COST
COUNCIL ON STATE TAXATION

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Chairman Joe Jett
Revenue and Taxation Committee
Arkansas House of Representatives

Chairman Jake Files
Revenue and Tax Committee
Arkansas Senate

Via E-mail

Re: Retroactive Sales and Tourism Tax Provisions in S.B. 663

Dear Chair Jett, Chair Files, and Committee Members:

On behalf of the Council On State Taxation (COST),[1] I am writing to oppose retroactive tax provisions concerning a substantive addition to the list of entities required to collect and remit Arkansas' sales and tourism taxes contained in Senate Bill 663.

The COST Board of Directors has adopted a formal policy position[2] regarding retroactive tax legislation:

> *Legislation imposing new or increased tax liabilities attributable to prior periods is fundamentally unfair and in some cases unconstitutional and thus must be avoided. Under no circumstance should legislation imposing new or increased tax liabilities be applied to any periods beginning prior to the date the legislation was enacted.*

Retroactive tax legislation potentially violates due process under the U.S. Constitution. Pursuant to the U.S. Supreme Court decision in *U.S. v. Carlton*, 512 U.S. 26 (1994), retroactive legislation is appropriate and will survive a due process challenge only where a legislature has acted with a "legitimate legislative purpose" and "promptly," imposing "only a modest period of retroactivity." States have increasingly attempted to sweep these Constitutional requirements aside, even seeking to usurp the judicial function of the courts. Such legislation undermines taxpayers' perception of fair and impartial tax appeals, and betrays taxpayer trust.

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[1] COST is a nonprofit trade association consisting of approximately 600 multistate corporations engaged in interstate and international business. COST's objective is to preserve and promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities.
[2] Available at:
http://cost.org/uploadedFiles/About_COST/Policy_Statement/RetroactiveTaxLegislation.pdf.

In COST's most recent Scorecard on Tax Appeals & Procedural Requirements,[3] COST included retroactive legislation as one of its objective criteria for grading the states. In the current COST Scorecard, Arkansas is not cited for enacting any retroactive tax legislation, and indeed, the State received a commendation as the "Most Improved" state in 2016. However, S.B. 663 contains blatant and excessively retroactive provisions, adding "accommodations intermediaries" to the list of entities required to collect the State's sales and tourism taxes and providing a new definition for what constitutes such an entity. Though Section 1 of the bill purports that these changes are clarifications, they would make substantive changes, including creating a new defined class of entity subject to collection and remittance requirements, with express retroactive effect reaching back to 1999 – eighteen years.

Retroactive tax legislation is one of the most corrosive elements undermining our voluntary state tax compliance system today, fostering a lack of trust in the tax system, which reduces voluntary compliance because taxpayers fear that the law will not be fairly applied. **COST strongly urges the Committee to reject any proposed retroactive application of this provision.**

Respectfully,

David C. Sawyer

cc: COST Board of Directors
Douglas L. Lindholm, COST President & Executive Director

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[3] The Best and Worst of State Tax Administration: COST Scorecard on Tax Appeals & Procedural Requirements, Council On State Taxation, December 2016, available at: http://cost.org/WorkArea/DownloadAsset.aspx?id=94726.