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In this article, Morris focuses on the six-day de minimis standard for use tax on interstate commercial vehicles as recently set forth in the Massachusetts Department of Revenue's Directive 23-1.

On March 23, the Massachusetts Department of Revenue released "Directive 23-1: Use Tax Applied to the Sale of Rolling Stock; De Minimis Standard."[1] The directive provides national transportation companies with a bright-line de minimis threshold for the imposition of use tax on tractors and trailers that are traveling to or through Massachusetts in interstate commerce. This standard generally provides that the presence of rolling stock in Massachusetts for six or fewer days in a 12-month period will be considered de minimis for purposes of the Massachusetts use tax.[2]

Larger companies might find that the standard is too rigorous to offer meaningful relief because any day on which a tractor or trailer spends time in Massachusetts is treated as a full day for purposes of the six-day threshold. Another potential objection to the directive is that it imposes an unreasonable administrative burden. Transportation companies routinely track mileage and pickup and delivery information for their tractors, as well as pickup and delivery information for their trailers, but they do not necessarily track information regarding days spent in each state.

Regardless of whether the directive applies to relieve specific tractors and trailers from liability, companies of any size should find that it marks a subtle but important shift toward a less aggressive DOR enforcement policy. Companies should also find that incorporating a time-based tracking system for their tractors and trailers will help identify those with disproportionately short time periods spent in Massachusetts, even if these vehicles fall outside the six-day de minimis standard.

I. Statutory Foundations of the Sales and Use Tax on Rolling Stock

Chapter 64H, section 2 of the Massachusetts General Laws imposes a 6.25 percent sales tax on "sales at retail in the commonwealth, by any vendor, of tangible personal property."[3] As a corollary to the sales tax, chapter 64I, section 2 imposes a 6.25 percent use tax "upon the storage, use or other consumption in the commonwealth of tangible personal property . . . for storage, use or

[1] Massachusetts Department of Revenue, Directive 23-1 (Mar. 23, 2023).

[2] *See id.* at Section III.

[3] Mass. Gen. Laws ch. 64H, section 2.

other consumption within the commonwealth."[4] Tangible personal property includes "rolling stock," a term that generally refers to tractors (which the directive describes as "trucks") and trailers (which the directive describes as "storage trailers that are affixed to the tractors").[5]

Rolling stock and other items of tangible personal property "sold or transferred for delivery in Massachusetts or brought into Massachusetts within six months of its purchase [are] presumed to have been sold or transferred for storage or use in Massachusetts."[6] As the Massachusetts Supreme Judicial Court explained, the sales tax and use tax are "complementary components of our tax system, created to reach all transactions, except those expressly exempted, in which tangible personal property is sold inside or outside the Commonwealth for storage, use, or other consumption within the Commonwealth."[7]

II. Constitutional Limitations on Sales and Use Tax on Interstate Commercial Vehicles: The *Complete Auto* Test

The credit mechanism in the Massachusetts motor vehicle sales and use tax regulation provides that "the sale or transfer of a motor vehicle [or] trailer . . . in any state or territory within the United States that is subsequently brought to or used in Massachusetts" is exempt from Massachusetts use tax as follows:

> a. the purchaser or the transferee must have paid a sales or use tax on the vehicle to the state or territory in which the sale or transfer occurred;
>
> b. the sales or use tax must have been paid by the purchaser or the transferee and legally due the state or territory;
>
> c. the purchaser or the transferee must not have received and must not have a right to receive a refund or credit of the sales or use tax from the state or territory in which the sale or transfer occurred; and
>
> d. the state or territory to which the sales or use tax was paid must allow a corresponding exemption with respect to motor vehicle sales and use taxes paid to Massachusetts.[8]

If a taxpayer does not qualify for the credit mechanism in chapter 64H, section 25.1(7)(g) of the Massachusetts General Laws, it can nevertheless meet the exemption in section 25.1(7)(h), which provides that a violation of the Supreme Court's four-part *Complete Auto*[9] test is grounds for an exemption. The basic purpose of this test is to provide a means by which federal and state courts can determine whether a state tax violates the dormant commerce clause, which is generally interpreted as the Constitution's implicit prohibition of any state from enacting laws that interfere with Congress's explicit authority to "regulate Commerce with foreign Nations, and among the several States."[10] The *Complete Auto* exemption in the motor vehicle use tax regulation provides as follows:

