

Summary of Interested Parties Meeting Regulation §25137-11, Trucking

- I. **Administration:** On May 26, 2009 at 10:00 a.m., members of the public attended an interested parties meeting at the Franchise Tax Board central office in Sacramento. Parties attended in person and by telephone with those present including trucking company representatives, trucking association representatives, representatives from accounting and law firms, and tax administrators. Those physically present were asked to register at the entrance and all participants introduced themselves. The session was to be tape recorded.

The Hearing Officer, Laurie McElhatton, listed the five documents available as handouts: summary of the prior interested parties meeting, notice of the interested parties meeting, discussion topics memo, proposed regulation as amended, and one written comment from the public. Parties were notified that the discussion topics memorandum and proposed amended regulation had been changed in recent weeks so if they had an old copy they may want to download a new one. Introductions were made over the phone and parties were told they had 30 days to submit written comments.

The purpose of the meeting was discussed as being a time for the public to provide comments on the trucking regulation.

Discussion of the actual proposed amendments then proceeded.

- II. **"Trucking Company" and "Trucking Activities" Definitions:**

The portions of the discussion topics memorandum for subsection a. "Trucking Company" definition, and for subsection b. "Trucking Activity" definition, were combined for one discussion of that proposed change. In that context, a question was brought up about what "motor carrier" includes and whether that only includes private carriers. (The proposed trucking activity definition states, "As used in this regulation, the term 'trucking activities' means the transportation of tangible personal property by motor carrier." Also, the use of the word "motor carrier" in this context was a revision from the current regulation which defines a trucking company as a "motor common carrier, a motor contract carrier, or an express carrier.") The current definition was abbreviated to "motor carrier" rather than the list of terms which were redundant. The speaker stated that use of the single term "motor carrier" seemed vague but did not want the definition expanded back out again to what it is currently. The FTB commented that the type of carriers covered in the proposed amended regulation is unchanged from the existing regulation.

The written comment submitted by Swift Transportation, Inc. was brought up and the party who wrote it chose not to make further comment. The letter was included in the available materials. In summary, the letter said:

(1) FTB is involved in an unresolved controversy and is making changes by regulation in response to that controversy which is not appropriate. If FTB were to lose on rehearing, the regulation "would have substantive effect."

(2) FTB is not defining the regulation but is actually changing it by using "truck activities" rather than "trucking company", ..."expand[ing] its rules to activity not previously covered."

(3) The operative date of the regulation is stated to be taxable years beginning on or after 1/1/91 and Swift asserts that these changes should be prospective only.

A comment was made about how "back haul" trips would be treated under the regulation. The described scenario was that a retailer moves its own property by truck, but when the trucks are going back to their origin, they often take paying goods. The party asked if these hauls would be carved out from the interstate ratio, or if they need to keep track of those miles and income, though minimal. His concern was that these are very small sources of income compared to the large main retail business. The FTB response was that yes these would be included in the proposed amended regulation, and that in fact they are already included under the current regulation at section 25137-11(a)(2) where it states,

When a taxpayer, or an affiliate of a taxpayer, other than a trucking company conducts trucking activities and the apportionment factors directly related to such activities are separately identified, such factor shall be assigned to the apportionment formula pursuant to subsection (c) herein.

FTB explained that the retailer would have income from moving property by truck, so those activities would fall within the regulation, and in fact already do. If those activities can be separately identified, then the retailer should keep track of those receipts and those miles. If the activities cannot be separately identified, then the income from backhaul shipments is apportioned based on the standard formula and factors from their main line of business.

III. **"Owner Operator" definition:**

Discussion turned to the proposed added definition of "owner operators." The first question was what would be the result when a third party owns the tractor and the trucking operation taxpayer owns the trailer. FTB response was that this would not be a true "owner operator" so those miles would be included in the taxpayer's interstate ratio. It was explained that to be a true "owner operator," the entity would need to own both the tractor and the trailer before those miles could be excluded under the proposed amended regulation. The FTB response to the question concluded by stating that if the trucking operation taxpayer owns the trailer holding the freight and another entity owns the tractor, then it is not an "owner operator" situation.

