A Survey of
State Taxation of Business

presented to the

Maryland Business Tax Reform Commission

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Introduction

There is no magic formula that will allow governments to painlessly manage the economic downturn. The delivery of state services is dependent on only two factors - the quantity and quality of services demanded by a state's citizenry and that citizenry's ability and willingness to pay for those services. This paper does not address the level of spending that is appropriate. Neither does it address every important issue that is currently part of the public discourse about state and local taxation. It seeks only to summarize some of the ways in which states are raising revenues and suggest meaningful criteria for evaluating tax systems.

Principles of a "Good" Tax System

- Taxes should be adequate to provide an appropriate level of those goods and services best provided by the public sector, such as education, public safety and transportation.

- Taxes should do the least harm to the private economy. Tax bases should be as broad as possible so that tax rates can be as low as possible.

- Taxes should not only be fair and equitable towards individuals and businesses similarly situated, but also they must be perceived as fair by taxpayers. Individuals with the same income level should bear the same or similar tax burden. Businesses engaged in similar commercial activities should be subject to the same level of taxation.

- Taxes should not be costly for government to administer and should be easily understood by taxpayers so as to maximize taxpayer understanding and minimize taxpayer compliance costs.

- Taxes should be evaluated on the basis of the impact of all taxes levied on taxpayers, not just a single tax or tax rate.

- Deviations from sound tax policy in pursuit of economic development, social or other goals should be well-reasoned and implemented only when established tax policies are not significantly undermined and the results of such deviations can subsequently be evaluated.

State Taxes

States and local governments obviously have a need for monies to pay for the services that they provide to the people and institutions of their jurisdiction. The most common broad traditional bases to which tax are imposed are sales, income and property. In addition there are specialty taxes on such items as tobacco, motor fuel, insurance and others. A list of the taxes traditionally collected by the states appears below.

Alcoholic beverages taxes	Motor fuels taxes
Amusements taxes	Motor vehicle licenses
Compensating (Use) taxes	Motor vehicle operators' licenses
Corporation licenses	Occupation and business licenses
Corporation net income taxes	Pari-mutuels taxes
Death and gift taxes	Property taxes
Documentary taxes	Public utilities taxes
Stock Transfer taxes	Public utility franchise
Gross Receipts taxes	Sales taxes
Hunting and fishing licenses	Severance taxes
Individual income taxes	Tobacco products taxes
Insurance premiums taxes	

A few states in recent years have enacted these traditional taxes in new ways or enacted a new kind of tax. It is these latter kinds of innovations that will be discussed as well as corporate income taxation. Inasmuch as property taxes are predominantly collected at the local level and not at the state level, that tax is not addressed herein. Information on sales taxes will concentrate on the taxation of services.

Business Taxation

Most economists will tell you that corporations, because they are artificial entities that mostly flow money through to real people (stockholders, employees, and suppliers), should not be taxed. They argue that taxing corporations results in double or more taxation and is not an efficient way to deal with business operations in an economy because it creates disincentives for efficient business operations.

Many individuals and their political leaders disagree when they see the level of revenues flowing to and through some of these entities, often the largest ones. They argue that government provides a structured and ordered environment in which these entities operate and earn income and, therefore, the corporations should contribute in a meaningful way to the public good by paying taxes. Having recognized this ambivalent universe, however, policy makers also recognize that many corporations provide employment to many individuals, which is usually recognized as a desirable public policy goal.

The practical problem then becomes how best to extract from businesses their "fair share" without being so punitive or confiscatory that the businesses, who are increasingly mobile, decide to leave the taxing jurisdiction for better taxing climes. This dilemma, and the fact that it is not new, can be illustrated by the following quote: "The art of taxation consists in so plucking the goose as to get the most feathers with the least hissing." *Jean Baptiste Colbert, Controller General of Finances for Louis XIV.*

Corporate Income Taxes

The taxation of corporations' income in 2008 on a national basis produced approximately 6.6% of total state revenues collected according to the United States Bureau of the Census. In 2007 the percentage was 7.1%. The percentage has fluctuated in the 4% to 10% range over the years. Although corporate income taxes produce a relatively small percentage of states' revenues, casual observation reveals that it produces a significant percentage of the controversy and litigation, often resulting in United States Supreme Court opinions. Again, according to the United State Bureau of the Census, in 2008 Maryland collected the 16th largest amount of all taxes, ranking between the states of Washington and Wisconsin.