> The sale or transfer of a motor vehicle, trailer, or other vehicle in any state or territory within the United States that is subsequently brought to or used in Massachusetts for purposes of interstate commerce, is exempt from Massachusetts use tax if the sale or transfer of the vehicle is exempt under the provisions of 830 CMR 64H.25.1(7)(g), or if the use of the vehicle in Massachusetts as part of interstate commerce is exempt from use tax under the Constitution or laws of the United States. For the purposes of this subsection, the use of such a vehicle in Massachusetts as part of interstate commerce is exempt from Massachusetts use tax under the Constitution or laws of the United States only if application of the use tax violates the test applied by the United States Supreme Court in *Complete*

[4] Mass. Gen. Laws ch. 64I, section 2.

[5] Directive 23-1, Section I.

[6] *Id.* at Section IV (citing Mass. Gen. Laws ch. 64I, section 8f, and 830 Mass. Code Regs. 64H.25.1(3)(c)(2)).

[7] *Town Fair Tire Centers Inc. v. Commissioner of Revenue*, 911 N.E.2d 757 (Mass. 2009).

[8] 830 Mass. Code Regs. 64H.25.1(7)(g)(1).

[9] *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274 (1977).

[10] U.S. Const. Art. I, section 8.

Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), or any other test subsequently developed by the courts or enacted under the laws of the United States. Under the *Complete Auto Transit* test, the imposition of a use tax is permissible if

> 1. the tax is applied to an activity that has a substantial nexus with Massachusetts;
>
> 2. the tax is fairly apportioned;
>
> 3. the tax does not discriminate against interstate commerce; and,
>
> 4. the tax is fairly related to the services provided by the taxing authority.[11]

Like the *Complete Auto* exemption in the motor vehicle use tax regulation, the sales tax exemption in chapter 64H, section 6(a) of the Massachusetts General Laws — which extends to the use tax by operation of chapter 64I, section 7(b) — provides an exemption for "sales which the commonwealth is prohibited from taxing under the constitution or laws of the United States."[12]

Although the credit mechanism exempts rolling stock on which the owner has paid a sales or use tax to another jurisdiction, 30 of the 48 contiguous U.S. states have enacted sales and use tax exemptions for vehicles used in interstate commerce (commonly referred to as "rolling stock exemptions").[13] Accordingly, most interstate transportation companies were, prior to the directive, left with the *Complete Auto* test as the only meaningful grounds for Massachusetts use tax exemption.

III. Uncertain Scope of the *Complete Auto* Test After *Regency Transportation*

Before the directive, the Massachusetts Supreme Court's decision in *Regency Transportation* was the most recent guidance on the DOR's authority to assess use tax on interstate commercial vehicles.[14] Regency Transportation Inc. — which at the time of the assessment was a Massachusetts corporation with a corporate headquarters in Massachusetts, terminals and warehouses in Massachusetts and New Jersey, and most of its employees in Massachusetts and New Jersey — argued that the imposition of use tax on its interstate fleet of tractors and trailers violated the commerce clause.[15]

One of Regency's main arguments was that the DOR's assessment violated the "external consistency" sub-requirement of fair apportionment under the *Complete Auto* test. Unlike internal consistency, which focuses on whether a hypothetical cloning of the challenged tax in other jurisdictions would result in multiple taxation, external consistency looks "to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing state."[16] Regency argued, *inter alia*, that the imposition of an unapportioned use tax on any vehicle used on Massachusetts roads, no matter how briefly, was externally inconsistent because it did not "reasonably reflect[] the in-state component of the activity being taxed."[17]

In holding that the imposition of the use tax did not violate the commerce clause, the Supreme Judicial Court focused on Regency's corporate domicile and facilities in Massachusetts rather than the mileage and activity of specific tractors and trailers. The court stated that "the use tax is imposed in connection with Regency's use and storage of the fleet within the Commonwealth, and not solely based on its use of roads within the Commonwealth."[18] This language blurs the distinction between the activities of the taxpayer as a corporate entity and the activities of the assessed tractors and trailers. Even though one of the assessed tractors only traveled 2.29 percent of its total mileage on Massachusetts roads and Regency's tractors in the aggregate only traveled

[11] 830 Code Mass. Regs. 64H.25.1(7)(h).

