Through the Looking Glass — Reflections on the MTC

by Michael D. Herbert, Wm. Gregory Turner, and Marty Dakessian

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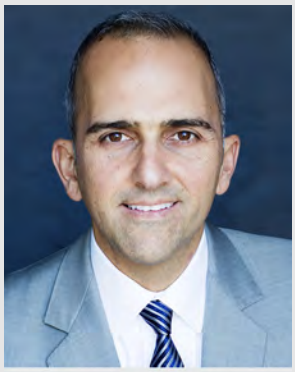

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In this viewpoint, Herbert addresses potential issues that may arise as the result of the positions taken by the Multistate Tax Commission in the multiple compact apportionment suits. Herbert then engages Turner and Dakessian in a discussion on these issues, with the three concluding that the commission should stop claiming its purpose is uniformity and that it is an intergovernmental tax agency.

Herbert, Turner, and Dakessian thank Bryan Mayster of PwC for his substantial contributions to this article.

To hazard much to get much has more of avarice than wisdom.

—William Penn

Introduction

Is the MTC the Multistate Tax Commission or the Multistate Tax Compact? After many years of litigating that question, we now know Commission is the better fit, as the courts have told us there is no binding compact. The commission "hazards much" to successfully argue the compact is merely an advisory agreement. But at what cost? What are the implications of its successfully arguing the compact is merely a model law?

While some questions involving the compact[1] may have been answered as a result of litigation, other important issues affecting the commission, as well as all non-congressionally approved interstate compacts, remain unresolved. For example, after the California Supreme Court ruled in *Gillette v. Franchise Tax Board*,[2] one may reasonably ponder: If the compact is not a binding agreement and the commission is a creature created by that nonagreement,[3] just what is the Multistate Tax Commission and what powers does it legally possess? Is the commission truly an "intergovernmental state tax agency," as represented on its website and recently noted by its chair?[4]

[1] There are still at least two cases outstanding on this issue — *Graphic Packaging Corp. v. Hegar* (No. 15-0669) at the Texas Supreme Court (not yet argued), and *Health Net Inc. v. Department of Revenue* (S063625) at the Oregon Supreme Court (argued and awaiting decision).

[2] 363 P.3d 94 (Cal. 2015).

[3] Multistate Tax Compact, Article VI(1)(a), Organization and Management.

[4] *See* John McGown Jr., "An Interview With MTC Chair Rich Jackson," *State Tax Notes*, June 12, 2017, p. 1071.

For the past 14 years, I have studied the commission and interstate compacts and have been closely associated with many of the challenges surrounding the apportionment election. Before the *Gillette* litigation, the commission didn't have any reference to a model law on its website. I also note that the commission has never entered into audit contracts with its full member party states, as it had considered the compact itself to be a binding agreement that authorizes it to audit for these states. To this day, only the nonparty states — those that haven't adopted the model law — have written contracts authorizing the commission to audit on their behalf. This raises another unanswered question: Have member states legally authorized the commission to conduct taxpayer audits?

Those judicially created uncertainties, as well as numerous other long-standing issues presented to me by those who participated in the commission's formative years,[5] lead me to believe that the original intent of the states participating in the compact was to have a binding agreement. Unfortunately, because of how the cases had to be litigated, a more telling factual background about the compact is not in the record. As a result, taxpayers have been unable to convince the courts that the compact is a binding contract giving them the right to use the three-factor apportionment formula. All eyes remain on Oregon and Texas to uphold the original intent.

I believe the holding in *Gillette* will reverberate beyond the state tax world and potentially touch the wide spectrum of existing non-congressionally approved interstate compacts, resulting in the possibility of extended litigation initiated both by states, ostensibly bound by the agreements, and by citizens, who are the supposed beneficiaries or subjects of such contracts. For example, a member state could decide to deviate from the requirements of the Compact on Education for Military Children.[6] Such a dispute could take years to resolve and negatively affect children who are faced with education issues as their parents are reassigned to different states. The risk of negative impacts from *Gillette* on ordinary citizens in a nontax context may be significant.

