The nuances of market-based sourcing of service revenue: Not all markets look the same

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As the United States has evolved into a service-based economy, the economic impact of the sourcing of service revenue for purposes of apportionment has received increased scrutiny, which has led to the adoption of market-based sourcing regimes for those receipts. The following states have adopted market-based sourcing for service revenue: California (beginning in 2011 for certain taxpayers); Georgia; Illinois; Iowa; Maine; Maryland; Michigan; Minnesota; Ohio; Oklahoma; Utah; Washington; and Wisconsin.

For several reasons, states are moving away from the traditional cost-of-performance (COP) rules and adopting market-based sourcing. Proponents of market-based sourcing claim that such a methodology serves the purpose of the sales factor by balancing the origin-based property and payroll factors, and also results in an increased level of certainty for taxpayers selling services and intangibles. Further, COP has been criticized as too difficult to determine, penalizing in-state companies and unfair when using an all-or-nothing approach.

One of the more persuasive arguments for the adoption of market-based sourcing has been that state departments of revenue dislike the occurrence of the “nowhere sales” that can result from COP. As discussed below, however, depending on a taxpayer’s facts, the adoption of the recent market-based sourcing regimes is not likely to prevent nowhere sales in some instances or prove to be “fair” to taxpayers in others.

This article discusses not just the shift to market-based sourcing, but also the unique and often inconsistent mechanics of applying these sourcing rules.

**The trend toward market-based sourcing of services**

For sales other than sales of tangible personal property (e.g., sales of services), Section 17 of the Uniform Division of Income for Tax Purposes Act (UDITPA) sources receipts by looking at the taxpayer’s COP. Under this method, service revenue in particular is sourced to a state if: (1) the income-producing activity is performed in such state; or (2) the income-producing activity is performed both within and outside such state and a greater proportion of the income-producing activity is performed in such state than in any other state, based on COP. Typically, states that use COP for service revenue use one of two sourcing methods: preponderance (all-or-nothing) or proportionate (pro rata).
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All-or-nothing vs. pro rata
Under the preponderance method, which is followed by a significant number of states, sales from services are sourced solely to the state in which the plurality of COP occurs. The determination of where the greatest proportion of the income-producing activity is performed is based on the costs associated with the performance of that income-producing activity.

In contrast, under the proportionate method receipts from service are sourced to each state in which COP is incurred, or by some other measure of the service provider’s activity in the state. Some states follow a “time spent” method, whereby receipts from services are sourced to each state in which the service provider’s personnel perform services. This method is particularly popular when the service is characterized as a personal service.

The influence of the MTC’s (attempted) revision of UDITPA Section 17
The Multistate Tax Commission (MTC) follows a long-standing regulation that it adopted interpreting UDITPA Section 17. This regulation (MTC Reg. IV.17) provides significant detail for determining the sourcing treatment of sales other than sales of tangible personal property. According to MTC Reg. IV.17(2):

“The term ‘income producing activity’ applies to each separate item of income and means the transactions and activity engaged in by the taxpayer in the regular course of its trade or business for the ultimate purpose of producing that item of income. Such activity includes transactions and activities performed on behalf of a taxpayer, such as those conducted on its behalf by an independent contractor.” (Emphasis added.)

The inclusion of “independent contractor” activities in this calculation is a relatively new development, adopted by the MTC in 2007. Historically, such activities were explicitly excluded from the analysis.

Further, under Reg. IV.17(2), income-producing activity includes, but is not limited to: (1) “[t]he rendering of personal services by employees or by an agent or independent contractor acting on behalf of the taxpayer or the utilization of tangible and intangible property by the taxpayer or by an agent or independent contractor acting on behalf of the taxpayer in performing a service”; (2) “[t]he sale, rental, leasing, licensing or other use of real property”; (3) “[t]he sale, leasing, licensing or other use of tangible personal property”; and (4) “[t]he sale, licensing or other use of intangible personal property.” In addition, “[t]he mere holding of intangible personal property is not, of itself an income producing activity.”

MTC Reg. IV.17(3) defines COP as “direct costs determined in a manner consistent with generally accepted accounting principles [GAAP] and in accordance with accepted conditions or practices in the trade or business of the taxpayer to perform the income producing activity which gives rise to the particular item of income.” (Emphasis added.) The remainder of the MTC regulation deals with its application: Reg. IV.17(4)(A) recites the preponderance COP approach endorsed by UDITPA, and Reg. IV.17(4)(B) addresses certain special rules with respect to sales of items other than tangible personal property, including an alternative rule for “personal services” based on “time spent.”
Currently, the MTC is considering more radical changes to its interpretive regulation, as well as possibly adopting a market-based sourcing approach. To date, however, the changes the MTC already made to the COP regulation have not been largely followed by the states within the Multistate Tax Compact, and thus it remains to be seen how many traditional COP states will conform to changes that the MTC suggests involving the use of market-based sourcing.

**Traditional market-based sourcing rules**

Historically, for purposes of the sales factor, states that adopted market-based sourcing for service revenue sought to assign such revenue based on (1) the location of either (a) the service provider’s customers or (b) where the customers received benefit from the service provided, rather than (2) the location where the service provider performed the service. The following is a brief description of some of the long-standing market-based sourcing rules in Georgia, Iowa, Maryland, and Minnesota, the first four states that adopted this concept for service revenue.

**Georgia**

Georgia employs a customer location/benefit service-revenue sourcing rule with the following language: “Gross receipts are in this state [Georgia] if the receipts are derived from customers within this state or if the receipts are otherwise attributable to this state’s marketplace.” This gross receipts factor is designed to measure the marketplace for the taxpayer’s goods and services.

The Georgia regulations go into significant detail in defining the applicable terminology used. For example, “customers within this state” is defined as “(i) A customer that is engaged in a trade or business and maintains a regular place of business within [Georgia]; or (ii) A customer that is not engaged in a trade or business whose billing address is in [Georgia].” A “regular place of business” is “an office, factory, warehouse, or other business location at which the customer conducts business in a regular and systematic manner and which is continuously maintained, occupied and used by employees, agents or representatives of the customer.” A “billing address” is “the location indicated in the books and records of the taxpayer as the address of record where any notice, statement and/or bill relating to a customer’s account is mailed.” Finally, the Georgia regulations provide rules to determine “the amount that is attributable to this state’s marketplace” for a variety of income streams.

