Revised 01/2020

MINNESOTA TAX COURT FORM 1
NOTICE OF APPEAL OF AN ORDER OF THE COMMISSIONER OF REVENUE
MINN. STAT. CH. 271

1 Appellant(s) [Taxpayer] Name(s):	2 Indicate the division of Court being appealed to:
United Parcel Service, Inc. (Ohio) & Affiliates	■ Regular Division ☐ Small Claims Division (see instructions below) In appealing to small claims division, appellant/s is/are aware of the fact that no appeal may be had from a small claims judgment and agrees that the decision of the Tax Court shall be conclusive
3 Minnesota County of Residence	4 Indicate where hearing is to be held ☐ At courthouse in Minnesota County of Residence ■ At Tax Court's hearing room in St Paul, Minnesota

5 Date of Order *(Notice Date)*	6 Type of Tax *(for property tax, use Minnesota Tax Court Form 7)*	7 Tax Year(s) or Period(s) Involved
August 31, 2022	Corporate Franchise Tax	2011 through 2015

8 If being assessed personally liable for a tax originally incurred in another name, list the name of the other person or business involved

9 Attach a copy of the order being appealed from State reasons for your appeal *(attach additional pages if necessary)*	--DO NOT WRITE IN THIS SECTION— (For Tax Court Use Only)
See Notice of Appeal attached	

10 Name & Address of Appellant(s) or Attorney:	11. WHEREFORE, appellant(s) pray(s) this Honorable Court for a determination on appellant(s)' claim
J Edward Goff 1650 Market St , Suite 3600 Philadelphia, PA 19103 Telephone number (215) egoff@egoff com Fax number: (215) 546-3460 Attorney Registration Number PA 45095 Email address egoff@egoff com	Signature of Appellant (or Attorney for Appellant) Signature of Additional Appellant (or Attorney)

INSTRUCTIONS

1. **FILING PROCEDURES:**
   - Complete all sections of the front of this form and make two copies with attachments; and
   - Fill out the appropriate Affidavit/Admission of Service on the back of the original form, and
   - **SERVE ONE COPY UPON THE COMMISSIONER OF REVENUE AT 600 NORTH ROBERT STREET, MAIL STATION 2220, ST. PAUL, MN 55146-2220 (SEE BACK FOR FURTHER DETAILS);** and
   - Keep the second copy for your records
   - **FILE THE ORIGINAL FORM WITH YOUR FILING FEE WITH THE MINNESOTA TAX COURT, 245 MINNESOTA JUDICIAL CENTER, 25 REV. DR. MARTIN LUTHER KING JR. BLVD., ST. PAUL, MN 55155**

2. **The Notice of Appeal must be received by the Tax Court within sixty (60) days of the "Notice Date" in the Commissioner's Order (any document imposing a tax liability or denying in whole or in part a refund). The Tax Court, for cause shown, may by written order extend the time for appealing by thirty (30) days. The extension must be requested within sixty (60) days of the "Notice Date" in the Commissioner's Order. You may file the Notice of Appeal with the Tax Court by United States mail, provided that the Notice of Appeal is postmarked by the United States Postal Service within 60 days of the Notice Date (within 90 days if an extension is granted). See Minn. Stat. § 271.06 for more information.**

FILING FEE: Regular Division: $285.00 –OR– Small Claims Division: $150.00

Check payable to "Clerk of Tax Court " In Regular Division, the taxpayer is required to pay for court reporter costs, see Minn Stat Sec 271 07

If the amount in controversy is less than $15,000.00, the taxpayer has the option of appealing to either the Regular or Small Claims Division of the Tax Court If the amount in controversy is over $15,000 00, an appeal must be to the Regular Division of the Tax Court

For alternate methods of filing see Minn Stat Ch. 271.

STATE OF MINNESOTA
TAX COURT

United Parcel Service, Inc. & Affs Appellant v. Commissioner of Revenue Appellee	In The Matter of the Appeal from the Commissioner's Order dated September 1, 2022 relating to the Corporate Franchise Tax of United Parcel Service, Inc. & Affs for the years ending 2011, 2012, 2013, 2014 & 2015

NOTICE OF APPEAL
For United Parcel Service, Inc. (Ohio) & Affiliates for Tax Years 2011 – 2015

By its Notice of Determination on Appeal dated September 1, 2022 (the"NOD"), the Minnesota Department of Revenue and its Commissioner of Revenue (the "Department" or the "Commissioner") upheld $4,603,354.00 in tax and interest assessed against United Parcel Service, Inc. (Ohio) & Affiliates (the "Taxpayer" or "UPS-Ohio"). Details of the tax and interest amounts by year are summarized on the first page of the NOD, a copy of which is attached. With this Notice of Appeal, the Taxpayer disputes all of the tax and interest upheld. All of the tax at issue is Minnesota corporate franchise tax and relates to the 2011 through 2015 tax years (the "Relevant Periods").

This appeal presents a single apportionment issue that has multiple factual and legal components. UPS-Ohio contends that its sales factor should be computed using miles, while the Department contends it should be computed using deliveries. That dispute breaks down into component arguments about: (1) what do the words of Minn. Stat. §290.191 really mean; and (2) does the doctrine of

"Administrative Gloss" bind the Commissioner because of the Department's long-standing use of miles for this and other taxpayers. We address each in turn.

