State Tax Administrators and the Tax Section

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I. A Personal Journey

I became the Vice Chair of the State and Local Taxes (SALT) Committee of the ABA Tax Section in 1997. In October 1998, in the middle of my term, I was appointed to the Utah State Tax Commission. After my confirmation by the Utah Senate, one of the first questions I needed to address was whether I should complete my term as Vice Chair of the SALT Committee and go on to serve as Chair. Did it make sense for me personally? Did it make sense for the Committee? Did it make sense for the taxpayers of Utah?

The first question was easily answered. I very much enjoyed the work of the Committee and the fine practitioners who served on it. The issues that were discussed were relevant to my work and enabled me to keep abreast of national developments. The Committee publications, especially the *Sales & Use Tax* and *Property Tax Deskbooks*, were valuable resources to the profession. The Committee's Saturday Roundtable Discussions were not only entertaining—they were highly informative.[1] Moreover, it was important to me personally to fulfill my commitment to the Committee.

The second question was only marginally more difficult. Many of our members had former experience working for government, but, to my knowledge, we had never had a government official as Chair. In fact, we only had one government official who regularly attended our meetings, Rick Handel, from the South Carolina Department of Revenue. I knew that I greatly valued Rick's contributions to the Committee, and I knew that the other Committee members shared my view. I also knew that we as a Committee tried hard to advocate for good tax policy and administration, not just taxpayer-favorable policy and administration. We tried to be nonpartisan. Nevertheless, the vast majority of the Committee members were in private practice representing

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[1] For those who are not familiar with the Committee's work, the Saturday Roundtable is an informal meeting, open to all Committee members but closed to the press, in which any Committee member can query the other members present on any topic of interest. For example, "I have an auditor from the State of Disarray who is taking this outrageous position on nexus. Have any of you seen this in other states, and how do you, or would you, respond?"

private taxpayers. A handful were in-house tax counsel with various corporations. I was not sure if they would be comfortable with a tax collector as their Chair.

I talked to Joe Hull, my Committee Chair, and other members of the Committee whose views I respected, and I was uniformly encouraged to complete my term. The uniform view was not only that it would not be detrimental to the Committee but that it would be valuable. Rick Handel's contributions were cited as evidence. Moreover, the Committee's standing as a nonpartisan advocate of good tax policy would be enhanced. Finally, the Committee members were always interested in knowing what the states were thinking and doing, and having a Chair that had some insight into that could not only inform our discussions, it might help recruit new members.

The third question was the thorniest. Was it a good use of Utah taxpayers' money to pay my salary and my expenses to attend Committee meetings in fancy hotels in big cities? The expense issue was ameliorated in two ways. First, as Committee Chair, many of my expenses were defrayed, if not fully reimbursed, by the Tax Division. (When I finished my term as Chair, this issue, thus, became more important.) Second, the ABA registration fees are significantly lower for government lawyers.[2] The ABA should be applauded for this, and its importance to government lawyers cannot be overstated.

I concluded that my continued service to the Committee would, in fact, make me a better commissioner. As I said earlier, the continuing legal education programs (CLE) of the Tax Section as a whole, and the SALT Committee in particular, are excellent. It can still be challenging to get good state and local tax CLE in many states. It was much more difficult 16 years ago. More importantly, however, I felt it was important to stay in touch, to the extent possible, with taxpayers and their representatives. I did not want to get isolated. It is, of course, critically important to be responsive to your own taxpayers and their counsel, but sometimes those conversations are not as candid as they would be with lawyers who are unlikely to appear before you in a hearing. Moreover, in Utah, commissioners have a significant quasi-judicial role. To maintain impartiality, we avoid ex parte contacts, both with taxpayers and our own divisions (Auditing, Taxpayer Services, and Property Tax), on issues that may come before us in an administrative appeal.

Finally, I should add that my decision was made easier by the unqualified support from my fellow commissioners, particularly Rich McKeown, the Chair of the Commission at that time. Rich was a trial lawyer by background, with a great interest in alternative dispute resolution. He was a great believer in the importance of understanding the interests and motivations of the taxpayers who appeared before us. He agreed that more exposure to multistate taxpayers and their counsel in informal contexts would be beneficial.

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[2]There are also special rates for young lawyers and full-time academics—other groups whose participation greatly enhances the value of the ABA.

Thus, my personal decision to remain active on the Committee was a relatively easy one in the final analysis. I know it benefited me. I hope it benefited my fellow Committee members. And I believe it made me a better Tax Commissioner for the State of Utah.

This, however, is my personal story. To what extent does it extend more broadly to state tax officials and practitioners generally? I believe that many, if not all, of the considerations discussed above are easily transferable to other tax administrators.

II. Benefits to the Committee from Government Participation

This issue might be more gracefully addressed by nongovernment Committee members, but I believe the benefits are significant. First, taxpayers expect their tax counsel to be well-informed. They do not relish spending fees to educate their lawyers on every new issue. In my days with a private law firm, I was surprised how often the issues that came across my desk were issues that were being actively debated at SALT meetings. This is perhaps especially true for UDITPA states, but it is certainly not limited to them. Unclaimed property, taxation of the Cloud, sales taxation of services, the tax treatment of intangibles for both property and sales tax purposes, for example, are all issues of broad interest around the country. Many of these topics, in addition to being presented on panels in the main Committee meetings, are the subject of lively informal discussions at the Saturday Roundtable. In many cases, there is very little formal guidance. It is invaluable for a tax lawyer to get a sense of how states may be viewing these issues—and whether they have thought about them at all. In many cases, a state tax official can give helpful information on how his or her state is addressing these issues, if at all.

Moreover, the official, particularly if active in the Federation of Tax Administrators (FTA) or the Multistate Tax Commission (MTC), may have a sense of what other states are doing as well.

It is also a great benefit to a lawyer to know whom to call. Over the years I have received many calls and e-mails from colleagues on the SALT Committee who apologized for taking my time, but just wanted to know who to contact to address an issue. Usually those calls related to Utah, but from time to time I was asked if I knew anyone at another state's tax agency that might be knowledgeable on a certain topic. I was glad to take those inquiries and was usually able to make a helpful referral.

I always stressed to our auditors and taxpayer service representatives that a taxpayer should not get a different answer just because the referral was coming from a commissioner. (Similarly, they should not get a different answer if the inquiry came directly from the Governor's office.) I hope and believe that the Tax Commission treated everyone fairly, whether the Governor or the Tax Commission Chair instituted the inquiry, or whether the taxpayer walked in off the street. I have no illusions, however, that those answers were provided with the same alacrity. Human nature being what it is, if the Governor asked

me to make a call, it went to the top of my "to do" list.[3] I suspect if I asked an auditor to contact a taxpayer, it went to the top of her "to do" list also.

I have also mentioned the Committee's genuine desire to be "nonpartisan." I was privileged to sit on the Committee task force that drafted the Uniform Tax Refund Act. I also provided comments, from a government point of view, on the Uniform State Tax Tribunal Act. Although I did not then—and do not now—purport to represent any or all government lawyers in my comments, I believe both projects benefitted from having been reviewed by someone with a "government perspective." The most important benefit, however, is more intangible. I will call it the "Learned Hand" benefit. Because it applies equally, or perhaps with even more force, to government officials, I will discuss it in the next section.

III. Benefits to the Government from Committee Participation

The most obvious benefit to a government official from participation on the Committee comes from the professional education that is available. Many states now have tax conferences with at least a few sessions on state and local tax. There is also excellent CLE available from the FTA and the MTC. In addition, the MTC will provide schools in a specific state if there is enough demand and resources are available.[4] There are also high quality programs available through many universities that are well-respected and open to state tax personnel.[5] The ABA Tax Section, however, provides another venue and provides an unprecedented range of topics on a very frequent basis. Moreover, the Committee Roundtable is, in my experience, unique.

The greatest benefit to state tax officials, however, and the greatest benefit to private practitioners from having state tax officials attend, is what I will term the "Learned Hand" effect.

In 1944, in the midst of a devastating war against perhaps the greatest evil our country has ever faced, Judge Learned Hand gave a speech entitled *The Spirit of Liberty*. It was a time when we had turned the tide on Nazism, and Americans could justifiably feel that our views of right and justice had been vindicated. Judge Hand, however, took another approach. Judge Hand did not view the war as a vindication of any particular version of truth, rather he viewed it as a vindication of "the spirit of liberty." He asked:

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[3] I am actually speaking hypothetically. In 16 years, I don't remember ever getting such a call from any of the four governors under whom I served. I did get calls occasionally from the Governor's Office of Economic Development and, more frequently, from various legislators on behalf of their constituents, and I always tried to respond to those calls expeditiously.

[4] MTC training courses are available for Corporate Income Tax, Computer Assisted Auditing Techniques, Nexus, and Statistical Sampling for Sales and Use Tax Audits (the last also being available to private sector tax personnel).

[5] The Georgetown University Law Center, through the good offices of Phil Tatarowicz, a former Chair of the SALT Committee, has been particularly proactive in reaching out to state tax personnel and making quality education available to them at an affordable price.

> What then is the spirit of liberty? I cannot define it; I can only tell you my own faith. The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interest alongside its own without bias . . . .[6]

I do not pretend that "economic presence" or "section 18 equitable adjustments"[7] are issues that approach in any way the importance of the significant social and political issues of our day. I do believe, however, that as tax officials and taxpayers interact, it is critical both to the process and to a just resolution that we seek to understand the minds of our counterparts and that we weigh their interest along with our own.

Many of you have probably had the same experience I have had when you have read a judicial decision and thought, "That's obvious. I can't understand how that case even went to trial." And then you read the dissent. And you said to yourself, "Oh. Now I get it. I see that there was a real dispute. Reasonable minds can differ." As taxpayers considering an issue, we may benefit from looking at it from the government's point of view. As tax administrators considering an issue, we can undoubtedly benefit from considering the issue from the taxpayer's point of view. But that consideration is easier and more fruitful before the battle lines have been drawn and the adversary proceedings have begun. The SALT Committee, if state tax officials and practitioners are present, provides an excellent venue for learning each other's point of view.

Another manifestation of the lack of a "spirit of liberty" arises in the public square. It is now axiomatic that the "public debate" is more rancorous than ever. The atmosphere in our nation's capital is frequently described as "toxic." And conventional wisdom indicates that one of the reasons for this rancor is the fact that we can all choose the news sources and the talk shows that vindicate our own prejudices. If we want to feel good about ourselves, we can go to Sean Hannity or Rachael Maddow as we choose.[8] We have gerrymandered ourselves into like-thinking communities.

Again, the issues we face in state and local tax law are not as difficult as same-sex marriage, immigration, and civil liberties vs. terrorism, to name a few, but they are important. As tax officials and taxpayers and their representatives meet on neutral territory, in an atmosphere of mutual respect, it becomes harder to demonize the other side, either as a greedy horde of tax evaders or as an equally greedy, lazy bunch of bureaucrats. It is easier to admit, if only to ourselves, that we may not be right.

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[6] Learned Hand, *The Spirit of Liberty*, *in* The Spirit of Liberty: Papers and Addresses of Learned Hand 190 (Irving Dillard ed., 1952).

[7] *See* Uniform Division of Income for Tax Purposes Act, Section 18.

[8] *See generally* Amy Mitchell et al., *Political Polarization & Media Habits*, Pew Research Center, Oct. 21, 2014, http://www.journalism.org/2014/10/21/political-polarization-media-habits/.

The MTC allows (and encourages) public comment. Its annual seminar, as well as the Annual Meeting of the FTA, always enjoys the participation of speakers from the private sector. Similarly, most of the national state tax seminars seek participation from state tax administrators on one or more panels. I have been honored to participate on many of those panels, and I hope they have been worthwhile for the attendees. But the dynamics between a presenter and the audience, or between a government panelist and a private sector panelist, are somewhat constrained by the situation. It is one thing for a private taxpayer to testify at an MTC audit committee meeting. It is another thing for that taxpayer to be shoulder-to-shoulder around a table, discussing those issues with a group of tax lawyers, some of whom represent the government. The SALT Committee can be a common ground where taxpayer and government representatives can meet on equal terms and candidly exchange views, recognizing that there is a possibility, though it may be remote, that the other person may be right or at least that the truth may lie somewhere in between.

My participation on the SALT Committee has enriched my experience and my expertise. I think it has made me a better Tax Commissioner. I know Rick Handel's judicious comments and thoughtful viewpoint benefitted me when I was in private practice. I hope my participation on the Committee, as a tax administrator, has benefitted others.

The Committee could benefit greatly from the participation of other state and local tax officials. I believe those officials could benefit as well. Tax administration and policy is too important to be left to one side. In the final analysis, government is funded by taxpayers but it exists only to serve those taxpayers, either in their role as citizens or in their capacity as the employers and providers of goods and services to those citizens. The SALT Committee, in its own way and with its own strengths and unique structure, can materially improve tax administration for all of us.

Reflections on the Past 15 Years

DAVID R. CASSIDY*

I was asked to comment on the changes I have seen in the practice of state and local taxes since I served as Chair of the SALT Committee in 2001 through 2003. Upon reflection and review of old periodicals and seminar materials (note to librarian: I told you I would need those documents one day), it strikes me that, while we still litigate the same substantive questions (nexus, apportionment, scope of exemptions, etc.), the facts and circumstances giving rise to those questions have, in many instances, changed. Further, the way we practice has substantially changed. These changes were brought about in large part by the decline of the more traditional forms of commerce, the continued growth of electronic commerce, commerce's effect on how business is done, and the widespread use of more sophisticated information technology by practitioners.

For instance, in 2001 Blockbuster had 7,000 stores located throughout the United States. It earned $5 billion in revenue from its sales and rentals of DVDs and CDs. It had just passed up the opportunity to buy Netflix for $50 million. Today Netflix is located in the Cloud and has more than 27 million subscribers to its streaming services, more than 8 million subscribers to its DVD rental service, and annual revenues in excess of $1 billion. Blockbuster is bankrupt and closed its last store in 2014.