Eventually, the U.S. Supreme Court may take a case to explore the boundaries of a non-congressionally approved interstate compact. Until then, we can anticipate continued challenges to the force and effect of such compacts, including challenges to the rights and authority of the MTC, as explained herein.

The Multistate Tax Commission

The commission begins celebrating its 50th anniversary today at its 2017 annual meeting in Louisville, Kentucky. In 1967, as Congress debated legislation that would sharply curtail states' jurisdiction to tax and dictate apportionment and allocation provisions, the National Association of Tax Administrators held a special meeting and for the first time discussed an interstate agreement or compact for state taxes. By the end of 1968, 14 states had enacted the similar laws, which at the time was called the compact. On February 1, 1969, Eugene Corrigan became the first executive director of the commission.

In its 50 years, the commission has participated as amicus in many legendary state tax cases[7] and has itself withstood constitutional challenge. In *United States Steel*,[8] the U.S. Supreme Court was asked to address whether the compact required the consent of Congress to be a valid contract among states. While it found that the compact did not need the consent of Congress, the Court did not directly address the nature of the compact among the signatory states or, more specifically, whether the compact was binding, although many ask how the binding nature was not implicit in the Court's recognition of the compact as a valid contract among the party states. According to the commission, *United States Steel* "vindicate[ed] the MTC as [an] intergovernmental state tax agency in general,

[5] *See* Herbert et al., "MTC and the Fallacy of Its Florida Resolution," *State Tax Notes*, Sept. 14, 2015, p. 935.

[6] "The Interstate Compact on Educational Opportunity for Military Children," Military Child Education Coalition.

[7] *See, e.g.*, *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 439 (1980); *Allied-Signal Inc. v. Director, Division of Taxation*, 504 U.S. 768 (1992); *MeadWestvaco Corp. v. Illinois Department of Revenue*, 553 U.S. 16 (2008); and *Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787 (2015).

[8] *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1978).

and its multistate joint audit program in particular."[9]

Most recently, California successfully argued before its state supreme court that the State Legislature could, consistent with the compact, eliminate the equally weighted three-factor apportionment election provision found in Article III of the compact. In *Gillette*, the California Supreme Court found the compact does not satisfy any of the indicia of binding interstate compacts. The court further held that the commission lacks any binding authority over the member states and is not a joint regulatory organization.[10] Thus, the court held the compact is not a binding agreement.

Taxpayers received minimal benefit from the compact.[11] Clearly, they never received the promised uniformity. But, as it turns out, the commission, after the early years under Corrigan, did not appear interested in uniformity. Most of the commission's proposed uniformity rules were never adopted by more than a few states, and the commission never filed a brief in full support of taxpayers arguing for uniformity. Rather, over the years the commission has focused on broadening the tax base through various efforts like worldwide combined reporting;[12] expanding nexus principles and addbacks; and, more recently, imposing transfer pricing standards across affiliated groups. While some taxpayers may argue that the commission's joint audit program is beneficial, others disagree. They further believe that the states don't have the proper information sharing rules in place.[13]

The compact litigation has rallied the states, however, and those participating in commission activities appear to be as powerful and coordinated as ever. This can be seen, for example, through the commission's newly announced efforts to support states in litigation[14] and the recent influx of states participating in the joint corporate income tax audit program.[15]

Added to the rulings on the status of the compact are the recent taxpayer losses involving retroactive laws. We saw, for example, Michigan successfully change its law retroactively, going back six and a half years.[16] Taxpayers have been unsuccessful in getting the Supreme Court to reconsider its *Carlton* decision, which allows for a "modest period" of retroactivity.[17] As numerous commentators noted after the denials by the Supreme Court in the Michigan cases, states may be emboldened to continue this practice, and retroactive tax laws may contribute to a decrease of trust in society as a whole and the rule of law.

