

# A Lively Debate with Huddleston, Lindholm, and Pomp: Debating the Great State Tax Issues Across the Nation

**Joe Huddleston**  
Multistate Tax Commission

**Douglas L. Lindholm**  
Council On State Taxation

**Richard D. Pomp, Esq.**  
University of Connecticut



# Great Issues in SALT

- SALT at the Supreme Court
- More SALT for Congress?
- MTC Projects and Audits
- “Tax Havens” in the Water’s-Edge Group
- State Tax Incentives Conundrum: Can’t live with them, can’t live without them...
- Corporate Tax Return Disclosure
- Nexus, Nexus, Nexus: Due Process Redux?
- Uniformity in State Taxation

# SALT at the Supreme Court

# *Wynne v. MD: Fair Apportionment?*

*Comptroller of Maryland v. Wynne* – Docket 13-485, cert. granted 5/27/14 (from MD Ct. of Appeals, 431 Md. 147)

- Question Presented: Does the U.S. Constitution prohibit a state from taxing all the income of its residents – wherever earned – by mandating a credit for taxes paid on income earned in other states?
- Can individual residents of a state be taxed on their full income without the state apportioning or providing credit for taxes paid to other states?
- How far would this apply? – sales/use taxes, piggyback and non-piggyback local income taxes, etc.?

# ***DMA v. CO: Scope of the Tax Injunction Act***

*DMA v. Colorado DOR* – Docket 13-1032, cert. granted 7/1/2014 (from 10<sup>th</sup> Cir. Ct. of Appeals, 735 F.3d 904)

- Question Presented: Does the Tax Injunction Act bar federal court jurisdiction over a suit brought by non-taxpayers to enjoin the informational notice and reporting requirements of a state law that neither imposes a tax, nor requires the collection of a tax, but serves only as a secondary aspect of state tax administration?
- Colorado's State District Court issued a preliminary injunction (2/18/14) based on the statute as discriminating against interstate commerce; permanent injunction granted 6/2/2014 based on a finding that the statute was discriminatory.

# CSX v. AL: Evaluating Discrimination

*Alabama DOR v. CSX* – Docket 13-553, cert. granted 7/1/2014 (from 11<sup>th</sup> Cir. Ct. of Appeals, 720 F.3d 863)

- Several states impose a sales/use tax if motor fuel is not subject to the state's motor fuel excise tax. (Some states impose both!)
- Questions Presented:
  - Does a state discriminate against a rail carrier in violation of the 4-R Act when the state generally requires businesses to pay a sales/use tax, but grants exemptions from the tax to competitors of the railroads?
  - In resolving a claim of unlawful tax discrimination under 49 U.S.C. § 11501(b)(4), should a court consider other aspects of the State's tax scheme rather than focusing solely on the challenged tax provision?

# More SALT for Congress?

# Nonresident Withholding Issues (TGIF)

## Mobile Workforce State Income Tax Simplification Act

- 113<sup>th</sup> Congress: HR 1129 / S.1645. New bills expected in 114<sup>th</sup> Congress
- Statutory Framework:
  - No state personal income tax on:
    - “Wages or other remuneration,” earned by
    - “Employee” performing “employment duties,” except by:
      - Employee’s state of residence, or
      - State in which employee is “present” for more than 30 days
- Identical to legislation passed by the full House in May 2012
- Top Legislative Priority for the AICPA



# Can We Get a Nexus Standard, Please?

## Business Activity Tax Simplification Act (BATSA)

- Would adopt a bright line 14-day physical presence test, with exceptions, before an entity is subject to a state's business activity taxes.
- Would “modernize” P.L. 86-272:
  - Expand scope beyond sales of tangible personal property to sales of services
  - Apply more broadly than to just net income taxes imposed by the states

