



Multistate Tax Commission Update

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MTC Background & Programs



Multistate Tax Commission



- ❧ An intergovernmental state tax agency established in 1967 by states adopting the Multistate Tax Compact
 - ❧ A response by states to the Willis Commission report
 - ❧ Uniform Division of Income for Tax Purposes Act (UDITPA) adopted in Article IV of the Compact

Multistate Tax Commission, cont.



- ❧ Established to preserve state tax authority against federal preemption through –
 - ❧ Facilitating the proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases;
 - ❧ Promoting uniformity or compatibility in significant components of tax systems;
 - ❧ Facilitating taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration;
 - ❧ Avoiding duplicative taxation

Core Programs



❧ Joint Audit Program

- ❧ Operates under authority of the Multistate Tax Compact; auditors are agents of, and work at the direction of, participating states in conducting an audit (the Commission does not have assessment or collection authority)
- ❧ 28 states participate in the program (25 for income tax audits, 20 for sales & use tax audits, and 1 observing state)

❧ National Nexus Program

- ❧ Created to foster state tax compliance by business that is engaged in multi-jurisdictional commerce, and to promote cooperation and consistent state tax enforcement and administration of issues in the nexus area
- ❧ 36 states participate in the program
- ❧ Offers multi-state voluntary disclosure to help businesses and individuals settle nexus issues efficiently through a single point of contact and uniform process

Core Programs, cont.



What the Joint Audit Program and National Nexus Program mean to participating states for the last three completed fiscal years –

FY2011

Voluntary Disclosure Program back taxes collected: \$11,884,837

Joint Audit Program proposed assessments: \$96,104,743

FY2012

Voluntary Disclosure Program back taxes collected: \$15,246,349

Joint Audit Program proposed assessments: \$117,868,384

FY2013

Voluntary Disclosure Program back taxes collected: \$10,842,380

Joint Audit Program proposed assessments: \$47,686,035

Core Programs, cont.



☞ Uniformity

- ☞ The Commission promotes and maintains uniformity in state taxation of interstate business through uniformity projects under the direction of the Uniformity Committee
- ☞ The Uniformity Committee is composed of representatives from participating states
- ☞ The uniformity process is designed to maximize input from states and interested parties at nearly every stage

Other Support



☞ Legal Support

- ☞ Amicus briefs & case consultation
- ☞ Semiannual Litigation Committee meetings
- ☞ State tax attorney teleconferences

☞ Training

- ☞ Schools and programs designed to increase the effectiveness and efficiency of state tax administration with courses that enhance knowledge and practical skills.

☞ Policy Research

- ☞ Staff economist provides technical support for uniformity projects
- ☞ Consultation with states on fiscal & legislative issues
- ☞ Support for addressing federal legislative activity

☞ Voluntary Alternative Dispute Resolution Program

- ☞ Resolve controversies of an interstate nature involving more than one state
- ☞ Mediation, Arbitration, or any Combination

MTC Uniformity Process & Efforts



Uniformity Process



1. Proposal initiated by or assigned to Uniformity Committee
2. Uniformity Committee develops proposal, with input from relevant interest groups
3. Uniformity Committee proposal considered by Executive Committee
4. Public Hearing
5. Hearing Officer Report considered by Executive Committee
6. Bylaw 7 Survey of Affected Commission States
7. Proposal Considered for Adoption by Commission at Annual Business Meeting
8. Adopted Proposal submitted to the States

Uniformity Committee



- ❧ The Uniformity Committee consists of representatives from all interested member states (not just Compact states)
- ❧ The Uniformity Committee's goals are three-fold –
 - ❧ Simplicity, equity, and consistency
 - ❧ Greater voluntary compliance through taxpayer education and increased enforcement
 - ❧ Fostering greater communication among stakeholders
- ❧ To facilitate its work, the Uniformity Committee is divided into two working subcommittees
 - ❧ Subcommittee on Income and Franchise Taxes
 - ❧ Subcommittee on Sales and Use Taxes

Examples of MTC Model Laws



Exercise Jurisdiction

- Factor Presence Nexus

Tax Base

- Add-back
- Captive REITs
- Mobile Workforce
Withholding

Administrative

- Uniform Protest
- RAR Reporting

Apportionment:

- UDITPA Regulations
- Special Apportionment
 - Financial Institutions
 - Telecommunications
 - Airlines, etc.
- Combined Reporting

Sales and Use Tax

- Priority - Leasing;
Construction Inventory
- Models for
Telecommunications
Transaction Tax Centralized
Administration
- Models on the Tax Collection
Responsibilities of
Accommodations
Intermediaries

Recently Adopted by the Commission



- ❧ Resolution in Support of State Consideration of the Streamlined Sales and Use Tax Agreement's Telecommunications Sourcing Rules and Definitions
 - ❧ Industry asked the Commission to develop uniform rules for communications sourcing, sourcing definitions, and tax base/exemptions definitions.
 - ❧ Since the Streamlined Sales and Use Tax Agreement already covers these topics, rather than develop its own set of model rules and definitions, the Uniformity Committee recommended a resolution encouraging states to consider adoption of Streamlined's sourcing rules, definitions, and tax base/exemptions definitions.
 - ❧ The Commission approved the resolution on July 24, 2013.

Current Uniformity Projects



- ❧ Recommended Amendments to Compact Art. IV (UDITPA)
 - ❧ Section 17
 - ❧ Section 1(g), Definition of “sales”
 - ❧ Section 1(a), Definition of “business income”
 - ❧ Section 9, Factor weighting
 - ❧ Section 18, Distortion relief

- ❧ Amendments to Model Financial Institutions Apportionment Rule

Current Uniformity Projects, Cont.



☞ Model Sales & Use Tax Notice and Reporting Statute

☞ Model Nexus Statute

☞ Model Provisions Concerning Class Actions and False Claims

Litigation



Gillette Co. et al. v. Franchise Tax Bd.



- ❧ Review granted by California Supreme Court. FTB opening brief and Gillette response brief have been filed. FTB reply brief filed September 20, 2013. Amicus briefs due October 21st. Reply to amicus briefs due November 20th.
- ❧ The Court of Appeals held that the apportionment election provision in Article III of the Multistate Tax Compact is a mandatory provision of the Compact and that, unless California repeals the Compact in its entirety, multistate taxpayers have the right to the Article III election.
- ❧ Some other, California-specific issues at play in the case (e.g., impairment of contracts, statutory construction).
- ❧ Prior to the original decision, the California legislature prospectively withdrew from the Multistate Tax Compact.

IBM v. Dep't of Treasury



- ❧ Michigan won at the Michigan Court of Appeals
- ❧ Michigan Supreme Court granted leave to appeal.
- ❧ The issue in the case is whether Michigan must recognize the Multistate Tax Compact Article III election for purposes of the Single Business Tax and the Michigan Business Tax
- ❧ Two other cases at the Court of Appeals stage: *Lorillard Tobacco* (Michigan won), and *Anheuser Busch* (Taxpayer won) -- Michigan Supreme Court denied motions in these cases to skip Court of Appeals and intervene directly in *IBM*.

Direct Marketing Ass'n v. Huber



- ❧ The Federal District Court of the Western District of Colorado, on cross motions for summary judgment, had enjoined Colorado from enforcing its notice and reporting requirements.
- ❧ The issue is whether the commerce clause, which prohibits a state from requiring use tax collection by remote sellers with no physical presence, also prohibits a state from requiring consumer notices and certain reports from these same remote sellers.
- ❧ On August 20, 2013, the U.S. Court of Appeals for the Tenth Circuit held that the federal Tax Injunction Act (TIA) barred district court jurisdiction to hear a challenge to Colorado's notice and reporting sales tax statute for out-of-state sellers, and that the TIA applies even though the plaintiff is not a taxpayer and the statute in question is not a tax assessment.

Performance Marketing Ass'n v. Hamer



- ❧ Currently before the Illinois Supreme Court.
- ❧ The issue is whether Illinois's statute, which is modeled after New York's so-called "Amazon" statute, violates the dormant commerce clause and the Internet Tax Freedom Act.
- ❧ The Illinois Supreme Court heard oral arguments on May 22, 2013.