A. The Words of Minn. Stat. §290.191

1. Introduction. There is no dispute that UPS-Ohio is principally in the business of picking up, transporting and delivering envelopes and packages. However that is where the agreement ends and the dispute over whether and how to apply Minn. Stat. §290.191, subdiv 5(j), begins. That statute provides:

> Receipts from the performance of services must be attributed to the state where the services are received.

Id.

The first question is how to decode the meaning of "where the services are received" for purposes of that provision. Interestingly, there is no real difficulty here to knowing factually how many miles UPS-Ohio logged or where it delivered packages. Rather the questions raised here are about interpreting the statute.

The procedures for resolving questions of statutory interpretation in Minnesota are well established. First the Court should look to the plain meaning of the words, and unless those words are susceptible to more than one reasonable interpretation, the inquiry ends there. *Marks v. Commissioner of Revenue,* 875 N.W.2d 321, 327 (MN 2016). If more than one interpretation is reasonable, then the Court should look to legislative intent. *Id.* Also when considering legislative intent, long-standing administrative interpretations are entitled to deference. *Id.*; Minn. Stat. § 645.16(8).

Moreover, for tax statutes, a special rule of statutory interpretation applies where the statutory meaning is ambiguous. For tax statutes found to be ambiguous, the statute should be interpreted in favor of the taxpayer. *BCBSM, Inc. v. Comm'r of Revenue,* 663 N.W.2d 531 (MN 2003).

2. The Plain Meaning of "Where the Services are Received." With that first sentence of subdiv 5(j) quoted above, the legislature connected the performance of services with where they are received. To the Taxpayer that connection clearly implies that services are received where they are performed. As discussed below, that interpretation is consistent with both the Department's Rules concerning apportionment of transportation receipts. Moreover, it is also consistent with the Department's longstanding administrative practice with this Taxpayer as well as other trucking companies.

Departing from its past, in this case the Department argues that "where the services are received" clearly means where UPS delivers the packages. But that conflates sales of tangible property with sales of services. It also ignores the use of the passive voice with the words "are received." By using the passive voice, the statute deliberately assumes we understand whose receipt the statute is focused on.

When UPS-Ohio delivers a package, UPS-Ohio is not delivering property that it sold and delivered to the purchaser. When UPS-Ohio delivers a package from Amazon to your house, the seller of the item is Amazon, and Amazon is UPS-Ohio's customer.

Because the Department is confused about this, it places special emphasis on the plain meaning of the word "received," arguing that handing something over is the quintessential manifestation of receipt. When the UPS driver hands a package over, that is the point where the recipient acquires the package and so that delivery is where the Department argues that the service is received. The first problem with that argument is that when the hand over occurs, the recipient is receiving something from Amazon or whoever shipped it.

The packages that UPS-Ohio delivers were never the property of UPS-Ohio. Arguing that the recipient acquired the package from UPS-Ohio rather than from Amazon is like arguing that a purchaser of candy acquired candy from the candy store clerk, rather than from the candy store.

The argument about receiving the service at the delivery point also ignores that the statute impliedly focuses on receipt by the customer. We have at least three parties involved in the delivery, and so we need to understand whose receipt is the statute referring to with the words "where the services are received." In the subse-

quent sentences in subdivision 5(j) there are multiple reverences to the location of the "customer."

The multiple references in subdivision 5(j) to customers implies that it is UPS-Ohio's customers who receive UPS-Ohio's services. That makes sense, because it was the customer who chose to use UPS rather than FedEx and it is the customer who pays UPS for its services.

If the plain meaning of received implies received by UPS-Ohio's customer, then the Department's interpretation of the statue fails because the recipient of the package is not UPS-Ohio's customer. UPS-Ohio's customer is generally the shipper, and packages are therefore delivered to UPS-Ohio's customer's customer.

In any event, if the Department's interpretation that received by whom doesn't matter, then there are two reasonable interpretations, and we then look to legislative intent.

3. The Legislative Intent for "Where the Services are Received." The Department argues that the 1995 law change tells us that the legislature clearly meant for transportation sourcing to happen at the end point of the transportation. The argument is that the legislation removed the concept of the benefit of services being consumed, but how that applies to transportation is mystifying.

If anything, removing the concept of benefit, would seem to directly contradict the Commissioner's position. Removing the references to where benefits of services are consumed indicates that services are received where the services are performed. When the legislature removed the words benefits and consumed, it did not change the word "performance," which remains in multiple places in the statute.

Thus the 1995 law change indicates legislative intent that where services are received should be interpreted as where the services are performed. Transportation is performed all along the route of the transportation, from the beginning up to and including the end. That interpretation supports the taxpayer's position that transportation services are received all along the route of transportation, which in turn supports the miles method.

4. For Tax Statutes, Ambiguities are Resolved in Favor of the Taxpayer. In the above discussion, we have reviewed Minnesota law on statutory interpretation generally. However, in the case of tax statutes, there is an additional consideration when discerning the meaning of the words of a tax statute.

