



MULTISTATE TAX COMMISSION

**MINUTES of
Sales and Use Tax Uniformity Subcommittee Meeting
Wednesday, March 6, 2013
8:30 a.m. Central Time**

I. Introductions

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

Joe Huddleston, Greg Matson, Shirley Sicilian, Roxanne Bland, Sheldon Laskin, Thomas Shimkin, Ken Beier, Harold Jennings, Lila Disque	Multistate Tax Commission	Derek Bell	Montana Department of Revenue
Richard Cram, Bryan Vargas	Kansas Department of Revenue	Michael Fatale	Massachusetts Department of Revenue
Frank Hales	Utah State Tax Commission	Lennie Collins	North Carolina Department of Revenue
Louis Joe Gomez	New Mexico Taxation and Revenue Department	Phil Horwitz	Colorado Department of Revenue
Pam Evans, Jeff Vogt	Minnesota Department of Revenue	Nancy Prosser	Texas Comptroller of Public Accounts
Stewart Binke	Michigan Department of Treasury	Derek Loeb	Baker & McKenzie
Chris Coffman	Washington State Department of	Ferdinand Hogroian	Council on State Taxation

	Revenue		
Randy Tilley, Phil Skinner	Idaho State Tax Commission	Deborah Bierbaum	AT&T
Wood Miller	Missouri State Tax Commission	Todd Lard, Charlie Kearns	Sutherland
Christy Edwards, Kelly Gilliken, Mike Gamble, Christy Vandevander, Craig Banks	Alabama Department of Revenue	John Blase	Attorney
Aaishah Hashmii	District of Columbia Office of Tax and Revenue	Terry Fredericks	Sprint
		Karen Boucher	Deloitte LLP
Appearing by Phone			
Andrew Glancy	West Virginia State Tax Department	Margaret Wilson	Reeder Wilson LLP
Nancy Prosser	Texas Comptroller of Public Accounts	Pat Calore	Michigan Department of Treasury
Christy Comanita	Arizona Department of Revenue	Margaret Rizer	Minnesota Department of Revenue
		Jaime Fenwick	Time Warner Cable

II. Public Comment Period

There were no public comments at this time

III. Approval of Minutes of In-Person Meeting of December 4, 2012, Teleconference of February 15, 2013

The minutes were approved.

IV. Reports and Updates

Roxanne Bland, MTC Counsel, presented the federal issues affecting state taxation. The 113th Congress is now in session. Ms. Bland noted that the Subcommittee on Constitutional, Commercial and Administrative Law has changed its name to the Subcommittee on Regulatory Reform, Commercial and Antitrust Law, and listed the new members, including a new chair. Bills concerning state taxation are usually submitted to the Senate Finance Committee; the chair is Max Baucus, from Montana. Senate Bill 31, the Permanent Internet Tax Freedom Act has been introduced, as have Senate Bill 86 and Senate Bill 3334, the Marketplace Fairness Act. The Act provides a set of criteria to simplify sales and use taxes and permits collection from remote sellers, within certain rules and guidelines. This is very similar to the provisions found in SSUTA. Mr. Cram noted these bills seem to pick up more momentum each year, and they seem to be widely favored this year.

Shirley Sicilian, MTC General Counsel, gave the report on commission action on uniformity projects. She reported the Model Sales and Use Tax Notice and Reporting Statute is on hold at the Executive Committee, pending a decision from the 10th Circuit on the DMA v. Brohl case. The MTC model is based on the Colorado statute, which was subject to litigation almost immediately after enactment on a variety of state and federal constitutional questions. The district court enjoined the state from enforcement, and the case is currently pending in the Tenth Circuit.

Phil Horwitz (CO) provided an update on the DMA case: oral arguments were held Nov. 7th, so a decision could come down at any time. The court seemed interested in both sides of the argument, and the consensus seemed to be that the district court's opinion would not be the way the Tenth Circuit ultimately went. A remand would essentially be a win for the state, since it is coming from a permanent injunction.

V. Model Associate Nexus Statute

Ms. Bland presented the staff memorandum, which had been requested by the Committee at the last meeting. MTC Staff assembled pieces of legislation from various parts of the country to illustrate some of the cases on nexus-producing activities, including property and employees in the state, independent contractors, associates, and non-contractual representatives. The MTC draft Associate Nexus Model Statute was attached to the paper. There were no public comments.