Part of Blockbuster's fall was due to the decline in sales of physical copies of CDs and DVDs, which peaked in 2003. That was the year Apple began offering digital downloads. In 2003, sales of CDs accounted for 93% of all music sales. Today, digital downloads account for 64% of music sales, and even those sales are being seriously eroded by the rise of streaming services.

In 2001, sales of electronic books represented a miniscule portion of all book sales. Borders, a leading retailer of paper books at the time, decided to outsource its online book sales to Amazon and concentrate on sales at its brick-and-mortar stores. Bad decision! Today, electronic books make up more than 22% of all book sales. Amazon is thriving, and Borders doesn't exist.

Overall, electronic commerce sales in 2001 were approximately 1.1% of total retail sales in the United States. By 2014, electronic commerce sales constituted 6.5% of total sales. What this signifies is that commerce is shifting from its traditional form of a customer walking in, buying, and walking out with tangible personal property to one of a customer clicking in to a website and having an out-of-state retailer ship the property to the customer. In other

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instances the customer buys digital property or pays for digital services that are received electronically. Not unexpectedly, state and local tax revenues from sales taxes were adversely impacted because their sales and use tax statutes had been enacted when society's consumption of tangible personal property greatly exceeded sales of services, tangible personal property was something you could actually see, and buying from remote sellers largely consisted of ordering items out of the Sears & Roebuck and Montgomery Ward catalogs.

State and local authorities have attempted to protect their revenues by "modernizing" their laws. Some enacted "Amazon laws" designed to expand the nexus net so that remote retailers would have to collect and remit sales taxes. Some states apply the concept of economic nexus to insure that out-of-state companies pay the local income tax. Others expanded their definitions of tangible personal property and taxable services through legislation, regulation, or by adopting a "they're taxable because we say they're taxable" attitude to capture transactions which were once thought not to have been taxable. Just like they were in 2001, practitioners are still litigating whether transactions come within the scope of the law, whether regulations are valid, and whether *ipse dixit* can serve as the basis for a tax. Of course, there are, and probably always will be, disputes over nexus.

As electronic commerce expands, the number of taxpayers doing interstate business likewise increases. This has led to a concomitant rise in nexus issues for both the sales and income tax. For example, I recently handled a matter where a software program was developed in Louisiana and loaded onto servers located in another state from where it could be accessed by users throughout the United States. Determining which states considered my client as having nexus for purposes of both the sales and income tax was not straightforward. A generally accepted, cohesive theory of nexus continues to be an elusive concept in the area of state and local taxes, and it does not appear that we are any closer to an answer.

In 1992, the Supreme Court, in *Quill*, suggested that Congress get involved and legislatively overturn the Court's decision in *Bellas Hess* that nexus, for purposes of collecting a sales tax, required a physical presence. Since then, tax collectors have lobbied Congress, unsuccessfully so far, to enact the Marketplace Fairness Act, which would compel remote sellers to collect local taxes. Remote sellers apparently do not see the fairness in the Marketplace Fairness Act and have successfully, so far, lobbied against its enactment. The Marketplace Fairness Act of 2015 was recently introduced, so Congress will try again this year.

At least one member of the Supreme Court has, however, apparently given up on Congress acting. Justice Kennedy, in *Direct Marketing*, implored the tax bar to bring a case the Court could use as a vehicle for overturning *Bellas Hess*. I am sure the bar will rise to that challenge with the only question being how long it will take for such a case to slowly wind its way up to the Court. Of course, one thing that has not changed since 2001 (or since Shakespeare's time for that matter) is that we must still suffer the law's delays.

The rise of electronic commerce has also changed other areas of taxation. For instance, how income is apportioned among the states in which a company does business and what constitutes a "fair apportionment" of that income for income tax purposes are still key issues in our practice. In 2001, the standard model for apportioning income was a three-factor formula consisting of ratios of in-state property, payroll, and sales to total everywhere. With the growth of electronic commerce, more states have gone to the use of formulas that double-weigh sales or even use sales as the single factor, since a company can receive substantial revenue from a state without having any property or employees in that state. With more services being provided on the Internet, some states now source revenues from services to the place where the benefit is received as opposed to the state where the service was actually performed.

Another issue practitioners were dealing with in 2001 was the forum in which tax cases should be tried. Lawyers representing taxpayers have long advocated establishing independent tax tribunals. Lawyers representing tax collectors prefer a home-field advantage. In 2006, the ABA adopted the Model State Administrative Tax Tribunal Act, which grew out of a project of the SALT Committee. Slowly but surely, states are moving toward a more neutral tribunal. Even Louisiana and Alabama recently revised their procedures for contesting taxes such that the issues are heard by persons who are independent of the tax collector. If those two states can do it, then there is hope for every state.

While many of the legal issues facing practitioners in 2015 may be similar to those they faced in 2001, the way practitioners practice has certainly changed. In 2001, most of us had computers in our offices, which were big ugly boxes occupying a lot of space on one's desktop and took forever (at least by today's standards) to do what you wanted it to do. Now you can carry a computer in your pocket or purse, and how fast it works depends on the number of "bars" available.

In 2001, our research sources were housed in rooms just down the hall from our offices. For smaller firms, these sources were largely limited to those relative to our home state and the federal government. Now, our research sources reside on the Internet and are accessible from almost any place you happen to be. Even the smallest firms can research how all 50 states, the District of Columbia, and other jurisdictions have addressed a particular issue. I had occasion to cite a decision issued by a Hawaiian court in the 1960s on one particularly obscure Louisiana issue.

The way we communicate has also changed. In 2001, our mobile phones were likely made by Nokia or Motorola and were just phones. Now Samsung and Apple are the leading manufacturers, and our mobile devices are our constant companions and function as computers, calculators, calendars, cameras, recorders, and entertainment centers that can suggest a restaurant, guide us there, pay for the meal, and chide us for the number of calories we consumed while there. They are phones almost as an afterthought. Soon we may jettison these devices for a watch.

The way we communicate with clients has also changed. In 2001, we played phone tag with clients and faxed or even mailed documents to them. Now we use e-mail instead of mail, texts instead of e-mailw, and scans instead of faxes. We deliver packages and documents by private overnight services. The historic institution of the USPS is used primarily for firm announcements and holiday greetings.

So while we still apply the same legal concepts, those concepts are being applied to fact patterns that were uncommon in 2001 but are now the norm because of how our economy has evolved. As our economy continues to change the tax system will, as any parasite would, evolve. As the tax system mutates, the way we treat, and deal with, issues created by the tax system will also change. Indeed, the one thing that will never change in the SALT practice is that the SALT practice will always be changing.

Reflections on the SALT Committee: An Interview with Arthur R. Rosen*

As a constant presence at ABA Section of Taxation meetings over the last 35 years, Arthur Rosen missed (by his estimate) three meetings. No more, no less. Punctual and pugnacious, Mr. Rosen served as Chair of the SALT Committee from 1985–1987, endures as a regular speaker on ABA SALT panels, a fixture at SALT Committee dinners, and offers input and insight while attending Saturday morning SALT roundtable discussions. To fete the 75th Anniversary of the Section, the editors spoke with Mr. Rosen (Art) about his involvement with the ABA, his favorite aspects of Tax Section meetings (condensed here, of course), what the SALT Committee has meant to him, his reflections on past SALT Committee projects, and what he hopes to see from the SALT Committee in the future.

SALTE: When did you first become involved with the ABA? Do you remember attending your first SALT Committee meeting?

Art Rosen: I first became involved with the ABA in the late 1970s. I was working for Xerox, and Jim Peters, who would later be my boss at AT&T, was the chair of the SALT Committee. I do not remember too much about that first meeting other than that it was held at 1095 Avenue of the Americas in New York and that the main topic of discussion was unitary. I recall that there were approximately 25 people in the room, and maybe three of the people were doing virtually all of the talking.

SALTE: You have attended many meetings since that first one. Did you know at that first meeting that you wanted to be very active within the ABA?

Rosen: Nothing in my memory is jumping out, but there must have been something at the first meeting that I enjoyed because I am not masochistic and thus would not have continued attending meetings just for the sake of doing so. Some people might think it is compulsively crazy to attend all the meetings, but, in my view, if you are going to be a member of an organization, you should devote a reasonable amount of energy to it and do more than just occasionally sit as a member of the audience.

In the case of the ABA, part of what drew me in was the feeling I got from the meetings. There is a certain comfort in meeting with people from comparable backgrounds and lives from all around the country to discuss SALT in a noncompetitive environment. Members of the committee genuinely like each other and can socialize in a setting where the focus is on intellectual development or camaraderie rather than on business development. There is an opportunity for people who generally like each other to socialize in an environment

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with intellectual undertones. In some cases, genuine friendships with other practitioners form, as you see the same people again and again over decades.

SALTE: Could you discuss what you think are some of the more important SALT Committee projects?

Rosen: I would say the Model Acts. There are several Model Tax Tribunal Acts that have been drafted and worked on by the ABA SALT Committee over the years. They have been influential and have been used as models for state tax courts. There was also a model Administrative Procedure Act that did not have substantial legs. I believe there may have been a Model S Corporation Act as well.

SALTE: Are there projects that you would like to see the ABA's SALT Committee take on?

Rosen: I am no longer part of the leadership of the SALT Committee, but I would like to see the SALT Committee engage in more advocacy work. It seems that other sections are not shy about advocating for certain positions. There might be a problem with tax practitioners generally—there may sometimes be a tendency for tax practitioners to exercise extreme discipline and to become almost like detached academics when in membership organizations rather than weighing in on issues. This is too bad. The composition of the SALT Committee, which includes practitioners in private practice, employees of corporations, and officials in government agencies, offers a mixture of perspectives that would be important to advocate in a credible and constructive way. More advocacy by the SALT Committee has the potential to make a difference and change our state and local tax world for the better. For example, I know that many state legislators consider state tax policy changes so as to improve their grade in the COST Scorecard on Tax Appeals and Procedural Requirements. I would imagine that if the SALT Committee actively sought reform, it could have a voice with state tax administrators and could achieve a meaningful impact.

SALTE: What might be an example of an area in which you would be interested in seeing the SALT Committee advocate more? Is section 18 a possible area?

Rosen: Generally, that would be developing positions good for the tax system and working to see those changes adopted and implemented. Section 18 and alternative apportionment in general is a great example. The SALT Committee could express its view on when alternative apportionment is justified. It also could state that court decisions are wrong when they suggest that the burden is on the taxpayer to explain why the statutory filing methodology produces the correct result—rather, the burden should always be on the party requesting alternative apportionment.

SALTE: Could you speak to the composition of the SALT Committee?

Rosen: The joke is that the composition of the SALT Committee has changed drastically. It used to be almost all in-house corporate tax people, but now it is people at law firms. However, it is the same people—their roles have just changed. The chairs of the SALT Committee have been diverse—a

mix of relatively old and relatively young people, men, women, attorneys from industry, and attorneys from private practice.

SALTE: What do you think about the content of the SALT Committee luncheons and the panels? What makes a good luncheon speaker or panel?

Rosen: The luncheon speakers who have been involved in or are litigating important state and local tax cases have been particularly valuable, particularly those that are appearing, or have recently appeared, before the United States Supreme Court. I may not always agree with their approach to a case, but they bring a unique perspective because of their involvement and knowledge of the details and process. Similarly, government officials who are supporting a state tax bill can be good speakers, even if they are not technical tax specialists, because they know what it takes—as a practical matter—to get legislation enacted and who the stakeholders are.

For me, a good panel discusses a few cases in depth and confines itself to a narrow area. The panelists consider, address, and debate what the best policy and legal answer is.

SALTE: You have mentioned the importance of the social aspect of ABA Tax Section meetings. Is there a particularly memorable social occasion at a Tax Section meeting that comes to mind?

Rosen: I remember attending a Tax Section meeting in San Diego a while back. A large group of us decided to go directly to Tijuana from the ABA meeting attired in suits. Shortly after we arrived in Tijuana we went to a bar and several of us waited in line to use the bathroom. There was a long line. When the people in line saw how we were dressed (suits and ties), they said, "must be NARCs, better let them through" and got out of the way to let us use the bathroom immediately.

SALTE: It is common for SALT Committee members to socialize on the Thursdays and Fridays around the time of the meetings. Has that always been the case?

Rosen: The SALT Committee leadership meetings on Thursdays used to be at nice restaurants, a practice that I am proud to have initiated. More recently, that has been changed, so that the meeting is more business-oriented, and it is usually held in a conference room at a firm. The Friday night dinners have always been somewhat more informally arranged and often are just groups of people who know each other selecting a local restaurant and deciding to go together. For a lot of people, it achieves a principal goal of being around colleagues in a noncompetitive environment. That's the "good feeling" I mentioned earlier. I tried to facilitate that when I started the Thursday dinner.

SALTE: SALT Committee members enjoy the Saturday roundtable discussions. Do you know how the roundtable discussions came about?

Rosen: The roundtable started when I was chair in the 1980s. I borrowed the idea from the monthly SALT luncheons that Paul Frankel was

chairing at NYU.[1] (For readers who might not know, Paul Frankel chaired the NYU Institute on State and Local Taxation for many years. He established Morrison & Foerster's East Coast SALT practice and has won significant state tax cases in state supreme courts throughout the United States.) Paul's lunch program was unique at the time, and if people didn't appreciate it, they certainly should have. The point of Paul's luncheon and the SALT Committee's roundtable is to provide a forum where there can be an exchange of ideas among practitioners about whatever they are working on or want to know about. Everyone can check their jobs at the door and there can be a full and open discussion of the issues. Initially, we wanted the roundtable to be at the Friday lunch meeting, but it was decided that there should be speakers at the Friday lunch meeting, so the roundtable was slotted for Saturday mornings.

