

Tax Matters

The Newsletter of the New Mexico Tax Research Institute

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IN THIS ISSUE OF *TAX MATTERS*:

- **6th Annual Legislative Outlook Coming December 15th – Register NOW!**
- **Tax Committee Looking at Tax Legislation Endorsements and Consensus Revenue Forecast Coming**
- **Federal Activity Impacting the States**
 - **Sales Tax Collection and Workforce Mobility Discussed and Moving?**
- **Knick Knacks**
 - **Tax and Rev Proposes New Regulation**
 - **New Mexico Publishes New Gross Receipts Tax and Payroll Withholding Schedules**
 - **Texas Doesn't Hate All Taxes**
- **Tax Quotables**

SIXTH ANNUAL NMTRI LEGISLATIVE OUTLOOK CONFERENCE

REGISTER NOW for the Sixth Annual New Mexico Tax Research Institute Legislative Outlook Conference: December 15 at the **Hotel Albuquerque at Old Town**. Members of NMTRI and government/academics may attend and have lunch for \$36.00 per person. Not-yet-member attendees may attend and have lunch for \$45.00. Reservations and payment should be received no later than December 12, 2011. The program will begin promptly at 8:30 a.m. (registration begins at 8:00). Continuing Professional Education (CPE) credits are available (currently 4 hours but the agenda is subject to change).

DECEMBER 15, 2011



The program will include:

- a revenue/budget overview by Legislative Finance Committee (LFC) Director David Abbey,
- perspectives of influential legislators,
- comments from interested groups on the current topics,
- discussion of the potential for general state tax increases and property tax lightning.

Take the opportunity to hear from these elected officials who drive New Mexico tax policy:

- House Minority Leader and Taxation and Revenue Committee (“HTRC”) and interim Revenue Stabilization and Tax Policy Committee member Tom Taylor
- Chairman of the Legislative Finance Committee and Senate Finance Committee, John Arthur Smith
- Vice-Chair of the Legislative Finance Committee and House Appropriations Committee Luciano “Lucky” Varela
- House Minority Whip, Taxation and Revenue Committee and interim Revenue Stabilization and Tax Policy Committee member Don Bratton

- Albuquerque’s interim Revenue Stabilization and Tax Policy Committee member, Senator Tim Keller

Interested stakeholders include:

- Beverlee McClure - the Association of Commerce and Industry
- Bill Jordan – New Mexico Voices For Children
- Paul Gutierrez - the Association of Counties, and
- Terri Cole - Greater Albuquerque Area Chamber of Commerce.

Department of Finance and Administration Secretary-Designate Dr. Thomas E. Clifford will be presenting on relevant tax/budget matters and the administration’s perspectives, and the Governor’s Chief of Staff Keith Gardner may join us again at lunch to offer up his thoughts and perspectives on current events and the upcoming session.

Preliminary results of the New Mexico Tax Competitiveness Study will also be discussed, and Albuquerque Economic Development’s President Gary Tonjes will discuss economic development in New Mexico during tough times. An evolving draft agenda can be found [here](#).

Registration is currently available through the NMTRI website (www.nmtri.org under *Conferences* click *Upcoming Events*, or click [here](#)), or you can call (505) 842-5833.

Don’t miss your chance to hear from your legislators and other interested stakeholders and contribute to good tax policy in New Mexico. Seriously – REGISTER NOW!



Tax Committee Looking at Endorsements and Consensus Revenue Forecast

Revenue Stabilization and Tax Policy Committee Hears Proposals

The interim Revenue Stabilization and Tax Policy Committee (“RSTP”) met last week and heard proposed legislation for consideration for committee endorsement. A proposal from last year to create a gross receipts tax deduction for dialysis services was revisited, as was a proposal to exempt plug-in electric drive vehicles from the motor vehicle excise tax, while also including them, perhaps redundantly so, in the definition of “alternative energy vehicle” for purposes of the Alternative Energy Product Manufacturers Tax Credit.

