

SENATE TAXATION

EXHIBIT NO. 7

DATE 3-21-05

BILL NO. 513

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Senate Taxation Committee  
State of Montana  
State Capitol  
Helena, Mt.

Re: LC0973 now known as SB 513

Dear Senators,

Thank you for the opportunity to provide input on this particular piece of legislation.

I would love to appear in person but the timing of this bill makes my physical presence impossible. It is harvest time for CPA's and other tax preparers. Since this bill has very important and perhaps unintended consequences, it would be prudent to stop and smell the coffee before jumping into this area whole hog.

I do not have problems with the idea of closing opportunities to cheat and not report income. However, I have major concerns with this bill where it deviates from Federal tax law. The withholding of tax on certain real estate transactions and the intent to disallow tax deferred exchanges with property outside of Montana are examples of deviation from Federal tax law. I have been informed that these items are to be deleted from the bill by amendment. I point to this situation of changing by amendment before the first reading as an example of the haste with which this bill is being promoted. "Haste makes waste"!

One of the provided tax handouts cites that the General Accounting Office reported that the Federal government lost \$ 85 billion in income taxes over a decade as one argument in favor of this legislation. I have heard this claim before. However, I believe that this 85 billion dollar number is inflated. The reason I believe that this lost tax number is inflated is that thousands of taxpayers do not file returns for various reasons including death, death in the family, health incapacities, etc. Business and other tax information providers submit 1099 income reporting forms to the IRS on these non filers. The IRS eventually issues a "Substitute for return" form and a bill. These 1099 forms include but are not limited to sales of stocks, real estate and rentals. When the "substitute for return" forms are prepared that include income from the sales of stock and real estate or rentals, no cost

or expenses are included. Therefore, the tax that appears on these substitute returns may not actually be due when all of the facts (cost and expenses) are included.

I have strong objections to the use of the word "avoidance". A trend has been developing in various circles to use the term "avoidance" as something evil or sinister. Avoidance is and should be legal, whereas evasion is illegal and should be treated as such. A court decision in 1936 rendered by Judge Learned Hand included the following "Anyone may arrange his affairs so that his taxes shall be as low as possible; he is not bound to choose that pattern which best pays the treasury. There is not even a patriotic duty to increase one's taxes. Over and over again the courts have said that there is nothing sinister in so arranging affairs as to keep taxes as low as possible". *Helvering v. Gregory*, 69F.2d809

I wish to add that the term "avoidance" should be struck from the bill at every reference. I have no problems with kicking cheaters and criminals in the teeth for illegal activity. The legislation should be designed to address evasion and abuse. Throwing a blanket over all taxpayers with the intent to confront sends a wrong message. The Montana Department of Revenue has several tools already in their arsenal to address tax evasion. Tax shelters as reported to the IRS are available at the present time as copies of the IRS form 8271 that reports these tax shelters is currently being provided by most fee tax preparers. Also, 1099S forms are being filed for real estate closing transactions to the IRS. The Montana Department of Revenue should be able to obtain Montana forms 1099S either from the IRS or from Montana real estate closing agents. If the DOR is not doing so at the present time, then it should be.

We should take the time necessary to completely review every section of the proposed bill. The Montana Department of Revenue has worked with the Montana Society of CPA's on previous legislation and a good bill was the result concerning pass through entities such as partnerships with nonresident partners.

The following are specific comments on the bill as I obtained from the internet system for LC0973.

Section 2- Definitions – inconsistent filing position- many states have specific rules on how to treat certain transactions. Taxpayers may have to take inconsistent filing positions between states by default i.e. a taxpayer may have to prepare their tax return in compliance with State X but will be inconsistent with State Y. State X may have one definition of non-business income and State Y may have another definition, thereby creating a "Catch 22" situation. A safe harbor should be given to taxpayers who find themselves in this predicament.

Also, adoption of Federal tax law definitions and multi-state compact definitions should be adopted as part of this legislation. Section 6 describes a duty to report activity and property and if Montana law does not define business or non business income with specificity, then taxpayer compliance will be difficult without tremendous amounts of litigation and/or taxpayer appeals.

Section 8- I object to the venue to any action brought under this section to be Lewis & Clark County. A taxpayer so charged should be able to have the action heard in any judicial district in the State of Montana if the taxpayer is a resident. A nonresident taxpayer should have the same ability. There is nothing sacred about Lewis & Clark County and the relationships between courts, the Department of Revenue and other departments of the State of Montana being so close may give the appearance of lack of independence, if not in fact.

Section 9- (b) – I object to the definition of “Tax avoidance transaction”. The term avoidance should be replaced with the term “evasion”. The definition sentence would state as follows: “Tax evasion transaction” means a plan or arrangement devised for the principal purpose of evading federal or Montana income tax.

I would also like to add at this point that there are several transactions that everyone takes for granted that are tax avoidance. IRA's and retirement plans of all sorts are examples of tax avoidance. Mortgage interest and property tax deductions are tax avoidance transactions. Installment sales of property also fit in this category. Are these transactions evil? I don't think so. Therefore, this whole discussion on tax avoidance, tax shelters and the like has to be done with great care, time and due diligence.

Sections 10, 11 & 12 – I object to these provisions since they cause a major deviation from Federal tax law.

Section 14- I believe that Uniform penalties and interest assessments are important. However, I believe that these provisions should follow Federal tax law verbatim. Why is a wheel being reinvented? I do not have the time now to benchmark these provisions with Federal law on penalty and interest assessment, but someone should. I believe that the Federal penalty and interest rates would be just fine relative to Montana tax. Minimum penalties should be considered very carefully.

Summary- I object to this legislation as detailed above. I do not object to legislation aimed at evasion including penalties. However, the haste at which this legislation was introduced makes me nervous due to the many unintended consequences that bills such as SB 513 can produce. Great care and due diligence should be exercised with this bill. I have been told that some of the more objectionable provisions will be dropped by amendment. Such amendments would be welcomed. However, there are very many serious provisions of the bill that will remain after amendment and these need to be reviewed in detail.

Again, thanks for the opportunity to speak my peace.

Sincerely,

  
Walter J Kero, CPA