[12] Mass. Gen. Laws ch. 64H, section 6(a).

[13] Brief of Appellant, *Regency Transportation Inc. v. Commissioner of Revenue*, 473 Mass. 459, 42 N.E.3d 1133 (Mass. 2016).

[14] *Regency*, 473 Mass. 459.

[15] *Id.*

[16] *Oklahoma Tax Commission v. Jefferson Lines Inc.*, 514 U.S. 175, 185 (1995).

[17] *Id.* at 466 (citing *Aloha Freightways Inc. v. Commissioner*, 428 Mass. 418, 422 (1998)); *see also Goldberg v. Sweet*, 488 U.S. 252, 262 (1989) (discussing the internal consistency and external consistency sub-requirements of fair apportionment).

[18] *Regency*, 473 Mass. at 468.

approximately 35 percent of their total mileage on Massachusetts roads, the court suggested (but did not explicitly state) that a use tax on any vehicle stored or used in Massachusetts for any amount of time during the audit period, no matter how brief, was permissible under the commerce clause because of Regency's underlying connections with the commonwealth.[19]

Although Regency's extensive connections with Massachusetts informed much of the court's analysis of the external consistency argument, the Supreme Judicial Court should have clarified that the *Complete Auto* test in general — and the external consistency sub-requirement of fair apportionment in particular — is a fact-intensive inquiry that depends on the activities of the assessed vehicles in addition to the taxpayer's connections with the taxing state. It might have been more difficult for the court to clarify this distinction in *Regency Transportation* because of the implied benefits associated with Regency's corporate domicile in Massachusetts, but the court's failure to do so helped to crystallize the DOR's overly aggressive audit position. Both before and after *Regency Transportation*, the DOR's standard (but unofficial) audit position was that any storage, use, or consumption of an interstate commercial vehicle in Massachusetts, even if only for one mile or one day, is sufficient to justify the imposition of a Massachusetts use tax.

Notwithstanding the DOR's rigid audit position, the Massachusetts Appellate Tax Board and Supreme Judicial Court have consistently refused to uphold formalistic, mechanical impositions of any tax or fee triggered by a single commercial entry into the state. In *The Macton Corporation v. Commissioner*, the Appellate Tax Board concluded that — under the factors described in DOR Directive 87-3 — temporary stops of an airplane in Massachusetts, used by a corporation that is a nonresident of the state, do not establish that the corporation purchased the airplane for "storage, use or consumption" in Massachusetts under chapter 64I, section 2 of the Massachusetts General Laws.[20] In *American Trucking Associations*, the Supreme Judicial Court determined that annual flat fees that do not take into account each vehicle's actual use of Massachusetts roads violate the commerce clause because the "full measure of each fee is triggered by an interstate truck simply crossing the border of Massachusetts and making just one commercial entry into the State."[21]

IV. Summary of Directive 23-1

After years of assessing rolling stock with the bare minimum indicia of storage or use in Massachusetts, the DOR finally established a bright-line de minimis threshold in its first directive of 2023. The directive provides that "where a taxpayer demonstrates that rolling stock that it owns or leases for 12 months or longer was used or stored in Massachusetts *for no more than six days during a 12-month period*, the Commissioner will consider the in-state use to be de minimis and will neither impose, nor require the taxpayer to pay, use tax on the use or storage of the rolling stock in Massachusetts for that period."[22] Although this language would technically enable the DOR to use a 12-month period that straddles two different calendar years, the examples in the directive clarify that this 12-month period will typically correspond with the calendar year.[23]

Consistent with the rules for determining the number of days of physical presence in Massachusetts for individual income tax residency,[24] any day of partial presence in Massachusetts will constitute a full day for purposes of the six-day de minimis threshold. There are benefits to a bright-line de minimis

[19] *See id.* at 466 ("There are ample facts to support the board's finding that Regency's tax liability reasonably reflects the in-State activity being taxed. Regency has used all of the tractors and trailers in its fleet in Massachusetts, and stores and maintains its fleet, at least in part, in the Commonwealth.").

