

DEPARTMENT OF REVENUE

LEGAL DIVISION
INDIANA GOVERNMENT CENTER NORTH
100 N. SENATE AVE., Room N248

FAX: (317) 233-6489

October 20, 2014

Craig Johnson
Executive Director
Streamlined Sales Tax Governing Board
100 Majestic Drive, Suite 400
Westby, WI 54667

Dear Craig:

This letter is in response to the memorandum concerning the preliminary report on 2014 annual recertification for Indiana.

The report requires responses to comments related to the Taxability Matrix and Certificate of Compliance.

Report Comment: The Federal Manufacturer's Tax and Federal Retailer's Excise Tax are exempt from the sales tax.

Response: The cited statute exempts "retailer's excise tax imposed by the United States," and "manufacturer's excise tax imposed by the United States" on specified categories of vehicles and other tangible personal property if either collected or stated separately.

Indiana's change to IC § 6-2.5-4-1(f) went into effect on July 1, 2014, which eliminates the exclusion of federal and state excise taxes from the sales price of gasoline. The Department continues to examine its exclusion of certain excise taxes from the calculation of sales tax on transactions involving special fuel; and from the calculation of sales price on specified categories of vehicles and other tangible personal property.

Report Comment: Accepting a SER from a Model 4 seller.

Response: The Indiana Department of Revenue continues its implementation of major software and data collection archive upgrades started in 2013 to expand its electronic filing capabilities and administration for more of Indiana's listed taxes. These asset acquisitions and procedural advancements have already enabled the Department to accept and process more returns, payments, and refunds. SER form adjustments remain an integral part of the upgrade project and the Department's continuing objectives in making sales tax filing and remitting as easy and efficient for taxpayers as possible.

Again, the upgrade project includes configuring, testing, and implementing the Department's SER program within the new software platform and schema. The Model 4 SER remains a

priority for the Department, although the Department probably will not complete its implementation until the end of 2015.

Report Comment: Compliance Review has requested various technical changes on Indiana's Certificate of Compliance and Taxability Matrix.

Certificate of Compliance changes

Section 310.1, 2nd question – Indiana agrees with the recommendation, and has changed "No" to "N/A";

Sections 317, 318, 321, 402 – Indiana agrees with the recommendations, and has moved the Information Bulletins and Commissioner's Directives citations from the comment column to citation column;

Sec. 328, paragraph C.1. – Indiana agrees with the recommendation and has changed IC 6-2.5-11-11 to IC 6-2.5-11-10;

Ancillary services, vertical services – Indiana agrees with the recommendations and has moved the Information Bulletin to the citation column;

Conference bridging, 900, 800, coin operated services, international, Interstate, pay telephone and residential tel. services – Indiana agrees with the recommendations and has added "No."

Paragraph C.2. – Indiana agrees that the cited statute does not provide a complete answer to question C.2., so the Department has added IC 6-2.5-11-10 to the citations column. Indiana will also publish a revised Information Bulletin No. 80 to provide further clarification, and has added that Bulletin as a citation on Indiana's Certificate of Compliance.

Taxability Matrix changes

Intrastate telecommunications service (ref. no. 61000) – Indiana agrees with the recommendation and has changed the statutory reference from IC 6-2.5-4-13 to IC 6-2.5-4-6 in the state's online taxability matrix.

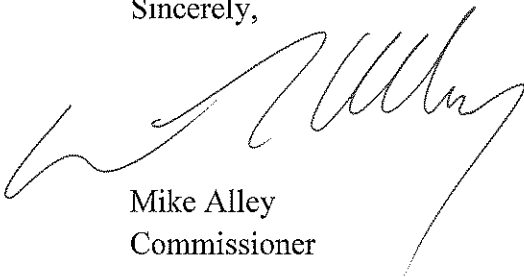
BAC Report Comment: The Indiana Department of State Revenue has issued rulings, e.g., Revenue Ruling #2009-03 ST (released 4/29/2009), taking the position that prewritten software that is licensed for use and available from a remote server is taxable. Indiana's attempt to tax access to prewritten software (and any associated hardware) from a customer merely accessing the prewritten software that is not delivered (i.e., downloaded) to the customer as a sale of "tangible personal property" is not compliant with the SSUTA. While the definition of "tangible personal property" specifically includes "prewritten software," § 333 of the SSUTA excludes computer software, which prewritten software is a component of, from the term "products transferred electronically." This is an important distinction because, as pointed out in Rule 332.2.B.4, the term "transferred electronically" is broader than the term "delivered electronically" that is used in computer related definitions. That rule specifies that just accessing a product can be considered something "transferred electronically;" however, this provision cannot apply to prewritten software because § 333 of the SSUTA excludes it from being a product "transferred electronically." It also, logically, does not fit in as tangible personal property based on the SSUTA sourcing provisions for tangible personal property. When

prewritten software is only accessed by a purchaser, there is no “[t]aking possession of the tangible personal property” as specified § 311.A of the SSUTA (defining when something is “received”). Further, if it is found that Indiana can tax access to prewritten software based on it being “transferred electronically,” the requirements in § 332.D of the SSUTA must be met. Absent Indiana having a law (i.e., statute), the tax on such software only reaches transactions where the purchaser: 1) has a right of permanent use, 2) has no obligation to make continued payments and 3) is an end user. Accordingly, while Indiana may choose to tax access to prewritten software by specifically imposing a tax on the sale of such product, Indiana cannot do it via the SSUTA’s definition of tangible personal property and remain compliant with the SSUTA.

Response: While the Department of Revenue recognizes BAC concerns, the Department re-asserts that its sales and use tax treatment of remote access to prewritten computer software remains in compliance with SSUTA. The Department also recognizes and respects the Remote Access to Prewritten Computer Software Workgroup’s continuing activities and information collection specifically devoted to addressing remote access to prewritten computer software. That workgroup maintains its reliance on the conclusion reported to the Governing Board at the September 2012 meetings in Salt Lake City, which stated that “[t]he SSUTA allows States to tax remote access to pre-written computer software by taxing it as a sale or use of tangible personal property.”

If you have any further questions, please do not hesitate to contact Larry Molnar at (317) 233-0656.

Sincerely,

A handwritten signature in black ink, appearing to read "Mike Alley", written in a cursive style.

Mike Alley
Commissioner