

MINUTES
SENATE LOCAL GOVERNMENT & TAXATION COMMITTEE

DATE: Wednesday, February 14, 2018

TIME: 3:00 P.M.

PLACE: Room WW53

MEMBERS PRESENT: Chairman Johnson, Vice Chairman Bayer, Senators Siddoway, Rice, Vick, Patrick, Burgoyne, and Nye

ABSENT/ EXCUSED: Senator Hill

NOTE: The sign-in sheet, testimonies and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

CONVENED: **Chairman Johnson** called the meeting of the Local Government and Taxation Committee (Committee) to order at 3:01 p.m.

GUBERNATORIAL APPOINTMENT: **Ken Roberts of Donnelly, Idaho was appointed to the Multistate Tax Commission to serve a term commencing January 29, 2018.**

Chairman Johnson welcomed Ken Roberts, Chairman, Idaho State Tax Commission (Commission) to the podium. **Commissioner Roberts** explained that the Multistate Tax Commission (MTC) is an intergovernmental state tax agency that facilitates the equitable administration of tax laws to multistate and multinational enterprises. There are approximately 12,700 multistate companies that file taxes in Idaho. **Commissioner Roberts** stated that Idaho Code § 63-3703 requires the Governor, with consent from the Senate, to appoint one representative to the MTC. Idaho Code § 63-3706 requires a Multistate Tax Compact advisory committee, composed of representatives from various state agencies, to meet annually to review multistate taxation issues and present recommendations to the Idaho Legislature and the MTC.

Senator Siddoway asked Commissioner Roberts what issues he will bring, regarding Idaho's tax system, to the MTC. **Commissioner Roberts** stated that market sourcing is an emerging national issue; he indicated his intention to bring together legislators, Commission staff, and tax professionals to determine Idaho tax policy in this regard. **Senator Siddoway** then asked if issues pertaining to Idaho conformity, specifically regarding pass-through entities, fall within the purview of the MTC. **Commissioner Roberts** responded that tax applied to pass-through entities does not because this type of income is reported on individual tax returns.

Senator Nye reported that the MTC has filed a brief in support of South Dakota in its Supreme Court petition in the *Wayfair* case. He asked Commissioner Roberts if he will have authority to weigh in on these types of cases. **Commissioner Roberts** replied that statute grants authority to the Idaho member of the MTC to represent the State. He highlighted the importance of the confirmation process in this regard.

Senator Burgoyne asked how MTC member voting is determined. **Commissioner Roberts** stated that each state is entitled to one vote.

Chairman Johnson asked Commissioner Roberts about potential conflicts of interest relating to his appointment. **Commissioner Roberts** did not foresee any conflicts of interests. **Chairman Johnson** indicated the confirmation vote will occur the following week.

**PASSED THE
GAVEL:**

Chairman Johnson passed the gavel to Vice Chairman Bayer.

**DOCKET NO.
35-0102-1702**

Relating to Idaho Sales and Use Tax Administrative Rules. Vice Chairman Bayer explained that the Committee will address Section 013 of **Docket No. 35-0102-1702**; the remaining sections of the docket have been approved by the Committee.

Tom Shaner, Tax Policy Manager with the Commission, presented pending Rule 013. **Mr. Shaner** noted this was negotiated rulemaking. He reviewed Idaho statutes pertaining to the application of sale and use tax and relevant tax exemptions. **Mr. Shaner** stated that, without statutory designation, the use of materials by a contractor is subject to use tax. He sees no statutory distinction between repairs and maintenance, and improvements to real property. **Mr. Shaner** then explained that the proposed examples in Section 013 are intended to provide clarity and guidance for contractors in this arena.

Senator Rice commented that his previous concerns regarding the constitutionality of the proposed rule change have not been addressed. **Mr. Shaner** deferred to Phil Skinner, Deputy Attorney General assigned to the Commission, to address the legal basis for the rule change.

DISCUSSION:

A discussion ensued regarding the constitutionality of the proposed examples to Subsection 013.03. **Senator Rice** discussed federal court proceedings pertaining to the application of tax to federal contractors, due to the similar nature of constitutional-level exemptions. That court ruled that a contractor, acting as a federal procurement agent, can be so closely associated with the government in the purchase of materials as to constitute a sale to the government. The imposition of tax on a contractor under these circumstances constitutes a tax directly on the federal government. **Senator Rice** asked Mr. Skinner if this suggests that the imposition of tax on a contractor for the use of materials already owned by a state or political subdivision falls under the same category of tax liability. **Senator Rice** concluded that, using the same analysis, all of the proposed examples in Subsection 013.03 violate Article 7, Section 4 of the Idaho Constitution.