In tax cases, "where the meaning of a taxing statute is doubtful, the doubt must be resolved in the favor of the taxpayer." *Charles W. Sexton Co. v. Hatfield,* 263 Minn. 187, 195, 116 N.W.2d 574, 580 (Minn. 1962). Accord *Dahlberg Hearing Sys., Inc. v. Comm'r of Revenue,* 546 N.W.2d 739, 743 (Minn. 1996) ("One well-recognized rule is that where the meaning of a taxing statute is doubtful, the doubt must be resolved in the favor of the taxpayer.").

That maxim of statutory interpretation for tax statutes was discussed and applied in a case involving whether a premiums tax applied to certain premiums paid to a Blue Cross affiliate. In *BCBSM, Inc. v. Comm'r of Revenue,* 663 N.W.2d 531 (Minn. 2003), the Supreme Court considered whether premiums received by an insurer on stop-loss insurance policies issued to employers who self-fund health care coverage for their employees were subject to the Minnesota premium tax.

There the Court concluded that "the plain meaning of the statute is not self evident. . . . We, therefore, conclude that the statute is not clear and free from ambiguity." *Id.* at 533.

Having found an ambiguity, the Court then resolved the matter in favor of the taxpayer: "[W]e construe ambiguous taxation provisions in favor of the taxpayer . . . . [W]hile the commissioner's interpretation of the statute was rational, the presence of crucial undefined terms will invoke the principle that tax statutes are interpreted in favor of the taxpayer." *Id.* at 533. citing *Northland Country Club v. Comm'r of Taxation,* 308 Minn. 265, 267, 241 N.W.2d 806, 807 (Minn. 1976).

In light of the discussion above, there can be little doubt that the meaning of the words "where the services are received" in subdivision 5(j) are ambiguous in the context of transportation. Accordingly, under the *Charles W. Sexton Co., Dahlberg Hearing Sys., BCBSM,* and *Northland Country Club* cases cited above, this Court should resolve this matter in favor of the taxpayer.

B. Administrative Gloss – Longstanding Administrative Interpretation of Where Transportation Services are Received.

1. Introduction. As indicated above, Minnesota law holds that in examining legislative intent to discern the meaning of a statute, longstanding administrative interpretations are entitled to deference. *See, Marks v. Comm'r,* supra. That rule applies here because the Department has endorsed miles-based apportionment for this and other trucking companies since at least the mid-1980s.

UPS-Ohio has filed combined Minnesota corporate income tax returns since at least 1985, and the Department has audited the returns for every year since then. For all of that time UPS-Ohio has filed in Minnesota using miles-based apportionment.[1] For all of that time, UPS-Ohio's use of miles-based apportionment was thus sanctioned by the Department.

2. The Facts. In the Department's audit of UPS for the 1985 through 1989 tax years, the Department's workpapers clearly show that the sales apportionment factor was computed on the basis of a mileage ratio. That detail is shown in schedule "APPT 4." A similar 'Appt-4' schedule for the 1990 cycle, again demonstrates the Departments review and acceptance of miles-based apportionment for UPS.

As part of the audit for the 1991-95 cycle, the Department again considered and accepted UPS-Ohio's use of miles-based apportionment, in the context of an amended return for the 1994 year. On October 15, 1995 UPS filed its Minnesota return for 1994, and then four months later on February 16, 1996, UPS filed an amended return for 1994 claiming a refund. That 1994 amended return apportioned UPS-Ohio's income to Minnesota using miles, correcting UPS-Ohio's mistaken use of another apportionment method on the originally filed return. Thus the refund was the result of changing the apportionment method for UPS-Ohio to miles-based apportionment.

During the course of that audit, UPS and the auditors agreed that Minn. R. 8017.6000 was a fair justification for applying a mileage ratio to determine the

[1] As discussed further below, on October 15, 1995 UPS-Ohio filed its 1994 Minnesota return mistakenly using another sourcing method, but four months later filed an amended return on February 16, 1996 to correct the mistake.

Minnesota sales numerator for the sales apportionment fraction of UPS-Ohio. By its terms, Minn. R. 8017.6000 applies only to air carriers.

UPS-Ohio is not an air carrier. Nevertheless Minn. R. 8017.6000 was the justification for using the trucking miles of UPS-Ohio to calculate its sales apportionment factor. In its audit report, the Department makes an adjustment labeled: "Decrease/Increase in MN revenue/sales or receipts by using Mileage Ratio." In the note related to that change, the Department states:

> On 7/20/1992, Minnesota Rule 8017.6000 became effective. This rule requires the use of the method of apportionment of the net income of air carriers. In this audit, Minnesota Rule 8017.6000 and applicable transportation mileage ratio were used.

(MN Corp Franchise Tax Audit Report and Notice of Change in Tax, dated July 22, 2002, schedule Appt - 1).

Miles-based apportionment was again explicitly discussed and sanctioned by the Department in the 2000-04 audit cycle. As shown in the workpapers from that audit, composition of the miles numerator and denominator, including whether the miles of an east-coast UPS affiliate should be included, were explicitly examined and agreed by the Department.

