



## AMERICAN TRUCKING ASSOCIATIONS

950 N. Glebe Road ★ Suite 210 ★ Arlington, VA ★ 22203-4181  
www.truckline.com

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April 12, 2012

**TO:** Small Business/Pass Throughs Tax Reform  
Working Group  
House Ways & Means Committee

**FROM:** American Trucking Associations

**RE:** Public Comments on Federal Tax Reform

This is the submission for the record of the American Trucking Associations (ATA), the national trade association of the U.S. trucking industry. It is a united federation of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the motor carrier industry. ATA's membership includes nearly 2,000 trucking companies and suppliers of motor carrier equipment and services. Directly and indirectly through our affiliated organizations, ATA encompasses over 37,000 companies and every type and class of motor carrier operation.

Our submission on federal tax reform is limited to the following items: (1) our general view of the appropriate goals of tax reform, which ATA believes should involve both the corporate and individual levels of taxation and result, among other things, in wholesale simplification of the federal tax code; and (2) information for the Committee on a tax issue specific to the trucking industry, that is, the industry's urgent need for federal protection from overreaching state tax practices.

ATA thanks the Committee for this opportunity to present our preliminary views on federal tax reform. We stand ready to assist you in any way we can as you continue your work in this area.



## BUSINESS TAX REFORM

**PROPOSAL:** In reforming the federal tax code, Congress should:

Lower the rate of the income tax on all business income.

Provide interstate motor carriers protection against burdensome and discriminatory state taxation; and

Retain the existing provision in federal law granting motor carriers using owner-operators a safe harbor for these independent-contractor relationships.

**BACKGROUND:** The health of the Nation's economy depends critically on interstate commerce, and interstate commerce in turn depends very heavily on efficient freight transportation. Most of that freight is carried by truck – some 67% by tonnage and some 81% as measured by transportation receipts. The interstate motor carrier industry is correspondingly large, comprising several hundred thousand for-hire trucking companies. All told, some 6.8 million Americans are employed in job related to trucking, about one in every 17 U.S. workers in the private sector. Although a few carriers are large, the overwhelming majority of trucking companies are, by any definition, small businesses. The average trucking company operates a fleet of only six trucks, and there are many thousands of operations with only a single vehicle. In many respects, these small businesses resemble their counterparts in other industries, except that even the smallest motor carriers may travel into dozens of states in the regular course of their business.

### JUSTIFICATION:

-- The corporate income tax rate imposed by the U.S. is the highest in the Organization for Economic Cooperation and Development (OECD). Income taxes put American companies at a disadvantage and are a drag on the economy. Lowering the rate will benefit not only international businesses but will boost the economy, and in doing so benefit domestic companies as well.

-- Most trucking companies are small businesses. ATA statistics indicate the average motor carrier operates six trucks. Many of trucking companies are now organized for tax purposes as pass-through entities. For this reason, it will be important in tax reform to lower not only the corporate tax rate, but the tax rates applying to all business income.

-- The trucking industry currently pays a very high effective tax – about 31%, according to an analysis by New York University. A number of existing tax provisions are beneficial to trucking, but if the industry's effective tax rate were significantly reduced from where it is today, the industry is open to the modification or elimination of these, including bonus and accelerated depreciation.

-- As a part of the Motor Carrier Act of 1980, which deregulated the trucking industry, Congress granted the industry relief from discriminatory state and local property taxes. Although this provision has been helpful to trucking companies that faced property taxes with a discriminatory effect, carriers face other state and local taxes for which there is no effective federal relief. Congress has, however, granted the railroad industry relief (in the Railroad Regulatory Reform and Revitalization Act of 1976) from all forms of discriminatory state and local taxes; the trucking industry is requesting protection similar to that granted many years ago to our competitors. In addition, motor carriers face a serious threat of disproportionate compliance costs related to state business taxation, from states in which trucking companies do little or no business and with which they have few if any of the

connections that are commonly considered to establish taxability. This is a longstanding problem for which only a federal solution will be effective.

