

SALES AND USE TAX PUBLIC PARTICIPATION WORKING GROUP

Teleconference Minutes

of

Phase II Task Force Five

held **February 11, 1998**, 11:00 am to 12:30pm

I. Welcome and Introductions.

Identified teleconference participants:

Kaye Caldwell (Facilitator)	William Lunka (MN)
René Blocker (MTC)	Paul Mines (MTC)
Merle Buff	Larry O'Nan (KY)
Jeff Friedman	Art Rosen
Oscar Garza	Kathy Snell
Jennifer Hays (KY)	Rose Vegdahl (MN)
Latisha Johnson (MN)	Dale Vettel (MI)
Robert Keller (AZ)	Mark Wainwright (UT)

II. Public Comment Period.

Paul Mines reminded the group that participants had been asked to provide specific written proposals for the items sought to be included in the Phase II document. The MTC had received no proposals related to the subjects to be addressed by this Task Force. He indicated that more productive discussions may be held where specific proposals have been developed.

There was no other public comment.

III. Phase II Task Force Five evaluation/consideration of proposed topics.

Kaye Caldwell (facilitator) led the discussion on the Task Force topics.

- a. Common/contract carriers (*Description: Address the distinction between common carriers and contract carriers, which can occur by reference to: (1) actual activities provided by each (e.g., if activities of either do not exceed delivery, perhaps even in own trucks); (2) a functional equivalency test (e.g., are services undifferentiated, whatever they happen to be?); or (3) a checklist of permitted activities. Phase I's Task Force 3 addressed this question in some detail.*)

The participants were reminded that the discussion here should be on how the States may under their laws and/or rules define whether the activities of

contract carriers would create nexus. Constitutional principles are not under consideration.

From the business perspective, there is no practical difference between contract and common carriers. The focus should be on functionality for purposes of nexus determinations, that is, whether the actual activities of either a contract carrier or common carrier are sufficient to create nexus regardless of how the carrier is characterized. One State representative expressed concern over how the functionality standard affects nexus determinations where the activities are conducted by employees rather than independent representatives.

In response to an inquiry to identify reasons why a State should relinquish asserting nexus for the activities of a contract carrier, it was indicated that such activity helps with economic development. Additionally, it was indicated that business considers there to be no constitutional distinction between contract and common carriers and therefore, States' adoption of a policy to forego assertion of nexus via contract carriers would avoid unnecessary nexus litigation.

One State representative noted that it would be very difficult to convince a legislature to forego nexus through contract carriers on economic development grounds because it amounts to an exemption for out of state businesses not available to in state businesses. Avoiding litigation appears to be a more solid ground.

In attempting to draft the language of a proposal under this topic several business participants indicated that no statutory change would be needed since constitutionally there is no legitimate distinction between contract and common carriers. It was suggested that the definition of common carrier should include contract carrier, thus, the proposal would state that neither common nor contract carrier delivery activity would create nexus unless there are additional activities like installation or training or unless employees deliver into the State.

A question was raised about how to treat a contract carrier with an exclusive contract with a business or one that places the business' name on its trucks. If a sign were placed on the truck of a common carrier would the nexus determination be different? If a business sets up a separate but exclusive trucking company, what would be the nexus determination? If a business agrees to use one carrier exclusively, how does that affect nexus? It was noted that the common/contract carrier distinction might be a sensitive issue for the States.

Kaye Caldwell agreed to draft the initial proposal on this topic.

- b. Mobile property (*Description: Establishing when nexus will not result for the lessor of mobile property when the lessee moves the property into a particular State.*)

From the perspective of a lessor of mobile property, there are several major problems with the concept of mobile property creating nexus: 1) the lessor does not necessarily know whether, when and to where the lessee will move the property and 2) the conflict of State laws on first use and the provision of credits for taxes paid to other jurisdiction. (It was pointed out that the MTC Uniformity Committee has commenced work on a project addressing this problem, the tax priority project.) The suggestion was made that the first use conflict should be resolved based on the State of delivery. It was noted that the second identified problem may not involve a nexus question and the group was reminded that the Phase II document should be limited to issues of nexus.

Business representatives indicated that mobile property should create nexus for the lessor only in situations where the lessor has control over the property. The definition of control is an issue, but it was suggested that control partially includes possession.

Oscar Garza agreed to draft the initial proposal on this topic.

- c. In what state does a sale occur (*Description: Addressing when a sale occurs within a State; reference may be to UCC principles, or other concepts (transfer of title, possession, risk of loss, location of last event, customer's location).*)

This topic apparently arose in the context of leased property where a State defines leases as continuing sales and imposes tax at the time of each rental period of the lease.

It was noted also that there is a problem under circumstances where the State imposes tax on the first use in the State. For example, in a dock sale situation where the product is sold and delivery is made in State A and the customer takes the product into State B for use. Should the out-of-state vendor that has nexus with State B be obligated to collect use tax for State B although the sale took place in State A? It was suggested that under this example the vendor should not be obligated to collect use tax in State B because the sale transaction occurred in State A. Some observed that while this may be true, this kind of approach may be subject to abuse.

Kaye Caldwell agreed to draft the initial proposal on this topic.