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January 10, 2008

Via Email

Mr. Charles A. Trost, Esq.
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Re: Opposition to NCCUSL Revision of UDITPA

Dear Charlie:

I am writing on behalf of the Council On State Taxation (COST) to urge you to table the NCCUSL project to amend the Uniform Division of Income for Tax Purposes Act (UDITPA). COST appreciates that some time has been invested in this project and that a decision to table a project is a difficult one. However, it is highly unlikely that the myriad of concerns that states and businesses will undoubtedly raise throughout the process can be satisfactorily reconciled by amendments to UDITPA.

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.

UDITPA Rewrite Fails NCCUSL’s Constitutional Purpose

Article 1.2 of the constitution of the National Conference of Commissioners on Uniform State Laws (NCCUSL) states: “It is the purpose of the Conference to promote uniformity in the law among the several States on subjects as to which uniformity is desirable and practicable.” Given the plenitude of demographic, statutory and political differences among states, it is quite clear that the proposed revision of UDITPA is neither desirable nor practicable – and from the standpoint of uniform enactment, realistically unachievable.

With respect to desirability, it has been our experience that elected state policymakers have little or no interest in uniformity in the area of corporate income tax apportionment. In fact, governors and state legislatures regularly enact corporate income tax measures that distinguish their state from their sister states. The inherent desire for state elected officials to differentiate their states so as to develop an attractive climate for jobs and investment is in direct conflict with the interest of certain tax administrators to enact uniform corporate income tax apportionment laws.

Of equal significance, businesses that would be affected by a revision to UDITPA have expressed no desire for endorsing such a lengthy and complex project with such poor prospects for success. COST recently surveyed its Board of Directors, Policy Committee and Lawyers Coordinating Committee on this very issue, and 94% of respondents opposed the project to revise UDITPA. 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.

With respect to practicality, efforts to achieve uniformity in state tax law via voluntary model statutes have been less than successful by any measure. Few states have historically adopted the multitude of uniform state tax laws offered by NCCUSL, the Multistate Tax Commission or other bodies, and none of these uniform laws has ever been broadly adopted. The low adoption rate of such statutes is primarily due to the inability of such laws to be crafted in such a way as to be uniformly embraced by individual state governors or legislatures.

The most successful example to date of truly uniform state tax law has been the Streamlined Sales and Use Tax Agreement (SSUTA). After eight years of development and action, seventeen states have come into full compliance with SSUTA. However, amendments were recently made to the SSUTA that undercut the original goal of simplification at the behest of larger states that have thus far not enacted compliance legislation. Moreover, it is critical to recognize that even this limited movement toward uniformity has only been possible because the states perceive that tens of billions of dollars in use taxes are currently going uncollected precisely because of the states' lack of uniformity in the sales and use tax area. Even with this powerful incentive, and with the strong backing of the business community, including COST, uniformity has not yet been achieved and will likely never be achieved absent federal action.

The experience with the SSUTA points to a critical flaw common to all uniform state tax laws that have been put forward to date: there is no "one size fits all" solution for broad issues of taxation that states would voluntarily adopt. In fact, the only areas in which uniformity in state tax law have been achieved are those where the Congress has enacted federal law mandating such uniformity. Although some of these, such as the International Fuels Tax Agreement, began as voluntary state efforts, and others, such as the Mobile Telecommunications Sourcing Act, were developed through joint industry-state negotiations, it was only through Congressional action that uniformity was made possible.

Finally, it appears inevitable that the scope of the current NCCUSL project would be broadened beyond the original UDITPA to include "third-rail" type topics such as mandatory unitary combined reporting and nexus standards. The inclusion of these topics further decreases the likelihood that the project would result in a product that could ever be uniformly adopted by the states.

Even if NCCUSL were able to arrive at a "brokered" compromise on these and other issues, such a compromise would never be uniformly adopted. Many taxpayers and tax administrators would advocate only for those portions of a revised UDITPA that satisfied their own interests. Further, it is likely that different sets of taxpayers would have different preferences, and it is clear that taxpayer and tax

administrator interest groups would vary dramatically from state to state. This reality conspires against uniform adoption of any work product.

Conclusion

COST does not oppose uniformity 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, uniformity in state taxation cannot be achieved absent federal action. We admire NCCUSL for its willingness to tackle difficult subjects, but with regard to the issues addressed by the UDITPA project, NCCUSL fails to meet its constitutional purpose of promoting uniformity where uniformity is desirable and practicable. Accordingly, we respectfully urge NCCUSL to table the UDITPA project.

Sincerely,



Douglas L. Lindholm, Esq.

Cc: COST Board of Directors
NCCUSL Executive Committee
NCCUSL UDITPA Drafting Committee
Mr. John A. Sebert, NCCUSL Executive Director
Mr. Michael R. Kerr, NCCUSL Legislative Director/Legal Counsel
Ms. Michelle Clayton, NCCUSL Senior Counsel, Legislative/Scope & Program
Mr. Prentiss Willson, Jr., Esq.
Professor Richard D. Pomp, Esq.