With respect to services, “all gross receipts from the performance of services are included in the numerator of the apportionment factor if the recipient of the service receives all of the benefit of the service in Georgia. If the recipient of the service receives some of the benefit of the service in Georgia, the gross receipts are included in the numerator of the apportionment factor in proportion to the extent the recipient receives benefit of the service in Georgia.”

**Iowa**

The Iowa statute affords the Director of the Department of Revenue the power to adopt rules for sourcing income derived from businesses other than the manufacture or sale of tangible personal property. The Department has adopted regulations attributing to Iowa income from these types of sales in the proportion that Iowa gross receipts bear to total gross receipts. In line with the general rules applicable in Georgia, Iowa gross receipts include receipts from services to the extent that the service recipient receives the benefit of the service in Iowa. In addition, the explanation of the benefit rule, and the accompanying examples used in the regulation, trace Georgia’s analysis.
**Maryland**

While the Maryland statutes are silent regarding how to source receipts from services, a Maryland regulation adopts a customer location/benefit service-revenue sourcing rule, stating: “Gross receipts from contracting or service-related activities shall be included in the numerator if the receipts are derived from customers within this State [Maryland].” The term “customers within the state” includes individuals and business enterprises. “A business enterprise shall be considered a customer within [Maryland] if the business enterprise is domiciled in this State.” Further, “domicile is the state in which is located the office or place of business that provides the principal impetus for the sale,” and “[i]f an office or place of business cannot be identified as providing the principal impetus for the sale, then the domicile shall be the state in which the headquarters or principal place of business management of the customer is located.” The regulation includes examples that further explain how to apply this concept. Maryland is the only state that endorses the “impetus for the sale” method of sourcing service revenue.

**Principal impetus for the sale**

Here, the threshold question to overcome is: what exactly is the meaning of the term “principal impetus for the sale”? Is it where the customer receives the benefit of the sale, or where the customer makes the decision on whether the transaction moves forward? The first example in the regulations (redesigning the operating software for the customer’s billing operations) relies on the place where the transaction provides a benefit to the customer (location of the customer’s central billing computers), and thus it is possible to conclude that the “principal impetus for the sale” is akin to where the benefit of the service is received, and not necessarily the location where the customer made the decision to commit to receiving the service.

Even if one determines that the definition of “principal impetus for the sale” requires looking at where the customer is benefitting from the service, additional issues can arise in relatively commonplace transactions. For example, how does one determine the location of the “principal impetus for the sale” when that impetus occurs partly in Maryland and partly in other states? Should the sale be sourced to all the states on essentially a pro rata basis or, in the alternative, should the taxpayer try to determine in which state the majority (or even the plurality) of the impetus for the sale occurred and then source the sale in an all-or-nothing manner to that one state? The use of the word “principal” seems to require some sort of all-or-nothing calculation, but that is not entirely clear from the regulations. If the Maryland taxing authorities have no clearly stated policy on this issue, does a taxpayer have a duty to choose one type of sourcing method and be consistent with it, or can the taxpayer make its own determination on how to proceed year-by-year? All of these potential issues with Maryland’s market-based sourcing standard are made more serious when trying to deal with the underlying problem with using a market-based standard, which is the taxpayer’s difficulty in obtaining information regarding where the customer’s impetus for a particular sale took place.

In many instances, a taxpayer performs a large-scale project involving the provision of a number of services for a customer with locations in Maryland and in other states. When determining the location of the principal impetus for the sale in such a transaction, is a taxpayer allowed to separate out each distinct service and perform the sourcing calculation at a service-by-service level, or should all of the services for the transaction be combined, leaving the taxpayer with one all-or-nothing calculation that...
could wildly affect the composition of the Maryland sales factor? Again, should a taxpayer be required to be consistent in its approach from transaction to transaction, and from year to year?

With respect to bundled transactions in which a taxpayer sells both tangible personal property and services, what sourcing rule controls? Is the transaction bifurcated, under which the sale of tangible personal property is sourced using pure destination rules, and the service is sourced using the “impetus for the sale” rule? Or is some form of a “true object” test used, whereby the transaction is first classified as solely a sale of tangible personal property or a sale of a service?

As noted above, when the principal impetus for the sale cannot be determined by the taxpayer, presumably when the taxpayer is unable to obtain sufficient information from its customer, the taxpayer is allowed to source the sale to the customer’s headquarters or principal place of business. With respect to ascertaining the impetus for the sale, how much due diligence must a taxpayer perform prior to resorting to the customer’s headquarters or seat of management as a method of sourcing the sale? Does the second sourcing option allow the taxpayer to choose whether to use the customer’s headquarters or the principal place of business? Does a “principal place of business” test require that a taxpayer measure the customer’s presence in each of the states in which it does business and make its own determination, or can the taxpayer rely on a customer’s representations about where that place is located?

**Minnesota**

Minnesota employs a customer location/benefit service revenue sourcing rule through the following statute:

> “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.”

In contrast to several of the other long-standing market-based sourcing rules, the Minnesota statute provides for a cascading rule and a requirement that the initial sourcing determination be made with regard to the customer’s fixed place of doing business. The use of a cascading rule, however, would later be followed by some of the more-recent adherents to market-based sourcing.

**New state market-based sourcing rules**

As mentioned above, several states have recently switched from the traditional COP rules to some form of market-based sourcing. The new regimes put in place are not homogenous and contain significant nuances that create, for large multijurisdictional taxpayers, complexities and uncertainties in implementing the rules, as well as the continued risk of duplicate taxation. The following discussion reviews some of these new service apportionment regimes.
California
California historically has followed preponderance COP principles. For tax years beginning after 2010, the COP methodology is replaced with a market-based sourcing rule, whereby sales from services are sourced to California to the extent the purchaser of the service received the benefit of the service in California. This new sourcing rule, however, is available only to taxpayers that make an annual irrevocable election to use a single sales factor apportionment formula when that election is available for tax years beginning after 2010. Taxpayers that do not elect to use the single sales factor apportionment formula will continue to use the preponderance COP rule.

Draft rules apply market-based sourcing
The California Franchise Tax Board is in the process of promulgating a regulation that explains how to source services under the new market-based sourcing rule. The draft regulation defines “benefit of a service is received” as “the location where the taxpayer’s customer has either directly or indirectly received value from delivery of that service.” In addition, the sourcing rules are different for a taxpayer’s individual customers as opposed to its corporate customers.