[20] *See* 1993 WL 436992 (Mass. App. Tax. Bd. Aug. 5, 1993).

[21] *American Trucking Associations Inc. v. Secretary of Administration*, 415 Mass. 337, 345-346 (1993).

[22] Directive 23-1, Section III (emphasis added).

[23] *Id.* at Section IV, examples 1-4. *But see id.* at Section IV, Example 5 (referring generally to a "12-month period," which may or may not coincide with the calendar year).

[24] *See* 830 Mass. Code Regs. 62.5A.1(2) (defining the term "resident" or "inhabitant" as any person who is domiciled in Massachusetts or who is not domiciled in Massachusetts but maintains a permanent place of abode there and spends more than 183 days in the tax year in Massachusetts, including days spent "partially in and partially out of Massachusetts").

threshold in terms of predictability, but a rigid, mechanical application of the partial presence standard could easily lead to unfair results. Example 1 in the directive describes a tractor that "traveled through Massachusetts on 12 separate days" as not qualifying for the de minimis use exception.[25] In contrast to the tractor in Example 1, which might have only been present on Massachusetts roads for 10 minutes on each of the 12 separate days (a total of 120 minutes, or two hours), the tractor in Example 5 qualifies for the de minimis exception after it was stored in Massachusetts for "four consecutive days" (a total of 96 hours).[26]

Another problem with the rigid application of the de minimis standard is that it captures time on Massachusetts roads while en route to a customer in another state with no corresponding storage or commercial activity (either pickup or delivery) in Massachusetts. As discussed above, the directive explicitly provides that any day on which the rolling stock spends any time on Massachusetts roads will be considered a full day for purposes of determining the applicability of the de minimis exception.[27] Example 1 provides that a tractor that "travelled *through* Massachusetts on 12 separate days does not qualify for the exception"; accordingly, it is irrelevant for purposes of the de minimis standard that a particular tractor or trailer was simply passing through Massachusetts to reach a customer in another state.

It is unlikely that the DOR's assessment of use tax on a vehicle that traveled purely passthrough mileage in Massachusetts would withstand scrutiny under the *Complete Auto* test. As discussed above, the Appellate Tax Board in *Macton* determined that temporary stopovers of an airplane in Massachusetts, which was used by the lessor (Macton) and the lessee (Beechcraft) "in their respective non-Massachusetts businesses," was insufficient to establish Macton's knowledge or intent that the plane would be used in Massachusetts.[28] Both the U.S. Supreme Court and the Massachusetts Supreme Judicial Court have determined that flat fees and taxes that are triggered by a single entry into the state, regardless of the substance and frequency of the underlying use, are prohibited under the commerce clause.[29] Because of these constitutional obstacles, the DOR would likely prefer to frame the de minimis standard as an exercise of discretion designed to simplify the administration of use tax audits rather than a new or supplementary standard for purposes of determining nexus or fair apportionment under *Complete Auto*.

Although larger transportation companies are likely to argue that a six-day threshold is not an adequate de minimis standard (especially in consideration of the partial presence rule discussed above), Example 5 in the directive provides a refreshing analysis of the activities of specific vehicles in Massachusetts regardless of the company's connections to the state. The example describes a Rhode Island trucking company that leases rolling stock from a New Jersey company and maintains storage depots in several states, including Massachusetts.[30] During a 12-month period, one of the trailers is driven into Massachusetts and stored at the company's storage depot for four consecutive days.[31]

The directive concludes that the trailer qualifies for the de minimis exception because its only use in Massachusetts during a 12-month period was the four days of storage.[32] This example clarifies that a company's tractors and trailers are not subject to use tax simply because the company maintains storage depots in

[25] Directive 23-1, Section IV.