-- A large portion of the trucking industry consists of motor carriers whose drivers are independent contractors – owner-operators. The latter are true small businesses, whose proprietors have made very significant investments in equipment and whose relationships with trucking companies are governed by regulations of the Department of Transportation. Congress recognized the validity of these independent-contractor relationships in Section 530 of the Revenue Act of 1978, which grants to carriers and their owner-operators an effective safe harbor from attempts by the Internal Revenue Service to reclassify these workers as employees. Section 530 should be retained.

**ATA CONTACT:** Mary Phillips, 202 544 6245

## **INTERSTATE MOTOR CARRIERS FACE SERIOUS PROBLEMS WITH STATE BUSINESS TAX NEXUS ISSUES**

### **The Problem**

Due to a lack of clarity in federal law, interstate motor carriers, which are primarily small businesses, are often subjected to disproportionate state business taxation and extraordinary compliance and administrative costs. States regularly impose taxes on motor carriers that have no location, employees, or assets within these states, who pay all their fuel taxes and registration fees, and who only travel through or perhaps make incidental pick-ups and deliveries of freight.

Commonly, the tax owed is far less than the accountant's fees and other compliance costs borne by the carriers, and states regularly bill for many years of back taxes from carriers who had no idea that any liability was owed. One state, under color of state law, has stopped hundreds if not thousands of motor carrier vehicles in interstate commerce, and effectively held them and the cargos they carry for ransom until their operators pay arbitrarily assessed state taxes.

No judicial remedy is readily available for these motor carriers, since an issue involving a state tax must be addressed through the state's own courts. No effective legislative remedy is available at the state level, since the entities being taxed are, almost by definition, without political presence in the taxing jurisdiction. In addition, the unjustified state practices in this area seem to be spreading, at least in part in retaliation as states react to their neighbors' activity.

More detail on the plight of interstate motor carriers is available in the Statement of the American Trucking Associations (ATA) before the Senate Finance Committee, at a hearing held April 25, 2012, on state and local tax and fiscal policy.

### **A Solution**

ATA suggests that language be added to federal law to restrict state taxation of interstate motor carriers (excluding those engaged primarily in private carriage – that is, hauling their own property) to carriers that (1) are incorporated in the state, (2) have their principal place of business in the state, (3) have real property in the state, or (4) have obtained intrastate operating authority in the state. This clarification of federal law will leave motor carriers subject, as they should be, to taxation in states where they have significant physical presence, and will relieve them of the fiscal and compliance burdens of paying taxes in dozens of states where they have no such presence.

There is ample precedent for such a federal solution to problems of state taxation involving interstate motor carriers: 49 U.S.C. 14502 protects trucking companies against discriminatory state and local property taxations, 49 U.S.C. 14503 confers protection to truck drivers similar to what we suggest for motor carriers, and the requirement for states to participate in the International Registration Plan and International Fuel Tax Agreement contained in 49 U.S.C. Ch. 317 protect motor carriers from burdensome in state administration of fuel use tax and vehicle registration.

*For more information, contact: Bob Pitcher  
VP, State Laws  
American Trucking Associations  
703-838-7939 / [rpitcher@trucking.org](mailto:rpitcher@trucking.org)*

## **MINIMUM JURISDICTIONAL STANDARD FOR STATE AND LOCAL NET INCOME TAXES AND OTHER BUSINESS ACTIVITY TAXES ON INTERSTATE MOTOR CARRIERS**

(a) In General- No taxing authority of a State shall have power to impose, assess, or collect a net income tax or other business activity tax on any motor carrier subject to the jurisdiction of the Department of Transportation under subchapter I of chapter 135 of title 49, and engaged primarily in for-hire transportation, relating to such motor carrier's activities in interstate commerce, unless such motor carrier has a physical presence in the State during the taxable period with respect to which the tax is imposed.

(b) Requirements for Physical Presence- For purposes of subsection (a), a motor carrier has a physical presence in a State only if such motor carrier's business activities in the State include any of the following during such motor carrier's taxable year:

- (1) the motor carrier is incorporated in the State;
- (2) the State is the principal place of business of the motor carrier, as may be declared by the motor carrier under regulations promulgated by the Secretary of Transportation pursuant to section 13902 of title 49;
- (3) the motor carrier leases or owns real property in the State; or
- (4) the motor carrier holds authority from the State to operate in intrastate commerce within the State.