SALTE: Thank you for sharing your time and reflections on the SALT Committee.

Over the past three decades, Art Rosen has been ubiquitous in the state tax community, and his involvement with the ABA has been no different. What struck us in speaking with Art was the deep connection Art seemed to have with the ABA, and the different feeling he gets from Tax Section meetings compared to meetings with other organizations. Specifically, Art spoke of the "quiet contented happiness" that comes at Tax Section meetings, due to seeing familiar faces and being in the company of other SALT practitioners for intellectual companionship in a noncompetitive environment—from being among friends. Art's constancy at Tax Section meetings and participation in SALT Committee meetings and decisions, truly exemplifies his advice about "devoting a reasonable amount of energy" to associations with which one is involved.

[1] Jasper L. Cummings, Jr. & Alan J.J. Swirski, *Paul H. Frankel: A Life in Tax*, American Bar Association, last accessed Apr. 18, 2015, http://www.americanbar.org/content/dam/aba/publishing/newsquarterly/13fal/13fall_n q_paulfrankelalifeintax.authcheckdam.pdf.

Montreal Debate on Congressional Limitation of State Taxation of Interstate Commerce*

On August 7, 1966, during the business session of the ABA Section of Taxation at the Montreal Annual Meeting, the report of the Committee on State and Local Taxes was principally devoted to the presentation of the pros and cons of whether Congress should, by legislation, impose limitations on state taxation of interstate commerce. The affirmative of the proposition was argued by Jess N. Rosenberg, Franklin C. Latcham, Arthur B. Barber, and Stephen C. Nemeth. The negative was argued by Theodore W. DeLooze, John J. O'Connell, and Mitchell Wendell. The remarks of these seven speakers are set out below. All speakers are members of the Section of Taxation.

I. The Case for Congressional Action

A. *Remarks of Jess N. Rosenberg*

During today's meeting this Section will be asked to act upon a resolution under which the American Bar Association would approve in principle the proposition that (1) the Congress of the United States should adopt legislation prescribing jurisdictional rules or standards to be observed by state and local governments wishing to tax interstate commerce, or seeking to require businesses engaged in interstate commerce to collect state and local taxes, and (2) legislation specifying appropriate methods or procedures by which state governments may determine that portion of tax base which can be reached by a state having jurisdiction to so tax.

Since its inception, this Committee on State and Local Taxes has been concerned with problems of state taxation of interstate commerce and each of its technical sessions have been devoted to analysis of decisions and developments in this field. This has been especially true during the past ten years, starting in 1956 with an examination of the extent to which Congress might define the areas of interstate commerce exposed to state and local taxation; continuing in 1957 with the consideration and approval by the committee of UDITPA (Uniform Division of Income for Tax Purposes Act); intensified by Supreme Court decisions in Northwestern States and Stockham Valves, 358 U.S. 450 (1959), and by congressional action following it (P.L. 86-272, September 14, 1959; P.L. 87-17, April 7, 1961; P.L. 88-42, June 21, 1963; P.L. 88-286, March 18, 1964; 15 U.S.C.A. § 381). Members of the Committee have reviewed constitutional aspects of congressional action and

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prepared a comprehensive brief of the power of Congress to regulate state and local taxation of interstate commerce. The last revision was on July 21, 1965.

Three members of the Committee will assist me today in presenting the case for congressional action. They will speak from three different backgrounds: one is an attorney in general practice; one is an attorney engaged in state tax administration; and one is engaged directly in the service of a large business corporation. My own experience is that of a former chief counsel for a state tax department and head of a research organization supported in part by a number of companies engaged in interstate transportation. It should be emphasized at the outset, however, that none of the proponents of this case for congressional action speaks to you today representing his clients or their interests. Instead, each will give you his views as a responsible member of the Bar emphasizing the need for the Bar, as a matter of public responsibility, to adopt principles regarding the solution of a pressing national problem which is essentially legal in nature, but which also involves important economic considerations.

In essence, our case is that the Congress of the United States is the proper forum for the solution of the problems of interstate commerce as affected by state and local taxation, and that ample authority exists in the Congress to deal with the problem in an adequate manner. It is also our thesis that, unless the organized Bar of the nation assumes leadership in the matter, the present situation will continue unimproved or, what is more likely, Congress will be asked to give piecemeal consideration to individual problems of affected businesses.

1. *No Question of Federal Intervention*

At the outset it must be understood that no question of states' rights or federal intervention is involved. The power to regulate commerce among the states has been in federal hands since the Constitution took the place of the Articles of Confederation in 1789. For most of our national history the constitutional grant to Congress regarding regulation of commerce acted as a limitation on state taxing power under decisions of the United States Supreme Court acting as arbiter. The only current question, in our view, is whether this power should continue to be exercised by courts or whether it should be assumed by Congress. The choice to be made is simply one between litigation (the status quo) or legislation embodying rules to be formulated and prescribed by Congress.

2. *Power of Congress*

Those who have studied the Supreme Court's attitudes toward this problem have seen a shift since the early thirties from almost complete state tax exemption for interstate business to adoption by the Court of a permissive attitude toward state levies in the absence of congressional action. As the Court created its own "tangled underbrush" in a maze of decisions in this field it continued to sound one clear note in both affirmative and dissenting opinions,

viz. the ultimate power to regulate state taxation of interstate commerce is a prerogative of Congress.

At least as far as the present Court is concerned, it has become more clear that it still looks to Congress for guidance. Pertinent to this consideration is the fact that during the past 30 years states have increasingly adopted franchise, privilege, excise, and occupation taxes as major revenue producers and that this trend has been directly related to or coincidental with the trend in decisions of the Supreme Court extending the power of states to tax interstate enterprises. Eleven states adopted sales taxes in 1933. Today, only eight states do not impose a sales tax and only five percent of the nation's taxpayers reside in this latter group of states. The due process clause no longer provides a shield for defeating state tax jurisdiction as it did 30 years ago. Furthermore, there are now 36 states which have enacted legislation for reciprocal "tax comity," opening their courts to other states for enforcement of tax liability.

In short, the situation is that the expanded power of states to tax interstate business has rendered ineffectual any regulation of commerce by Supreme Court decision guidelines arrived at on a case-by-case basis. The result is that the only resort for orderly solution is the Congress itself. It is only of passing interest that the present Court seems to hold this view. The fact is that a pressing national problem exists which demands an orderly solution.

3. *A Need for Uniformity*

The tremendous growth of this nation has seen corresponding growth and change in the nature of business organizations and their manner of doing business in our expanding national economy. Very few businesses of any consequence limit their activity to a single taxing jurisdiction, and every phase of economic activity is beset with multistate problems of taxation, regulation, and competition.

This same growth has created tremendous pressures for state and local governments as well. Their revenue sources are limited; yet their obligations, due to expanding responsibilities, continue to mount. These two factors alone create a pressing need for orderly methods of taxation of multistate businesses which will permit states and municipalities to receive a fair share of taxes without unduly hampering trade among the states and without giving advantage to interstate business, discriminating against it, or giving preferment to local or intrastate business.

As the economy continues to expand, as we have more rapid travel and more rapid communications, as population explosion continues, and so on, ad infinitum, there is a greater and increasing need for new ground rules. The ballpark has gotten smaller all the time, but the game has become more complex. If the states are to retain any sovereignty in this field whatsoever, we need rules binding everyone playing ball in the park—we need uniformity.

4. *Uniformity by Congressional Action*

Perhaps the best case for congressional action to secure uniformity has been made by the states themselves. Their actions over a long period of years indicate that their solution to the problems of taxation of interstate business has been the adoption of uniform laws and procedures by state governments. At the same time, their performance toward achieving this uniformity has amply demonstrated their inability to attain this goal. It is, therefore, increasingly evident that the desired uniformity can only come about through federal action which will preserve the common market of the United States and, at the same time, give adequate protection to the revenue potential of the states.

5. *The Needs of the States*

State and local tax problems have not received the national attention which is focused on federal taxation. This is natural, since the latter affects everyone and thus draws concentrated attention. It is enlightening to note, however, that, in 1964, tax revenues of state and local governments were double Federal Government expenditures for purely domestic purposes. It is also interesting to note that, although municipal tax revenues are on the increase, indebtedness is increasing at a greater percentage rate and the percentage increase of spending is greater than either the rate of collections or of indebtedness.

It is obvious that financing state and local government is a problem of national importance and that unless the responsibilities and activities of state and local governments are cut back—an extremely unlikely proposition—or federal subventions are increased—a proposition which is extremely distasteful to those who believe in independence of local government—their revenue demands vis-à-vis interstate businesses will increase in the future.

Under these circumstances the least that might be expected from Congress (the Supreme Court having indicated its lack of ability in the matter and having invited Congress to act) is to delineate rules for local taxing jurisdiction and methods for apportionment—rules which will assure each jurisdiction of the same appropriate fair share of interstate businesses free from any duplicating or overlapping effects of piecemeal state assertion of tax liability.

6. *Need for Diversity*

The actions of the states in their pursuit of uniformity have led your speaker to conclude that the objective of state and local governments is not uniformity but, rather, a uniform plan which will permit them to retain their sovereign right to the diversity arrived at by individual state selection of taxing methods. Minimal standards for jurisdiction and apportionment seem ideally suited to achieve the objective of the states. At the same time, the history of the problem demonstrates that neither the states nor the United States Supreme Court are capable of developing these rules.

7. *Need for Action by the American Bar Association*

The states, like many affected interstate businesses, have indicated a preference for the status quo. The National Association of Attorneys General recently adopted a resolution, part of which states, "The Courts are always available to prevent state and local governments from exceeding constitutionally permissible tax limitations." They, in common with many taxpayers, want to continue the game of commerce clause roulette.

This reaction was anticipated over ten years ago by your Committee. Unless lawyers who have dealt with the problems of state taxation of interstate commerce for so many years assume the leadership in developing appropriate rules, congressional action is likely to be directed only toward solution of particular problems of affected states or industries. This is what I call the "blow torch" principle. Those who have been badly burned want something done; those who have not will delay the proposal of solutions while they deal with the problem on an ad hoc, day-to-day basis. The danger in this piecemeal approach to congressional action—and I submit it has already taken place in the various Public Laws cited above—is that the Supreme Court may adopt the attitude that, having referred the problem to Congress, it will be guided by the limited action taken by Congress. The legal problems we face, however, are only manifestations of the much larger economic problem facing our nation. Solutions must be broad-gauge and not limited to individual problems of particular industries or particular states. Instead, they must be addressed to accommodation of the dual sovereignties inherent in our federal system and the continued growth of our expanding economy.

Support of the basic principles of uniform rules for jurisdiction and apportionment is an essential first step to assumption of appropriate responsibility in this field by the nation's lawyers.

B. *Remarks of Franklin C. Latcham*

I

The federal legislation under consideration in Resolution No. 1 relates only to state jurisdiction to tax interstate commerce and to apportionment of the state tax base of a business engaged in interstate commerce. Thus, the federal legislation relates only to interstate commerce, an area where federal power is predominant.

From the founding of our nation and the establishment of the Constitution, it has been recognized that the Federal Government, not the states, has primary power concerning regulation and taxation of goods moving in interstate commerce. The wisdom of this policy has been amply demonstrated in the establishment of the world's greatest common market. Therefore, the question is not whether the Federal Government has the power to act, but whether the Federal Government should assert its undoubted authority.

II

Why is federal legislation particularly needed in the areas of state jurisdiction to tax and apportionment of the state tax base? I think the simple answer is that federal legislation appears to be the only feasible solution to a serious breakdown in the law.

For years the courts have been struggling with an attempt to define the federal constitutional limits in state taxation of interstate commerce. This has particularly been the burden of the United States Supreme Court because its pronouncements are final, at least for the time being. Indeed, by the time of the *Northwestern States Portland Cement* decision in 1959, the case that engendered P. L. 86-272, the Supreme Court had decided some 300 full-dress opinions on this problem.

However, to attempt to find a uniform standard for determining state jurisdiction to tax in the constitutional cases is a frustrating task. As the Court said in *Miller Bros. Co. v. Maryland*, "the decisions have not always been clear . . . consistent or reconcilable. A few have been specifically overruled, while others no longer represent the present state of the law." Moreover, the Court has not limited jurisdiction to one state in the case of a single transaction; in the case of some taxes, more than one state may constitutionally tax the same transaction. It is readily apparent, as the Supreme Court has stated, that it is impossible for the courts to piece together overall jurisdictional rules on a case-by-case basis. The judicial process cannot give a determination of what level of nexus would strike the most equitable balance between the demands of the state for revenue and the probable burdens of compliance. In fact, in a number of opinions the Supreme Court has, in effect, asked Congress for legislation in this field.

The present legislative and administrative enactments of various states are of no help in determining a uniform rule. As the House Special Subcommittee Report states,

> For each kind of tax, there is a broad range of activities for which liability is asserted by some states and not by others. In many cases, the determination of whether or not liability exists is difficult, if not impossible . . . . When the problem of determining whether there is liability is reviewed in the terms of cumulative effect of all four types of taxes, the variety and complexity is greatly increased. Not only do jurisdictional standards differ among the states, but they are also non-uniform for different taxes within a single state.

In fact, in over 30 selected types of contacts which out-of-state taxpayers might have with a state the subcommittee report found a wide variety of responses from questionnaires sent to administrators of state income taxes and sales and use taxes. Furthermore, comprehensive statements of administrative positions are rarely available, and it is difficult for taxpayers to learn what are the state claims for jurisdiction to tax.

III

What about apportionment of the tax base? It should be pointed out initially that apportionment of the tax base is closely linked with jurisdiction to tax; indeed it is only an extension of the problem of determining jurisdiction. The apportionment formula determines the extent of the state's right to tax once jurisdiction has been established. If a uniform federal statute could be enacted fairly apportioning the tax base in regard to major state taxes, each state would be able to tax its fair share of the tax base and no interstate business should have more than 100% of its tax base subject to state taxation.

