



MULTISTATE TAX COMMISSION

MINUTES of Executive Committee Meeting

Thursday, May 8, 2014

I. Welcome and Introductions

Julie Magee, Chair, called the meeting to order at 8:39 a.m. EST, and confirmed the presence of a quorum. The following persons were in attendance:

In person		By telephone	
Name	Affiliation	Name	Affiliation
Julie McGee	Alabama	John Mollencamp, Wood Miller	Missouri
Steve Cordi	District of Columbia	Myles Vosberg, Matt Peyerl, Dee Wald	North Dakota
Nancy Prosser	Texas	Lennie Collins	North Carolina
Bruce Johnson	Utah	Gary Humphrey	Oregon
Demesia Padilla	New Mexico	Deborah Bierbaum	AT&T
Rich Jackson, Tom Katsilometes, Ken Roberts	Idaho State Tax Commission	Amy Hamilton	State Tax Notes
Gene Walborn	Montana	Diann Smith	McDermott
Gil Brewer, Tim Jennrich	Washington	Multistate Tax Commission	
Michael Fatale	Massachusetts	Joe Huddleston, Greg Matson, Sheldon Laskin, Lila Disque, Elliott Dubin,	Thomas Shimkin, Bill Six, Les Koenig (via phone), Ken Beier (via phone)
Pete Donnelly	Georgia	Jim Rosapepe, Len Lucchi	Patuxent Consulting
Helen Hecht	Federation of Tax Administrators		
Todd Lard	Sutherland		
Karl Friedan	Council on State Taxation		
Michael Paxton	Deloitte		

II. Initial Public Comment Period

There were no public comments.

III. Approval of Minutes of Executive Committee Meetings on December 12, 2013

There were no corrections or changes to the minutes. Upon a motion duly made by Mr. Cordi, the minutes were approved.

IV. Report of the Chair

A. Resolutions Committee

The Chair requested volunteers to work with the MTC legal division on reviewing resolutions and making recommendations to the Commission on renewal. Mr. Mollencamp volunteered.

B. Nominating Committee

The Chair requested volunteers to work with her and Mr. Huddleston to develop a slate of officers and at-large members of the Executive Committee to stand for election at the Commission's annual meeting. Mr. Cordi volunteered.

V. Report of the Treasurer

A. Financial Report for the Period July 1, 2013 – March 31, 2014

Mr. Jackson, Treasurer, presented his report, and provided a general review of the Commission's finances and a budget review for the coming year and projections based on the best estimates for the succeeding three years. For the nine months ended March 31, 2014, the actual overall surplus from operations was \$45,314 versus a budgeted deficit of \$(2,895). This was likely because of 4 vacancies, in audit and legal, and a change in the health insurance plan. Investment earnings continue to be lower than anticipated.

Upon a motion duly made, the financial report was approved.

B. 2013-2014 Budget Review & Approval

MTC staff is recommending membership, nexus, and audit assessment increases of 2%. These requested fee increases for FY 2015 are the same as what were projected within the FY 2014 approved budget document. Mr. Jackson stated there was little difference between the FY 2014 and FY 2015 expenditure budgets, and recommended that the Committee approve the next year's budget.

Upon a motion duly made by Mr. Jackson, the 2013-2014 Budget was approved.

VI. Report of the Executive Director

Mr. Huddleston presented his report, which provides an overview of program and staff activities. He emphasized the fact that the MTC has begun an arm's-length adjustment service (ALAS) design project, which will be having its first meeting in June in St. Louis. This is a complicated project, and Mr. Huddleston thanked those states that have already contributed their time and resources. There will likely not be a finalized report and recommendation on that until next year. He also emphasized Section 2 of his report, "Administration." He outlined the movement of some of the audit positions in terms of vacancies, and noted that Shirley Sicilian, former General Counsel of the MTC, tendered her resignation last fall and departed on December 31, 2013. She is now working at KPMG. After extensive interviews, Helen Hecht was selected as the next MTC general counsel. She will start July 1, 2014. Les Koenig, the longtime director of the Joint Audit Program, will be retiring in July, and after a lengthy search the MTC has selected Keith Getchel (currently with the Minnesota Department of Revenue) as his replacement. He will start on June 16, 2014. There were no questions.

VII. Committee & Program Reports

A. Audit Committee

Mr. Koenig stated the Audit Committee has met three times in this fiscal year. There was excellent participation and the vast majority of the audit program states have been present. Most meetings were spent reviewing the status of ongoing audits and implementing recommendations from the committees on early no change audits and the audit selection process. There were no questions for Mr. Koenig.