Under the draft regulation, an individual customer is presumed to receive the benefit of the service at the customer’s billing address, but this presumption can be overcome, resulting in sourcing based on a location in the sales contract or taxpayer’s books and records, or even, when nothing else is conclusive, a reasonable approximation. In contrast, a corporate customer is presumed to receive the benefit of the service at the location designated in the contract or in the taxpayer’s books and records, but this presumption, too, can be overcome, resulting in sourcing based on a reasonable approximation of where the benefit is received, the customer’s ordering location, or the customer’s billing address. The draft regulation includes numerous examples to explain these concepts.

Illinois
Historically, Illinois followed a majority COP rule, whereby a sale was sourced to Illinois if the income-producing activity was performed entirely in Illinois, or more of the income-producing activity was performed in Illinois than in all other states, based on COP. For tax years ending on or after 12/31/08, Illinois adopted a market-based sourcing approach for sales of services. The market-based method in Illinois generally sources sales of services to the state if the benefit of the service is realized in the state. The new law also adopts a “throw-out” rule, whereby receipts for services received by customers in states where the taxpayer is not taxable are entirely excluded from both the numerator and denominator of the sales factor.

Under Illinois law, gross receipts from the performance of services provided to a corporation, partnership, or trust may be attributed only to a state where that corporation, partnership, or trust has a fixed place of 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 business, the services are deemed to be received at the location of the customer’s office 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 are deemed to be received at the customer’s office to which the services are billed. The Department is directed to adopt rules prescribing where specific types of service are received, including, but not limited to, publishing and utility services.
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Maine
Historically, Maine followed preponderance COP principles. Now, for tax years beginning after 2006, receipts from the performance of services must be attributed to the state where the services are received. If that state is not readily determinable, the services are deemed to be received at the customer’s home or, in the case of a business, the customer’s office from which the services were ordered in the regular course of the customer’s trade or business. If the ordering location cannot be determined, the services are deemed to be received at the customer’s home or office to which the services are billed. If the purchaser is the federal government, the receipts are attributable to Maine if a greater proportion of the income-producing activity is performed in Maine than in any other state, based on COP.

Michigan
The Michigan Business Tax (MBT), adopted in 2008, uses a market-based methodology for sourcing services. All receipts from the performance of services are included in the numerator of the apportionment factor if the recipient of the services receives all of the benefit of the services in Michigan. If the recipient of the services receives some of the benefit of the services in Michigan, the receipts are included in the numerator of the apportionment factor in proportion to the extent that the recipient receives benefit of the services in Michigan. In addition, specific rules apply for sales derived from securities brokerage services, as well as receipts derived from the sale of management, distribution, administration, or securities brokerage services to, or on behalf of, a regulated investment company or its beneficial owners.

Departmental guidance
The Michigan Department of Treasury has released Revenue Administrative Bulletin (RAB) 2010-5, 5/20/10 (“Michigan Business Tax Where Benefit of Services Is Received”), addressing how taxpayers that provide services should determine the location where the recipient of the service received the benefit. The RAB discusses a variety of related topics, including (1) situations when only a portion of the benefit is received in Michigan, (2) whether the recipient of the services can be different from the purchaser of the services, (3) how the guidance will be applied in practice, and (4) what a taxpayer should do if it cannot determine where the recipient of the service received the benefit.

While the Department’s RAB is useful in offering taxpayers guidance on how the Michigan sourcing statute should work in practice, an RAB merely expresses the Department’s views on the interpretation of a statute and does not carry the authority of a formal rule (which may be promulgated by the Department in the future).

In the RAB, the Department has taken the position that the benefit of a service is received 100% in Michigan in any of the following situations:

1. The service relates to real property located entirely in Michigan.
2. The service relates to tangible personal property that is either: (a) owned or leased by the purchaser and located in Michigan at the time the service is received, or (b) delivered to the purchaser or the purchaser’s designee(s) in Michigan.
3. The service is provided to a purchaser who is an individual physically present in Michigan at the time the service is received.
4. The services are received in Michigan, and are personal-type services (e.g., consulting, counseling, training, speaking, or providing entertainment) that, typically, are conducted or performed first-hand, on a direct, one-to-one or one-to-many basis.
5. The service is provided to a purchaser engaged in a trade or business in Michigan and relates only to that Michigan trade or business.
6. The service relates to the use of intangible property, such as computer software (other than canned/prewritten software), licenses, designs, processes, patents and copyrights, that is used entirely within Michigan.
7. The services are professional (e.g., legal or accounting services) provided to either an individual purchaser domiciled in Michigan or a purchaser with Michigan-only business operations.  

The RAB goes on to explain that, as noted above, if the services at issue are received only partially within Michigan, then pursuant to the MBT, “the receipts are included in the apportionment factor in proportion to the extent that the benefit of the services is received in [Michigan].” Accordingly, the benefit of the services is received in Michigan to the extent the property or business operations related to the service is located, used, or occurs in Michigan. The RAB lists a second series of rules to be used when services are received partially within Michigan:

1. If the service relates to real property that is located in Michigan and in one or more other states, the benefit of the service is received in Michigan to the extent that the real property is located in Michigan.
2. If the service relates to tangible personal property that is (a) owned or leased by the purchaser and located in Michigan and in one or more other states at the time that the service is received, or (b) delivered to the purchaser or the purchaser’s designee(s) in Michigan and in one or more other states, the benefit of the service is received in Michigan to the extent that the tangible personal property is located in Michigan, or is delivered to the purchaser or the purchaser’s designee(s) in Michigan.
3. If the service is provided to a purchaser that is engaged in a trade or business in Michigan and in one or more other states, and the service relates to the trade or business of that purchaser in Michigan and in one or more other states, the benefit of the service is received in Michigan to the extent that it relates to the trade or business of the purchaser in Michigan.
4. If the service relates to the use of intangible property, such as computer software (other than prewritten computer software), licenses, designs, processes, patents, and copyrights, that is used in Michigan and in one or more other states, the benefit of the service is received in Michigan to the extent that the intangible property is used in Michigan.
5. If the services provided are professional in nature, such as legal or accounting services, and are provided to a purchaser with business operations in Michigan and in one or more other states, and the services relate to the purchaser’s operations both in Michigan and in one or more other states, the benefit of the services is received in Michigan to the extent that the services relate to the purchaser’s Michigan operations.