This same procedure was used in subsequent cycles. For example, in the 2008 – 2010 audit cycle, the Minnesota auditors requested the apportionment workpapers and supporting data showing the computation of the sales factor. The response provided on December 10, 2012 clearly shows that the calculation for UPS-Ohio's sales factor was based on miles in Minnesota over miles everywhere.

In each of the foregoing examples, it is important to note that the miles-based apportionment method is clearly and repeatedly reflected on official workpapers, explanations and notes created not by UPS, but by the Department.

3. The Law. As discussed above, under Minn. Stat. §645.16(8), "administrative interpretations of the statute" are relevant to determine legislative intent.

Citing that statute, the Minnesota Supreme Court recently refused to per-

mit the Minnesota Department of Transportation to enforce the prevailing wage law applicable for highway construction in a way that was inconsistent with the Department's prior practice. *J.D. Donovan, Inc. v. Minn. DOT,* 878 N.W.2d 1 (MN 2016). In that case the Department had traditionally treated hauling activities as subject to the prevailing wage law only if the hauling was to, from or on the site of the highway construction. However, in the *J.D. Donovan* case the Department sought to enforce prevailing wage rates for hauling asphalt from a refinery to an intermediate site where the asphalt was stored and mixed with concrete, and then hauled by someone else to the site. The Court found the relevant statute and administrative rule ambiguous, and then refused to extend the prevailing wage to hauling that was not to, from or on the site.

> [A]s the Supreme Court has recognized, although agency enforcement power cannot simply "evaporate through lack of administrative exercise," it is also true that "the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." . . . . In even clearer terms, in *Bankamerica Corp. v. United States,* the Court underscored the significance of an agency's inconsistent enforcement history, noting that the Federal Trade Commission had "made no attempt" in 60 years to enforce an act with respect to activities it was claiming were covered, despite those activities being "widespread and a matter of public record throughout the period."

Id. at 10-11, quoting *Fed. Trade Comm'n v. Bunte Bros., Inc.,* 312 U.S. 349, 351-52 (1941) (concluding that the Federal Trade Commission's 25-year-long failure to assert the power it was then claiming was a "powerful indication" of the scope of the act at issue) and quoting *Bankamerica Corp. v. United States,* 462 U.S. 122, 130 (1983).

Reference to administrative interpretation has a long history in Minnesota:

> When meaning of statute is doubtful, great weight is to be given by courts to construction placed upon it by the department charged with its administration. Administrative interpretation of statutes, al-

> though not binding upon the courts, should receive consideration unless found to be erroneous and in conflict with expressed purposes of the act and intentions of the legislature.

Knopp v. Gutterman, 258 Minn. 33, 41, 102 N.W. (2d) 689, 695 (MN 1960).

So when there is an ambiguity in the statute and other legislative history isn't dispositive, the next threshold is to test whether the administrative interpretation is reasonable in light of the statute. In *Ingebritson v. Tjernlund Mfg. Co.,* 289 Minn. 232, 183 N.W.2d 552 (MN 1971), the Minnesota Supreme Court considered whether a longstanding administrative practice by the workers compensation commission constituted an authorized administrative gloss. The Court held that longstanding administrative practice was not valid reason for departing from the words of the statute:

> A reasonable departmental practice in the administration of the statute is normally accorded substantial consideration, but even a longstanding administrative practice is not binding if it is erroneous or contrary to the plain meaning of a statute.

Id. at 237, 183 N.W.2d at 554-55. (citations omitted).

In contrast, in *A.A.A. v. Minn. Dep't of Human Servs.,* 832 N.W.2d 816 (MN 2013), the Minnesota Supreme Court decided to accept an administrative interpretation of a statute that the court first determined to be ambiguous.

> When interpreting a statute that is ambiguous, we may examine factors outside the language of the statute to determine legislative intent . . . [W]e may consider, among other things, the administrative interpretation of the statute, and the occasion and necessity for the law. Minn. Stat. § 645.16, subds. (1), (8). We conclude that the Commissioner's interpretation of the phrase "hands-on assistance to complete the task" in Minn. Stat. § 256B.0659, subd. 4(b)(1)(ii) – the physical ability to complete the task of moving from one location to another location – is reasonable and supported by the plain meaning of the statute.

Id. 832 N.W.2d at 822. (citations omitted).

In sum, the above cases demonstrate that the doctrine of administrative gloss applies under Minnesota law if two criteria are met: First, an administrative agency has evinced a position on the meaning of a statutory provision, either through action or inaction; and Second, is the administrative interpretation reasonable or unreasonable and is it consistent with or contrary to the plain meaning of the statute.

4. Applicaton of the Administrative Gloss Doctrine to the Case at Hand. In the UPS case at hand, the workpapers, annotations and notes created by the Department over the course of decades of audits demonstrates the longstanding practice of the Department. That practice was to apply miles based apportionment to this Taxpayer.

Thirty or thirty-five years would seem to qualify as longstanding, and the record reflects that the Department was not passively unaware that trucking companies were using miles. To the contrary, this Taxpayer's audit records reflect that the calculations of which miles belonged in the fraction was repeatedly examined, and the concept of using miles was explicitly endorsed. That longstanding pattern shows that the Department interpreted where the services are received to mean all along the route for transportation services.