Two of the most significant issues that have arisen in corporate income taxation over the last several years is the examination by state tax policy makers of requiring combined reporting and the apportionment factors to be used to determine the proportionate amount of a multistate business enterprise's entire income that should be taxed by a particular state. Combined reporting is a system of reporting this proportionate amount of income based on the determination being made that a "unitary business" exists.

One of the most authoritative descriptions of combined reporting is provided by Professor Walter Hellerstein of the University of Georgia School of Law, recognized as the preeminent academic legal scholar on state and local taxation. Professor Hellerstein describes combined reporting as follows: "…when a group of affiliated corporations is conducting a unitary business, it is required to report its income on a "combined" basis, by combining the operating income of all of the unitary affiliates and apportioning this income on the basis of the combined property, payroll and sales factors of the unitary corporate group." Note that states have begun to vary their formulas and move away from the traditional equally weighted three-factor formula. "Under combined reporting the apportionable income of a group of corporations conducting a unitary business is the income derived by members of the multicorporate unitary enterprise from dealings with nonmembers of the group. Dividends paid by one member of the group to other members of the group, insofar as they reflect income from the unitary business, are eliminated altogether from the tax base."

The concept of taxing on a unit basis "first arose out of property tax law, wherein states, counties, and cities attempted to tax the property of the railroads, telegraph companies, and express companies subject to their jurisdiction by taxing a proportional share of the entire company's property or capital stock. As multicorporate enterprises began to operate in multiple states the concept of unitary taxation was adapted in some states to the taxation of income and its constitutionality was accepted by the Supreme Court of the United States, who once observed that "the linchpin of apportionability in the field of state income taxation is the unitary-business principle."

The Supreme Court has described a unitary business as “a functionally integrated enterprise, the parts of which are characterized by substantial mutual interdependence and a flow of value between or among the entities.”

