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www.mtc.gov

Minutes
Nexus Committee Meeting (Open Session)
November 5, 2019
Hotel Contessa, San Antonio, TX

List attendees:

Steven Alvarez*	GA
Dan Armer	NM
Tripp Baltz*	Bloomberg Tax
Lee Baerlocher	MT
Michelle Biermeier	WI
Karolyn Bishop	WA
Keith Broussard	MT
Danielle Cabe	TX
Joan Cagle*	TN
Wendy Conlin*	MN
Richard Cram	MTC
Angela Cumbie	AL
Richard Dobson*	KY
Jessie Eisenmenger	Amazon
Michael Emfinger	AL
Cathy Felix	MTC
Antonio Ferachi	LA
Megan Ferris*	NE
Stacey Greaud	LA
Layne Hadlock	ID
Frank Hales	UT
Gracie Hartman	TX
Christina Heath	TX
Nathan Hoeppepner	KS
Joe Huddleston	EY
Jennifer Hudson	DE
Mary Hugo*	NE
Rusty Johnson	TX

Harold Jones	TN
Bryan Kelly	WA
Samwel Khakame*	CO
Robert Kindred	DC
James Kral*	NJ
Jayne Kulberg	WI
Katie Lolley	OR
Deanna Munds-Smith	AR
Denny Mwangi*	GA
Renee Nacrelli	MD
Marcia Oakman*	KY
Sonia Palao Flores	TX
Matt Peyerl	ND
Jordan Raye	KS
Brendi Romick*	TX
Morgan Scarboro*	MultiState Associates
Mark Schoenfield	MT
Miranda Scroggins	LA
Tom Shaner	ID
Thomas Shimkin	MTC
Larry Shinder	MTC
Jeff Silver	MTC
Brian Smith	Transaction Tax Resources
Kathy Smith	SD
Tiffany Southworth	UT
Scott Spilinek*	NE
Kim Stewart	MTC
Christy Vandevender	AL
Charla Wagner*	KS
Paul Williams	Law360
Adam Wolfson	WA
Warren Wood	DE
Steve Yang	MTC

*participation by telephone

Christy Vandevender, Chair, AL, brought the meeting to order at 8:30 am CST, introductions of attendees were made, and public comment was invited.

Public Comment

Joe Huddleston, EY, made a public comment concerning *Wayfair* implementation. He congratulated the Multistate Tax Commission and participating states for helping taxpayers get registered after *Wayfair*. He noted that clients of his firm that are inbound from foreign countries have encountered significant obstacles to getting registered for sales/use tax with states. Many states are asking for FEIN's and SS#'s of the officers or responsible parties. Many of these taxpayers do not have permanent establishments, so do not have FEIN's or SS#'s. If the companies are required to obtain an FEIN, they simply will not register with the states. States need to find away to register these taxpayers and publish that information.

Steven Alvarez, GA, stated that Georgia Department of Revenue does have the ability to register a foreign business using a non-U.S. identification number.

Jayne Kulberg, Vice-Chair, WI, moved for approval of the minutes of the August 5, 2019 open session meeting of the Nexus Committee, and the motion passed unanimously.

Nexus Director's Report and Update on Recent Nexus Law Developments since August 5, 2019

Richard Cram, Director of the National Nexus Program, presented the Update on Recent Nexus Law Developments since August 5, 2019 and the 1st Q FY 2020 Nexus Program Director's Report. The update focused on states' efforts to implement the recent *South Dakota v. Wayfair* decision, and the trend toward enactment of laws requiring marketplace facilitators to collect on facilitated sales of their marketplace sellers. Back tax collections from agreements closed in 1st Q, FY 2020 were \$5,261,190, with 82 executed agreements.

Proposed Amendment to Agreement

Richard Cram summarized his memorandum (attached), which discussed the concern that post-*Wayfair*, some taxpayers applying for voluntary disclosure and claiming sales/use tax economic nexus have represented estimated back tax liability in excess of \$500 to the state, but after the taxpayer signs the agreement and sends the back tax returns to MTC staff, those returns show "zero" or very minimal tax liability. The policy of the Multistate Voluntary Disclosure Program is that an application for voluntary disclosure will not be processed unless it shows a back-tax liability estimate of \$500 or more to the state. However, the agreement itself contains no such language. The memorandum included a proposed amendment to the agreement form used for sales/use tax economic nexus taxpayers that contained language making the agreement voidable by either the state or the MTC if the back-tax liability to the state

shown on the returns or spreadsheets submitted by the taxpayer after signing the agreement is less than \$500. Alternative language making the agreement void under those circumstances was also included in the proposal.