In response, **Mr. Skinner** stated that federal court held it is constitutionally irrelevant if a contractor paid sales or use tax that was subsequently passed on to a governmental entity. He further asserted that the federal court rulings are not applicable to use tax. **Mr. Skinner** indicated that the Idaho Supreme Court has ruled that Article 7, Section 5 applies only to property tax. The Court has not addressed Article 7, Section 4, but **Mr. Skinner** felt that it would not apply to tax imposed on the use of property owned by the State.

TESTIMONY:

Rick Smith, representing Johnny B Transport, spoke in opposition to the proposed changes to Section 013. He noted that a 1984 district court decision held that a chip sealer, under the direction and supervision of a county authority, does not have sufficient control over asphalt to satisfy use tax requirements. The proposed rule changes are not clarifications, but changes to the way the law is applied. In his opinion, if the statute is ambiguous, the statute should be amended through legislative action rather than rule promulgation. **Mr. Smith** asked the Committee to reject Subsection 013.02 and 013.03(b).

Senator Nye asked Mr. Smith to comment on the applicability of the 1984 district court decision. **Mr. Smith** stated the doctrines of *res judicata* and *collateral estoppel* would apply to the Commission in its imposition of tax statewide; in his opinion, the court decision provides legal precedent on this issue. The Commission did not appeal the district court decision.

Chairman Johnson asked Mr. Smith if equal application of use tax to all road contractors would mitigate his concerns. **Mr. Smith** felt it would be difficult to determine if tax were applied uniformly to all contractors. He stated that road contractors would ultimately transfer the tax amount to the client; if the client is a governmental entity, the same legal challenges would apply.

Vice Chairman Bayer noted for the record the correspondence from Elliot Werk, Commissioner, Idaho State Tax Commission, regarding Section 013 of **Docket No. 35-0102-1702**.

Senator Burgoyne felt the central issue is whether the proposed rule is consistent with statute. The nature of the 1984 district court case is binding on the Commission in relation to one taxpayer. The rule, however, will have Statewide application. **Senator Burgoyne** concluded that the Commission is not precluded from promulgating a rule, nor is the Legislature precluded from approving a rule based on a court decision.

Senator Rice stated that his analysis of statute is based on the Idaho Constitution, and he believes that Article 7, Section 4 prohibits the application of tax to State property. The proposed examples in Subsection 013.03 do not specify that property donated to the State is exempt from taxation; rather, the examples appear to dictate that the use of such property is taxable to a contractor. **Senator Rice** felt that statute is unclear regarding the tax imposition of property independently owned by the State.

Mr. Shaner returned to the podium to provide closing remarks. **Senator Burgoyne** asked Mr. Shaner if Section 013 includes donations of property to the State within its scope, and if the Commission agrees that such donations are taxable. **Mr. Shaner** felt the Commission could have been more clear on donated property, and he stated that materials purchased by a highway district may be subject to tax.

MOTION: **Senator Rice** moved to reject Subsections 013.02 and 013.03 of **Docket No. 35-0102-1702**. **Senator Burgoyne** seconded the motion.

Vice Chairman Bayer called for a roll call vote. **Vice Chairman Bayer, Senators Rice, Vick, and Burgoyne** voted **aye**. **Chairman Johnson, Senators Siddoway, Patrick and Nye** voted **nay**. The motion failed.

MOTION: **Senator Patrick** moved to approve Section 013 of **Docket No. 35-0102-1702**. **Senator Siddoway** seconded the motion.

Senator Rice called for a roll call vote. **Chairman Johnson, Vice Chairman Bayer, Senators Siddoway, Patrick, and Nye** voted **aye**. **Senators Rice, Vick, and Burgoyne** voted **nay**. The motion carried.

PASSED THE GAVEL: Vice Chairman Bayer passed the gavel back to Chairman Johnson.

MINUTES APPROVAL: **Senator Patrick** moved to approve the Minutes of February 1, 2018. **Senator Siddoway** seconded the motion. The motion carried by **voice vote**.

PAGE GRADUATION: **Chairman Johnson** thanked Senate Page Christine Peterson for her service. He recognized her hard work and dedication to the Committee.

ADJOURNED: There being no further business at this time, **Chairman Johnson** adjourned the meeting at 4:18 p.m.

Senator Johnson
Chairman

Jennifer Carr
Secretary