



Scott Peterson, Executive Director
C/o Jessica Ando
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**RE: Compliance Review and Interpretations Committee
Public Notice dated February 25, 2010**

Dear Mr. Peterson,

On behalf of its members and in accordance with Governing Board Rule 902, the Equipment Leasing and Finance Association (ELFA) respectfully submits comment on the request for interpretation from Mr. Tim Maloney.

ELFA is the trade association representing financial services companies and manufacturers in the \$600 billion U.S. equipment finance sector. ELFA members are the driving force behind the growth in the commercial equipment finance market and contribute to capital formation in the U.S. and abroad. ELFA has more than 600 members including brokers and packagers, investment banks, service providers, independent leasing and finance companies, captive finance companies, commercial banks as well as diversified financial services companies. These comprise many of the nation's largest financial services companies and manufacturers as well as regional and community banks and independent medium and small finance companies throughout the country. ELFA membership also includes a number of multinational financial and manufacturing companies operating in the U.S.

We have reviewed the Interpretation Request submitted by Mr. Tim Maloney, which pertains to Streamlined Sales and Use Tax Agreement (SSUTA) “General Sourcing Rules”, Section 310 A & B and “Election for Origin-Based Sourcing”, Section 310.1(B). ELFA rejects Mr. Maloney’s proposed interpretation and recommends the instant request be denied. The plain language of Section 310.1(B) clearly excludes from the election for origin based sourcing those retail sale transactions that meet the definition of “lease or rental” that was adopted into the SSUTA Library of Definitions.

Section 310.1(B) provides:

*A member state may source retail sales, **excluding lease or rental**, of tangible personal property or digital goods to the location where the order is received by the seller if: ... [Emphasis added.]*

The transaction highlighted in Mr. Maloney’s interpretation request clearly falls within the definition of “Lease or rental”. These transactions are excluded from the election provided in Section 310.1. As such, they are to be sourced according to Section 310(B). If the lease

payments are structured such that it falls under Section 310(B)(2), as outlined in the situation provided, the payment is then sourced under the hierarchy provided in Section 310(A).

We would also note that this treatment is consistent with the SST workgroup discussions and conclusions that occurred in September through December of 2007 as SLAC and BAC worked to develop the election for origin-based sourcing. Nothing in the Interpretation Request would indicate that there is an exception to the language in Section 310.1(B). Accordingly, the interpretation proposed should be denied.

ELFA respectfully requests your consideration of the arguments presented above. We further reserve the right to present additional comments and/or documents on this issue at the scheduled hearing(s) or at some time in the future.

ELFA thanks you for this opportunity to submit comment on this interpretation request.

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APPENDIX

Definitions, Appendix C, Part I

“Lease or rental” means any transfer of possession or control of tangible personal property for a fixed or indeterminate term for consideration. A lease or rental may include future options to purchase or extend.

A. Lease or rental does not include:

1. A transfer of possession or control of property under a security agreement or deferred payment plan that requires the transfer of title upon completion of the required payments;
2. A transfer or possession or control of property under an agreement that requires the transfer of title upon completion of required payments and payment of an option price does not exceed the greater of one hundred dollars or one percent of the total required payments; or
3. Providing tangible personal property along with an operator for a fixed or indeterminate period of time. A condition of this exclusion is that the operator is necessary for the equipment to perform as designed. For the purpose of this subsection, an operator must do more than maintain, inspect or set up the tangible personal property.

...

Section 310: GENERAL SOURCING RULES

A. Except as provided in Section 310.1, the retail sale, excluding lease or rental, of a product shall be sourced as follows:

1. When the product is received by the purchaser at a business location of the seller, the sale is sourced to that business location.
2. When the product is not received by the purchaser at a business location of the seller, the sale is sourced to the location where receipt by the purchaser (or the purchaser's donee, designated as such by the purchaser) occurs, including the location indicated by instructions for delivery to the purchaser (or donee), known to the seller.
3. When subsections (A)(1) and (A)(2) do not apply, the sale is sourced to the location indicated by an address for the purchaser that is available from the business records of the seller that are maintained in the ordinary course of the seller's business when use of this address does not constitute bad faith.
4. When subsections (A)(1), (A)(2), and (A)(3) do not apply, the sale is sourced to the location indicated by an address for the purchaser obtained during the consummation of the sale, including the address of a purchaser's payment instrument, if no other address is available, when use of this address does not constitute bad faith.
5. When none of the previous rules of subsections (A)(1), (A)(2), (A)(3), or (A)(4) apply, including the circumstance in which the seller is without sufficient information to apply the previous rules, then the location will be determined by the address from which tangible personal property was shipped, from which the digital good or the computer software delivered electronically was first available for transmission by the seller, or from which the service was provided (disregarding for these purposes any location that merely provided the digital transfer of the product sold).