B. Litigation Committee

Mr. Laskin, acting general counsel, presented the Litigation Committee report. He noted the legal department will be filing two legal briefs in the near future, one by request of the Massachusetts Superior Judicial Court. This Massachusetts case is one of the few appellate cases under the MTC's financial institution model regulation. The issue is sourcing of the property factor for a financial institution's holding company with no payroll or sales. In the Oregon tax court on June 17, the Commission will be filing its amicus brief in the *HealthNet* case, Oregon's analog to the *Gillette* case.

Ms. Padilla asked whether there would be more problems with state legislators as they start to see more *Gillette*-type cases. Mr. Laskin noted there actually has been very little legislative action in response. There should soon be a decision on the *IBM* case in Michigan, although it's not clear that the court will even reach this particular issue, because there are assorted complicating state law issues. In Texas's analog to the *Gillette* case, the state won at the trial court level. He added that there is a very strong argument that the Compact is just an advisory compact, and does not require unanimous consent to ratify it.

C. Nexus Committee

Mr. Shimkin, the director of the National Nexus Program, reported that multi-state voluntary disclosure so far this fiscal year has raised a little over \$5 million for the states. He stated the nexus committee has recently begun working on strategic planning, and has established a subcommittee to work on specific issues. There will be a report on this planning effort at the next meeting. As far as policy issues, the most important is the limit on the dollar amount of voluntary disclosures that the MTC staff will process. The staff has been giving a disproportionate amount of attention to disclosures where the company actually did not owe any money, so in future there will be a \$500 threshold. In addition, the Nexus Committee has begun to charge for its services to non-member states. Nexus staff has been working on revising and updating their technology for timely processing of voluntary disclosures. It also revised its charter over the past year to bring it up to date with the current activities and goals.

Mr. Johnson asked how the \$500 minimum works. If a taxpayer has five MTC states and one is below \$500, do they ask the company to work it out individually with the state? Mr. Johnson questioned the efficiency of this method, but Mr. Shimkin pointed out that (1) most states impose a de minimis level on the program, and (2) without a minimum, the staff cannot keep up with the workload. Mr. Donnelly noted that from a state perspective, this is a matter of efficiency and effectiveness: the state has to put as much work into a million-dollar collection as it would into a 500-dollar collection.

In response to a question from Mr. Cordi, Mr. Huddleston stated non-participating states have been informed (with no response from these states) that they will no longer receive Nexus Program services, but services have not ceased at this point.

D. Uniformity Committee

Mr. Miller, the Uniformity Committee chair, presented the Committee's report. The Committee met in person twice, and drafting groups and work groups met routinely by teleconference. The income and franchise tax subcommittee, led by Robynn Wilson, has concluded the proposed revised model financial institutions apportionment regulation. Income and franchise has also worked on strategic planning, and the committee received its report yesterday regarding barriers to implementation. There have been proposals for future projects regarding a review of flow-through entities, sourcing of electricity, and trusts. The sales and use tax subcommittee, led by Richard Cram, has produced draft language on a nexus model, and the subcommittee is considering endorsing the ABA's model class action statute. The subcommittee has also monitored developments on Capitol Hill regarding the Marketplace Fairness Act, should Congress decide to enact that law.

E. Training Program

Mr. Beier, director of training, delivered the report for the Training Program. There have been recent courses in Colorado, Wisconsin, Massachusetts, and Alabama. This marked the first time the statistical sampling class was offered through the Center for Governmental Services at Auburn University. There will be a nexus school in Little Rock, AR, Sept 15-16, and one is being scheduled for New Jersey. There are still dates available on the schedule, so states with an interest should contact Mr. Beier.

F. Other Committee & Program Business (if any)

There was no other business.

VIII. Recommended Amendments to Public Participation Policy § 5(b)

Suggested amendments to § 5, *Required open and public meetings*, specifically § 5(b), teleconferences, were brought before the committee at its meeting in December 2013, along with suggested amendments to § 14. Mr. Huddleston recommended moving forward only with the § 5 amendments. The amendments address rules and procedure for teleconferences, which are extensively used now by the Commission. The rules were intended to confirm the Commission's current practice with respect to providing public access via telecommunication to the portions of all meetings open to the public, and to make it clear that the telecommunications tools now widely available may be used to ensure the orderly conduct of the meetings. In response to a question from Mr. Cordi, Mr. Huddleston stated the "senior member" referenced in 5(b) would be the chair. Mr. Johnson recommended changing the language under 5(b) to "the member of the Commission or Commission body or Commission staff who is conducting the meeting."