Perhaps the states that participate in the commission and find retroactive taxes reprehensible should consider a vote for a bylaw change to deny participation to Michigan and Washington[18] based on the negative impact to tax compliance. Because the states are coordinating their efforts and possess the power to retroactively change laws, taxpayers are facing the troubling prospect of successful state tax litigation in the future, especially if it's regarding issues in which states may support each other.

Questions to Ponder

With this as a background, let's look more closely at what the holdings in the apportionment election cases mean for the commission. The commission took the position — first in *Gillette*, and then in *Kimberly-Clark*[19] — that the Multistate Tax Compact is not a binding agreement, but is

[9] Multistate Tax Commission, "Timeline of Events in the History of the MTC" (undated).

[10] *Gillette*, 363 P.3d at 110.

[11] Only a small number of taxpayers are known to have received refunds because of the three-factor election litigation.

[12] Michael S. Greve, "Compacts, Cartels and Congressional Consent," 68 *Mo. L. Rev*. 285 (2003).

[13] *See* Herbert et al., "The MTC and Its Joint Audit Program State Not the Obvious," *State Tax Notes*, July 28, 2014, p. 279.

[14] Amy Hamilton, "MTC Creates Subcommittee on Amicus Briefing," *State Tax Notes*, Mar. 20, 2017, p. 976.

[15] Greg Matson, MTC executive director, quoted in Hamilton, "MTC Joint Audit Program's Proposed Income Tax Assessments Up Over 2016," *State Tax Notes*, May 29, 2017, p. 847.

[16] The U.S. Supreme Court on May 22 denied six petitions for certiorari seeking review of Michigan state court decisions upholding retroactive tax legislation.

[17] *United States v. Carlton*, 512 U.S. 26 (1994).

[18] The Dot Foods petition for certiorari requesting that the U.S. Supreme Court (No. 16-308) consider the Washington Supreme Court decision in *Dot Foods Inc. v. Department of Revenue*, No. 92398-1 (Wash. 2016), which upheld the legislature's 27-year retroactive elimination of a tax exemption for out-of-state businesses, was denied on May 22.

[19] *Kimberly-Clark v. Commissioner of Revenue*, 880 N.W.2d 844 (Mich. 2016), cert denied Dec. 12, 2016.

instead a model law. Clearly, if the compact is not a binding agreement, there are more implications than just the ability to avoid the three-factor election. To help shed light on the effect of those decisions, I asked for contributions from two well-respected state and local tax attorneys familiar with the history of the commission. Both filed amicus briefs in the apportionment election controversies.

In his 20 years as a state tax professional, Greg Turner has worked both in government, having served members of the California State Legislature and State Board of Equalization, and in private practice, with stints at the Council On State Taxation and Sheppard Mullin Richter & Hampton LLP. Marty Dakessian is the founder of Dakessian Law Ltd., a law firm specializing in California controversy and litigation. Before founding his firm, Marty was a partner at Reed Smith LLP, where he litigated many significant California tax matters.

Herbert: The first and overarching question involves the status of the commission today. Article VI(1)(a) of the compact creates the commission and authorizes its activity. If the compact is not a binding contract among its members, and the commission's role is merely "advisory and informational," what force and effect does Article VI have?

Turner: It really was peculiar that the Supreme Court refused certiorari in the compact cases. Not simply because of the number of cases bound together over retroactivity, but because if the Court looked even somewhat closely at the cases, they would have seen that the states found different rationales for relieving themselves of their Article IV obligations under the compact. For California, the compact is nothing more than ink on parchment. But Michigan found the compact binding and enforceable, it was only their subsequent validation of a retroactive repeal of the election provisions that staved off a larger taxpayer victory.

So, in terms of answering the overarching question about the force and effect of Article VI, I don't think anybody knows, and the answer is likely only resolved state-by-state. States are going to defend the compact based on what is in their situational best interests, and taxpayers may be able to challenge that position only by going to court. Just like with *United States Steel*, at some point, the commission may make a demand of a taxpayer who is going to ask to "see some badges," so to speak, and that's when the matter could come before a judge. I don't know that the commission will press such a fight, frankly. The MTC may just turn the demand back to one or more of the states to prosecute. But isn't all this rather ironic? The quintessential expression of state self-governance to achieve uniformity, rather than having it imposed by the federal government, is defined on a state-by-state, ad hoc basis. You can't make this stuff up!