While the recipient and the purchaser of a service will usually be the same person or entity, the RAB acknowledges that this is not always the case. The RAB points out that the MBT statute refers to the “recipient of the services,” and notes that this language indicates that the recipient of the services may be someone other than the purchaser of those services.
In an attempt to provide practical guidance, the RAB includes 13 nonexclusive examples of how the Department will apply these rules. Specifically, the examples outline how the Department plans to interpret the market-based sourcing rules under various fact patterns. The rules contain some interesting analyses and are informative to taxpayers sourcing services in Michigan.

Further, in the RAB the Department reminds taxpayers that they have a duty to maintain adequate documentation to support their determination of where the benefit of a service is received. In determining the extent of the benefit received in Michigan, taxpayers must use reasonable means or methods that are uniformly and consistently applied.

The RAB notes that if a receipt from the sale of services is not addressed by a specific statutory subsection, “the MBT Act states that the receipt is sourced based on where the benefit to the customer is received or, if where the benefit to the customer is received cannot be determined, to the customer’s location.” The Department cautions, however, that a taxpayer cannot use the customer’s location to source a sale of services without first making a reasonable and demonstrable effort, based on its books and records, to determine the location where the benefit of the service is received. Moreover, the RAB emphasizes that sales are not excluded from the apportionment factor if the location of the recipient’s benefit cannot be determined.

For most large corporate purchasers of services, specifically those having significant multistate operational footprints, it would seldom be the case that “all” the benefit of services received in a given transaction would be in Michigan. As such, service providers may be challenged to determine, from a practical as well as a tax-planning perspective, where customers receive the proportionate value of the services provided. Further, the determination of when or how a service recipient “receives benefit of services” within Michigan may prove problematic. To that end, the statutory catch-all provision noted above (receipts not otherwise sourced under the MBT are sourced based on where the benefit to the customer is received or, if that cannot be determined, to the customer’s location) appears to require the seller to determine either the location of benefit or the “customer’s location.”

**Oklahoma**

Historically, Oklahoma’s statutes and administrative rules were silent on the sourcing of service revenue. In recent years, however, following the national trend, Oklahoma auditors have been informally trying to push taxpayers toward market-based sourcing. Effective 7/11/10, the Oklahoma Tax Commission amended an apportionment rule providing that for purposes of the sales factor, taxpayers must report revenues from the performance of services in the sales factor numerator essentially using market-based sourcing. This amended regulation is the first official guidance the Oklahoma Tax Commission has provided on the subject.

Oklahoma’s newly amended rule succinctly addresses the sourcing of service revenue for sales factor purposes. Specifically, the rule states: “Receipts from the performance of services shall be included in the numerator of the [sales factor] fraction if the receipts are derived from customers within this state [Oklahoma] or if the receipts are otherwise attributable to this state’s marketplace.” Under the rule, a “customer within Oklahoma” is either (1) “a customer that is engaged in a trade or business and maintains a regular place of business in Oklahoma,” or (2) “a customer that is not engaged in a trade or business whose billing address is in Oklahoma.” Further, a “billing address” is “the location indicated
in the books and records of the taxpayer as the address of record where the bill relating to the customer’s account is mailed.” Because the Commission considers this language to be a clarification of, rather than a change to, existing policy, the amended rule may have a retroactive effect.

The broad and inclusive definition of what is a “customer within Oklahoma” is significant, since both (1) a customer engaging in a trade or business and maintaining a regular place of business in Oklahoma, and (2) a customer whose billing address (based on information in the taxpayer’s records) is in Oklahoma, meet this standard. This approach differs significantly from the more common market-based sourcing rule, which typically provides for sourcing of service revenue based on where the customer receives the benefit of the services provided.

**Utah**
Historically, Utah followed preponderance COP principles. For tax years beginning after 2008, receipts from the performance of a service are sourced to Utah if the purchaser receives a greater benefit of the service in Utah than in any other state. While the State Tax Commission is authorized to promulgate rules to prescribe the circumstances under which a purchaser of a service receives a greater benefit of the service in Utah than in any other state, it has not yet done so.

**Wisconsin**
In 2005, Wisconsin became a market-based sourcing state. Gross receipts from services are sourced to Wisconsin if the purchaser of the service received the benefit of the service in Wisconsin. The benefit of a service is received in Wisconsin if any of the following applies:

1. The service relates to real property that is located in Wisconsin.
2. The service relates to tangible personal property that is either (a) located in Wisconsin at the time that the service is received, or (b) delivered directly or indirectly to customers in Wisconsin.
3. The service is provided to an individual who is physically present in Wisconsin at the time that the service is received.
4. The service is provided to a person engaged in a trade or business in Wisconsin and relates to that person’s business in Wisconsin.

For purchasers of services that receive the benefit of a service in more than one state, the gross receipts from the performance of the service are included in the numerator of the sales factor according to the portion of the service received in Wisconsin.

**New state market-based sourcing rules (gross receipts taxes)**
While Ohio and Washington do not impose corporate net income taxes, their gross receipts tax regimes use market-based sourcing rules that borrow heavily from the concepts adopted by other states.

**Ohio**
In 2005, Ohio replaced the state’s corporation franchise tax by phasing in over a five-year period the gross-receipts based “commercial activity tax” (CAT), imposed on all business entities. Instead of taxing apportioned (via a three-factor formula) net income, the CAT is imposed on sitused gross receipts. For purposes of the CAT, gross receipts from the sale of services generally are sitused to Ohio in the proportion that the purchaser’s benefit in Ohio with respect to what was purchased bears to the
purchaser’s benefit everywhere.\textsuperscript{59} The physical location where the purchaser ultimately uses or receives the benefit of what was purchased is paramount in determining the proportion of the benefit in Ohio to the benefit everywhere.\textsuperscript{60} In a regulation issued by the Ohio Department of Taxation, the situs of a wide variety of services is generally based on this “physical location” rule.\textsuperscript{61}

The Ohio regulation specifies sourcing mechanics for 54 specifically enumerated services.\textsuperscript{62} Also, while it depends on the specific type of services provided, for services provided to customers that have locations both within and without Ohio, the gross receipts generally may be sitused to Ohio using any reasonable, consistent, and uniform method of apportionment that is supported by the service provider’s business records as they existed at the time the service was provided or within a reasonable time thereafter.\textsuperscript{63}