# Amazon Bills: River of Doubt?

State	Effective Date	Affiliate Threshold	Statute
Arkansas (rebuttable presumption)	Oct. 24, 2011	More than \$10,000	Ark. Code Ann. § 26-52-117
California (rebuttable presumption)	September 15, 2012	More than \$10,000 and (and more than \$1 million in annual in-state sales)	Cal. Rev. & Tax. § 6203(c)
Connecticut (irrebuttable presumption)	July 1, 2011	More than \$2,000	Conn. Gen. Stat. § 12-407(a)(12)(L)
Georgia (rebuttable presumption)	October 1, 2012	More than \$50,000	Ga. Stat. Ann. § 48-8-2(8)(K)
Illinois (now rebuttable presumption); status of law based on Performance Mktg. Ass'n v. Hamer, 998 N.E.2d 54 (Ill. 10/14/2013) is now unknown	July 1, 2011; 1/1/2015	More than \$10,000	35 ILCS 105/2 and 110/2
Kansas (rebuttable presumption)	July 1, 2013	More than \$10,000	K.S.A. § 79-3702(C)
Maine (rebuttable presumption)	October 9, 2013	More than \$10,000	Me. Rev. Stat. Ann. § 1754-B(1-A)(C)
Minnesota (rebuttable presumption)	July 1, 2013	More than \$10,000	Minn. Stat. § 297A.66(4a)

# Amazon Bills: River of Doubt? (part 2)

State	Effective Date	Affiliate Threshold	Statute
Missouri (rebuttable presumption)	Aug. 28, 2013	More than \$10,000	Mo. Rev. Stat. 144.605(2)(e)
New Jersey (rebuttable presumption)	July 1, 2014	More than \$10,000	N.J.S.A. 54:32B-2(i)(1)
New York (rebuttable presumption)	June 1, 2008	More than \$10,000	N.Y. Tax Law § 1101(b)(8)(vi)
North Carolina (rebuttable presumption)	Aug. 7, 2009	More than \$10,000	N.C. Gen. Stat. § 105-164.8
Pennsylvania	September 1, 2012	None specified	Tax Bulletin 2011-01; proposed legislation in 2013 (HB 1043)
Rhode Island (rebuttable presumption)	July 1, 2009	More than \$5,000	R.I. Gen. Laws § 44-18-15
Vermont (rebuttable presumption)	When adopted in 15 other states.	More than \$10,000	Vt. Stat. Ann. tit. 32, § 9701(9)(I) (H.B. 436)

**Bills introduced in 2014: HI: HB 1651; IN: SB 269; SC: S 870; & TN: HB 1537**

# Federal Legislation: River of Doubt?

Marketplace Fairness Act – where we left it in the 113th:  
H.R. 684 / S. 743, S. 336

- Various federal legislation introduced addressing issue of sales tax collection authority on remote sales transacted via the internet
- Senate passed S. 743 on May 6, 2013, 69-27
- House Judiciary Committee hearing held in March 2014

Two alternatives for states that affirmatively choose to exercise such collection authority:

- Streamlined Sales and Use Tax Agreement (SSUTA) member states – So long as SSUTA contains minimum simplification requirements and the state publishes its intent to collect tax with 180 days notice, or
- Non-SSUTA states – Required to enact legislation satisfying minimum simplification requirements; authority commences no earlier than 6 months after enactment, starting on the first day of a calendar quarter.

Will we see a Hybrid Origin approach in 2015?



# MTC Projects and Audits

# Uniformity Efforts



- 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

# Current Uniformity Projects



- Recommended Amendments to Compact Art. IV (UDITPA), adopted by Commission, July 2014 —
  - Section 17
  - Section 1(g), Definition of "sales"
  - Section 1(a), Definition of "business income"
  - Section 9, Factor weighting
- Recommended Amendments to Compact Art. IV (UDITPA), passed bylaw 7 survey, ready for next Commission meeting —
  - Section 18, Distortion relief
  - Conforming amendments

Amendments to Model Financial Institutions Apportionment Rule, pending bylaw 7 survey

# Current Uniformity Projects (cont'd)



Model Sales & Use Tax Notice and Reporting Statute — being held by Executive Committee pending outcome of litigation

Model Sales & Use Nexus Statute — being worked on at Uniformity Committee

Section 17 (Market Sourcing) Regulations — being worked on at Uniformity Committee

Section 1 (Definition of Receipts) Regulations — being worked on at Uniformity Committee

Model Provisions Concerning Class Actions and False Claims — being worked on at Uniformity Committee

- Resolution Commending ABA Transaction Tax Overpayment Act – Executive Committee referred to Commission resolutions process for adoption



