IN THE SUPREME COURT OF THE STATE OF INDIANA

MILLER BREWING COMPANY,	)	
	)	
Petitioner,	)	**Cause No. 49S00-0711-TA-00553**
	)	
vs.	)	
	)	
INDIANA STATE DEPARTMENT OF REVENUE,	)	
	)	
	)	
Respondent.	)	
	)	

MOTION OF MULTISTATE TAX COMMISSION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENT, INDIANA STATE DEPARTMENT OF REVENUE

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Pursuant to Rule 41 of the Indiana Rules of Court, the Multistate Tax Commission (Commission) respectfully moves that this Court grant leave to file an *Amicus Curiae* brief in support of Respondent, Indiana State Department of Revenue (the Department). Also pursuant to Rule 41, a copy of the proposed *Amicus Curiae* brief accompanies this Motion.

The Commission is the administrative agency created by the Multistate Tax Compact, *see* RIA State & Local Taxes: All States Tax Guide ¶ 701 *et seq*. (2005). The purposes of the Compact are to (1) facilitate proper determination of state and local tax liability of multistate taxpayers; (2) promote uniformity or compatibility in significant components of tax systems; (3) facilitate taxpayer convenience and compliance; and (4) avoid duplicative taxation.

The Commission seeks permission to file its brief on the issue raised by the Indiana Department of Revenue concerning 45 Ind. Admin. Code 3.1-1-42 and 45 I.A.C. 3.1-1-50, which, read together, require a taxpayer to be consistent in its method of reporting receipts for the sales factor from year-to-year and as between Indiana and other states with apportionment statutes and regulations substantially similar to Indiana's. The regulations further require that if a taxpayer's Indiana returns are not consistent in these respects, it must disclose to the Department the nature and extent of the inconsistency. The Commission's own long-standing model uniform regulations contain similar requirements for disclosure of inconsistent filing positions related to uniform state apportionment laws[1]. In addition, the Commission has recently adopted a model uniform statute for achieving these same purposes[2].

The Commission respectfully requests permission to submit this brief to provide its rationale for these long-standing model rules and to underscore the significance of such rules to uniform interpretations of state apportionment laws, full apportionment of business income, and taxpayer compliance. We urge this Court to consider our rationale and the importance we place on these rules, and to uphold the Department's right and duty to enforce its own, similar regulations.

WHEREFORE, the Commission requests that this Court grant it leave to participate in this case as *Amicus Curiae* and to file the attached brief.

Respectfully submitted,

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[1] Multistate Tax Commission Allocation and Apportionment Regulations, Reg. IV.1(d)(3) and (4), (proration of deductions for business and nonbusiness income); Reg. IV.2(c)(1) and (2), (classification of business and nonbusiness income; Reg. IV.10(c)(1) and (2), (property factor); and Reg. IV.15.(a)(3) and (4), (sales factor). http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Uniformity_Projects/A_-_Z/AllocaitonandApportionmentReg.pdf.

[2] Multistate Tax Commission Model Statute on Complication of State Tax Return Data, http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Uniformity_Projects/A_-_Z/Final%20-%20Compilation%20of%20State%20Tax%20Return%20Data%20Statute.pdf.

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MULTISTATE TAX COMMISSION *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENT, INDIANA DEPARTMENT OF REVENUE

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INTEREST OF THE *AMICUS CURIAE*, MULTISTATE TAX COMMISSION

Amicus Curiae Multistate Tax Commission (Commission) files this brief in support of Respondent, the Indiana State Department of Revenue (the Department). Specifically, the Commission files in support of the Department's right and duty to enforce its regulations requiring taxpayers, for purposes of determining the Indiana sales factor,[3] to treat receipts consistently between years and between states in which the taxpayer reports; and further, if such treatment is inconsistent, to disclose "the nature and extent of inconsistenc[ies]"[4] in filing Indiana returns with respect to "returns filed with other states having apportionment statutes and regulations substantially similar to Indiana's."[5] The disclosures required under this regulation serve important state tax purposes and are virtually identical to disclosures required under the Commission's model regulations.