Another public comment was that the FTB needs to change the "owner operator" language in the proposed amended regulation to be congruent and clear along

the lines of the preceding explanatory language in the Discussion Topics memorandum which states that an "owner operator" is one that owns both the tractor and trailer rather than referring only to "mobile property," as it is currently in the proposed amended regulation. The actual definition of "mobile property" from the regulation is that it "means all motor vehicles, including trailers, engaged directly in the movement of tangible personal property." The proposed amendment dealing with owner operators states that the owner operator must "drive **mobile property** that is neither owned nor leased by the entity or group of entities subject to this regulation." The party stated no preference on whether an "owner operator" is defined as only those that own both the tractor and the trailer, but that the regulation should state more than simply "mobile property" which was considered vague and may lead to interpretation problems. One such problem mentioned was that an issue may result where a third party owns the tractor and the trucking operation taxpayer owns the trailer. In that case, under the current proposed amended regulation, the trucking operation taxpayer may try and exclude those miles as being those from an "owner operator."

Discussion followed regarding how the industry is structured and what entities own what pieces of equipment. One party stated that the industry applies the term "owner operators" to persons and entities that own the tractor only, regardless of who owns the trailer. The party stated that the FTB definition of "owner operators" is different than the definition used in the industry and requested that any report indicate this fact.

Another public comment was that trucking operations should not be required to log miles for tractors and trailers owned by "owner operators." The party indicated that one tractor may have 5 or 6 trailers that it hauls around. It might have different trailers every day. In addition, it might be that the shipper (freight owner) owns the trailer. It might also be that the trailer is owned by the third party but not the tractor. This party stated that usually an "owner operator," as used in the industry, owns the tractor, but not the trailers, although it may own some trailers. The party continued, explaining that the shipper is the entity that owns the contents that are being moved or sometimes just the container. The shipper might own the trailer or the container that fits on a chassis. The party stated that for items unloaded in containers at Long Beach, there might be 20,000 to 30,000 loads per day. These are called "intermodal" shipments and 90 percent involve different owners between the tractor and the trailer or containers. The party stated that larger trucking companies own both the tractor and the trailer and they hire "owner operators" during peak times. According to the party, those "owner operators," as used in the industry, typically own the tractor but not the trailer.

The commentator stated that trucking operations generally don't keep track of miles for trailers and there isn't always an odometer on the trailers. According to the party speaking, the trucking operations keep track of miles on each tractor no matter who owns the tractor and that is what goes into the interstate ratio. FTB response was that this method of using tractor miles would be reflective of

taxpayer's trucking operation and hence a process to be encouraged. It was indicated that the FTB is not trying to create a new category of miles to then be backed out of the interstate ratio. Rather, the intention is simply to define owner operators so that if any trucking operation taxpayers seek to subtract those miles, there is a clear definition of which miles may be subtracted. Logging tractor miles for the interstate ratio is a good method, simple to apply, in line with the trucking regulation, and reflective of a trucking operation's business activities. The party additionally stated that "owner operators" usually charge by the load using their own tractor.

A speaker stated that for their company they have about 50 percent company owned equipment and 50 percent "owner operators." In addition, the party stated that for intermodal shipments, usually no one owns the trailer except for the shipping lines. According to this speaker, most "owner operators" own their own tractor and not the trailer. This trucking operation uses 300 "owner operators" and 90 percent of them own only their own tractor. They also only keep track of tractor miles for taxpayer shipments regardless of who owns the tractor.

Another speaker agreed that at least 90 percent of the "owner operators" as defined by the industry only own their own tractor and they pull trailers owned by others.

There were no further comments or concerns. FTB staff thanked the interested parties for their input and participation.