B. The lease or rental of tangible personal property, other than property identified in subsection (C) or subsection (D), shall be sourced as follows:

1. For a lease or rental that requires recurring periodic payments, the first periodic payment is sourced the same as a retail sale in accordance with the provisions of subsection (A). Periodic payments made subsequent to the first payment are sourced to the primary property location for each period covered by the payment. The primary property location shall be as indicated by an address for the property provided by the lessee that is available to the lessor from its records maintained in the ordinary course of business, when use of this address does not constitute bad faith. The property location shall not be altered by intermittent use at different locations, such as use of business property that accompanies employees on business trips and service calls.
2. For a lease or rental that does not require recurring periodic payments, the payment is sourced the same as a retail sale in accordance with the provisions of subsection (A).
3. This subsection does not affect the imposition or computation of sales or use tax on leases or rentals based on a lump sum or accelerated basis, or on the acquisition of property for lease.

C. The lease or rental of motor vehicles, trailers, semi-trailers, or aircraft that do not qualify as transportation equipment, as defined in subsection (D), shall be sourced as follows:

1. For a lease or rental that requires recurring periodic payments, each periodic payment is sourced to the primary property location. The primary property location shall be as indicated by an address for the property provided by the lessee that is available to the lessor from its records maintained in the ordinary course of business, when use of this address does not constitute bad faith. This location shall not be altered by intermittent use at different locations.
2. For a lease or rental that does not require recurring periodic payments, the payment is sourced the same as a retail sale in accordance with the provisions of subsection (A).
3. This subsection does not affect the imposition or computation of sales or use tax on leases or rentals based on a lump sum or accelerated basis, or on the acquisition of property for lease.

D. The retail sale, including lease or rental, of transportation equipment shall be sourced the same as a retail sale in accordance with the provisions of subsection (A), notwithstanding the exclusion of lease or rental in subsection (A). "Transportation equipment" means any of the following:

1. Locomotives and railcars that are utilized for the carriage of persons or property in interstate commerce.
2. Trucks and truck-tractors with a Gross Vehicle Weight Rating (GVWR) of 10,001 pounds or greater, trailers, semi-trailers, or passenger buses that are:
 - a. Registered through the International Registration Plan; and
 - b. Operated under authority of a carrier authorized and certificated by the U.S. Department of Transportation or another federal authority to engage in the carriage of persons or property in interstate commerce.
3. Aircraft that are operated by air carriers authorized and certificated by the U.S. Department of Transportation or another federal or a foreign authority to engage in the carriage of persons or property in interstate or foreign commerce.
4. Containers designed for use on and component parts attached or secured on the items set forth in subsections (D)(1) through (D)(3).

Compiler's note: The Governing Board issued an interpretation of Section 310C on April 18, 2006. That interpretation can be found in the Library of Interpretations. Compiler's note: The Governing Board issued an interpretation of the definition of Section 310A on September 20, 2007. That interpretation can be found in the Library of Interpretations.

Compiler's note: On December 12, 2007 Section 310 (A)(4) was amended as follows: "The Except as provided in Section 310.1, the retail sale, excluding lease or rental, of a product shall be sourced as follows:". The amendment was effective upon its adoption.

Section 310.1: ELECTION FOR ORIGIN-BASED SOURCING (Effective January 1, 2010)

A. A member state that has local jurisdictions that levy or receive sales or use taxes may elect to source the retail sale of tangible personal property and digital goods pursuant to the provisions of this section in lieu of the provisions of subsection A (2), (3) and (4) of Section 310 if they comply with all provisions of subsection C of this section and the only exception to Section 310 is the exception provided for in subsection B of this section.

B. A member state may source retail sales, excluding lease or rental, of tangible personal property or digital goods to the location where the order is received by the seller if:

1. The order is received in the same state by the seller where receipt of the product by the purchaser (or the purchaser's donee, designated as such by the purchaser) occurs;
2. Location where receipt of the product by the purchaser occurs is determined pursuant to Section 310A (2), (3) and (4); and
3. At the time the order is received, the recordkeeping system of the seller used to calculate the proper amount of sales or use tax to be imposed captures the location where the order is received.

