

SSTP – MPU White Paper

Purpose:

The purpose of this Paper is to provide guidance as to the appropriate application of the Multiple Points of Use (MPU) provision contained in the Streamlined Sales and Use Tax Agreement (the “Agreement” or “SSUTA”). The MPU provision was revised and amended on April 16, 2005. Because few states adopted the previous provision, this Paper is primarily addresses the revised MPU provision.

I. MPU Qualifications

A. Business Purchaser

The MPU is only applicable to business purchasers. This limitation was included within this MPU definition because business purchasers are more likely to be using products in more than one jurisdiction. However, there is no definition of “business purchaser” within the Agreement. The MPU provision should be made available to all types of business purchasers, regardless of the purchaser’s entity classification (e.g., corporation, partnership, or sole proprietorship). Safe harbors for qualification for business purchaser status should be provided states adopting the MPU provision, including: qualification for doing business in at least one SSTP member state, a federal or state tax identification number indicating a business entity, and any other information that substantiates a “business purchaser.”

B. Direct Pay Permit Non-Holder: Section 312

The MPU is not generally afforded to a business purchaser who is holding a direct pay permit. Direct pay permits are covered under section 326 of the Agreement. Specifically, section 326 of the Agreement provides that a member state shall allow the holder of a direct pay permit to purchase otherwise taxable goods and services without the payment of sales tax to the supplier of the good at the time of the purchase. The states may create additional requirements for obtaining a direct pay permit. However, a holder of a direct pay permit may or may not be afforded MPU treatment under a number of instances. Specifically, the availability of MPU should be considered in the following circumstances: (1) purchasing a product related to the direct pay permit; (2) purchasing a product unrelated to the direct pay permit; and (3) purchasing a product related to the direct permit but the purchaser does not provide the seller with the direct pay permit.

1. Purchase Related to Direct Pay Permit

In the first instance, a holder of a direct pay permit directly related to the purchase at issue will be unable to use the MPU. As an example, consider an automobile manufacturer. This automobile manufacturer may be the holder of multiple direct pay permits, including a direct pay permit that applies to software purchases. If the automobile manufacturer purchases software that otherwise qualifies for MPU treatment, and the automobile manufacturer notifies its seller

that it holds an applicable direct pay permit, then the MPU provision is not available and the transaction will be sourced under the applicable sourcing regime (i.e., the sourcing provisions contained in section 310 of the Agreement).

2. Purchase Unrelated to Direct Pay Permit

In the second instance, a holder of a direct pay permit will have the ability to utilize the MPU if the purchase is unrelated to its direct pay permit. In this instance, the direct pay permit does not prohibit the application of the MPU provision. Consider again the automobile manufacturer with its multiple direct pay permits as an example. If it purchases accounting services that qualify for MPU treatment and does not hold a direct pay permit related to the purchase of accounting services, the automobile manufacturer will be afforded the ability to use the MPU. In other words, the mere holding of a direct pay permit will not disqualify a purchaser from MPU treatment for transactions unrelated to the scope of the direct pay permit. The direct pay permit must relate to the transaction in order for disqualification of MPU treatment.

3. Purchase Related to Direct Pay Permit Where Direct Pay Permit Is Not Provided to Seller

In the third instance, a holder of a direct pay permit that applies to the purchase at issue may relieve the seller from collecting sales or use tax if the sale otherwise qualifies for MPU treatment but the seller is unaware of the direct pay permit. For instance, if an automobile manufacturer holds a direct pay permit related to the purchase of software and purchases software from a software vendor who is unaware that that the automobile manufacturer holds a direct pay permit, then the seller will be permitted to accept the exemption certificate indicating the MPU exemption applies. Presumably, the automobile manufacturer may have additional liability due to its failure to qualify for MPU treatment. The software seller will be protected from liability.

C. Types of Transactions

The MPU applies to three kinds of transactions, including sales of: (1) digital goods; (2) computer software; and (3) services.

1. Digital Goods

The discussion relating to the digital goods is reserved until SSTP completes its definition of digital goods. In the interim, states may define digital goods without limitation.