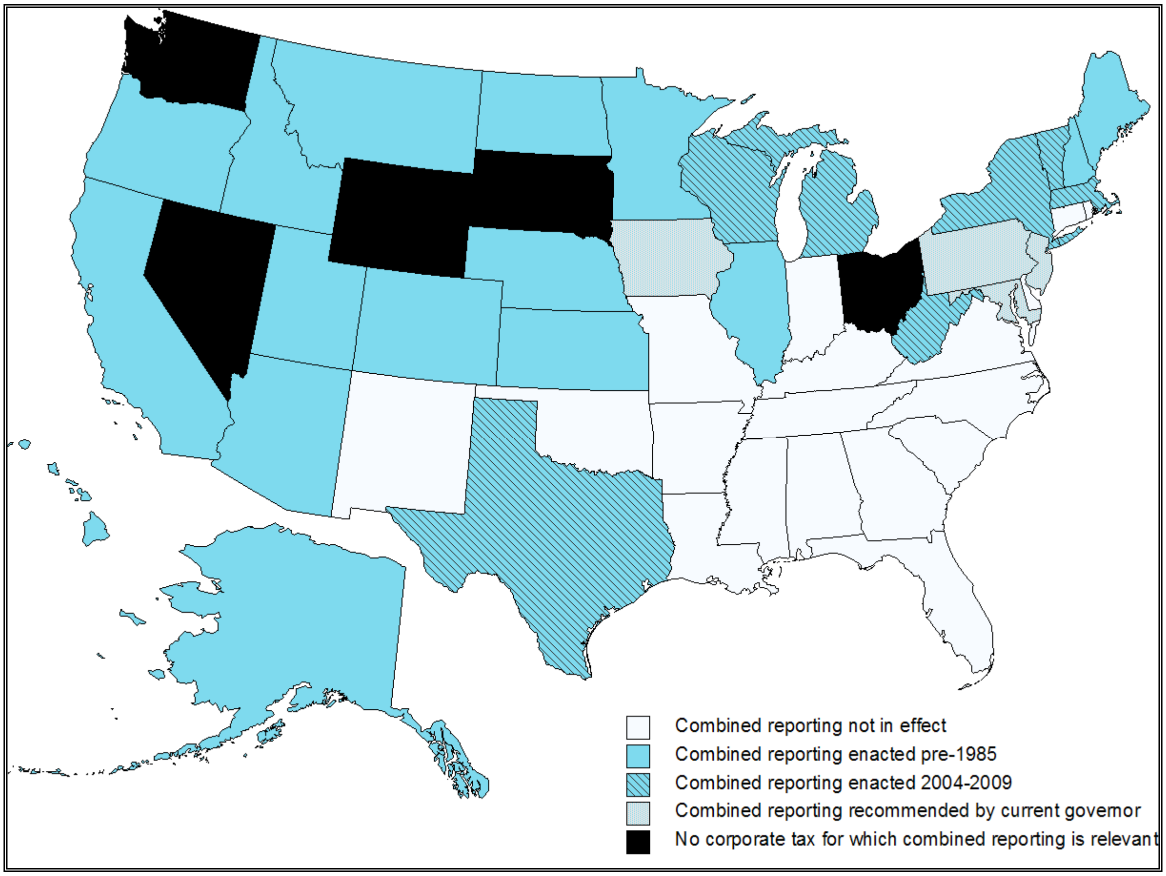
“While the states are generally free to impose taxes, the U.S. Constitution’s Due Process Clause of the 14th Amendment and the Commerce Clause limit their ability to tax the value or income of firms to only that value or income that is earned within the states’ borders”. Courts have developed alternative tests over the years in an attempt to capture what constitutes a unitary enterprise for state taxation purposes. Thus, a unitary business will be found to exist when the evidence of a variety of firm characteristics is sufficient in a particular case to pass one of three principal judicial tests. No one set of characteristics is required; rather, any combination can be sufficient in a particular case.

The first test is known as “the three unities test” and requires (1) unity of ownership; (2) unity of operation evidenced by central purchasing, advertising, accounting, and management; and (3) unity of use in the centralized executive force and general system of operation. The second test is known as “the contribution or dependency test,” and states that a unitary business exists “if the operation of the portion of the business done within the state is dependent upon or contributes to the operation of the business done without the state.” The third test is known as “the three trinities test” or “factors of profitability test,” and states that a unitary business is functionally integrated, centrally managed, and possesses economies of scale. A fourth test, known as “the flow of value test,” states that a unitary enterprise is one that exhibits a flow of value between or among the various businesses. “

There has been considerable litigation regarding unitary taxation and the Supreme Court itself recognized that the concept is not the definitive answer to multistate taxation when it said that “the unitary business concept is not, so to speak, unitary: there are variations on the theme, and any number of them are logically consistent with the underlying principles motivating the approach.”

Seven states, Massachusetts, Michigan, New York, Texas, Vermont, West Virginia, and Wisconsin, have adopted combined reporting since 2004, with Wisconsin being the most recent. There are now a total of 23 states that have made this choice and a few other states are examining the issue.

The issues raised by a consideration of combined reporting are, at their most basic, the same kinds of questions raised by any tax planning action. If you have a gain on a stock transaction this year and can sell some other stock at a loss to offset the gain, is that tax planning? Should you be penalized for taking that action? Should it be illegal? Going to a combined reporting regime will produce winners and losers among corporate taxpayers, addresses some significant problems inherent in multistate taxation, presents significant transition issues, but carries no guarantee of increased of revenue to the state. Maryland's program of requiring the filing of combined "information returns" will give you insight most states have not had as they considered the issue Combined reporting is one constitutional approach to multistate corporate income taxation, but not a panacea devoid of difficulties.



