



MULTISTATE TAX COMMISSION

**MINUTES of
Joint Meeting of Sales and Use Tax Uniformity Subcommittee and Litigation Committee
via Teleconference
Friday, February 15, 2013
3:00 p.m. Eastern time**

I. Welcome and Introductions

Sheldon Laskin, MTC counsel, opened the meeting, noting that today the committees would address half of the project the MTC recently took on. This half relates to class actions in the context of tax collection suits relating to over-collection of tax. The other half involves the application of the False Claims Act in instances of failure to collect tax. Bruce Johnson (UT), a member of the ABA State Taxation section, was present to introduce the American Bar Association Model Transactional Tax Overpayment Act.

Mr. Laskin took roll. The following persons were in attendance:

Name of Attendee	Affiliation	Name of Attendee	Affiliation
Richard Cram	Kansas Department of Revenue	David Roth, Nancy Prosser	Texas Comptroller of Public Accounts
Representatives	Minnesota Department of Revenue	Richard Cram	Kansas Department of Revenue
Pat Calore, Stewart Binke	Michigan Department of Treasury	Tom Atchley, Johnson Payne	Arkansas Department of Finance and Administration
Representatives	Pennsylvania Department of Revenue	Mark Wainwright	Utah Attorney General's Office
Bruce Johnson	Utah State Tax Commission	Deborah Bierbaum	AT&T
Tammy Miller	Florida Department of Revenue	Terry Frederick	Sprint
Rob Carter	Kentucky Department of Revenue	Burt Andergroin	Council on State Taxation
Dee Wald, Dan Routh, Emily Thompson, Myles Vosberg	North Dakota Office of State Tax Commissioner	Jamie Fenwick	Time Warner
Shirley Sicilian, Sheldon Laskin, Lila Disque	MTC		

II. Public Comments

There were no public comments.

III. Presentation by Utah Tax Commission Chair R. Bruce Johnson re the American Bar Association Model Transactional Tax Overpayment Act (February 2011) (“Model Act”).

Mr. Johnson noted the sales tax is a viable tax because states have required the retailers to collect it on behalf of the state/state and local government. Sellers that collect the tax have two main liability risks: 1) failure to collect enough, in which case they will be audited and assessed interest and possibly penalties of more than 10%, which could exceed their profit margin, and 2) if they over-collect, they face potential action from purchasers. Previously, sellers were safest resolving all doubts in favor of collectability. But now retailers are subject to a variety of plaintiff claims for over-collection.

The other problem is that over-collection cases are often decided in state or federal court without a tax tribunal involved. Often the taxing authority is not even a party to the case, since they are not deemed to be a necessary party. These and other concerns gave rise to Principles 1-15 included in the materials.

Mr. Johnson briefly discussed the provisions of the act, highlighting the definition of "overpayment" in Section 3(2). The tax must be charged by the seller, paid by the purchaser, and remitted to the taxing entity. If not remitted by the seller, it has no protection.

Section 4 is the meat of the act from the seller's point of view. It applies to any claim by the purchaser against the seller arising from or in any way related to an overpayment. Part B says relief is limited to the refund claim pursuant to section 5(a)(1) of the act. Deceptive trade practices claims, unfair practices, and those types of claims will not be allowed.

The seller will not be a party to a claim related to overpayment. The purchaser may file a claim with the seller, and the seller may honor it and refund the tax within 90 days. If they do not do so within 90 days, the claim is deemed denied. If they do pay it, they need pay no interest unless the seller has already received the money back from the state, in which case any interest applicable would also go to the purchaser. If the claim is deemed denied or no claim is filed, the purchaser may file a claim in writing with the taxing jurisdiction. The state may request additional information within 90 days. The state must notify the purchaser in writing if the claim is granted, and if it is granted -- this is somewhat precatory language -- the jurisdiction should provide guidance to similarly situated taxpayers. If the claim is denied, the state must state why. If the state does not act within 6 months of the later of the claim or the receipt of the additional information, the claim is deemed denied. If the state grants the refund, it may or may not pay interest, as required by state law.