2. Computer Software

The MPU applies to the sale of computer software. As a result of the April 16, 2005 amendments made to the SSUTA, the MPU is applicable to all sales taxable transactions involving software (provided the transaction otherwise complies with MPU requirements).

Section 312 (A) contains a software specific exclusion from MPU treatment – software purchased “at a business location of the seller” does not qualify for MPU treatment. Such over-the-counter sales include sales of software at a retailer’s place of business; these sales will be sourced under the SSUTA’s other sourcing requirements (e.g., section 310) despite the fact that the purchaser’s use of the software may otherwise qualify for section 312 treatment. No additional sales or use tax will be due on these over-the-counter sales as a result of section 312 (i.e., the jurisdictions where the over-the-counter software is concurrently available for use cannot require section 312 treatment on a use tax basis on these sales).

3. Services

The MPU applies to the sale of taxable services that otherwise comply with MPU requirements.. As seen with computer software, the MPU does not provide limiting language with regard to what services fall within the scope of the MPU provision. Therefore, the application of the MPU applies to all types of services that otherwise comply with MPU requirements.

D. Concurrently Available for Use

Section 312 (A) of the MPU provision refers to a sale that is “concurrently available for use in more than one jurisdiction.” The general purpose of the MPU provision is to divide the tax base of a transaction among more than one jurisdiction where the underlying digital good, computer software or service is being used in more than one jurisdiction. Following is further elaboration of this rule.

1. “Jurisdiction”

The SSUTA does not define “jurisdiction.” However, the intent of the MPU provision is to divide the tax base of a transaction among states. Therefore, sales that occur wholly within a state (“intrastate sales”) will not qualify and are outside the scope of the MPU provision. However, a sale transaction that implicates jurisdictions in multiple states (and the District of Columbia) will qualify.

2. “Concurrently Available for Use”

The term “concurrently available for use” is not defined in the SSUTA. “Concurrent” is defined to mean “occurring at the same time, existing together.” *Webster’s New World Dictionary*, 2d. College Edition (1980). Further, “available” is defined to mean “suitable; useable; accessible; obtainable; present or ready for immediate use.” *Black’s Law Dictionary*, 6th Ed. (1990). Thus, this provision means that the digital good, computer software or service must be accessible or ready for immediate use at the same time in more than one jurisdiction. It is important to note that the digital good, software or service need not be actually used simultaneously on a concurrent basis. Rather, the item must be available for use on a concurrent basis. For instance, a sale of software that allows one single user to access the software at any one time and is accessible by the business purchaser from various states will satisfy the “concurrently available for use” requirement.

II. MPU Operation – Seller

312(A)(1) – Upon receipt of an exemption certificate claiming multiple points of use, the seller is relieved of all obligation to collect, pay, or remit the available tax and the purchaser shall be obligated to collect, pay, or remit the applicable tax on a direct pay basis.

A. Obligations of Sellers.

This MPU provision operates to relieve the seller of all obligations to collect, pay, or remit the applicable sales tax resulting from a purchase. Moreover, the seller has no obligation to ensure the accuracy of the MPU general exemption certificate requirements. Notably, the MPU operates consistently with section 317, which states that the administration of exemptions relieves the sellers of liability. Thus, for instance, sellers need not ensure that purchasers who claim an MPU exemption actually intend to use the digital good, software or service in more than one jurisdiction.

312(B) – Notwithstanding subsection A, when the seller knows that the product will be concurrently available for use in more than one jurisdiction, but the purchaser does not provide an exemption certificate claiming multiple points of use as required in subsection A, the seller may work with the purchaser to produce the correct apportionment. The purchaser and seller may use any reasonable, but consistent and uniform, method of apportionment that is supported by the seller’s and purchaser’s business records as they exist at the time the transaction is reported for sales and use tax purposes. If the purchaser certifies to the accuracy of the apportionment and the seller accepts the certification, the seller shall conduct and remit the tax pursuant to subsection A(3). In the absence of bad faith, the seller is relieved of any further obligation to collect tax on any transaction where the seller has collected tax pursuant to the information certificate certified by the purchaser.