The Commission is the administrative agency for the Multistate Tax Compact, which became effective in 1967. (*See* RIA STATE & LOCAL TAXES: ALL STATES TAX GUIDE ¶ 701 *et seq*. (2005)). Twenty States have legislatively established full membership in the Compact.[6] Seven States have established Sovereignty membership in the Commission,[7] and twenty-two States—including Indiana—participate in Commission activities as

[3] 45 Ind. Admin. Code 3.1-1-50

[4] 45 I.A.C. 3.1-1-42.

[5] Id.

[6] The full members of the Commission are the states of Alabama, Alaska, Arkansas, California, Colorado, Hawaii, Idaho, Kansas, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington, and the District of Columbia.

[7] The Sovereignty Members of the Commission are the states of Georgia, Kentucky, Louisiana, Maryland, New Jersey, West Virginia and Wyoming.

associate members.[8] The U.S. Supreme Court upheld the validity of the Compact in *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978).

The four stated purposes of the Compact are to (1) facilitate proper determination of state and local tax liability of multistate taxpayers; (2) promote uniformity or compatibility in significant components of tax systems; (3) facilitate taxpayer convenience and compliance; and (4) avoid duplicative taxation. To that end, Article IV of the Compact incorporates the Uniform Division of Income for Tax Purposes Act (UDITPA) virtually word for word. In addition, Article VII of the Compact charges the Commission with developing model regulations for its interpretation. (Compact, Art. VII.1). Several states, like Indiana, though not members of the Compact, have enacted statutes that closely follow UDITPA. And many of these states have adopted regulations that follow the Commission's model regulations. In particular, Indiana has adopted regulations similar to the Commission's model uniform regulations requiring taxpayer disclosure of inconsistencies.[9]

The importance the Commission attaches to the present case, and its motivation for filing this brief today, lies in its desire to highlight the significance of taxpayer consistency—year-to-year and state-to-state—in facilitating the full apportionment of multistate taxpayers' income and the proper determination of taxpayers' state tax liability. The requirement to disclose inconsistencies plays a critical role in promoting consistency, and thus in fostering full apportionment and proper determinations of

[8] In addition to Indiana, the Associate Members are the states of Arizona, Connecticut, Florida, Illinois, Iowa, Maine, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, and Wisconsin.

[9] *Compare*, 45 I.A.C. 3.1-1-42 and 45 I.A.C. 3.1-1-50 and Multistate Tax Commission Allocation and Apportionment Regulations, Reg. IV.15.(a)(3) and (4).

liability. The disclosure requirement facilitates taxpayer compliance by serving as a monitoring tool for states to ensure their apportionment rules are being properly applied. In this same vein, disclosure of inconsistencies helps to alert tax administrators to instances of duplicative taxation. Finally, disclosure promotes long-run compatibility in significant components of state tax systems by bringing different interpretations of substantially similar state apportionment statutes to light, allowing states to compare these interpretations and determine whether there is a need for statutory clarification or additional regulatory guidance.

In deciding whether to affirm the Department's tax assessment against the taxpayer, Miller Brewing Co., the Commission respectfully urges this Court to bear in mind the important policy considerations underlying the need for taxpayer consistency and the vital role that the requirement to disclose inconsistencies plays in promoting these policy considerations. To this end, we ask the Court to consider the role of the Commission in promulgating model regulations interpreting UDITPA and the Commission's rationale in adopting its model regulations requiring disclosure of inconsistencies. We provide the Commission's rationale in order to underscore the importance of such rules to uniform interpretations of state apportionment laws, full apportionment of business income, and taxpayer compliance. We urge this Court to consider our rationale and to uphold the Department's right and duty to enforce its own, similar regulations.