Source: Center on Budget & Policy Priorities

Innovative Taxes

Some states have embarked on efforts to tax businesses either as an alternative to a more traditional corporate net income or franchise tax or as a complementary tax. These efforts were undertaken at some political risk to policy makers because fiscal needs were determined to be critical. A brief description of some of these taxes follows.

Among these efforts is the **New Hampshire** Business Enterprise Tax, which has been described as a multistage consumption tax or value added tax (VAT) imposed and administered at the business level. The rate is 0.75% on the enterprise value tax base, which is the sum of all compensation paid or accrued, interest paid or accrued, and dividends paid by the business enterprise, after special adjustments and apportionment. Enterprises with more than $150,000 of gross receipts from all their activities, or an enterprise value tax base more than $75,000, are required to file a return. New Hampshire retained its longtime business profits tax, and adopted the BET as an alternative tax that is allowed as a credit against BPT liability. Advocates for the tax argue that it is a both economically and politically stable source of revenue and that the business community in New Hampshire is very supportive.

Michigan has replaced its Single Business Tax with the Business Income Tax (MBT). The MBT is imposed on the business income of all taxpayers (not just corporations) with business activity in Michigan, subject to the limitations of federal law. "Business income" is defined as "that part of federal taxable income derived from business activity." For a tax-exempt person, business income means only that part of federal taxable income derived from unrelated business activity. Business income is subject to a number of adjustments, including a deduction for net earnings from self-employment as defined in Internal Revenue Code (IRC) section 1402, and then apportioned using the sales factor. Any federal net operating loss carryback or carryover is added into the tax base before apportionment, and any apportioned negative business income taxable amount incurred after 2007 is deducted from the tax base after apportionment. In addition to the MBT, Michigan adopted a Modified Gross Receipts Tax. The modified gross receipts tax base is defined as gross receipts less purchases from other firms. Michigan Business Tax (MBT) uses the Single Business Tax (SBT) definition of gross receipts, with additional exclusions for a motor vehicle sales finance company, mortgage company, professional employer organization, and for invoiced items used to provide more favorable floor plan assistance. "Purchases from other firms" is defined to mean inventory acquired; other materials and supplies; depreciable property acquired; for a staffing company, the compensation of personnel supplied to their customers; and for a construction contractor not eligible for the section 417 alternate tax credit, payments to a subcontractor. Inventory is defined to include the floor plan interest expenses of new motor vehicle dealers. For the 2008 tax year, a taxpayer may deduct 65% of an SBT business loss carryforward incurred in 2006 or 2007. The tax base is apportioned using the sales factor.

