



Software Finance & Tax Executives Council

www.softwarefinance.org

October 25, 2010

Via Email

Mr. Scott Peterson
Executive Director
Streamlined Sales Tax Governing Board
4205 Hillsboro Pike, Suite 305
Nashville, TN 37215

Re: Michigan's Compliance with the Agreement

Dear Mr. Peterson:

These are the comments of the Software Finance and Tax Executives Council to the SST staff's 2010 recertification analysis of Michigan's compliance with the Streamlined Sales and Use Tax Agreement (the "Agreement"). As the attached documentation shows, Michigan does not allow sellers and purchasers of downloaded prewritten computer software to source the sales price to the jurisdictions where the purchasers will be downloading the software. Michigan takes the position that if the software license is billed to a Michigan address, even if the software will be downloaded in other states, then Michigan sales tax is due on the transaction. We believe this is contrary to the sourcing rules of Section 310.A.2 of the Agreement and Rule 309.2(2) promulgated there under. Thus, Michigan is out of compliance with SSUTA's sourcing rules. The SST staff's analysis does not mention Michigan's lack of compliance with the SST's sourcing rules. We urge that the Compliance Review and Interpretations Committee find Michigan out of compliance.

Discussion:

Agreement Section 310.A generally sets out the destination sourcing hierarchy. Section 310.A.1 provides for the sourcing of sales to the sellers' business location in over-the-counter sales. Under Section 310.A.2, when a sale does not occur in an over-the-counter transaction, it is sourced to the location where the seller receives the product, if known to the seller. Only if the sale does not occur over-the-counter or if the seller does not know the location where the product is to be delivered does the seller source the sale to the purchaser's billing address. See Section 310.A.3.

The Michigan legislature has adopted the sourcing regime specified by the SSUTA. See [MCL Sec. 205.69\(1\)\(a\)-\(e\)](#).

The Governing Board has adopted guidance in the application of Section 310.A as it applies to sales of computer software. Specifically, Rule 309.2(2) provides guidance for

sourcing when the purchaser receives computer software at multiple locations. That rule provides that the seller is to source the sale to the specific location or locations where the purchaser is to receive the software if the seller receives delivery information from the purchaser by the time of the invoice. The Rule goes on to provide an example of how the Rule works when software is electronically delivered:

Example 2: Seller electronically delivers copies of the prewritten computer software to multiple locations of the Purchaser. The Seller has the information identifying the multiple locations for the electronic delivery of the prewritten computer software. The Seller sources the retail sale to each jurisdiction where the Purchaser receives the prewritten computer software.

However, Michigan is not administering its sourcing statutes in accordance with the guidance spelled out in Rule 309.2(2) and Example 2. As the attached correspondence from the Michigan Department of Treasury (“MDT”) states:

[I]t is the department’s position that if the charges for all the software licenses are billed to a Michigan address, the entire sale would be sourced to the Michigan regardless of the physical location where the software licenses are downloaded.

This position on the administration of the sourcing rules is plainly contrary to SSUTA Section 310.A.2, MCL 205.69(1)(b) and Rule 309.2(2), which require that downloaded software be sourced to the location or locations where the purchaser receives the download(s), if those locations are known to the seller, regardless of the billing address.

As the correspondence explains, the basis for the MDT’s position is the legislature’s repeal of MCL 205.70 and MCL 205.102. Those statutes were related to Michigan’s implementation of the since-repealed “multiple points of use” (“MPU”) regime. See Agreement Sec. 312 (repealed Dec. 14, 2006). The MPU exemption regime only applied when computer software was to be concurrently available for use in more than one jurisdiction. The facts involved in transactions to which Rule 309.2(2) and Example 2 apply do not necessarily only involve software that is currently available for use in more than one jurisdiction; the facts also involve the delivery of software to more than one jurisdiction.¹

Conclusion:

The Compliance Review and Interpretations Committee should find Michigan out of compliance with Section 310.A.2 of the Agreement and Rule 309.2(2).

¹ Even in cases where software is to be concurrently available for use in more than one jurisdiction, the allocation sourcing scheme outlined in the last part of former Section 312 survived repeal. See Rule 309.3.b. To the extent the correspondence from the MDT can be construed as prohibiting the allocation of sales price and subsequent sourcing of software sales to the locations of concurrent use, our belief is that Michigan is similarly out of compliance with Agreement Section 310.A.2 and Rule 309.3.b.

I can be reached at (202) 486-3725 or mnebergall@softwarefinance.org with any questions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mark e. Nebergall". The signature is fluid and cursive, with a large initial "M" and a distinct "e" before the last name.

Mark e. Nebergall
President
Software Finance & Tax Executives Council

Cc: Dale Vettel
Mike Eschelbach

From:
Sent:
To:
Subject: Fw: - MI sales/use appt

Bill,

Please attached Michigan rule.

Jim

[State and Local Tax | PricewaterhouseCoopers]

treas_tax_autoreponse@michigan.gov

To: V/TLS/PwC@Americas-US

cc

03/24/2010 08:48 AM

Subject RE: Sales Use Apportionment method

"Reply to All" is Disabled

Thank you for contacting the Michigan Department of Treasury.

Please be advised that, with the repeal of MCL 205.70 and MCL 205.102 effective January 9, 2009, there are no provisions under Michigan statutes to apportion sales of prewritten computer software sourced to Michigan. Therefore, it is the department's position that if the charges for the all of the software licenses are billed to a Michigan address, the entire sale would be sourced to Michigan regardless of the physical location where the software licenses are downloaded.

If the software licenses are billed by the seller to their customer in another state, the other state would have the first taxing authority. Any software licenses downloaded or used in Michigan would be subject to the 6% Michigan use tax; however, Michigan would allow credit of up to 6% for tax properly due and paid to another state.

The Michigan Department of Treasury is not responsible for the misdirection or misuse of any information that may be transmitted via e-mail across the Internet. The use of this information is not intended to be a substitute for legal counsel. To fully understand the legal, tax, or financial implications please consult an attorney, accountant, or other professional.

[THREAD ID:1-9ALG19]

-----Original Message-----

From:
Sent:
To: treasSUW2@michigan.gov
Subject: Sales Use Apportionment method

Hello,

I was wondering if Michigan had an apportionment method for sales and use tax? If so, what would that apportionment formula be for software used out of the state?

Thank you.

U PricewaterhouseCoopers LLP Tax

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