ARGUMENT

TAXPAYER CONSISTENCY IN FILING RETURNS AND THE DISCLOSURE OF INCONSISTENCIES IS AN IMPORTANT POLICY GOAL AND THE DEPARTMENT HAS THE RIGHT AND DUTY TO UPHOLD REGULATIONS REQUIRING SUCH DISCLOSURE

A. Taxpayer Consistency in Assigning Receipts for Sales Factor Purposes Is Important to Achieving Full Apportionment of a Multistate Business' Tax Base, Thereby Fostering Competitive Neutrality Between Multistate and In-State Only Businesses.

One of the central purposes of UDITPA and the Compact is to "promote uniformity or compatibility between significant components of state tax systems."[10] The promotion of uniformity through the Compact was the states' answer to an urgent need for reform in state taxation of interstate commerce. (*See e.g.,* H.R. Rep. No. 952, 89th Cong. 1st Sess., Pt. VI, at 1143 (1965) ["While each of the state laws contains its own inner logic, the aggregate of these laws – comprising the system confronting the interstate taxpayer – defies reason. Indeed, so varied are the provisions concerning jurisdiction, division of income, and tax base, that it is rare to find a statement which is true of all income tax states."]) Substantial lack of uniformity had resulted in burdensome complexity, uncertainty, compliance problems, serious administrative challenges, duplicate taxation and less than full apportionment of income. If the states failed to act, Congress stood ready to impose reform itself through federal legislation that would preempt and regulate state taxation.[11]

The promise of uniformity established by the states' adoption of the Compact and UDITPA was critical to preserving the recognized sovereignty the states enjoyed, and continue to enjoy, with respect to taxation of interstate commerce. Today, the need for uniformity in state taxation has significantly intensified as our modern economy becomes less centered on local business and increasingly organized around interstate markets.

[10] Multistate Tax Compact, *supra.*

[11] The Willis Committee performed a congressional study, sanctioned by Title II of Pub. L. 86-272, 73 Stat. 555, 556 (1959), of state taxation of interstate commerce, and made extensive recommendations as to how Congress could regulate state taxation of interstate and foreign commerce. (H.R. REP. NO. 952, 89th Cong., 1st Sess., Pt. VI, at 1139*ff* (1965).)

Taxpayer consistency in reporting and filing returns across the multiple jurisdictions that have adopted UDITPA is key to the uniform administration of state tax laws, and thus the full and fair apportionment of income earned in interstate commerce. Specifically, consistency in assigning and reporting receipts for purposes of determining the sales factor helps to ensure full apportionment of the tax base among those states in which the taxpayer does business.

The instant case is illustrative. Under *Miller Brewing Co. v. Indiana Department of Revenue*, 831 N.E.2d 859 (Ind. Tax Ct. 2005), Miller's sales receipts from Indiana distributors who arranged for common carrier pick up of their purchases at Miller's Ohio breweries for transport back into Indiana could not be sourced to Indiana. But Ohio law provides that the same receipts should not be sourced to Ohio.[12] Moreover, Ohio does not have a throwback rule.[13] The result is that a portion of Miller's business income will be reported to neither state and, as "nowhere income," will escape taxation altogether. Because inconsistency in reporting can give rise to nowhere income, state tax agencies must be alerted when a taxpayer is interpreting uniform state laws differently in different states.

Full apportionment of the tax base through uniform interpretation of the sales factor is not just a matter of fairness to the state that provides a market for a multistate taxpayer to sell its goods. It is also a matter of fairness to local taxpayers that do not do business in multiple states. If multistate taxpayers are able to avoid full apportionment of income to the states in which they do business, less of their income would be subject to tax. With less income subject to tax, multistate taxpayers would have an unfair advantage over their

[12] Ohio Rev. Code § 5733/05(b)(2)(c)(i).

[13] CCH Internet Tax Research Network, ¶ 600-810.

in-state competitors, one hundred percent of whose income is subject to tax in the state in which they do business. If multistate taxpayers are able to avoid full apportionment of income, local in-state businesses would bear a disproportionate share of the state tax burden. Thus, by ensuring full apportionment, consistency in reporting also promotes the equitable distribution of the tax burden between multistate businesses and their local in-state competitors.