It's hard to understand Article VI when there is no agreement. The article begins: "The Multistate Tax Commission is hereby established. It shall be composed of one 'member' from each party State who shall be the head of the State agency charged with the administration of the types of taxes to which this compact applies." When there is no agreement, how can anything of force and effect be established? And why should members be limited to party states, when nothing was enacted that created parties to an agreement? Maybe all this means is that the states that have been contributing membership dues must no longer make contributions. Maybe taxpayers can raise questions of government waste or improper gifts of public funds?

Dakessian: It is inconsistent to argue the compact is little more than a set of model rules while attempting to enforce its provisions. But this battle never has been about the intellectual honesty of the MTC or its member states. It has been about taxing agencies protecting the fisc at all costs, the MTC facing an existential threat, and a judicial system lacking the gumption to hold states accountable. If you are looking for consistency, that is where you will find it.

I like Greg's idea about a potential taxpayer action against government waste. If the compact never existed, then perhaps someone should sue to recoup the dues paid as a misuse of public funds.

Herbert: As a follow-up question, I note that on the commission's website, it refers to itself as an "intergovernmental state agency." As noted in my article with Bryan Mayster:

for purposes of disclosure under IRC section 6103, the IRS has never considered the commission a state or given it direct access to federal tax information. Announcement 2011-78, 2011-51 IRB 874, which provides guidance as to whether an entity is eligible for an IRC section 457 deferred compensation plan, defines key terms for IRC section 457, including "state," "political subdivision of a state," and "agency or instrumentality of a state or political subdivision of a state." Under the announcement, state means any state of the United States and the District of Columbia. Thus, while the commission is not a state or a political subdivision of a state, might it be considered an agency or instrumentality of a state? The determination is a facts and circumstances test. There are five key factors and, on examination, the commission appears to meet only the first.[20]

That raises the question of what makes the commission an intergovernmental state agency.

Turner: Proclamations of identity are like TV commercials; caveat emptor applies. It seems clear, however, that it is not a state agency, intergovernmental or otherwise. Perhaps it is time for the IRS to conduct an audit and make a formal determination — they have seemed willing to audit numerous lesser profiled association-type entities recently, if memory serves. Does anyone really think any state tax agency is going to initiate an investigation into whether the commission is really a third-party contract auditor and therefore subject to all the same rules for conducting a multistate business enterprise like everyone else?

Dakessian: It takes more than the ".gov" suffix on its URL for the commission to achieve this status. Legal obstacles are everywhere. For example, under California law, the creation of executive branch agencies (which include the Franchise Tax Board, the Employment Development Department, and the newly created Department of Taxes and Fees and Office of Tax Appeals) must go through the Little Hoover Commission. At its most basic level, the Multistate Tax Commission is a creature of contract to which the state is a party, not a part of the state itself. And although some of the compact provisions may appear to create a legal agency *relationship* between the state as principal and the commission as agent, that is different than calling the commission an intergovernmental agency, which implies not only that the commission itself is imbued with the power of the sovereign, but carries other consequences with it, such as sovereign immunity and liability.

Herbert: I think the commission is a contract auditor for multiple states and not an intergovernmental agency, especially after *Gillette* because its relationship is contractual with an individual state and not mutual among multiple states. Taxpayers faced with amicus briefs claiming the commission is an intergovernmental agency may wish to consider how to push back on that assertion. In fact, COST or the Tax Executives Institute may wish to consider authoring a brief for any taxpayer to use in challenging the commission's status.

The *Gillette* court noted that "the Commission may conduct taxpayer audits but only if the member state has passed separate authorizing legislation."[21] If a state legislatively adopts the compact — not as a binding contract, but as a model law — has it, in effect, passed separate legislation authorizing taxpayer audits? Is there truly a contract expressly allowing the commission to audit taxpayers?

