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State Corporate Income Tax Uniform Laws Committee Begins Work

The National Conference of Commissioners on Uniform State Laws (NCCUSL) Drafting Committee (the “Committee”), which will consider possible changes to the Uniform Division of Income for Tax Purposes Act (UDITPA), held its organizational meeting in Chicago May 30–31, 2008. UDITPA is the model act that several states have adopted to govern their corporate income tax collection and is included in the Multistate Tax Compact (MTC). The Multistate Tax Commission was the primary proponent of the possible revision.

Any significant revision of the uniform law, if adopted by many states, could have significant and far-reaching impact on the collection of corporate income taxes in the states. Although intended as a “uniform” act to facilitate determination and reporting of corporate income to multiple jurisdictions, the act has not been universally adopted. Depending on the standard used, only about half the states have enacted it, and in recent years, many of those states have enacted significant departures from the uniform act’s provisions. The existing UDITPA is 50 years old, and its age and the changes in the economy that have occurred since its promulgation are cited as reasons the review should be undertaken now.

Multistate businesses and their representatives turned out in force for the meeting. Approximately 70 people attended. The Committee is made up of attorneys from around the country and includes two advisors from the American Bar Association. The Committee roster includes: Charles Trost, Chair from Tennessee; Robert Desiderio, Member from New Mexico; Steven Frost, Member from Illinois; Michael Geraghty, Member from Alaska; Dale Higer, Member from Idaho; Ann Park, Member from California; Daniel Robbins, Member from California; William Breetz, Jr., Division Chair from Connecticut; Ethan Millar, ABA Advisor from Georgia; Stephanie Lipinski Galland, ABA Advisor from District of Columbia; and James McKay, Jr., Style Member from District of Columbia. Two co-reporters have been selected to research, advise, and draft a possible statute for the Committee. They are Professor Richard Pomp of the University of Connecticut School of Law and Prentiss Willson, Esq., formerly of Ernst & Young and Morrison & Forster in California. In addition, the Committee has enlisted Professor Charles McLure of the Hoover Institution at Stanford University as an advisor. Professor McLure is an economist who has written extensively about tax policy.

The Committee reviewed a list of possible issues for consideration that the co-reporters had prepared consisting of each section of the existing UDITPA and other possible issues that might be considered in any possible rewrite. Certainly, the two most controversial additional issues were a nexus standard for tax reporting and combined reporting of unitary income. The existing sections list of issues included such possible controversial items like business/non-business income definitions, apportionment factors, cost of performance calculation for services, and relief provisions when normal apportionment might need to be changed.

The issues review and discussion elicited rather minimal comment from the business representatives in the audience. Numerous comments were made by the representatives from the Multistate Tax Commission, the California Franchise Tax Board, and the Center for Budget and Policy Priorities. Indeed, the Committee completed its issue discussion in about half the time it had allocated for the review.

Instead, the most enthusiastic input from the business representatives came when there was a discussion of whether or not the Committee should move ahead or disband. Representatives from the Council on State Taxation; the Tax Executives Institute; Sutherland, Asbill & Brennan;

McDermott, Will & Emery; and others urged the Committee to halt its work for two principal reasons. They argued that 1) there is not now and is not likely to be uniformity as to the division of income for tax purposes among the states and, thus, 2) the need for action does not meet the standard for NCCUSL to undertake a project. Several other organizations have also questioned the need for the Committee to continue, among them a Task Force from the National Conference of State Legislatures and the American Legislative Exchange Council as well as several state tax policy organizations. Although the Committee listened to the spirited discussion, the decision as to whether or not the Committee will continue rests with the NCCUSL Executive Committee. Chairman Trost indicated that the Executive Committee will consider the matter at its next regularly scheduled meeting in Montana in July. If the decision is made to continue the project, the Committee will meet again in December in Chicago to reconsider the issues list, based on what it heard at its first meeting, and possibly consider a first draft of a new statute.

Certainly, the stakes are huge for the states and for multistate businesses. Good policy is everyone's goal. But corporate income tax collections average approximately 5% of state tax revenues, and it is no secret that many tax administrators and some legislators would very much like to increase that percentage. The fear is that it is highly likely that any proposed changes will increase many corporations' state tax liabilities. There was agreement during the meeting that changes inevitably create "winners and losers." Indeed, changes might even induce more states to adopt UDITPA and/or the MTC. In contrast, the changes might not be adopted by the states for years, if ever.