Information Sharing by Revenue Authorities

TEI Charlotte Chapter Meeting

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November 4, 2016
Agenda

- Background: Why is it Important?
- Statutory Framework for Taxpayer Confidentiality
  - IRS Statutes
  - Permissible Disclosure
  - Information Sharing
  - State Examples
- Information Sharing Agreements
  - With the IRS
  - State Examples
  - Other Agreements: FTA, MTC, SEATA, NESTOA
- Other Public Disclosure Trends
  - Trend Toward Reporting and Publication of Incentive Information
  - Potential for Broad Disclosure of State Tax Returns
  - Potential for Disclosure in Tax Litigation
Background

- State Tax Authorities are increasingly requesting information not normally contained in a standard corporate income tax return
- Furthermore, there are increased disclosures of information in initial filings
- Taxpayers may also provide additional information during the course of any audit
- Other programs (e.g., amnesty, etc.) provide additional forums for taxpayers to provide even more information to the state
- Growing trend to share this information with other state taxing authorities
Background: History of Confidentiality

- *Flint v. Stone Tracy Co.*, 220 US 107 (1911). The filing and public inspection of corporate income tax returns does not violate the unreasonable search and seizure clause of the Fourth Amendment or the self-incrimination clause of the Fifth Amendment. *Id.* at 177.

- Constitutional provisions do not protect tax returns and taxpayer information forming the basis of returns from disclosure.

- However, most states have adopted statutes and regulations limiting the ability to disclose taxpayer information.

- The limitations to disclosure do not preclude, and in many cases expressly authorize, information sharing among tax authorities including other states and the MTC.
Statutory Framework for Taxpayer Confidentiality
Statutory Framework: IRC § 6103

- **General Rule:** Returns and Return Information are confidential § 6103(a)
- **Definitions.** § 6103(b)
  - **Return** is broad to include any information submitted in compliance with the I.R.C.
  - **Return Information** includes the taxpayer’s identity, the amount of income, deductions, etc. *and* documents relating to a written determination that is otherwise not public (i.e. – litigation)
    - Allows release of data without taxpayer’s identity so long as Secretary does not believe it will harm assessment, collection, or enforcement of revenue laws.
  - **Taxpayer Identity** is the name of the person, mailing address, taxpayer ID, or a combination thereof.
- **Exceptions to General Rule:**
  - Disclosure to Authorized Person § 6103(c)
  - Disclosure to State tax officials and State and local law enforcement agencies § 6103(d)
  - Disclosure to persons having material interest § 6103(e)
  - Disclosure to Congress, President, federal employees/officers § 6103(f, g, h, i)
- **Safeguards.** § 6103(p)
  - Establishes the procedures and recordkeeping requirements for the confidential tax information and requires any entity receiving such information to comply with standards
  - Required annual reporting and audits, and regulations regarding data protection
Statutory Framework: Protected Information

- Generally state laws provide that taxpayer information is protected from disclosure following the IRS model and statute.
- States often have broad protections.
- Taxpayer information may include:
  - Tax Returns
  - Information provided through audit
  - Correspondence between the taxpayer and state
  - Taxpayer identifying information
  - Tax or business applications
  - Information requested by DOR
  - Settlement agreements
States often have broad exceptions that allow the disclosure of confidential information in certain circumstances or to certain parties, including disclosure:
- To other agencies of the state;
- To other states or localities;
- Because confidentiality has been waived;
- Because permission for disclosure has been granted;
- Comply with a court order;
- To the IRS.

Exceptions are generally interpreted narrowly.
Statutory Framework: State Statutes

- Statutes often define the types of information a state may share with other states

- Examples:
  - Typical information includes: tax returns/reports, registration applications, information obtained through audit, filing/non-filing status, and/or taxpayer’s name, address, FEIN
  - Other states permit more broad disclosure
    - E.g., Washington defines tax information as including the nature, source, or amount of the taxpayer's income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability deficiencies, over assessments, or tax payments, whether taken from the taxpayer's books and records or any other source. R.C.W. § 82.32.330(1)(c)
Statutory Framework: NC Example

- North Carolina (N.C. Gen. Stat. § 105-259)
  - Over 40 exceptions to the disclosure exception
  - Disclosure is permitted:
    - To comply with a court order, an administrative law judge's order in a contested tax case, or a law.
    - Review by the Attorney General or a representative of the Attorney General.
    - To exchange the following types of information with a tax official of another jurisdiction if the laws of the other jurisdiction allow it to provide similar tax information to a representative of this State:
      - Information to aid the jurisdiction in collecting a tax imposed by this State or the other jurisdiction.
      - Information needed for statistical reports and revenue estimates.
Standard Disclosure Language in Settlement Agreements:
“The parties agree that the terms of this Agreement are confidential and that neither the Department, Taxpayer, or the officers, directors, employees or representatives of Taxpayer Group shall disclose the terms thereof without prior written approval from the other party unless required to do so by law, court order or pursuant to the terms of existing agreements between the Department and other governmental agencies. Either party may disclose this Agreement if necessary to enforce any term herein. Notwithstanding the foregoing conditions of this paragraph, Taxpayer may disclose this settlement and its terms to its agents, employees and other representatives to the extent that they have a need to know (e.g., one of the company’s accountants).”
Information Sharing Agreements
Information Sharing Agreements

