

July 10, 2024

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Dear Nancy:

We are writing to share our comments relating to the draft rule for sourcing transportation receipts (“Draft Rule”). The following comments are submitted on behalf of the undersigned, and not on behalf of our clients, colleagues, or our law firm. Specifically, the expansion of the Draft Rule to address receipts earned by marketplace facilitators – including “product delivery” services – should be removed and considered separately. Further, the proposed marketplace facilitator subsections go beyond transportation receipts and therefore, to the extent they are included in the Draft Rule, they should be revised to only apply to transportation related receipts.

1. Market-Based Sourcing

A state’s decision to reject the Uniform Division of Income for Tax Purposes Act (UDITPA) section 17 – often referred to as costs of performance (COP)¹ – or to adopt a market-based method has been subject to increased controversy. Market-based sourcing is not monolithic and despite the MTC’s effort to encourage a uniform market-based sourcing regime, the differences continue to grow. For example, California’s market-based sourcing method sources sales of services to the state to the extent the purchaser of the service received the *benefit* of the services in the state.² California applies a “look-through” rule in certain circumstances to determine where the benefit is received.³ In contrast, New Mexico sources the sales of services to the state to the extent the services are *delivered* in the state.⁴ New Mexico also applies a look-through rule in certain circumstances to determine where the

¹ It is important to keep in mind that some states have stayed true to UDITPA and have retained COP. *See e.g.*, Ark. Code. Ann. §26-51-717 (stating that sales are sourced to the state if the income-producing activity is performed in the state).

² Cal Rev & Tax Code § 25136(a)(1).

³ Franchise Tax Board, Legal Ruling 2022-01 (Mar. 25, 2022) (providing an example of a company contracting with a health plan provider to provide pharmaceuticals to the plan members and stating that the benefit of the service is received at the location of the plan members).

⁴ N.M. Code R. § 3.5.18.9(D)(3)(a)(i) (“The sale of services delivered by physical means to a customer or third party are ... included in the ... sales factor numerator if the delivery takes place in [the state].”)

service is delivered.⁵ Like California, Washington also sources sales of services to the state to the extent the customer received the benefit in the state.⁶ Although the Washington Department of Revenue has attempted to apply a look-through rule, it has been rejected by the Washington Court of Appeals in some circumstances.⁷

The MTC’s regulation sources receipts based on “delivery location.”⁸ And, the MTC has adopted a “look through” approach.⁹ Thus, there are a number of states that cannot adopt the MTC’s regulation because of their decision to not apply either “delivery location” and/or “look-through” sourcing. The utility of the MTC’s proposed re-write of its Draft Rule is even further marginalized due to the proposed scope expansion to sweep in unrelated receipts from “product delivery” services.

2. When You Come to a Fork In the Road, Take It!¹⁰

The rules applicable to sourcing transportation receipts are complicated as evidenced by the MTC’s inability to land on a single “uniform” approach. The MTC’s advocacy of alternative approaches to source receipts means more work needs to be done on the specific topic of how best to source receipts from transportation services.¹¹

3. The Draft Rule Should Define Key Concepts

The expansion of the Draft Rule to product delivery services – without defining product delivery services – creates significant confusion rather than uniformity and simplification. What services provided by “logistics companies” or marketplace facilitators are within the scope of the proposed Draft Rule? Fees to store goods? Fees to maintain goods? Fees to reallocate goods among distribution centers? How about fees to accept returned goods – are they covered? The questions about the scope of “product delivery services” gets harder when one considers the evolving business models of companies that

⁵ N.M. Code R. § 3.5.18.9(D)(3)(c)(i) (“The sale of a service delivered electronically to third-party recipients on behalf of the customer is delivered in [the state] if and to the extent that the third-party recipients are in [the state].”)

⁶ Wash. Rev. Code §82.04.462(3)(b)(i).

⁷ *LendingTree, LLC v. Department of Revenue*, 12 Wn.App.2d 887 (2020). However, the Department has indicated that it will still apply the look-through rule in certain circumstances. See Washington State Department of Revenue, Tax Topic: LendingTree decision – what next? (“The court’s opinion does not suggest that Washington must always attribute receipts to a customer’s business location, nor does the case represent a new legal framework. Thus, for example, if a taxpayer provides marketing or advertising services to a customer engaging in selling goods or services, the customer’s most directly related activity is “selling” and that activity occurs in the customer’s market and receipts will be attributed to that location.)

⁸ Multistate Tax Commission, Model General Allocation & Apportionment Regulations Reg.IV.17.(d).(1).

⁹ Multistate Tax Commission, Model General Allocation & Apportionment Regulations Reg.IV.17.(d).(3).

¹⁰ This saying is often attributed to hall of fame baseball player Yogi Berra. Yogi Berra Museum, Yogi-isms <https://yogiberramuseum.org/about-yogi/yogisms/>.

¹¹ See Eric S. Tresh, Nikki E. Dobay, and Chelsea E. Marmor, Heads I Win, Tails You Lose – The MTC Can’t Choose, TaxNotes (Mar. 18, 2024) (Criticism regarding the MTC’s Uniformity Committee work group’s decision to draft a new alternative regulation for the trucking industry because it would, among other things, require states to choose between two different mutually exclusive apportionment methods for one special industry and how this approach could undermine the MTC’s uniformity process.)

provide “fulfillment services” but not delivery services, or companies that enlist the help of “gig economy” couriers.

The broad applicability of this language is demonstrated by the inclusion of the marketplace facilitator example contained in the Draft Rule where there is a service fee of \$15 for each product sold. The example states that this fee is for storing the seller’s products in the marketplace facilitator’s warehouse and delivering products to customers. The example then concludes that the receipts from the fee are sourced to the state where the seller’s customers are located. However, the fee charged is for more than just delivery. In addition to storage, the service may also include other non-transportation services, such as advertising and website posting. Given the nature of the varied services provided by marketplaces, sourcing these receipts in the same way as transportation receipts may not be appropriate.

4. Now is Not the Right Time.

A threshold question should be decided regarding the sourcing of product delivery services (however defined): is now the right time to propose a uniform approach? The answer to this question is dependent on the states’ willingness to put aside their individual policy decisions that form the foundation of their market-based sourcing rules. For instance, if a state has rejected the application of “look-through” sourcing, should it nevertheless apply look-through to product delivery services? Or, does the Draft Rule reflect a call to the states to uniformly adopt look-through sourcing as it relates to all types of sales of services and intangibles (as is suggested in the MTC regulation)? Either way, stakeholders have a reasonable expectation to know how the Draft Rule fits into the MTC’s long game.

In conclusion, given the undefined concept of product delivery services it is inappropriate to address the sourcing of those receipts in the Draft Rule. Instead, the sourcing of such receipts should be considered under a separate effort – once the dust settles as to how the states will handle the varying applications of market-based sourcing.

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We appreciate the Work Group’s continued efforts to draft the sourcing rules for transportation receipts. That effort has perhaps proven more difficult than originally anticipated. Rather than expanding the challenge, we call on the Work Group to exercise restraint and to reconsider the expansion of the Draft Rule to apply to the undefined product delivery services.

Very truly yours,



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