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Tax Policy

Criss-crossing the country, Crowell & Moring's state tax team meets regularly with state tax commissioners and their counsel to bring Bloomberg BNA's readers candid and timely observations from the country's top state tax decision-makers. Well into this 50-state journey, Don Griswold, Walt Nagel, and Jeremy Abrams spoke this month with John Mollenkamp, Acting Director of Revenue for the State of Missouri. In this interview, Mollenkamp discusses his department's responsibilities, implementing tax laws, and the state's apportionment election options. For Mollenkamp, arriving at the "simplest correct result" is an operating principle and key weapon in working with multistate taxpayers.

Crowell's Conversations: An Interview With John Mollenkamp, Missouri Department of Revenue



JOHN MOLLENKAMP, INTERVIEWED BY DON
GRISWOLD, WALT NAGEL, AND JEREMY ABRAMS

The Well Respected Tax Agency

CROWELL: We're here in Don's home State of Missouri to interview Acting Director John Mollenkamp. Thanks for having us today, John.

MOLLENKAMP: So glad you were able to make it.

CROWELL: The Tax Foundation, widely respected, recently rated Missouri 16th for all tax types and 7th for corporate income tax. What makes Missouri such a good tax jurisdiction?

MOLLENKAMP: I think any organization that puts together a detailed analysis of taxes is going to come to the conclusion that Missouri is a low tax burden state compared to the other states. I always hesitate to celebrate too much for fear that someday somebody will

come up with a different calculation, but I think this is an accurate assessment. Of course, there is more than just the low tax burden that makes Missouri a great place to do business, and the Tax Foundation recognizes that in that report too. It's not the only thing for anyone, but as for picking between Kansas and Missouri or Illinois and Missouri, certainly the Tax Foundation ranking actually has Missouri doing very well compared to our neighboring states, thank you very much.

CROWELL: Missouri has a bit of a border war with Illinois on one side of the State and Kansas on the other, doesn't it?

MOLLENKAMP: We do but that is much more an area that the Department of Economic Development deals with. Revenue is concerned with collecting what taxes are due, not a penny more, not a penny less. Mike Downing is the Director of Economic Development and he is top notch at what he does. If a statute creates a tax credit and someone uses that tax credit on their return we'll process it. So, in that regard, we work together quite well.

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But there was always a good reason to be here in Missouri in the center of the country. And for some things, you wouldn't want to be anywhere else. The automotive industry is a great example. Ford and Chevrolet announcing new plants. Then suppliers follow. Then you have all parties working hand in hand creating jobs. It feeds itself at that point. If Chrysler looked to build Dodge pickups here—that would be great. They would find a work force that is hard working, educated, and ready to do the job. And if you want everything from river traffic, to rail, to air, to highways, Missouri has the ways to get the goods to market and get the raw materials to the manufacturing facilities. So in that sense, Missouri is a great place to be, the same as it always has been.

CROWELL: What have been your biggest challenges since the governor asked you to serve as Acting Director on April 15, 2013?

MOLLENKAMP: The challenges for me personally are going to be similar to what a lot of folks find when they come into a department. The first challenge was coming to understand the scope of the enterprise and how to keep that enterprise continuing to function well without so disruptively changing it. We're at about 1,200 employees total, with about 600 on the tax side. Our Department of Revenue does so much more.

CROWELL: What else does your department handle? The Revenue Department in Colorado now is responsible for the regulation of marijuana!

MOLLENKAMP: Well, that's Colorado and we don't have that. But we do motor vehicle registrations, driver licensing, and we contract with 179 license offices that are independently operated. So we bid out essentially retail locations where independent businesses or not-for-profits or municipal governments can bid to operate the license offices. We oversee it, of course, to make

sure that everything is done correctly. The first couple of offices were privatized in the previous administration but, in 2009, Governor Nixon determined that the proper course of action was to completely end the political patronage system. They have always been operated independently; they were just given out as favors in the past. Governor Nixon did not do that at all and put in a competitive bid process which we continue to use today.

But back to my challenges. At any given time, we have somebody retiring, and somebody else coming on new who needs to be trained. So we are a large-scale operation. Because of that, one of my predecessors explained to me it's like a ship and it does not turn quickly. It can turn—and we can continuously improve and change—but we cannot suddenly change. Because, to do so, would mean stopping what we're doing, and we can't stop what we are doing. We're the only ones collecting the revenue that goes to fund all the government services at the state and local level. You know, if you think of the classic three-legged stool of sales tax, income tax and property tax, we're two of those legs. We collect and distribute the income tax and the sales tax.

CROWELL: Do you handle unclaimed property?

