

House Judiciary Committee Approves Three State Tax Bills

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Yesterday, on June 17, 2015, three state tax bills were favorably reported to the ***United States House of Representatives*** (House) by the House Judiciary Committee (House Judiciary) after considering each during a half-day markup. The bills that were advanced included: (1) the Mobile Workforce State Income Tax Simplification Act (Mobile Workforce, H.R. 2315); (2) the Digital Goods and Services Tax Fairness Act (DGSTFA, H.R. 1643); and (3) the Business Activity Tax Simplification Act (BATSA, H.R. 2584).

Mobile Workforce State Income Tax Simplification Act

The Mobile Workforce bill was the first considered and seeks to establish a clear, uniform framework for when states may tax non-resident employees that travel for work. As advanced, the bill generally allows states to impose income tax compliance burdens on non-resident individuals only when the non-resident works in a state other than their state of residence for more than 30 days in a year. The bill also prevents those states from imposing a withholding requirement on employers for wages paid to such employees. Three proposed amendments seeking to limit the adverse revenue impact to New York were discussed and rejected. The Mobile Workforce bill was then favorably reported to the House by a vote of 23-4.

Digital Goods and Services Tax Fairness Act

DGSTFA would implement a uniform sourcing framework for states and localities seeking to tax digital goods and services. In doing so, the bill prevents any state or locality from imposing multiple or discriminatory taxes. Of the three pieces of legislation considered yesterday, only the DGSTFA was amended. The amendment, offered by the bill's lead sponsor Representative Lamar Smith, was technical in nature and did not change the basic protections the bill would provide. At the markup, Chairman Goodlatte noted that the National Governors Association (NGA), which had previously voiced objections, was no longer opposed to the legislation after the revisions—though the NGA testimony indicated that the organization could not support the legislation without addressing the

remote seller sales tax nexus issue.

The first technical changes in the adopted amendment were to the definitions of *delivered or transferred electronically* and *provided electronically*. The amendment added the term *digital good* and *digital service* after each respective term of art to clarify that digital goods are delivered or transferred electronically, whereas digital services are provided electronically. The second technical change was to the definition of *digital good*. In modifying the term, the amendment clarifies that streaming and other similar digital transmissions that do not “result in the delivery to the customer of a complete copy of such software or other good, with the right to use permanently or for a specified period” are not *digital goods* and would instead fall under the definition of a *digital service*.

Business Activity Tax Simplification Act

BATSA would codify the prerequisite of *physical presence* for a state to impose a direct tax on a non-resident business. BATSA would modernize the existing federal protection against state income taxation offered under P.L. 86-272 to include solicitation for sales of intangible property and services (as opposed to just solicitation of sales of tangible personal property). The bill also sets forth specific criteria for the determination of whether a person has a physical presence in a state. To have physical presence under BATSA, the business must: (a) have employees assigned to the state; (b) use an in-state agent to establish or maintain a market in the state, provided the agent does not perform services for anyone else during the taxable year; or (c) lease or own tangible personal property or real property in the state. This is the same physical presence standard that is included in the Remote Transactions Parity Act, which was introduced on Monday. Both bills also include a *de minimis* physical presence exception for any seller that has an in-state presence (i) for less than 15 days or (ii) to conduct limited or transient business activity. Lastly, BATSA adopts a *Joyce* apportionment methodology as opposed to a *Finnigan* methodology for certain combined and consolidated returns.

Like Mobile Workforce, several amendments were offered and subsequently rejected. Unlike the two other bills, which generally enjoyed bipartisan support, BATSA was ultimately approved by a party-line vote of 18-7.

Practice Note

These three pieces of legislation were advanced just two days after the Remote Transactions Parity Act was introduced by Representative Jason Chaffetz, who also sits on the House Judiciary Committee. Throughout the markup, members from both sides of the aisle expressed support for the Remote Transactions Parity Act, which was not on yesterday's agenda. Each of the favorably recommended bills had been approved by the House Judiciary Committee in prior years, but did not advance in the House or U.S. Senate. With these three bills, the Internet Tax Freedom Act extension, and the marketplace sales tax bills, there are probably now more pieces of federal legislation involving state tax than ever before. It will be interesting to see if Congress acts on any of them in the near future.

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