**Washington**

In 2010, Washington adopted a variety of Business and Occupation (B&O) tax provisions, including (1) a temporary increase in the tax rate for services and other business activities, (2) an economic nexus standard, and (3) single sales factor apportionment for services and royalties.\textsuperscript{64} The new law also replaces cost-based apportionment with a single-factor receipts-based formula. Effective 6/1/10, for purposes of the B&O tax, income is apportioned to Washington based on a receipts factor that equals the taxpayer’s gross income attributable to the state divided by the taxpayer’s gross income everywhere.\textsuperscript{65}

Under the new apportionment law, for purposes of computing the receipts factor, service receipts are attributed to a state based primarily on where the customer received the benefit of the service. A taxpayer will need to analyze the new sourcing provisions, which generally provide as follows:

1. The receipts are attributable to the state where the customer received the benefit of the taxpayer’s service or, for royalty income, used the taxpayer’s intangible property.
2. If the benefit or use is in two or more states, the receipts are attributed to the state in which the benefit was primarily received or the intangible was primarily used.
3. If the taxpayer is unable to source receipts under items (1) or (2), the receipts are attributed to the state from which the customer ordered the service or negotiated the royalty agreement with the taxpayer.
4. If unable to source under items (1), (2), or (3), the receipts are attributed to the state to which the billing statement or invoice is sent by the taxpayer to the customer.
5. If unable to source under items (1), (2), (3), or (4), the receipts are attributed to the state from which the customer sends payment to the taxpayer.
6. If unable to source under items (1), (2), (3), (4), or (5), the receipts are attributed to state in which the customer is located, as reflected by the customer’s address (a) shown in the taxpayer’s business records kept in the ordinary course of business, or (b) obtained during the transaction.
7. If unable to source under any of the above rules, the receipts are attributed to the taxpayer’s (i.e., vendor’s) commercial domicile.\textsuperscript{66}

As indicated above, the numerator of the receipts factor is gross income attributable to Washington, and the denominator is worldwide apportionable income. A separate receipts factor and apportionment calculation must be performed for each classification of apportionable income, effectively resulting in
the separate accounting of income. An exception to this rule applies when a taxpayer has apportionable gross income that must be “thrown out” (i.e., excluded) from the denominator because the income is attributable to a state in which the taxpayer is not taxable (i.e., not subject to a business activity tax). Nevertheless, a taxpayer is taxable in a state with which it is deemed to have nexus under Washington’s new economic nexus standard.67

In determining the location where a customer receives the benefit of a service, the benefit is received in Washington in each of the following instances:

1. The service relates to real property located in Washington.
2. The service relates to tangible personal property located in Washington at the time the service is received.
3. The service does not relate to real or tangible personal property, and: (a) the service is provided to a person not engaged in business who is physically present in Washington at the time the service is received; or (b) the service is provided to a person engaged in business in Washington and the service relates to the person’s business activities in Washington.68

Administrative and judicial efforts to adopt market-based sourcing

Some state taxing authorities have not waited for changes in statutes or regulations to assert market-based sourcing of service revenue. Instead, they have employed a market-based sourcing theory at the audit level and sought to enforce such theory via litigation.

For example, state taxing authorities have been invoking alternative apportionment to achieve market-based sourcing where COP-sourcing results in no sales being attributed to the state. In some instances, state taxing authorities have tried to change the characterization of a transaction from (1) the sale of a service sourced by COP, to (2) the sale of tangible personal property sourced by the location of the marketplace.69 Finally, state taxing authorities have argued that depending on a taxpayer’s particular facts and circumstances, COP does not properly reflect a taxpayer’s income, particularly if the sales are not included in any state’s sales factor numerator. Assessments based on these methodologies have been successful at the litigation phase of a controversy to the extent a court is unwilling to apply statutory COP methodologies to taxpayers that clearly are soliciting and interacting with customers in the state but not performing a preponderance of the services in question in the state.70 The following discussion examines some recent litigation in this area.

Wisconsin’s Ameritech case

In Ameritech Publishing, Inc. v. Wisconsin Department of Revenue,71 the Wisconsin Court of Appeals affirmed a decision by the Wisconsin Tax Appeals Commission holding that all of a taxpayer’s income generated from its sales of local telephone directory advertising be assigned to Wisconsin because all of its income-producing activity was performed in that state. For purposes of apportionment, the taxpayer’s income-producing activity was defined as furnishing access to a Wisconsin audience by advertisements placed in the telephone directories.

The taxpayer, a publisher incorporated in Delaware with its principal place of business in Michigan, sold advertising for placement in telephone directories. Advertising income was generated from national accounts as well as local accounts consisting of Wisconsin-based businesses. Local advertising
was solicited by sales representatives from offices in Indiana, Michigan, Ohio, and Wisconsin. The
taxpayer’s national account sales offices were in Michigan and Illinois. Representatives from both
within Wisconsin and outside the state solicited sales for advertising in the Wisconsin telephone
directories. The taxpayer contracted for the publication and delivery of the telephone directories on
behalf of the local telephone company.

For tax years 1994 through 1996, prior to Wisconsin’s adoption of market-based sourcing for service
revenue, the taxpayer timely filed Wisconsin corporate income returns and used an apportionment
method that sourced sales based on the geographic distribution of the telephone directories. The
taxpayer later filed an amended Wisconsin return that lowered its tax liability by apportioning income
based on the cost of performing the advertising services. The taxpayer continued to use the COP
method on its return for the 1997 tax year. The Wisconsin Department of Revenue denied the
taxpayer’s specific use of the COP method. The Tax Appeals Commission held that the taxpayer’s sale
of telephone directory advertising was the sale of a service and not the sale of tangible personal
property; it further held that performance of directory advertising services in Wisconsin constituted
income-producing activities sourced to Wisconsin. The circuit court affirmed the Commission’s
decision and the taxpayer appealed to the court of appeals.

For the tax years at issue, 1994-1997, Wisconsin used a three-factor apportionment formula with a
double-weighted sales factor. For purposes of the sales factor, sales other than sales of tangible
personal property (e.g., sales of services) were in Wisconsin if the income-producing activity was
performed in the state; if the activity was performed both within and outside Wisconsin, the sales were
subject to the COP method of apportionment. This provision, found in UDITPA, is still used by
many states today.