Albuquerque’s Senator Keller proposed two measures: one creating a \$300 personal income tax credit for hiring New Mexico college graduates and another modifying the Investment Credit Act to act in what appears to be a corporate headquarters – allowing the credit on capital investments for local businesses or those who relocate 80% of their employees to New Mexico. However the expanded credit on capital investment can only be carried forward five years, must be paid back within five years of when taken, and is effectively capped at \$102,500. So, it appears to effectively be a small local business short term interest free loan program for those with sufficient tax liability (“tax appetite”) to take advantage.

Other proposals included tightening of the High Wage Jobs Tax Credit, sunset of gross receipts tax healthcare deductions and the associated hold harmless distribution to local governments, a

proposal to create transportation reinvestment zones which would allow local governments to dedicate gross receipts tax increments to construction projects (similar to TIDD's), and proposal to phase-out the food and medical hold harmless distributions to local governments over time. Other presentations included changes to the administration of delinquent property taxes, an LFC report on healthcare tax expenditures, and a proposal to extend the county local option gross receipts tax increment for education.

Seven of the proposals above can be found on the legislative website [here](#).

Tax Committees Meeting in December

Both the Legislative Finance Committee ("LFC") and RSTP will meet again in December. LFC is meeting in Room 322 of the State Capitol for a week in Santa Fe on December 5-9. Of particular interest, on Monday they'll hear the revised consensus revenue forecast, as presented by Dr. Tom Clifford, Secretary Designee of the Department of Finance and Administration, Secretary Demesia Padilla of the Taxation and Revenue Department, and Elisa Walker-Moran, Chief Economist for the LFC. That forecast will be the last one prepared prior to the upcoming legislative session, and will determine the fiscal constraints (i.e. anticipated revenues) the legislature has to work with. Also presenting that day are Tax and Rev's Secretary Padilla on their legislative agenda, and NMTRI's Richard Anklam will discuss the history and preliminary results of the New Mexico Business Tax Competitiveness Study currently in progress. The LFC agenda can be found on the legislative website [here](#).

Later in the month on December x-y, the Revenue Stabilization and Tax Policy Committee will meet. They too will hear a presentation on the December revision of the consensus revenue forecast, as well as more tax proposals. Customarily, this is also the meeting where the committee decides which proposals, if any, to endorse, and solicits members to volunteer to carry those proposals in the upcoming session. When finalized, the RSTP agenda can be found [here](#) on the legislative website.



Federal Activity Impacting States

Sales Taxes and the Commerce Clause

In addition to the Streamlined Sales Tax Project ("SSTP") bill, H.R. 2701/S. 1452 or the *Main Street Fairness Act*, (on the Library of Congress website [here](#)) two similar proposals have been introduced that would have similar effects in allowing states to require out-of-state businesses without nexus, or "remote sellers," to collect sales or use taxes on sales into the states, but not necessarily requiring SSTP compliance or participation.

This morning, the U.S. House of Representatives Judiciary Committee held hearings on the question of whether it should pass legislation granting state authority to require remote sellers to collect sales tax. In addition to the Main Street Fairness Act, the other related bills are: H.R. 3179, the *Marketplace Equity Act*, (on the Library of Congress website [here](#)) and S. 1832, the *Marketplace Fairness Act* (on the Library of Congress website [here](#)).

Witnesses at the hearing included a small business owner, representatives from Overstock.com, Amazon.com, eBay, and Indiana State Sen. Luke Kenley (representing the Streamlined

Governing Board). All of the witnesses supported some form of legislation, although some more than others. Of the historically opposed e-retailers, Amazon.com appears to have changed its position the most, asserting that the means to comply through technology now exists to allow for collection and payment of tax. The other e-retailers attempted to frame the controversy and disagreement as one between the e-retailers and the big box retailers, who the e-retailers presume are behind the recent swell of interest in this issue. However, small business pointed out that they understood that they had no choice but to compete with the big box retailers, but were much more concerned about the untaxed competition from the e-retailers. Committee members expressed concerns about the “level playing field,” particularly in light of accounts that would-be customers are walking into local stores to look at merchandise so they can then go home and order the same merchandise over the internet to avoid paying tax.