The **Ohio** Commercial Activity Tax (CAT) first applies for taxable gross receipts received on and after July 1, 2005. The CAT is an annual privilege tax measured by gross receipts on business activities in this state. Ohio's CAT was one element of a tax reform package that had several parts. The CAT was intended to replace two business taxes: the tangible personal property tax and the corporate franchise tax. The tax was intended to simultaneously satisfy several goals of tax policy. First, the tax was designed satisfy the “low-rate, broad-base” criteria. The theory idea is that a tax that falls upon a very broad swath of economic activity, but at a very low tax rate, will tend to minimize the distortion of economic decisions. Second, the CAT deliberately moved away from taxing businesses on their profits. It seeks to adopt the theory that businesses should be taxed in proportion to the government benefits that they receive. Ohio's CAT attempts to incorporate this benefit principle of taxation, taking gross receipts as a proxy for the scale of the business enterprise and thus as a proxy for the extent to which the business makes use of Ohio's roadways, waterways, police and fire protections, court system, and other public services. Third, the CAT addresses the principle of state competitiveness. The CAT is explicitly a pro-exporting. Ohio-based production that is exported to other countries or to other states is not subject to the CAT, but imports into Ohio are subject to the CAT. It applies to all types of businesses: e.g., retailers, service providers (such as lawyers, accountants, and doctors), manufacturers, and other types of businesses. The CAT also applies whether the business is located in this state or is located outside of this state if the taxpayer has enough business contacts with this state. The CAT applies to all entities regardless of form, (e.g., sole proprietorships, partnerships, LLCs, and all types of corporations). A person with taxable gross receipts of more than $150,000 per calendar year is subject to this tax, which requires such person to register with this department as a taxpayer. Certain receipts are not taxable receipts, such as interest income. The tax does have limited exclusions for certain types of businesses, such as financial institutions, dealers in intangibles, insurance companies and some public utilities if those businesses pay specific other Ohio taxes. Gross receipts subject to CAT are broadly defined to include most business types of receipts from the sale of property or realized in the performance of a service. The following are some examples of receipts that are not subject to the CAT: interest (other than from installment sales), dividends, capital gains, wages reported on a W-2, or gifts. In general, for the sale of property, such receipt is only considered a taxable gross receipt if the property is delivered to a location in this state. For services, the receipt is sitused (sourced) to Ohio in the proportion that the purchaser's benefit in this state bears to the purchaser's benefit everywhere. The physical location where the purchaser ultimately uses or receives the benefit of what was purchased is paramount in making this determination, *i.e.,* receipts from sales to out-of-state purchasers or the proportion of the services where the benefit is primarily received outside of this state are not subject to the CAT.

The revised **Texas** Franchise Tax was born out of crisis. Texas had labored on the issue of the property tax as s mechanism for financing public education for years without finding a solution that was acceptable. Only after the Texas Supreme Court declared the system unconstitutional did the popular and political will come together to find a funding solution. One major aspect of the solution was applying the tax to entities that had not before been included in the tax base. The revised Franchise Tax, known as the "Margin Tax" applies to more kinds of entities than the franchise tax it replaced. Taxable entities now include partnerships (general, limited and limited liability), corporations, LLCs, business trusts, professional associations, business associations, joint ventures and other legal entities. The revised franchise tax does not apply to sole proprietorships (except the tax does apply to single member LLCs filing as a sole proprietor for federal income tax purposes); general partnerships directly and solely owned by natural persons (except the tax does apply to all limited liability partnerships); certain exempt entities and passive entities. The revised franchise tax base is the taxable entity's margin. Margin equals the lowest of three calculations: total revenue minus cost of goods sold; total revenue minus compensation; or total revenue times 70 percent. The franchise tax rates are 1.0% for most entities, 0.5% for qualifying wholesalers and retailers or 0.575% for those entities with $10 million or less in Total Revenue (annualized per 12 month period on which the report is based) electing the E-Z Computation. Taxable entities with total revenue (annualized per 12-month period on which the report is based) of $300,000 or less will owe no tax. Taxable entities with tax due of less than $1,000 will owe no tax. Exception: If the entity is a tiered partnership, the calculated amount of tax is due, even if it is less than $1,000. A taxable entity with total revenue of $10 million or less, annualized per 12 month period on which the tax is based, may elect to pay the franchise tax by multiplying total revenue times the apportionment factor times a tax rate of 0.575% (.00575). A taxable entity that elects to use the E-Z Computation may still qualify for the discount from tax liability; however, the taxable entity may not claim any credits.

Sales Taxes

Sales taxes began as simple applications of a tax rate to the retail price of sales of tangible personal property. Sales taxes are often deemed “fair” taxes in surveys of ordinary taxpayers, perhaps because they are thought of as pennies on the dollar. “Pyramiding”, i.e., the application of tax to prior tax amounts in successive commercial transactions is one problem often cited with the sales tax. Taxing more services can actually exacerbate the problem of pyramiding of the tax. The other issue frequently cited with regard to the sales tax is the inequity created when the sales tax applies “necessities” which account for a greater percentage of income of low-income people. This problem has been reduced in recent years as states have removed the tax from sales of food and other essential items.