This MPU provision is an alteration to section 312(A)(1) and enhances the application of the MPU provision. Specifically, this section of the SSUTA was included to account for situations where MPU treatment is appropriate, but the seller, and not the purchaser, is better suited to determine how the MPU apportionment should be determined and reported. Thus, while section 312(A)(1) indicates that purchasers are to determine the apportionment method, section 312(B) provides that sellers are to determine the apportionment (and to report the transaction using MPU principles).

1. “Works with the purchaser”

This section also allows the seller to “work with the purchaser” to determine the apportionment method. In other words, this provision is intended to apply to a situation where the seller is better equipped to determine taxability under the MPU provision, and the seller and purchaser agree on an appropriate apportionment method. Circumstances may arise where the seller has

better access to a purchaser's use of a digital good, computer software or service. In this instance, the purchaser and seller need to only agree on an apportionment method. This may be accomplished by the purchaser agreeing with the seller's method of apportionment based on information contained in the seller's records. In the absence of bad faith, the seller, relying on information certified by the purchaser, will be relieved of any tax liability. Certification may be accomplished via any type of written document, including a term in the sales document between the seller and purchaser.

2. "Bad Faith"

This section also includes the phrase "absence of bad faith." This inclusion is an affirmative statement evidencing that a presumption operates in the seller's favor. Specifically, the seller is presumed to be acting in good faith absent a showing of other evidence. Thus, the burden falls upon the jurisdiction to prove that the seller is acting in bad faith.

3. "At the time the transaction is reported"

The apportionment method must be selected at the time the transaction is reported for sales or use tax purposes. Thus, the taxpayer must select the apportionment method no later than the filing of the sales or use tax return. However, if information contained in the seller's or purchaser's books and records becomes available subsequent to reporting the transaction that would provide greater accuracy in performing the apportionment, then the purchaser or seller may use this updated information to support the apportionment.

B. Duration of the Exemption Certificate

312(A)(4) – The exemption certificate claiming multiple points of use will remain in effect for all future sales by the seller to the purchaser (except as to the subsequent sale's specific apportionment that is governed by the principles of subsection A(2) and A(3)) until it is revoked in writing.

Section 312(A)(4) is a temporal paragraph that is clear in its meaning: the exemption certificate claiming MPU treatment is good forever until the purchaser revokes the certificate in writing. Notably, this section refers only to the certification remaining valid until it is revoked and does not require that the apportionment method must also remain the same.

C. MPU Exemption Certificate Not Provided

312(C) – When the seller knows that the product will be concurrently available for use in more than one jurisdiction and the purchaser does not have a direct pay permit and does not provide the seller with an exemption certificate claiming multiple points of use exemption as required in subsection A, or certification pursuant to subsection B, the seller shall collect and remit the tax based on the provisions of Section 310.

As noted in the above language, when an MPU is otherwise applicable but the purchaser does not provide an exemption certificate claiming an MPU exemption *and* the seller and purchaser

do not work with each other to determine the appropriate apportionment method (as is provided in section 312(B)), then the seller must not apply section 312. Rather, the seller must source the sale of digital goods, software or services using a method consistent with the general sourcing rules contained in section 310. The seller will be relieved of any additional liability that may otherwise arise out of section 312.

III. MPU Operation – Purchaser

312(A)(2) – A purchaser delivering the exemption certificate claiming multiple points of use may use any reasonable, but consistent and uniform, method of apportionment that is supported by the purchaser’s books and records, as they exist at the time the transaction is reported for sales or use tax purposes.

Pursuant to section 312(A), the purchaser, after delivering the exemption certificate claiming MPU, must use any reasonable, but consistent and uniform, method of apportionment that is supported by the purchaser’s books and records, as they exist at the time the transaction is reported for sales and use tax purposes. Questions arise to what the following terms mean including: (1) reasonable, but consistent and uniform; (2) books and records; and (3) at time transaction is reported for sales tax purposes.

