EVERETT TRANSTRENDS

THE TRANSLAW GROUP, INC. EDITOR: JAMES M. BURNS

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IF YOU WISH TO END YOUR SUBSCRIPTION TO TRANSTRENDS, SIMPLY SEND AN EMAIL REQUESTING A CANCELLATION TO JBURNS@TRANSREGS.COM

COMMENTARY:

Each year as the warm weather appears so do the on-the-road tax men in New Jersey and often in New York and Pennsylvania. What do they do? In New Jersey the tax man will impound your vehicle if you are found not paying corporate tax.

Generally, the ransom will be in the five to ten thousand dollar range whether or not that is the figure you would have owed if you filed corporate tax.

Each year this office receives two or three inquires concerning New Jersey taxation after a carrier has been "caught". Please call the office with your questions concerning this very important matter. The following item will give you more information to digest!

THEY CAN'T DO THAT, CAN THEY?

You bet they can and they have. It may not seem fair but other states can tax your business even if you only make a delivery or two in that state each year! We are talking about New York, New Jersey and Pennsylvania in particular; however, almost all states have similar tax regulations on the books but may not be as active as the above named states in their enforcement actions. In fact, we just learned that Connecticut is pursuing carriers in a similar nature. So much for neighborliness.

It was in the days of James Madison that he saw the need for relief that allowed the free flow of commerce free from undue taxation, interruption of the flow of commerce and arbitrary regulations. The Commerce Clause was born by the Continental Congress to address these very issues.

48 ROBBINS ROAD
SPRINGFIELD, MA 01104
TOLL FREE 800 637 0754
TEL 413 732 8588
FAX 413 732 8553
EMAIL: information@everett-associates.com

The Commerce Clause is more than an affirmative granting of power it additionally has an inverse side know as the Dormant Commerce Clause. The Dormant Commerce Clause prohibits certain state action that interferes with interstate commerce originally the Supreme Court saw the Dormant Commerce Clause as prohibiting any form of state taxation on interstate commerce. This was stated in Leloub v Port of Mobile 127 U. S. 640, 648 (1888) (stating that "No state has the right to lay a tax on interstate commerce in any form). Strong language, but soon to fall.

On might think that standard is still in effect, however, the courts began to change the standard by allowing certain indirect "burdens" on interstate commerce without totally destroying the prohibition. This action began in the late 1890's and early to mid 1900's.

What we have today is a scheme that allows for taxation of interstate commerce when there is a showing of a substantial nexus. And, in recent years the standard for "substantial nexus" has eroded to the point that a single shipment is enough to trigger the particular states taxation laws. The only good news is that not every state is as aggressive as other states such as Pennsylvania, New York and New Jersey. Many carriers see the occasional property rendition tax forms that yield little tax such as Arkansas, Kentucky and Kansas. But as states seek new revenues you can expect to see a more aggressive stance towards such taxation.

RANSOM: The three states mentioned above are very aggressive in assessing business tax and, in fact, New Jersey is so aggressive that they will even impound your vehicle until you pay them a "ransom" to release your vehicle and you still have to make the necessary tax filings. You may find that the ransom was much more than the actual tax and you will have a difficult time trying to get the balance back, if ever.

In 2002 more than 6.2 trillion dollars worth of goods moved by truck. That a lot of money ripe for opportunistic taxation. Add to that figure the fact that 221 billion dollars was generated in carrier operating revenue and employed some 3.1 million truck drivers. All of which are potentially subject to some type of taxation as the truck rolls. As previously stated the Dormant Commerce Clause was slowly eroded during the first part of the 1900's. It was in 1977 in Complete Auto Transit, Inc v Brody 430 U. S. 274 (1977) that the courts brought the Dormant Commerce Clause and due process considerations together. Under the Complete Auto case a tax will be sustained if it is

- Applied to an activity with a substantial nexus with the taxing authority.
- Is fairly apportioned.
- Does not discriminate against interstate commerce
- Is fairly related to the services proved by the state.

The states that do enforce the collection of such taxes have obviously made sure they are in compliance with this 4 prong test. Routinely we see various trucking interests fighting the imposition of new taxes if they are not in compliance with the above test.