Mr. Cram noted the nexus statute had returned to the education phase, and requested input as to further research needed. Michael Fatale (MA) asked about the first sentence of the draft, which he found overbroad. He would prefer something that was more transaction-specific, and suggested "a person who engages in a sales transaction that results in a sale or use taxable under this act". He feels that in its current form it implicates a co-user of the property who had no connection to the transaction.

Pat Calore (MI) stated the concept was to define the category of person that is a retailer subject to jurisdiction. So the introductory language doesn't focus on the actual transaction giving rise to the tax, but is trying to indicate the markers that define engaging in a retail business in the state; this is probably why the original language referred to a person who sold tangible personal property. She felt the new language dilutes the concept as far as defining the category of "sellers." Mr. Horwitz proposed "a person who engages in a transaction taxable under this act." Ms. Calore's concern was that the purpose of the section was to start with a simple concept establishing nexus; she likes the Kansas statute, and feels it's a simpler and neater way to reach our goal. She suggested adding it as the introductory general provision, followed by click-through and affiliate nexus. Mr. Cram reminded those in attendance that the project is still in the research phase, and asked for input regarding the memo. Todd Lard (Sutherland) reminded those in attendance that a number of the cases are still in litigation. For example, the Barnes and Noble case is still pending in the New Mexico Supreme Court, as are the Amazon case in New York and the PMA case in Illinois. He recommended the committee look at the implications of the Internet Tax Freedom Act. The subcommittee asked the working group to develop a list of policy questions with illustrative statutes, and to research three questions (1) must an in-state activity help to "establish and maintain a market" in order to create sales and use tax nexus in a state? (2) can sales and use tax nexus be established for a unitary business as a whole (or must a determination of nexus be made on a corporation by corporation basis within the unitary group)? And (3) would the Internet Tax Freedom Act have any impact on the associate nexus portion of the model statute?

In response to Mr. Cram's question, Ms. Bland stated it is possible, and probably preferable, to do a policy checklist as the committee proceeds with further research.

At this point, Mr. Cram solicited alternate names, ultimately recommending "Sales and Use Tax Nexus Statute."

There were no further comments.

VI. Model Provisions Concerning Class Actions and False Claims

Mr. Laskin presented the staff memo, as well as some extensive background on the Illinois False Claims Act, via PowerPoint. He noted the project is in the educational phase. Mr. Horwitz noted if he was on the industry side he would worry that the Department might lack motivation to pursue overcollection claims, and he wonders if it is proper to put the matter in the department's hands. Ferdinand Hogroian (COST) noted that in Utah, when the commissioner becomes aware of overpayments, they then contact the companies that overpaid. So the focus is forward-looking, rather than backward-looking. Randy Tilley (ID) noted there was a case in Idaho similar to the Utah carpet case outlined in the PowerPoint; Idaho treated the claims individually, but also put out information to the industry regarding proper collection of tax.

At this point, Mr. Horwitz asked about the logical next step for this project. Mr. Laskin stated it is still in the educational phase and will also be presented to the litigation committee. Regarding the issue statement, Mr. Cram said it may be good to get input from Litigation Committee members on where to proceed. Ms. Calore asked whether there had been a state survey on the issue yet, regarding the types of statutes that could be embedded with the language. Mr. Laskin clarified that one of the slides listed the states that had false claims acts, but it would be very useful to look at which states have overpayment collections statutes. Karen Boucher (Deloitte Tax LLP) pointed out that the SSUTA project did a review of the false claims act, and recommended starting there.

Mr. Horwitz recommended the committee come closer to finalizing the issue list before establishing a work group on the matter. He believes part of the process should be looking at whether there is some easy administrative way to set up a specialized forum wherein a party may submit the refund claim and receipts and request a refund. He would like to know what costs would be involved and whether this is a sensible solution.

Mr. Cram recommended the subcommittee continue the educational phase of the project subject to subcommittee review. Derek Loeb (McKenzie & Baker) asked whether Mr. Laskin's PowerPoint would be available online. Mr. Laskin stated he would post it online. Mr. Hogroian stated COST encourages the subcommittee to continue to investigate the model statute. Staff will continue refining the policy checklist and will look at the SSUTA white paper and consider putting together a survey. Mr. Horwitz recommended taking the Illinois statute and generalizing it to a model statute so there is a baseline from which to work. Mr. Laskin reminded those in attendance that, thus far, it is just a bill in Illinois, so it's unclear where it will go within the state.

VII. New Business

There was no new business.

VIII. Adjournment

The Subcommittee adjourned.