(c) Minimum Jurisdictional Standard- This section provides for minimum jurisdictional standards and shall not be construed to modify, affect, or supersede the authority of a State or any other provision of Federal law allowing motor carriers to conduct greater activities without the imposition of tax jurisdiction.

(d) Definitions, etc- For purposes of this section:

- (1) NET INCOME TAX- The term `net income tax' has the meaning given that term for the purposes of the Act entitled `An Act relating to the power of the States to impose net income taxes on income derived from interstate commerce, and authorizing studies by congressional committees of matters pertaining thereto', approved September 14, 1959 (15 U.S.C. 381, et seq.).
- (2) OTHER BUSINESS ACTIVITY TAX- The term `other business activity tax' means any tax in the nature of a net income tax or tax measured by the amount of, or economic results of, business or related activity conducted in the State.
- (3) STATE- The term `State' means any of the several States, the District of Columbia, or any territory or possession of the United States, or any political subdivision of any of the foregoing.

(e) Effective Date- This section shall apply with respect to taxable periods beginning on or after January 1, 20xx.

**Prepared Statement of  
American Trucking Associations**

**Before the  
Committee on Finance  
United States Senate**

**April 25, 2012**

**Hearing on State & Local  
Tax & Fiscal Policy**

*Mr. Chairman, Ranking Member Hatch, and members of the Committee:*

The health of this Nation's economy depends critically on interstate commerce, and interstate commerce in turn depends very heavily on efficient freight transportation. Most of that freight is carried by truck – some 67% by tonnage and some 81% as measured by transportation receipts. The interstate motor carrier industry is correspondingly large, comprising several hundred thousand for-hire trucking companies. Although a few carriers are large, the overwhelming majority of trucking companies are, by any definition, small businesses. The average trucking company operates a fleet of only six trucks, and there are many thousands of operations with only a single vehicle.<sup>1</sup> In many respects, these small businesses resemble their counterparts in other industries, except that even the smallest motor carriers may travel into dozens of states in the regular course of their business.

Our industry faces a serious threat of disproportionate compliance costs related to state business taxation, from states in which trucking companies do little or no business and with which they have few if any of the connections that are commonly considered to establish tax nexus. The American Trucking Associations appreciates this opportunity to join with other industries to support the call for federal relief from overreaching and inequitable state taxation of interstate commerce.<sup>2</sup> We emphasize that our industry's primary concern in this area is compliance costs rather than the amount of taxes involved. The relief we request should affect aggregate state revenues little if at all. We urge Congress to enact such business tax relief promptly.

### Background

Until 1980, interstate motor carriers were subject to strict federal regulation in an economic sense. Prior to deregulation, individual trucking companies did not typically travel in more than a few states and therefore were not exposed to taxation in many states. The great expansion in the number of trucking companies and in the scope of their operations in a largely deregulated economy has changed that. And with deregulation, states began to tap what they saw as a new source of revenue. The fact that trucking companies might be involved in critical areas of interstate commerce seems to have made them more rather than less attractive objects for taxation for states and localities, since, in any given place, most of the trucks passing through do not represent local residents but businesses from outside the state.

### Prior Congressional Action

Time and again since 1980, Congress has had to step in to protect the motor carrier industry from the effects of state and local taxation, to restrict the taxing authority of these jurisdictions and the manner in which they may administer otherwise valid taxes. Some years ago, for example, a number of states began to assess personal income taxes against interstate truck *drivers* who merely drove through in the

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<sup>1</sup> Some 90% of motor carriers operate fewer than six trucks; only some 3% operate more than twenty. American Trucking Assns., *2012 American Trucking Trends*, ATA: Arlington, VA, 2012, pp. iv-vi.