48 ROBBINS ROAD
SPRINGFIELD, MA 01104
TOLL FREE 800 637 0754
TEL 413 732 8588
FAX 413 732 8553
EMAIL: information@everett-associates.com

Motor carriers can be subject to as many as 6000 taxing jurisdictions. The motor carrier industry as a whole has been on the front line fighting efforts to place additional tax burdens on carriers.

The case that probably best explains the current climate and the aggressiveness of Pennsylvania, New Jersey and New York was a 1948 case, Central Greyhound Lines, Inc. v Mealy when Central Greyhound was assessed taxes for all gross receipts on a trip that originated in New York but traversed New Jersey and Pennsylvania and back into New York on the way to Buffalo. Greyhound Central argued that PA and NJ wanted their portion of tax as well and that only 57 percent of all miles were actually in New York. New York wanted all of the tax!

THE SOLUTION: There is no solution other than to fight each new tax. Changing existing laws to eliminate these taxes would certainly not be met well by the individual states. However, Pennsylvania and New Jersey offer an amnesty program that will enable a carrier to avoid the unpleasantness of an impoundment while avoiding the unreasonable ransom. The program allows the carrier to come forward, file documents and determine what taxes are due. The carrier is given an opportunity to file the appropriate tax filings and not be stopped in a routine highway check and then be impounded.

With the warm weather approaching carriers should be warned that these states will be on the lookout for carriers who are not paying tax. In some instances the state will hire independent companies that handle the “on the road” activity and they only get paid when they stop a truck. They don’t let you off because then they won’t get paid.

Call the office for more information on the various amnesty programs that are available at this time. That is your best course of action.

PRIVATE ATTORNEY TO INVESTIGATE BIG DIG AS PRICE TAG GOES UP

Massachusetts attorney general has named a special prosecutor to investigate last year’s tunnel collapse in Boston’s Big Dig project that left one woman dead.

One would have thought that Mitt would have taken care of this before he left office and headed out to grab the big prize!

Paul Ware, chairman of Goodwin Proctor, one of the biggest private litigation firms in the country, will head up the investigation during the next four months to determine if criminal charges will be pressed, according to The Boston Globe. It is our guess that the investigaton will result in a no finding of criminal intent based on the sloppy work that is quite evident throughout the Big Dig system. Have you driven through this labyrinth lately? Good luck to Mr. Ware. His good character will certainly be tested on this one.

As you will recall the incident happened in July 2006, when a chunk of the ceiling from one of the tunnels in the massive highway project came loose, crushing a car below and killing passenger

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Milena Del Valle. Surprise, since then, numerous flaws and needed repairs have been found in the tunnels, giving way to accusations of shoddy workmanship and shady business practices from the project's contractor, Bechtel/Parsons Brinkerhoff.

Meanwhile, the Massachusetts Turnpike Authority has approved an additional $6 million for repairs to the project, bringing the total cost of repairs to $31 million and that is just for the repairs. The total cost of the Big Dig will, we are sure, approach 20 Billion dollars when all is said and done.

GIULIANI SELLS CONSULTING FIRM TO MACQUARIE

Undeclared Republican presidential candidate Rudy Giuliani has sold his consulting firm to the Australian company involved in the 75-year lease of the Indiana Toll Road and the privatization of other U.S. infrastructure.

The New York Times reported that Macquarie Bank of Australia – parent company of Macquarie Infrastructure Group – has acquired Giuliani Capital Advisors.

Macquarie and a Spanish company Cintra combined in 2005 to pay the state of Illinois $1.83 billion to lease the eight-mile Chicago Skyway for 99 years. The same consortium paid the state of Indiana $3.85 billion in 2006 for the rights to the 157-mile Indiana Toll Road.

Giuliani reportedly profited between $70 million and $90 million from the sale of the consulting and investment company he founded in 2004. A campaign spokeswoman said in a statement that the transaction was part of Giuliani's plan to focus on his campaign. I think that Rudy's ungrateful son should take a second look at reconciling with dear old dad and Judy after this transaction is finished! Meanwhile, Macquarie continues to reign as a big player in the toll road business.

F. O. B. ORIGIN – F. O. B. DESTINATION

The term 'F.O.B. origin or place of shipment or the term "F.O.B. destination" or "place of destination", is often misused by shippers and receivers alike. These terms are to be differentiated from the terms "prepaid" and "collect" which refer only to the party responsible for the payment of freight charges.

