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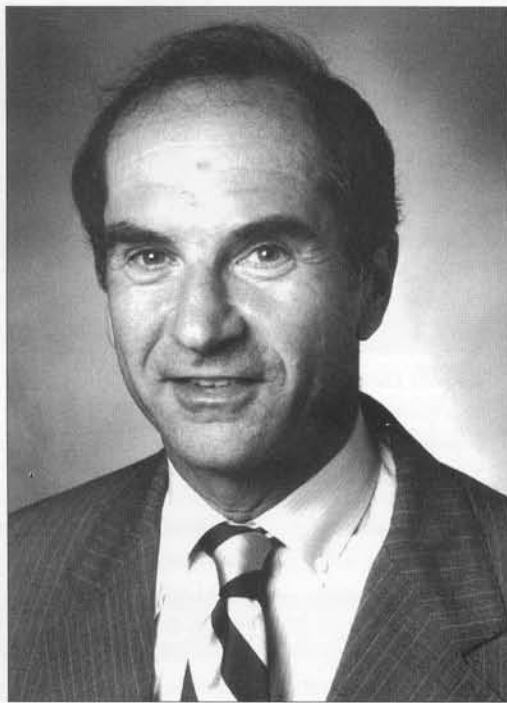
TAXATION OF TELECOMMUNICATIONS AND ELECTRONIC COMMERCE

The following essay is drawn from Professor Walter Hellerstein's article, "Telecommunications and Electronic Commerce: Overview and Appraisal" which ran in *State Tax Notes* in February. The article will become the concluding chapter of a book published by the organizers of the Conference on Taxation of Telecommunications and Electronic Commerce; Prof. Hellerstein participated in that conference in Boston.

The issues raised by taxation of telecommunications and electronic commerce (hereafter simply "electronic commerce") pose daunting challenges for taxpayers and lawmakers alike. Despite serious disagreements among interested parties over how to resolve these issues, there are also significant areas of agreement.

Consensus

First, virtually everyone agrees that taxation of electronic commerce creates problems that need to be addressed. Existing tax laws simply fail to deal satisfactorily with the emerging technology that characterizes electronic commerce. The new technology and the concomitant reconfiguration of telecommunications and related industries play havoc with traditional standards for determining jurisdiction to tax; the sourcing of income; the nature, value, situs, and timing of sales; the classification of property and taxpayers; and the collection of taxes. As a consequence, the application of today's taxing regimes to the contemporary world of



Professor Walter Hellerstein, a member of the UGA law faculty since 1978, is regarded as the nation's foremost expert on state and local taxation. He is co-author (with his father) of the leading treatise in the field, *State Taxation* (Warren Gorham Lamont, 2d ed. 1993), as well as the leading casebook, *State and Local Taxation, Cases and Materials* (6th ed. 1997), to be published this summer.

Hellerstein has also published more than 75 law review articles, monographs, book chapters, and reviews dealing with state and local taxation, and his work is frequently cited by the U.S. Supreme Court and other tribunals. In 1992, Hellerstein received the Multistate Tax Commission Award for Outstanding Contributions to Multistate Taxation. He serves on the editorial boards of several respected tax journals, including *State Tax Notes*, of which he is chair.

electronic commerce is uncertain, inconsistent, and complex.

Second, virtually everyone agrees on

many of the basic principles that ought to guide efforts to resolve the problems created by taxation of electronic commerce. Everyone agrees, for example, that taxation of electronic commerce should be economically neutral. The principle of tax neutrality suggests that taxpayers who provide services over the Information Superhighway should not be subjected to income, excise, or property taxes that differ from those that are imposed on taxpayers who provide competing services off the Information Superhighway. Subjecting the former but not the latter to tax will distort economic decisionmaking by increasing the cost of doing business on the Information Superhighway and inducing taxpayers to redirect their activities off the information highway.