What is the present picture in regard to apportionment of the tax base? Here again the constitutional limitations are extremely vague and the varying limitations found in different state statutes are the only effective measure. However, states have enacted apportionment rules (mainly for corporate income taxes) which for the most part ignore the apportionment rules of other states.

In regard to corporate income taxes, although a few states favor separate accounting, most have adopted apportionment by formulas, which usually include the property, payroll, and sales factors. Some variations appear in defining the property and payroll factors, but the great differences occur in the sales factor. The subcommittee report summarizes the problem as follows:

> Sales are assigned to States by six general standards. These standards are used either singly or in combination. The most prevalent standard is destination, followed by sales office, origin, sales activity, place of acceptance, and intrastate shipments. Within these general standards there is further diversity. For example, there are about a half-dozen variations among those states which adhere to a destination standard. There are also three major variations in the concept of origin. In view of these diversities the categories into which States or their sales factors have been classified should not obscure the full scope of the diversities presented.

To further confuse the problem, the other major tax utilizing apportionment, the capital stock tax, oftentimes uses different factors from the income tax. And in a few states which levy both corporate income and capital stock taxes, different apportionment formulas have been adopted for the two types of taxes.

Apportionment of the tax base has not been adopted in the fields of sales and use and gross receipts taxes. The state either taxes the whole transaction, or nothing at all. However, here again there is little rapport between the taxes in regard to similar problems. For example, sales figures which must be developed for income tax apportionment, are generally of no value in determining liability for sales and use taxes or gross receipts taxes, levied by the same state.

Of course, some states have made an effort in the direction of uniformity through adopting the Uniform Division of Income for Tax Purposes Act, and providing a credit for sales or use taxes or gross receipt taxes levied on the same transaction by another state. In a recent count it appears that 12 out

of the 37 states, plus the District of Columbia, which levy corporate income taxes have adopted the uniform act, and 32 out of 42 states levying sales or use taxes, or gross receipt taxes, provide for a credit where a tax has been levied upon the same transaction by another state.

Some difficulties with state action are: (1) we do not know whether all states will join in these efforts; (2) we do not know whether the legislation adopted by the various states will be identical or whether it will continue in existence once it is adopted; and (3) we find that the efforts of the states towards uniformity to date (UDITPA and the sales and use tax credit) have been rather narrow in approach considering the scope of the problems involved.

IV

Any lawyer reading the subcommittee's report cannot help but be impressed with the chaotic state of the law in the area of state taxation of interstate commerce, and he must conclude that a solution to this situation is urgently required. The subcommittee report found that most interstate businesses have a geographic spread of sales much larger than the spread of places of business. However, most interstate businesses are only paying taxes to states where they have business locations and not to states where they have merely sales activity in spite of state assertions of tax liability.

The rule of law has broken down, and this state of affairs cannot be endured in our society. It is indeed a sobering thought that because of this chaos many businesses are ignoring state laws and many states are helpless to enforce their laws.

The federal legislation encompassed by Resolution No. 1 pending before the Section of Taxation goes to the heart of the problem. Once state jurisdiction is established and a fair apportionment of the tax base can be determined, no business should be reluctant to conform to the tax requirements of the particular jurisdiction. Indeed, we already have efforts towards uniformity for these areas through Public Law No. 86-272 and UDITPA. It would seem that these pieces of legislation are only the beginning towards ultimate federal legislation in these two areas. If we are to preserve a system of voluntary tax compliance, well-defined rules of jurisdiction and apportionment are a necessity.

As I understand Resolution No. 1, it in effect advocates a limitation of federal legislation to the two areas of jurisdiction and apportionment. I am in favor of so limiting federal legislation and leaving to the states the problem of administering uniformity in other areas such as tax base, cooperative auditing, and so forth, and also leaving administration of both state and federal legislation to the states.

C. *Remarks of Arthur B. Barber*

Although I have been Chief Counsel for the Wisconsin Department of Taxation for over 20 years, I am addressing you today as a private citizen, and not in my official capacity. I mention my background merely to acquaint you

with the fact that my views have been molded during a long and virtually day-to-day involvement with state income taxation of multistate businesses and that I have seen these problems from the angle of a state tax attorney who has tried every multistate income tax case in Wisconsin since early in 1945.

I speak to you as a strong advocate for the proposition that there is a case for congressional action relative to state income taxation. And I assert that the need for congressional action becomes more imperative with each passing day.

I am satisfied that in the area under discussion Congress has not only the authority to act, but the obligation to act. On several occasions members of the United States Supreme Court have pointed out the inadequacy of the case-by-case method of handling tax problems involving interstate commerce and have urged Congress to legislate to protect the free flow of commerce between the states. In upholding Public Law 86-272 the Supreme Courts of Louisiana, Oregon, and Missouri have recognized the plenary power of Congress to legislate concerning interstate commerce. A subcommittee of the Committee on State and Local Taxes of the Tax Section of the American Bar Association has studied the problem, and, with one dissenting vote, has concluded that Congress has ample power to act.

There has been, and probably will continue to be, by those who favor the status quo, many pious statements about federal encroachment on the internal affairs of sovereign states. You will hear talk about upsetting the federalism envisioned by our founding fathers. These statements seek to substitute emotion for fact. The simple fact is—our founding fathers imposed upon the Federal Government the duty to remove all state impediments to the free flow of commerce between the states, and this includes impediments inherent in state tax systems.

Assuming adequate federal *authority* to act, we come to the matter of the *desirability* of federal action.

It seems to me that for us to consider rationally, the desirability of federal action, we should:

FIRST: Determine whether the current situation is sufficiently bad to warrant congressional involvement.

SECOND: Determine whether the passage of time will result in correction or worsening of the current situation.

THIRD: If satisfied that the situation now is sufficiently bad to warrant action and that lapse of time will only make things worse, determine whether there are alternatives to federal action.

FOURTH: If there are alternatives, weigh them against federal action as a means of correcting the situation as it now is, and as it will develop with the passage of time.

Based upon my own experience, I am satisfied that the current situation is sufficiently bad to warrant congressional involvement with the problem of state income taxation of multistate businesses. And my experience is underscored by the careful study made by the Special Subcommittee of the Judiciary Committee of the House of Representatives.

At the present time 37 states and the District of Columbia tax the income of multistate businesses. A number of cities also tax net income of such businesses. In the enactment of these tax laws, the several taxing units have gone their own way, and these laws, accordingly, are highly individualistic. When viewed separately, they do not appear unreasonable, but their aggregate impact on multistate businesses has two adverse effects on the free flow of commerce: First, these laws overlap in a number of ways, causing excessive taxation of some businesses to their disadvantage in the market place. In other instances they underlap (if I may coin a word) to the competitive advantage of the favored corporations over those seeking to do business in the same markets. Additionally, because of their individuality, coupled with the fact that they are being constantly amended, the cost of compliance constitutes an economic waste.

It is assumed by many people, not sophisticated in the area, that if all the states were to adopt the same apportionment formula, the problems of the multistate taxpayer would be solved. Unfortunately, this is not the case. There are a number of other areas that would require uniformity if we are to eliminate excessive taxation of multistate businesses and eliminate unnecessary compliance costs. For example, it would be essential to determine what unit or aggregate of units constitutes the taxpayer whose net income is to be apportioned. This involves uniformity as to:

1. separate accounting
2. divisional apportionments
3. consolidations of related entities
4. non apportionable income, if any
5. tax situs of non apportionable income, if any.

Uniformity also requires that all states relate to the same conception of net income.

In all of these areas, the laws of the several states and cities taxing net income vary. And though there have been constant efforts by tax associations to bring about improvement, little progress has been made, and most of it has occurred after the Federal Government was moved to look into the situation.

I know from my own experience over the years that the lack of uniformity in these several areas has subjected businesses to excessive taxation by the aggregate of the taxing states. And the cost of compliance with these radically different and constantly changing state and local income tax laws should be apparent to any fair minded person.

It is clear to me that these current problems will not go away with the passage of time, but will grow increasingly onerous, unfair and disruptive, unless something is done. Our world is getting smaller every day, with all of our modern means of communication. States are less and less isolated from each other. What used to be local markets are becoming regional and national markets. It is the nature of business to expand, and mergers and consolidations are also changing more and more businesses from intrastate to interstate. The

expansion of business across state lines is like the natural flow of water, but like water, can be diverted and obstructed by man-made barriers. While interstate commerce is increasing, more and more states are turning to net income taxation as a revenue source, and more and more cities are adopting income tax laws to help solve their budgetary problems. Thus, more and more businesses become involved in multistate income taxation, and more and more large businesses become more deeply involved.

Aside from sitting by and letting this situation continue to deteriorate, the only alternative to intervention by the Federal Government would be joint action by the several states. Indeed, the only alternative suggested by those who concede that something must be done, but who don't want the Federal Government to do it, is an interstate compact.

In my view, such a compact, even if attainable, would be a poor substitute for a federal statute. Such a compact would have to reconcile the conflicting views of the several states; would have to be approved by all 50 states and by those local units of government which, having home rule, seek to impose income taxes; and would have to be approved also by the Federal Government. No state would be likely to join if it couldn't withdraw. No state could delegate its legislative power to this new governmental entity so each *substantive* change would have to be ratified by state legislatures. A whole new governmental machinery with its attendant bureaucracy might have to be established and financed.

It would take time to draft a workable, reasonable compact, and years to present it to all the legislatures and to Congress, and, if achieved, would be, at best, a bad alternative to action by Congress, in an area where Congress has plenary power to act, and has been urged by the courts to act. In a real sense, the Federal Government *is an existing interstate compact*, designed, equipped, and experienced in the handling of national problems, with a constitutional mandate to protect and preserve the free flow of commerce among the several states. There is a certain naiveté in the suggestion that a new governmental unit—an interstate compact, could better handle this *national* problem. We don't need more government. Congress can and should proceed. There is no reason for anyone to believe that Congress has any intention of favoring interstate commerce, or burdening intrastate commerce. Neither is there any evidence that Congress would seek to deny to the states any current revenue source. The job before Congress is not to curtail taxation of income from interstate commerce, but to give the game a set of simple rules which would include definition of the playing field.

D. *Remarks of Stephen C. Nemeth, Jr.*

The problems incident to state taxation of interstate commerce have come to the forefront because of the rapid growth of business across state boundaries and the ever increasing revenue needs of the states and political subdivisions.

State and local boundaries, while clearly delineated for many purposes, have become less meaningful to our growing and mobile population, making

for a complex society. Additionally, large metropolitan areas have grown without respect to state boundaries. The marketing and distribution of products and services are attuned to the needs of these new economic markets and have followed the growth pattern across state lines. As the economy grew more complex, the very nature of the complexity demanded expanded government services with resultant revenue needs. It is these two forces which have resulted in an extension of state taxing policies and increased participation by interstate business, both large and small, in financing state government functions.

Commerce, having grown to a national and international scale, now requires that interstate taxation problems be analyzed and, indeed, be solved on a national level. Only in this way can we maintain a measure of commercial freedom for the necessary flow of goods and services, yet providing a system whereby all who share in the fruits of this economy can participate in tax contributions on an equitable basis, related to protections and benefits received.

The only governmental instrumentality that has thus far endeavored to exercise control on the national level in the interstate taxation field is the United States Supreme Court. Unfortunately, the decisions of the court have not solved the interstate tax problems because the very nature of the judicial process is to resolve the dispute between two litigants pursuant to the adversary system. Forced to render decisions on a case-by-case basis, considering only the facts presented, a "body of law" which can be referred to for purposes of uniformity has not been achieved. Further, the judiciary, not having the benefit of adequate statistical information with which to appraise the gravity or economic import of the tax burdens placed on interstate commerce, has had to deal with complex problems on a somewhat handicapped basis. The uncertainties which pervade the interstate tax field are not the fault of decisional law nor of the jurists themselves for, indeed, the judicial process can do no more.

Of equal significance is the fact that it should not be incumbent upon the courts to make political decisions—that of striking the delicate balance between the revenue needs of state and local governments and the degree of commercial freedom which a viable economy requires. This is the function of the Congress and that legislative body is now being challenged with assuming its responsibilities and exercising its plenary power in the interstate taxation field. No one is more acutely aware of this problem than the U.S. Supreme Court itself, whose justices have on several occasions urged Congress, via the written decision, to assume its authority over interstate taxation.

Many would oppose federal legislation on the premise that the problem should be left to the states. They assume that the states have both the will and the ability to effect uniform legislation. At this juncture, one must carefully weight this self-help approach with the knowledge that historically nothing is more jealously guarded than the power to tax. The type and manner of taxing by a state is a controversial political item of significant importance and it is

unlikely that state legislators will be impressed with the needs of the national economy or of the other states in designing its own taxing program.

The diversity of interests among the states, the desire of each state to formulate its own taxing policy, the propensity to protect in-state business, and the pride in the sovereignty of each state do not lend themselves to a common ground of understanding between the states.

Can we realistically believe that all the state tax officials can agree on the substance and scope of uniform rules to be presented to each state legislature for adoption?

Can we realistically expect the legislatures of 50 states to voluntarily set aside some of their interests for the benefit of the national interest by adoption of such legislation?

Can we realistically expect the many powerful in-state interests, who play an important role in the legislative process in each state, to voluntarily set aside their own interests in deference to a greater national interest, especially when they have no assurance that each and every state would likewise adopt the proposed uniform rules?

The answers to these questions should be apparent. Let us not lose sight of the fact that the various associations of state officials are not legislative bodies. Should any of such organizations ever come to an agreement as to the solution to this complex problem, it is most improbable that the legislatures of each of the 50 states would find it advisable to adopt their recommendations without modification. Clearly, if there is to be a meaningful solution to this problem, it must emanate from a federal authority with power to legislate.

