



# **COST 2012 SPRING AUDIT SESSION/ INCOME TAX CONFERENCE**

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## **WHO KNOWS WHAT? ANTICIPATING THE EFFECTS OF STATE INFORMATION SHARING AGREEMENTS**

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# State Information Sharing Agreements

- What Specific Exchange Agreements Exist?
- What Type of Information May Be Exchanged?
- How Can the Information Be Used?
- What Types of Protections Exist to Keep Information Confidential?
- Can a Company Restrict the Exchange of Information?



# Polling Question 1

- If you call Doug Lindholm “Skipper”, are you most likely referring to him as:
  - a. A sailor
  - b. A baseball manager
  - c. Barbie’s BFF
  - d. COST’s head honcho



# What Specific Exchange Agreements Exist?

- Federation of Tax Administrators (FTA) Uniform Exchange of Information Agreement
- Memorandum of Agreement Re Abusive Tax Avoidance Transactions
- Memorandums of Understanding Between Internal Revenue Service (IRS) and States Under IRC §6103
- Memorandums of Understanding Between States and Multistate Tax Commission (MTC) Re IRS Data
- Multistate Tax Compact
- Specific State Statutory Provisions
- Miscellaneous Exchanges of Tax Information



# FTA Uniform Exchange of Information Agreement

- FTA is an IRC §501(c)(3) not-for-profit organization. It has provided services to state tax agencies since 1937
- FTA does not see, handle, hear about or pass along taxpayer confidential information
- FTA created the Uniform Exchange of Information Agreement in 1993 to replace the longstanding system of bilateral agreements between and among the states (including District of Columbia and New York City)
- All states except New Mexico are signatories of the Agreement
- MTC is a signatory of the Agreement



# FTA Uniform Exchange of Information Agreement

- Agreement superseded existing bilateral exchange of information agreements
- Agreement does not permit new or different exchanges of information
- Agreement applies to the exchange of information which could reasonably be considered useful to other parties for the facilitation of tax administration
- Agreement does not permit the exchange of information received from the IRS unless authorized by the Service
- Agreement contains strict confidentiality provisions
- Procedures for exchange of information



# Memorandum of Agreement Re Abusive Tax Avoidance Transactions

- MOA incorporates FTA Uniform Exchange of Information Agreement
- Most states are signatories to the MOA
- Intended to facilitate tax administration in conjunction with ATATs
- Purpose is to implement an information sharing arrangement among the states
- MOA does not permit exchange of information received from the IRS unless authorized by the Service



# Memorandums of Understanding Between IRS and States Under IRC §6103

- IRC §6103(d) authorizes the IRS to disclose federal tax information to state tax officials for tax administration purposes upon written request
- Highest level of protection of data required
- IRS Office of Safeguards is oversight authority
- Department of Treasury TIGTA closely monitors the Safeguards' office



# Memorandums of Understanding Between IRS and States Under IRC §6103

- Reciprocal exchange of returns and return information between IRS and states
- The term “state” includes municipalities
- Only for the purpose of, and to the extent necessary in, the administration of any state tax law
- Agreement with a state may allow for continuing disclosures



## Memorandum of Understanding Between IRS and States Re ATATs

- MOU sets forth agreement between IRS and states with respect to an initiative to facilitate information sharing for tax administration purposes in conjunction with ATATs
- Most states are signatories to the MOU
- MOU complements FTA Memorandum of Agreement Re ATATs



# Memorandums of Understanding Between States and MTC Re IRS Data

- MOUs Allow MTC to handle federal taxpayer information as a contractor on behalf of a state
- MOUs provide for MTC sharing audit results with IRS



# Multistate Tax Compact

- Article VIII, which deals with interstate audits, provides authority for exchange of taxpayer information
- If MTC is requested by a state to participate in an audit, MTC shall have access to and may examine, at any reasonable time, such accounts, books, papers, records, and other documents and any relevant property or stock of merchandise
- Information obtained in an MTC audit shall be confidential and available only for tax administration purposes to party States, their subdivisions and the US
- Availability of information shall be in accordance with the laws of the States or subdivisions on whose account the MTC performs the audit and only through the appropriate agencies or officers of such States or subdivisions



