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June 22, 2009

Via Email

Dale Higer
Chair, NCCUSL Study Committee
111 N. Wabash Ave.
Suite 1010
Chicago, IL 60602

Re: NCCUSL Study Committee on Revision of UDITPA

Dear Mr. Higer:

I am writing on behalf of the Council On State Taxation (COST) to express our opposition to a request by the Uniform Division of Income for Tax Purposes Act (UDITPA) Study Committee for additional time to determine whether a rewrite of UDITPA should be commenced. COST appreciates the effort and time that the NCCUSL volunteers have invested in this project and recognizes that a decision not to go forward with a project is a difficult one. However, the simple fact is that nearly two and a half years of deliberations should have provided ample substantiation that a project to amend UDITPA is not a feasible undertaking. Six additional months of meetings and deliberations will do nothing to alter that reality.

About COST

COST is a non-profit trade association based in Washington, D.C. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce and today has an independent membership of over 600 major multistate corporations engaged in interstate and international business. COST's mission is to preserve and promote the equitable and nondiscriminatory state and local taxation of multi-jurisdictional business entities. COST has filed more than 150 *amicus curiae* briefs on state tax matters and regularly offers testimony and comments on pending state tax legislation and regulations.

COST's Involvement with the Study Committee

From the onset of this project, COST has participated in the UDITPA Study Committee process to the extent possible and has consistently expressed its view that given the plenitude of demographic, statutory, and political differences among states, a proposed revision of UDITPA is neither desirable nor practicable—and from the standpoint of uniform enactment, realistically unachievable.

COST does not oppose uniform state tax laws per se. In fact, COST is currently working to advance uniformity in the areas of nonresident personal income taxes, sales and use tax simplification, and business activity tax nexus. COST recognizes, however, that taxation is unique and different from other areas of law in which NCCUSL has long worked. The power to tax is the core of state sovereignty. State elected officials will always vigilantly guard their taxing authority and use it to seek advantage for their states, however they define advantage. As a result, we remain convinced that uniformity in state taxation cannot be achieved absent federal action.

A survey we conducted of our members shortly after this project commenced shows that those companies most affected by a rewrite have no desire for endorsing such a lengthy and complex project with such poor prospects for success. COST surveyed its Board of Directors, Policy Committee, and Lawyers Coordinating Committee on this issue, and 94% of respondents opposed the project to revise UDITPA. Follow-up surveys have produced similar results. It is significant to note that that opposition was based not on satisfaction with the status quo, but on the perceived inability to achieve uniformity of state tax statutes through a voluntary process.

Continuation of the Study Committee Cannot Change Reality

NCCUSL initiated its study of whether to rewrite UDITPA in February 2007. We recognize that the progress of this project has been somewhat unconventional, partly because many interested parties were unfamiliar with the NCCUSL process. However, throughout the process a great deal of attention has been paid to the feasibility of the project. Despite having heard on numerous occasions from those most impacted by UDITPA, the study committee believes that some interested parties have yet to express their views or perhaps might change their views. This belief seems to be partially motivated by a perception that evolving business structures and tax policies amongst the states would somehow make the project more palatable as time goes on. That is simply not the case. In fact, the futility of efforts to enact uniform state corporate income tax apportionment schemes like those embodied in UDITPA has long been acknowledged.

For example, in 1982 the U.S. General Accounting Office (GAO) issued a report to the House Ways and Means Committee concerning this issue¹. The GAO reviewed the failure of voluntary (state-led) efforts to achieve uniform state corporate income tax apportionment, beginning with the National Tax Association prior to World War I, continuing with UDITPA and

¹ GAO/GGD-82-38, "Key Issues Affecting State Taxation of Multijurisdictional Corporate Income Need Resolving," July 1, 1982.

moving then to the creation of the Multistate Tax Commission “as an alternative” to federal legislation. According to the GAO, progress toward uniformity has been “slow primarily because individual States have sought to have laws and regulations which embody their particular political and economic views.” The report finds that UDITPA and MTC rules have been adopted “on a piecemeal basis” or, in the case of 20 states, not adopted at all.² The GAO concluded that “only the Congress appears capable of striking the needed balance between the States’ right to tax and the Federal interest in interstate and international policy issues arising from State taxation.”³

Conclusion

It is remarkable how little has changed in the more than 25 years since the GAO report was issued. If anything, state corporate income tax apportionment regimes have become substantially more divergent in recent years. It is difficult to understand how an additional six months of deliberations could change the inevitable conclusion that a uniform apportionment scheme is not attainable through voluntary state action. Accordingly, we respectfully urge NCCUSL to table the UDITPA project.

Sincerely,



Douglas L. Lindholm, Esq.

cc: COST Board of Directors
Mr. John A. Sebert, NCCUSL Executive Director
Honorable Martha Lee Walters, NCCUSL President
Robert A. Stein, Chair, NCCUSL Executive Committee
Michael Houghton, Chair, NCCUSL Scope and Program Committee

² Ibid, p. 11.

³ Ibid, p. v.