

MINUTES

MONTANA SENATE 52nd LEGISLATURE - REGULAR SESSION

FREE CONFERENCE COMMITTEE ON SB 333

Call to Order: By Senator Thomas Towe, Chairman, on April 22, 1991 at 11:00 a.m.

ROLL CALL

Members Present:

Senator Thomas Towe, Chairman (D)
Senator Francis Koehnke (D)
Senator Delwyn Gage (R)
Representative Dan Harrington (D)
Representative Jim Elliott (D)
Representative Mike Foster (R)

Staff Present:

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Announcements/Discussion:

EXECUTIVE ACTION ON SENATE BILL 333

Discussion:

Senator Towe led the discussion of the proposed amendments.

Senator Gage stated that the Department of Revenue were primarily trying to alleviate at least one problem with one taxpayer, and maybe with some others who are not here with regard to that. The department has done considerable tax planning in the past with regard to sub "s" corporations that are not Montana corporations and some way or other, grandfather them in at least, so that they will be able to adjust their tax planning over a period of time. There is some indication that these taxpayers have relied on the advise from the Department of Revenue in setting up the situation that they are currently operating under. The Department of Revenue has prepared the suggested amendments to the bill.

Senator Towe passed out the copy of the bill and the proposed amendments.

Dennis Adams, Department of Revenue, stated that there were one group of amendments introduced by the House which the Department of Revenue feels comfortable with as far as allowing taxpayers, that have been filing either "s" or "c", to do business in the state of Montana. But the one area not covered by the House, even though it was discussed with the House Taxation Committee, is the amendment before you now. It is for a taxpayer who is a Montana resident involved in an "s" corporation that does not do business in the state of Montana. Since there is no business done in Montana, it is an individual election as to how they will file because no corporate returns would be filed with the state. There seems to be a dispute as to whether or not the taxpayers have relied upon advice from the Department of Revenue as to how the business should be treated. It would still be up to the staff to determine whether or not there was advice from the Department of Revenue, and whether this advice was used in making their election decision regarding their individual Montana Income Tax returns.

This amendment states if the taxpayer can establish by substantial credible evidence that the Department of Revenue gave the taxpayer advice concerning the application of Section 15-30-111 to the taxpayer's facts and circumstances, then the taxpayer, in that case, would have what is referred to as a "conditional grandfather". The taxpayer would have until December 31, 1996 to change his tax planning, to eliminate confusion in this situation.

Senator Towe reiterated, that the bill itself deals with subchapter "s", elections for out of state corporations.

Mr. Adams explained that what is covered in the bill right now is a consistent way for taxpayers or shareholders of "s" corporations' reporting for Montana purposes. Thirty-seven states already require that if you make out an "s" corporation for federal, then you also have to do so for the state. That is the essence of the bill. There is a grandfather clause in bill for those who have made an "s" or "c" election for state purposes. It would only apply to new taxpayers making elections so that it will be consistent in the future.

Senator Towe asked if that was in the original bill?

Mr. Adams stated that it was, and that the House amendments cover it. That is the grandfather portion of the House amendments.

Senator Towe asked then if any "s" corporation, already having made a valid election in Montana to go "s" will be able to continue "s", even if they are not on the federal?

Mr. Adams stated that what happens usually is the other way around. They file "s" for federal and a "c" for Montana. They will still be allowed to do that. It is especially noticeable if they are an out-of-state shareholder investing in Montana, rather than their only income in Montana. So most prior to file a "c" corporation rather than having fifteen or twenty shareholders have to file individual income tax returns for Montana. So they have elected to be treated as a "c" corporation for state purposes. Montana is getting the taxes either way, either as an "s" corporation or as a "c" corporation.

Senator Towe asked if this proposed amendment that he is proposing would grandfather further a taxpayer who is a shareholder that is not doing business in Montana and has elected an "s" corporation. How does that fit in with what we just said?

Mr. Adams stated that basically the "s" corporation is not doing business in the state of Montana but the shareholders are Montana residents, so for federal purposes they pick up the "s" corporation income on the federal return, but then they back it out as an adjustment for Montana. Usually these are in states that have no other income tax, so they don't get the credit back and forth.

Senator Towe stated that this will allow shareholders, up until 1996, to continue to do this even though the corporation (sub "s") is not doing business in Montana. It will allow them to continue their current practice until 1996?

Mr. Adams stated yes, assuming that the Department of Revenue is successful in its position as it goes through the appeals process.

Senator Towe asked Mr. Adams if the taxpayer can prove that they have obtained advise from the Department of Revenue and, in fact, gave them advise that they relied on as the way to do it, then the taxpayer can continue that practice until 1996, and that is the amendment.