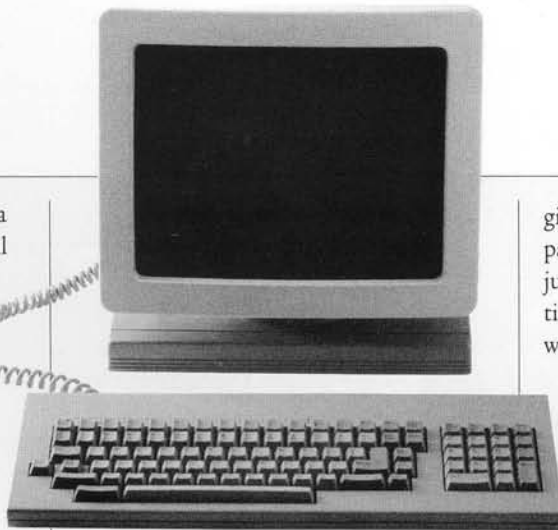
Everyone also agrees that the taxation of electronic commerce must be structured in a manner so that the system is administrable. However theoretically desirable it may be, for example, to structure a sales tax on electronic commerce so that the goods or services purchased are taxed in the jurisdiction in which they are consumed, it may, as a practical matter, be impossible to construct a collection and enforcement mechanism consistent with established jurisdictional limitations that will permit the implementation of such a tax. Accordingly, there is widespread recognition that we may have to accept approaches to taxation of electronic commerce that are "second best" from a theoretical standpoint but which nevertheless provide workable solutions to real problems.

Finally, there is broad agreement on a number of subsidiary principles that will tend to support these broader principles: definitions of taxable and nontaxable transactions should be clarified to avoid artificial distinctions between functionally similar activities; a clear line should be drawn between transmission-based services and content-based services to facilitate implementation of the tax neutrality principle; and duplicative taxation should be avoided, especially when such taxation creates competitive inequalities between similarly situated services.

Conflict

Despite significant agreement regarding both the existence of the problem of taxation of electronic commerce and the general direction that a solution to that problem should take, there is considerable conflict on a number of critical issues, particularly with regard to state and local taxation. While everyone would agree that we need clear jurisdictional standards for assessing income and excise taxes on those engaged in electronic commerce, there is no consensus on precisely what the jurisdictional standard ought to be. While everyone would agree that we need a "level playing field" for competitors in the electronic commerce industries, there are differing views regarding the relevant universe of players on that field. And while most would support the desirability of separating transmission-based services from content-based services, there is room for considerable disagreement as to what constitutes "transmission" and what constitutes "content."

Even more important than the conflict over specific substantive issues at the state level, however, is the fundamental difference in perception between the states and industry regarding the nature of the problem that needs to be resolved. While both



states and industry agree there is a problem, the states perceive the essential problem as the disappearance of their tax base into cyberspace. If massive amounts of economic activity will soon be conducted through electronic commerce by remote service providers engaged in nontraceable transactions from distant and often unidentifiable locations, what, the states understandably want to know, will happen to their income and sales tax bases? They therefore seek a solution to the problem that will stanch the hemorrhaging of their tax revenues.

Industry, on the other hand, perceives the problem as one of killing the goose that lays the golden eggs. If fiscally-strained states, burdened by new obligations imposed on them by a shrinking Federal Government, seize on the Information Superhighway as an untapped source of revenues that provides a panacea to their budget woes, what, industry understandably wants to know, will be the future of the most economically dynamic sector of the economy, particularly to those smaller businesses who may be severely affected by increased tax liabilities and compliance obligations? Industry therefore seeks a solution to the problem that will protect it from the aggressive reach of the state tax collector.

Prospects for Uniformity

Is there a solution to the problems raised by taxation of electronic commerce, particularly at the state and local level,

given the divergent perspectives that taxpayers and states bring to the table? In my judgment, the answer is "yes." The solution lies in developing a neutral *process* by which a uniform statute can be drafted to codify the substantial areas of agreement among the interested parties while resolving the areas of disagreement. The neutral process is critical because it will serve to temper the adversarial perceptions that now inform much of the discourse over taxation of electronic commerce. With a neutral forum in which all views are aired, all interests are represented, and all parties believe they are getting a fair hearing, the possibility for a cooperative solution to the problems raised by taxation of electronic commerce will be significantly enhanced.

If, for example, the National Conference of Commissioners on Uniform State Laws or the National Tax Association would undertake the task of sponsoring the development of a uniform state law governing taxation of electronic commerce, I, for one, am hopeful that states and industry would be able to build on their important points of agreement, iron out their major points of disagreement, and forge a workable solution to many of the problems of taxing electronic commerce.

—Walter Hellerstein