# 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 Admin.
- Models on the Tax Collection Responsibilities of Accommodations Intermediaries

# MTC Audit & Nexus Programs



- **Joint Audit Program** - Operates under authority of the Multistate Tax Compact and state contracts; 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)
  - 27 states participate in the program (25 for income tax audits, 17 for sales & use tax audits, and one observing state).
  - Joint Audit Program proposed assessments (last 3 yrs): \$208,079,639
- **National Nexus Program** - Created to foster state tax compliance by businesses engaged in multi-jurisdictional commerce, and to promote cooperation and consistent state tax enforcement and administration in the nexus area. 37 states participate in the program
  - Offers multi-state voluntary disclosure to help settle nexus issues efficiently through a single point of contact and uniform process
  - Voluntary Disclosure Program back taxes collected (last 3 yrs): \$37,695,591

# MTC ALAS Project



**Goal:** design a high quality, viable arm's-length adjustment service, with state commitments to participate if approved.

## **Priorities:**

- Joint Economics Expertise
- Training
- Joint Audit Issue Review
- Information Exchange
- Joint Case Resolution & Joint State Advanced Pricing Agreements

# MTC ALAS Project - Draft Design Goals & Objectives



- Enhance the ability of participating states to correct cases of taxpayer underreporting associated with related party transactions.
- Increase audit coverage of related party transactions for states electing to participate in the MTC Audit Program for corporate income taxes.
- Provide support for satisfactory resolution of disputes involving related party transactions and transfer pricing issues.
- Inform and advise states of emerging developments concerning related party transactions and transfer pricing issues.

# MTC 3-Factor Election Cases



- **California** - *Gillette Co. v. Franchise Tax Board*, 207 Cal.App.4th 1369 (Cal. Ct. App. July 24, 2012), Cal. S.Ct., No. S206587, petition for review granted 01/16/2013.
- **Michigan** - *International Business Machines Corporation v. Department of Treasury*, No. 146440 (Mich. S.Ct. Jul. 14, 2014)
- **Texas** - *Graphic Packaging Corp. v. Combs* (on appeal to 3<sup>rd</sup> court of appeals)
- **Oregon** - *Health Net, Inc. v. Dep't of Revenue*, Case No. TC 5127 (Or. Tax Ct.)
- **Minnesota** - *Kimberly-Clark Corp. v. Comm'r of Revenue* (on appeal to Minn. Tax Court)

# **“Tax Havens” in the Water’s-Edge Group**

# States Identifying Foreign “Tax Havens” in the Water’s-Edge Group

- Under MTC’s model combined reporting statute, taxpayer members must take into account “the entire income and apportionment factors of any member that is doing business in a tax haven”
- States identifying “tax havens” by statutory list: Montana, Oregon
- States identifying “tax haven” characteristics: Alaska, D.C., Rhode Island, West Virginia
- Tax haven legislation vetoed in Maine last year; proposals offered in Massachusetts, West Virginia, Wisconsin.
- Tax haven legislation already prefiled in New Hampshire

# “BEPS” at the State Level?

Renewed interest in worldwide combined reporting

MTC transfer pricing project

- Participating states include AL, FL, GA, HI, IA, KY, NJ, NC, PA, and DC
- Potential role of MTC in transfer pricing audits
- Continued use of third party auditors

Inversions: the next big thing?

- NJ proposal (S. 2361/A. 3678) would bar the State from contracting with “an inverted domestic corporation” for the purchase of goods or services



# **State Tax Incentives:**

**Can't live with them, can't live without them**

# State Tax Incentives as a Policy Choice

Who Benefits, and Why?

Numerous Tension Points:

- Broad-base/low-rate or inducements to relocate?
- Existing business v. new business
- Clawbacks for non-performance
- Disclosure v. confidentiality
- Political reality or unnecessary evil?

