FL, MN, WV

Motion carried

The question was raised whether the term apportionable income should be used in place of the term business income. CA FTB moved to replace the term business income with the term apportionable income as provided in a separate draft.

YES: OR, ID, AL, MN, WV, CO, NC, MA, MI, CA FTB, AK, AR

NO: MO, NM, UT, ND

Abstain: FL, SC

The motion carried.

## **VII. Project to Amend Multistate Tax Compact Article IV.18 [Distortion Relief]**

Ms. Sicilian walked the subcommittee through the draft revisions to section 18. Again, she highlighted the policy issues and identified the policy choices reflected in the draft. MA asked whether states can use ad hoc arrangements; or, must they use applicable industry wide rules? Ms. Sicilian responded that section (a), which is the original portion of the statute, is clear statutory authority for an ad hoc adjustment if the general rule creates distortion in a particular taxpayer's case. The proposal would add section (b) to clarify that industry-wide regulations may be used in addition to the ad hoc approach. She noted that (b) makes clear that companies in industries which have special apportionment formulas can still use the ad hoc rule in (a) if the special apportionment formula distorts its income. Diann Smith of Sutherland commented that her clients want to use industry wide solutions that apply to all. Mr. Horwitz averred that states must also have the ability to make ad hoc arrangements when necessary.

Ms. Sicilian drew the subcommittee's attention to the remaining policy issues on the policy issue list for discussion.

The Subcommittee discussed whether the word "procedures" was appropriate in section (b). CO moved to use the term "rules and regulations" but not "procedures."

YES: OR, ID, AL, KS, MO, CO, NM, NC, UT, MA, MI, ND, AK, CA FTB

NO: MN,

Abstain: WV, FL, SC

The motion carried.

The next question to be discussed was whether separate accounting should be deleted as a means of mitigating distortion. Ms. Sicilian pointed out that separate accounting is not the same as separate entity apportionment. Separate accounting is not formulary apportionment at all – essentially, income and expenses are all allocated. Mr. Ben Miller noted that use of section 18 involves apportionment problems and questioned whether separate accounting should be a possible solution, but he noted that separate accounting had been used appropriately in a rare circumstance in California.

CO moved that separate accounting be retained.

YES: OR, ID, AL, KS, MN, CO, NM, NC, UT, MA, MI, ND, CA FTB

NO: AK

Abstain: WV, FL, SC

The motion carried.

CA FTB moved to recommend section 18 amendments as drafted to the Full Uniformity Committee

YES: OR, ID, AL, KS, MN, WV, CO, NM, UT, MA, MI, ND, CA FTB, MO

NO: 0

Abstain: FL, AK, SC

The motion carried.

### **VIII. Project Regarding Partnership or Pass-Through Entity Income Ultimately Realized by and Entity That is not Subject to Income Tax**

Sheldon Laskin, MTC Counsel told the Subcommittee that the Executive Committee had sent this project back the Uniformity Committee given that the insurance industry is working to produce an alternative proposal. The idea is to give the Subcommittee the opportunity work with the alternative. The Executive Committee wants a matrix of issues and options.

Mr. Fatale reiterated his finding that the insurance industry has increasingly used pass-through entities to generate income to fund policy liabilities. The incomes generated by the pass-throughs are not captured in gross premiums taxes. AL asked where hedge funds are domiciled. Mr. Mason (AL) and Ms. Sicilian told the subcommittee that under the proper conditions, insurance companies can be considered unitary with other lines of business. One member proposed that states consider all income earned by an insurance company as insurance business and thus subject to gross premiums taxes. The subcommittee is waiting for industry to produce a working paper.

### **IX. Possible New Project Regarding Interpretation of Article IV.3 [taxable in Another State]**

Bruce Fort, MTC Counsel, walked the subcommittee through his memorandum and highlighted the policy and enforcement issues. He told the Subcommittee that there could be a potential

problem, but it has not materialized as yet. For compliance with this regulation, states require a company file a return in another state in order to be considered as taxable in another state. One of the potential problems entails throwout and throwback rules. If a company says that it is taxable in another state, the taxing state cannot require the firm to throwback or throw-out the sales in that states. Les Koenig, Director of the MTC Joint Audit Program, said that auditors look at each states nexus and throwback rules and determine whether the company actually has nexus in the destination state. However, companies can pay the minimum tax if they file a tax return in the destination state.

CO moved that the subcommittee cease studying this topic.

YES: OR, ID, AL, MN, WV, CO, NM, NC, MI, ND, AK, MO

NO: MA, CA

Abstain: FL, SC

The motion carried.

#### **X. New Business**

There was no new business.

#### **XI. Adjourn**

CO moved to adjourn

The motion carried unanimously.