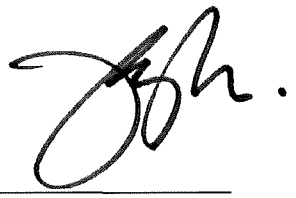
In addition, the longstanding practice of the Department in applying miles-based apportionment to transportation companies is reasonable and consistent because: (1) transportation is more like a service than like any of the other categories in the statute; and (2) both the provision of transportation and the place where it is received occurs all along the route of the transportation.

The point of Minn. Stat. §290.191 is to equitably divide the federally reported taxable income of multi-state corporations among the several states and particularly to apportion part of that income for taxation in Minnesota. Miles based apportionment fairly and equitable does that by deeming the income to arise all along the route of transportation.

That interpretation is what UPS-Ohio is urging here and it is thus supported by the doctrine of administrative gloss.

WHEREFORE United Parcel Service, Inc. (Ohio) & Affiliates, by its undersigned counsel respectfully represents that the foregoing statements are true and correct in all material respects to the best of its information and belief, and hereby requests that this Tax Court enter its judgment in favor of the Taxpayer, finding that the Taxpayer is not liable for any of the tax and interest detailed in the Department's Notice of Determination dated September 1, 2022.

Date: October 26, 2022



J. Edward Goff, Esq.[2]
1650 Market Street
Suite 3600
Philadelphia, PA 19103
215-546-3400

Counsel for Petitioner,
United Parcel Service, Inc. (Ohio) & Affs.

[2] An affidavit under Minn. Rule 8610.0020 is attached.

STATE OF MINNESOTA
TAX COURT

United Parcel Service, Inc. & Affs Appellant v. Commissioner of Revenue Appellee	In The Matter of the Appeal from the Commissioner's Order dated September 1, 2022 relating to the Corporate Franchise Tax of United Parcel Service, Inc. & Affs for the years ending 2011, 2012, 2013, 2014 & 2015

Affidavit of Service

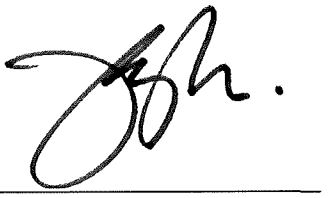
I, J. Edward Goff, of full age and sound mind, do hereby declare under penalties of perjury that:

On this date written below I did serve by U.S. Mail a true and complete copy of the foregoing notice of appeal with all the attachments thereto upon:

COMMISSIONER OF REVENUE
600 NORTH ROBERT STREET
MAIL STATION 2220
ST. PAUL, MN 55146-2220

I declare under penalty of perjury that everything I have stated in this document is true and correct.

Date: October 26, 2022
Executed in:
Delaware County, Commonwealth of Pennsylvania



J. Edward Goff, Esq.
1650 Market Street
Suite 3600
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215-546-3400

DEPARTMENT OF REVENUE

August 31, 2022

MN ID: 9310792
Letter ID: L0952617120

UNITED PARCEL SERVICE INC (OHIO)
55 GLENLAKE PKWY
ATLANTA GA 30328-3474

Notice of Determination on Appeal

Notice Date: September 1, 2022
Tax Type: Corporate Franchise Tax

This Notice is issued pursuant to Minnesota Statutes Section 270C.35, Subd. 8 and is an Official Order of the Commissioner of Revenue. The change in tax, penalty, and interest stated in this Notice results from the review of your administrative appeal of a prior notice. The changes are explained on the attached schedule(s).

This Notice supersedes the prior Notice from which you appealed.

Period	Tax	Penalty	Interest	Other	Credit	Total
12/31/2011	$41,239.00	$0.00	$15,420.00	$0.00	$0.00	$56,659.00
12/31/2012	$199,611.00	$0.00	$68,661.00	$0.00	$0.00	$268,272.00
12/31/2013	$1,099,566.00	$0.00	$345,052.00	$0.00	$0.00	$1,444,618.00
12/31/2014	$638,343.00	$0.00	$181,218.00	$0.00	$0.00	$819,561.00
12/31/2015	$1,606,373.00	$0.00	$407,871.00	$0.00	$0.00	$2,014,244.00

Net change from above or attached schedule	$4,603,354.00
Less: Amount refunded on prior Notice	$0.00
Less: Amount of prepayment against this assessment	$0.00
AMOUNT DUE	**$4,603,354.00**

COMMISSIONER OF REVENUE

By: Jason Weyer
Jason Weyer, Supervisor

DS

IF YOU AGREE WITH THIS DETERMINATION; you must pay the full amount due within 60 days of the notice date. Otherwise, you will also owe a late payment penalty and additional interest. Please use the attached payment voucher.

IF YOU DISAGREE WITH THIS DETERMINATION; please see explanation of further Appeal Rights.

You have the right to appeal these changes

If you disagree with the changes on this notice, you may appeal to the Minnesota Tax Court. You have 60 days from the Notice Date to appeal to the tax court.

If the changes are for a claim for refund, you may appeal to either the Minnesota Tax Court within 60 days from the Notice Date or to the District Court within 18 months of the Notice Date.

