



**MULTISTATE TAX COMMISSION**

**MINUTES of  
Uniformity Committee Meeting  
Wednesday, March 12, 2014  
8:30 a.m. Mountain Time**

**I. Welcome and Introductions**

Wood Miller, Chair of the Uniformity Committee, (MO) opened the meeting. The following persons were in attendance:

Lennie Collins	North Carolina Department of Revenue	Chris Sherlock	Alabama Department of Revenue
Derek Bell	Montana Department of Revenue	Holly Coon	
Lee Baerlocher		Kelly Gillikin	
Gene Walborn		Stewart Binke	Michigan Department of Treasury
Dee Wald	North Dakota Office of State Tax Commissioner	Chris Coffman	Washington State Department of Revenue
Matt Peyrl		Joe Huddleston	Multistate Tax Commission
Myles Vosberg		Greg Matson	
R. Jay Frost	Louisiana Department of Revenue	Ben Abalos	
Richard Cram	Kansas Department of Revenue	Steve Yang	
Aaishah Hashmii	DC Office of Tax and Revenue	Ken Beier	
Phillip Horwitz	Colorado Department of Revenue	Roxanne Bland	
Wood Miller	Missouri Department of	Sheldon Laskin	

Jeremiah Morgan	Revenue	Jeff Silver	
David M. Ferguson	New Mexico Taxation & Revenue	Bruce Fort	
Frank Hales	Utah State Tax Commission	Lila Disque	
Bill von Tagen	Idaho Office of the Attorney General	Cathy Felix	
Phil Skinner		Helen Hecht	Federation of Tax Administrators
Richard W. Jackson	Idaho State Tax Commission	Greg Turner	Council on State Taxation
Steve Wynn		Todd Lard	Sutherland Asbill & Brennan
Randy Tilley		Tripp Baltz	Bloomberg BNA
Jeff Henderson	Oregon Department of Revenue	Deborah Bierbaum	AT&T
Gary Humphrey		Shirley Sicilian	KPMG
Robynn Wilson	Alaska Department of Revenue	Ben Miller	(appearing independently)
Michael Fatale	Massachusetts Department Of Revenue	Michael Herbert	PriceWaterhouseCooper
Brian Fliflet	Illinois Department of Revenue		
Kathy Sher	New Hampshire Department of Revenue Administration		

**II. Approval of Minutes of In-person Meeting, December 11, 2013**

The minutes of the December 11 meeting were approved by unanimous voice vote

**III. Public Comment Period**

There were no comments.

**IV. Reports and Possible Action  
(Sales/Use Tax Subcommittee)**

Richard Cram, Chair of the Sales and Use Tax Subcommittee, (KS) reported on the subcommittee meeting. The subcommittee reviewed the draft Sales Tax Nexus Model statute, and it has gone back to the work group for finalization. Regarding the Model Provisions Concerning Class Actions and False Claims, the group has narrowed its focus to transactional taxes where there is a duty to collect. The Marketplace Fairness Project is on hold indefinitely pending progress in the House.

**(Income/Franchise Tax Subcommittee)**

Robynn Wilson, Chair of the Uniformity Subcommittee on Income & Franchise Tax, (AK) reported on the subcommittee meeting. The subcommittee reviewed the Strategic Planning survey re-

garding uniformity recommendations, and provided more input on issues that keep states from adopting uniformity measures. In addition, staff has been assigned work on three new projects:

1. Regarding a possible trusts project, staff has been directed to prepare an in-depth educational presentation for the subcommittee.
2. Regarding sourcing of electricity, staff is to prepare a report to the committee regarding the nature of the potential project.
3. A similar staff report has been requested for cloud computing.

**V. Consideration of Hearing Officer's Report on Amendments to Art. IV (UDITPA) For Recommendations to Executive Committee for Further Action**

**a. Introduction**

In addition to the seven specific recommendations for changes to the draft that are in the Hearing Officer Report, Mr. Laskin, Acting General Counsel, also prepared a short list of additional issues for the Committee's consideration. Any other suggestions, such as cost of performance, which did not rise to the level of a Hearing Officer recommendation to amend the draft, were not included. In previous meetings, the committee members discussed these matters, and a straw poll was conducted, to assess tax administrators' inclinations regarding whether to alter the draft and how. The work group also addressed Bruce Johnson's request for examples.

**b. Public comment**

There were no comments.

**c. Discussion (by issue)**

**Section 18: Make explicit the burden of proof**

The group first clarified that it was charged with making a decision in order to determine the Committee's recommendation and pass this on to the Executive Committee.

Professor Pomp's reasons for all of his recommendations regarding Section 18 included the fact that industry would be less likely to support the draft if the burden of proof was not explicit. One concern voiced by several state representatives was that burden of proof is a procedural issue that should not be addressed in a model statute, since states frequently address that issue separately. Wood then asked for a show of hands in favor of the Hearing Officer's recommendation.

All in favor of the Hearing Officer's proposal: 4

All opposed (favor the committee draft as prepared): 12

Abstaining: 0

After some discussion, Mr. Miller noted the group may make a comment to the Executive Committee regarding additional issues that have come to its attention. Mr. Huddleston clarified that the Executive Committee controls what ultimately happens. He noted that the private sector still has opportunities to provide input; the Executive Committee will still hear their comments, and they should make their opinions known.

**Section 18: Prohibit the tax administrator from imposing a penalty on the taxpayer when the administrator has successfully invoked alternative apportionment but the taxpayer acted in good faith.**

All in favor of the Hearing Officer's proposal: 3

All opposed (favor the committee draft as prepared): 13

Abstaining: 0

Holly Coon stated that Alabama in general did not object to the Hearing Officer's recommendation, but only to the degree the Department had not given the taxpayer specific guidance on the issue. Ben Miller (appearing on his own behalf) stated the Hearing Officer recommendation as drafted would at least need to be reworded because it does not cover cases where the taxpayer continues to file under the general apportionment rule after the administrator has invoked alternative apportionment.