Upon a motion duly made by Ms. Padilla, the recommended amendments with Mr. Johnson's language change were approved.

IX. Strategic Planning Report

Ms. Prosser, chair of the Strategic Planning Steering Committee, informed the Commission that the strategic planning meeting had been postponed, and they are currently seeking members to participate in the committee. Work is ongoing, and there will be a full report at the next meeting.

X. Uniformity

A. Revised Article IV (UDITPA) Draft Hearing Officer Recommendations

Mr. Miller stated that at the New Orleans meeting, the Executive Committee assigned the Uniformity Committee to review, discuss, and make a recommendation on the Hearing Officer report, determining only whether to accept the Hearing Officer's recommendations and not to otherwise reopen the draft. This included a straw poll and culminated in a vote at the March

meetings. The Uniformity Committee completed this work and, in each instance, recommended that the Executive Committee adopt the draft as it was proposed by the committee.

Mr. Laskin referred the group to Exhibit 3, comparing the committee's proposed amendments to the Hearing Officer's proposed amendments. Mr. Huddleston stated the Executive Committee had four options in light of the Uniformity Committee's recommendations:

- (1) approve all or some or none of the hearing officer's recommendations and recommend consideration of the model by the Commission (with or without amendments of its own) for adoption (triggering a bylaw 7 survey),
- (2) retain the proposals for further consideration by this committee or to allow additional time for the states and public to review and react,
- (3) direct further study and consideration by the hearing officer or by the Uniformity Committee (providing the Uniformity Committee another opportunity to review and make recommendations with respect to the hearing officer report, or perform other work), or
- (4) disapprove with no further action.

The group decided first to address number 1 (Section 9, Factor weighting) and number 4 (Section 17, Sales factor sourcing for services and intangibles) on the agenda, since the Hearing Officer did not recommend any changes to the committee draft. Mr. Friedan strongly urged the Executive Committee to adopt all of the Hearing Officer's recommendations, particularly since Mr. Pomp, the Hearing Officer, is very knowledgeable and respected in his field. Mr. Friedan felt that Mr. Pomp's recommendations provided a fair balance between taxpayer interests and those of tax administrators. Mr. Lard echoed Mr. Friedan's comments, and added that he had submitted some written comments further outlining this position.

1. Section 9, Factor weighting

There was no discussion. After consideration of Item 4 below (Section 17, Sales factor sourcing for services and intangibles), and after a motion duly made, the Committee voted to recommend consideration of both the Section 9 proposal and the Section 17 proposal by the Commission, triggering the bylaw 7 survey process.

2. Section 18, Distortion relief

[Note: this item was taken up after other related agenda items had handled]

Art. IV.18(b)(1), Under certain conditions, whether the department should issue a regulation rather than making an adjustment under equitable apportionment: Under the distortion relief portion of Section 18 as drafted by the committee, the tax administrator has the authority – but is not required – to promulgate regulations under Section 18. The hearing officer would require promulgation of regulations in cases of general applicability, a situation not defined.

The Uniformity Committee felt this unduly restricts the ability of the tax administrator to respond to changing situations

Mr. Johnson advocated for all of the Hearing Officer's recommendations. Mr. Fatale noted the language as proposed seems to foreclose audit activity in any case where there two or more industry members would be affected. Mr. Brewer agreed that the language as proposed by the hearing officer seems to limit the state when it attempts to apply a particular method; the taxpayer would likely try to associate itself with a different industry to which a rule had been applied. After some discussion, Mr. Johnson recommended reviewing and altering the language in question.

Mr. Johnson moved to remand to the Uniformity Committee for further consideration of the draft provision on regulations. Mr. Walborn opposed the motion; he stated this is general practice in most states anyway, and he did not believe that revisiting the two proposals would end in an improvement. He was supported by Ms. Prosser and Mr. Fatale, who noted the language may not work as the hearing officer envisioned.

The Chair took a vote on Mr. Johnson's motion to remand back to the Uniformity Committee for alteration of the language. The motion failed by voice vote.

Upon a motion duly made by Mr. Walborn to recommend consideration of the Uniformity Committee's version by the Commission, the motion passed by voice vote, triggering the bylaw 7 survey process.