<sup>2</sup> ATA is the national trade association of the American trucking industry. It is a united federation of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the motor carrier industry. ATA's membership includes nearly 2,000 trucking companies and suppliers of motor carrier equipment and services. Directly and indirectly through our affiliated organizations, ATA encompasses over 37,000 companies and every type and class of motor carrier operation.

course of their employment. Congress responded to this intolerable situation by prohibiting any state but the state of residence from taxing an interstate transportation worker, and from requiring transportation company employers from withholding wages except for the state of residence.<sup>3</sup> Again, following a U.S. Supreme Court decision on a state tax issue that could drastically have affected interstate bus operators, Congress stepped in to give this segment of the motor carrier industry the relief it needed.<sup>4</sup> And in the Motor Carrier Act of 1980 itself, Congress provided the industry protection against discriminatory state and local property taxes and access to federal district courts to invoke that protection.<sup>5</sup>

Because of deregulation and the competition it has so successfully fostered, trucking is today a low-margin industry. Deregulation of our industry has saved the overall American economy billions in reduced transportation costs, but truck rates remain much lower in real terms than they were in 1980.<sup>6</sup> In a typical year, the average for-hire trucking operation may clear a 2% to 3% profit - very roughly, 3 to 6 cents per mile traveled by a truck. In a bad year, the average industry profit may sink close to zero.<sup>7</sup> Compared to many other industries, motor carriers commonly have little in the way of net income for states to subject to tax.

The recent recession was very hard on the trucking industry, as it was on so many other businesses. The deregulated industry had never faced times like these. Motor carriers that have survived the last few years now face both very high fuel prices and unprecedentedly high prices for the replacement of their equipment. Those higher truck prices are driven in large part by the cost of environmental regulation, and smaller trucking operations are in many instances hard-pressed to find financing for the equipment they need to buy. Unwarrantedly high state and local tax compliance costs are, for a growing number of our members, another source of hardship.

Under economic regulation, except for the largest operations, motor carriers fulfilled their state business tax obligations at home. To a great extent, this has remained the case: small trucking companies, like small businesses in other industries, file corporate tax reports in their state of domicile and in perhaps one or two others where a significant proportion of their business may occur.<sup>8</sup> Indeed, the typical smaller trucking operation has but one place of business – in its home state – and has no property or payroll in any other jurisdiction.<sup>9</sup>

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<sup>3</sup> See, 49 U.S.C. 14503.

<sup>4</sup> See, 49 U.S.C. 14505.

<sup>5</sup> Congress has granted the railroad industry much more comprehensive protection in this respect, however; compare 49 U.S. 14502(b) with 49 U.S.C. 11501(b).

<sup>6</sup> American Trucking Assns., *2012 American Trucking Trends*, *op. cit.*, p. 18.

<sup>7</sup> Statistics from 1993 through 2002. American Trucking Assns., *2004 American Trucking Trends*, ATA: Alexandria, VA, p. 15. The U.S. DOT has yet to release data for more recent years.

<sup>8</sup> All interstate trucking operations, large and small, pay vehicle registration fees and motor fuel taxes for the use of the roads to each state in which they travel. Carriers fulfill these obligations to pay taxes through two organizations – the International Registration Plan and the International Fuel Tax Agreement – which, under Congressional mandate (*see*, 49 U.S.C. 31701, *ff.*), ensure that all states administer these tax programs by means of a uniform structure that guarantees to all states the revenues due them and minimizes administrative costs for state and motor carrier alike. These operating taxes are not at issue here.

<sup>9</sup> Larger companies, of course, with facilities in multiple states, are obligated to file returns in those states as well as where their home offices are located.

## Held for Ransom

Imagine now if you will the situation of a small trucking company, one that might be based in any state and operates only a few trucks. In the course of its business, it gets a call to pick up or to deliver a load in New Jersey, a state it may enter only occasionally. In New Jersey, perhaps at a rest stop or a shipper or consignee's loading dock, an agent of the New Jersey Division of Taxation approaches the truck, identifies himself to the driver, states that the company hasn't registered for the state's corporate tax, and asks the driver how long the company has been picking up or delivering loads in New Jersey. The driver is unlikely to know, of course, but will probably venture some number of years. The state multiplies the number given by \$1,100, and the resulting sum serves as a "jeopardy assessment" of corporate tax – in practical effect the ransom for the truck, the driver, and its cargo. The truck and cargo is impounded, the driver is told to contact the company and that the truck will be released only when the money is wired to the state. If the driver protests at the outrage, he may be taken to jail. There is evidence that New Jersey has assessed some 40,000 interstate motor carriers in this manner over the last five to ten years, most of them small businesses.<sup>10</sup> New Jersey does accord a carrier the option of appealing an assessment – once it has been paid – but the process is long, laborious, expensive, and uncertain.

