

Summary of Fourth Interested Parties Meeting

Regulation Section 25136-2, Market-Based Sourcing Rules for Sales of other than Tangible Personal Property

- I. **Administration:** On July 19, 2019 at 10:00 a.m., at the Franchise Tax Board (FTB) central office in Sacramento, interested members of the public (Participants) attended the fourth Interested Parties Meeting (IPM) on potential amendments to California Code of Regulations (CCR), Title 18, section 25136-2 (Regulation). Participants attended in person and by telephone. Participants physically present were asked to register at the entrance, and phone participants introduced themselves.

Melissa Williams, FTB Tax Counsel IV, and Amanda Smith, FTB Tax Counsel, served as the IPM Facilitators (Facilitator(s)). Ms. Smith listed the documents made available as handouts: the IPM announcement, draft language, and a draft language explanation document (Explanation Document). Ms. Smith explained the purpose of the IPM was to provide the public with an opportunity to discuss and provide comments on draft amendments to the Regulation. Participants were advised they had sixty days to submit written comments, and that this summary of the IPM and comments would thereafter be prepared and published online.

- II. **Discussion:** The IPM discussion was organized by first reviewing two discussion topics and then the proposed amendments, proposed for the first time at the Fourth IPM, in their numerical order.
- III. **Summary:** Facilitator remarks for each set of proposed Regulation amendments are presented below, and are followed by a summary of the comments received during the IPM and in writing by the close of the IPM comment period.

Discussion Topic 1 –Assigning Sales of Digital Products

Facilitator Remarks

Facilitators asked whether the regulation provided sufficient guidance to assign sales of digital products such as music and eBook downloads, streaming services, and access to online digital products such as cloud-based programs and storage, and, if not, whether additional provisions or examples were needed.

Comments

No comments received.

Discussion Topic 2 – High volume sales of identical services
Facilitator Remarks

Facilitators asked whether taxpayers providing a high-volume of identical services to business customers should be provided a safe harbor provision to allow them to assign such sales to the billing addresses or commercial domiciles of their customers.

Comments

Multiple commenters stated that a safe harbor like the Multistate Tax Commission's ("MTC") should be adopted. A few commenters noted that a safe harbor provides certainty and uniformity, and thus encourages compliance. These commenters also thought a safe harbor would ease auditors' review burdens.

Commenters stated that a safe harbor is needed because the proposed simplifying rules at subsection (c)(2) require the taxpayer to examine each contract generating a receipt. These commenters felt that doing so results in an unreasonable compliance burden for taxpayers with a high volume of transactions, and that it may be difficult for taxpayers to reasonably approximate the location of benefit under the proposed subsection at (c)(2), since where a customer receives the benefit is open to reasonable interpretation and available information varies depending on the customer. Finally, the commenters suggested that allowing audit to review reasonably approximated locations would contravene the goal of efficiency and clarity.

Multiple commenters stated that a safe harbor is needed because Taxpayers often don't have methods for tracking whether a service is related to items such as real property or tangible personal property, as is required under the proposed subsection (c)(2). Furthermore, these commenters felt it would be costly (if even possible) to modify taxpayer systems to do this tracking, and that tracking such information might also present legal/privacy challenges if the service is related to individuals.

In response to remarks in the Explanation Document, one commenter denied that a safe harbor would materially affect assignment accuracy. The commenter explained that the only other option for taxpayers would be to attempt to assign sales using approximations from irregular sources of documentation. Also, the commenter denied that a safe harbor would provide larger taxpayers with a benefit not available to smaller ones, because smaller taxpayers could use a similar assignment method under reasonable approximation.

Multiple commenters suggested that if a safe harbor is not included, the FTB should provide examples on how to assign high volumes of financial service

receipts, including receipts related to underwriting, investment banking, and other treasury functions. One commenter recommended using customer's commercial domicile to assign sales for these types of services, and if commercial domicile is not available, for the FTB to allow the taxpayer to reasonably approximate using billing address. The commenter noted this is similar to the approach currently used to assign sales of marketable securities.

One commenter stated that the safe harbor should be available for sales to government entities as well.

Defined "beneficial owner" at subsection (b)(1).

Facilitator Remarks

Staff proposed to modify the definition of beneficial owner presented at the third IPM. The definition was modified to address the beneficial owner's relationship to the managed asset.

Comments

A commenter expressed confusion on the intention of the definition. The commenter wanted to know if the person controlling the assets pursuant to the proposed definition determined the identity of the customer, i.e., whether the customer was the beneficial owner who ultimately controlled the assets or was the feeder fund that had the contract with the taxpayer for asset management services.