Art. IV.18(c), Burden of proof for alternative apportionment: The hearing officer had proposed that the burden of proof be placed on the party that invokes alternative apportionment. Many states already apply this basic principle. The problem with putting it into the model is that it isn't always clear which party has changed its position. The hearing officer would not permit penalties if the taxpayer reasonably relied on the rules. Many states do this anyway, but there remains a question of whether the tax administrator should be limited in this way. The hearing officer would not allow, in most cases, the tax department to revoke a prior approved apportionment method except where there is a material change in the facts or a material misrepresentation of the facts. In some cases, the states allow alternative apportionment as long as the taxpayer does not change its system of determining the apportionment. This is largely consistent with the recommendation but does not fall within the language, "material change of the facts or material misrepresentation."

Mr. Johnson supported the hearing officer's recommendation as far as the burden of proof, but believed the position is well taken that once the taxpayer adopts an alternative method, they should have the burden of proof to establish that the general method is more accurate. Anyone asking for a change from the status quo should carry the burden of proof. Mr. Walborn opposed the hearing officer's proposal, since most state provisions and cases cover the burden of proof, and in this case they seem to be carving out one piece of tax code that says the burden of proof must be determined in this way only in this specific case. The Chair supported the hearing officer's

recommendation. Some committee members pointed out that in some cases placing the burden of proof on the state would be inappropriate even if the state is seeking to invoke alternative apportionment. This might be because the industry practice is highly complex or it is the taxpayer that effectively initiates the need for alternative apportionment by changing its long-standing filing methodology.

Upon a motion duly made by Mr. Johnson to retain the hearing officer's version but remand the provision to the Uniformity Committee for the addition of language that would impose the burden of proof on the taxpayer when the taxpayer is changing its long-standing apportionment method, the motion passed by voice vote.

Art. IV.18(d), Imposition of penalty where tax administrator has successfully invoked alternative apportionment but the taxpayer complied with the general apportionment rules:

The hearing officer proposed that in situations where the tax administrator makes a section 18 adjustment, it be prevented from imposing civil or criminal penalties where the taxpayer has reasonably relied on the provisions of the article. Although there was some debate as to whether this should be left to the state's discretion, Mr. Johnson moved to support the hearing officer's recommendation.

Mr. Peyerl noted, regarding the hearing officer's language, that there is some concern that the hearing officer's proposed bar on imposing "any" penalty goes too far. Sometimes penalties may be related to late payment or other issues not related to the choice of apportionment method. Mr. Johnson believed the word "solely" provides any necessary clarification.

Upon a motion duly made by Mr. Johnson to retain the hearing officer's version but remand to the Uniformity Committee for editing to address the problems associated with the word "any" and the "solely because" phrasing, the motion passed by show of hands (5 for, 4 against, and 2 abstaining).

Art. IV.18(e), Retroactive revocation of a tax administrator's prior approval of alternative apportionment: The hearing officer proposed that a taxpayer whose alternate method of allocation and apportionment has been approved by the tax administrator cannot have this permission retroactively revoked unless there has been a material change in or material misrepresentation of the facts. Mr. Johnson felt this is appropriate where there is reasonable reliance. The Chair moved to support the hearing officer's version. Mr. Fatale pointed out that in the Uniformity Committee meeting, they rejected this proposal on the basis that under current law, states would be highly unlikely to retroactively revoke the use of a previously approved apportionment method in the absence of unusual circumstances such as a change in filing methodology.

Upon a motion duly made by the Chair to recommend consideration of the hearing officer's version by the Commission, the motion passed by voice vote (with New Mexico abstaining), triggering the bylaw 7 survey process.

3. Section 1(a), Definition of “business income”

The hearing officer would retain receipts that are generated as a result of the functional test, and provided two alternate methods for doing so.

Upon a motion duly made by Mr. Brewer to recommend consideration of the Uniformity Committee's version by the Commission, the motion passed by voice vote, triggering the bylaw 7 survey process.

The hearing officer had noted a conflict between Art. IV(1)(g) and the proposed Art. IV.17(a)(4)(ii)(C). Under Art. IV.1(g), gross receipts of a securities dealer are included in the receipts factor. But those receipts would be thrown out under Art. IV.17(a)(4)(ii)(C). The Uniformity Committee provided two proposed ways to deal with the discrepancy: strike the phrase “other than a securities dealer” in Art. IV.1(g), or add a new subsection to Art. IV.17 essentially inserting the securities dealer carve-out. The Uniformity Committee recommended the first solution.

Upon a motion duly made by Mr. Johnson to recommend consideration of the Uniformity Committee's recommendation to strike the phrase by the Commission, the motion passed by voice vote.

4. Section 17, Sales factor sourcing for services and intangibles

Upon a motion duly made by Mr. Johnson to recommend consideration of the proposal by the Commission, the motion passed by voice vote, triggering the bylaw 7 survey process.