## Other State Campaigns

New Jersey is – so far – the only state that has attacked interstate commerce by truck so aggressively. Periodically, however, and typically in difficult economic times like the present, one or more states mount a general campaign to force smaller trucking companies located outside their borders but traveling on their roads to pay their business taxes. Such a campaign typically starts with a widespread mailing of a "nexus questionnaire" to hundreds or thousands of motor carriers that have paid operating taxes to the state.<sup>11</sup> Companies that answer the questionnaire and return it – and those that do not return it receive increasingly threatening communications from the state until they do – typically then receive a further letter from the state, advising them that the state has determined that they have nexus there and enclosing a bill, typically for several years (occasionally even decades) of back taxes, plus penalty and interest.

Particularly for smaller motor carriers, this is a cruel absurdity. Typically, the state that seeks to force interstate motor carriers to pay its business taxes not only assesses for years of back taxes, but also either imposes a minimum corporate tax or taxes gross rather than net receipts.<sup>12</sup> Through the use of these gimmicks, a state will have magnified the claimed liability out of all proportion either to the carrier's travel in the state or to its net income.

A large, unanticipated assessment for back taxes frequently represents a disaster for a small (or even a larger) motor carrier. For the more distant back years, the carrier will also be precluded by the statute

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<sup>10</sup> Note too that owner-operators that have incorporated, and many have, are also subject to the New Jersey tax, even though they may never operate in the state under their own interstate authority, but always while leased to another carrier. Sometimes, therefore, the presence of a single truck, making a single delivery of freight, is nexus – as far as New Jersey is concerned, that is – for *two* entities. In hard economic times, a jeopardy tax assessment such as those New Jersey has been in the habit of levying on the industry could easily be the last straw for a company attempting to stave off bankruptcy.

<sup>11</sup> When the Pennsylvania Department of Revenue began its "nexus campaign" against the industry about 1993, it mailed out threatening notices and assessments to some 30,000 interstate trucking companies.

<sup>12</sup> California, Massachusetts, New Jersey, New York, and Pennsylvania have all aggressively sought to tax interstate motor carriers while they imposed minimum taxes of several hundred to well over \$1,000 per year. Michigan and Pennsylvania have sought to impose taxes based at least in part on gross receipts on the industry. Other states that regularly seek to impose their business taxes on interstate motor carriers with only slight contacts with the state include Illinois, Nebraska, Ohio, Virginia, and Wisconsin.

of limitations from amending the returns it filed with its home state and claiming a credit. Last – and definitely not least – are the accountant’s fees the carrier must pay to have the newly required return prepared. These can run upwards of \$1,500 for even a single, relatively simple corporate tax report. And this is an expense the carrier can look forward to bearing in each year into the future, for once it starts filing an annual tax return with a state it cannot easily stop doing so.

It is these compliance costs – the accountant’s costs, and the sheer labor, time, and trouble involved in complying with numerous varying state requirements – of which our industry most complains. Trucking companies are not trying to avoid their tax obligations; they understand that the government services they really avail themselves of must be paid for. But they do object to paying exorbitant costs for complying with the requirements of states where they have no establishment, where they have little business, and where the nexus rules, where they published at all, are extremely vague as regards interstate trucking operations.