You can find information for filing a tax court appeal, including the forms, instructions, extensions, and filing fees on the Minnesota Tax Court's website at https://mn gov/tax-court or by contacting the court directly:

Minnesota Tax Court
Minnesota Judicial Center, Suite 245
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155

Phone number: 651-539-3260
Fax: 651-297-8737
Email: info@taxcourt.state.mn.us

Right to pay and file for a refund
If the changes on this notice are for an additional amount due, you can file a written claim for refund within 3-1/2 years from the date the tax return was due or one year from the date of this notice determining an appeal whichever is later, provided that you have paid in full the amount shown. The refund claim must identify the taxpayer, the type of tax paid, the period for which the tax was paid, the amount of the overpayment and the grounds on which the refund is being claimed.

Explanation/Schedule of adjustments

See attached Explanation/Schedule of Adjustments.

Any questions concerning this Notice should be directed to:
Derek Schmitz, Appeals Officer
651-556-4098

When remitting a payment please use the voucher at the bottom of this page. Make your check out to the Minnesota Department of Revenue, write your taxpayer I.D. number on the check and return to the following address:

Minnesota Department of Revenue
Appeals & Legal Services Division
Mail Station 2220
St. Paul, MN 55146-2220

Cut carefully along this line to detach
Your check authorizes us to make a one-time electronic fund transfer from your account

DEPARTMENT OF REVENUE

Corporate Franchise Tax Audit
UNITED PARCEL SERVICE INC (OHIO)
Letter ID: L0952617120

MN ID: 9310792

Amount Due. $4,603,354.00

Make check payable to
Minnesota Revenue
Mail Station 2220 Appeals And Legal Services, Saint Paul, MN 55146-2220

Amount of Check: _____

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Notice of Determination on Appeal
Explanation/Schedule of Adjustments

The administrative appeal provided in your letter dated February 25, 2018 ("Appeal"), of the Order of the Commissioner of Revenue, Notice of Change in Tax dated January 14, 2019 ("Order") has been considered in this determination.

United Parcel Service, Inc. (Ohio) & Affiliates ("Taxpayer") disputes the total assessment of $4,838,599.40 in Minnesota corporate franchise tax ("CFT"). The amount due is broken down as follows:

Period Ending	Tax	Penalty	Interest	Total
12/31/2011	$41,239.00	$8,247.80	$9,494.00	$58,981.80
12/31/2012	$199,611.00	$39,922.20	$39,972.00	$279,505.20
12/31/2013	$1,099,566.00	$219,913.20	$187,022.00	$1,506,501.20
12/31/2014	$638,343.00	$127,668.60	$101,753.00	$867,764.60
12/31/2015	$1,606,373.00	$321,274.60	$198,200.00	$2,125,847.60
Total	$3,585,132.00	$717,026.40	$536,441.00	$4,838,599.40

FACTS

Since at least 1985, the Minnesota Department of Revenue ("Department") has regularly audited the Taxpayer's returns and allowed the use of mileage-based apportionment.[1] On July 20, 1992, the Department adopted Minnesota Rule 8017.6000 to specifically provide for the apportionment of net income of air carriers. This rule uses a mileage-method similar to what the Taxpayer has used to apportion its income from its parcel delivery service. In 1995, the Minnesota Legislature amended Minnesota Statutes § 290.191, subdivision 5(j)[2] ("1995 Amendment"). The 1995 Amendment, which is discussed further in the analysis section below, replaced "benefits of the services are consumed" with "where the services are received" and removed the "pro rata" part of the law. Based on several audit reports, the Department allowed and used mileage-based apportionment when apportioning the Taxpayer's parcel delivery service through tax year ending December 31, 2010.

For each of the tax years ending December 31, 2011 through December 31, 2015, Department auditors denied the Taxpayer's usage of the mileage-method to apportion the income of United Parcel Service, Inc. (OH) ("UPS OH") to Minnesota. The auditors denied this method and required all services not included in the air carrier service portion of UPS OH's businesses to be apportioned consistent with the sales of services apportionment statutes provided in Minnesota Statutes § 290.191, subdivision 5(j). The auditors claimed that subdivision 5(j) requires parcel delivery services to be sourced to the location of delivery ("destination-method). The Taxpayer disagrees with this interpretation and argues that the parcel delivery service is received throughout the delivery process, and that the service must be sourced using the mileage-method.

[1] The mileage-method uses the percentage of mileage driven within a jurisdiction over total mileage driven to apportion sales.
[2] 1995 Minn. Laws., Ch. 264, Art. 10, § 10.

ISSUE

Does Minn. Stat. § 290.191, subd. 5(j) require the destination-method or the mileage-method to apportion the Taxpayer's non-air carrier parcel delivery and freight transportation income?

KEY STATUTORY PROVISIONS

Minn. Stat. § 290.191, subd. 5(j) provides:

> Receipts from the performance of services must be attributed to **the state where the services are received.** For the purposes of this section, receipts from the performance of services provided to a corporation, partnership, or trust may only be attributed to a state where it has a fixed place of doing business. If the state where the services are received is not readily determinable or is a state where the corporation, partnership, or trust receiving the service does not have a fixed place of doing business, the services shall be deemed to be received at the location of the office of the customer from which the services were ordered in the regular course of the customer's trade or business. If the ordering office cannot be determined, the services shall be deemed to be received at the office of the customer to which the services are billed. (Emphasis added.)