The substantive issue addressed in this case was whether the income-producing activity associated with
the telephone directory advertising services was performed in Wisconsin, or performed both within and
outside the state. The taxpayer argued that the Commission should have assigned sales according to
actual costs of performance, which would include the various activities performed by the taxpayer
within and outside Wisconsin. The directory advertising income was dependent on a series of integrated
activities, beginning with the solicitation of the sale, continuing with ad layout and production, and
delivery of directory ad copy to the printer, and concluding with the distribution of the directories to
the final users. Many of these activities were performed primarily in Michigan, with some services
performed in Indiana, Ohio, and Illinois, as well as Wisconsin. The taxpayer argued that the
Commission should not have based its assessment solely on the last activity in the chain—the
distribution of the directories. In fact, according to the taxpayer, the distribution of the directories
should not have been considered an income-producing activity at all because it was performed by a
third party.

The Department responded that the taxpayer’s argument was unreasonable because it would allow
“large amounts of income-producing activity to virtually escape taxation in Wisconsin, where all of the
advertising occurred.” The court agreed with the Tax Appeals Commission and circuit court that all of
the taxpayer’s income-producing activity was performed in Wisconsin. In reaching its decision, the
Court of Appeals noted an earlier decision of the Tax Appeals Commission, The Hearst Corporation v.
Department of Revenue, which the Commission relied on in the present case. In Hearst, the Commission
considered whether advertising income received from the operator of a television station was properly included in the numerator of the Wisconsin sales factor. There, as in the present case, the Commission concluded that the income-producing activity of advertising services was performed in Wisconsin when the advertisement reached its intended audience there.

In Ameritech, the court of appeals found reasonable the taxpayer’s view that part of its income-producing activity was performed outside Wisconsin, but it was not more reasonable than the Commission’s interpretation of the statute. The taxpayer’s argument failed to consider the fact that its primary income-producing activity was furnishing access to a Wisconsin audience.

This case offers insight regarding the application of the COP rule in sourcing service income. Wisconsin no longer uses the COP approach, but this case provides useful guidance for taxpayers in the many states that continue to source service revenue based on COP. The approach upheld in Ameritech resembles a market-based method used by a growing number of states, because the court of appeals considered where the benefit of the service (i.e., the distribution of the advertising) was received. This approach was detrimental to the taxpayer because it sourced to Wisconsin all of the telephone directory advertising revenue, without accounting for the income-producing activities that were performed in other states. Had the taxpayer separately sourced components of its revenue, such as advertisement design and advertisement placement, perhaps a different result would have been reached.

**Tennessee’s BellSouth case**

In BellSouth Advertising & Publishing Corp. v. Chumley, the Tennessee Court of Appeals held that the Department of Revenue correctly used an alternative apportionment method instead of the statutory COP method in a case involving a telephone directory publisher that incurred all of its costs outside Tennessee but earned its advertising revenue from the distribution of directories within the state. Under Tennessee law, sales, other than sales of tangible personal property, are in the state if the earnings-producing activity is (1) performed in the state, or (2) performed both in and outside the state and a greater proportion of the activity is performed in Tennessee than in any other state, based on costs of performance. A taxpayer or the Department of Revenue may request a variance from the standard apportionment provisions if they do not fairly represent the taxpayer’s activities in the state.

During the years at issue, the taxpayer produced and caused to be distributed in Tennessee more than 23 million telephone directories. Almost all of the taxpayer’s revenues were derived from the sale of advertising in the directories. The taxpayer’s annual revenues during the period at issue were between $160 million and $200 million. The advertising services were performed outside Tennessee. The taxpayer used the statutory COP method to source a relatively small amount of revenue to Tennessee. The Tax Department found that the COP method did not fairly represent the extent of the taxpayer’s business activities in the state, and thus, under its discretionary authority, it used an alternative apportionment method based on where the telephone directories were distributed.

The trial court found in favor of the taxpayer and determined that the variance from the statutory COP apportionment method was not justified. According to the trial court, the Tax Department did not satisfy the statutory requirement of proving that the standard apportionment formula did not fairly represent the extent of the taxpayer’s business activity in the state. The sole fact that significant revenues received from the sale of advertising in Tennessee were not apportioned to Tennessee did not
justify the variance. The Tax Department failed to identify that a greater proportion of the taxpayer’s earning-producing activity was performed in Tennessee.

The Tennessee Court of Appeals reversed the trial court and held that the Department correctly used an alternative apportionment method. The appellate court agreed with the Department that the use of the COP formula did not reasonably reflect the taxpayer’s business activity in Tennessee. Based on the COP method, during the five years at issue the taxpayer paid taxes of only about $296,000 on income of more than $897 million. The Tax Department argued that it was “patently absurd” to contend that the tax payment was commensurate with the business that the taxpayer conducted in Tennessee. Also, the Department noted that the UDITPA authors had expressed concerns about the application of the COP formula to income from advertising in publications. Based on those arguments, the court of appeals held that application of the COP formula did not fairly represent the taxpayer’s business in the state, and the variance thus was appropriate.

The appellate court rejected the taxpayer’s argument that, in light of the variance provision and Tennessee’s “all-or-nothing” COP approach, the Tax Department can virtually ignore the COP formula when the results are unfavorable to the state. Despite this potential for the Department’s misuse of the variance provision, the legislature provided the Department with the authority to permit or require a departure from the standard apportionment formula when application of that formula does not fairly represent the taxpayer’s activity in the state.

**Conclusion**

As the number of market-based sourcing states continues to grow, the mechanics of the rules adopted by those states will take on greater importance. While, at first blush, sourcing revenue to a taxpayer’s market seems simple, the definitions of “market” vary substantially across the states. The term can mean simply the customer’s actual location or commercial domicile, or it can mean the location where the customer receives the benefit of the services provided. In states where a “benefit received” test is used, several issues are likely to arise, including who should be considered the purchaser of record; where is the benefit actually received (commercial domicile, office taking the order, billing address, or other location); and where is the service performed or delivered. Accordingly, it will not always be easy for a taxpayer to determine the location of its market, particularly if the “benefit of services received” sourcing rule is used.