In re *BarnesandNoble.Com*



✧ The New Mexico Supreme Court held that BarnesandNoble.com, an Internet retailer with no physical presence in New Mexico, nevertheless had nexus in the state for sales tax purposes through the actions of its sister corporation, Barnes & Noble Booksellers Inc., via the promotion of gift cards, sharing of e-mail addresses, the companies' shared loyalty program and return policy, and use of logos and trademarks.

Equifax v. Mississippi Dep't of Revenue



- ❧ Equifax was a Georgia corp. engaged in the business of consumer credit reporting. Equifax apportioned its income to Mississippi using the standard cost of performance method for service companies and determined that no income was subject to tax in Mississippi.
- ❧ On audit, the Department determined that Equifax should have used an alternative market-based sourcing formula. Equifax challenged the Department's use of an alternative apportionment method.
- ❧ The Mississippi Appellate Court held that the Chancery Court improperly placed the burden on the taxpayer to establish the Department's use of an alternative apportionment method was unreasonable, concluding that the Department has the burden to show that the standard formula did not fairly represent the activities of Equifax within Mississippi and that the alternative market-based formula was reasonable.
- ❧ On June 20, 2013, the Mississippi Supreme Court held Department's determination entitled to deference; Equifax has petitioned for rehearing.

Thomas v. Louisiana



- ❧ A Louisiana taxpayer formed a Montana LLC which then purchased an RV (Montana does not have an applicable sales tax).
- ❧ The Board of Tax Appeals upheld the Department's assessment, but the district court reversed the Board's decision and dismissed the assessment of sales tax and penalties.
- ❧ The Department appealed, but on June 28, 2013, the Court of Appeals held that Mr. Thomas was not personally liable for sales tax because there was no evidence in the record that he committed fraud or that he was the LLC's alter ego so that the entity's veil should be pierced.
- ❧ The use of Montana LLCs for purchasing "big ticket" items like RVs is widely marketed service, and is a widespread problem.
- ❧ The Department has petitioned the Louisiana Supreme Court to review the case.

Overstock.com & Amazon.com v. N.Y. State Dep't of Taxation & Finance

- ❧ New York “Amazon law” creates a presumption that a seller is doing business in the state if the seller contracts with New York residents and pays them a commission for referring customers to its website.
- ❧ Amazon and Overstock filed challenges to the statute arguing that it violates the commerce clause and the due process clause.
- ❧ The New York Court of Appeals (the state’s highest court) upheld the law on March 28, 2013.
- ❧ Overstock.com and Amazon.com filed petitions for writs of certiorari in the U.S. Supreme Court on August 22, 2013.

Media General Communications v. S.C. Dep't of Revenue

- ❧ The Supreme Court of S.C. found that, under a statute permitting taxpayers to petition the Department of Revenue for use of any other methods of income allocation and apportionment to effectuate equitable apportionment of income, the Department was authorized to use the combined entity method in apportioning multistate corporations' income.
- ❧ Media General was a multistate corporation that, with its subsidiaries, comprised a unitary group.
- ❧ The Department conceded that combined apportionment would more accurately reflect the group's activities in the state, but it argued it was not authorized under S.C. law to apply the combined entity apportionment method.

Federal Legislation



Federal Legislation



- ❧ The Commission opposes any federal legislation that encroaches on states' sovereign tax authority as established in our system of federalism.
- ❧ We do recognize, however, that Congress has a constitutional duty to regulate interstate commerce.
- ❧ Thus, in addressing any federal legislation, we seek to help Congress maintain the careful balance implicated by states' sovereignty and federal responsibility.

Permanent Internet Tax Freedom Act



- ❧ Amends the Internet Tax Freedom Act to make permanent the ban on state and local taxation of Internet access and on multiple or discriminatory taxes on electronic commerce.
- ❧ Four bills now introduced, two in the House, two in the Senate.
- ❧ One of the Senate bills is titled the “Internet Tax Freedom Forever Act” and includes a seven-point findings section.

Marketplace Fairness Act



- ❧ Authorizes each member state under the Streamlined Sales and Use Tax Agreement (the multistate agreement for the administration and collection of sales and use taxes adopted on November 12, 2002) to require all sellers to collect and remit sales and use taxes with respect to remote sales under provisions of the Agreement.
- ❧ Provides same authority to non-SSUTA states if the state adopts and implements minimum simplification requirements relating to the administration of the tax, audits, and streamlined filing.
- ❧ Exception for “small-sellers” – sellers with annual gross receipts in total U.S. remote sales not exceeding \$1 million.