Modified the definition of "reasonably approximated" at subsection (b)(8).

Facilitator Remarks

Staff proposed to modify the definition of "reasonably approximated" by changing the word "shown" to "substantiate." Staff explained that "substantiate" more clearly reflects the purpose of the definition to limit assignment of sales to foreign jurisdictions and geographic areas where the taxpayer actually has sales, and that this limitation would apply when the taxpayer uses population as a reasonable approximation method.

Comments

No comments received.

Substantially modified rules for assigning receipts from services provided to business entity and government entity customers at subsection (c)(2).

Facilitator Remarks

Staff substantially modified rules for assigning receipts from services provided to business entity and government entity customers in response to comments from the third IPM. The rule that would apply to services related to tangible personal property was proposed to be modified to better reflect the location of the taxpayer's market. Also, the fifth presumption proposed at the third IPM

was deleted in response to feedback that it did not provide sufficient guidance.

Comments

One commenter expressed confusion why there is a separate rule proposed for asset management fees, and why the rules were not the same as those in Regulation 25137-14.

Another commenter was unclear whether the presumption for services related to tangible personal property is an "ultimate destination rule." The commenter stated it does not appear to be, despite its wording, given that the presumption can be overcome by demonstrating the tangible personal property was used by the customer in a location other than the delivery location. Therefore, the commenter suggested FTB change the rule to assign the sale to the location of use.

An additional commenter was unsure what the intent was in using the term "directly or indirectly" in the presumption for services related to tangible personal property.

Additional proposed changes to these rules, and their associated comments, are arranged by sub-topic as addressed at the IPM:

a. Two-step process at subsections (c)(2)(A) and (c)(2)(B).

Facilitator Remarks

Staff proposed a two-step process to assign sales of services. The first step was to determine the method for locating the benefit of the service and the second step was to substantiate the assignment of sales pursuant to that method.

Comments

One commenter stated the two step process was unclear.

Two commenters stated that the simplifying rules would be difficult to administer because taxpayers do not keep track of whether a service is related to real property, tangible personal property, etc., or if their customers are businesses or individuals. Furthermore, each contract would have to be examined which is unreasonable for many taxpayers, given the high volume of transactions.

Two other commenters suggested changing the term "shall" in the presumptions section to the word "may," otherwise taxpayers and the FTB would not be allowed to overcome the presumptions.

Another commenter stated it is not clear when one presumption applies or if any apply at all. The commenter stated if two apply, it is not clear how to

apply the "predominance test." The commenter stated that the predominance test also may conflict with the "catch-all" rule at subsection (c)(2)(A)(4) and create confusion, so the predominance test should be deleted and the regulation should only keep the catch-all rule.

An additional commenter stated that the simplifying rules do not practically provide guidance to assign financial services. For instance, taxpayers providing financial services would have to figure out where each of its customers are using its loan proceeds, which is unduly burdensome.

A number of comments were received on the presumption that applies to services related to individuals, which is located at proposed subsection (c)(2)(A)(1)(D). One commenter stated that most services would fall under this presumption because most services are related to individuals, yet noted there is not a lot of guidance for that presumption. Another commenter stated that there is always an individual "at the end" of a service, so there will always be the question of where to draw the line when a service is for an individual or benefitting a client company that has individuals. One commenter expressed confusion whether the individuals in question are meant to be the employees of a customer or the customer's customer. The commenter suggested rewording the provision, and offered language for FTB to consider which would begin with "if a taxpayer's service relates to the customer's employees or individuals who are the customer's customer..." to clarify.

One commenter suggested that instead of having simplifying rules or a two-step process, FTB should consider an approach to assigning service receipts that is similar to the assignment method used for marketable securities, where taxpayers can use commercial domicile or billing address to assign service receipts. The commenter stated it makes little sense to assign marketable securities this way but not allow taxpayers to assign services using the same method.

Another commenter suggested bringing back the cascading rules, moving billing address up the hierarchy, and putting reasonable approximation last. This would bring taxpayers more certainty.

Many commenters stated that the regulation should not include the term "precise." Two commenters stated that requiring taxpayers to provide a "precise location" goes against the purpose of apportionment, which is meant to provide an approximation or rough estimate of a multijurisdictional taxpayer's business activities. Furthermore, requiring a taxpayer to determine substantiation information with precision is tedious and overly burdensome. Other commenters stated using "precise" suggests a higher standard to determine where the benefit was received

than the statute requires. An additional commenter stated that it seemed FTB was underestimating the audit burden associated with the term and the extra work taxpayer would have to engage in to satisfy that the "precise" location was used. A commenter questioned how broad "precise" could be.

b. Removal of location of order and customer's billing address rules under subsection (c)(2).