- FTA Uniform Exchange of Information Agreement
- SEATA Exchange
- Memorandum of Understanding between
  - IRS and state and local governments
  - States and the Multistate Tax Commission
- Multistate Tax Commission’s State Intercompany Transaction Advisory Service Committee (SITASC)
  - Based on FTA Agreement
  - Information to be exchanged includes returns, audit reports, nexus questionnaires, workpapers, proprietary taxpayer information
- Streamlined Sales Tax information sharing agreement
Information Sharing Agreements: IRS & States

- IRC § 6103(d) authorizes the IRS to share tax information with state tax agencies for tax administration purposes; comparable state statutes allow the states to share their information with the IRS
  - “any State agency, body, commission, or its legal representative, which is charged … responsibility for administration of State tax laws for the purpose of, and only to the extent necessary in, the administration of such laws”
  - The IRS shares information with all 50 states in accordance with written agreements generally known as Fed/State agreements

- IRC § 6103(n) authorizes the IRS to share tax information with any person to the extent necessary in connection with providing services for purposes of tax administration (including municipalities)

- States can enter into a Memorandum of Understanding with the Multistate Tax Commission (MTC) that would allow MTC to obtain information from, and share information with, the IRS
  - The MTC Joint Audit Program states executed this Memorandum of Understanding with the MTC
Information Sharing Agreements: State Statutes

- State statutes on information typically follow IRC § 6103, with possible exceptions (e.g., tax incentives) and/or considerations for state constitutional provisions

- **Statutory similarities**
  - Exception to general taxpayer confidentiality rule;
  - Other state’s representative must be authorized;
  - Reciprocity; and/or
  - Tax purposes only

- **Examples**
  - North Carolina: N.C. Gen. Stat. § 105-259(b)(3);
  - Georgia: O.C.G.A. 48-2-16;
  - New York: N.Y. Tax Law § 202(3);
North Carolina and Washington Information Sharing Agreement Provides:

- The parties hereby agree to exchange tax returns and tax return information to the extent permitted by their state laws

- Return information includes “any other data received by, recorded by, prepared by, furnished to or collected by the agency with respect to a return or the determination of the existence or possible existence of a liability.”
Information Sharing Agreement: FTA

FTA Uniform Exchange of Information Agreement

- Executed in 1993
- Currently all states (except New Mexico and Nevada), New York City DC, and the MTC are signatories to the Agreement
- Applies to the exchange of information which could reasonably be considered useful to other parties for the facilitation of tax administration
- Prohibits exchange of information received from the IRS unless authorized by the Service
- Contains strict confidentiality provisions
- Establishes procedures for exchange of information
- FTA is a nonprofit assisting state tax administrators
  - Does not have access to any taxpayer information
Multistate Tax Compact (Article VIII)

- Provides authority for exchange of taxpayer information for multistate audits
- If MTC participates in audit, MTC shall have access to and may examine, accounts, books, papers, records, and other documents and any relevant property or stock of merchandise
- Information obtained in an MTC audit is confidential and available only for tax administration
- Availability must be through authorized agencies and persons and is subject to state laws
SEATA Information Exchange Agreement

- Signed in July 1989 by Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, and West Virginia

- Originally to address use tax on purchases made from out of-state sellers
  - Encouraged business to voluntarily register to collect use tax on interstate sales
  - Allowed stated to exchange audit information for untaxed sales

- In 1991, expanded to include corporate income tax, and all other state taxes
  - Goal to facilitate compliance across state boundaries
Information Sharing Agreements: NESTOA

- North Eastern State Tax Officials Association (NESTOA) Agreement to apply uniform criteria for determining individual taxpayer’s domicile
- Established a system of interstate sharing of data and compliance techniques in the area of domicile and statutory residencies
- Uniform rules in the sourcing of income and the calculation of credits for taxes paid to other states
Information Sharing Agreements: Summary

- What are states sharing?
  - Taxpayer returns (as broadly defined)
  - Determination results
  - Filing (or non-filing) status

- Agreements limit purposes for which exchanged information can be used (tax only, or more limited)
  - For what purposes?
    - More efficient auditing of multistate taxpayers (ex: MTC)
    - Compliance across state boundaries (ex: SEATA)
    - Identify non-filers or discrepancies on returns (ex: IRS MOUs)

- Reciprocity Required

- Subject to state law limitations
  - Cannot share information obtained from other sharing agreements

- Procedures and safeguards
Other Public Disclosure Trends
Other Public Disclosure Trends: Reporting & Publication of Incentive Information

