



MULTISTATE TAX COMMISSION

MEETING NOTES

MTC Work Group – Sales Taxation of Digital Products

January 11, 2024

I. **Welcome and Introductions –**

Gil Brewer (Washington), Chair of the Work Group, convened the meeting and provided introductory information on the work group and its procedures. He noted, in particular, that state participants who speak do so from their own experience.

II. **Initial Public Comment –**

Brewer invited any initial public comments. There were no initial public comments.

III. **Review of notes from November 2, 2023 work group meeting**

Brewer asked for if there were any changes to the notes of the October meeting. There were none.

IV. **Discussion of draft matrix with three approaches to taxing digital products, including presentations from state tax agency representatives from Louisiana and New Mexico about their experiences dealing with the taxation of digital products to help add more information to the draft matrix.**

Brewer introduced this item on the agenda and turned it over to Nancy Prosser, MTC, who facilitated the discussion. Prosser noted that there have been no updates published to the draft matrix since the last meeting, but that some would be forthcoming. Prosser noted also that the West Virginia member of the work group had reviewed the matrix and that state had nothing to add, and that she believes that all the states that are participating and have been contacted have now responded.

The first person to speak at the meeting was Mia Strong, Louisiana. She noted that while Louisiana takes a very narrow approach to taxing digital products currently, they are looking at expanding the sales tax base. They tax canned software but do not tax custom software. They also tax certain downloadable digital products. They have had legislation proposed in the past that would include more digital products including some digital services. The tax department has also looked to Washington's approach to expand the base—broad definitions with some exclusions. Part of the push-back on that idea has come in the form of business opposing tax on their digital business inputs. One reason they are looking at expanding the sales tax base is to make it more stable. Another is to supplement the tax revenues in the event that the state reduces the tax on income.

Prosser asked whether Strong could share exactly what input the state had gotten on the taxation of business inputs. Strong responded that she believed that businesses had not had sufficient time when the legislation was introduced and so were unable to provide more specific feedback.

Mark Nebergall, SofTec, noted that the “elephant in the room” in Louisiana is the local taxes which are often not uniform. He also conceded that the state tax department can only do so much about that. Strong noted that the locals are working with the tax department to consider how to coordinate their tax bases and part of the problem is that the local governments have different needs.

Karl Frieden, COST, mentioned that his organization had authored an article that will be coming out in State Tax Notes soon and will address how states might want to exclude some of the business inputs.

Prosser then introduced Mark Chaiken, New Mexico. He noted that New Mexico taxes digital products using a very broad approach under that state’s “gross receipts tax.” It does not have a “traditional” sales and use tax. The New Mexico tax has long applied to tangible and intangible products and services. The tax basically applies to receipts unless an exemption applies. So New Mexico has been taxing digital goods since they came “online.” And, for example, with the new regulations on the sourcing of digital advertising, these regulations are not implementing a “new” tax but are simply clarifying how the existing tax applies.

Chaiken noted that there are some questions about sourcing—especially of services. In New Mexico, the law looks to delivery of the “product of the service” which can be hard to define. He also noted that New Mexico does define “digital goods” as a separate type of property. That definition was added more recently. This is not an exclusive definition and it is slightly circular. The definition also references the fact that digital goods are often provided under a license to use arrangement which is specifically referenced.

Chaiken also noted that the recent regulations on digital advertising were meant to clarify how to source those sales. New Mexico also taxes other forms of advertising generally. This is important because it doesn’t raise Internet Tax Freedom Act issues, meaning there is no possible claim that digital advertising is subject to discrimination compared to the taxing of other forms of advertising. Also, New Mexico does have a uniform tax base. He noted that state regulations provide that when a product is delivered simultaneously to multiple locations, the seller can “revert” to origin sourcing rather than delivery. Chaiken further noted a new issue his tax agency has encountered: platforms that host content creators and the different payment arrangements that exist between the platforms and the creators and how to determine which receipts are subject to tax. Finally, he noted that there has been legislation to exempt certain business inputs and would expect to see that legislation proposed again.

Nebergall asked how New Mexico’s tax on digital advertising applies to national advertising. Chaiken responded that it is likely not covered by the New Mexico tax given that the tax applies to advertising focused on the New Mexico market.

Marcus Johnson asked how downloaded software would be taxed if charges were made on a subscription basis. Chaiken responded that the tax would apply to subscription-based charges in the same way, based on location of use. Chaiken also noted that the New Mexico regulations permit the use of reasonable estimates to determine the sourcing location.

Prosser noted that the work group hasn’t gotten to the issue of sourcing yet and might be circling back to New Mexico to see how they can help the work group better understand issues related to that topic.

Josh Pens, work group member from the Colorado tax agency, asked whether New Mexico needs to be able to distinguish services from property or if that issue is irrelevant because of the state's broad tax. Chaiken responded that it could be relevant and offered to talk to Pens specifically about it.

V. Consideration of and possible vote on new work group chair.

Brewer noted that his retirement effective the end of January necessitated the installation of a new chair. He explained there is one volunteer—work group member Tim Jennrich of Washington. Ray Langenberg, Texas, made a motion to nominate Jennrich as the new chair. Jennrich gave a short summary of his background and interest in serving, and expressed his view that the work group is doing important work and he would be honored to serve as chair. Prosser took a rollcall vote of the work group members in attendance. The vote passed unanimously (CO, KS, LA, MD, NM, ND, SD, TX, WA – present and voting yes).

Jennrich thanked the members of the work group and noted his desire to continue the work Brewer and others were doing.

VI. Comments from outgoing work group chair, Gil Brewer, and incoming chair (if voted on by the work group).

Brewer made some closing remarks to the work group, noting: This is a hard project but an essential one. The expansion of the sales tax base is already happening and will continue. Anyone with an interest in how that happens, including businesses that want to see business inputs excluded, have a reason to work together to find the best approaches. Having all the states do things differently is bound to create uncertainty and a host of problems. So this work group and the states working together on these issues, along with public input, is the only way to avoid those problems.

Brewer also expressed optimism that the work group's efforts would be successful and that this was not due to his work but to the work of everyone who participates. He mentioned a recent article in State Tax Notes on the project, and his role, in particular (which named him Person of the Year)—noting that he was thankful for the recognition but felt any praise of should be shared with members and staff.

Prosser noted that the article Brewer referred to is on the MTC's webpage for this project and thanked Brewer for sharing the credit, noting that he has been a great chair and that his work is much appreciated.

VII. Adjourn

Brewer asked if there were any other comments. There were none and the meeting was adjourned.