Facilitator Remarks

Staff proposed to delete the location of order and customer billing address assignment rules for service receipts from business and government customers.

Comments

Multiple commenters stated that billing address should be kept as an allowable assignment methodology for taxpayers who cannot reasonably approximate because the rule provides certainty. One commenter suggested certainty could also be achieved by adopting the approach in Regulation section 25137-14, which allows a taxpayer to use "any reasonable basis" to assign sales to a jurisdiction.

One commenter stated if taxpayers can no longer use billing address to assign receipts, it would be a significant policy shift and make California an "outlier," as no other market-based sourcing state entirely prohibits use of billing address.

c. Deletion of the term "reasonably approximated" from subsection (c)(2).

Facilitator Remarks

The definition "reasonably approximated" requires taxpayers to engage in an analysis to determine the location of the taxpayer's market. The newly-proposed rules already provide guidance at subsection (c)(2)(A) on how to engage in such an analysis. Therefore, to reduce confusion and ensure the applicable method at (c)(2)(A) is applied, and not the method in the "reasonably approximated" definition, staff proposed to delete "reasonably approximated" from the section.

Comments

One commenter suggested the FTB clarify with explicit language that "reasonably approximated" does not apply when assigning receipts from services to business customers or from asset management services.

Another commenter expressed confusion how "approximation" differed from "reasonable approximation," as one would assume that if a taxpayer is to "approximate" pursuant to subsection 25136-2(c)(2)(B)(2), the FTB would want the taxpayer's approximation to be reasonable.

d. Additional language at proposed subsection (c)(2)(C) to assign sales of services provided under U.S. government contracts.

Facilitator Remarks

Staff proposed a rule to assign sales of services provided under US government contracts that could not otherwise be assigned under the two-step process. In these cases, the benefit of the service would be deemed received by the fifty states of the United States and be assigned to this state based on the ratio of California population over U.S. population. The rationale for this proposed rule is that services provided to the U.S. government are predominantly intended to benefit the interests of U.S. citizens.

Comments

One commenter stated that using California over U.S. population was too remote from the benefit to justify assigning government services, and noted that, instead, the default method for assigning services to government entities should allow for a population metric with a stronger factual connection to the type of service provided. The commenter suggested, for example, using the ratio of U.S. military personnel stationed in California versus everywhere for defense services, because the military personnel are directly benefitting from government service contracts. The commenter suggested we address government sales in another regulation if such changes cannot be done in this regulation.

Two commenters stated that taxpayers with government contracts should not be limited to using U.S. population to the extent the taxpayer can substantiate that foreign jurisdictions benefitted from a service, even if its books and records are unavailable or silent.

A third commenter stated that the default rule using California over U.S. population does not make sense when the United States has standing treaties with foreign jurisdictions.

Two commenters noted that the services taxpayers provide to the U.S. government are to the United States government itself as an entity, not to the people of the United States. These commenters suggested that a default population rule, as proposed, ignores the customer (the U.S. government entity) and assigns sales to the customer's customer (the U.S. population).

Another commenter stated that due to the interplay between the assignment rule for government contracts, which uses the word "shall," and the rules for doing business, every entity with a classified government contract will be turned into a California taxpayer if more than approximately twelve percent of the contract amount is over \$550,000.

Commenters also suggested adding a number of examples. First, a commenter stated adding an additional example to show how to assign receipts from services to systems and tangible personal property currently in use by the U.S. government. The commenter suggested that the benefit of these services is where the systems are used by the U.S. government, even if the services were performed in California. Second, a commenter suggested inclusion of an example to clarify whether contracts, which are similar to research and development contracts, are services related to intangibles or to tangible personal property.

One commenter stated that if a research and development contract between the taxpayer and the government states where the government plans to use the product of the research and development, that is where the service should be assigned. The commenter further stated that if the contract does not state the location, California over U.S. population should be used.

Other commenters stated that the language of this provision is clearer and helps assign sales. Commenters noted, however, that having a safe harbor for services provided to the U.S. government, whereby sales are allowed to always be assigned based on California over U.S. population, would be even easier.

Finally, a commenter stated that a safe harbor for government contracts should be permitted, where a population ratio can be used to approximate the benefit received by the U.S. government.