## Specific State Statutory Provisions

- States generally provide that taxpayer information is confidential with various exceptions
- Exchange of taxpayer information permitted with the IRS and other states (and MTC)
- Must be a reciprocal exchange
- Information may only be used for tax administration purposes
- Other state's representative must be authorized to receive the information
- Examples: CA RTC §19551; Oregon ORS §314.840; FL FS §213.053



# Miscellaneous Exchanges of Tax Information

- Some states have reciprocal exchange agreements with cities
- Information may only be used for tax administration purposes
- Taxpayer must have an address in the city's jurisdictional boundaries
- Example: CA RTC §19551.1
  
- Some states require cities which assess a business license tax to furnish certain specified information to the state income taxing agency
- Example: CA RTC §19551.5
  
- Most states receive import data from U.S. Customs for use in compliance programs, particularly business use tax compliance



# What Type of Information May Be Exchanged?

- “State Tax Return Information” (FTA Uniform Exchange Agreement)
  - Taxpayer’s identity, nature, source or amount of income, apportionment factors, payments, receipts, deductions, credits, assets, liabilities, net worth
  - Whether taxpayer’s return was, is being or will be examined
  - Names of customers and any relevant information related to specific transactions or any other data received, recorded by, prepared by, furnished to or collected by the tax agency
  - Any part of any written determination or any supporting document relating to such written determination



# What Type of Information May Be Exchanged?

- “Information Subject to Exchange” (FTA Uniform Exchange of Information)
  - Lists of taxpayers or potential taxpayers, including identifying data
  - Tax or information returns or documents, including supporting schedules, attachments, and lists
  - Nexus information and questionnaires
  - Research and revenue estimating materials
  - Audit reports and other information regarding audits
  - Collection and enforcement activities
  - Appeals regarding any taxpayer or group of taxpayers



## What Type of Information May Be Exchanged?

- California RTC §19551 is a good example of how broad the information exchange is
- It provides that “information concerning any item of income contained in any return or disclosed by the report of any investigation of the income or return” may be exchanged



## How Can the Information Be Used?

- The general rule is that the information will only be used “tax administration purposes”
- “All information, in any form whatsoever, exchanged pursuant to the agreement shall be employed solely for the purposes of tax administration” (FTA Uniform Exchange of Information)
- “The purpose for the request (must) relate to an investigation of the tax specified in the request and that the information will be used in the ordinary performance of the applicant's official duties” (CA RTC §19551)
- “Federal tax information may be obtained only to the extent the information is needed for, or is reasonably expected to be used for, state tax administration” (IRC §6103)



## What Types of Protections Exist to Keep Information Confidential?

- Comprehensive provisions exist in all agreements ensuring the confidentiality of taxpayer information
- All agreements provide that the recipients of the information must be identified and limited



# Can a Company Restrict the Exchange of Information?

- The various agreements do not specifically provide any restrictions with respect to the exchange of a taxpayer's confidential information provided the recipient jurisdiction follows the requirements noted above
- Taxpayers seeking protection against the disclosure of trade secrets and other company information should consider attempting to obtain some form of a protective order
- Without such a protective order, taxpayers should assume any information (with the possible exception of specific terms of settlements) which was provided to or obtained by a particular state will be available to other states



# Can a Company Restrict the Exchange of Information?

- *Harley-Davidson v. DOR*, CCH Oregon Tax Rptr ¶400-711 (2006)
  - Oregon DOR sought business records (trade secrets, customer lists, etc.) in connection with an audit to determine whether the taxpayer had nexus with the State
  - The taxpayer sought a protective order against the disclosure because of its concern that the information would be shared with the MTC and other states
  - The Tax Court denied the taxpayer's motion and specifically approved of the exchange of the information with the MTC and other states



## Polling Question 2

- It was a dark and stormy night (really). Doug Lindholm was at the helm of a vessel plowing through a headwind on the Potomac River. What was he likely piloting?
  - a. The S.S. Minnow
  - b. A Duck Tour Boat
  - c. U.S.S. Sequoia Presidential Yacht
  - d. The COST Cruise Ship



# QUESTIONS