Minn. Stat. § 290.20, subd. 1 provides, in relevant part:

> The methods prescribed by section 290.191 shall be presumed to determine fairly and correctly the taxpayer's taxable net income allocable to this state. If the methods prescribed by section 290.191 **do not fairly reflect all or any part of taxable net income allocable to this state**, the taxpayer may petition for or the commissioner may require the determination of net income by the use of **another method**, if that method fairly reflects net income. (Emphasis added.)

ANALYSIS

I. Non-air carrier parcel delivery must be sourced to where the parcel is delivered

A. The Department's interpretation of Minn. Stat. § 290.191, subd. 5(j)

Where a term is not defined in statute, as is the case with "receive" in subdivision 5(j), a Minnesota court will first look to see if the word has a plain meaning. *Hibbing Taconite* Company, *J.V. v. Commissioner of Revenue*, 958 N.W.2d. 325, 329 (Minn. 2021) ("[W]e consult other interpretive tools to ascertain the plain meaning of these terms, including dictionary definitions.") The dictionary defines the word "receive" to mean: "to come into the possession of: ACQUIRE."[3] The true object of UPS OH's business is the delivery of parcels. Accordingly, by applying the common meaning of "receive", there is no receipt of a parcel until it is acquired

[3] https://www.merriam-webster.com/dictionary/receive

by a consignee, often UPS OH's customer's customer. Thus, UPS OH must source receipts from the delivery of non-air carrier parcels to the location of delivery, i.e., the destination-method.

B. Legislative history supports this interpretation

Minn. Stat. § 290.191, subd. 5(j) was amended in 1995 to its current form.[4] Here are the changes that were made to subdivision 5(j) in 1995:

> (j) Receipts from the performance of services must be attributed to the state ~~in which the benefits of~~ where the services are ~~consumed~~ received. ~~If the benefits are consumed in more than one state, the receipts from those benefits must be apportioned to this state pro rata according to the portion of the benefits consumed in this state. If the extent to which the benefits of services are consumed in this state is not readily determinable, the benefits of the~~ For the purposes of this section, receipts from the performance of services provided to a corporation, partnership, or trust may only be attributed to a state where it has a fixed place of doing business. If the state where the services are received is not readily determinable or is a state where the corporation, partnership, or trust receiving the service does not have a fixed place of doing business, the services shall be deemed to be ~~consumed~~ received at the location of the office of the customer from which the services were ordered in the regular course of the customer's trade or business. If the ordering office cannot be determined, the ~~benefits of the~~ services shall be deemed to be ~~consumed~~ received at the office of the customer to which the services are billed.

Specifically, this amendment replaced the "benefits of the services are consumed" language with "where the services are received" and removed the "pro rata" part of the law. These two amendments work in concert to source services to one location. In effect, the law states that the service is received where the parcel is delivered, and not pro rata according to the portion of activity in the state. The removal of the "pro rata" part of the law is a clear rejection of the mileage-method. The current subdivision 5(j) supports the destination-method employed by the Department auditors.

Even if "where the services are received" is found to be ambiguous, Minnesota courts defer to the agency's interpretation so long as the agency's interpretation is reasonable.[5] The Department's interpretation of subdivision 5(j) is reasonable.

C. Case history supports the use of subdivision 5(j)

In *HMN Financial, Inc., and Affiliates v. Comm'r of Revenue*, 782 N.W.2d 558, 567 (Minn. 2010), the Court stated that where the commissioner fails to rebut the presumption of fairness of the statutory method, the commissioner cannot require an alternative method. In the matter at hand, the commissioner is requiring the statutory apportionment method (destination-method)

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[4] 1995 Minn. Laws., Ch. 264, Art. 10, § 10.

[5] *In re Minn Dep't of Nat Res. Special Permit No. 16868*, 867 N.W.2d 522, 527 (Minn. Ct. App. 2015) at 527.

and the Taxpayer is requesting an alternative method (mileage-method). Thus, it is the Taxpayer who must overcome the presumption that the statutory apportionment formula is a fair representation of its business activity in Minnesota. Because the Taxpayer has not shown the statutory method to be unfair, it may not use an alternate method.

In *United Parcel Serv. Inc. (Ohio) v. New Mexico Tax'n & Revenue Dep't*, No. 19-27, New Mexico Tax'n & Revenue Dep't, Oct. 25, 2019, the New Mexico Administrative Hearings Office determined that the statutory method was grossly distortive for the Taxpayer because it resulted in a more than ten-fold increase in sales attributed to New Mexico compared to actual revenue from New Mexico customers. No such evidence has been presented in the matter at hand.

While in practice the Department appears to have changed from the mileage-method in previous audits to the destination-method in the matter at hand, there is no record of analysis in the prior audits showing that the auditors concluded that the destination-method was unfair. As such, and because there is not sufficient evidence demonstrating that the destination-method is unfair, the Department is not prevented from requiring its use. Thus, the Taxpayer's request to use an alternative method is denied.