### State Nexus Standards

What do states commonly assert as tax nexus for an interstate motor carrier? This is often unclear; state tax statutes and regulations often have nothing specific to motor carrier nexus, and provisions adequate for less mobile industries can be perplexing for administrator and carrier alike when applied to trucking. Moreover, while it is undoubtedly the case that a state may under the U.S. Constitution levy a tax on an interstate motor carrier,<sup>13</sup> the U.S. Supreme Court has left this area of the law in obscurity. A state may make a mere assertion of nexus rather than define it exactly. Until recently, no state has sought to collect tax from a motor carrier that merely travels on its roads and has no business at all in the state, but now at least a couple of states seem prepared to try to collect money on even that slim basis.<sup>14</sup>

This uncertainty in the law leaves motor carriers in a quandary, not knowing whether to file in a given state or not. Many motor carriers, typically on the advice of their accountants, file in many more states than may be warranted, and spend thousands of dollars annually in accountants’ fees to pay perhaps hundreds of dollars or less in state taxes.<sup>15</sup> Others, in the absence of any indication from a state that out-of-state carriers need to file there, forego filing until suddenly the state changes its position and sends out bills for three, five, seven, or more years of back taxes to thousands of interstate carriers. Motor carriers commonly find it extremely difficult to pass on these compliance costs to their customers.

### State Retaliation

The year 2009 saw something new in this difficult area – an instance of one state threatening to retaliate against another because of the latter’s aggressive pursuit of business taxes motor carriers based in the former. Colorado Joint Resolution HJR09-1024, adopted May 6, 2009, and attached to this testimony, first recites the elements of the problem we are addressing here, and then encourages the Colorado Department of Revenue to increase its enforcement of Colorado business taxes against carriers based in states that have “unreasonably” burdened Colorado’s. In somewhat similar fashion,

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<sup>13</sup> In fact, the leading case in this area, *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), involved state taxation of a motor carrier.

<sup>14</sup> Nebraska and New Mexico have recently asserted nexus for motor carriers on the basis solely of such “pass-through” miles, no other contact with the state being, in their view, legally necessary. Carriers that ignore or question Nebraska’s collection efforts may have liens filed against their equipment.

<sup>15</sup> Filing in many states has another danger for interstate motor carriers: overlapping state apportionment formulas can capture more than all of a carrier’s net income for state taxation. See, for example, *Consolidated Freightways Corp. of Delaware v. Wisconsin Dept. of Revenue*, 477 N.W.2d 44 (Wisc., 1991).

South Dakota Senate Concurrent Resolution 7, adopted March 9, 2009, and also attached to this testimony, calls on the state of Nebraska to “provide tax relief and amnesty” to trucking companies based in South Dakota. The situations these resolutions seek to address are serious, but it may be evident that state efforts of this sort could easily make things worse rather than better for interstate motor carriers. A federal solution is needed. The current economic times only make this more urgent.

### A Federal Solution

For the reasons we have outlined, interstate motor carriers are now approaching Congress for relief from the efforts of states to impose their taxes on interstate trucking companies that have only very tenuous contacts with those states. Public Law 86-272 is of very limited – if indeed any – assistance to our industry, and the provisions of that law, which was both necessary and appropriate for its time, urgently need updating to reflect the Nation’s deregulated, more mobile, more service-oriented economy. Trucking companies – and interstate commerce, to which trucking is so critical – need protection from taxation by a state when they do not have a significant physical or legal establishment within its borders. Nor, because of our industry’s operations, would a solution such as that offered by the Business Activities Tax Simplification Act, H.R. 1439, provide much relief to motor carriers. The provisions of that legislation would leave the nexus rules for motor carriers largely undefined.

We recommend that Congress pass legislation that would permit a state to impose a business tax on a for-hire interstate motor carrier only if that carrier has real property or has obtained intrastate operating authority in that state, or is incorporated or has its principal place of business in that state. This will leave the vast majority of motor carriers to report and pay business taxes only at home, and would leave the aggregate state taxes collected from the motor carrier industry as a whole substantially unchanged. In many respects, our proposal closely resembles the relief we cited earlier that Congress enacted for truck drivers, when those employees were being harassed by states they merely drove through in furtherance of interstate commerce. Local government impositions on motor carriers can also be a significant burden. Congress should extend whatever relief it may enact with respect to state motor carrier taxation to cover local taxes as well.

We anticipate that a bill incorporating our solution to this pressing problem will shortly be introduced. We recommend it to the Committee’s attention, and urge Congress to enact such relief for motor carriers promptly.

We appreciate very much this opportunity to testify before the Committee.

*Robert C. Pitcher*  
*Vice President, State Laws*  
*American Trucking Associations*