In recent years the focus of most of the efforts at expansion of the sales tax base has been services as that sector of the economy has grown. In 2008 the Federation of Tax Administrators updated its survey of the taxation of services. FTA first conducted a survey of service taxation in 1990. The survey has been updated periodically and the latest survey was published in 2008 and reflects data as of July 2007.

FTA sent a list of 168 different services and asked states to list the taxable status of each service. A tax official in the state specified whether the sales tax applied, a special excise or gross receipts tax applied, or whether the service is exempt from taxation. Space was also provided for the official to describe exceptions and include notes to clarify the status. Please note that the list of services in this survey is not a comprehensive list of all services that can or should be taxed. The list was selected to identify different categories in order to provide readers with a picture of how much each state taxes services. FTA received responses from 42 states and the District of Columbia. For states not responding, the 2004 responses were used.

The results of this update illustrate that most states tax services to some degree.

Utility services are taxed in most all states and admissions and repair services are taxed in many states. On the other hand, few states tax personal and business services. Professional services, such as doctors and lawyers, are taxed in only seven states.

Only Hawaii and New Mexico have broad-based sales taxes that include most all the services (160 and 158, respectively) tracked by the survey. Delaware and Washington tax a large number of services, mainly through their low-rate business gross receipts taxes. South Dakota and West Virginia are the only other states to tax more than 100 services.

Several other states apply tax to a significant number of selected services. These include Arkansas, Connecticut, District of Columbia, Iowa, Kansas, Mississippi, Nebraska, New Jersey, Texas, and Wisconsin. These states widely tax utilities, admissions/amusements and labor and repair services, but leave professional services largely untaxed. Of these states, Connecticut, District of Columbia and Texas tax more computer service than is the norm for most states. Also, Connecticut taxes more business services while Iowa taxes more personal and business services than others in this group.

When comparing the 2007 results with the 2004 survey, FTA found that very little has changed in the level of state service taxation. The strong economy and good state finances have led policymakers to be reluctant to impose tax increases or new type of taxes. Only New Jersey enacted legislation to expand the taxation of services. Maryland and Michigan also enacted legislation to tax additional services but legislation in these states was repealed before implementation. Facing a budget deficit in 2006 and a need to provide local property tax relief, New Jersey lawmakers enacted a tax package that included an increase in the sales tax rate and broadened the base to include more services. Some of the services included in the tax base include storage, tanning and massage services, limousine services and information services. This raised the number of taxable services in New Jersey from 55 services in 2004 to 74 services in the current survey.

Our 2008 survey shows Maryland taxing 39 services out of our total of 162 possibilities. Please note that I am not advocating the taxation of any particular service, only pointing out what is going on in other states. Maryland has experimented with taxing a broader array of services and has found that the public's reaction can be strong.

The complete report, including the list of services queried and the responses from the states is available on the Federation of Tax Administrators website, www.taxadmin.org at http://www.taxadmin.org/fta/pub/services/services.html.

The other big issue in the state sales and use tax area is the policy-litigation-legislation matter of the states' ability to require collection of use taxes by sellers that do not have a physical presence in the taxing jurisdiction. This issue has existed for decades as a result of two opinions of the United States Supreme Court. Essentially the rule is that a taxing jurisdiction may not require a seller of taxable goods or services to collect a sales or use tax unless the seller has a physical presence in the taxing jurisdiction. Unless this ruling is overturned by the Court or changed by Congress enacting a different standard in the exercise of its power to regulate interstate commerce, the states are denied an efficient way of collecting these taxes.

Legislation has been introduced in Congress for many years without any significant progress. The states have taken steps to improve their chances of change through the work of the Streamlined Sales Tax Project that led to the adoption by 22 states of the Streamlined Sales Tax Agreement, essentially an agreement to simplify the administration of sales and use taxes to reduce the burden on interstate commerce. Maryland is not a participating state in this effort.