Having reviewed the various market-sourcing rules currently in place, trying to put them into context is difficult. When viewed as a whole by multistate service providers, the rules prove to be a patchwork of definitions, exceptions, and ordering precepts. Trying to make any analytical sense of them is, at best, difficult. The sidebar (“Dealing With the New Rules for Market-Based Sourcing of Service Revenue”) accompanying this article offers a list of questions practitioners might ask.

The unfortunate result of the proliferation of market-based sourcing rules is that it will be increasingly common for taxpayers to have aggregate multistate sales factors of greater than 100% for service revenue in situations where (1) the services are performed in a COP state, and (2) the customer is located or receives the benefit of the services in a market-based sourcing state. Also, because of the divergent expressions of market-based sourcing rules, there will be unfavorable results where the location of the customer and the location where the benefits of the services are deemed received cause
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the same revenue to be included in the sales factor numerator of multiple market-sourcing states. As a response to potential apportionment whipsaws (greater than 100% apportionment), taxpayers will need to consider the states’ various complex and inconsistent rules for market-based sourcing of service revenue and take remedial steps to avoid such a result.

Needless to say, from a state income tax perspective, these are interesting times for service providers with significant multistate activity. A closer look at this changing apportionment landscape indicates that the trend toward market-based sourcing of services is not likely to either provide more “fairness” for taxpayers or prove to be easier to administer for state taxing authorities.
Appendix

Dealing with the new rules for market-based sourcing of service revenue: Consider these questions

For each state to which a service provider may need to source revenue, the following questions can offer some guidance.

1. What is the primary sourcing rule: (a) where the benefit of the service is received, (b) the location of the impetus for the sale? Is it important where the customer “directly or indirectly receives” the benefit of the service? Is the location or billing address of the customer the determinative consideration, as opposed to where the benefit of the service is received? Does it matter if the customer is an individual or a business?

2. Is there a fall-back rule if the taxpayer’s records do not indicate where the customer receives the benefit of the service?

3. Is there a set of cascading or ordering rules that govern how a taxpayer should determine where to market-source revenue?

4. Is the “benefit of the service” rule an all-or-nothing determination based on a set of cascading rules for ascertaining the location of the benefit; or can the service revenue be apportioned between states when the customer receives the benefit of the service in more than one state?

5. Does it matter whether the service is related to real property, tangible personal property, or intangible property?

6. Does the state have industry-specific rules for applying market-based sourcing for services?

7. Do bundled transactions of services and tangible personal property have to be bifurcated to be properly sourced?

8. Do the market-based sourcing rules require enhanced recordkeeping?
9. Is there a throwback or throwout rule in play for services in a given state?

10. Are there any state presumptions within the rules, and if so, how do they apply?

11. Does existing guidance provide any specific examples as to the application of a state’s rules?

12. Is further guidance forthcoming?

13. Could definitional rules cause service revenue to be sourced to multiple market-based states (for example, a “customer” is defined as being engaged in a trade or business within the state or having a billing address within the state)?

14. Depending on the services at issue, will cost-of-performance (COP) states choose to selectively use an “equitable” form of market sourcing?

15. Is the “time spent” analysis for personal services still relevant in a state that has adopted market-based sourcing, and if so, to what extent?
Notes

1 Traditionally, the sales factor gave the market state representation when the items sold were classified as tangible personal property, as most states use destination sourcing for such sales. The new market-sourcing regimes for the sale of services seem to be, in part, an attempt to restore that historical balance among the apportionment factors.

2 UDITPA is the model act drafted in 1957 by the National Conference of Commissioners on Uniform State Laws in order to promote uniformity with regard to income allocation and apportionment practices among the states and to relieve the need for congressional legislation in this area. The Conference’s website is www.nccusl.org.


4 Ga. Comp. Rules & Regs. 560-7-7-.03(5)(c)1.

5 Id., 560-7-7-.03(5)(c)3. Emphasis added.

6 Id., 560-7-7-.03(5)(c)4.

7 Id., 560-7-7-.03(5)(c)5.

8 Id., 560-7-7-.03(5)(c)6.

9 Id., 560-7-7-.03(5)(c)6(ii).

10 Iowa Code Section 422.33.2.b(3).

11 Iowa Admin. Code 701—54.6 (422).

12 Id.

13 Iowa Admin. Code 701—54.6(1) (422).

14 Md. Regs. Code Section 03.04.03.08.C(3)(c).

15 Id., Section 03.04.03.08.D(2).

16 Id., Section 03.04.03.08.D(2)(b)(ii).

17 Id., Section 03.04.03.08.D(2)(b)(iii). Emphasis added.

18 Id., Section 03.04.03.08.D(2)(b)(iii), Examples 3 and 4.

19 Minn. Stat. Section 290.191, subd. 5(j).


21 Id., Section 25136(b)(1).
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Id., Section 25136(b)(5) (referencing Section 25128.5, the single sales factor election). On 11/2/10, California voters rejected an initiative (Proposition 24, the Repeal Corporate Tax Loopholes Act) that would have repealed the single sales factor election, and would have caused the sourcing of services to revert to the COP rule for all taxpayers.

Id., Section 25136(a).

18 Cal. Code Regs. Section 25136(b) (draft). Existing Reg. Section 25136 is to be renumbered as 25136(a). The draft regulation is available on the FTB’s website at www.ftb.ca.gov/law/meetings/attachments/120210/3b.pdf.

Id., Section 25136(b)(1) (draft).

Id., Section 25136(b)(1)(d) (draft).

Id., Section 25136(b)(2) (draft).

Id., Section Section 25136(b)(c)(1)(C), (2)(E) (draft).

Former 35 ILCS Section 5/304(a)(3)(C).

III. S.B 783, 1/11/08; P.A. 95-707.


Id.

At this writing, the Illinois Department of Revenue has drafted proposed rules for the market-based sourcing of services. Those rules have been released to some members of the practitioner community for comment.


Mich. Comp. Laws Section 208.1305(2)(a); also see Section 208.1311 (any receipts not otherwise sourced under the MBT are sourced “based on where the benefit to the customer is received, or if where the benefit to the customer is received cannot be determined, to the customer’s location”).

Id., Section 208.1305(2)(b) and (c).

Revenue Administrative Bulletin (RAB) 2010-5 (Mich. Dept. Treas., 5/20/10) (hereinafter, RAB 2010-5), Section III.

RAB 2010-5, Section III (citing Mich. Comp. Laws Section 208.1305(2)(a)).

