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To: Uniformity Sales and Use Tax Subcommittee
From: Roxanne Bland, Counsel
Date: November 7, 2008
Subject: Sales and Use Tax Uniformity Recommendations and SSUTA

At its July 2008 meeting, the subcommittee directed staff to review the Commission's adopted sales and use tax uniformity recommendations for purposes of comparison with the Streamlined Sales and Use Tax Agreement (SSUTA)¹. To date, there are five recommendations related to sales and use taxes that may be affected by SSUTA.

1. Applicability of Sales and/or Use Tax to Sales of Computer Software

http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Uniformity_Projects/A_-_Z/SalesUseCompSoftware.pdf (CTRL + CLICK)

Adopted by Commission: July 1988

This recommendation, a guideline in the form of a statute, is intended to provide a uniform standard to distinguish between “canned” and “custom” computer software in those states that differentiate the two for sales and use tax purposes.² The recommendation assumes that a signatory state taxes “canned” (or pre-written) software as tangible personal property, while exempting “custom” software as a service. The guideline further contains definitions of the terms: a) computer; b) computer software; c) custom software; and d) canned software.

The SSUTA applies to sales of computer software, and contains definitions for “computer”, “computer software”, and “pre-written computer software.” A comparison of the MTC and SSUTA definitions appears below.

MTC Guideline:

¹ <http://www.streamlinedsalestax.org/DOCUMENTS/SSTUA/SSUTA%20As%20Amended%209-05-08.pdf> (CTRL + CLICK)

² The guideline states that its goal is to “establish a uniform standard by which the signatory states will distinguish between canned and custom sales of computer software. It is relevant for only those states which differentiate between the two for the purpose of distinguishing between taxable and non-taxable sales of computer software.”

Computer, as used here, means a programmable machine or device (including word processing equipment and testing equipment) having information processing capabilities and usually consisting of a central processing unit, internal memory and input and output peripherals. The term includes a programmable microprocessor and/or any other integrated circuit embedded in manufactured machinery or equipment.

SSUTA:

“**Computer**” means an electronic device that accepts information in digital or similar form and manipulates it for a result based on a sequence of instructions.³

MTC Guideline:

Computer software, as used here, means and includes programming, i.e., a set of statements or instructions which, when incorporated into a machine-usable data processing storage or communication medium or device (such as printed material, cards, disks, tapes or modems), is capable of causing a computer to indicate, perform or achieve a particular function, task or result.

SSUTA:

“**Computer software**” means a set of coded instructions designed to cause a “computer” or automatic data processing equipment to perform a task.

MTC Guideline:

Canned software, as used here, means and includes programming that has general applicability and/or has not been prepared at the special request of the purchaser to meet his particular needs. It is sometimes known and/or described as "pre-written programming." Evidence of general applicability is to be found in the selling, licensing and/or leasing of the identical program more than once. A program may qualify as custom software for the original purchaser/lessee/licensee but become canned software with respect to all others. The signatory states treat the sale of canned software as either a taxable sale of, lease of or license to use tangible personal property. Examples of prominent canned programs are: Bank Street, Crossfire, D-Base III, DOS, Electric Desk, Fun Pack, Kings's Quest, Lisa, Lotus 1-2-3, MacEdge, MacPaint, MacPhone, MacVegas, MacWrite, MegaMerge, Soft Maker II, Solomon II, Ventura, Word Perfect, Word Proof, Wordstar, and Writing Assistant (IBM).”

SSUTA:

³ SSUTA, Appendix C, Part II, Product Definitions.

“Prewritten computer software” means “computer software,” including prewritten upgrades, which is not designed and developed by the author or other creator to the specifications of a specific purchaser. The combining of two or more “prewritten computer software” programs or prewritten portions thereof does not cause the combination to be other than “prewritten computer software.” “Prewritten computer software” includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than the specific purchaser. Where a person modifies or enhances “computer software” of which the person is not the author or creator, the person shall be deemed to be the author or creator only of such person’s modifications or enhancements. “Prewritten computer software” or a prewritten portion thereof that is modified or enhanced to any degree, where such modification or enhancement is designed and developed to the specifications of a specific purchaser, remains “prewritten computer software;” provided, however, that where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for such modification or enhancement, such modification or enhancement shall not constitute “prewritten computer software.” A member state may exempt “prewritten computer software” “delivered electronically” or by “load and leave.”