Katie Lolley, OR, proposed a motion to approve the proposed amendment language making the agreement voidable by the state or the MTC if the back-tax liability to the state shown on the returns or spreadsheets submitted by the taxpayer is less than \$500. The motion was approved by the Committee unanimously by voice vote.

Scott Spilinek noted that MTC staff needs to inform the state if the MTC voids the agreement under this language.

Matt Peyerl, ND, stated that guidance is needed on exercising the discretion provided by this language, if the back-tax liability shown on the returns or spreadsheets is somewhere between “zero” and some amount less than \$500.

Chair Christy Vandevender requested that Richard circulate a survey to the Nexus Committee, soliciting guidance on how that discretion under this language should be exercised.

Alabama Online Voluntary Disclosure Program

Chair Christy Vandevender gave a presentation on the new online voluntary disclosure program developed by the Alabama Department of Revenue. She indicated that applications received through the Multistate Voluntary Disclosure Program will be handled manually as they have been in the past, but applications received directly from taxpayers will be processed using the new online system.

New Business

No new business was brought before the Committee.

Closed Session

The committee entered closed session to discuss matters protected from disclosure.

Open Session

The Committee returned to open session, had nothing to report, and on motion of Frank Hales, approved unanimously, adjourned.

Memorandum

To: Christy Vandevender, Chair, Nexus Committee

From: Richard Cram, Director, National Nexus Program

Re: Minimum Back-tax Liability Requirement for Voluntary Disclosure Agreements

Date: November 5, 2019

Background

The application for the Multistate Voluntary Disclosure Program (MVDP) requests that the taxpayer provide a “good faith estimate” of the taxpayer’s back-tax liability to the state for the prior 4 tax years, broken out by tax type and tax year. The application also states: “National Nexus Program staff will not process an application when the good-faith estimate for all tax-types f o r t h e look- back period is less than \$500 in that state.”

Information on the Multistate Tax Commission website (www.mtc.gov) about the (MVDP) states the following:

NNP staff do not process voluntary disclosure applications when the good-faith estimate of tax due to a state for the lookback period is less than \$500. Taxpayers with minimal tax liability should pay such liability upon filing an initial return directly with the state.

Since the *Wayfair* decision and enactment of sales/use tax economic nexus by many states, an increasing number of MVDP applications concern taxpayers representing on their application only sales/use tax economic nexus with the state. In some situations, the taxpayer provides a “good faith estimate” of \$500 or more in back-tax liability to the state in the application, but when NNP staff receive the executed final voluntary disclosure agreement, the taxpayer claims zero or minimal back-tax liability to the state. The taxpayer will typically apply to a large number of states, requiring significant staff time to process the applications and agreements.

Although the application states the minimum back-tax liability requirement, there is nothing currently in the standard agreement itself that addresses this issue.

Issue

Should a provision be added to the standard agreement providing that either the state or NNP staff can void the agreement, if the actual total back-tax liability, as reflected on the returns provided with the executed agreement, is less than \$500?

Discussion

The purpose of the minimum back-tax liability requirement is to help participating states and NNP staff more efficiently allocate limited resources in processing voluntary disclosure applications and agreements. When the back-tax liability amount is minimal, it is more efficient for the taxpayer to simply register with the state and commence filing returns, rather than go through the voluntary disclosure process.

At the time the taxpayer applies for voluntary disclosure, the taxpayer may have difficulty computing an accurate back-tax liability estimate for prior years for income tax until the returns are actually completed, which often happens well after the voluntary disclosure application is submitted. That situation should be less likely to occur with preparing back tax liability estimates for sales/use tax.

Attached for consideration is suggested language (shown in red) to address this issue added to paragraph 5.1.4 of the agreement form used for taxpayers seeking sales/use tax voluntary disclosure and representing economic nexus.

Voluntary Disclosure Agreement
MTC 00-00 and [Signatory State]
[Tax Type]
Application Date:

VOLUNTARY DISCLOSURE AGREEMENT

MTC 00-00 & [Signatory State]

[Tax Type]

In exchange for the mutual promises herein, the [State or Commonwealth] of [Signatory State], MTC 00-00, and the Multistate Tax Commission (“Commission”) agree as follows:

1. Parties

The parties to this Voluntary Disclosure Agreement (“Agreement”) are the [State or Commonwealth] of [Signatory State], MTC 00-00, and the Commission. As used herein, “[Signatory State]” shall mean the tax administration agency for [Signatory State].