RAB 2010-5, Section III.

RAB 2010-5, Section II.

RAB 2010-5, Section IV, Examples A through M.

Id.

RAB 2010-5, Section V (citing Mich. Comp. Laws Section 208.1311).

Id.

Id.

In contrast to apportionment statutes in many other states, the Oklahoma apportionment statute does not contain a provision for sourcing sales other than sales of tangible personal property. See 68 Okla. Stat. Section 2358.A.5(c).


Id., Section 710:50-17-71(1)(A)(ii).

Id., Section 710:50-17-71(1)(A)(ii)(I) and (II).
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52 Former Utah Code Ann. Section 59-7-319(1).
53 Utah Code Ann. Section 59-7-319(3)(a).
54 Id., Section 59-7-319(3)(b).
55 Wis. Stat. Section 71.25(9)(dh)1.
56 Id., Section 71.25(9)(dh)2.
57 Id., Section 71.25(9)(dh)3.
60 Id. This sourcing rule for purposes of the CAT is very similar to the rule under Ohio’s former franchise tax for tax years ending on or after 12/11/03: “Receipts from the sale of services ... shall be sitused to [Ohio] in the proportion to the purchaser’s benefit, with respect to the sale, in [Ohio] to the purchaser’s benefit, with respect to the sale, everywhere. The physical location where the purchaser ultimately uses or receives the benefit of what was purchased shall be paramount in determining the proportion of the benefit in [Ohio] to the benefit everywhere.” See Ohio Rev. Code Ann. Section 5733.05(B)(2)(c)(ii); Corporation Franchise Tax—Sales Factor Situsing Provisions (Ohio Dept. Tax’n, Tax Info. Release No. IT-CFT 2004-01, 4/19/04).
61 Ohio Admin. Code Section 5703-29-17. According to the rule, the Tax Commission “will not require taxpayers to upgrade their systems in order to comply with the general provisions of this rule as long as the taxpayer makes a good faith effort to situs receipts from services in a reasonable, consistent, and uniform method that is supported by the taxpayer’s business records as they existed at the time the service was provided or within a reasonable time thereafter.” Id., Section 5703-29-17(A). Further, if the Commission “disagrees with a taxpayer’s reasonable, consistent, and uniform method of situsing its gross receipts, a penalty will not be imposed if the situsing was found to be made in good faith. While different methods may be used for different types of services, the same method must be consistently used for all types of similar services.” Id., Section 5703-29-17(B)(2)(b).
62 Id., Section 5703-29-17(C).
63 See, for example, Ohio Admin. Code Section 5703-29-17(C)(4)(d) (regarding agency services). A similar provision is included for most of the 54 specified services discussed in Section 5703-29-17(C).
64 Wash. S.B. 6143, 4/23/10; Laws 2010, 1st Spec. Sess. ch. 23. For tax reporting periods beginning after 2005 through 5/31/10, the sourcing of service revenue for purposes of the Washington B&O tax was governed by a Department of Revenue regulation that provided taxpayers with the ability to use separate accounting or cost apportionment, depending on each taxpayer’s particular facts and circumstances. Wash. Admin. Code Section 458-20-194.
65 S.B. 6143, supra note 64, Part I, Section 105 (adding Wash. Rev. Code Section 82.04.462).
66 Wash. Rev. Code Section 82.04.462(3)(b).
67 Id., Section 82.04.462(3)(a) and (c). Washington’s new nexus standard is in Wash. Rev. Code Section 82.04.067 (added by S.B. 6143, supra note 64, Part I, Section 104).
69 Likewise, state taxing authorities have tried to change the characterization of a transaction from (1) the sale of a service sourced by preponderance COP, to (2) the sale of a personal service sourced by “time spent” or other proportionate COP rule.
70 Further, many states have adopted market-based sourcing for sales of intangibles (location of use), and for specific industries or specific types of services, including: (1) broker-dealers; (2) mutual fund service providers; and (3) financial institutions. While very detailed rules apply to distinct revenue streams for these industries, the trend is to look at the taxpayer’s market, and not where the taxpayer incurred COP.
71 788 NW2d 383 (Wis. Ct. App., 2010), rev. dism’d Wis. S.Ct., 12/13/10.
72 Former Wis. Stat. Section 71.25(6). In the 2008 tax year, Wisconsin began using a single sales factor apportionment formula.
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73 Former Wis. Stat. Section 71.25(9)(d). Effective 1/1/05, Wisconsin began using a market-based method for sourcing service income.

74 The main procedural issue addressed in the case was the appropriate standard of review to be applied by the court of appeals in interpreting the Wisconsin sales factor statute. The court had three options to consider: (1) a de novo review of the statute, under which the court would interpret the statute without considering the Department's interpretation; (2) a “great weight” deference standard, under which the Department's interpretation would be upheld as long as it was reasonable and not contrary to the statute's clear meaning, even if the court found a different interpretation to be more reasonable; and (3) a “due weight” deference standard, under which the Department's interpretation of the statute would be upheld if it comported with the purpose of the statute, and no alternative interpretation was more reasonable than the Department's interpretation. See Wisconsin Dept. of Revenue v. A. Gagliano Co., Inc., 702 NW2d 834 (Wis. Ct. App., 2005). The taxpayer requested de novo review, while the Department sought great weight deference. The court of appeals concluded that a due weight deference standard was appropriate.

75 During the tax years at issue, Wisconsin's regulations indicated that “activities performed on behalf of a taxpayer, such as those conducted on its behalf by an independent contractor” were not included in the taxpayer’s “income producing activity.” Wis. Admin. Code Section 2.39(6)(c)3.


77 Under the “due weight” standard applied by the court, a reasonable position by the taxpayer was not enough to change the Commission's determination (see note 74, supra). Query whether the result would have been the same had a de novo standard been used.


79 Tenn. Code Ann. Section 67-4-2012(i). The tax years at issue were 1997 to 2001. While the Tennessee statutes were substantially revised in 1999, the provisions relevant to this case remained substantially the same.

80 Tenn. Code Ann. Section 67-4-2014(a); Tenn. Comp. Rules & Regs. 1320-6-1-.35.

81 In this situation, of course, the sales factor also could be less than 100%. To the extent the aggregate sales factor is below 100%, however, those state taxing authorities that believe they are not getting their fair share from the taxpayer likely will protest.