

July 23, 2013

MTC's Annual Meeting Update: Financial Institution Apportionment; Sales Tax Model Nexus Statute

During the Multistate Tax Commission's (MTC) Annual Conference and Committee Meetings in San Diego on July 22, 2013, the Income and Franchise Tax Uniformity Subcommittee (I/F Subcommittee) discussed its effort to redesign the financial institution apportionment rules. In addition, the Sales and Use Tax Uniformity Subcommittee (S/U Subcommittee) will move forward in drafting a model nexus statute.

SINAA No More

Since 2007, the MTC's Financial Institutions Working Group has examined whether the MTC's special financial institution apportionment regulations, which were adopted in 1994 in a cooperative effort between financial institutions, MTC member states and some non-MTC member states, are still the best method to apportion income. Under the existing MTC rules, loans are sourced for property factor purposes based on where the preponderance of the substantive contacts relating to a loan has occurred. This process considers five factors: solicitation, investigation, negotiation, approval and administration of the loan (the aptly named SINAA test). The Working Group considered the sourcing of loans and the viability of the SINAA test that is provided under existing MTC rules. The Working Group conveyed to the I/F Subcommittee that states believe the existing SINAA test—as well as the variations that have been proposed to the group—are too subjective to effectively administer. States expressed the view that there is not appropriate documentation available to audit compliance with the SINAA test and that auditors do not have the requisite knowledge to review compliance with it.

After presenting its findings, the I/F Subcommittee passed a motion without objection by any state (although four states abstained) directing the Working Group to abandon SINAA (and any variations of SINAA) and to instead reflect the property factor purely as a function of the taxpayer's real and tangible personal property. Under this methodology, loans would not directly be attributed to the property factor, but rather indirectly in relation to the taxpayer's real and tangible personal property. In addition, the I/F Subcommittee directed the Working Group to consider including within the proposed rule a "trigger mechanism," to determine the effective date of a state's adoption of the apportionment rule. The "trigger mechanism" could be based on time (e.g., after two years), on a given number of states adopting the new rule, or both.

Model Nexus Statute Working Group Receives the Green Light

The S/U Subcommittee established a Model Sales and Use Tax Nexus Statute Working Group in response to New York's enactment of a click-through nexus statute in 2008. Although initially directed only to consider click-through nexus, the Working Group subsequently expanded its scope to consider other potential nexus-creating activities (i.e., attributional and affiliate activities). At its March 2013 meeting, the Working Group was asked to address the following policy questions:

1. Must an in-state activity help to "establish and maintain a market" in order to create sales and use tax nexus in a state?

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2. Can sales and use tax nexus be established for a unitary business as a whole? Or must a determination of nexus be made on a corporation-by-corporation basis within the unitary group?
3. Would the Internet Tax Freedom Act have any impact on the associate nexus portion of the model statute?

The Working Group presented a report addressing these questions as well as providing a list of seven policy issues to be considered, available [here](#). The S/U Subcommittee unanimously approved a motion accepting the Working Group’s report and directing the Working Group to draft the model nexus statute. Discussion at the committee meeting indicated that New Mexico’s recent decision in *New Mexico Taxation and Revenue Dept. v. BarnesAndNoble.com LLC*, holding that the bookseller’s retail locations were significantly associated with the related website seller’s ability to establish and maintain a marketplace in New Mexico, will be looked to for guidance in drafting the model language.

Additional MTC Projects in the Pipeline

After reviewing a [survey](#) of state law regarding class action tax refund claims against sellers for the over-collection of transaction tax and the use of state false claims acts for the under-collection of tax, the S/U Subcommittee established a working group to prepare model language. The working group will look to the ABA Model Transactional Tax Overpayment Act as a starting point.

Finally, pending approval from the MTC Executive Committee, the S/U Subcommittee will begin to prepare guidance around implementing the simplification and notification requirements of the Marketplace Fairness Act.



If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

Michele Borens	202.383.0936	michele.borens@sutherland.com
Jonathan A. Feldman	404.853.8189	jonathan.feldman@sutherland.com
Jeffrey A. Friedman	202.383.0718	jeff.friedman@sutherland.com
Todd A. Lard	202.383.0909	todd.lard@sutherland.com
Carley A. Roberts	916.241.0502	carley.roberts@sutherland.com
Marc A. Simonetti	212.389.5015	marc.simonetti@sutherland.com
Eric S. Tresh	404.853.8579	eric.tresh@sutherland.com
W. Scott Wright	404.853.8374	scott.wright@sutherland.com
Douglas Mo	916.241.0505	douglas.mo@sutherland.com
Prentiss Willson	916.241.0504	prentiss.willson@sutherland.com
Pilar Mata	202.383.0116	pilar.mata@sutherland.com
Mary C. Alexander	202.383.0881	mary.alexander@sutherland.com
Andrew D. Appleby	212.389.5042	andrew.appleby@sutherland.com
Zachary T. Atkins	404.853.8312	zachary.atkins@sutherland.com
Madison J. Barnett	404.853.8191	madison.barnett@sutherland.com
Todd G. Betor	202.383.0855	todd.betor@sutherland.com
Scott A. Booth	202.383.0256	scott.booth@sutherland.com
Nicole D. Boutros	212.389.5058	nicole.boutros@sutherland.com
Christopher N. Chang	212.389.5068	christopher.chang@sutherland.com
Miranda K. Davis	404.853.8242	miranda.davis@sutherland.com

[Timothy A. Gustafson](#)
[Sahang-Hee Hahn](#)
[Saabir S. Kapoor](#)
[Charles C. Kearns](#)
[Jessica L. Kerner](#)
[Shane A. Lord](#)
[Suzanne M. Palms](#)
[Kathryn E. Pittman](#)
[David A. Pope](#)
[Maria M. Todorova](#)

916.241.0507
212.389.4028
202.383.0819
202.383.0864
212.389.5009
404.853.8091
404.853.8074
202.383.0826
212.389.5048
404.853.8214

tim.gustafson@sutherland.com
sahang-hee.hahn@sutherland.com
saabir.kapoor@sutherland.com
charlie.kearns@sutherland.com
jessica.kerner@sutherland.com
shane.lord@sutherland.com
suzanne.palms@sutherland.com
kathryn.pittman@sutherland.com
david.pope@sutherland.com
maria.todorova@sutherland.com