

Converting to a Destination Basis

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The Streamlined Sales and Use Tax Agreement (SSUTA) is designed to collect and administer sales and local sales and use taxes imposed on a destination basis. SSUTA does provide for an origin-based alternative but that really is not a viable option.

For New Mexico (and most states), there are two major fiscal points to the **Wayfair** decision. The first is that tax equity can be established between our own main street merchants and their out-of-state competitors. The second is that local gross receipts/compensating taxes can be imposed and collected on business done by out-of-state vendors with local residents. This works only on a destination basis.

If New Mexico wishes to capture the benefits to local governments of this decision, its gross receipts tax system can no longer be the outlier it has long been. It has to be converted to a destination basis—at least for transactions in tangible personal property.

If it does convert, then it might as well look as much like a SSUTA state as possible, for two reasons. One, vendors have experience in dealing with SSUTA states; adding New Mexico to the list would not be a big deal. Two, the US Supreme Court cautioned that one of the reasons it was approving South Dakota's tax scheme was the minimal administrative burden it imposed on out-of-state merchants because that state is a SSUTA member.

I have separately outlined a blow-by-blow comparison highlighting the convergences and differences between the Gross Receipts and Compensating Tax Act (GR&CTA) and SSUTA. Here I outline only major taxation (as opposed to administration) issues.

1. **Sourcing Rules:**

SSUTA itself, particularly Section 310, gives guidance on how to construct destination sourcing rules that have been tested elsewhere. Following its language would automatically align the GR&CTA with SSUTA, at least for sales of tangible personal property. Rules on leasing of tangible personal property may be an issue and we may be on our own for rules on services.

SSUTA has extensive rules on sourcing of digital products. New Mexico law and practice has not kept up with the times in this area. It may be most efficient simply to adopt SSUTA terminology and rules as far as we can.

2. Caps and limits

As a practical matter, out-of-state vendors cannot reasonably be expected to keep track of whether a particular sale to a particular customer exceeds a threshold amount. Either a transaction is fully taxable or fully deductible. Fortunately GR&CTA has only 3 such provisions. Unfortunately one is 7-9-65 & -77 (chemicals and reagents). These rules do not apply to sales tax holidays.

3. Partial deductions

SSUTA Section 308 prohibits imposition by either the state or its local governments of multiple rates (except for food and drugs). What this means is that, like the previous section, an item must be fully taxed or fully deductible. Partial deductions are not allowed: 7-9-62 (50% for agricultural implements, etc.) and 7-9-83 & -84 (55% or 40% for jet fuel). The most important effect of this rule would be to bar the technique of phasing in a costly deduction.

4. Transportation.

There is only one instance in which a local tax base can diverge from the state tax base, which contravenes SSUTA Section 302. Transportation is a service and, as a service, the default sourcing rule is that receipts are to be reported from the firm's place of business (not necessarily the origin or termination of the transportation service). The several municipal and county local option gross receipts taxes, however, contain provisions that exempt persons transporting people or property from municipal tax if the transportation crosses a municipal boundary and from county tax if the transportation crosses county boundaries. No one now knows what purpose these exemptions were to serve and not all transportation companies are aware of them. And clearly there is a conceptual conflict between the sourcing rule and the special exemption rules. Whether transportation, like other services, is to remain on an origin basis or to be converted to a destination basis, these special exemptions serve no function and should be replaced with specific sourcing rules.