B. Requiring Taxpayer Disclosure of Inconsistencies in Assigning Receipts for Sales Factor Purposes is a Tool to Achieve Consistent Interpretations by Monitoring Taxpayer Compliance and Serves as a Barometer of Uniformity

Facilitating the proper determination of the state tax liability for income earned in multiple jurisdictions is another stated purpose of UDITPA and the Compact. Proper determination of tax liability is, in turn, is dependent on the full apportionment of a taxpayer's income among the states in which it does business. To achieve full apportionment, taxpayer consistency in reporting—in this case the sourcing of receipts for the sales factor—is crucial. And the requirement that taxpayers disclose inconsistencies in reporting income is a critical tool for achieving consistency. Indeed, inconsistent reporting has long been identified as an obstacle to full apportionment of income. The Commission's long-standing model uniform regulations, first promulgated in 1973, contain requirements for disclosure of inconsistent filing positions related to uniform state apportionment laws[14]. In addition, in 1984, the Worldwide Unitary Taxation Working Group recommended implementation of a "domestic disclosure

[14] Multistate Tax Commission Allocation and Apportionment Regulations, Reg. IV.1(d)(3) and (4), (proration of deductions for business and nonbusiness income); Reg. IV.2(c)(1) and (2), (classification of business and nonbusiness income; Reg. IV.10(c)(1) and (2), (property factor); and Reg. IV.15.(a)(3) and (4), (sales factor). http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Uniformity_Projects/A_-_Z/AllocaitonandApportionmentReg.pdf.

spreadsheet" that would have required multistate (and multinational) taxpayers to report to the federal government and the states the reporting positions taken in each state in which it was subject to tax.[15] Twenty years later, the 2004 Corporate Income Tax Sheltering Work Group Report, a product of the MTC-sponsored State Tax Compliance Initiative, stated that "[i]t is the experience of the states that some taxpayers will report a transaction in a different manner to states that have identical, or virtually identical, allocation and apportionment rules[,]"[16] and recommended as a solution that "[s]tate statutes or regulations could contain a requirement that a taxpayer disclose when it files its returns that it has taken an inconsistent position with respect to the treatment of an item on a return filed with another State that has similar laws."[17]

For state tax administrators then, the value of a requirement to disclose inconsistencies when sourcing receipts is obvious. Disclosure is a tool that can be used for monitoring taxpayer compliance in that it creates transparency between taxpayer filings in multiple states. This "window" into other jurisdictional reporting positions aids tax administrators in determining whether a taxpayer's sales factor receipts have been properly assigned to the taxing state, and, if not, to make the necessary adjustments.

The disclosure requirement can also serve as a barometer of uniformity in the way UDITPA and Compact States interpret the apportionment regulations as applied in such states. Variances in the interpretation of substantially similar or identical apportionment rules can, as applied, lead to over- or under-apportionment of the tax base and thus potentially duplicative taxation. Disclosure can alert tax administrators to possible

[15] Final Report of the Worldwide Unitary Taxation Working Group, (1984) at p. 60.
[16] Multistate Tax Commission Corporate Income Tax Sheltering Work Group Report, June 17, 2004, p. 10.
[17] Id., at p. 20.

inconsistencies in the interpretation of apportionment rules among states. Such inconsistencies could indicate to a State that it may need to examine its own statutes, regulations and interpretations of the apportionment rules vis-à-vis those of other States. And, of course, sufficient differences in state interpretations could be an indication and an incentive for the Commission and interested states to resolve the differences through a joint effort to develop a new uniform rule.

CONCLUSION

Required disclosure of inconsistencies is an important tool tax administrators can use to ensure the full and fair apportionment of income earned in multiple states. It can also serve as a barometer for assessing the level of uniformity in interpretations of substantially similar or identical apportionment statutes and regulations. For these reasons, the Commission files in support of the Indiana Department of Revenue’s right and duty to enforce its regulations requiring taxpayer disclosure of inconsistency in the method of reporting income.

Respectfully submitted,

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