

The Role of Trade Associations and Coalitions In Forming State Tax Policy

*featuring Joe Crosby, Kendall Houghton, Stephen P. Kranz, and Diann L. Smith
interviewed by Doug Sheppard*



Joe Crosby



Kendall Houghton



Stephen P. Kranz



Diann L. Smith

In *Raising the Bar*, *State Tax Notes* commentary editor Doug Sheppard interviews four seasoned state and local tax practitioners: Kendall Houghton of Alston & Bird LLP, Joe Crosby of MultiState Associates, and Stephen P. Kranz and Diann L. Smith of McDermott Will & Emery. All four interviewees were staffers with the Council On State Taxation.

In this edition, the group discusses the importance of trade associations and coalitions in forming state tax policy.

Business tax policy debates most often revolve around the companies or industries that would benefit from a tax break or be harmed by tax policy changes. Companies, however, are typically not the ones driving the debate. Rather, they have trade associations or coalitions to advocate on their behalf and present the relevant issues from a broader perspective.

This column discusses the importance of trade associations and coalitions in forming state tax policy: how com-

panies use them, when a coalition is a more appropriate vehicle than a trade association, and when lobbying efforts should be proactive, reactive, or both.

Stephen P. Kranz: All of us that have worked for the Council On State Taxation have a background in state tax policy and understand the importance organizations like COST and other trade associations play in helping our clients achieve their policy goals. We also recognize the importance of getting groups of clients together outside the trade association environment when those companies care about a particular issue that does not fall within the scope of a trade association's responsibility. There are many lessons each of us has learned in our trade association and coalition experience that we use as we represent individual taxpayers facing policy issues.

Every tax issue has a life cycle that starts on the compliance end: What are you reporting on your returns? Does that issue show up in audit? Does it lead to an appeal or litigation? If you don't like where the law ends up at the conclusion of the tax controversy, you should look at fixing it in the regulatory or statutory world. Most people fail to look at tax policy holistically and understand that trade associations, coalitions, and individual companies can play an important role in influencing what revenue departments do, what legislative bodies do, what national organizations like the Big Seven do; each of us have had our fingers on that world our whole SALT career.

Joe Crosby: I would add that when you look at tax policy activity from a business perspective in the states, associations and coalitions are arrayed across a spectrum. National and state business and trade associations are by far the biggest voices in the overall debate over state tax policy as it relates to business. Many issues are too narrow for trade association involvement, and that's when coalitions are most active — when you've got an issue that affects an industry, or maybe even a smaller subset of companies than that. Then you go to the most granular level, like the Tesla incentives package in Nevada. Obviously, that's a single-company issue; no association is necessarily going to get involved, at least not heavily. I'm sure they were involved behind the scenes, but that's something that's really led by an individual company.

Action by a single company in setting state tax policy is probably the exception rather than the rule, in that most companies look to coalitions and associations to help aggregate influence and credibility. They want to identify that the issue they're talking about is not an issue that serves only their own pecuniary interest, but that it also has a broader constituency and is beneficial for the state or local government overall.

Kendall Houghton: I find it interesting, thinking back over the last 20—some years that I've been doing this — and you guys presumably have similar experience — but the coalition efforts and the trade association efforts that are undertaken in this arena strike me as being internally or self-generated 50 percent of the time. So in other words, an organization identifies the need to address a tax policy issue and sort of initiates the dialogue or the action or starts the debate or education process. But probably the other half of the time — and Steve, you alluded to this in your introductory comments — the efforts are essentially reactive, as opposed to proactive. I was pondering whether we would view coalition efforts as having been more successful over the last 20 years when they were proactive or reactive, or if it doesn't really matter; rather, is it about how you address the issue when it hits the radar?

Kranz: Interesting question. My experience is that the coalition work we've done has largely been reactive, and I think we've been successful. That may be in part because I enjoy being reactive; when pushed, I respond. I tend to fight harder if I'm pushed. I'll steal Crosby's terminology here: It's hope or fear. Are you hoping to achieve something proactively, or do you fear some end result and are reacting to that fear? In a sense, the policy world is driven by those two things. And no matter what it says about me as an advocate, I thrive when representing someone who is afraid of an outcome.

Crosby: I agree, Steve. I tend not to view it as a binary question of being reactive or proactive, because you're looking at a complex system. One effort that I engaged in quite a long time ago — so I'm comfortable talking about it — involved West Virginia's sales tax on nonprofessional services. A few companies under audit, absent any official policy change by the state, were assessed sales tax for nonprofessional services on the payments they made as manufacturers or wholesalers to retailers for things like shelf space and advertising. Those payments were deemed payments for nonprofessional services because the agreements with the retailers would require them to do something like rotate stock — something retailers routinely do anyway.

