

May 4, 2011

The Honorable Howard Coble  
Chairman  
Subcommittee on Commercial and Administrative Law,  
House Judiciary Committee  
U.S. House of Representatives

The Honorable Steve Cohen  
Ranking Member  
Subcommittee on Commercial and Administrative Law,  
House Judiciary Committee  
U.S. House of Representatives

Dear Rep. Coble and Rep. Cohen:

I write on behalf of Citizens for Tax Justice to urge the House Judiciary Committee to reject the so-called “Business Activity Tax Simplification Act” (BATSA), H.R. 1439.

This legislation would make state and local taxes on businesses dramatically more complex, increase litigation related to business taxes, increase government interference in the market and reduce revenue to state and local governments by billions of dollars each year.

No member of Congress would openly claim to support any of these outcomes. But the corporate lobbyists promoting BATSA have disguised their true goals with a deceptive argument. They claim that simplification will result from enacting a federal law limiting state and local governments to taxing only those businesses that have a “physical” presence in the state.

### **Increased Complexity**

Even if the “physical presence” standard made any sense, it would not matter under H.R. 1439 because it is not the standard set out in the bill. The bill has many “safe harbors” which are essentially loopholes allowing large corporations with lobbying clout to avoid state and local taxes even though they have what any rational person would call a “physical presence” in the jurisdiction.

Under BATSA, a company that sends a full-time worker into another state each day to install equipment could be subject to that state’s taxes. However, if the company created two subsidiaries which each provided half of the equipment and which each hired the worker to perform the installations, the state would not be able to tax the business under BATSA.

The state would also be unable to tax a business if the employee was only sent into the state 14 days each year, or if the company created several subsidiaries that each hired the

employee and sent him or her into the state for just 14 days each year. Can anyone honestly call this simplification?

If the company warehoused items in the state before shipping them to customers, one would think this, at least, constitutes “physical presence,” but under BATSA it might not. Items could be warehoused in the state by a second company that ships them to customers and this second company could also be exempt from the state’s business activity taxes under the exception for third-party “fulfillment” activities.

Perhaps the most outrageous abuses would occur when a company is actually based in the state in question. Such a company might create subsidiaries in other states (states without business activity taxes) and transfer trademarks and logos to them. The company would then pay royalties to those subsidiaries for the use of the trademarks and logos, and these payments would reduce or even wipe out the income reported to the state where the company is based. Most states currently have laws that allow them to tax the out-of-state subsidiaries receiving royalties in this scenario, but BATSA would nullify those laws so that this type of tax avoidance would increase dramatically.

In other words, BATSA would greatly increase complexity and the incentives for companies to engage in aggressive tax planning to avoid state and local taxes.

### **Increased Litigation**

The various intricacies of BATSA that would encourage more aggressive tax planning would naturally lead to increased litigation. Besides that, some of the safe harbors in BATSA are not defined at all, which will certainly leave state and local governments no choice but to call upon the courts to interpret the provisions of the law when companies manipulate them.

For example, even a company that has physical property and employees in a state will not have a “physical presence” there under BATSA if the property and employees are only used to carry out “limited and transient business activity,” which is left undefined. It’s difficult to imagine how this ambiguity could *not* lead to increased litigation.

### **Increased Government Interference in Economy**

Perhaps some lawmakers may comfort themselves with the notion that despite all of these problems, in the end BATSA will mean the government has a lighter hand in the economy because businesses will be taxed by fewer state and local governments.

To the contrary, BATSA is the ultimate example of government picking “winners and losers” among businesses competing against each other. BATSA would create artificial advantages for very large, multi-state companies that conduct most of their business online or over the phone and which have the resources to engage in the type of tax avoidance schemes already described.

Even if BATSA was dramatically amended so that it imposed a true “physical presence” standard, it would still create an artificial advantage for large, multi-state companies and make it more difficult for independent, local businesses to compete.

In the internet age, when we all buy countless products and services from out-of-state companies, “physical presence” is not a reasonable standard to determine which companies should be taxed by a state or local government. Companies that ship products into a state benefit from the roads that facilitate delivery, the state and local courts that are used to enforce contracts, and the telephone and cable lines that are regulated by state agencies. An out-of-state company that receives all of these benefits should help pay to finance them. And yet, under BATSA, the responsibility of financing these benefits would be further concentrated on independent, local businesses.

### **Reduced State and Local Revenue**

The Congressional Budget Office estimated in 2006 that a very similar bill would cost state and local governments collectively around \$3 billion annually. The cost of the legislation currently under consideration would likely be even bigger because the bill provides more loopholes than previous versions.

The reasons for the projected revenue loss are straightforward. Companies would avoid taxes in the jurisdictions where they are actually conducting much of their business. Some states have laws that allow them to tax the income and activities of their businesses if they are not taxed by any other state, but many states do not have such laws. The phenomenon of “nowhere income,” which is not taxable in any state, will become more prevalent and will benefit those corporations large enough to conduct business across state lines and to engage in the sort of tax avoidance schemes described here.

In short, BATSA has nothing to do with tax simplification or economic efficiency. Instead, it is still another example of large, multi-state corporations trying to shirk their tax responsibilities.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert S. McIntyre". The signature is stylized and cursive.

Robert S. McIntyre  
Director, Citizens for Tax Justice