



**MULTISTATE TAX COMMISSION**

*Maximizing the synergies of multi-state tax cooperation*

**To: MTC Uniformity Sales and Use Tax Subcommittee**

**From: Sheldon H. Laskin**

**Date: February 22, 2013**

**Subject: Uniformity Class Action & False Claims Act Project**

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The purpose of this memo is to update the subcommittee on developments in the class action project that was begun in December 2012, and to set forth several possible policy questions that the subcommittee might decide to use to guide subsequent work on the project.

Sellers that are required to collect sales and use tax<sup>1</sup> under state law and to remit the tax to the state face exposure to private litigation in two respects. If the seller allegedly over-collects tax, it may be exposed to class action litigation filed on behalf of consumers under state consumer protection laws or for breach of common law or statutory fraud, conversion or other causes of action that are based on the misappropriation of funds by the seller. On the other hand, if a seller allegedly under-collects tax, it could find itself subjected to a *qui tam* or False Claims Act suit for failure to follow applicable state tax collection statutes.<sup>2</sup>

The Commission has been approached by telecommunications providers to address the over-collection issue. In addition, COST has suggested that the Commission should at the same time address the under-collection issue. The Executive Committee approved the project in December 2012 and directed the Uniformity Committee to work with the Litigation Committee. Since then, there have been two developments in relation to this project.

On February 15, 2013, the Commission conducted a joint teleconference of the Sales and Use Tax Uniformity Subcommittee and the Litigation Committee. Commissioner Bruce Johnson made a

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<sup>1</sup> The issues this project is intended to address may well apply to other transaction-type taxes that state law requires a third-party to collect from the taxpayer and remit to the state. "Sales and use tax" as used herein is intended to encompass any such tax.

<sup>2</sup> *Qui tam* or "private attorney general" suits are common law procedures whereby a private individual files suit to enforce a state law on behalf of the state. These common law procedures have largely been codified in state False Claims Acts which set forth the circumstances in which private individuals can act as a private attorney general, provide mechanisms by which the attorney general or other applicable state official can intervene in or elect to prosecute the suit instead of the private individual and establish rules for the awarding of a portion of any recovery to the complaining individual in the event of a successful suit against the defendant. This memo will use the term False Claims Act to encompass both state statutes and any remaining common law private attorney general remedies that may still be in effect.

presentation regarding the over-collection issue. Commissioner Johnson had served as a member of the ABA State and Local Tax Committee in its work drafting its Model Transactional Tax Overpayment Act, which is available at

[http://www.mtc.gov/uploadedFiles/Multistate\\_Tax\\_Commission/Uniformity/Sales\\_Use\\_Tax/ABA%20Model%20Act.pdf](http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Sales_Use_Tax/ABA%20Model%20Act.pdf). There was a thorough discussion of the issues the statute seeks to address. The attached proposed policy checklist is based on Mr. Johnson's presentation and the ensuing discussion.

In addition, the Litigation Committee has placed this project on its agenda for its meeting on March 7, 2013. Staff will present an overview of both issues after which the Litigation Committee may consider recommendations to the Uniformity Subcommittee regarding the Uniformity Subcommittee's own recommendation on whether the Commission should endorse the ABA Model Act.

Furthermore, the Uniformity Subcommittee may wish to consider HB 0074, a bill currently pending before the Illinois General Assembly. (Attached) HB0074 would amend the Illinois False Claims Act. Broadly speaking, the bill would preclude false claims acts based on allegations that the defendant has failed to comply with various state tax laws. Instead, the complaining individual would be required to file the complaint with the state revenue department or state attorney general. If the state views the complaint as meritorious, it would utilize existing state tax collection procedures and/or litigation to recover any tax due. The bill sets forth procedures under which the complaining individual would receive a percentage of any recovery received as a result of information provided, but the individual's role would be limited to filing the complaint with the state. The Uniformity Subcommittee may consider whether HB0074 or similar state proposals can serve as a model for a proposed MTC false claims act reform statute.