Perhaps the most ambitious undertaking by the states in recent years directed toward the achievement of uniformity has been the "Uniformula" or Uniform Division of Income for Tax Purposes Act adopted by the National Conference of Commissioners of Uniform State Laws in July 1957. While over a dozen states have made some attempt toward uniformity and have seen fit to adopt the Uniformula, at least in principle, it must be noted that even this attempt toward uniformity has not been entirely successful because many of those states who have adopted the Uniformula have seen fit to make modifications consistent with their own state's taxing policy. Indeed, a review of past and present conduct of state legislatures offers little encouragement that uniform legislation will be forthcoming from the state level.

The impetus which motivated Congress to authorize a study of the present state tax system was supplied primarily by small business taxpayers. As they grow in size, reaching out beyond their state boundaries in search of new markets, they run headlong into the diverse and complex state requirements. Even the most willing taxpayers are prostrate in their efforts to cope with these state tax obligations.

While I need not review the results of the five-year study conducted by the Special Subcommittee of Congress, it should be pointed out that for the first time, the diversity and overwhelming complexity of the present system of state taxation of interstate commerce has been documented. There is ample

evidence of widespread lack of compliance and admitted inaccuracies in return preparation, which not only deprives states of their proper revenues but imposes unfair burdens upon taxpayers who make a sincere effort to meet state requirements.

In a voluntary self-assessment tax system, there is need for assurance that tax burdens are shared equitably. It should be of concern to the legal fraternity, as it is to many in business, that the present interstate tax system has not worked well. The vagueness and complexities in the diverse requirements have resulted in a low level of compliance. It appears that all too often, taxpayers in their quest for achieving some form of uniformity in reporting practices have oversimplified the diverse state requirements, thereby fabricating their own set of uniform rules. While these unorthodox procedures may serve well the needs of such taxpayer, it is an additional factor which further creates inequities between those taxpayers who properly comply with reporting requirements and those who do not. Further evidence of unequal sharing of the tax burden is the accepted pattern of “negotiating” a tax reporting basis which is at variance with prescribed rules.

A viable economy requires an orderly system of tax payments predicated on predictable tax liabilities. All too often the diverse rules have resulted in over-taxation to some and under-taxation to others. Business decisions and modes of doing business should be based on economic facts and less on tax considerations. The economy suffers where tax barriers would be a deterrent to business expansion into new areas; society suffers where the business would expand into new areas unaware of its tax obligations.

It is of paramount importance in achieving a uniform interstate tax system that the system be simplified and understandable. The majority of interstate businesses are very small enterprises, and lacking professional tax staffs and computerized accounting, they are overcome when faced with diverse and vague jurisdictional and reporting requirements. It is primarily in the area of jurisdictional requirements, apportionment formula and the oftentimes unreasonable burdens under the sales and use tax collection system which are of greatest concern to business. While the larger corporations are perhaps better equipped to cope with the situation, these problems nevertheless confront them as well.

A properly designed, simplified and internally consistent taxing system should eliminate *de minimis* tax reporting where compliance costs far exceed tax payments. Such a system could be designed to shift tax payments away from taxpayer’s area of fringe activities, thereby resulting in decreased return filing. Conversely, there should be a corresponding increase in tax payments to these states wherein are located the taxpayer’s major facilities, thereby creating a more meaningful relationship between tax payments and services and protection received. Such a system would be beneficial to both tax administrators and business, and, perhaps more importantly, there will be a reversal of the trend of “taxation without representation” which business presently experiences in states where investments and activities are small, yet their tax

payments are oftentimes large. The expected result of a uniform and simplified tax system would be increased and more responsible compliance and, probably, an increase in state and local revenues. A clear and forthright expression of national policy in state taxation could be achieved through federal legislation without jeopardizing the economic independence of the states. Absent federal legislation setting forth limited guidelines in the field of state taxation of interstate commerce, a further deterioration of the present system will probably result, perhaps to a point where the national interests may someday dictate federal collection and administration of state taxation in the interstate commerce area.

It seems to me that in many respects state tax officials have been unfairly criticized for the inability to achieve agreement on uniform standards and legislation. In-state business interests should also admit to their interest in maintaining certain local tax advantages and favorable practices which they seek to preserve, even at the expense of possible benefits of a uniform national system. Students of taxation should be concerned with the growing trend toward some of the so-called economic incentives to encourage in-state plant locations and correctly question whether they are truly incentives or merely a means of lowering an in-state tax burden at the expense of multistate companies.

In the final analysis, the in-state business "protected" in his home state eventually ventures outside his state and soon finds himself in the out-state areas as the "abused" interstate business, faced with multiple tax reporting as tax payments are merely shifted from one state to another. Without federal guideline legislation prescribing a coherent and orderly tax system, the trend can only continue to more tax return filing with small tax payments to more states. Such a trend could be reversed by federal legislation and, based on the findings of the Congressional Subcommittee, such could be accomplished without materially affecting state revenues.

In concluding, it may be said that the problems in the interstate tax system as they exist today would dictate that something be done. The prospect that the worst features of the present system could continue with even greater impact in the future without Congressional action is even less encouraging. The ever increasing number of jurisdictions imposing taxes and the ever increasing emphasis on taxation by the state of the market promise to magnify the problem to ever greater proportions.

Make no mistake, the problems and proposed alternative solutions are complex and controversial. At the very root of the problem is the strong desire to salvage the right of each state to maintain its own taxing structure and of instate interests to effect legislation favorable to themselves. As members of the legal profession, I would suggest that the responsibility may well be yours to aid in achieving an unbiased, far-reaching and economically sound interstate tax program. The problem cries out for solution. Let us not avoid our responsibilities by featuring this problem as an economic or

political problem, rather than one of legal significance, for it is the law which has traditionally been the cornerstone of social, political, and economic order.

II. The Case Against Government Action

A. *Remarks of Theodore W. De Looze*

The first resolution upon which you are being asked to vote is approval by the American Bar Association in principle of the proposition that the Congress of the United States should adopt legislation prescribing jurisdictional limitations to be observed by state and local governments in the field of interstate commerce or in the field of collection in interstate commerce of state and local taxes. The resolution goes on to concern itself with the adoption of legislation for apportionment of a tax base, but it should follow that this would not occur unless the jurisdictional prescription had been first adopted.

I speak today in opposition to this resolution, and on the question of whether or not Congress should adopt jurisdictional prescriptions. In doing so, I speak as an attorney and a member of this Association. The views expressed here are my own. Because my experience has been with the State of Oregon, and in the area of state income and excise taxes, my remarks and illustrations make reference to states and cases by name.

Jurisdictional limitations have always been a part of the law. Jurisdictional standards lie embedded in the constitutional requirements of due process of law, equal protection of the law, and the prohibition against undue burdens on interstate commerce. Despite the oft-repeated cry of despair that the courts are incapable of handling the questions involved in setting down jurisdictional limitations, the courts must remain responsible in our constitutional system for defining these limitations, whether in the form of constitutional questions or interpretation of statutes. In 1959, the time of the enactment of the jurisdictional limitations in Public Law 86-272, the courts probably had accomplished most of the groundwork necessary insofar as judicial determination of such limitations is required for certainty of operation and achievement of tax equity. The *Northwestern Portland Cement Company* case, the *Scripto* case, the *General Motors* case in the State of Washington, and such local decisions as the *Brown-Forman* and the *International Shoe Company* cases in Louisiana, *United States Tobacco Company* and *American Refrigerator Transit Company* cases in Oregon, to mention a few, show that the courts had achieved a feeling for what constituted a sufficient activity by a corporation to permit the imposition of a tax without a violation of due process or other constitutional provisions.

In passing, it should be noted that the problem of what is jurisdictional activity is not peculiar to the field of taxation. Probably the greatest area in which this has been the subject of litigation is in the service-of-process field. The famous case, *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154 (1945), is illustrative. More recently, the extent-of-activity problem

was the subject of the United States Supreme Court's decision in *Eli Lilly & Co. v. Sav-on Drugs*, 366 U.S. 276, 81 S. Ct. 1316 (1961), which involved the question of state licensing.

The area of taxable activities has been held to be quite broad. The 30 so-called jurisdictional contact tests contained in the special subcommittee's report and referred to by a prior speaker, have, for all practical purposes, disappeared as constitutional distinctions. Regular and systematic solicitation activities, generally speaking, create jurisdiction to tax, and, of course, no tax arises unless there is net income. Legislation, therefore, to limit jurisdiction necessarily has the effect of granting exemptions to what would, otherwise be taxable situations. We have the example of Public Law 86-272. It does not define limitations which are already a matter of law, but carves out an exemption which would not otherwise be there. The Oregon case of *Smith Kline & French Laboratories v. State Tax Commission*, 241 Or. 50, 403 P.2d 375 (1965), illustrates the result of such a statute. There is no doubt in my mind that the company carried on activities in Oregon which were ample and sufficient to permit the exploitation of the Oregon marketplace with relatively little inconvenience or loss of efficiency because of the lack of real property located in the state or an office located in the state. Sometimes the nature of the product is sufficient to permit this type of activity. Sometimes the proximity of a non-income tax state, such as the State of Washington, permits this type of activity. Activities which would otherwise create jurisdiction to tax under Public Law 86-272 may be located in the State of Washington, albeit this might subject the company to a Washington Business and Occupation Tax. However, two birds are apparently killed with one office.

The justification for such an exemption is difficult to find. To exempt Smith Kline & French is to discriminate against local drug companies. The exemption cannot be justified as protection of small business, as obviously, this company is a nationwide concern and a leader in its field. The justification cannot come because the extent of activities is so inconsequential as to be *de minimis* in nature. The presence of an organized team of detail men engaged in visitations to hospitals, doctor's offices, drug stores, and the like, making presentations to wholesale houses, to conventions, to hospitals, following up data on drug effects from doctors and from hospital personnel and so on, is hardly the drummer type of case. And, the difference between these activities and the addition of another activity sufficient to give Oregon jurisdiction does not mean the difference between inability to comply and ability to comply with the income tax laws.

Nor is the creation of the exemption under Public Law 86-272 justifiable by reason of ease of construction and application of the statute. Fact situations have a way of following statutory lines, falling on whichever side of the statutory fence is most convenient to the viewer. In one situation a salesman is characterized as doing much more than simply selling a product. He is an expert who gives out technical information, inspects the purchaser's operation, trains personnel, and, in fact, is indispensable to the purchaser. That

same person in a different tax consequence setting is represented as a fellow who really does not know too much but is sent to jolly up the purchasing department, play a good game of golf, help sweep the floors and otherwise keep those repeat sales flowing. Fact-finding in this area is extremely difficult. It requires extensive interviewing of employees of the purchaser and seller and of third parties. It involves a characterization of activities that is capable of wide variety of expression. Under Public Law 86-272 we have had two cases in our Oregon Supreme Court and we have others in the Tax Commission and Tax Court. Because of the preoccupation of the court with the constitutional questions in the *Smith Kline & French* case, I feel that the statutory jurisdictional test of "solicitation only" was not given the attention it deserved. In the more recent case of *Cal-Roof Wholesale, Inc. v. State Tax Commission*, 82 Or. Adv. Sh. 89 (1966), the shoe was on the other foot. Additional activities engaged in by the salesmen outside of Oregon, such as giving on the spot credit, selling small items from the back of the car, and so on, permitted the allocation of sales to the non-income tax state of Washington. A partial list of activities which have to be explored and weighed in the determination of "solicitation" include the giving of technical engineering advice, the checking of inventories, the inspection of products for defect and damage, the carrying of oft-needed inventory items and on-the-spot sales, the training of personnel in the use of, or the selling of the company's products, the recruiting and hiring of personnel, visitation by out-of-state company officers on field trips, the use of an office in the home and so on. As to the use of a home for an office, we have the language in the case of *General Motors Corp. v. Washington*, 377 U.S. 436, 84 S. Ct. 1564 (1964), where the court stated:

> The Pontiac and Oldsmobile Divisions of General Motors had no branch offices in Washington. But these divisions had district managers, service representatives and other employees who were residents of the state and who performed substantial services in relation to General Motors' function therein, particularly with relation to the establishment and maintenance of sales, upon which the tax was measured. *We place little weight on the fact that these divisions had no formal offices in the state, since in actuality the homes of these officials were used as corporate offices. Despite their label as 'homes' they served the corporation just as effectively as 'offices*.' (Emphasis ours)

The decision is being exploited by both sides.

I could go on. Needless to say, I am satisfied that we have at least the same set of problems trying to apply statutory jurisdictional limitations to a set of facts as we did when we were worried about what constituted a minimum amount of activity to comply with due process. Given the court cases extant today, we would have little or no problem under the Due Process and Commerce Clause. Under present and proposed federal legislation we are required to deal strictly with questions of exemption.

Turning to the resolution you are to vote on today, it then becomes apparent that you are really asked to approve the giving of some type of exemption by Congress. You cannot intelligently expect that you will be eliminating

court cases and court tests as to the extent of such a statutory exemption. Any of you who have examined H.R. 11798 or the new bill, H.R. 16491, and the language which would determine whether or not a particular state could take jurisdiction should be satisfied that here again is a hotbed of potential fact finding problems and for case-by-case interpretation. The obvious implication of approving Resolution No. 1 is to say to Congress that the American Bar Association approves any type of exemption which might be proposed in Congress. If this were not true, there would be submitted to you, not such a general proposition, but specific statutory language. You could then decide whether this was a proper and acceptable type of exemption, one that would solve whatever problems you believe are created by constitutional interpretations. If, indeed, there is any justification supporting the proponents for exemption because of, say, alleged compliance costs, should not the first step be the elimination of as much of the problem as possible, by the adoption of uniform apportionment provisions. It should be emphasized that the Uniform Division of Income for Tax Purposes Act is notoriously absent from all proposed federal legislation.