A couple of those companies under audit reached out to COST, which was where I was then, and COST formed an internal coalition to assist the subset of members who were interested in the issue. So in that case, it was a reactive effort, in that the companies were reacting to something that was presented to them on audit. But then they were proactive in that they sought out others who were having common experiences, banded together with those others, jointly fi-

nanced an effort first to seek an executive branch rule that these were not nonprofessional services and thus nontaxable and when that failed, ultimately to get a legislative amendment that clarified that these sorts of arrangements were not nonprofessional services and were not subject to sales tax, which was the ultimate conclusion. It took probably 2½ years overall to get it down.

You could say that effort was reactive, but really I look at it as proactive in that the companies identified what some would view as a nontraditional path to resolve an issue that arose on audit. I think we're seeing more of that; Steve and Diann, I know you've worked on some of these issues too where something happens and a client could theoretically just live with it, but they for one reason or another don't think it's appropriate policy and are concerned it ultimately will affect their ability to do business in that jurisdiction. And so they want to go make a change.

Diann L. Smith: Another way that I think associations are underused by sophisticated taxpayers is associations that address revenue issues on behalf of the states: for example, the Multistate Tax Commission, Federation of Tax Administrators, or National Conference of State Legislatures. To me, those are perfect associations for which taxpayers can get their point of view across by attending and participating in meetings. You've got a captive audience of people who are interested in revenue issues for the state and in many circumstances not only make policy, but have some type of national platform in which they're talking to other states about ideas and concepts.

Because of that, I think the state trade associations are a great way for either single taxpayers — or, in many cases, even better, a coalition of taxpayers or taxpayer trade associations — to participate. This also gets back into the concepts of proactive and reactive — taxpayers certainly can be reactive, for example, when the MTC comes up with an idea. But I also think that all those types of state-centered organizations are amenable to taxpayers or taxpayer coalitions coming forward with ideas to work with the organization on some type of policy or legislative changes.

Crosby: I agree, Diann, and I think one of the resources that many tax professionals fail to take advantage of is the tax committees of their state chambers of commerce. Larger taxpayers are highly likely to be a member of the chamber of commerce in the state where they're headquartered, and possibly other states as well. Getting engaged in those tax committees gives you the opportunity to be educated on what's going on — but also to educate, because those committees frequently bring in public officials, whether they're elected or from revenue departments. Those officials come and talk about tax policy developments and engage in a dialogue on issues of concern to the business community.

You mentioned NCSL, another organization that has regular meetings with state lawmakers engaged in tax policy. Taxpayers who are forward-thinking and are not looking at engaging in tax policy as a transactional matter only but are also looking to make an investment in the future can attend

those meetings and learn what policymakers are thinking about and also contribute to their education on the various taxes that affect the business community.

Smith: Joe, I think the state chamber of commerce issue is a fascinating idea because in many states, the tax committee is frequently dominated by either companies that are headquartered there or the small business community. Out-of-state companies may be really large employers in the state, but aren't necessarily participating in the chamber of commerce, but can have a lot to add and influence if they became involved.

Regardless of choosing in which forum you advance some type of cause and how you organize it, I know that for Steve and me, when the MTC first looked into changing the Uniform Division of Income for Tax Purposes Act, one of the decisions that we made was that instead of trying to work with the Uniform Law Commission to get things changed, let's try to get the Uniform Law Commission to say, "It doesn't need to be changed." And let's actually move the forum from the Uniform Law Commission to the MTC.

Kranz: And we did that in a coalition structure that was very effective. Another example of that was a coalition of companies that we represented that were opposed to the spread of contingent-fee income tax audits on the state side, and we were very successful there preventing several pieces of legislation from moving around the country and the spread of transfer pricing assessments on a contingent-fee basis. We've still got that problem in the District of Columbia, but we haven't seen it popping up in any other states.

Doug Sheppard: You talked about individual coalitions outside the groups, such as COST. Do those come into play for more specialized issues in which not every business has the same interest?

Crosby: Yes, absolutely. A classic example is state proposals to extend the sales tax base to services. In those situations, you've got several different things going on. You've got state chambers of commerce, for example, that will weigh in, but whose overall position may be muted depending on how that entire package is structured. So if the package would extend the sales tax base to services and take that money to reduce or eliminate the personal income tax or the corporate income tax, they're going to have members who are perhaps at cross-purposes. And then you've got folks who will pursue their narrow self-interest — and I don't mean that pejoratively, I think they ought to — like accountants and attorneys.

But there are other affected interests that may not normally be engaged in the political environment. Like in Maryland a few years ago when they looked to extend the sales tax base, they ultimately stuck on data services and computer services. And those folks weren't actually represented in the state capitol, so they did come together in a coalition; I think it ultimately became an association, but they quickly formed a group of like-minded people and said, "Hey, we need to get together because we've got to defend

ourselves." That happens in every state when sales tax base expansion is considered. You've got activity all the way along: You'll have individual companies advocating, you'll have trade associations like the state chambers advocating. But there will be collections of interests that coalesce specifically around a common position on sales tax base expansion.