F.O.B. place of shipment (or "origin") - U.C.C. 2-319 provides that where "F.O.B. place of shipment" is specified, the seller is bound to ship the goods at that place and bears the risk and expense of putting the goods in possession of the carrier. Thereafter, the risk of loss is on the buyer. F.O.B. place of destination - When the term is "F.O.B. place of destination", the seller must transport the goods to that place at his own risk and expense and tender proper delivery. Thus, the risk of loss is on the seller during transit.

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The term used determines who has the risk of loss during transit and the correct usage of the term is very important when the consignor or consignee wants to be free from cargo loss and damage during transit.

The first step in any claims case is to ascertain who has risk of loss in transit. This concept is significant because it determines who has the legal right or obligation to file the claim. And who is the proper "party in interest" in the event of litigation. In practice, claims are very often not filed by the party who has risk of loss. For example, a large shipper which has an experienced traffic department may file claims for its customers as a courtesy or service. However, if the shipper does not bear risk of loss for the shipment, it has no legal obligation to do so.

Under common law and the old Uniform Sales Act, which has been replaced in all states by the Uniform Commercial Code, risk of loss generally followed "title" to the goods. Under the Uniform Commercial Code, risk of loss is related to "delivery" of the goods. While the parties may specify otherwise in the contract of sale, there are certain presumptions, based on the "terms of sale" used.

Caution is in order where the contract is silent, or there is no written purchase order, invoice, etc. The general rule is that risk of loss passes to the buyer upon delivery to the carrier at the place of shipment. The custom and usage of the particular trade or business are also relevant in determining risk of loss in such situations. A common misconception is that the party who pays the freight is the one who has risk of loss in transit. This is not true; always refer to the "term of sale" in the contract to determine who has risk of loss.

A shipper, therefore, who wishes to insulate itself from risk of loss while the goods are in transit, should ship all goods "F.O.B. origin". It does not matter who pays the freight charges, however, a shipment designated as "F.O.B. origin" with prepaid freight charges should be evidenced with underlying documents with the actual "terms of sale" set forth in a sales contact or purchase order or some other similar document between the consignor (shipper or seller) and the consignee (receiver or buyer) that set forth the terms of the sale and the fact that the shipment was intended to be "F.O.B. origin".

Certainly, the term of sale should indicate that the shipment is "F.O.B. origin" which means that the consignee (receiver or buyer) has the risk of loss in transit.

ST-10 EXCISE TAX OBLIGATION

Department ST-10 filing requirements were, generally, unknown within the motor carrier industry in regard to the affect of the excise tax on the value of fuel consumed on the Massachusetts Turnpike where the miles were adjusted on the International Fuel Tax Agreement filing for the above stated periods. Basically, the State wants its use tax on the fuel that is backed off of the IFTA return when MA Pike miles are not reported. MA Pike miles are exempt from IFTA, however, MA state law allows for the collection of the use portion of the highway use tax.

48 ROBBINS ROAD
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Many years ago when the tax rate was set at .21 cents per gallon 16 cents was considered “fuel tax” and .05 cents was considered “use” tax. Those figures were set when a gallon of fuel cost just about a dollar and the .16 cents was static but the .05 cents when calculated against usage one would find that the 5% could be more than a nickel since fuel has gone up drastically since the setting of the original fuel tax increase that brought the tax to .21 cents per gallon from the prior level of .17 cents.

This procedure affects MA based and non-MA based IFTA registrants. Obviously, I must advise all tax payers that they must file the return. Clients who use TaxTrakTM, our fuel tax reporting service will automatically receive the tax filing in early February for filing no later than April 16, 2007.

SOPHISTICATED SHIPPERS – WHO ARE THEY?

Since the sun-setting of the Interstate Commerce Commission we often hear the term “sophisticated shipper” used in conjunction with freight claims. What does it mean?

Generally, the courts have held shippers to be “sophisticated” and therefore responsible for their actions when the shipper is a commercial enterprise and is capable of understanding the documents it signs. In other words, the courts are holding shippers responsible for knowing the law.