Exemption provisions should be left to each state to determine as a part of its public policy. What is nominal revenue to one state, such as New York, may be important revenue to another state, such as Oregon, Idaho, Nevada, or Utah. One state might decide that the company making a million dollars of sales in the state need not be considered for taxation purposes. The test might well be $100,000 in another state. Or the test might be based upon net income of the company rather than sales. A million dollars of "average annual income" may be nominal in New York, but important to Oregon, where, conceivably the corporation could be Washington-based, with its major income producing activities—now proposed to be tax exempt—in Oregon.

When all is said and done, all of these federal bills are bills creating arbitrary areas of exemption. They do not create uniform jurisdictional rules or uniform apportionment methods. Jurisdictional limitations do not necessarily improve ease of administration and do not necessarily reflect who should and who should not be subject to taxation. The statute has yet to be written which will solve the problems alleged by the prior speakers. Once the constitutional tests of sufficient activity within the state to permit a "fair play" imposition of a tax rate met, exclusion from that point on simply becomes the matter of who has the ability to influence the legislative body in question to grant an exemption. So long as the weight of taxation imposed by a particular state upon a corporation's net income attributable to that state remains a matter of state policy, and the states are not stripped of all of their fiscal independence, then the burden is shifted to a particular company to determine whether or not it wants to engage in profit-seeking activities and sales of its products within that state. I cannot differentiate between the costs of taxation and any other costs incurred by a business, except that the costs of taxation appear to be politically vulnerable to power and pressure in the legislative halls. I cannot see the difference between a corporation being willing to

pay taxes in one state because it has real property there and not being willing to pay taxes in another state because it has only an inventory and salesmen there. No one has satisfactorily demonstrated that the contribution of the real property is so much greater towards the production of net income that that state has a fair right to collect a tax, whereas the contribution of inventory and salesmen who dart across state lines is so tenuous that that state does not have a right to collect a tax.

It has been stated by our United States Supreme Court many times that interstate commerce must pay its way. If a business enterprise engages in interstate activities, it appears to be no less liable for the payment of taxes to the state in which it is engaged in the exploitation of the marketplace than a corporation which sets up individual enterprises, each in a separate state with a common ownership. In each instance, the business enterprise should expect to assume the tax burden fairly attributable to its activities and net income production. The fact that in one case only a certain amount of activity is carried on through inventory and salesmen and other supporting activities is reflected in the fact that the apportionment formula apportions less net income.

This is an apportionment question and not a jurisdictional question. In conclusion, I would like to reiterate the following points:

(1) As many, if not more, problems of interpretation and construction are inherent in the enactment of any statutory standard as to jurisdiction as at present.
(2) Statutory standards of jurisdiction at this stage in the development of the law create areas of exemption. An intelligent vote cannot be made on the area of exemption that is being approved in the absence of specific language submitted to this body.
(3) In the absence of restrictive language as to what kind of an exemption this body specifically approves, approval of this resolution can only mean that this body approved any exemption that might be imposed by Congress.

B. *Remarks of John J. O'Connell*

The discussion this afternoon brings to mind the old adage that taxation is the art of plucking the goose while getting the least squawk. Hopefully, the representatives of interstate businesses here will not be offended if I compare their clients to a goose, for I also compare the states to feather pluckers. However apt or inapt these comparisons, it cannot be denied that there has been a tremendous amount of squawking lately.

Before considering the question of whether or not the American Bar Association should officially come out on the side of the geese, in the form of the two resolutions here proposed, it might be well to discuss briefly how and why all this squawking started; I would like to do so from an aspect that is too easily overlooked.

Underlying the whole problem are some simple facts of economic life. Greater and greater burdens are being placed upon state and local governments, and tax revenues must rise to meet them. This you have probably heard many times before, perhaps *ad nauseam*, but the real impact can be realized only by looking at some figures. For the past ten years, federal tax revenues increased about 44%. This rise, I believe, is almost exclusively attributable to rising economic conditions. No new federal taxes were imposed that I know of during that period; in fact some excises were taken off, and income tax rates were lowered. State and local government revenues, in contrast, rose at a rate over twice as great during this period: slightly less than 96%. This difference of about 52% is undoubtedly accounted for mainly by new taxes or increases in rates of old taxes. For example, in the past seven years, ten states have been obliged to enact that political abomination, a sales tax.

This has an impact not only on taxpayers' bills, but also on how tax collectors do their jobs. Faced with these mounting revenue needs, many tax administrators tend to examine the collection net for holes and then start patching them up. This should not be surprising. The United States Treasury Department does the same thing, as evidenced by the campaign some time ago—fortified by new legislation—to tighten up on taxation of dividend and interest income. They are all just "doing what comes naturally" and properly so. With rising pressures on taxing systems, be they federal or state, such tightening up is absolutely necessary.

It is more than just a matter of squeezing out the last nickel of possible tax in order to maximize revenue. It is a matter of making tax burdens as equal and as fair as possible, so as to maximize public confidence in the taxing system and minimize pressures for erosion of the tax base.

Where, as in this country, payment of taxes is still to a great extent a matter of voluntary compliance, public confidence in the fairness of the taxing system is vitally important. Without such confidence, you start down the road toward the situation where tax evasion is a national pastime and tax collection is a game of hide-and-go-seek. As for erosion of the tax base, we do not have to look outside our own country for examples of that. In the March 30, 1956, issue of Colliers magazine, Stanley Surrey blasted away at special exemptions and privileges in the federal income tax structure and nicely summarized the whole problem by stating:

> "The strongest objection to special exemptions is that when Congress grants one favor, it is encouraged to grant another and still another until the basic fabric of our tax system begins to unravel."

And again:

> "The cost of government must be met by taxes, and we must pay those taxes. As long as the load is distributed fairly, we will. But when the load shifts to one side, look out."

My point, then, is a simple one. As tax burdens increase, the equal spreading of those burdens becomes more and more important. And it is a never-ending battle to prevent further holes in the dike and plug up, if possible, old ones.

This is why recent cases such as *Northwest Cement-Stockham Valves*, *Scripto*, and our own *General Motors* case, are landmarks in this battle.

Note the approach taken by the Court in these cases. It is to pierce through legal formalities and distinctions, in order to arrive at a result which, as far as possible, gives equality of tax treatment. Thus, in *General Motors*, the Court found the fact that certain General Motors' employees operated out of their homes rather than formal offices to be without significance. And in *Scripto*, it found the fact that Scripto operated in Florida through independent contractors rather than employees to be without significance.

Naturally, taxpayers aren't very fond of this approach. What appears to the tax collector as a gaping loophole often appears to the taxpayer as a self-evident piece of equity. Thus, it is not surprising that, with rapidly mounting revenue needs for our states and local governments, counter pressures arise on the part of taxpayers for relief from these rising burdens.

I make these general remarks simply to show that these conflicts do not arise because of some sinister conspiracy by the states to harass interstate businesses—although, as I shall point out later, Congressman Willis seems to think so. Rather, they arise because state officials are honestly and sincerely trying to do their best in the equitable spread of tax burdens, and because state officials believe this task is more important than ever before.

How these conflicts will be resolved remains to be seen. However, here I wish to turn to these two resolutions proposed for adoption today, and show that their adoption will not help in an intelligent resolution of these conflicts.

From one point of view, the task of opposing the resolutions is an impossible one. For we in effect are being asked to establish a universal negative, a task which the logicians remind us is a foolhardy venture. Thus, I do not propose to argue that any and all conceivable federal legislation on this subject matter, no matter how worded under any and every conceivable circumstance, would be unacceptable to the states. That would presume too much on my imagination and your patience.

This does point up, however, one of the main vices of these resolutions. They are not tied to specific proposals which can be analyzed and discussed in detail. They would put this Association on record as squarely behind federal action, without saying what exactly that action should be. May I suggest that this is not a very good way for a group of lawyers—and especially this Association—to do business.

Gentlemen, this general problem is one of the most important, complicated, and delicate problems of federal–state relations that has ever faced this nation. And this Association should not now appear to say to the Federal Government: "Go solve it! We don't particularly care how you solve it, and

we aren't going on record in favor of any specific solution. But go to it! We're behind you, whatever you come up with."

This brings up a related and even more serious problem with these resolutions. Although they are not tied to specific proposals now, and are not so drafted, they will undoubtedly become tied to specific proposals in the future, at least in the mind of Congressmen. And let's face the plain fact that these resolutions are directed straight toward Congress. By passage of these resolutions, I believe this Association will be handling the Willis Subcommittee a blank check. You can be absolutely sure that the supporters of whatever legislation finally emerges on the floor in Congress will wave these resolutions about as constituting ABA endorsement.

It frightens me to think how this blank check might be filled out. The two groups with which I am associated, the National Association of Attorneys General and the Special Committee on Interstate Taxation of the Council of State Governments, have both taken a hard line: no more federal legislation. Behind these stands were not only the usual consideration of states' rights, but also a more immediate consideration. From the report of the Willis subcommittee issued last year, it was obvious that the states were going to take a licking at its hands; and, when H.R. 11798 was introduced, our worst fears were realized. Admittedly, H.R. 11798 is past history now. It seems to have been a monster to almost everyone, including large parts of the business community. The subcommittee is pushing for a new proposal, H.R. 16491. Whether this latest proposal will be revised again remains to be seen. But it certainly continues to justify our fears as to what kind of treatment the states can expect from this subcommittee to whose tender mercies these resolutions would commit us. Let's take a few examples.

Although the public statements of the subcommittee members and staff have often manifested a special regard for the problems of small businesses, the original bill, H.R. 11798, had no special provisions for them, with the possible exception of the $100 exclusion for interstate sales (Section 305).

Now, however, there are special provisions, involving jurisdictional standards and use of the two-factor apportionment formula for corporations with the average annual net income of $1 million or less. I was quite curious as to how small such corporations might be, so as to merit this special regard by the subcommittee.

They can be pretty large indeed! I am told that for wholesaling and retailing businesses with net income in this amount, the average rate of return is about two per cent of sales. In other words, we are talking about businesses that may well have $50 million or more of sales. For industrial businesses, the average rate of return is higher, perhaps five or six percent. But we would still be talking about businesses with up to $20 million of sales.

This is a very interesting contrast with the definition of a small business for purposes of the Federal Small Business Administration. There, a small business must have less than $1 million of gross income, and must also have less than 200 employees.

Is it any wonder that some of us are somewhat suspicious when the Willis subcommittee casts its case for federal action in terms of relief for small businesses?

Moreover, look at the effect of these special provisions. One of them establishes a lid on the net income attributable to a state. This lid is based upon the two-factor formula which the subcommittee seems so attached to. This formula, incidentally, is contrary to the practice of most of the states and contrary to the Uniform Division of Income for Tax Purposes Act proposed by the NCCUSL and recommended by this Association. With this lid, a taxpayer has the best of all possible worlds. In the market state, where the sales factor with a destination basis tends to increase the net income, the taxpayer gets the benefit of the lid and can avoid the impact of the sales factor. But if the state of origin also has such a sales factor, this tends to decrease the net income there, and the taxpayer gets the benefit of that too. Thus, it is likely that a substantial portion of the net income will not be subjected to tax in any state. This provision will decrease the net income attributable to certain states while increasing it in none.

A quick glance at the jurisdictional provisions is also interesting. These strike me as an open invitation to avoid tax liability completely in certain states by use of subsidiary corporations, public warehouses, and independent contractors. The trick is to avoid directly owning or leasing real property or having an employee permanently based in the taxing state.

Again, I wish to emphasize that, under the terms of the resolutions proposed, we are not directly concerned with this latest product of the Willis Subcommittee. We are not given an opportunity to vote on any of its proposals. But I think we should be concerned with the thinking of that subcommittee, and its general attitudes, as manifested by its products. As the Bible says, "By their fruits you shall know them."

If I seem overly distrustful and prejudiced toward the Willis Subcommittee, I can only plead in defense that Mr. Willis seems even more distrustful and prejudiced toward the states. In the July 6 issue of the *Wall Street Journal*, Mr. Willis was quoted, as follows.

> "'The states oppose change because they want an unbridled right to abuse, mistreat, harass and burden out-of-state firms in the name of states' rights.' . . . 'That's intolerable and it's got to be stopped.'"

This statement is utterly astonishing, and I assure you that it is completely wrong. What's at stake here is not the unbridled right of the states to abuse, mistreat, and harass out-of-state firms. We do not want any such rights. But we must fight for the right to spread tax burdens equally. The pressures on our revenue systems demand it. And plain fairness demands it.

The status quo is far from perfect. And frankly, the prospect of federal action, and the squawking mentioned in the beginning of my remarks, are not without benefit even to the states. They have forced the states to take a good hard look at some of their practices, especially in the area of apportionment.

Corrections have already come, and more are forthcoming. But I fear we cannot look to Mr. Willis for a sympathetic hearing. And we must combat any attempt, at this critical juncture, to strengthen his hand.

There are undoubtedly some of you here today who disagree with me and think that the Willis Subcommittee is doing a great job. In that case, should not the subject of these resolutions be the subcommittee's specific proposals, such as H.R. 11798 or H.R. 16491 so that they can be put to the test of analysis and debate? If it is these proposals that are at stake, let's not hide the fact, by purporting to vote only on broad principles.

One final thought: it would be a tragedy for both the states and interstate businesses if this conflict over federal intervention would prevent cooperation at the state level, especially in the legislative halls. Needed changes—such as increased uniformity in apportionment formulas—cannot come about through the efforts of tax administrators alone. They need the help of the business interests. But with that help, more improvements can take place. This may sound naive and idealistic, but look at the history of the Uniform Commercial Code. Let's not form attitudes in Washington, D. C.—or Montreal—which will prevent mutual understanding back in our state capitols. I have tried not to violate this admonition myself this afternoon. If I have failed, my apologies. Thank you.