The committee appeared to favor the notion of passing some sort of legislation. The conversation will now likely turn the appropriateness and appropriate size of small business exceptions, and whether to require SSTP participation. Stay tuned, this one is just getting started...

And other stuff...

While H.R. 1860/S. 971, or the *Digital Goods and Services Tax Fairness Act*, (on the Library of Congress Website [here](#)) appears to have lost traction, H.R. 1864 or the *Mobile Workforce State Income Tax Simplification Act* (on the Library of Congress website [here](#)) was recently passed out of the House Judiciary Committee over the objections of two members who noted that the Multistate Tax Commission had recently approved a model statute for the states. The House proposal limits states’ abilities to impose income tax or withholding requirements for certain non-resident workers not in a state for more than 30 days each year. The goal of the act is to limit compliance burdens on employers and workers. State laws, policies and enforcement of income tax and withholding requirements vary widely from state to state with respect to when non-resident employees are subject to tax and employers are responsible for income tax withholding. Compliance can present significant burdens and risks to employers and employees. Many companies set internal policies on the subject, and hope they aren’t challenged on audit. The proposal enjoys broad bi-partisan support, as well as support from the business community, and even the American Institute of Certified Public Accountants (AICPA).

While the bill was passed out of committee, there is no guarantee that the bill will be sent to the floor for a vote. Constitutional questions have been raised (i.e. is Congress poised to exercise its Commerce Clause authority to regulate interstate commerce, or is attempting to limit a state’s ability to tax income earned within its own borders beyond that authority?). New York, clearly with the most to lose, is the most adamant in opposition. Ironically, their aggressiveness, given their reliance on income taxes, has in part spurred the current effort. State governments in general also still have administrative concerns such as a lack of sufficient record keeping requirements that they believe still need to be addressed. More changes and compromise could be in the future for this proposal as well.

[NMTRI note: While the disparity among various state rules, and downright absence of them in many cases, create risk and uncertainty for employers and employees, the bill in Congress also presents an issue of federalism in that it creates federal limitations on the right of states to tax

those within their borders. Under the federal bill or the MTC draft uniform statute, New Mexico would lose income tax revenues from those non-residents who work for less than 20 or 30 days (but more than 15, the current limit), but would gain the tax credits currently given to residents for taxes paid to other states, where they work 20 days or fewer as non-residents.

Surprisingly, New Mexico is one of the 17 states already providing a reasonable exception from its withholding and income tax obligations for employers and employees, where employees are physically in the state for 15 or fewer days. Neighboring Arizona provides a 60-day exception. Oklahoma provides a withholding exception for wages under \$300 paid in any calendar quarter. Such rules do not appear to be problematic for the states, on the contrary it simplifies their compliance efforts as well and lessens compliance burdens for all. In the ideal case, federal intrusion would be avoided and the states would act on their own to address this problem.]

KNICK KNACKS

New Mexico Proposing One New Tax Regulation

The New Mexico Taxation and Revenue Department (“NMTRD”) has set a public hearing for a proposed regulation on December 15, 2011, in the Secretary’s conference room, located on the third floor of the Joseph M. Montoya Building, 1100 St. Francis Drive, Santa Fe, New Mexico. The hearing is scheduled to begin at 9:30 am.

The proposal narrows the scope of the recent regulatory requirement that all taxpayer’s file their gross receipts, compensating, income tax withholding, interstate telecommunications, and leased vehicle gross receipts taxes electronically, unless specifically granted special dispensation by the NMTRD. The proposal would create an exception to the mandatory requirement for taxpayers whose aggregate average monthly tax liability in the preceding calendar year was \$1000 or less. Other taxpayers may still request an exception to the rule under certain narrow circumstances such as disability or sudden death of the accountant who otherwise fulfills the electronic filing function.