[26] *Id.*

[27] *See id.* ("A taxpayer can demonstrate the frequency with which rolling stock was used or stored in Massachusetts through sufficient records that show the dates of travel *into and in* Massachusetts, such as GPS logs."). (Emphasis added.)

[28] *Macton*, 1993 WL 436992 at *6.

[29] *See American Trucking Associations Inc. v. Scheiner*, 483 U.S. 266, 286 n.21 (1987) ("A flat tax, substantial in amount and the same for busses plying the streets continuously in local service and for busses making, as do many interstate busses, only a single trip daily, could hardly have been designed as a measure of the cost or value of the use of the highways.") (quoting *Sprout v. South Bend*, 277 U.S. 163, 170 (1928)); *American Trucking Associations*, 415 Mass. at 345, 613 N.E. 2d 95 ("The three Massachusetts annual flat fees appear to violate the internal consistency test because the imposition of the full measure of each fee is triggered by an interstate truck simply crossing the border of Massachusetts and making just one commercial entry into the State.").

[30] Directive 23-1, Section IV.

[31] *Id.*

[32] *Id.*

Massachusetts. It confirms that the de minimis inquiry is focused on the item of rolling stock's usage in the commonwealth rather than the company's connections to Massachusetts. This example also lends support to the argument that, for purposes of determining "substantial nexus" under the first prong of the *Complete Auto* test, "in the case of a tax on an activity, there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax."[33]

V. Relationship Between the Directive and the Statutory Presumption of Use in Massachusetts

Practitioners should bear in mind that the directive does not supplant or supersede the statutory presumption that "tangible personal property shipped or brought to the commonwealth by the purchaser was purchased for a retailer for storage, use or other consumption in the commonwealth, provided that such property was shipped or brought into the commonwealth within six months after its purchase."[34] Even if the company establishes that a particular tractor or trailer is eligible for the de minimis exception in a particular year (including the year of purchase), a vehicle could still be subject to use tax if it was used or stored in Massachusetts within six months of purchase (for any period of time) and exceeded the de minimis threshold in a subsequent calendar year within the audit period.

Consider the following scenario: Tractor A was purchased on November 1, 2022, and only traveled into and out of Massachusetts on three separate days between the date of purchase and December 31, 2022. Tractor A travels into and out of Massachusetts on 12 separate days in calendar year 2023. Although Tractor A meets the de minimis exception in calendar year 2022, it does not meet the de minimis exception in 2023 and is subject to the rebuttable statutory presumption that the vehicle was purchased for use in Massachusetts.

For those vehicles that are subject to the statutory presumption and ineligible for the de minimis exception in at least one year during the audit period, companies should be prepared to articulate specific factors to rebut the presumption that the vehicle was purchased for storage or use in Massachusetts. Directive 87-3 provides a list of factors that could be used to rebut this presumption, including:

1) the residency of the taxpayer;

2) whether there was an intervening use of the property in another state;

3) the length of time between purchase of the property and its use in Massachusetts;

4) an unforeseen change in circumstances occurring after purchase; and

5) whether the purchaser knew at the time of purchase that the property would be used in Massachusetts.[35]

The Appellate Tax Board in *Macton* described these factors as a "common sense approach to determine whether a particular taxpayer can overcome the presumption" and an "aid to understanding what facts will be sufficient to overcome the presumption."[36]

VI. Potential Administrative Burden on Interstate Trucking Companies

When considering the potential administrative burden associated with the directive, we should first acknowledge that interstate trucking companies have preestablished systems for complying with various federal and state laws and regulations. One of the most recordkeeping-intensive regulations is the International Fuel Tax Agreement (IFTA), which requires companies to track the number of miles each tractor travels in

[33] *Allied-Signal Inc. v. Director, Division of Taxation*, 504 U.S. 768, 778 (1992).

[34] Mass. Gen. Laws ch. 64I, section 8(f).

[35] Mass. DOR, Directive 87-3, "Property Purchased for Use in Massachusetts; Burden of Proof" (June 1, 1987).