C. A member state electing to source sales pursuant to this section shall comply with all of the following:

1. When the location where the order is received by the seller and the location where the receipt of the product by the purchaser (or the purchaser's donee, designated as such by the purchaser) occurs as determined pursuant to Section 310A (2), (3) and (4) are in different states, the sale must be sourced pursuant to the provisions of Section 310.
2. When the product is sourced pursuant to this section to the location where the order is received by the seller, only the sales tax for the location where the order is received by the seller may be levied. No additional sales or use tax based on the location where the product is delivered to the purchaser may be levied. The purchaser shall not be entitled to any refund if the combined state and local rate or rates at the location where the product is received by the purchaser is lower than the rate where the order is received by the seller.
3. A member state may not require a seller to utilize a recordkeeping system which captures the location where an order is received to calculate the proper amount of sales or use tax to be imposed.
4. A purchaser shall have no additional liability to the state for tax, penalty or interest on a sale for which the purchaser remits tax to the seller in the amount invoiced by the seller if such invoice amount is calculated at either the rate applicable to the location where receipt by the purchaser occurs or at the rate applicable to the location where the order is received by the seller. A purchaser may rely on a written representation by the seller as to the location where the order for such sale was received by the seller. When the purchaser does not have a written representation by the seller as to the location where the order for such sale was received by the seller, the purchaser may use a location indicated by a business address for the seller that is available from the business records of the purchaser that are maintained in the ordinary course of the purchaser's business to determine the rate applicable to the location where the order was received.
5. The location where the order is received by or on behalf of the seller means the physical location of a seller or third party such as an established outlet, office location or automated order receipt system operated by or on behalf of the seller where an order is initially received by or on behalf of the seller and not where the order may be subsequently accepted, completed or fulfilled. An order is received when all of the information necessary to the determination whether the order can be accepted has been received by or on behalf of the seller. The location from which a product is shipped shall not be used in determining the location where the order is received by the seller.
6. Such member state shall provide for direct pay permits pursuant to Section 326 of this Agreement and the requirements of this subsection. Purchasers which remit sales and use tax pursuant to such a permit shall remit tax at the rate in effect for the location where receipt of the product by the purchaser occurs or the product is first used as determined by state law. A member state may

establish reasonable thresholds at which level the member state will consider direct pay applications, provided the threshold must be based upon purchases with no distinction between taxable and non-taxable purchases. The member state shall establish a process for application for a direct pay permit as provided herein. The member state may require the applicant to demonstrate:

- a. Ability to comply with the sales and use tax laws of the state,
- b. A showing of a business purpose for seeking direct payment permit and how the permit will benefit tax compliance, and
- c. Proof of good standing under the tax laws of the state.

The member state shall review all permit applications in a timely manner so that applicants receive notification of authorization or denial within one hundred twenty (120) days. The member state may not limit direct pay applicants to businesses engaged in manufacturing or businesses that do not know the ultimate use of the product at the time of the purchase.

7. When taxable services are sold with tangible personal property or digital products pursuant to a single contract or in the same transaction, are billed on the same billing statement(s), and, because of the application of this section, would be sourced to different jurisdictions, a member state shall elect either origin sourcing or destination sourcing to determine a single situs for that transaction. Such member state election is required until such time as the governing board adopts a uniform methodology to address such sales.

8. A member state that elects to source the sale of tangible personal property and digital goods pursuant to the provisions of this section shall inform the governing board of such election.

D. Compliance with the provisions of this section shall satisfy a state's eligibility for membership in this Agreement as follows:

1. If a state is in substantial compliance with each of the provisions of this Agreement other than sourcing of sales of tangible personal property and digital goods as provided in Section 310 and elects to source sales of tangible personal property and digital goods pursuant to this section, such state may become an associate member state in the same manner as provided for states to become full member states pursuant to Article VIII of this Agreement.

2. A state which becomes an associate member state pursuant to this subsection shall automatically become a full member state, provided that at least five (5) states which are not full member states on December 31, 2007, have been found to be in substantial compliance with each of the provisions of the Agreement other than sourcing sales of tangible personal property and digital goods pursuant to Section 310 of the Agreement and have notified the governing board of an election pursuant to paragraph 8 of subsection C of this section to source sales pursuant to this section and have been found to be in substantial compliance with the provisions of this section.

3. The provisions of this section shall be fully effective for all purposes on or after January 1, 2010. *Compiler's note: On December 12, 2007 Section 310.1 was adopted. This section becomes effective on and after January 1, 2010. On September 30, 2009 Section 310.1 was amended to delete "On or after January 1, 2010, a" in D 2 and to delete the following after "2010" in D 3: ", provided that at least five (5) states which are not full member states on December 31, 2007, have been found to be in substantial compliance with each of the provisions of the Agreement other than sourcing sales of tangible personal property and digital goods pursuant to Section 310 of the Agreement and have notified the governing board of an election pursuant to paragraph 8 of subsection C of this section to source sales pursuant to this section and have been found to be in substantial compliance with the provisions of this section. States electing to source sales under this section after that time may become full member states if all other requirements for membership are satisfied". This amendment became effective upon its adoption.*