Smith: Doug, another way that unique issues versus more comprehensive business issues come up is when you've got an issue like what the Uniform Law Commission is doing right now on revising the Unclaimed Property Act. We see many larger organizations getting involved and dealing with some of the big issues that, for example, all holders may encounter. There are lots of other issues that may be industry specific that the larger organizations don't address — because you do have to pick your battles. That's where smaller coalitions of groups in unique industries can be beneficial, because they can fill in the gaps that the larger organizations don't.

Houghton: That's a really good example, Diann, and in fact you are very much seeing that play itself out in the unclaimed property initiative of the Uniform Law Commission. Organizations like the Securities Industry and Financial Markets Association or the Investment Company Institute and other special niche-sector representative groups are actively addressing their particular issues in that forum. And there are also business coalitions formed, including one formed by our firm for that purpose. But there has been no shortage of papers, commentary, and proposed statutory amendments that have been sent to the Uniform Law Commission's drafting committee advocating holder interests in modernization and reform.

It's interesting, because once the invitation was extended to provide feedback, I've been told that the ULC reporter for that effort, Charlie Trost, found that he had a lot more than he expected to sort through. And that's probably going to slow down the process. But on the other hand, the submissions have been for the purpose of educating, for the purpose of advocating particular language or positions, and to address potentially conflicting viewpoints. Because it's not only holders who are active in this forum; we've seen submissions from the National Association of Unclaimed Property Administrators, the state unclaimed property administrators' group, as well as audit firms and owner-search firms. So there are all sorts of stakeholders in the mix that are doing exactly what you're saying: tackling issues at both the broader, comprehensive level and then at the specific, targeted level.

Smith: Another area that we have discussed in which trade associations and coalitions can be particularly effective is in filing amicus briefs in both state courts and, obviously, the U.S. Supreme Court. For those of us at COST, that was a big part of what we did while we were there: looking at the possible amicus briefs and the approach that we could take. It's certainly been interesting in some of the recent cases to

see what groups file amicus briefs. The MTC is a group we always follow to see what their position is in briefs.

Houghton: That's right. And it's also been interesting in that regard, Diann, to see how much more actively state attorneys general are involved in the amicus exercise. I didn't have the sense that that used to be the case, but I feel like we're seeing more briefs filed by states — and clearly we're seeing it in the Multistate Tax Compact election litigation.

Joe, do you have a protocol when you're being engaged to advocate on an issue in a state? In other words, do you start with a strategic summit? Do you think about the issues and how best to examine them? Do you usually have a white paper or talking points, that sort of thing? Or do you feel that you have to build a strategy and tool kit to suit the issue that you're dealing with?

Crosby: That's a really good question, Kendall. One of the reasons that I enjoy engaging in state and local government affairs and tax policy is because it's not like chess; there's not a strict set of rules that one must follow. It requires creativity and it requires thinking about each project separately — applying lessons from before and tools that you have developed, but recognizing that each effort is different. There are certainly some instances when you wouldn't want to shout from the rooftops; you want a very quiet process in which you hire someone who has the appropriate connections to help get your issue heard, because it's just not something that is really going to be amenable to a long, public debate.

But there are other issues for which there's a benefit to having outside groups brought in: You're going to want to develop materials, such as white papers and one-pagers, in which you have an open discussion with other potential businesses who may be affected and who would want to join the effort. The direction for each effort depends on several factors, such as the risk profile of the client, the profile of the issue itself, the amount of funding the client has, whether it's an association client or a corporation or a coalition — are you going to need to go out and find others who will help

shoulder the weight? The reality is that almost any change you make is going to affect multiple parties.

And often you've got the free-rider issue when one or a few companies are willing to fund an effort that's going to help a much broader set of folks. Ordinarily, you would try to expand the initial group to share those costs more appropriately. So I don't think there's any one answer; there are lots of things that you would consider with every effort.

I think the one thing that I have learned is that you always have to have — sorry for the sports analogy — a quarterback. Very little ever gets accomplished when, in an association environment, or a coalition environment, or within an individual company, it's not somebody's responsibility to move the issue forward. So if a coalition of companies gets together and they intend to do something, they almost always have to designate someone who will be responsible, whether they're inside the companies that are part of the coalition or whether it's an outside resource. The same is true in associations. Associations usually have very broad agendas. Unless it's a priority for either someone in the organization or someone they retain, it's unlikely the effort will succeed.

To me, that's the most important lesson: You can't have success if you don't know who's in charge.

Kranz: Those same issues come up if an individual taxpayer is trying to work on an issue outside the coalition or trade association world. Joe mentioned that there are times when things need to happen quietly and companies hire somebody on the ground to help them do that. I think about the people I've met in my career in state and local tax; there are some companies that have a state tax policy person in the tax department who's really a quiet fixer that has relationships around the country and can come in and help — whether it's a sticky audit or a traditional policy issue on the regulatory or statutory side. And more and more, we're seeing sophisticated taxpayers hire people on the ground. We've worked with Crosby to identify lobbyists for us to use as part of the team when a company is facing problems that they would like resolved quietly without public discussion. It's a very effective way to deal with a tax problem. ☆