Taxes and Economic Development

Most economists assert that economic incentives do not really work, i.e., businesses make decisions for reasons other than either tax policy or direct tax incentives. Many academicians suggest that they be eliminated. It has been reported that Jim Edgar, several years ago, when he was Governor of Illinois, suggested that states try to eliminate incentives. No state actually did that. Some Midwestern states did suggest that Illinois go first. The point is that states are in a competitive marketplace. States are competing for economic prizes and, in that arena; you do have to pay to play. The only real question is price. I believe that good tax policy is good economic development policy. The primary considerations for business decisions are generally thought to be labor, capital, transportation, infrastructure and the quality of life for management and workers. But, in the matrix of decision-making, could taxes become the pivot point of the business decision? The answer is "yes". So tax policy should be considered as a part, not the overriding part, but an important part of overall economic development policy. Winston Churchill is reported to have said: *"Some people regard private enterprise as a predatory tiger to be shot. Others look on it as a cow they can milk. Not enough people see it as a healthy horse, pulling a sturdy wagon."*

Taxation and Public Trust

In a speech delivered to the 101st Annual Conference on Taxation of the National Tax Association in November 2008, Dr. Tom Wolf, then Secretary of Revenue of the Commonwealth of Pennsylvania, addressed the issue of public goods and taxation. In that speech, he made the following assertion: "There is in fact a connection between taxation and public trust – between tax policy and political legitimacy, and it runs through public goods. The problem is that we do not pay for the public goods we want. For the most part, we balk at paying for them not because we don't want to consume them, but because we believe the system used to raise funds for those public goods – our tax system – is unfair."

He went on to observe that Americans have come to believe two totally contradictory things at the same time – that we can have both low taxes and robust public goods. He further suggested that the economic crisis is an opportunity. It is an opportunity because all of us are now forced to look both at our revenue systems and the cynicism that exists about government in general and taxes in particular. That imperative presents a compelling, politically credible reason to think about comprehensive fundamental tax reform.

Summary

Although I am not an economist, I talk with economists frequently. I am told that many states' current fiscal crisis can be broken into two components, a cyclical problem, *i.e.,* an economic slow-down is causing revenues to decline and expenditures to increase, and a structural component, *i.e.,* compulsory spending regularly exceeds revenues*.* The cyclical component can be handled through temporary tax increases or expenditure cuts, inasmuch as the crisis should go away when the economy recovers. The structural problem is caused by the tax and spending programs currently in states' laws, that cause revenue to grow less than spending – meaning policymakers must close a substantial deficit routinely. The solution to this problem requires tax/revenue changes to improve the elasticity of the tax system or, on the spending side, to eliminate or reduce the built-in growth in state spending programs.

Raising revenue and spending are the two sides of the same coin. Less spending means less tax that must be collected. It is not the purpose of this paper to suggest a level of taxation that is appropriate or even the best methods of raising revenue. One suggestion I would make is that it is always appropriate to do a "reality check" on decisions of policy makers. The decision is ultimately one that is difficulty for policy makers to make, choosing winners and losers from among the constituencies who elect them. Supreme Court Associate Justice Oliver Wendell Holmes said, *"Taxes are the price we pay for a civilized society"*. We should always remember that the greater good is the goal and reason, honesty, selflessness and trust are the paths that must be taken to achieve it.

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Helpful Resources

Tax Rates and Tax Burdens in the District of Columbia - A Nationwide Comparison 2007; Issued August, 2008 by the Government of the District of Columbia;
http://www.taxadmin.org/fta/rate/DC_Tax_Burden_07.pdf

2007 State Revenues per Capita & Percentage of Personal Income;
http://www.taxadmin.org/fta/rate/07taxbur.html

2007 State Revenues by Source (kind of tax);
http://www.taxadmin.org/fta/rate/07taxdis.html

2008 State Sales Tax Holidays;
http://www.taxadmin.org/fta/rate/sales_holiday.html

State Income, Sales and Excise Tax Rates
http://www.taxadmin.org/fta/rate/tax_stru.html

Summary of Key Tax Issues on November 2008 State Ballots
http://www.taxadmin.org/fta/rate/b-2708.html