Mr. Adams stated that was correct.

Tom Wilder stated that his amendment is technically different. The department has added a number of elements of gloss to this which concern him.

Senator Towe asked Mr. Wilder if he was satisfied with the department's amendment?

Mr. Wilder stated no. As you read through it the basic structure is the same. The Department of Revenue added some additional language that concerned him like "applicable to the taxpayers facts and circumstances" and "reliance to the taxpayers detriment". His concern is that when the accountant, working on these series of projects, proposed the issue to the department, it may have been in the general question, and how is the Montana resident shareholder of an "s" corporation treated under such and such a section? That was probably how the question was asked as opposed to reciting "taxpayers facts and circumstances" as would be the case.

Mr. Shanahan stated that Montana has literally no procedure for it. Why do we now want to put you under the same specific requirements as if you were requesting it literally? Mr. Wilder's amendment merely says that if we can prove to the satisfaction of the trier of fact, either the tax appeal board or the district court, that the we were given advise and we relied on it, that ought to be the issue rather than getting down to arguing about what does the legislature mean by arguing about facts and circumstances.

One other thing in the title of the bill is that every time there is a clarification of tax laws, it causes a series of supreme court decisions. One specific case is Asarco v. Department of Revenue. The Supreme Court said that this is the way that the Department of Revenue had always done it, and therefore it was not really an amendment to the bill, but merely a clarification. Therefore this application would apply seven or eight years retrospectively because "that is the way the department always did it". In this current case, that is not the way the department always did it. He would rather have the word "requiring" in the title instead of "clarifying".

Senator Towe asked if Mr. Adams if he had any problems with the word "requiring"?

Mr. Adams stated that his only concern is that the Department of Revenue has settled with some taxpayers on this issue and collected dollars from them. The Department of Revenue would have to be careful that having paid on this issue, they would go back against the Department of Revenue.

Senator Towe stated that it is effective December 31, 1991, and applies to tax years beginning after December 31, 1991,

so it should take care of that problem.

Mr. Adams stated that the problem is that these taxpayers are asking for an exemption from that. If they lose, they would have to come in immediately under the clause, in subsection 2. The taxpayer would not get the grandfather, and it would be a contradiction because the Department is trying to let them go until December 31, 1996, but this amendment would be coming in as of December 31, 1991.

Senator Towe asked for an explanation.

Representative Foster stated that he had another meeting to go at 11:00 a.m. He stated that he heard extensive arguments in the subcommittee and Taxation Committee from Mr. Wilder, Mr. Shanahan, and Mr. Adams. Our subcommittee and our committee, as a whole, did not adopt the Wilder amendments. He stated that as he remembers those amendments were not even moved, so they lack support on the subcommittee and in the full committee. He stated that Mr. Adams interprets his amendments as somewhat conciliatory in this regard. Before he left, he voted to adopt the Department of Revenue's proposed amendments, and not to support Mr. Wilder's.

Senator Towe asked Representative Foster if he had any sense of the other two House members, since these conference committees go House by House?

Representative Foster stated that Representative Harrington was chairman of the committee and stated that he hated to speak for either one of them. He didn't remember them expressing support of Mr. Wilder's amendment. He stated that if he sees them he will point them to this meeting.

Mr. Wilder pointed out that there was a lack of coordination before the House hearings. He talked with Mr. Adams about some concepts, and they worked out some things that were acceptable but those have not been communicated to Mr. Miller. Mr. Miller represented the Department of Revenue at the hearings. The Department of Revenue, through Mr. Miller, opposed any consideration of these changes because some additional changes and things had not been worked out. So, he is afraid that Representative Foster could view this as not pulling for it.

Senator Towe stated that they needed to get back to the language. He does not understand what Mr. Wilder's language accomplished that the departments language does not?

Mr. Wilder stated that he is concerned with the words "taxpayers", "facts and circumstances" and "advise to its detriment", that these will be seized upon by at least department hearings officers as imposing requirements that weren't anticipated here.

Senator Towe stated that Mr. Wilder's language says, "if the taxpayer establishes by substantial evidence" that the taxpayer relied on the departments advise.

Mr. Wilder stated that is correct.

Senator Towe stated the other one says, "The taxpayer can establish by substantial credible evidence the Department of Revenue gave the taxpayer advise concerning the application of the same section, to the "taxpayers facts and circumstances" and the taxpayer can establish by substantial credible evidence that he relied on that advise to his detriment." The only thing different is the taxpayer's "facts and circumstances".