Examples assigning sales of services from business entity and government customers at subsection (c)(2)(D).

Facilitator Remarks

Staff added, deleted, and modified examples to demonstrate the restructured rules for assigning sales of services to business entity and government customers.

Comments

A commenter stated an example should be added demonstrating that if a taxpayer's research and development contract states where the product of the taxpayer's research and development will be used by its customer, that location is where the service should be assigned.

Another commenter stated it is not clear how to assign financial services not covered by Regulation section 25137-4.2, such as broker-dealer services and underwriting services. The commenter suggested an example in which a financial services taxpayer assigns its sale based on commercial domicile, and if it didn't know and couldn't reasonably approximate the commercial

domicile, then the taxpayer would be allowed to use the customer's billing address.

A commenter stated that more examples should be added demonstrating how to assign sales of services related to individuals.

Added asset management receipt assignment rules and examples at subsection (c)(3).

Facilitator Remarks

Staff proposed rules to assign asset management service receipts. The rules provide that the benefit the customer receives from the asset management services is located where the investor is domiciled. However, if the investor is holding title to an asset for a beneficial owner, the customer receives the benefit at the domicile of the beneficial owner. The rules further outline how to assign receipts based on investor and/or beneficial owner domicile using a "value of interest" method. Presumed meanings of the term "domicile" to subsection (c)(3) were proposed, along with examples at subsection (c)(3)(C).

Comments

Multiple commenters stated that the proposed asset management rules are not realistic and do not provide adequate guidance. Commenters stated that advisors to private funds seldom know even the identities of their private fund clients' investors much less their commercial domiciles or their beneficial owners. These commenters noted that to assign asset management fees, the current rules would require the taxpayer to call its fund clients, request a list of investors, and then in turn contact the investors and inquire whether they are holding investments for beneficial owners, and, if so, where those beneficial owners are located. Commenters found this to be unrealistic and extremely burdensome, and noted that private funds have valid business reasons for refusing to share confidential investor information with their unaffiliated advisors. Commenters also noted that advisors currently do not maintain any investor/beneficial owner information and would have to institute new data collection practices solely for California tax purposes. These commenters felt that, doing so would likely expose them to non-tax legal obligations, such as California's privacy and data security requirements.

Multiple commenters stated the regulation should provide clear guidance to advisors that do not have information on beneficial owners, such as allowing these taxpayers to assign receipts based on fund customer billing address. One commenter stated that the currently-proposed example showing how to approximate domiciles does not provide this clarity because many funds, unlike the one in the example, are not state-specific, lack any apparent or obvious geographic characteristics or limitations, and can attract investors from across the globe.

A commenter expressed confusion why FTB used the term "holding title" in its rule, and requested that the FTB provide an example of the scenario of when an investor is holding title on behalf of a beneficial owner. The commenter could not see a scenario when that would occur.

One commenter expressed confusion why there is no throw-out rule where the taxpayer cannot identify the beneficial owner, just like Regulation section 25137-14 has for when a taxpayer cannot identify a shareholder.

Another commenter recommended FTB consider adding a definition to define investor.

Finally, one commenter stated that the proposed Mutual Fund Corp example sets up an unlikely scenario so should be deleted.

Modified language to clarify subsection (d)(1)(A).

Facilitator Remarks

Staff proposed moving the phrase "at the time of the sale" to clarify that it modifies the word "kept". Also, staff proposed the change the verb "is" to "will be," and to add the phrase "by the purchaser." Together, these changes clarify that it is the purchaser's use of the intangible post-sale which is the relevant use to consider when assigning receipts of intangibles pursuant to subsection (d)(1)(A).

Comments

No comments received.

Clarified rules for assigning receipts from shares of stock in a corporation or interest in a pass-through entity, dividends, and goodwill under (d)(1)(A)1.

Facilitator Remarks

Staff proposed to modify the language of these provisions to clarify the meaning of "property factor," "payroll factor," and "sales factor" as used in this subsection. Furthermore, staff proposed to add language to clarify that items such as cash, cash equivalents, and prepaid items are not included in the asset calculation because such items do not have a cost basis.

Comments

One commenter stated that the asset test is problematic because looking through a corporation is unusual, and yet the asset test requires a taxpayer to "look through" to the assets of the entity in which it sells an interest.