Turner: I would be truly surprised if the commission were to rely merely on the language from the compact to defend its authorization to audit for any particular state in the future. My sense of it is that the compact language empowers the commission to conduct audits like articles of organization for a corporation authorize it to engage in some acts. A separate state act, whether by contract through a state agency, if otherwise authorized by law, or a specific statute authorizing the commission to audit for the state, would be necessary for the commission to engage in audits for a state. I do not see the compact as being an expression by any individual state for

[20] Herbert et al., *supra* note 13, at 287.

[21] Multistate Tax Compact, Article VIII; and *Gillette*, 363 P.3d at 108.

the commission to be authorized to audit on its behalf. If a taxpayer is concerned about it, they should demand to see the commission auditor's authority before engaging with them on an audit.

Dakessian: I agree that the compact does not include the power to audit taxpayers. Even if provisions of the compact are read to allow it, there could be state constitutional problems with that. For example, under the California Constitution, the state's power to tax cannot be surrendered by contract. I'm sure the commission would argue that the states are not surrendering their taxing authority — that auditing taxpayer returns is not itself the power to tax, that it is only an enforcement of the taxing authority. But, on the other hand, without an enforcement mechanism, the power to tax is theoretical. So, drawing those distinctions can be tricky. It is also worth noting that in California, subdivisions of the state derive their power — including the power to tax — by legislative authorization. That is even true for constitutional charter cities where the state has preempted the specific area of the law. Without that explicit authority, what the compact itself says is immaterial.

Herbert: Notwithstanding the California rules, it appears that if there is no binding contract and the commission's role is merely advisory, the states must separately contract with the commission to serve as a third-party agent that audits on their behalf. In that regard, the commission's practice of auditing for nonparty states appears to be more valid because a contract is in place. The states that have only the compact language in their law, however, appear to have an issue. Article VIII of the nonbinding agreement still is a state statute where adopted, but those statutes say that the state can only participate in joint audits with other party states — those states that have the same language in their law. Thus, there are two concerns: Party states have no contract with the commission and, even if one were found based on enacting Article VIII into their law, they may participate in joint audits only of other party states. Should the commission now enter into contracts with the party states? It appears clear to me they won't do that until the other apportionment cases in Oregon and Texas are resolved.

Turning now to a natural follow-up to those issues, I have multiple questions: One, even if it is determined that member states have legislatively authorized the commission to conduct audits, what are the limitations to the audit authority? Does this authority extend to information sharing among states? And, two, what allows the commission to be a party to the Federation of Tax Administrators' Sharing of Information Agreement? Could a state be held liable for sharing information with the commission after *Gillette*? Are the commission auditors putting themselves at risk for criminal penalties?[22]

Turner: Like most issues involving the compact in the future, it will depend on the state. Information sharing among states may be authorized by respective state statute, or it may not be permitted. Sharing arrangements may satisfy IRS scrutiny, they may not. Unfortunately, there is no one-size-fits-all answer. Uniformity is completely lacking. Taxpayers are going to have to be extra vigilant protecting their information if a commission auditor comes calling. Taxpayers should consider demanding to see the authorizing statute or other state agreement from each participating state and the authority or limitations on the sharing of information. Taxpayers should not be afraid to challenge the commission's assertions of authority. The commission is, for all intents and purposes, a private third-party auditor and taxpayers should take all the appropriate precautions when dealing with them. Some welcome commission audits, finding them altogether a more efficient use of resources for the company being audited for several states; that's not the point. The point is simply that a commission auditor is not a state auditor and consequently, taxpayers must interact with them accordingly.