Also note that the SSUTA specifically includes prewritten computer software in its definition of tangible personal property:

“Tangible personal property” means personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses. “Tangible personal property” includes electricity, water, gas, steam, and *prewritten computer software*” (emphasis added).⁴

MTC Guideline:

Custom software, as used here, means and includes programming which results when a user purchases the services of a person to create software which is specialized to meet the user's particular needs. The term includes those services that are represented by separately stated and identified charges for those modifications to an existing pre-written program which are made to the special order of the customer, even though the sale, lease or license to use the existing program remains taxable. The signatory states treat the sale of custom software as a sale of services on the basis: 1) that the user has purchased not tangible personal property but services; and 2) that the resulting software is simply the means by which those services are delivered to the user.

SSUTA:

None.

⁴ SSUTA, Appendix C, Part I, Administrative Definitions.

2. Uniform Principles Governing State Transactional Taxation of Telecommunications Services—Vendee and Vendor Versions

http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Uniformity_Projects/A_-_Z/UniformPrinciplesGovStateTransTaxofTelecomm.pdf (CTRL + CLICK)

Adopted by the Commission: July 1993

The purpose of this MTC uniformity recommendation, as stated in its introductory section, is to set forth “uniform principles to govern state transactional taxation of *basic* telecommunication services, as distinguished from *enhanced* services...principles thought to be applicable to transactional taxation of the provision of telecommunications regardless of the form of transactional tax implemented” (emphasis in original). There are two versions of this recommendation, one applicable to vendee states (liability for the tax rests on the purchaser) and the other applicable to vendor states (liability rests with the seller). Section 1 in both the vendor and vendee versions, concerning definitions, are identical. Section 2, Imposition of Tax/Credits/Exemptions differ only with respect to §2(b) (preventing multijurisdictional taxation) with the phrase “taxpayer’s seller” (vendee version) and “taxpayer’s purchaser” (vendor version), due to the differing parties bearing liability for the tax, which also explains the more dramatic differences between Sections 3, “Collection of Tax” (vendee version) and “Reimbursement of Tax” (vendor version), respectively.

The purpose of the SSUTA is to provide uniform definitions and rules for sourcing sales of “goods” and some services, including sales of telecommunications services.

Section 1. Definitions

As the list of definitions contained the MTC Guideline and the SSUTA are extensive, this memo presents the lists in chart form. Also note that entries contained in the MTC Guideline will not always have a counterpart in the SSUTA list; however some definitions in the MTC list appear in other sections of the SSUTA Library of Definitions or in an entirely different section of the Agreement.

MTC Guideline	SSUTA—Library of Definitions
Bad Debts ⁵	Ancillary Services
Department	Conference Bridging Services
Director	Directory Assistance
Gross Revenue	Vertical Service
Intrastate Telecommunications	Voicemail Service
Interstate Telecommunications	Telecommunication Service
International Telecommunications	800 Service

⁵ The SSUTA definition of “bad debt” (SSUTA, Article III, §320) refers to 26 U.S.C. §166.

Person	900 Service
Private Line	Fixed Wireless Service
Retailer	Mobile Wireless Service
Sale at Retail	Paging Service
Sale of Intrastate, Interstate or International Telecommunications	Prepaid Calling Service
Service Address	Prepaid Wireless Calling Service
State	Private Communications Service
Taxpayer	Value-Added, Non-Voice Data Service
Telecommunication	Telecommunications Non-Recurring Charges (Appendix C, Part I, Administrative Definitions)
	Modifiers of Tax Base/Exemption Terms
	Coin-Operated Telephone Service
	International
	Interstate
	Intrastate
	Pay Telephone Service
	Residential Telecommunications Service
	Telecommunications Sourcing Definitions, §315
	Air-to-Ground Radio Telephone Service
	Ancillary Services
	Call-by-Call Basis
	Communications Channel
	Customer
	Customer Channel Termination Point
	End User
	Home Service Provider
	Place of Primary Use
	Post-paid Calling Service ⁶
	Service Address
	Examples of MTC Definitions Appearing in Other Sections of the SSUTA
	Retail Sale or Sale at Retail (Appendix C, Part I, Administrative Definitions)
	Section 208: Person (SSUTA, Article II, Definitions)

⁶ Some of the definitions appearing in this section of the SSUTA, such as “prepaid calling service” or “prepaid wireless service”, are not listed here as they are duplicated in the Library of Definitions.