Copies of the proposed regulation can be found on the New Mexico Register website or on the Taxation and Revenue Department’s website [here](#).

[NMTRI note: this change is intended to be taxpayer friendly by eliminating the filing requirement for small businesses. The downside is to the NMTRD who will likely manually process more returns as a result, something they were previously trying to avoid. Although some might prefer to see the Department go further, it’s not controversial, so unless highly interested, we suggest attending our 6th Annual Legislative Outlook Conference rather than this hearing.]

NM Publishes New Gross Receipts Tax Rate and Withholding Schedules

The New Mexico Taxation and Revenue Department has published the new gross receipts tax rates, effective January 1, 2012. Rate changes remain few, with most major municipalities remaining unchanged. Taos Ski Valley is holds the title for highest tax rate at 8.6875%, but closely followed by Ruidoso, Red River, Espanola, the El Prado water and sanitation district, and Taos. Recently incorporated Anthony is busy trying to enact local option taxes, with a rate already up to 7.25%. The new rate schedules can be found on the NMTRD website [here](#). Also recently published are the new income tax payroll withholding tables, which change this year

only to reflect any federal changes to standard deductions and personal exemptions. The new withholding tables can be found on the NMTRD's website [here](#).

Texas Doesn't Hate All Taxes

In a 7-2 opinion handed down on Monday, the Texas Supreme Court ruled that the Texas Margins Tax, a quasi-business income tax, does not violate the Texas constitution. Texas has a constitutional prohibition on the imposition of personal income taxes. The margins tax, which replaced an earlier Texas franchise tax, differed in part in that it was imposed on most business forms other than sole proprietors, including partnerships, LLC's, LLP's and Subchapter S corporations. The earlier tax was only imposed on Subchapter C corporations. The primary question before the court was whether or not taxing a "pass through entity," in this case a limited partnership, was an unconstitutional tax on the income of the individual partners. The court found that the tax was in fact a constitutional tax on the business entity. The dissent, in this case, was only as to whether the legislature could require the Supreme Court to take original jurisdiction of the matter.

[NMTRI note: Texas changed its franchise tax because it could essentially be planned around on a napkin, revenues were inadequate and falling, and it served only to discourage doing business in the form of a C-corporation. (Not to mention that the Supreme Court ordered the state to reform its school funding property tax system.) The current tax is interesting, but still inadequate, not generating near the anticipated revenue, but representing an effort to tax business activity more comprehensively. The drafters anticipated the legal challenge, requiring in statute that such challenges go directly to the Texas Supreme Court – the issue in the dissent]

TAX QUOTABLES ('cause we know you needed more than one):

Taxes are not good things, but if you want services, somebody's got to pay for them so they're a necessary evil.

~ *Michael Bloomberg*

The term "tax humor" is no doubt an oxymoron to many people; to the more cynical, it is an apt description of the entire tax code.

~ *John F. Iekel*

It's tax time. I know this because I'm staring at documents that make no sense to me, no matter how many beers I drink.

~ *Dave Barry*



COMMENTS: Your suggestions and comments on this newsletter, the conferences (past or future), the Distinguished Lectures Series, our research or any aspect of NMTRI's operation and programs are welcome. Please send them to richard.anklam@nmtri.org, call 505-269-6791 or mail them to P.O. Box 91657, Albuquerque, New Mexico 87199-1657. We genuinely solicit your input and thank you for your support.



Join NMTRI today!

"The power to tax involves the power to destroy" - McCulloch v. Maryland, 17 U.S. 316 (1819), Chief Justice John Marshall.

"Taxes are what we pay for civilized society" Campaña General de Tabacos v. Collector, 275 U.S. 87, 100 (1927), Justice Oliver Wendell Holmes, dissenting.