- 46 states and the District of Columbia provide recipient disclosure for at least one key subsidy program (e.g., tax credits, enterprise zones, sales tax exemptions), according to a recent study

- **Recent Legislation**
  - **California** A.B. 2900 (enacted 9/24/2016) – expands types of information publicly disclosed online for the California Competes tax credit program
  - **Alabama** S.B. 119 (enacted 5/21/2015) – new annual report detailing incentives information
  - **Kentucky** H.B. 17 (enacted 4/25/2014) – new online database of incentives and participants
  - **Mississippi** H.B. 1365 (enacted 4/23/2014) – new annual report detailing incentives and participants
Washington Enacted Legislation: Tax Incentive Public Data

On June 20, 2013, S.B. 5882 was enacted subjecting the amount claimed by a taxpayer for any “new tax preferences” to public disclosure

- On September 14, 2016, the Washington Department of Revenue rolled out an online interactive tool to allow the public and policy makers to share data about tax preferences and incentives
  - Functionality includes the ability to see which businesses have taken tax incentives and obtained the greatest benefit in any given year
  - Includes data from calendar years 2004 through 2015
Other Public Disclosure Trends: Reporting & Publication of Incentive Information

Washington Tax Incentive Public Disclosure [http://dor.wa.gov/content/findtaxesandrates/taxincentives/]

Tax incentive annual survey data by business

Businesses taking Incentives in 2015

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GASB Statement No. 77

- On August 14, 2015, the Governmental Accounting Standards Board (GASB) issued Statement No. 77, final guidance on requirements for state and local government disclosures on “tax abatements”
  - Includes rules for reporting programs under which governments agree to abate taxes, cost, and other commitments tied to the agreements
  - “Tax abatement” is “a reduction in tax revenues that results from an agreement between one or more governments and an individual or entity in which (a) one or more governments promise to forgo tax revenues to which they are otherwise entitled and (b) the individual or entity promises to take a specific action after the agreement has been entered into that contributes to economic development or otherwise benefits the governments or the citizens of those governments”
Other Public Disclosure Trends: Potential for Broad Disclosure of State Tax Returns

- Broad disclosure of tax-related information has not been as widespread as public reporting of state subsidy programs, but some states have sought company-specific disclosure of certain tax return information.
  - **Wisconsin**: Requires the Wisconsin Department of Revenue to furnish the amount of state income tax, franchise tax, or gift tax reported by an individual or corporation to a requesting Wisconsin resident. Wis. Stat. §§ 71.78(2), -(3)
  - **Massachusetts**: Requires certain banks, insurance companies, and publicly traded companies doing business in Massachusetts to file annual reports to the Secretary of State. The reports are available for public inspection by request after expunging the names and addresses of the companies.
    - **Information reported includes**: Massachusetts taxable income, total excise tax due, non-income excise tax due, gross receipts of sales, either gross or profit of credit carryovers to future years, income subject to apportionment, and the amount of each credit taken against the excise tax due. Mass. Gen. L. ch. 62C, § 83
Other Public Disclosure Trends: Potential for Broad Disclosure of State Tax Returns

Oregon Proposed Legislation

- In 2016, the Oregon State Legislature proposed H.B. 4035, which would require the Oregon Department of Revenue to disclose certain tax return information to the Legislative Revenue Office, which would make that information public through a report
  - Applies to C corporations subject to Oregon corporate excise tax with an Oregon apportionment less than 100%
  - Report would include a ranking of “the largest 100 Oregon corporate excise taxpayers that claimed at least $____ in corporate excise tax credits” for the following categories:
    - Oregon sales;
    - Oregon taxable income;
    - Total amount of corporate excise tax credits claimed under Oregon law; and
    - Oregon tax liability
- *Bill did not pass out of committee in 2016 legislative session*
Some state tax tribunals and courts allow taxpayers to designate material that is confidential, such as returns, so that they do not become public record
- E.g., Indiana Tax Court

Some state tax tribunals and courts have no mechanism to shield confidential taxpayer information from becoming part of the public record
- E.g., Massachusetts Appellate Tax Board
Other Public Disclosure Trends: Potential for Disclosure in Tax Litigation

Harley-Davidson, Inc. v. Dep’t of Revenue, No. TC MD0408097A (Or. Tax 2006)

- The Oregon Dep’t of Revenue requested business records in order to determine if Harley-Davidson was protected from taxation under P.L. 86-272.
  - Harley claimed it did not want trade secrets, customer lists and employee information to become public
  - The Department indicated it would, if asked, share the requested information with other states and the MTC
- The Tax Court noted under OR law the information could only be shared with another state “for tax purposes,” and only if the state “has a provision of law which meets the requirements of any applicable provision of the IRC as to confidentiality”
- The Tax Court denied Harley’s motion for protection stating it had not demonstrated that the request would cause “annoyance, embarrassment or oppression” within the meaning of OR law
Questions?

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