MOLLENKAMP: We do not. The state treasurer does unclaimed property in Missouri and does a great job. I am not trying to elbow in on that territory.

The Simplest Correct Result

CROWELL: You've been in private practice, you've been an Assistant Attorney General, and you're a law professor as well. Did you ever imagine yourself being Director of Revenue?

MOLLENKAMP: No. But, that is something I think you'll find in common with a lot of folks who have occupied my seat. My very first job, after law school, was clerking for Judge Elwood Thomas at the Missouri Supreme Court. Judge Thomas and Judge Duane Benton came on the court very close in time to each other. I mention those two, because from each of them I got something.

Judge Benton's prior job had been Director of Revenue. He's now on the 8th Circuit. He still gives this advice, which is that you always want to get to the simplest correct result. That's what a judicial opinion should be. I think he brought that from Revenue. And I try to emulate that.

Judge Thomas, for whom I clerked, practiced tax law in a small firm after law school. Then he went and taught for a while. Then he went to a big firm and litigated cigarette cases. Then he went to the Supreme Court. And, he said he didn't know, at any step along that way, what the next step was going to be. The opportunity just presented itself. That's where I am. At each of these steps, I didn't say, "Well, I need to go into private practice so I'll be better prepared to be an Assistant Attorney General, which I need to do so I can do a good job as County Counselor, and then I'll be ready to teach, and then after I teach for a while, I'll be ready for an Executive Administrative Cabinet level role." It would have been crazy for me to do or think that. I've been glad to serve every time the opportunity has presented itself. So no, I did not think, once upon a time, "Some day, I'll be the Director of Revenue." And I suspect that's true of a lot of folks who are directors.

CROWELL: The Director of Revenue is a Cabinet-level position, right?

MOLLENKAMP: In Missouri it is. I have been surprised to learn how many different ways there are to skin this cat. Different states do it completely different ways. Whether they have an elected director of revenue, like North Dakota, or someone appointed by a governor, or someone who is two or three notches down on an organization chart from secretary of the treasury or whatever the particular state might have.

CROWELL: In the time that you've been here, any particular accomplishments in nudging that ship?

MOLLENKAMP: This is, in some ways, an uncomfortable question, because the accomplishments that have happened while I have been in here are because of the efforts of the 1,200 employees that were already here. So I can't take credit for any of it.

One of the biggest things I've pointed to on the tax side is the Integrated Revenue Project that we are in the midst of doing. We are two and a half years into a 5-year project to modernize and integrate our computer system. It's a benefits-based contract. So the state of Missouri is ultimately not out any money. We're paying \$73 million dollars from an anticipated gain over a 5-year span of over \$220 million. The current schedule is to have a functioning business tax system by early 2016. That will include sales and use tax, withholding, corporate income, and an online portal for business to do all their tax interactions. The next one after that is individual income tax, which again, we want to be sure we are functioning and correct before we go live. The idea of keeping taxpayers' information secure and safe is part of this project, but it's obviously something that has already been a part of what we were doing. Certainly, South Carolina had a very unfortunate situation with privacy leaks. That was, in many ways, a worst-case scenario.

Implementing the Tax Laws

CROWELL: What is the Department's role in the legislative process?

MOLLENKAMP: Mostly advisory. To give one example that got some media attention last year, there was a bill to make substantial changes to the income tax and to bring Missouri into the Streamline Sales and Use Tax Agreement. There was a misplaced bracket, a typographical error that would have put sales tax on prescription drugs at \$200 million a year — a \$200 million misplaced bracket! That sort of thing ought not become law and it didn't. We caught the error and it did not become law, because there is a process. A bill passes the legislature, there is a review by the Executive Branch, and the bill can be vetoed or signed into law.

The tax reform bill is now law and we're going to do everything we can to appropriately apply it whether it was a good idea back when it was offered or not.

CROWELL: So, as a public servant you've got this broad obligation that transcends politics, but you were appointed by a governor of one party who has been clashing with a Legislature controlled by the other party. This year, there was passage of the tax reform law, the veto by Governor Nixon, and the override of the veto. Do the politics affect your job?

MOLLENKAMP: The tax reform bill is now law and we're going to do everything we can to appropriately apply it whether it was a good idea back when it was offered or not. We're now executing the law that exists. I certainly wouldn't want anyone to think that there was some overriding policy position that shaped what the Department of Revenue does other than follow the law. Our auditors strive to reach the result that is correct under the law as it has been given to us by the Legislature, the Executive and the Judiciary.