Commenters also noted problems with using original cost basis to value assets. The original cost basis is easier to audit, but it doesn't reflect how capital intensive a business is or what the true assets are on the balance sheet. Other commenters agreed, stating an asset's fair market value would be a better measure, as certain property, including intangibles, don't have

much of a cost basis but may make up the bulk of an entity's value. Another commenter stated that the relationship between cost basis and deciding which assignment rule to use was unclear.

Commenters stated removing cash and other securities is not a clarification, and would potentially increase tax balance sheet compliance pressures. Another commentator stated that it is not a clarification because removing cash from the asset test could change the test's outcome.

One commenter noted that the asset test may raise a constitutional issue. Merely receiving dividends from a company with payroll and property in California should not make that dividend recipient a California taxpayer. The commenter inquired regarding the intent of the FTB in creating the asset test.

Deleted the third cascading rule at current subsection (d)(1)(C) and its related example at proposed subsection (d)(1)(C)4.

Facilitator Remarks

Staff proposed to delete the rule which assigns receipts based on purchaser billing address under certain circumstances. Staff also proposed deleting its associated example. Staff explained reasonable approximation allows consideration of "all other information," therefore creating a special cascading rule addressing billing address is not necessary. Furthermore, deleting the rule will conform to the proposed deletion of the billing address assignment rule under subsection (c)(2).

Comments

Please refer to the comments above regarding removal of billing address as an assignment rule for sales of services to business entity and government entity customers at the section above, beginning at page 3, titled *Substantially modified rules for assigning receipts from services provided to business entity and government entity customers at subsection (c)(2)*, subparagraph (b).

Added rule for assigning mixed sales at subsection (e).

Staff Remarks

Staff proposed adding a subsection to assign mixed sales, (i.e., sales of services and property or sales of different types of property.) The draft language provides that the part of the receipt attributable to each portion of the sale will be assigned differently if the values of each portion are readily ascertainable. If the value of each portion is not readily ascertainable, the principal purpose for entering the contract will determine the assignment of the sale. For instance, if the principal purpose of entering into a mixed sale of tangible personal property and services was to obtain tangible personal property, then the sale will be assigned as a sale of tangible personal property. The Draft Language also clarifies that the value of gross receipts

attributable to tangible personal property includes all of the charges enumerated in CCR section 25134(a)(1)(A).

Comments

A commenter recommended FTB add language to allow the proposed "mixed sale" rule at 25136-2(e) to apply to situations when two or more services are received for one fee.

Modified language related to marketable securities at subsections (f), (i)(2), (i)(2)(A), and (i)(2)(C).

Facilitator Remarks

Because the location of a customer may be reasonably approximated under subsection (f)(2), staff proposed to add the phrase "sales from marketable securities" to subsections (i)(2), (i)(2)(A), and (i)(2)(C) which address application of reasonable approximation rules.

Comments

No comments received.

Clarified Securities Dealer Corp example at subsection (f)(3)(A).

Facilitator Remarks

Staff proposed to modify the example at subsection (f)(3)(A) to clarify that Securities Dealer Corp's receipts are from selling marketable securities on its own account.

Comments

No comments received.

Added the word "approximation" to subsection (i)(1).

Facilitator Remarks

Staff proposed insertion of the word "approximation" in addition to "reasonable approximation." The addition of "approximation" would allow this rule be applicable to approximations made under proposed subsection (c)(2)(B)2.

Comments

A commenter suggested deleting the provision that allows FTB to consider a taxpayer's resources when considering whether to accept a taxpayer's reasonable approximation or approximation method. The provision allows FTB auditors to reject a method based on the auditor's subjective opinion that the taxpayer has the "resources" to do more. This commenter also noted their opinion that FTB should help taxpayers understand when enough information is enough to support their filing positions.

Another commenter stated that providing a narrow safe harbor would be ideal, rather than a rule which allows the FTB to later say the taxpayer did not do enough investigation to support their assignment method.

Modified language regarding how a taxpayer may change its reasonable approximation method at subsection (i)(2)(C).

Facilitator Remarks

Staff proposed to add additional language which explains that, notwithstanding subsection (i)(2)(A), the rule that once a taxpayer uses a reasonable approximation method, it must continue to use that method and cannot change it unless the FTB provides written permission, still applies. Staff also proposed language to require that taxpayers notify the FTB when they are using a new reasonable approximation to provide a brief description of that method in the form and manner prescribed by the FTB.

Comments

A commenter expressed confusion how to obtain permission to change a taxpayer's reasonable approximation method, noting that if it is merely "check the box," the language should be changed to reflect this, because the proposed language sounds as though a taxpayer needs FTB's permission in advance.