Mr. Wilder stated the language also says, "and detriment".

Mr. Shanahan stated that his main concern is just the word "clarifying".

Mr. Adams stated that the Department of Revenue's concern is that these other taxpayers have already settled. This reflects additional dollars from a number of other taxpayers who have the identical circumstance. The Wilder's are not the only ones who are caught up in this situation. If we don't look at the individual facts and circumstances, all of these other people are going to say that they are going to come back at the Department of Revenue. We are trying to make sure that this doesn't just impact the Wilder's. The Department of Revenue has other cases out there where people have also checked with the department. They may have taken our advise or they may have called in and checked with the department without giving any facts and we went with them.

Senator Towe stated that makes sense. What if they used the word "requiring" and keep the words "facts and circumstances"?

Senator Gage asked if legally there was any difference between "substantial" and "substantial credible"?

Mr. Shanahan stated not really.

Senator Towe stated that he didn't feel that was a problem if they use "substantial credible evidence" like the Department of Revenue proposed. In other words, if we use exactly the Department of Revenue's language with the only difference being that they change the word "requiring" instead of "clarifying" in the title. That seems to meet everybody's concern. Senator Towe asked if Senator Gage was comfortable with that?

Senator Gage stated Yes.

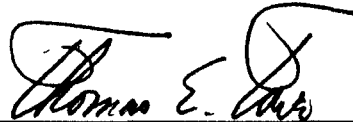
Senator Towe asked Senator Koehnke if he was comfortable with that.

Senator Koehnke stated yes.

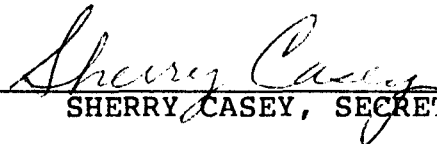
Senator Towe stated that he would write it up and talk to the absent members. If there are two of the House members disagreeing, they have a problem and he will have to call them back. If they agree, it will be circulated to have it signed.

All agreed.

Adjournment At: 11:30 A.M.



TOM TOWE, CHAIRMAN



SHERRY CASEY, SECRETARY

TT/sc

Free Conference Committee
on Senate Bill No. 333
Report No. 1, April 23, 1991

Page 1 of 1

Mr. President and Mr. Speaker:

We, your Free Conference Committee on Senate Bill No. 333, met and considered Senate Bill No. 333 (reference copy - salmon) and recommend that Senate Bill No. 333 (reference copy - salmon) be amended as follows:

1. Title, line 5.

Strike: "CLARIFYING" on line 5

Insert: "requiring"

2. Page 21

Following: line 1

Insert: "NEW SECTION. Section 11. Conditional Grandfather Clause for certain Montana Shareholders of Foreign Corporations that have elected S corporation status for federal tax purposes. A Montana taxpayer who is a shareholder in a corporation that is not doing business in Montana and has elected S corporation status for federal tax purposes can apply Section 15-3-111(3) (1989) for all tax years beginning on or before December 31, 1996, if the following conditions are met:.

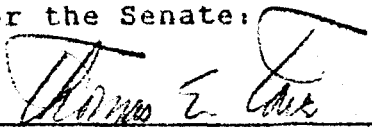
(1) The taxpayer can establish by substantial, credible evidence that the department of revenue gave the taxpayer advice concerning the application of Section 15-30-111(3), to the taxpayer's facts and circumstances.

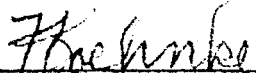
(2) The taxpayer can establish by substantial, credible evidence that he relied on that advice to his detriment."

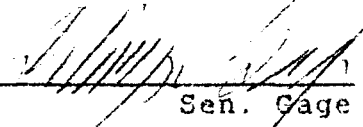
Renumber: subsequent sections

And that this Conference Committee report be adopted.

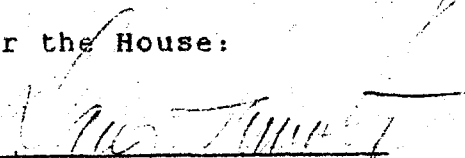
For the Senate:

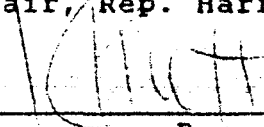

Chair, Sen. Towe


Sen. Koehnke


Sen. Gage

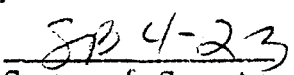
For the House:


Chair, Rep. Harrington


Rep. Elliot


Rep. Foster


2nd. Coord.


Sec. of Senate

ADOPT

REJECT

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