2. Purpose

Following overrule of the *Quill Corp. v. North Dakota* 504 U.S. 298 (1992) physical presence nexus standard in *South Dakota v. Wayfair*, 585 U.S. ___ (2018) and adoption of sales/use tax economic nexus by [Signatory State], MTC 00-00 has an obligation to register, collect and remit [Signatory State] sales/use tax beginning after [Lookback Date].

The parties agree to resolve MTC 00-00’s potential back [Tax Type] liability through compromise as set forth herein.

3. Scope

The parties acknowledge that this Agreement concerns only [Tax Type], interest, and penalty thereon, if any.

4. Procedures of Multistate Voluntary Disclosure

The Procedures of Multistate Voluntary Disclosure (“Procedures”) are incorporated herein by reference and, where applicable, govern this Agreement. The text of the Procedures is available at www.mtc.gov or by request from the staff of the National Nexus Program.

5. Duties of MTC 00-00

- 5.1. Unless [Signatory State] or the Commission grants a written extension, MTC 00-00 shall send to [Signatory State] or the Commission, subject to Subsection 5.1.4, the following within 60 days of written notice that [Signatory State] has approved MTC 00-00’s Agreement:

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MTC 00-00 and [Signatory State]
[Tax Type]
Application Date:

- 5.1.1. the complete Agreement signed and dated by MTC 00-00;
 - 5.1.2. the [Tax Type] returns, or spreadsheets (if permitted by [Signatory State]) for time periods that begin after [Lookback Date] (and returns for all time periods for collected and unremitted sales/use or withholding tax);
 - 5.1.3. the registration forms or confirmation receipts from online registration, if the [Tax Type] requires registration; and
 - 5.1.4. payment of tax due under the returns, or spreadsheets by check or money order payable to the taxing authority of [Signatory State]. If [Signatory State] requires electronic filing of such returns and electronic payment of such taxes, MTC 00-00 shall timely comply with such requirement. **If the total amount due under such returns or spreadsheets is less than \$500, [Signatory State] or the Commission may void this Agreement. [Alternative: If the total amount due under such returns or spreadsheets is less than \$500, this Agreement is void.]**
- 5.2. MTC 00-00 shall remit directly to [Signatory State] the penalty, if any, identified on the State Signature Page, and interest due with respect to time periods beginning after [Lookback Date] (and including penalty and interest on all time periods for collected and unremitted sales/use or withholding tax) not later than 30 days after receipt of notice from [Signatory State] of the amount due.
 - 5.3. This Agreement is void, if MTC 00-00 fails to send to [Signatory State] or the Commission, subject to Subsection 5.1.4, all of the items listed in Subsections 5.1.1 through 5.1.4 of this Agreement within 90 calendar days after the date that the Commission sent the Agreement signed by [Signatory State] to MTC 00-00, unless [Signatory State] or the Commission has granted a written extension of time.
 - 5.4. MTC 00-00 waives lack of nexus or jurisdiction to tax for any tax, interest, or penalty owed under this Agreement.
 - 5.5. MTC 00-00 shall make its books and records available to [Signatory State] upon reasonable notice for the purpose of:
 - 5.5.1. verifying the accuracy of MTC 00-00's factual representations in this Agreement; and

Voluntary Disclosure Agreement
MTC 00-00 and [Signatory State]
[Tax Type]
Application Date:

- 5.5.2. verifying the amount of tax due pursuant to returns or spreadsheets provided under Subsection 5.1.2 of this Agreement.

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MTC 00-00 and [Signatory State]
[Tax Type]
Application Date:

6. Duties of [Signatory State]

6.1. [Signatory State] shall:

6.1.1. not assess [Tax Type] and interest thereon attributable to any time period prior to and including [Lookback Date]; and

6.1.2. Except to the extent that [Signatory State] indicates on the [Signatory State]'s Signature Page that there is a non-waivable penalty, [Signatory State] waives all penalty arising from MTC 00-00's failure to register and file [Tax Type] returns, and make tax payments on [Tax Type] for all time periods prior to the Effective Date of this Agreement.

7. Duties of the Commission

7.1. The Commission shall maintain an electronic copy of this Agreement pursuant to its records retention policy and shall provide a copy to [Signatory State] or MTC 00-00, if requested.

7.2. The Commission agrees to assist [Signatory State] or MTC 00-00 to address any issues pertaining to this Agreement, if either party requests.

8. Confidentiality and Disclosure

[Signatory State], MTC 00-00, and the Commission agree not to disclose to any others the contents of this Agreement except in response to an inter-government exchange of information agreement, pursuant to a statutory requirement or lawful order, or as the other parties authorize in writing.