The act makes it clear that the seller may act on its own initiative to provide a refund if it discovers it has over-collected. But the seller will only get the refund from the state if it has already refunded the amount to the purchaser or agrees to refund it within 30 days.

In addition, there is some advisory language where if at least three refund claims show numerous similar transactions with respect to which tax should not have been collected, the taxing jurisdiction

should provide notice to the affected sellers. This reflects a similar case from Utah where a number of carpet sellers were inappropriately charging sales tax on installation, which affected many people. Under this act, the state would also have needed to publicize this fact in order to inform those who were entitled to the refund. In addition, there should be a procedure to prevent double refunds, and to make it easier for individual taxpayers to get refunds.

With that, Mr. Johnson invited questions.

Mr. Laskin asked whether there had been any action in the states since the act was promulgated. Deborah Bierbaum (AT&T) stated there was some movement in Illinois, although she's not sure whether a bill has been introduced. Mr. Laskin noted he hasn't seen it come up there yet. Ms. Bierbaum noted she just recently started briefing some of the industry groups on this, so it's only in the past month that they have been bringing attention to it.

Dee Wald (ND) asked whether Mr. Johnson expected over-taxation in particular lines of business, and whether, if a taxing jurisdiction discovers over-taxation by one vendor, there is an obligation to look at others in the same line of business. The Utah carpet case, Mr. Johnson said, was brought as a class action, so the plaintiffs' attorneys had an incentive to identify as many transactions as they could. The idea here is that in the event a taxing jurisdiction identifies a pattern of over-taxation, they should make aware the sellers and purchasers. The retailer could then initiate claims for refund with the state with the goal of refunding its customers, although it would have to satisfy the state that the money would go back to the customers. Alternately, if the retailer did not want to do that, then the original customer could come to the taxing jurisdiction; Mr. Johnson envisions some kind of pre-printed refund, where you can essentially check the box and attach your invoices, particularly since there may be hundreds of requests and it should be simple on both ends.

David Roth (TX) asked whether there was any provision stating that the vendor would then need to correct its problem with over-taxation. Mr. Johnson said there was, in Section 4(c): "Nothing in this Act shall preclude a government agency or official from exercising any powers such agency or official possesses to take action to prevent continuing over-collection of tax." So the taxing jurisdiction may continue to do whatever it would normally do to remedy the situation.

Pat Calore (MI) noted that in Michigan the sales tax is a privilege tax that is owed by the seller. In Section 3(e), the definition of "seller" would not fit neatly into Michigan's taxing scheme. She wondered if the committee has looked into alternate language. Mr. Johnson said no; if the obligation runs from the seller to the state, this act would not be applicable.

Richard Cram asked for clarification on Section 3(a)(2)'s definition of "overpayment." Mr. Johnson explained that if the law allows an exemption certificate to be presented at the time of sale but it was not, that could still be an overpayment. In Utah, they realized the exemptions may be limited to a certain class of people (like boy scouts and church groups) so they determined those will not be exempt at the point of sale: they need to process the refund claims through their organization. So the overpayment at the register would *not* be an overpayment for purposes of this act because it is clear the refund is available at a different point directly from the state.

Myles Vosberg (ND) asked whether, when discussing the model legislation, they discussed the likelihood that retailers would just ignore all refund claims and let the state handle them. Mr. Johnson stated that to the extent they discussed that, they thought market forces would help solve the problem

of gross over-collection. However, it would be preferable to have sellers default to collection of the tax, and then have the revenue director handle it if they overcharge. The goal is to shift the balance of responsibility back to the taxing entity.

At this point, there were no more questions. Mr. Johnson stated that those in attendance should call him with any questions related to the model act.

IV. Next Steps

Mr. Laskin noted that this will be taken up separately by the litigation committee and the sales and use tax uniformity subcommittee. With that, he requested final comments.

Mr. Johnson noted in conclusion that he thinks this measure will have the practical effect of putting more of an administrative burden on the states. To address this problem, Utah allowed direct refunds to the customers. They put some procedures in place to address when it is appropriate to deny claims submitted on behalf of a number of people or a single large consumer. This will shift some work to the tax collectors, but he believes they should have that burden, rather than the retailers.

V. Adjourn

The meeting adjourned at 3:50 PM EST.