Identifying Best Practices for States

# Corporate Tax Return Disclosure

# Corporate Tax Return Disclosure

## 2013 & 2014 Proposals (all rejected):

- California, Illinois, Connecticut, Maine, Oregon & Massachusetts

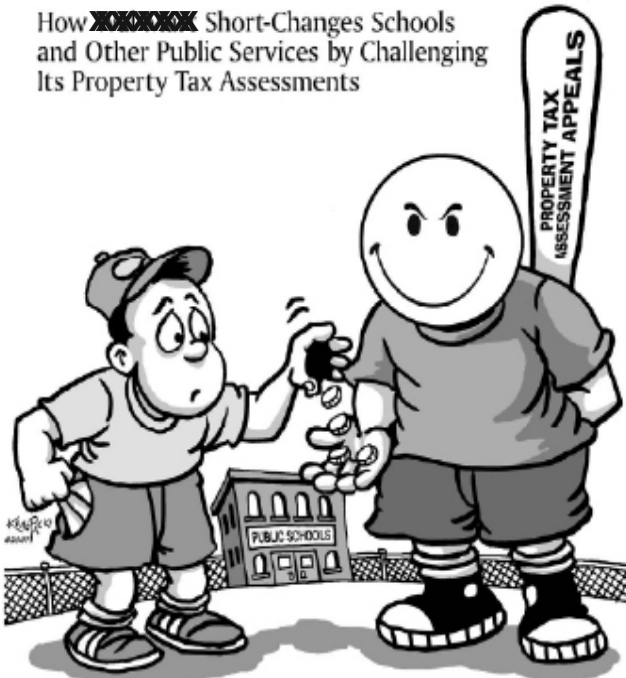
## The Disclosure Debate: Arguments Pro & Con

- Accountability
- Credibility in our Voluntary System
- Public Benefit
- Guide Policymaker Decisions
- Potential for Deliberate Misinterpretation/Misuse of Information

# Examples

## Rolling Back Property Tax Payments:

How ~~XEROX~~ Short-Changes Schools  
and Other Public Services by Challenging  
Its Property Tax Assessments




Good Jobs First - October 2007

The cartoon depicts a man in a suit and tie, representing Xerox, holding a baseball bat with the words 'PROPERTY TAX ASSESSMENT APPEALS' written vertically on it. He is standing next to a man in a cap and work clothes, who is looking at a building labeled 'PUBLIC SCHOOLS'. The man in the suit is holding a coin, suggesting a bribe or a small payment to influence the assessment process.

## Skimming the Sales Tax:

How ~~XEROX~~ and Other Big Retailers (Legally)  
Keep a Cut of the Taxes We Pay on Everyday Purchases



Good Jobs First - November 2008

The cartoon shows a man in a suit sitting at a cash register labeled 'SALES TAX'. He is counting stacks of money, with more stacks of money in his pockets. The cash register is open, showing various denominations of bills and coins. The man has a mischievous smile, indicating that he is skimming the sales tax.

# Public Disclosure of Taxpayer “Subsidy” Information

Maryland HB 1086 (2014 – died)

- Would require information reporting (generally, regarding job creation) by recipients of certain “state subsidies”
- Broadly drafted to include tax credits and exemptions
- Amendments narrow scope, exclude S&U/property tax

New Jersey A. 939 (2014 - died)

- Broad definition of “tax expenditures”
- Requires reporting by all expenditure recipients (formerly limited to “development subsidies”)

# **Nexus, Nexus, Nexus: Due Process Redux?**

# How much presence is needed?

***Washington DOR v. Sage V Foods, LLC***, Docket 12-2-01893-3, Thurston County Superior Court, 8/20/2013

- Superior court judge upholds WA BTA finding that Sage V Foods: (1) ownership of specialized rail cars to deliver product to suppliers in WA was not significantly associated with the taxpayer's ability to establish and maintain the market in WA (citing *Tyler Pipe*) and (2) one visit of the owner while on vacation (or three alleged visits by the DOR) was not a determining factor
- The judge stated (oral opinion): “the fact that people may have been customers in the state of Washington that the product was delivered to simply does not in and of itself establish that sufficient nexus.”
- WA DOR did not appeal
- Contrast with *Space Age Fuels, Inc.*, WA Ct of Appeals, 12/31/2013
  - Oregon fuel wholesaler making wholesale fuel deliveries using its own vehicles creates nexus



# Nexus: Due Process Resurgence?

*Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

- Conduct of U.S. sub on behalf of foreign parent corporation does not create general jurisdiction over foreign corporation

*Goodyear Dunlop Tires v. Brown*, 131 S. Ct. 2846 (2011).