9. MTC 00-00 Representations

9.1. MTC 00-00 provides its estimate of taxes due in Exhibit 1, which is attached to this Agreement and incorporated herein. The representations in MTC 00-00's application for multi-state voluntary disclosure are true and accurate, and such application is attached to this Agreement as Exhibit 2 and incorporated herein.

9.2. MTC 00-00 further represents that:

9.2.1. It has no physical presence in [Signatory State], has made sales to customers in [Signatory State] in the current or prior year exceeding the applicable economic nexus threshold of [Signatory State], and is obligated to commence registration,

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filing returns, and collecting/remitting [Signatory State] sales/use tax beginning after [Effective Date].

- 9.2.2. It has not received notice of audit from either [Signatory State] or the Commission on behalf of [Signatory State] with respect to any type of [Signatory State] tax for which voluntary disclosure relief is provided herein;
 - 9.2.3. It has not received an inquiry from [Signatory State] or the Commission on behalf of the state regarding potential liability arising from any type of [Signatory State] tax for which voluntary disclosure relief is provided herein; and
 - 9.2.4. It has not filed a tax return or an extension request with [Signatory State], made a tax payment to [Signatory State], or taken any similar action with [Signatory State] concerning any type of [Signatory State] tax for which voluntary disclosure relief is provided herein (requests for information and other communications with [Signatory State] or the Commission in which MTC 00-00 remains anonymous are permitted).
- 9.3. [Signatory State] is relying on MTC 00-00's representations made herein in entering into this Agreement. If [Signatory State] determines that MTC 00-00 has made a material misrepresentation or omission of fact in this Agreement, [Signatory State] may, within 90 days of the discovery thereof, void this Agreement, retain all tax, interest, and penalty (if any) already paid and enforce its tax laws.
- 9.4. A misrepresentation or omission of fact by MTC 00-00 is material if [Signatory State] reasonably would not have entered into this Agreement, or would have done so on terms significantly more favorable to itself had it not relied upon such misrepresentation or omission.
- 9.5. Any misrepresentation or omission of fact by MTC 00-00 in Subsection 9.2.1, 9.2.2, 9.2.3, or 9.2.4 of this Agreement shall be deemed material.

Voluntary Disclosure Agreement
MTC 00-00 and [Signatory State]
[Tax Type]
Application Date:

10. Miscellaneous

- 10.1. Each party to this Agreement warrants that the person executing it on that party's behalf is authorized to do so.
- 10.2. Addendum A, attached hereto, is incorporated herein as part of the Agreement to the extent Addendum A applies to [Signatory State].
- 10.3. This Agreement may be signed in counterparts, each one of which is considered an original, and all of which constitute one and the same instrument. Images of signatures transmitted electronically shall be considered as valid signatures. No provision of this Agreement shall be waived or modified except in writing signed by all parties to this Agreement.
- 10.4. The law of [Signatory State] governs this Agreement. Jurisdiction and venue of any administrative or judicial action with respect to this Agreement lies exclusively in the appropriate administrative or judicial body of [Signatory State].
- 10.5. This Agreement is fully executed on the Effective Date, which is the latest date by which [Signatory State], MTC 00-00, and the Commission have signed it and MTC 00-00 has performed all duties required in Subsection 5.1 of this Agreement. However, failure of the Commission to sign the Agreement does not affect its validity with respect to the mutual obligations of [Signatory State] and MTC 00-00.

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STATE SIGNATURE PAGE

[Signatory State] enters into this Agreement:

By: _____

Name: _____

Title: _____

Date: _____

Non-waivable penalties arising from MTC 00-00's potential back [Tax Type] liability (see Subsection 6.1.2, above) are:

_____.

To the extent that this Agreement concerns Sales/Use Tax, may MTC 00-00 file spreadsheets in lieu of actual returns? Initial here: _____ Yes. _____ No.

Voluntary Disclosure Agreement
MTC 00-00 and [Signatory State]
[Tax Type]
Application Date:

MULTISTATE TAX COMMISSION SIGNATURE PAGE

The Commission enters into this Agreement:

Multistate Tax Commission

By: _____
Gregory S. Matson
Executive Director
Multistate Tax Commission

Date: _____

Voluntary Disclosure Agreement
MTC 00-00 and [Signatory State]
[Tax Type]
Application Date:

MTC 00-00 SIGNATURE PAGE

MTC 00-00 Name: _____

Mailing Address: _____

FEIN: _____

MTC 00-00 enters into this Agreement:

By: _____

Name: _____

Title: _____

Date: _____

Voluntary Disclosure Agreement
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VOLUNTARY DISCLOSURE AGREEMENT