Now the courts do interpret things. In fact, recently, we've had some back and forth in the media about exercise facilities, gyms, whether those are places of amusement or recreation under Missouri sales tax law. It comes up as a new issue in the media, but it's an issue that was settled in the courts years ago. So as we go through enforcing the law as it's been given by the Legislature and the Court, there are then folks that say, "Well, this is something new, we ought to change that law." And they proposed a bill to exclude exercise from places of amusement, even though under the case law it's crystal clear. But that is the Legislature's function — to think about those things. Whether it's a wise thing they thought of or a foolish thing, it doesn't matter from the Department's standpoint.

Now, obviously I've taken an oath to uphold and defend the Constitution of the United States and the State of Missouri. But in those gray areas, we're not going to say to a taxpayer, "Yeah, you're right, that is unconstitutional."

CROWELL: Do you have the power to rule on constitutional challenges?

MOLLENKAMP: No. Missouri may be different than other states in this regard, but we have a very clear line of cases that specifically hold that administrative agencies have no power to find a statute unconstitutional. As the Director of the Department of Revenue, I can't weigh in on that. If the Legislature passes the law, then I implement it, and if someone challenges it, the Attorney General's Office defends the constitutionality as it goes to the Missouri Supreme Court, and we get the answer.

Certainly in the legislative process we may say, "This appears to be unconstitutional." We could give that technical advice. But then if we were to get a legislative enactment and then just say, "Well, we're not doing that one because we have some doubts as to whether it's valid or not," well, that would really be an awful lot of power for somebody who goes to work wearing a clip-on name badge. What folks like to point out is that mine is an unelected position, so I am not someone who should be deciding the constitutionality of things. Now, obviously I've taken an oath to uphold and defend the Constitution of the United States and the State of Missouri. But in those gray areas, we're not going to say to a taxpayer, "Yeah, you're right, that is unconstitutional."

But I do miss the academic side where we could debate about what is truth, what is beauty, what is justice. And then in the actual world of tax, sometimes we find ourselves wrestling with issues like whether a dozen donuts is subject to a lower sales tax rate than a single donut.¹

Apportionment Election

CROWELL: Missouri is a full Multistate Tax Compact member, right?

MOLLENKAMP: We are.

CROWELL: Have you been following the Compact litigation – *Gillette* and others?

MOLLENKAMP: As I understand it, the challenge in *Gillette* relates more to states that do not provide the taxpayer the option to elect the Compact's three-factor apportionment formula or which have insisted that a taxpayer take a particular position. On the contrary, Missouri statutes give the option to the taxpayer. You always get the Compact options.

¹ *Krispy Kreme Doughnut Corp. v. Missouri Dir. of Rev.*, 358 S.W.3d 48 (Mo. 2011) (affirming in part, reversing in part, and remanding to Missouri Administrative Hearing Commission for further proceedings on No. 06-1044 RS).

You've got the new single sales factor option that just became law last summer. But there is still an election to use the apportionment rules of the Multistate Tax Compact. We're never going into a case saying, "You should have done this other method of apportionment from our statute," because they're all set out as clearly optional at the election of the taxpayer. So I don't see Missouri having a *Gillette*-type challenge unless the legislature were to do something, taking away the election or giving the Department some power to insist on a particular method of apportionment. That has not happened, nor do I know of anyone asking for that.

Tax Litigation

CROWELL: How involved do you get in your Department's litigation?

MOLLENKAMP: I would say that I very much rely on the expertise of the more seasoned tax attorneys in the Department when it comes to litigation.

CROWELL: How many tax attorneys do you have?

MOLLENKAMP: We actually have six who do nothing but sales and use tax. And we have four that are full-time income tax. And then we have three to four bankruptcy attorneys who, by necessity, do a little bit in both those areas depending on the issue. Then of course we have our General Counsel. In addition to all those folks, we have two very talented attorneys at the Missouri Attorney General's Office who work on our cases as well. They do our appeals. They do other work besides that. One of them is Jim Layton, the State Solicitor. He is an outstanding attorney. We are fortunate to have him representing the State of Missouri. But I wish he were full time for Revenue.

CROWELL: Is there anything in the process for determining whether "Acting" gets removed from your current title as Acting Director of Revenue?

MOLLENKAMP: There are two steps to it – the governor appoints and the Senate confirms – and neither of those steps has happened yet. So I'd be hopeful, but the Senate is not in session right now, so I know it couldn't happen anytime soon. They will convene again in January – that is the earliest they could confirm. Of course, first, the Governor would have to decide to appoint me, and that has not yet happened. I'd be glad to serve if that came up.

CROWELL: That would be a wise appointment for the Governor to make. Thanks a lot, John. This has been a pleasure.