[36] *Macton*, 1993 WL 436992 at *5.

each mainland U.S. state and Canadian province and report this mileage on quarterly returns.[37] Trailer mileage is not tracked for IFTA purposes because trailers do not directly consume fuel.

For income tax purposes in Massachusetts and other states, trucking companies routinely track (or at least should routinely track) the number of pickups from and deliveries to each state by each tractor and trailer. The purpose of state-by-state tracking of pickups and deliveries is to determine whether the company has nexus with a particular state and how the company's sales factor should be apportioned based on activity in that state.[38]

If transportation companies already have systems in place for tracking mileage, pickups, and deliveries for their tractors and pickups and deliveries for their trailers, then why did the DOR introduce a de minimis threshold based on the number of days of presence in Massachusetts? The simple answer is that a time-based metric should capture the number of days that the tractors and trailers may be stored in the commonwealth, even if those vehicles are not making any Massachusetts deliveries and are traveling few miles in Massachusetts before and after these storage periods. Implementing a new time-based metric puts the burden on trucking companies to track this additional information for every tractor and trailer, which creates a potentially valuable source of data that the DOR could access by means of a standard information document request.

The problem is that neither the IFTA-based mileage nor the income-tax-based pickup and delivery data correlates with the time-based threshold set forth in the directive. The question is not whether it is feasible to track time spent in each jurisdiction; rather, the question is whether adopting a new time-based tracking system imposes an undue administrative burden under the commerce clause. In a case involving a challenge to the Illinois Telecommunications Excise Tax Act, the Supreme Court in *Goldberg v. Sweet* contrasted apportionment formulas based on the miles that a bus, train, or truck traveled within the taxing state, all of which "dealt with the movement of large physical objects over identifiable routes," with the "more intangible movement of electronic impulses through computerized networks" for which "an apportionment formula based on mileage or some other geographic division of individual telephone calls would produce insurmountable administrative and technological barriers."[39]

Although creating a new time-based tracking system or generating time-based tracking information based on existing backup data[40] is not nearly as complex as tracking state-by-state information for electronic signals, incorporating time-based systems will still result in a significant administrative burden for most transportation companies. We will likely need to wait until a company specifically challenges the time-based metric to determine whether this approach constitutes an undue administrative burden as a matter of law.

VII. Recommendations for Interstate Transportation Companies

Companies that are involved in a DOR examination of their tractors and trailers should discuss the applicability of the directive with their legal counsel or, if they are representing themselves in the audit, their assigned auditor. Companies that have already been assessed a use tax on tractors and trailers that qualify for the de minimis threshold for all years in the audit period should consider filing a Form ABT, "Application for Abatement," provided that the applicable

[37] The purpose of the IFTA is to properly apportion the fuel tax collected at the point of sale among the states in which the fuel is actually used. For example, if a tractor fills its tank and pays fuel tax in New Jersey but travels 90 percent of its taxable miles in New York and only 10 percent of its taxable miles in New Jersey, the IFTA return for that quarter will remedy this imbalance by determining how much fuel tax the company should have paid to each jurisdiction based on taxable miles. *See* Massachusetts DOR, "International Fuel Tax Agreement," IFTA Operations Unit (rev. May 2019) (describing the IFTA generally).

[38] *See* Directive 95-7, "Foreign Corporations Using Massachusetts Roads to Transport Goods: What Constitutes Substantial Nexus?" ("A foreign corporation which uses Massachusetts roads to transport goods will have substantial nexus for corporate excise purposes if, during the course of the tax year, it: (1) makes more than twelve pickups, deliveries, trips through Massachusetts without pickup or delivery, or any combination thereof totaling more than twelve, or (2) is otherwise doing business in Massachusetts.").

[39] *Goldberg*, 488 U.S. 252.

[40] These approaches are described as Option 1 and Option 2 below.

statute of limitations on claims for refund has not already expired.[41] There is no pay-to-play rule in Massachusetts, which means that companies can file a Form ABT without first paying the challenged tax.[42] There is also no effective date mentioned in the directive, which means that companies should be free to apply the de minimis threshold for prior tax periods.