Deregulation was supposed to create a more competitive motor carrier/shipping industry, however, like many industries; companies often downsize and cut back staff resulting in a loss of talent in the shipping area. This can translate into a “less sophisticated” traffic department, but, the shipper is still charged with being a sophisticate shipper and fully responsible for compliance with all rules and regulations. The following actual cases demonstrate the pitfalls of a shipper assuming a set of circumstances and trying to plead “ignorant” of applicable law. It just doesn’t work!

UNAUTHORIZED UNLOADING DOES NOT UNDERMINE LIMITATION OF LIABILITY

Lars T., Ltd. v. New Penn Motor Express, Inc., 2000 U. S. Dist. LEXIS 12254 (D. Maine 2000)

> It’s a pretty straightforward limitation of liability case, this time in the context of a shipper who hired a carrier to move a 150-pound engine. The only real issue in this case was whether use of a front-end loader by the carrier’s driver without authorization from the shipper somehow nixed the carrier’s entitlement to limited liability. Finding that the loading still was “related to the movement of the plaintiff’s property”, which was enough to keep the carriage within Carmack, the court didn’t give much credence to the shipper’s laments.

48 ROBBINS ROAD
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The shipper tried to claim the carrier's bill of lading was ambiguous and that fifty cents a pound was unreasonable as a limited amount. These arguments didn't fly either. The carrier carried the day.

LUMPING AND LUMPERS

Often clients request information concerning the rules and regulations that govern the practice of "lumping". This is not to be confused with Lumpy Rutherford from the *Leave It To Beaver* show. Feel free to call the office to discuss how these rules effect your operations.

§ 14103. Loading and unloading motor vehicles

(a) Shipper Responsible for Assisting.— Whenever a shipper or receiver of property requires that any person who owns or operates a motor vehicle transporting property in interstate commerce (whether or not such transportation is subject to jurisdiction under subchapter I of chapter 135) be assisted in the loading or unloading of such vehicle, the shipper or receiver shall be responsible for providing such assistance or shall compensate the owner or operator for all costs associated with securing and compensating the person or persons providing such assistance.

(b) Coercion Prohibited.— It shall be unlawful to coerce or attempt to coerce any person providing transportation of property by motor vehicle for compensation in interstate commerce (whether or not such transportation is subject to jurisdiction under subchapter I of chapter 135) to load or unload any part of such property onto or from such vehicle or to employ or pay one or more persons to load or unload any part of such property onto or from such vehicle; except that this subsection shall not be construed as making unlawful any activity which is not unlawful under the National Labor Relations Act or the Act of March 23, 1932 (47 Stat. 70; 29 U.S.C. 101 et seq.), commonly known as the Norris-LaGuardia Act.

§ 14905. Penalties for violations of rules relating to loading and unloading motor vehicles

(a) Civil Penalties.— Whoever knowingly authorizes, consents to, or permits a violation of subsection (a) or (b) of section 14103 or who knowingly violates subsection (a) of such section is liable to the United States for a civil penalty of not more than $10,000 for each violation.

(b) Criminal Penalties.— Whoever knowingly violates section 14103 (b) of this title shall be fined under title 18 or imprisoned not more than 2 years, or both.

NEW RULES REGARDING HIGHWAY USE TAX PERMITS AND STICKERS

The New York State Department of Taxation and Finance has issued a press release wherein they have re-stated the procedures to follow concerning the Highway Use Tax Permit regulations. It

48 ROBBINS ROAD
SPRINGFIELD, MA 01104
TOLL FREE 800 637 0754
TEL 413 732 8588
FAX 413 732 8553
EMAIL: information@everett-associates.com

may sound confusing; however, the highlighted text will explain the new procedures. Should you have any questions concerning the new procedure, please feel free to call this office.

Please remember that you are still required to obtain the permits for each vehicle but decals will no longer be issued. You must maintain the permits in your office or you may put them in the vehicle with a copy to be held at the office and you must still file and pay the appropriate tax on a monthly or quarterly basis depending on each individual carrier's total tax. Carriers must pay monthly when the total annual HUT tax reaches a certain level. If you qualify as a monthly filer the New York State Department of Taxation and Finance will be the first to let you know! The following text is the official wording issued by New York.