- No general jurisdiction over foreign subs of U.S. parent corporation because subs lacked “continuous and systematic general business contacts” with forum state.

*J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

- Lead opinion says defendant must “purposefully avail itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.”

*Walden v. Fiore*, 134 S. Ct. 1115 (2014).

- Two professional gamblers could not force defendant to litigate in NV for alleged conduct that took place in GA even though the conduct impacted defendants in forum state.

# Unitary Nexus Does Not Exist (or does it?)

## *Gore Enterprise Holdings, Inc. v. Comptroller of the Treasury* (Md. Ct. App Mar. 24, 2014)

- The Maryland Court of Appeals ruled that two out-of-state subsidiaries had Maryland nexus as they did not have economic substance as separate business entities apart from their parent that did business in Maryland.
  - The court clarified that entities engaged in a unitary business did not confer nexus on the out-of-state subsidiaries, but was merely a factor to consider in determining whether the entities had substance.
- The court held also that it was proper to apply the parent's entire apportionment factor (i.e., property, payroll and sales factors) to the subsidiaries' incomes.

# Establishing Nexus?

## ***Allied Domecq Spirits & Wines USA v. Comm'r***

(Mass. App. Tax Bd. May 22, 2013)

- Transfer of Massachusetts employees from an in-state company to its out-of-state parent was disregarded for tax purposes.
- Transfer established Massachusetts nexus, allowing parent's losses to offset income of others in the nexus combined corporate excise tax return.
- Board held the transfers had no business purpose other than tax avoidance, so they were disregarded under the sham transaction doctrine.

# Uniformity in State Taxation

# State Sovereignty vs. Uniformity

## Conflicting Goals:

- State Sovereignty, Laboratories of Democracy
- Efficient Free Flow of Goods & Commerce

## Practical Considerations:

- Global Competitiveness
- The New Economy

## State Tax Uniformity Efforts:

- NCCUSL (Now ULC)
- Multistate Tax Commission

**Is Federal Legislation the only Path to True Uniformity?**

# Uniformity Revisited?

- Can states help themselves?
  - Competition amongst the states
  - Viewpoints of Tax Administrators versus State Legislators
- Multistate Tax Commission: Headed towards a new direction?
- California *Gillette* case and Michigan *IBM* case: MTC still says compact is NOT binding
  - *IBM* case decided July 14, 2014; MI Supreme Court allows three-factor election based on MI statutory interpretation
  - Same day, Texas District Court (1/15/14) dismissed Graphic Packaging Corp.'s petition to use MTC's elective apportionment
- Is the MTC still a quasi-governmental entity?
- Several MTC states have repealed Article IV of the compact

# Repealing Compact Membership in the MTC

- South Dakota SB 239 (signed 2/28/2013)
- Utah SB 247 (signed 4/1/2013)
  - Repeals the MTC and temporarily reenacts the Compact for one year, without Article III election provision and the Article IV apportionment formula
- Minnesota HF 677 (signed 5/23/2013)
  - Repeals MTC but retains MTC audits
- Oregon SB 307 (signed 6/13/2013)
  - Repeals MTC and reenacts without Article III election provision or Article IV apportionment formula
- DC Bill 20-199 (signed 8/1/2013)
  - Repeals MTC and reenacts without Article III election provision or Article IV apportionment formula

# Contact Information

Richard D. Pomp, Esq.  
University of Connecticut  
[richard.pomp@uconn.edu](mailto:richard.pomp@uconn.edu)

Joe Huddleston  
Multistate Tax Commission  
[jhuddleston@mtc.gov](mailto:jhuddleston@mtc.gov)

Douglas L. Lindholm  
Council On State Taxation  
[dlindholm@cost.org](mailto:dlindholm@cost.org)



This presentation contains general information only and the respective speakers and their firms are not, by means of this presentation, rendering accounting, business, financial, investment, legal, tax, or other professional advice or services. This presentation is not a substitute for such professional advice or services, nor should it be used as a basis for any decision or action that may affect your business. Before making any decision or taking any action that may affect your business, you should consult a qualified professional advisor. The respective speakers and their firms shall not be responsible for any loss sustained by any person who relies on this presentation.