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Kansas State Legislature
House Committee on Taxation

Re: COST's Opposition to House Bill 2489, Retroactive Repeal of Multistate Tax Compact Provisions

Dear Chair Johnson, Vice Chair Phillips, and Members of the Committee:

Thank you for the opportunity to provide written testimony today on behalf of the Council On State Taxation (COST) in opposition to House Bill 2489, which would retroactively (from the 2008 tax year onward) repeal provisions in Kansas' adoption of the Multistate Tax Compact. Such retroactive repeal offends the separation of powers doctrine, is subject to constitutional challenge under the Due Process Clause, undermines taxpayers' perception of fair and impartial tax appeals, and betrays taxpayer trust. COST urges the Committee to reject this measure or amend it to delete its proposed retroactive application.

About COST

COST is a nonprofit trade association based in Washington, DC. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce and today has an independent membership of approximately 600 major corporations engaged in interstate and international business. COST's objective is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities.

COST's Position on Retroactive Tax Legislation

The COST Board of Directors has adopted a formal policy position¹ 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.

¹ Available at: <http://cost.org/globalassets/cost/state-tax-resources-pdf-pages/cost-policy-positions/retroactivetaxlegislation.pdf>.

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.

Retroactivity within House Bill 2489

In 2008, the Kansas State Legislature amended Kansas Statutes Sec. 79-3271 to adopt a broad definition of “business income” (see 2008 Kansas Laws Ch. 182 (H.B. 2434)), but left the narrower definition of “business income” found in the Multistate Tax Compact, as enacted in Kansas Statutes Sec. 79-4301, intact. House Bill 2489 purports to retroactively amend the Legislature’s 2008 enactment by similarly changing the definition of “business income” in the Compact and taking away taxpayers’ ability to elect treatment under the Compact, while stating an “intent” of the Legislature to have the Kansas Income Tax Act supersede the Compact, retroactive to 2008.

Kansas’ neighboring state, Missouri, provides taxpayers an election to apply the Multistate Tax Compact, as also clearly provided to Kansas taxpayers in the provisions that House Bill 2489 seeks to repeal. The wisdom of removing this choice, prospectively, for Kansas taxpayers is for the Legislature to decide. What should not be open to debate is the idea of the Legislature taking the place of Kansas courts and determining what the Legislature intended to do when it enacted law almost ten years ago.

In COST’s most recent Scorecard on Tax Appeals & Procedural Requirements,² COST included retroactive legislation as one of its objective criteria for grading the states. In the current COST Scorecard, Kansas is not cited for enacting any retroactive tax legislation, and indeed, the State received an “A” grade for fair treatment of taxpayers in 2016. However, H.B. 2489 contains blatant and excessively retroactive provisions, purporting to reach back ten years and take away taxpayer rights to use the Multistate Tax Compact (and thereby usurp the role of the Kansas courts to determine whether taxpayers possess such rights).

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.**

Sincerely,



Ferdinand S. Hogroian

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

² 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>.