

## MTC Reg Review Work Group – Meeting Notes – March 16, 2023

- I. Welcome - Katie Frank, Work Group chair – gave some background on the project.
- II. Initial Public Comment:

David Uri Ben Carmel of 349 Multistate Tax Consulting raised a comment that the group should make clear that the workgroup’s final product should only address apportionment and state that the regulation will not be used to judge whether there is economic nexus.

Eric Tresh – asked whether he means that this should be about sourcing rather than nexus.

David – noted that the economic nexus rules were created in the context of having COP rules.

Bruce Fort – reminded that the trucking regulation does address nexus, and that some states do use a “factor based nexus” standard.

Helen Hecht – noted that the factor presence nexus rules do not use COP rules – and there is no necessary connection between the special industry rules and the factor presence rules.
- III. Katie Frank – summarized the notes from the prior meeting.

Brian Hamer shared with the group a summary of possible pros and cons about the different approaches that might be used for sourcing receipts for railroads. [See pros/cons document.]

Brian asked whether we should give weight to the number of states using the current method (mileage) of sourcing receipts. Eric Tresh commented that, because taxpayers and states have systems in place using mileage, this should be taken into consideration. He also noted that these industry rules might have been looking to the same goal—reflection of the market—when drafted.

Brian asked whether one could make a case that the mileage rule conformed to cost-of-performance, and if states adopt market sourcing, they may want to re-examine the method. Eric responded that it may be that the states adopted the special industry rules because COP didn’t work for the industry.

Marilyn Harbor, Oregon, commented that Oregon excepted the trucking industry from UDITPA and so it may be that it was to get away from COP.

Phil Skinner, Idaho, noted that mileage was not COP because there was no attempt to source the receipts to the predominant COP state.

Eric Tresh commented on the idea that mileage might not reflect modern logistics and wondered why that was. Brian answered that there were lots of activities that were necessary for moving property, not just the act of moving it.

Eric wondered whether this would make it a con for both mileage and the pick-up/deliver methods.

Marilyn Harbor noted that there were likely other services are involved. For large companies, the mileage approach should work reasonably well since these companies are likely transporting goods and performing other services in roughly equal proportions in the states in which they operate.

Phil Skinner related that he had looked at the UPS website to research charges for deliveries between various cities. He found that, in a small sample, the charge was the same regardless of distance.

Eric commented that while he doesn't know about UPS, there are many pricing models out there—which is what makes this so complicated. There are companies where the charge varies by mileage. So it may be the case that there is no uniform industry model.

Marilyn Harbor commented that she agreed that this conforms to her experience as well. So maybe some combination of pick-up and delivery factors would be optimal.

Brian noted that he has spent time researching the issue of transportation generally, and apportionment, including airlines. He noted that there are a number of states that use multiple factors to source airline transportation revenue, including a combination of departures and mileage factors.

Marilyn noted that this might make sense given that there are both very small and very huge transportation companies where understanding the differences is important.

Eric noted that as to the differences between air and trucking, there are also other types of transportation. So it would be important to consider other types of transportation as well.

Brian asked about companies that use multiple types of vehicles and how they would go about applying what could be different sourcing rules for different components of the trip. Eric commented that this is likely not uniform among the states. He asked Marilyn to comment. Marilyn noted that Oregon has not adopted a formal rule but has had experience applying a combination of the rules to a taxpayer that engaged in multiple ways of transportation.

Brian commented that it may simply introduce complexity to have different sourcing rules for different types of transportation. Eric commented that it was not clear to him that different rules might not need to be considered.

Marilyn noted that it could be complicated to apply mileage to all methods of transportation—unless they capture mileage for all those methods. Eric responded that trucking companies track mileage currently. Marilyn commented that they must also track the pick-up and delivery locations. Eric admitted that they would definitely have that information.

Katie then read additional pros and cons – noting that they had been discussed. Eric then commented that he was not sure that the mileage rule did not reflect the market, and noted some of the things Phil had said.

Michael Fatale, Massachusetts, noted that the service in this case can be said to be delivered to the location where the package is delivered. The customer doesn't really care about how the package gets to that location or the route that is taken. So in his view, the mileage approach does not reflect the market.

Laurie McElhatton, California, agreed with Michael that the mileage approach does not necessarily reflect the market. Phil Skinner responded that the service really is delivered throughout the process of transporting it. That includes all the things that might be necessary to get the item across the country safely. He also commented that he could understand Michael's point of view as to the treatment of the service as an in-person service.

Michael responded that Phil was conflating the delivery of the service with the performance of the service—and the customer might not necessarily care how or where the transportation is performed.

Eric responded that there can be cases such as refrigerated items where the customer does care about how transportation is performed, including where it is performed. So some customers may want to understand the logistics. Michael commented that this is information most consumers do not know or care about.

Katie continued to review the pros and cons—focusing on the delivery location as the market. Marilyn noted that business activity could be said to be the service as much as the delivery. Brian asked whether or not professional services would be sourced to where they are performed or where the customer is. So, for example, if a lawyer does a service in one state and the customer is in another state.

Marilyn asked whether there had been cases asking for alternative apportionment in the case of states that have adopted market-based sourcing. She wondered whether pick-up and delivery would necessarily reflect transportation companies activity in the states.

Eric mentioned that, as to Marilyn's point and as to the cases in NM and MT, he believed that in some cases a pick-up/delivery approach could be highly distortive, depending on all the other things that might be required. So if the goal is to fairly reflect the market—there may be activities in other states which are necessary to deliver the service. So even trying to avoid the problems in NM and MT could just be creating other problems.

Katie continued to read off the pros and cons.

Katie suggested that this might be a time for a preliminary vote on the possible approaches. Brian asked first as to whether combining the approaches (mileage and pick-up/delivery) would be an option. Eric asked if it might be possible to discuss the question with industry and provide feedback. Michael commented that the question is whether we are trying to best reflect the business activity or a market-based approach.

Michael commented that market-based sourcing is the rule in most states, and we are no longer trying to determine where business activity takes place, but rather where the market is. Pickups and deliveries equals marketplace.

Bruce Fort commented that under market-based sourcing as adopted by the MTC, we look to the customer location generally. Helen noted that the comments about “business activity” were probably focused on the Sec. 18’s language. Helen also commented that the interpretation of Sec. 18 by the Commission, and its goal of equitable apportionment, necessarily looks to the standard formula adopted by the state. So that the approach is equitable in that sense.

Eric mentioned that it might be hard to reflect the market in some industry models.

Michael asked whether there would always be good mileage information, especially where the company uses different modes of transportation where different types of providers use different methods. Victoria Johnson, Oregon noted that there are weight-distance taxes in some states so that truckers must track in-state mileage.

Eric noted that a number of methods are able to track exactly where a package is and how it travels. He also noted that taxpayers are currently in compliance with the mileage rule and another method might be more difficult to adjust to.

Victoria asked whether the delivery would be the final delivery or other stops. Michael responded that the delivery would be the final delivery for the company that is being paid to deliver the package. Marilyn noted there is a difference between that location and the ultimate customer (where others might be involved in getting it to that customer’s location).

Marilyn commented that maybe the best approach is a combination of the mileage and pick-up/delivery approaches. Victoria commented on the Oregon rule’s specifics.

Next meeting will be Thursday, April 20, 3 pm.