**Section 18: Prohibit the tax administrator from retroactively revoking his prior approval of an alternate method unless there has been a material misrepresentation.**

All in favor of the Hearing Officer's proposal: 3

All opposed (favor the committee draft as prepared): 13

Abstaining: 0

Ms. Coon stated Alabama would have accepted the Hearing Officer's changes, but only to the extent the return had not been filed. The department may revoke the Section 18 alternative apportionment where the return has not yet been filed.

**Section 18: Limit alternative apportionment to isolated, limited, or non-recurring matters.**

Mr. Miller stated administrators are continually encountering absolutely new situations, and taxpayers are ahead of administrators in terms of recognizing the significance of these situations.

All in favor of the Hearing Officer's proposal: 0

All opposed (favor the committee draft as prepared): 16

Abstaining: 0

Phil Horwitz (CO) brought up a comment to Mr. Laskin's language in the memo. His objection to the Hearing Officer's recommendation is that the states are always responding to positions taken by taxpayers and audit is generally the first time they see and can respond to certain things. Michael Fatale (MA) stated this is not the time to edit the memo, but it might be a good idea to have a teleconference afterward. This teleconference will be appropriately noticed.

**Definitions of business/apportionable income: Replace the conjunctive "and" with the disjunctive "or" to eliminate ambiguity in the transactional vs functional tests.**

The committee had a lengthy discussion of whether a list of activities which satisfy the functional test following "and includes..." should be connected by an "or". The sense of the committee was that the phrase was correctly written in the current draft and would not cause confusion. "All fruit is delicious, including apples, oranges and bananas" reads better than "including apples, oranges or bananas," suggested Phil Skinner (ID).

Mr. Horwitz pointed out that grammatically the issue is resolved in the current draft without any need for the Hearing Officer's recommended change because ambiguity only appears when the subject is not repeated. So if the draft said "income arising from transactions and activities, and arising from tangible/intangible property," that would be ambiguous. But saying "income arising from" in each clause takes away the ambiguity.

In this case the draft language actually addresses the issue raised by Mr. Horwitz.

There was a second "or" issue: in his report, the Hearing Officer used the phrase for the functional test of 'tangible/intangible,' which appears to have been a scrivener's error leaving out the word 'or.' The committee should note that the Hearing Officer Report contained an omission and recommend that it be filled by the word "or." It would only be relevant if the Committee wanted to adopt the Hearing Officer's version.

**Delete the word "regular" as far as course of business**

Since "regular" was omitted in the functional test (part B), the hearing officer suggested that "regular" should also be removed from the transactional test (part A), or this difference might give rise to unnecessary litigation.

Ms. Wilson recommended first voting on those recommendations as a block, and then if there were issues, voting on them individually. If the majority favors the draft as proposed, there is no need to address these matters more minutely

All in favor of the Hearing Officer's proposal: 3

All opposed (favor the committee draft as prepared): 12

Abstaining: 1

Mr. Horwitz asked to hear from the 3 states that voted for the Hearing Officer report. Mr. Fliflet stated he liked the simplicity of the Hearing Officer approach. Getting into the tiny details doesn't benefit anyone. Idaho agreed that any extraneous details are unnecessary. Mr. Miller commented that the draft prepared by the Committee, which includes the phrase "is not allocable," was intended to allow this to be apportioned or allocated away from a state if that state desired, even though the income could be included in allocated income to that state. There are several states that provide that certain types of income that could be apportionable are instead allocable. That is constitutionally permissible, and why the draft included broader language than that proposed by the hearing officer

**Leave receipts from hedging transactions and treasury function in the receipts factor**

The Hearing Officer feels it would be a bad precedent to identify certain receipts as not includible. He viewed it as unnecessary to remove hedging transactions and treasury function under the receipts factor because they're already thrown out under Section 17.

All in favor of the Hearing Officer's proposal: 2

All opposed (favor the committee draft as prepared): 14

Abstaining: 1

Mr. Fatale raised the issue of securities dealers. There is some tension between the definition in 4(1)(g) and the language in draft Section 17 regarding the hedging function. This is not part of the vote, and is not part of the report to the Executive Committee, but a comment that should be made to the Executive Committee when they meet again. Mr. Miller stated the receipts factor definition is intended to reflect customer transactions. A securities dealer obviously has a customer, so that's why they were brought in. And hedging transactions were removed because there is no customer. Mr. Fliflet stated that hedging does affect what one receives from one's customer. If you're hedging foreign currency, you may in effect receive money off of that transaction. So they should distinguish between hedging the cost of inputs and hedging the product that's being sold.

Mr. Huddleston noted that at this time it appeared that the committee had completed its assignment from the Executive Committee. He stated that the issues relevant to the mod-

el and model regulations will persist. They are important to the member states and the taxpaying public, and will likely be discussed for a long time to come.

**VI. Roundtable Discussion\*(come prepared to share your State's multistate sales tax and income and franchise tax issues, including any plans for adopting current Commission uniformity recommendations)**

The states discussed current issues and developments in tax law. Notably, Utah's sunset provision on Compact membership was repealed, so Utah will remain a member state. Minnesota recently lost its hotel intermediaries case, and is weighing its options. North Carolina and DC are considering re-weighting the apportionment formula, with greater weight on the sales factor; if they do so, they will also need to switch to market-based sourcing. Michigan's IBM case was argued in January, so a decision should be handed down within the next few weeks. The court seemed unconcerned about the nature of the compact, and instead focused on reconciling state statutes.

**VII. New Business**

There was no new business.

**VIII. Adjourn**