PENALTY

The understatement penalty was correctly assessed per Minn. Stat. § 289A.60 subd. 4. However, the commissioner may abate all or any part of the addition to the tax provided by § 289A.60 on a showing by the Taxpayer that there was reasonable cause for the understatement, or part of it, and that the Taxpayer acted in good faith. Because this statute references Internal Revenue Code § 6662, we must look to it when deciding whether to abate penalties.

IRC § 6662(d)(2)(B) states the requirements to reduce the understatement penalty due to the position of a Taxpayer or a disclosed item:

> The amount of the understatement under subparagraph (A) shall be reduced by that portion of the understatement which is attributable to—
>
> > (i) the tax treatment of any item by the taxpayer if there is or was substantial authority for such treatment, or
> >
> > (ii) any item if—
> >
> > > (I) the relevant facts affecting the item's tax treatment are adequately disclosed in the return or in a statement attached to the return, and
> > >
> > > (II) there is a reasonable basis for the tax treatment of such item by the taxpayer.

The Taxpayer meets requirement (i) as the Department's past field audits in which the mileage-method was used qualifies as substantial authority. Thus, the Taxpayer has shown reasonable cause for the understatement of Tax. The understatement penalty is abated in full.

FINAL DETERMINATION ON APPEAL

The Taxpayer has not shown the statutory method of apportionment to unfairly represent the Taxpayer's business activity in Minnesota. Thus, its request for alternate apportionment using the mileage method is denied. However, the request for abatement of penalty is allowed. The Appeal is allowed in part.

STATE OF MINNESOTA
TAX COURT

United Parcel Service, Inc. & Affs Appellant v. Commissioner of Revenue Appellee	In The Matter of the Appeal from the Commissioner's Order dated September 1, 2022 relating to the Corporate Franchise Tax of United Parcel Service, Inc. & Affs for the years ending 2011, 2012, 2013, 2014 & 2015

Affidavit of J. Edward Goff

I, J. Edward Goff, of full age and sound mind, do hereby declare under penalties of perjury that:

1. I am a lawyer licensed to practice in the trial courts of a jurisdiction other than Minnesota withing the meaning of Minn. Rule 8610.0020, subpart 1.

2. My full name, office address and related email address and telephone numbers are as follows:

J. Edward Goff
Goff Law llc
1650 Market Street
Suite 3600
Philadelphia, Pa 19103
egoff@egoff.com
215-546-3400

3. I represent United Parcel Service, Inc. (Ohio) & Affilaites in the above captioned case.

4. I am familiar with and prepared and willing to follow Minnesota's:

   (a) Rules of Civil Procedure;

   (b) Rules of Evidence;

   (c) Rules of Professional Conduct;

   (d) Rules on Lawyers Professional Responsibility; and

   (e) Tax Court Rules of Procedure;

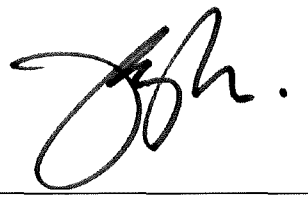
5. The following is a list of each jurisdiction of admission, including any state, territory, or commonwealth of the United States, the District of Columbia, or in a foreign country, and my full admission name and license number.

   Commonwealth of Pennsylvania; J. Edward Goff, IV; 45095

6. A certificate of Good Standing is attached.

I declare under penalty of perjury that everything I have stated in this document is true and correct.

Date: October 26, 2022
Executed in:
Delaware County, Commonwealth of Pennsylvania



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STATE OF MINNESOTA
TAX COURT

United Parcel Service, Inc. & Affs Appellant v. Commissioner of Revenue Appellee	In The Matter of the Appeal from the Commissioner's Order dated September 1, 2022 relating to the Corporate Franchise Tax of United Parcel Service, Inc. & Affs for the years ending 2011, 2012, 2013, 2014 & 2015

Affidavit of Service

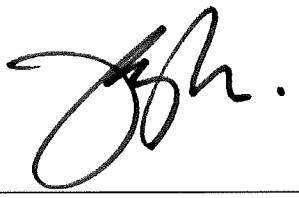
I, J. Edward Goff, of full age and sound mind, do hereby declare under penalties of perjury that:

On this date written below I did serve by U.S. Mail a true and complete copy of the foregoing Affidavit of J Edward Goff with all the attachments thereto upon:

COMMISSIONER OF REVENUE
600 NORTH ROBERT STREET
MAIL STATION 2220
ST. PAUL, MN 55146-2220

I declare under penalty of perjury that everything I have stated in this document is true and correct.

Date: October 26, 2022
Executed in:
Delaware County, Commonwealth of Pennsylvania



J. Edward Goff, Esq.
1650 Market Street
Suite 3600
Philadelphia, PA 19103
215-546-3400

Supreme Court of Pennsylvania

CERTIFICATE OF GOOD STANDING

J. Edward Goff IV, Esq.

DATE OF ADMISSION

November 25, 1985

The above named attorney was duly admitted to the bar of the Commonwealth of Pennsylvania, and is now a qualified member in good standing.

Witness my hand and official seal
Dated: August 31, 2022

Elizabeth E. Zisk
Chief Clerk

CERTIFIED MAIL®

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