A. Reasonable, but consistent and uniform

1. Reasonable

The business purchaser must use an apportionment method that is reasonable pursuant to section 312(A)(2). Reasonable is defined to mean “fair, proper, just, moderate, suitable under the circumstances.” Black’s Law Dictionary 2d (1990). It is not contemplated that only one apportionment method may be suitable for the circumstances. Rather, in some instances, a variety of apportionment methods may be deemed reasonable. This section operates to provide flexibility, allowing a purchaser (with the involvement of the seller pursuant to section 312(B)) to use a method that is based on information available to the purchaser, provided that the method is fair under the circumstances. If a reasonable apportionment method is unavailable (e.g., the information does not exist to support a reasonable apportionment method), and the purchaser provided the seller with an exemption certificate claiming multiple points of use, then the purchaser must account for the sale using the general sourcing principles contained in Section 310.

2. Consistent and uniform

In addition to finding an apportionment method that is reasonable, the business purchaser must also choose a method that is consistent and uniform. Thus, whatever reasonable apportionment method is selected, it must be applied consistently for all future sales of the same type. As MPU treatment will remain in effect for all future sales by the seller to the purchaser (unless revoked, see section 312(C)), the method may remain in-place for an extended period of time. Further, the apportionment method must remain consistent and uniform associated with the same type of

sale. If a purchaser and seller are engaged in sales of varying types, then the apportionment methods are not required to be consistent between different types of sales. The effectiveness of apportionment methods may vary from one type of sale to another, and this provision reflects this fact by providing purchasers with flexibility to select an appropriate apportionment method based on the sale type.

If circumstances change that would require a change to an apportionment method applied to a particular type of sale, the “consistent and uniform” method may be relaxed to allow for a different method. For instance, if information becomes available that will provide for a more accurate or result in a significantly lower tax compliance burden (i.e., historical usage of software becomes available), then the purchaser should be permitted to select a different method. Other changes that may justify a change of apportionment methods, without offending the consistent and uniform requirement, are changes resulting from availability of third party data, transaction level data, and recommendations from industry groups and the Governing Board. However, this relaxation of the consistent and uniform requirement is not expected to result in frequent changes to apportionment methods.

B. Books and Records

MPU refers to an apportionment method supported by the books and records of the business purchaser. As business become more complex, businesses’ recordkeeping are becoming equally complex. Thus, companies are implementing more elaborate enterprise reporting programs (ERP) and are gathering more detailed information about customers through customer relationship management (CRM) software. Further, procurement systems are increasingly more advanced and regulatory reporting and Sarbanes-Oxley requirements are adding to extensive recordkeeping and retention.

Any books and records maintained by the purchaser (and a seller pursuant to section 312(B)) in the regular course of its business will be accepted for supporting an apportionment method. The records need not be created for sales tax purposes. Rather, records maintained for business or regulatory purposes are acceptable. Further, the records need not be subjected to financial statement audit procedures.

C. At the Time the Sale is Made

The apportionment method must be selected at the time the transaction is reported for sales or use tax purposes. Thus, the purchaser, pursuant to 312(A)(2), must select the apportionment method no later than the filing of the sales or use tax return. However, if information contained in the purchaser’s books and records becomes available subsequent to reporting the transaction that would provide greater accuracy in performing the apportionment, then the purchaser may use this updated information to support the apportionment.

D. Payment of tax

312(A)(3) – A purchaser delivering an exemption certificate claiming multiple points of use shall report and pay the appropriate tax to each jurisdiction where concurrent use occurs. The tax due will be calculated as if the apportioned amount of the digital good, computer software or service had been delivered to each jurisdiction to which the sale is apportioned pursuant to A(2).

Once the apportionment calculation is complete, the purchaser will remit an apportioned sales or use tax to each state based on the results of the apportionment formula. If the apportionment relates to a state that does not adopt the MPU provisions contained within section 312, then the purchaser will not be required to report an apportioned amount to such jurisdiction. Further, the purchaser will have no further obligation to report the amount not taxed to any other state. Sales or use tax will be computed by multiplying the appropriate tax rate by the apportioned amount.