It's ironic to me, as is much with the MTC, that the compact litigation might well be the commission's resurrection from obscurity. It will entirely depend on whether it can moderate its historic role as policy advocate for the more extreme voices among state revenue agencies; develop an audit program that does not rely on the strong arm of state authority, but is service

[22] *See* Herbert et al., *supra* note 13.

oriented, efficient, and professional; and become more transparent and inclusive regarding those affected by the consequences of its policy positions when uniformity finds its rare entry into the discussion. The commission has an opportunity. It will be interesting to see what it does with it.

Dakessian: Yes, civil and even criminal liability is a consequence for violating taxpayer confidentiality statutes — at least in California. The taxpayer confidentiality statutes are incredibly strict and information sharing is defined by the limited statutory exceptions that exist. My experience with California taxing agencies and confidentiality is that they closely guard taxpayer information, even in the face of discovery requests in litigation. We've had to bring motions to compel in court for information that fell within one of the enumerated statutory exceptions and still the tax agency resisted. California tax agencies have separate disclosure offices in place to process taxpayer document requests, and employees are specially trained to identify confidential information and redact when appropriate. And they definitely err on the side of redaction. We often see reams of information that are almost entirely blacked out. They take this very seriously and so should the commission.

Herbert: Information sharing may be authorized by a state statute. However, not all party states have the correct sharing rules in place, as pointed out in the July 2014 article.[23] And, of course, the penalties for not complying are criminal. The IRS won't share information with a state if the state doesn't have criminal penalties for improper information sharing in its statutes. The FTA's Sharing of Information Agreement clearly shows the commission is not a state, and an agent of the state cannot be an authorized party.

Further, the FTA's agreement is limited by the authority of the statutes of the respective jurisdictions that are parties to the agreement. Is it not obvious that the states that enacted the compact language are violating their confidentiality statutes if they engage in joint audits and share taxpayer confidential information with states that haven't enacted the compact language, regardless of the binding nature of the language? Thus, the commission shouldn't be a party to the FTA agreement, and that in and of itself raises all sorts of issues. Until the various states correct their rules, there is the potential for liability.

Turning to the next issue, does the commission have governmental immunity and why is this important?

Turner: This is a complicated question with several uncertainties. As an initial matter, because the commission has argued in so many different forums that the compact is essentially a model law and not an agreement of sovereigns, I think it is going to be difficult to argue that the commission is a state actor and by its mere existence entitled to be covered by the blanket of state sovereign immunity. That means suing the commission is not tantamount to suing the state; traditional rules applicable to third-party agents of the states would seem to apply to acts of commission employees.

Even if some degree of immunity applies to acts by the commission or its employees, if you have been following the saga of *Hyatt v. Franchise Tax Board*[24] for the last 15 years, you know that the scope of state immunity itself differs state by state. So, what happens if a commission auditor audits Company X for three states, but the books and records are in a fourth state that is neither party to the audit nor a member of the commission, but it is in that unrelated state in which the illegal/tortious act occurs? Perhaps an academic exercise for now, but the commission as a third-party contract auditor in a multistate context raises those sorts of questions.

Dakessian: I agree. If the compact is just a model law, then how could the commission enjoy sovereign immunity? Again, there is no rhyme or reason to any of the commission's arguments during the compact litigation, save immediate self-preservation.

Herbert: We know the commission has relied on an opinion of counsel for its position that it is

[23] Herbert et al., *supra* note 13.

[24] 136 S. Ct. 1277 (2016).

tax-exempt.[25] Does the commission have to pay taxes on its dues and fees?

Turner: The only way the commission's tax status ever will be fairly addressed may be if the IRS engages in a process of examination and publishes its determination. No state is going to engage in that process on its own. The commission is certainly going to argue that, notwithstanding all the arguments in the compact litigation, its status is as it has always been and therefore it remains exempt from tax. What the litigation exposed, however, was the weakness of the legal foundation for its position as an agency of state government. There may well be arguments to exempt its dues revenue stream, but the fee for service activities seems particularly vulnerable. Only because of an IRS audit might state income tax obligations flow. But imagine the complexities the commission would face: having employees traveling around the country conducting audits in various states during the year, generating source income from each state paying for services. Perhaps the commission will become a convert and come out to support the Mobile Workforce State Income Tax Simplification Act of 2017!