C. *Remarks of Mitchell Wendell*

Some people purport to see a constitutional question in the issue we are discussing. Actually, there is none. In the *Northwest Portland Cement, Stockham*, and *Scripto* cases, the United States Supreme Court conclusively and clearly decided that state and local governments can tax multistate businesses in all the ways that they are presently being taxed, and that methods currently being employed for this purpose are not constitutionally objectionable. The only reason we are discussing this subject today is that the proponents of these two resolutions have lost the legal argument and now seek to gain their objective by persuading Congress to give them—as a matter of statutory policy—what the courts have decreed they cannot have as a matter of law.

Of course, if it should turn out that Congress lacks the constitutional power to enact a statute of the sort that the proponents of these resolutions want, the policy question would be irrelevant. But we are not being asked to give an opinion on whether Congress can restrict certain powers of state and local taxation. These resolutions propose that Congress should enact such restrictions, and that the Section on Taxation of our Association should be authorized to give Congress help in this direction. These are propositions of economic, social and political policy; they are not propositions of law. They are not technical questions, even though technical expertise may be helpful in completely understanding their implications.

The failure of these resolutions to identify any particular legislation and the conduct of this discussion during its first hour, as though it did not refer to any specific bills, should not be allowed to mislead anyone. Consideration of

this subject by the Tax Section now is meaningful only because H.R. 11798 was introduced last October, and because H.R. 16491 superseded it on July 25, 1966. The supporters of congressional action to limit state and local taxing jurisdiction clearly intend that favorable action on these resolutions by the American Bar Association be construed as endorsement of these bills and any refinements of them that may appear in the future. Consequently, we would be speaking in a vacuum if we did not relate the present question to the basic substance of the legislation actually being urged upon Congress by some elements of the multistate business community.

While there are a number of differences between H.R. 11798 and H.R. 16491, they are alike in essential respects. These bills, and the position being advanced by their supporters, provide for jurisdictional limits to be imposed by federal statute on state and local taxation of multistate businesses. They also provide for congressional enactment of a formula according to which some or all multistate business taxpayers must be permitted to apportion their income for tax purposes. So far as sales and use taxation is concerned, they would require exemption of certain types of transactions from the presently imposed duty of seller collection.

These proposals would not add a single taxpayer to any state or local roll. On the other hand, they would remove a number of taxpayers from the rolls, because they would fall outside the proposed federally prescribed jurisdictional limits. Also, the proposals would enable some taxpayers to remove certain segments of their business activities from state and local taxing jurisdiction by artificially rearranging their operations to conform to the statutory modes embodied in the proposed federal law. It does not take an accountant or an expert in mathematics to figure out that the inevitable effects must be to reduce state and local revenue realizable from these present sources, and probably to precipitate substantial shifts in tax burdens from those who can take advantage of the statute to those who cannot.

Such changes are bound to have consequences, not alone for the entire community, but for the very multistate businesses that appear to favor the legislation. These firms depend on the facilities and services financed with state and local tax dollars. One of the most costly activities of state and local governments is the furnishing of industrial water supplies. Others are the provision of police and fire protection, public sanitation, and the construction, repair and maintenance of streets and highways. If industry is not to be materially hurt, someone must be taxed to provide the revenues for the performance of these functions.

Advocates of restrictive federal legislation seek to convey the impression that they really do not mind paying state and local taxes. Rather they object to the unreasonable burdens and costs involved in complying with the nonuniform tax laws of a multitude of separate jurisdictions. There are two difficulties with this explanation: (1) it does not square with the evidence, and (2) the bills advocated as remedies have nothing to do with either uniformity or simplification of tax laws.

Proponents of congressional action look to the four volume report of the Willis Subcommittee for justification of their position. Certainly the Subcommittee has been anxious to provide it in order to justify its own legislative proposals. But after four years of study, the Subcommittee itself found, according to its report, that present state and local tax laws as currently administered do not burden interstate businesses through unreasonable compliance costs. If the Willis Subcommittee could not find anything other than what it reports to be the fact in four years of well financed and well staffed searching, with the help of a sympathetic group of multistate businesses; it is pretty good proof that no serious problem exists.

But the Subcommittee, joined eagerly by its supporters, goes on to say that if state and local tax administration were to change, there would be a compliance problem. In other words, we are being asked to go on record as favoring congressional control over state and local revenues on the plea that if things were different than in fact they are, a problem could exist. It would be difficult to find a more "iffy" proposition.

On the score of uniformity, one need only look at the concrete proposals made by the advocates of federal intervention to see what the game is really about. For all of its length and involved phraseology, neither H.R. 11798 nor H.R. 16491 does anything except put certain types of multistate taxpayers and certain types of transactions beyond the jurisdictional reach of one or more of the state or local governmental units in which taxpayers of the favored class operate. The legislation does not require or even encourage state and local governments to tax anything or anybody uniformly. Indeed, the provisions for federal administration which, however ill conceived, might have been supposed to be prompted by a desire for uniformity are now omitted from H.R. 16491. The bills would leave state and local governments free to give all the nonuniform exemptions they pleased, even though this would increase cost of compliance mightily—according to the line of argument used by proponents of federal intervention.

Another strange assertion is that, so long as only the Constitution and state statutes determine who must pay state and local taxes, there will be litigation producing uncertainty; whereas a federal statute would bring certainty and an absence of litigation. The best that one can say about this proposition is that it is naive and sounds like the utterance of someone who has never picked up a legal digest or an issue of the advance sheets from any federal court. A glance at any issue of the Supreme Court Reporter reveals that "Internal Revenue" is one of the most popular entries. This flood of litigation occurs under federal tax statutes. The basic reason for tax litigation has nothing to do with whether the source of the levy is a federal statute or a state statute, or whether uniformity is present or absent from the tax laws. We have copious litigation because people do not like to pay taxes and are tempted to argue over their liability.

There is one final hurdle that the advocates of federal intervention must surmount. Even if they succeed in persuading a sufficient number of people

that the inter-jurisdictional tax problems of multistate businesses are much more serious than in fact they are, it is necessary to establish that the states will not act to produce a desirable degree of uniformity and coordination in their own tax systems and in those of their subdivisions. The kernel of the argument here is that the taxing power is so jealously guarded by each of the states that any adjustment of it cannot be made, except by the external force of Congressional enactment. The contention sounds plausible enough. The only trouble with it is that it is entirely out of line with the facts. The report of this Tax Section's Committee on Uniformity, delivered earlier this afternoon, shows that there has been considerable state action of the very sort that is alleged to be impossible. The Uniform Division of Income for Tax Purposes Act is spreading—nine adoptions in the past two years, bringing the total to 14 states; tax credits in the sales and use tax field are the law in the overwhelming majority of jurisdictions; charges for out-of-state audits are disappearing, etc.

Work is also in progress on a Multistate Tax Compact. Supporters of federal intervention hurry to declare that states will never join it in sufficient numbers to make it meaningful. They choose to ignore the fact that we already have several nationwide compacts that have been adopted by the states in fields where they also have jealously guarded their individual prerogatives. These include the abolition of residence requirements in the care of mental patients, interstate assumption of responsibility for the return and supervision of runaway and delinquent juveniles, and interstate supervision of adult parolees and probationers.

Perhaps an even closer parallel to the subject now under discussion is furnished by the history of the Uniform Commercial Code. It was only 15 years or less ago that most people thought that project an impossible one. The Code's subject matter is even more diffuse than that of state and local corporate income, capital stock, gross receipts, sales and use taxation. Yet the Uniform Commercial Code is today a reality; not merely as a draft, but as a living part of the law.

It would seem that if the upholders of the other side of today's argument are really interested in tax reform, rather than merely in tax reduction for themselves, they should at least be willing to see whether the states will act, before they press federal solutions for problems that even the Willis Subcommittee has found to be hypothetical clouds on the future horizon rather than present evils.

The nature of the question posed by the two resolutions we have been asked to consider is clear. These resolutions would put the American Bar Association on record as favoring a reduction in taxes for certain types of businesses, with a coincident decrease in revenues available to state and local governments for the support of community services, a shift in tax burdens to make up for the favored treatment to be forced by congressional action, or both. I do not happen to think that these resolutions represent sound policy, but that is only a small part of the point. I would expect industrial

trade associations or organizations of merchants to take positions on today's question. Their economic interests are involved, and they can be expected to be for or against the proposals of the Willis Subcommittee, depending on whether they come from the part of the business community that would be benefited or damaged by preferential tax treatment for multistate firms.

But we are a professional association whose strength lies in its technical competence and its judicial impartiality. It is entirely appropriate for this Association to hold sessions on the present and possible future state of our tax laws. An understanding of those laws is essential to the professional performance of many of us. Also, I have no doubt that most of us, in our individual capacities, have views on this matter of policy, as on many others. But as lawyers we have no special competence to determine who should receive tax concessions and who should be required to make up the difference, or which public services should suffer on account of the diminished public revenues. My personal belief is that these resolutions are bad on the merits, but my professional belief is that the American Bar Association can only damage itself by taking a position on a controversial economic and political question that is in no sense justiciable.

SALT: A Rich Legacy and Richer Future

STEPHANIE ANNE LIPINSKI GALLAND*

Other long-time SALT professionals in this compendium will write about the past of SALT law, how it came to be, and how it has progressed and expanded over the years. While that narrative is necessary to provide the context of why SALT is important, it is also necessary to document why SALT is considered such a dynamic area of the tax law and why so many people continue to want to practice SALT.

One of the reasons that participation in SALT is so attractive is that SALT has the challenge of multiple levels of law and different rules of law in each state. As one colleague noted, "It's the Wild, Wild West out there!" While there are some federal constitutional restrictions, there is no overarching, uniform body of law that dictates the uniform taxation of any position. Every transaction or activity can be treated differently, requiring a true cost–benefit analysis for taxpayers to determine the end cost of every position. This poses exciting challenges for those that write, administer, interpret, implement, and estimate the impact of each law in each state.

The complex and varied set of laws, regulations, and rulings within SALT are mirrored in the wide number of fulfilling careers that SALT offers for those interested in SALT practice. State tax departments, professional entities, individuals, academics, and computer software providers are all part of the SALT world, and the subsets of each of these provide a wide range of careers. The ability to move between these professional areas also gives people the ability to gain experience in all areas of SALT within their professional lifetimes. The result is a robust group of professionals that has created a rich intellectual base and foundation for an outstanding library of analysis, articles, and publications.

One thing that identifies true SALT professionals is their enthusiasm for problem solving and their ability to analyze those problems on multiple levels. Another character trait shared by true SALT professionals is their sense of camaraderie and community. SALT is known as a practice area that fosters long-term friendships and professional relationships that cross over states, practice settings, and experience levels. This dynamic attracts an amazing group of people that also crosses generations, gender, and ethnicity.

With all these benefits, it is no wonder that SALT is growing—not only in the number of practitioners, but also in the types of individuals that participate in SALT. SALT has grown in an organic manner, which included a

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diverse base from the start. Members of diverse populations can be found in almost every SALT practice. Women have not only participated on a general level, but have also had a long history in SALT as directors of state tax departments, heads of legal sections within the state tax departments, partners in both law firms and accounting firms, heads of consulting practices, and "first chair" litigators—serving as a fantastic set of role models for both women and men alike. No matter who you are, SALT fully welcomes all who wish to join. SALT has also made a priority of seeking out young people and bringing them into the fold in thoughtful succession planning, both in an attempt to home grow SALT professionals and create a seamless body of SALT law to the benefit of clients, taxpayers, and taxing jurisdictions.

Until recently, there was no clear formal educational path to nurture a SALT professional. Most firms brought young people into SALT by teaching on the fly. Educational opportunities have been and continue to be provided by professional and trade groups such as the Institute for Professionals in Taxation (IPT) and COST. Three national annual programs, the Georgetown Advanced SALT Institute, NYU Institute on State and Local Taxation, and the Hartman program, have offered in depth programs developed and presented by leading SALT professionals, adding a rich history of thought leadership. Members of the SALT committee work in partnership with members of the IPT to organize the annual ABA/IPT Advanced Tax Seminars, which provide week-long CLE on the latest trends in state and local income, sales, use, and ad valorem taxation. Some law schools have offered a SALT class as either part of the general JD program or as one class in an LLM program. Georgetown University Law Center is the first in the nation to offer a dedicated SALT Certificate both as part of the resident LLM program and as the separate long-distance Executive program. Georgetown also offers a long-distance stand-alone SALT Certificate for non-lawyers with the option of getting a Masters in of Studies in Law–Taxation. These educational opportunities reflect the growing need to educate the increasing numbers of SALT practitioners.

Home, Sweet Home

The ABA Tax Section has been the "home base" to SALT attorneys for years and has a dedicated SALT Committee. The Section publications produced by the SALT Committee have long been the unifying force in preserving and encouraging SALT discourse and cutting edge thought leadership. The longstanding *Sales & Use Tax* and the *Property Tax Deskbooks* reflect the contributions of over 100 SALT Committee members who have provided multistate law information and opinions since long before the current Internet research capabilities. The State and Local Tax Edition of *The Tax Lawyer*, and its predecessor, *The State and Local Tax Lawyer*, have also provided opportunities to bring young people into SALT with an open article policy. This policy has allowed young SALT lawyers the opportunity to write notes and articles and see them published. This spirit of mentorship and inclusion has been a

focus of the SALT Committee in general and is one of the reasons why young people see a future for themselves in SALT.

My students ask all the time, “Why did you go into SALT?” My answer—and I am sure the answer of most of my colleagues—is the same every time. I love what I do. I love the exciting, complex issues that change almost every day. I love the people I have met and continue to meet in the practice of SALT, and I know this is just the beginning of a body of law and business that will continue to evolve and grow for years. SALT is the way to go if you want to pursue a full and rich professional life and have a good time doing it! The door is open—walk through it.