While the majority of the definitions contained in the MTC Guideline do not square with those in the SSUTA, there are a few that appear to be compatible. For example, compare the definitions of “private line (Guideline) to “private communication service” (SSUTA):

MTC Guideline:

(j) "**Private line**" means a dedicated, non-traffic sensitive, service for a single customer that entitles the customer to the exclusive or priority use of a communications channel or group of channels from one or more specified locations to one or more specified locations.

SSUTA:

“Private communications service” means a “telecommunications service” that entitles the customer to exclusive or priority use of a communications channel or group of channels between or among termination points, regardless of the manner in which such channel or channels are connected, and includes switching capacity, extension lines, stations, and any other associated services that are provided in connection with the use of such channel or channels.

Section 2. Imposition; Credits; Exemptions.

Section 2(a) of the MTC Guideline refers to the imposition of a single, state-level transaction tax, but unlike the SSUTA, does not address the possibility for centralized administration of state and local level taxes. Section 2(b), concerning credits, involves sourcing issues which are addressed by the SSUTA at Article III, §314. Section 2(c), regarding exemptions, is a general statement of the limitations federal law places on state tax authority, but the SSUTA eases some of those limitations for participating states.

Section 3. Collection of Tax (Vendee Version); Reimbursement of Tax (Vendor Version)

In the main, these provisions specify the duty of a retailer to collect tax from the purchaser, clarifies the legal incidence of the tax,⁷ and further provides that the tax should be separately stated (presumably on an invoice) “whenever possible.” All other aspects of administering the tax are as “prescribed by the Department.”

3. Uniform Statute/Regulation, Sales and Use Tax Priority—Construction Inventory

http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Uniformity_Projects/A_-_Z/SalesandUseTaxPriority.pdf (CTRL + CLICK)

⁷ In the Vendee version, the tax constitutes a debt of the retailer to the state as well as of the purchaser to the retailer.

Adopted by Commission: July 2004

The purpose of this recommendation is to avoid duplicative taxation of construction inventory in instances where items purchased in one state (and the applicable tax paid) are subsequently removed from inventory to be used in another state, which may impose a sales or use tax on the items removed from inventory. This recommendation does not appear to conflict with SSUTA as it addresses credits against sales or use taxes “properly paid “upon the initial purchase [or] withdrawal from inventory.”

4. Uniform Regulation for Determining Sales and Use Tax Priority for Leasing Transactions

http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Uniformity_Projects/A_-_Z/SalesandUseTaxPriorityforLeasingTransactions.pdf (CTRL + CLICK)

Adopted by Commission: October 2002

The purpose of this regulation is to establish standard rules “(1) for claiming tax credits to avoid double or multiple taxation of portions of a single leasing transaction, and (2) to provide a basis for comparing the impact of different forms of state transaction taxes on a leasing transaction.” The SSUTA provisions concerning leasing transactions⁸ address sourcing issues involved with such transactions, whereas this recommendation, similar to the recommendation regarding construction inventory, addresses procedures to claim credits for an accelerated sales tax paid to the state where the lease originated, and the property has been subsequently moved to a different state.

5. Provision for the Collection of Tax on Fundraising Transactions

http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Uniformity_Projects/A_-_Z/ProvisionforCollectionofTax.pdf (CTRL + CLICK)

Adopted by the Commission: July 2000

This recommendation is intended to relieve charitable and non profit organizations from the burden of collecting and remitting sales tax for goods purchased and sold for fundraising purposes, instead placing the burden on the wholesaler/distributor but only if the wholesaler/distributor is registered in the state where the transaction takes place. It appears to bear some relationship to the SSUTA’s Section 317, Administration of Exemptions, and particularly to the administration of entity-based exemptions:

⁸ SSUTA, §310(B). General Sourcing Rules.

“A member state shall administer use-based and entity-based exemptions when practicable through a direct pay permit, an exemption certificate, or another means that does not burden sellers.” (SSUTA, §317(A)(7)).