> Based on a change in Federal law (Public Law 109-59) and its interpretation by the Federal Motor Carrier Safety Administration, effective immediately, motor carriers subject to the highway use tax imposed under Article 21 of the Tax Law, are no longer required to either display highway use tax stickers or to carry highway use tax permits in their motor vehicles. Please note that this change does not relieve a carrier's obligation to file returns and pay the highway use tax. The revenue from this tax is pledged to the Dedicated Highway and Bridge Trust Fund and is used exclusively to construct, maintain, and repair the State's highways and bridges to ensure they are in a safe condition for motor carriers and motorists in New York State.
>
> Motor carriers must still obtain highway use tax permits for motor vehicles subject to the highway use tax. However, stickers will no longer be provided with the permits. Carriers should retain the permits, even though they are no longer required to be carried in the vehicles, to assist them in filing highway use tax returns and paying the tax. These new rules apply to all types of permits (e.g., automotive fuel carrier permits, trip permits). The fees for all permits remain the same.
>
> It should be noted that at the time this memorandum was issued, the Executive Budget proposal contains legislative amendments to Article 21 which will eliminate the permit and sticker requirements. In lieu of permits and stickers, the proposed legislation will require motor carriers to apply for a certificate of registration for each motor vehicle subject to tax. It also provides that rather than obtaining a certificate of registration, a carrier may opt to continue to use the existing highway use tax permits and stickers until such time as the Commissioner requires a renewal registration of vehicles.

CONNECTICUT BILLS ADDRESS ROAD SAFETY ISSUES

A bill moving through the Connecticut statehouse is intended to improve safety for drivers on Avon Mountain. The bill is one off several efforts put before lawmakers this year that are relevant to trucks operating in the state.

48 ROBBINS ROAD
SPRINGFIELD, MA 01104
TOLL FREE 800 637 0754
TEL 413 732 8588
FAX 413 732 8553
EMAIL: information@everett-associates.com

Sponsored by Sen. Jonathan Harris, D-West Hartford, the bill would authorize the cities of Avon and West Hartford to conduct a pilot program of automated speed enforcement on Route 44 over the mountain. Violators would face up to $150 fines. The cameras snap pictures of red-light runners or speeders. A ticket is mailed to the vehicles' owners, regardless who was driving at the time.

The roots of Harris' bill can be traced back to a deadly truck crash in July 2005 that killed four people and injured 19 in the town of Avon. It happened when a dump truck slammed into other vehicles that were stopped at the bottom of the mountain's steep grade at the intersection of state Routes 44 and 10. Since then, various safety-related bills have come before lawmakers in the state.

Another bill in the committee would make certain truck drivers responsible for paying more tax to the state. Sponsored by Rep. DebraLee Hovey, R-Monroe, the measure – HB5287 – would allow towns to levy a tax on each truckload of rocks, dirt or other materials removed from a construction site. I think this proposal is just unconscionable. The state picks on rocks and dirt thinking that nobody cares about the taxes to be levied, however, it is only a matter of time that this slippery slope will lead to a general sales tax on freight movement and then the exodus will begin. Massachusetts tried this plan many years ago.

Rep. Joseph Serra, D-Middletown, offered a bill that is intended to aid businesses in the state that do truck repairs. The measure – HB5031 – would exempt the sales tax on parts and labor for repairs to trucks and motor vehicles weighing more than 26,000 pounds. Serra wrote that the exemption potentially would "stop major fleets from going out of state for repairs, thus keeping the Connecticut repair industry competitive."

Other bills of interest have been killed. They failed to meet a Monday, March 19, deadline to advance from the Joint Committee on Transportation.

Among the legislative efforts that will need to wait until next year for consideration is a bill intended to limit the time of day that trucks can move hazardous materials on highways in the state. Sponsored by Sen. Bill Finch, D-Bridgeport, the bill – SB434 – would have limited hauling hazmat on affected routes to between 10 p.m. and 6 a.m. I don't think that this proposal would stand a Federal court appeal if passed. Washington, DC tried to limit hazmat moves from even entering the District and that was overruled.

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48 ROBBINS ROAD
SPRINGFIELD, MA 01104
TOLL FREE 800 637 0754
TEL 413 732 8588
FAX 413 732 8553
EMAIL: information@everett-associates.com