The Section of Taxation and State Taxation: A Practitioner's Perspective

PETER L. FABER[*]

The Section of Taxation has evolved over the years, and for the better. When I first began going to Section meetings, the agenda consisted almost entirely of plenary sessions at which the chairs of each committee gave brief (and boring) reports describing their committee's activities. The length of each report seemed to be inversely proportional to the amount of work that the committee had done. There was virtually no continuing legal education aspect to the meetings, and, while they were pleasant social occasions, I did not learn much from attending them. The focus in recent years has shifted to the Section's committees, and the committee meetings primarily serve an educational function. When I go to Section meetings, I learn not only from the presentations at committee meetings but also from conversations with my colleagues, both in the private sector and in government.

State taxation has been around as long as the Section of Taxation has been around, but its significance in the world of taxation generally, and in the Section in particular, has changed dramatically. When the Section was first organized, there were a few people who specialized in state taxation, but not many. State tax cases, when they arose, were generally handled by lawyers who focused primarily on federal taxation and did the occasional state tax case that came along. While lawyers were expected to handle tax litigation, their involvement in state tax planning was minimal. That was done by the accountants, if it was done at all.

For many years state tax practice was not held in high repute by members of the tax bar generally. There was a sense that, other than for the occasional constitutional issue, state tax matters generally were handled by unintellectual types who sat down with state tax auditors over a beer and cigars, talked about football, and "worked things out." State taxation was not regarded as a field for intellectuals.

All that has changed. State and local taxation has become, for lack of a better word, intellectualized. State tax planning involves legal research and analysis of the laws of many states and the same kinds of determinations of how to proceed in an uncertain world that federal tax lawyers make. In fact, the constant presence of constitutional issues is an element that our federal colleagues do not have. We deal with Due Process and Commerce Clause issues every day. Our firm recently won an apportionment case on

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First Amendment grounds. The intellectual "high ground" in the world of taxation is now occupied by the SALT practitioners.

More law schools are now teaching courses specifically focused on state taxation, and outstanding scholars like Wally Hellerstein and Rick Pomp are highly regarded in the academic community. We find in hiring that many bright young lawyers are interested in pursuing careers in state and local taxation. This was very rare as little as ten years ago. I was able to observe the process of discovering the intellectual challenges and fun of state and local taxation first-hand when my wife, through a series of rather improbable circumstances, broke into the field. (Our classmates at Swarthmore College many years ago probably would not have predicted that either of us would have ended up in the state tax field much less that both of us would.) She came home from work every day with talk of new issues that she was confronting, and she quickly caught the excitement that my colleagues and I feel when we encounter a new issue. The intellectual appeal of state and local taxation has, if anything, increased over the last few years as we have encountered the mysteries of cyberspace and attempted to apply statutes that were drafted 50 years ago to the world of the Internet. I am working on issues today that did not exist as issues five years ago. State and local taxation is no longer an "old boys' club." It is an intellectually stimulating area of the law, and it is attracting the "best and the brightest" young lawyers.

In fact, the presence of lawyers in the field in as great numbers as they are now is itself a significant development. For many years, state and local taxation was primarily the province of the accountants. I think that this may be a function of the intellectualization of the field. State and local tax planning and controversy work involves careful reading of statutes, regulations, and cases, and legal training is invaluable in doing that. An effective SALT practitioner must know how to read a statute carefully and must know the difference between a court case's holding and dicta.

Another development has been the increased diversity of state and local tax practitioners. There was a time when the field, as other fields of law, was entirely the province of rather elderly white men. When I look around the room at Tax Section meetings and, in particular, at meetings of the SALT Committee these days, I see many women, many young men, many minorities, and practitioners from all different parts of the country. I have worked on a number of client projects recently where I was the only male on the client's SALT team. Women and minorities now see the SALT field as one of opportunity. This is a relatively recent development. When I chaired the Tax Section, my final column in the quarterly *Newsletter* was devoted to things that I had not done during the year rather than to the Section's achievements under my leadership. One of the things that I mentioned was the failure to encourage greater participation in Section activities by women and minorities. My successor, Al O'Neill, promptly appointed me to chair a new Section Committee on Diversity. The commitment of the Section's leadership

to provide opportunities within the Section for women and minorities has borne fruit, and it is something of which we can all be proud.

Attorneys have come to play a greater role in the state and local tax world than they previously did. This has, in part, been a result of the increased audit activity by state departments of revenue and an increase in litigation. I am not sure why litigation is more common in the state and local tax area than it is in the federal tax area, but I believe that to be the case. The relative informality of state tax litigation procedures may make litigating in a state tax forum less expensive than litigating in a federal tax forum, but I doubt if that explains the difference. For whatever reason, the typical SALT practitioner is likely to have a number of cases in active litigation at any one time. This has placed a premium on advocacy skills. Writing an effective brief requires an ability to use the English language persuasively. It is not enough to state the basis of a client's legal position. One must explain it in a way that makes the judge want to decide for you. The importance of oral arguments in state tax cases has also highlighted the need for effective lawyering. Although the rules vary from state to state (oral arguments in the New Jersey Tax Court, for example, can last for hours), most fora allow a limited amount of time (*e.g.*, 10 or 15 minutes) for oral argument. This places a premium on the ability to determine the essence of a case and how to present it most effectively to judges who may or may not have a tax background. Presenting an oral argument to a panel of state tax judges who are knowledgeable about the tax laws and think they are interesting is one thing; presenting an oral argument to a panel of nontax judges who think that taxes are mysterious and boring (and, hence, are likely to affirm the decision of the state revenue department, which is presumed to be expert in these matters) is another thing entirely. Although some people have said that oral arguments are not important and that the briefs are what really count, experienced judges have told me to the contrary. Effective oral arguments can tip the scales in close cases, and this is something that lawyers are trained to do. Recent meetings of the Section's SALT Committee have devoted a considerable amount of time to litigated cases. The Committee's members are involved in litigation around the country, and issues that have been litigated in one state are often about to be litigated in others.

The increase in audit activity and litigation has changed the way in which state and local tax law is practiced. More attention is now being placed on procedural matters such as questions of privilege. The time to plan for privilege issues is when transactions are done, particularly with respect to the attorney–client privilege. If people only begin to think about preserving privilege when an audit begins, it may already have been lost because of disclosures to nonlawyers. Many of our clients are aware that there is an accountant–client privilege for federal tax purposes, but many are not aware that this does not extend to state tax matters. There, the question of privilege is a function of the law of each state. The work product doctrine can be helpful in protecting certain communications because disclosure to accountants and others does

not destroy the privilege, but, again, one has to be sensitive to the nuances of the doctrine or its protection will be lost.

I believe, although I have not conducted a systematic examination, that more and more younger lawyers are joining the SALT Committee, bringing fresh perspectives. This is in part a function of law firms asking lawyers to specialize in particular areas at an early point in their careers. When I began practice, it was common for young lawyers to rotate through several departments in their firms for a few years before beginning to specialize. Now, it is common for lawyers to specialize in state and local taxation (and in other areas) as soon as they graduate from law school. This is likely a result of the competitive environment and the high cost of associates, resulting in a need to provide uniformly high-quality services to clients and to generate a return on compensation paid to associates. While this may be a positive development, there is a downside. Young lawyers who specialize in state and local taxation immediately do not get a solid grounding in other areas of the law, particularly in transactional and estate work. I spent a year doing corporate work, a year doing trusts and estates work, and many years doing federal tax work before morphing into a SALT specialist. Having a working knowledge of these areas of the law has been a big help to me in practicing state and local taxation. It is hard to advise clients about the state and local aspects of transactions without a feel for the federal tax aspects or, for that matter, the nontax aspects of the transactions. Those of us in areas with law schools with good tax programs can send our young lawyers to get additional training in these areas, but not everyone has that luxury, and taking extra courses may be a significant burden for young lawyers who are working hard enough on client matters as it is and who have family obligations. A well-rounded lawyer is a better specialist, and those of us in senior positions in professional service firms have an obligation to help our young lawyers reach that goal.

Another recent development in the SALT Committee has been the increased participation of government personnel. When I chaired the Section, many Committee meetings and other activities were closed to Section members who worked for the Internal Revenue Service or state revenue departments. These members properly complained that they were part of the tax community and had paid their Section dues and should not be barred from some Section activities. Although some Section members felt that the presence of government people at certain functions would inhibit discussions among the private practitioners, the government people prevailed, and now all Section activities are open to everyone. The SALT Committee has certainly benefited from the active involvement of our government members. They have provided different perspectives on issues from those provided by private practitioners, and they have been candid in expressing their views. Their presence has not prevented the private sector lawyers from being candid about expressing their views, either. One of the highlights of Section meetings for me has been the Saturday morning SALT Committee Roundtables at which Committee members conduct informal conversations about hot issues. Members have

been willing to discuss planning ideas and strategies despite the presence of government personnel, and our government members have enthusiastically participated in the discussions.

The increased size and activities of the Section's SALT Committee have been accompanied by an increase in the recognition by other Section committees that state and local tax considerations should play a major role in structuring transactions. Other members of the Committee and I have taken part in panel discussions of other Section committees at which state and local tax aspects of transactions were discussed along with federal tax aspects. One of the challenges that SALT practitioners face (and I include people working within government and businesses as well as people working within professional service firms) is to make their colleagues aware of the importance of state and local tax issues. The need is particularly acute for our government members. I am aware of one instance in which a state governor had the bright idea that the state could raise more money at no political cost by taxing pensions paid to former residents who had moved to states with warmer climates. He had gone a fair way down this path before being brought up short by an advisor who told him that there was a federal statute that limited his ability to do so. We all need to reach out to our colleagues to make sure that they are aware of the importance of state and local taxes in their lives.

Present at the Creation: The SALT Committee's Role in the Formation of the New Jersey Tax Court

JAMES H. PETERS*

In the late 1960s and early 1970s several bills were introduced in Congress to regulate state taxation of interstate commerce. The Committee conducted a comprehensive review of those bills and submitted comments on one currently pending before the Senate. The Committee also commented on a bill to clarify state and local taxation of interstate banks and other depository institutions.

During 1979, the Committee produced a legislative recommendation to provide an alternative test for determining whether individuals working in foreign countries are subject to a state's income tax. It was based on easily ascertained facts so that states and taxpayers had an objective test for determining liability. The intent of the recommendation was to bring greater certainty to the taxation of expatriates.

Another legislative recommendation amended P.L. 86-272 to make the test for imposing a net income tax on out-of-state businesses reflect the extent of in-state activities rather than the nature of those activities, thereby avoiding the interpretative problems caused by using "solicitation" as the test.

A package of information and explanatory materials was put together to accompany the Committee's Revised Model State Tax Court Act as an aid to those states interested in furthering the adoption of the Act.

Shortly thereafter, I was contacted by Larry Lasser (a partner in a small New Jersey law firm) and State Senator Steven Perskie to assist in their effort to create a New Jersey Tax Court based on the Committee's Model. The remaining obstacle to passage of the Tax Court bill was the Chief Justice of the New Jersey Supreme Court's opposition to the creation of any specialized court.

I composed a letter to the Chief Justice setting forth the arguments for a judicial court and had John Pennell, Chairman of the Section, sign the letter. I was told that when Lasser and Perskie visited the Chief Justice in a last ditch effort to get his support, the Chief Justice pointed to the letter, which was open on his desk, and said that it had convinced him that a judicial tax court was the proper way to go. And, thus, the Tax Court of New Jersey came into being. Larry became the court's first Presiding Judge and, with my assistance, created the National Conference of State Tax Judges. It exists today and holds annual conferences under the auspices of the Lincoln Institute where

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*James H. Peters, former General Attorney, AT&T; Princeton University, A.B., 1948; University of Pennsylvania Law School, LL.B., 1951; Chair, ABA Section of Taxation, Committee on State and Local Taxes, 1977–1979.

administrative matters are discussed and lectures on timely subjects are presented by academics and practitioners.

Governor Byrne's June signing of legislation creating a Judicial Tax Court. The occasion was shared by (seated, from left): Assemblywoman Barbara McConnell, a former executive secretary of the Division of Tax Appeals; Governor Brendan T. Byrne; Sen. Steven Perskie; (standing) James H. Peters, Bedminster, who represented the American Bar Association; NJSBA Taxation Section Chairman A. Daniel D'Ambrosio; and Lawrence Lasser, former chairman of the NJSBA Taxation Section. N.J. ST. BAR ADVOC. (Sept. 1978).

ABA Section of Taxation: Chairs, Committee on State and Local Taxes[1]

2013–2015: Gregg D. Barton

2011–2013: William B. Prugh

2009–2011: Stewart M. Weintraub

2007–2009: Philip M. Tatarowicz

2005–2007: Stephanie A. Lipinski Galland

2003–2005: Linda P. Holman

2001–2003: David R. Cassidy

1999–2001: R. Bruce Johnson

1997–1999: Walter Nagel

1995–1997: Robert Joe Hull

1993–1995: John Cornelius Duffy, Jr.

1991–1993: D. Michael Young

1989–1991: Janice L. Robertson

1987–1989: Sterling L. Weaver

1985–1987: Arthur R. Rosen

1983–1985: John T. Piper

1981–1983: John S. Warren

1979–1981: Roy E. Crawford, III

1977–1979: James H. Peters

1975–1977: James H. Knecht

1973–1975: David H. Rosenbluth

1971–1973: Mark G. Ancel

1969–1971: Franklin C. Latcham

1967–1969: Jess N. Rosenberg

1965–1967: Walter H. Beaman

1963–1965: Donald K. Barnes

1961–1963: Arthur D. Lynn, Jr.

1959–1961: Allen H. Gardner

**1958–1959: Data unavailable – missing *Bulletin*

1956–1958: George Brabson

1952–1956: Jo. V. Morgan

1949–1952: Robert S. Cushman

1948–1949: Robert C. Vaughn

1946–1948: Richard C. Beckett

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[1]Taken from proceedings and other news published in THE TAX LAWYER and its predecessor, the BULLETIN, which was published from 1947–1967. Based on Committee proceedings published in 1947, the Committee on State and Local Taxes was established in 1946. Prior to 1946, there were a number of Tax Section committees devoted to aspects of state and local taxation.