Mobile Workforce State Income Tax Simplification Act

- ❧ Limits state taxation of the wages or other remuneration of any employee who performs duties in more than one state to: (1) the state of the employee's residence; and (2) the state in which the employee is present and performing employment duties for more than 30 days.
- ❧ Exempts from the definition of “employee” for purposes of this Act a professional athlete or entertainer or certain public figures
- ❧ The MTC adopted a uniformity recommendation for the states on this in 2011, but it uses a 20-day threshold.

Digital Goods and Services Tax Fairness Act

- ❧ A bill “to promote neutrality, simplicity, and fairness in the taxation of digital goods and digital services.”
- ❧ Prohibits a state or local jurisdiction from imposing “multiple or discriminatory” taxes on or with respect to the sale or use of digital goods or services delivered or transferred electronically to a customer.
- ❧ The bill would prohibit states from interpreting their laws to apply even-handedly to digital products, even when the products are simply the digital equivalent of other taxable electronic and tangible products.
- ❧ Grants jurisdiction to federal district courts to prevent a violation of this Act, without regard to the amount in controversy or the citizenship of the parties.

Business Activity Tax Simplification Act

- ❧ BATSA is an “anti-jobs” bill
- ❧ BATSA would hurt small business
- ❧ BATSA would upset well-established legal and policy principles
- ❧ BATSA would unnecessarily intrude upon state taxing authority, flouting the Tenth Amendment
- ❧ BATSA would blur the bright line rule
- ❧ BATSA would strip states of needed revenue -- scored by CBO as the largest unfunded mandate upon the states
- ❧ There is an alternative -- The Factor Presence Nexus standard adopted by the MTC

Industry-Specific State Tax Preemptions

- ❧ Increasingly, industries that have been unsuccessful in reducing their state taxes through litigation or state legislation have turned to Congress for redress by seeking to preempt state tax authority in their specific area of business, even when that business is thriving --
 - ❧ Direct Broadcast Satellites
 - ❧ Automobile Rentals
 - ❧ Hotel Intermediaries
 - ❧ Cell Phones
 - ❧ Natural Gas Pipelines
- ❧ Federalism is best maintained through Congress prompting the states and industry to address areas of concern, and then giving them reasonable time to work out a solution while refraining from pre-empting the states in tax matters traditionally managed by the states.

Looking for More?



Information on the Commission and its activities can always be found at www.mtc.gov –

The screenshot shows the homepage of the Multistate Tax Commission (MTC) website. The browser address bar displays <http://www.mtc.gov>. The page features a navigation menu on the left with categories such as Member States, Programs & Committees, and Policy Statements. The main content area includes a banner for the 46th Annual Conference & Committee Meetings in San Diego, California, from July 22-25, 2013. Below the banner, there is a list of speakers and topics for a half-day seminar on Wednesday. A section titled "Commission's Annual Legislative Day a Success" features a photo of participants and a brief description of the event. On the right side, there is a "Upcoming Events" sidebar listing various conferences and seminars, including the Financial Institutions Work Group, Corporate Income Tax, and the 2013 Fall Committee Meetings.

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MTC
MULTISTATE TAX COMMISSION
Maximizing the synergies of multi-state tax cooperation

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Upcoming Events

- Financial Institutions Work Group**
September 25, 2013 via Teleconference
- Corporate Income Tax**
October 7-10, 2013 in Washington, DC
- Statistical Sampling for Sales and Use Tax Audits**
October 15-18, 2013 in Wheat Ridge, Colorado (Denver area)
- Sales and Use Tax Nexus Model Statute Project**
October 23, 2013 via Teleconference
- Nexus School**
November 18-19, 2013 in Honolulu, Hawaii
- 2013 Fall Committee Meetings**
December 10-12, 2013 in New Orleans, Louisiana

Looking for information on past meeting?

- Uniformity Strategic Planning Project Team**
August 28, 2013 via Teleconference