Dakessian: Seeing the opinion would help us understand the commission's position, and it certainly would be good "government" for the commission to disclose it. Perhaps a taxpayer waste action would force taxing agencies to examine the commission's tax-exempt status, especially as it relates to its contract audit fees.

Herbert: I believe the responsible thing to do would be to disclose counsel's opinion if it exists, and have it reconsidered by its own counsel and the public. Tax collectors should be held to the highest standards regarding their own tax reporting responsibilities. As a simple matter of fairness, if the commission is going to audit taxpayers for states, it too should be filing correct tax returns for itself and its employees. The commission should adopt a public policy on its tax treatment of the traveling staff and be transparent about its own tax positions.

Turning to another issue: Is the funding of the commission proper under state laws?

Article VI(1)(i) of the compact provides "the Commission may accept for any of its purposes and functions any and all donations and grants of money . . . from any governmental entity." When the compact was first proposed, some states wanted an agreement, a binding compact, as they feared that funding a commission could be an unauthorized gift of public funds. Further, if there is no binding agreement, why should some states be paying membership fees and other states not? Should the states that were full members be entitled to a refund of a portion of their fees?

Turner: I am only familiar with California's gift of public fund prohibitions. It seems to me that dues to support the commission's policy/uniformity discussions are like any other dues to an association, whether it be the FTA, the National Conference of State Legislators, the National Governors Association, or the many other of the commissions and associations that states support. Whether a particular state finds value in their association membership is going to be a value judgment relative to their contribution.

Dakessian: Michael, you raise an excellent point here. Yes, full member states should be entitled to some refund of compact dues. If the compact is not binding, taxpayers should demand their money back under contract or quasi-contract principles. As discussed above, California law allows taxpayers to bring actions to obtain those sorts of recoveries for the states. There are consequences to the commission's very public litigation position and they should be called to account. In the final analysis, they've taken substantial sums of money from hardworking California taxpayers and have provided nothing in return.

Herbert: Maybe the party states to this model law have been paying more than their fair share? Maybe all states now need to fund the commission for whatever it is legally?

Finally, it is apparent that the commission's behaviors are not likely to change. When it files a brief against a taxpayer in a case and states its purpose is uniformity and it represents the views of many states as an intergovernmental tax agency, what should taxpayers consider as a response?

[25] See the footnotes to the fiscal 1976-1977 annual report and earlier reports, www.mtc.gov/The-Commissioner/Annual-Report.

Turner: Personally, I don't know that I would devote a lot of resources to challenging the image of the commission as amicus curiae. Doing so presumes its submissions are influential because of that status and likely draws resources away from more important tasks. But, that determination is wholly contextual. If its status as a contract auditor or paid advocate impugns the credibility of their argument which is the focus of the issue before the court, it might be worthy of some attention. Or, if uniformity was an issue, I don't think you could avoid calling the courts attention to the MTC's inability to achieve even a modicum of uniformity as that is not really their mission. But generally speaking, I would tend to ignore what they call themselves and focus on the issues.

Dakessian: I agree that maintaining focus is important, but it is also fair to question the commission's legitimacy in light of the compact litigation. And, it is appropriate to bring the commission's dubious legal status to a court's attention. I agree that context is important in deciding whether and how to do this. At this point, we know the commission is not an agency — intergovernmental or otherwise — and if it attempts to present its positions as cloaked with some sort of governmental or quasi-governmental legitimacy, then it should be exposed.

Herbert: As mentioned above, we can hope that the commission stops claiming its purpose is uniformity and that it is an intergovernmental tax agency. *Gillette* can't be ignored by the commission to suit state purposes of avoiding payment of refunds while, at the same time, allowing it to continue to act as it has in the past when all assumed the compact was binding. Taxpayers and taxpayer organizations such as COST and TEI should consider helping the courts address the issues mentioned in this discussion so that we may all better understand what the commission is and who it represents. ■