Another commenter noted confusion what it meant to "change" a reasonable approximation method. The commenter wondered whether merely having different data would be considered a different reasonable approximation method, and what the ramifications were if the taxpayer did not think it had changed its reasonable approximation method but the FTB did think it had.

Corrected applicability date clerical errors at subsections (j) and (j)(2).

Facilitator Remarks

Staff proposed to change the subsection title from "Effective date" to "Applicability dates" because the subsection concerns dates that the original regulation and its various amendments are applicable, not effective.

Comments

No comments were received.

Applicability date placeholder language to subsection (j)(3).

Facilitator Remarks

Staff proposed language to indicate the applicability dates of the amendments currently proposed in the draft language. Since the Draft Language is still proposed as opposed to final, and the respective sections to update are undefined, this section provided placeholder language at this time.

Comments

A commenter expressed confusion why FTB has not provided firm applicability dates for the proposed amendments.

Retroactive application election under subsection (j)(4).

Facilitator Remarks

Staff has not yet decided whether to provide for a retroactive application election for the new amendments proposed in the Draft Language document.

Comments

Commenters stated FTB should make it optional to apply the amended regulations retroactively. Another commenter agreed this would be a fair way to approach the amendments.

Additional comments not directly related to topics facilitators introduced at the IPM.

Comment received regarding "benefit of the service" definition

A commenter stated that the definition of "benefit of the service" should be changed to read, "Where the benefit of the service is received is determined by the use made of the service by the taxpayer's customer." This commenter suggested the tank example could be improved by providing language that states the benefit is received at the delivery location because it is presumed the tank will be used there. The commenter also noted that emphasizing the tangible personal property's location of use would be consistent with the simplifying presumption assignment of services related to intangible property., and that modifying the definition would help interpret the term "delivered directly or indirectly" because the taxpayer would know the regulation is attempting to isolate the place of use with those terms.

A commenter stated the following factors should be considered when determining where the benefit of a service is received by a government customer: Language of contract, intent/purpose of contract, industry practice, historical data, what service relates to and what will operationally be used for, and agency-specific mission statements.

Comments received regarding "Reasonably Approximated" definition currently in effect

One commenter stated that the definition for "reasonably approximated" uses ambiguous terms, such as "substantially received," "materially used," and "geographic areas," which cause uncertainty. The commenter stated that because our tax system relies on self-compliance, without clear thresholds or definitions it would be hard for taxpayers to comply. The commenter stated that defining these terms and inserting examples would be useful.

Another commenter stated that since the definition for where a taxpayer received the benefit of a service does not require the benefit be received "substantially," this term should be deleted from the definition of "reasonably approximated."

A third commenter expressed confusion why the taxpayer's books and records are not considered when reasonably approximating.

A final commenter stated the regulation would be susceptible to Commerce Clause and Foreign Commerce Clause challenges because, due to the proposed reasonable approximation definition changes, there would be extra hurdles to get foreign sales into the sales factor denominator. The commenter stated the same standard for sales factor inclusion should apply when considering the populations of domestic states, i.e., only populations of the geographic areas in the state where there are substantial sales should be included.

Comment received regarding assigning receipts from freight forwarding services

A commenter stated that the best assignment method for freight forwarders is a mileage approach, because the benefit of the freight forwarding service begins when the goods are picked up and ends when they are delivered, and therefore are received throughout the course of the shipment. This commenter noted that FTB's previously proposed example embodied this approach and was consistent with the substance of where the benefit of the service is received, was consistent with reporting for US GAAP revenue recognition purposes, and put freight forwarders on the same playing field as companies that own their own fleet of trucks/planes/ships/trains (and which assign sales pursuant to a mileage ratio).

The same commenter stated that it appears the example was changed to conform to the new simplifying rule for services related to tangible personal property. The commenter states transportation and logistics services are fundamentally different from other services related to tangible personal property. Furthermore, the commenter noted that the industry likely could not overcome the presumption that the benefit was received at the destination of the shipment, because an example provides that the entire receipt for logistics services is assigned to the destination state.

Comment received regarding assigning receipts from intangibles

One commenter expressed confusion why the taxpayer, under the default reasonable approximation rule, would look to where the intangible was used by the seller in the past twelve months. The commenter stated that it is the purchaser's use that is relevant.

Comments received regarding burden of proof at provision at subsection (i)(2)(A)

Multiple commenters stated that the taxpayer presumption for “reasonable approximation method” in subsection 25136-2(i)(2)(A) should be extended to taxpayer’s “approximation method.”