Companies that are concerned about the possibility of a DOR examination for past, current, or future tax periods must first determine which of the following options is the best fit for their objectives and business structure.

The first option (Option 1) is a proactive approach. To defend against a future audit, companies could introduce a new time-based recordkeeping system that tracks the days on which tractors and trailers entered and exited Massachusetts (regardless of whether the vehicles were delivering to or picking up from a customer in Massachusetts) and the days on which tractors and trailers were physically present in Massachusetts without entering or exiting the state (that is, days on which the vehicles were stored in Massachusetts between pickups or deliveries). Option 1 will likely be expensive, complex, and time-consuming to administer, especially in the first year in which the system is adopted, but should provide consistent and reliable data that companies can use to defend against a potential use tax audit by Massachusetts or another state. Option 1 is best suited for companies that want to defend themselves against DOR audits for present and future tax periods; it is unlikely that Option 1 could be used to efficiently generate time-based data for prior tax periods.

The second option (Option 2) is a wait-and-see approach. In the event of an audit, companies can retain an internal or external IT specialist to generate time-based tracking information using backup data for mileage, pickups, and deliveries. A company could either (i) use Option 2 to fill in time-based data for periods prior to the date on which it adopted Option 1, or (ii) use Option 2 without ever adopting Option 1. Although Option 2 will likely result in a lower overall administrative burden than Option 1 (especially for companies that are never audited by the DOR), the quality of the data generated in Option 2 will depend to a significant extent on the IT specialist's ability to navigate the company's various systems used to track mileage and activity data. Regardless of the IT specialist's ability to retrieve the requested data, it is likely that other professionals within the company will need to be available to explain why certain vehicles listed on the mileage and activity reports — including but not limited to leased and "owner-operator" vehicles — might not be subject to Massachusetts use tax.

Even if there is no independent business reason that a transportation company would need to track the time that its tractors and trailers spend in each jurisdiction on an annual basis, companies should ask themselves whether the potential tax savings associated with this new data are worth the additional costs and administrative burden. Large transportation companies with significant regional fleets might initially assume that they are unlikely to derive significant use tax savings from the de minimis threshold. However, all transportation companies should look beyond the directive's narrow scope to assess the benefits of a new time-based tracking system.

A time-based tracking system could help companies to strengthen their argument that the imposition of use tax is externally inconsistent when comparing the amount of time that the vehicle spent in Massachusetts with the time spent nationwide for a particular year. A time-based system can also be used to identify vehicles that fall outside of the statutory presumption for use in Massachusetts. *Regency Transportation* illustrates that mileage, pickup, and delivery information on its own is insufficient to rebut the statutory presumption that vehicles brought into Massachusetts within six months of purchase are intended for storage or use in Massachusetts, or to rebut the DOR's implicit assumption that a company with Massachusetts terminals or storage

[41] *See* Mass. Gen. Laws ch. 62C, section 36 ("A request for a refund or credit of an overpayment of tax where the required return was timely filed shall be made within the period permitted for abatement for that return under section 37."); *id.* at section 37 (an aggrieved taxpayer may apply for an abatement (1) within three years of the date of filing of the return, (2) within two years from the date the tax was assessed or deemed to be assessed, or (3) within one year from the date that the tax was paid, whichever is later).

[42] *See* Massachusetts DOR, "TIR 99-18: Legislative Repeal of So-Called 'Pay to Play' Provisions" (Dec. 17, 1999).

facilities might be storing these vehicles in Massachusetts between pickups or deliveries.

Instead of defending against the DOR's implicit assumptions about storage or use that are not reflected in the mileage or pickup and delivery reports, companies can use Option 1 to assume immediate control over the data that will serve as the foundation for the entire audit. Companies that follow the wait-and-see approach of Option 2 can still generate valuable time-based data from existing mileage and activity records but will likely lose significant advantages associated with the proactive approach of Option 1, such as the reliability of and familiarity with the source data. In either case, transportation companies of all sizes should consider how they can use time-based records as a valuable audit defense mechanism despite the additional costs and administrative burdens. ■