MTC 00-00 & [Signatory State]

[Tax Type]

ADDENDUM A

The following provisions are included in the Voluntary Disclosure Agreement entered into by MTC 00-00, the Multistate Tax Commission and the State of **Arizona, Georgia, Missouri, or District of Columbia**, as indicated below:

For **ARIZONA CORPORATE TAX**, add new Subsection 5.6, including Subsections 5.6.1, 5.6.2, and 5.6.3:

- 5.6. *With regard to net operating losses in Arizona, MTC [XX-XXX] shall:*
- 5.6.1. *waive the carry-forward option on all net operating losses generated in tax years before the start date;*
 - 5.6.2. *suspend the deduction of net operating losses for periods beginning after [Lookback Date] through the Effective Date; and*
 - 5.6.3. *agree that net operating losses generated in periods beginning after [Lookback Date] through the Effective Date may be utilized, pursuant to statute, for tax years beginning after the first year ending after Effective Date.*

For **ARIZONA TRANSACTION PRIVILEGE TAX**, add new Subsection 5.7:

- 5.7. *[MTC YY-NNN] shall become duly licensed for Transaction Privilege, Use and Severance Tax with the Department and applicable Program Cities and Towns by registering on www.AZTaxes.gov and pay all state and city license fees or by submitting a Joint Tax Application (Form JT-1) with payment for state and city license fees. **The Taxpayer shall also become duly licensed for Privilege Tax with all applicable Non-Program Cities and Towns** and pay all associated license fees for the Period. The Taxpayer shall comply with all licensing provisions of Title 42 of the Arizona Revised Statutes and the Model City Tax Code. Taxpayer will file **TPT-1 returns and applicable Non-Program City and Town Privilege Tax returns** that are due as of the [Effective Date] forward, as required by law, and continue to file returns for not less than eight (8) years from the Effective Date of the Agreement, provided that the business remains active, until such time as [MTC YY-NNN] no longer has nexus for tax purposes in Arizona, or until a change in law occurs due to legislative enactment or final judicial determination, in which the change clearly provides that [MTC YY-NNN] is not subject to Transaction Privilege and Use Tax. Taxpayer and the Department agree that such change will be applied prospectively only from the date of such legislative enactment or*

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judicial determination, even though the change may be interpreted to apply retroactively. Taxpayer hereby waives any claim for refund and any right of appeal of any assessment for tax subject to the change in law for periods that would be subject to retroactive application.

For **GEORGIA SALES/USE AND WITHHOLDING TAX**, add new Subsection 5.1.3.1:
5.1.3.1. the Georgia sales and use tax (withholding tax) registration number, after [MTC XX-XXX] has registered online, effective the first day of the month following [MTC XX-XXX]’s acceptance of this Agreement; and

For **GEORGIA SALES/USE, INCOME/FRANCHISE, AND WITHHOLDING TAX**, add new Subsection 5.6:

5.6. In consideration for the Department waiving all applicable penalties and filing requirements for prior periods, [MTC XX-XXX] waives all rights to net refunds for all periods included in this agreement. Anonymous [MTC XX-XXX] also forfeits all NOL carryovers and waives its right to all net refunds for all periods included in this voluntary disclosure agreement.

For **MISSOURI INCOME/FRANCHISE TAX**, add new Subsection 5.6:

5.6. No loss carry forward for losses realized in any year before the first year filed pursuant to this agreement will be allowed for any filing period covered by this agreement or periods after this agreement. No loss carry back for losses realized in any year after the periods covered by this agreement will be allowed for such periods.

For **DISTRICT OF COLUMBIA** add after the word “penalty” wherever used in Subsections 3.1, 5.2, 6.3.2, 10.2 and the State Signature Page: “*and fees*”.

Voluntary Disclosure Agreement
MTC 00-00 and [Signatory State]
[Tax Type]
Application Date:

VOLUNTARY DISCLOSURE AGREEMENT

MTC 00-00 & [Signatory State]

EXHIBIT 1

ESTIMATE OF TAXES DUE

State: [Signatory State]

MTC 00-00 *estimates* that it will pay a total of \$ [Estimate] in discharge of its [Tax Type] liability for the periods beginning after [Lookback Date].

The above amount is only a good-faith estimate of the actual tax payment that will be due. This Agreement requires payment of the actual amount of tax due under the returns, or spreadsheets submitted by MTC 00-00 for periods beginning after [Lookback Date], irrespective of the estimated amount provided here.

Voluntary Disclosure Agreement
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MTC 00-00 & [Signatory State]

EXHIBIT 2

MTC 00-00 REPRESENTATIONS