5. Section 1(g), Definition of “sales”

The hearing officer had no change to the Uniformity Committee's proposed language. Upon a motion duly made by the Chair to recommend consideration of the proposal by the Commission, the motion passed by voice vote, triggering the bylaw 7 survey process.

B. Referral to Public Hearing of Proposed Amendments to Model Uniform Financial Institutions Apportionment Rule

This uniformity proposal was before the committee for consideration for the first time, which is when the committee would approve it for public hearing if it thought it was ready and wanted it to move forward.

Upon a motion duly made by the Chair to refer the proposal to a public hearing, the motion passed by voice vote.

C. Model Sales & Use Tax Notice and Reporting Statute

The committee has retained this proposal pending the outcome of *Direct Marketing Association v. Barbara Brohl* case in the U.S. Court of Appeals for the 10th Circuit. The federal court dismissed the case under the Tax Injunction Act but it is now pending in the state court.

Mr. Laskin provided an update on the status of the state court case. Mr. Laskin was encouraged by the state district court's opinion on the taxpayer's motion for preliminary injunction. Although the court granted the motion, the court nevertheless rejected *Quill* as the controlling opinion for analysis, instead viewing the statute as a regulatory and not as a taxing statute. The court indicated it will apply the *Pike* balancing test at trial to assess the relative burden on out of state retailers under the statute as compared to the burden imposed on in-state retailers who must collect Colorado sales tax. The court set forth a detailed list of evidence it wanted to see when the case goes to trial. No trial date has been set.

D. Other Uniformity Matters (if any)

There were no other matters to discuss.

XI. Federal Issues with State Tax Implications

Mr. Rosapepe and Mr. Lucchi provided an analysis of federal legislative activity. Currently, Republicans control the House and Democrats control the Senate and people are not working together as well as they could. This is relevant to state revenue in general, but also affects the context of actions. Mr. Rosapepe stated that, even compared to last year, very little is happening in Congress. Last year there were too many issues relating to the debt ceiling, which were generally resolved. However, any activities now are geared toward election season. Right now, there's an assumption that it would be very hard for the Democrats to take back the house. Immigration reform might, at some point, happen post-election. But there is little incentive to do anything at this point.

A. S. 31/H.R. 434/H.R. 3086, Permanent Internet Tax Freedom Act of 2013; and S. 1431, Internet Tax Freedom Forever Act

This is the only measure that has any kind of urgency to pass this year, because the current moratorium expires Nov. 1 of this year. This will likely be continued or made permanent.

B. S. 743/H.R. 684, Marketplace Fairness Act of 2013

This bill passed the senate a year ago. It has remained in the House for the past year. Something may be introduced this fall to address remote sellers; how much it will resemble the senate bill remains to be seen. It will likely be discussed next year rather than this year.

C. H.R. 1129/S. 1645, Mobile Workforce State Income Tax Simplification Act of 2013

There was a hearing last week in the House Judiciary Committee regarding mobile workforce issues. This bill has passed the house in previous years and has then been locked up in the Senate primarily due to New York's objections

D. S. 1364/H.R. 3724, Digital Goods and Services Tax Fairness Act of 2013

This bill may receive new consideration since one of the chief sponsors is the new Senate Finance chairman.

E. H.R. 2992, Business Activity Tax Simplification Act of 2013

This bill has been introduced in each of the last 6 Congresses; last year it passed the House Judiciary Committee, but went no further. There was a favorable hearing a couple of months ago, but there is significant opposition to this bill.

F. H.R. 2309/S. 1235, Wireless Tax Fairness Act of 2013

This is a prospective prohibition on mobile phone taxes only. It has large number of sponsors in the house and the senate finance chair. It passed the house last time, only to wait in the Senate Finance Committee.

G. Federal Tax Reform

Former Senate Finance chair Max Baucus and current House Ways And Means chair David Kemp both came forward with serious proposals for federal tax reform, neither of which were seriously considered.

H. Other Federal Legislative Activity

There are some extenders for tax breaks, which may be retroactively extended (primarily R&D tax).

XII. Upcoming Meetings & Events

Mr. Huddleston encouraged everyone to make plans to attend the Commission's annual meetings and conference, July 28-31, 2014, Albuquerque, New Mexico.

XIII. Closed Session

The committee went into closed session at 1:20 p.m.

XIV. Resumption of Public Session and Reports from Closed Session (if any)

The public session resumed at 1:36 p.m. There was nothing to report from the closed session.

XV. Adjournment

The meeting adjourned at 1:37 p.m. EST.