STATE OF INDIANA

DEPARTMENT OF REVENUE
OFFICE OF THE COMMISSIONER
INDIANA GOVERNMENT CENTER NORTH
100 NORTH SENATE AVENUE, ROOM N248

INDIANAPOLIS, 46204-2253

September 25, 2015

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

Dear Craig:

This letter is in response to the memorandum concerning the preliminary report on 2015 annual recertification for Indiana.

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

Report Comment: The state was declared out of compliance in 2013 because the Federal Manufacturer's Tax and Federal Retailer's Excise Tax are exempt from the sales tax.

Response:

Earlier this year, Indiana submitted to the Governing Board a motion to amend the definition of "sales price" in the Streamlined Sales and Use Tax Agreement to allow certain exemptions for federal taxes. During the May 2015 Governing Board meetings, the Governing Board instructed the State and Local Advisory Council (SLAC) to create a workgroup to gather more information and materials, and to refine the language and scope of Indiana's proposed amendment.

Indiana's Department of Revenue representative, Larry Molnar, formed and led this Federal Exemptions workgroup, conducting several teleconferences over the summer to discuss the proposed amendment and its possible effects and administration. With the input and assistance of other Member State representatives, members of the Business Advisory Council (BAC), and both Craig Johnson and Pam Cook, Mr. Molnar refined language in the proposed amendment, as well as revised the accompanying Governing Board Rule 327.9.

Mr. Molnar and the Federal Exemptions workgroup presented the revised proposed amendment to both the definition of "sales price" and to Rule 327.9 at the September 2015 Governing Board meetings in Louisville, Kentucky. The Governing Board voted upon, and approved, the revised amendment and Rule 327.9. The amendment and revised Rule allow Indiana to continue providing exemptions to certain federal excise and manufacturing taxes, so long as Indiana specifically cites those exemptions on its Taxability Matrix. Perhaps more importantly, the

amendment does not require other Member States to change their respective sales tax administration processes and procedures.

Mr. Molnar, Craig Johnson, and David Thompson continue working on matrix template changes so that Indiana can provide citations of the federal taxes exempted from "sales price."

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 upgrades started in 2013 to expand its electronic filing capabilities and administration for the remainder of Indiana's listed taxes. These asset acquisitions and procedural advancements have already enabled the Department to accept and process more returns, payments, and refund claims.

The 2015 Indiana General Assembly legislated a tax amnesty program, which Governor Pence scheduled for September-November 2015. Other Member States that have carried out tax amnesty programs likely recognize the importance of Indiana implementing enhanced software and data collection protocols to equip the Department of Revenue with the necessary tools and resources to ensure a successful tax amnesty program, for both Indiana taxpayers and the State. The Model 4 SER remains a priority for the Department, although the Department probably will not complete its Model 4 SER implementation until the middle of 2016.

Report Comment: The Taxability Matrix—ref no. 41040—indicates food sold without eating utensils that ordinarily requires cooking prior to consumption is excluded from prepared food. The citations given do not address this issue. This position needs to be in writing in the statutes, rules or a policy statement.
Citations: IC § 6-2.5-1-20; IC § 6-2.5-5-20; Sales Tax Information Bulletin No. 29

Response: The Department provided the two statutes, and the Information Bulletin, to address various aspects of the transactions involving food and food ingredients represented by this matrix line item. The Department respectfully asserts that the cited materials support Indiana's response to this line item in the Matrix.

The Department agrees that none of the cited materials contain the language provided in the Report's Comment. In order to clarify Indiana's position regarding the taxability of transactions involving prepared food, the Department has formed a workgroup to update Sales Tax Information Bulletin No. 29, as well as any related Indiana tax policy documents.

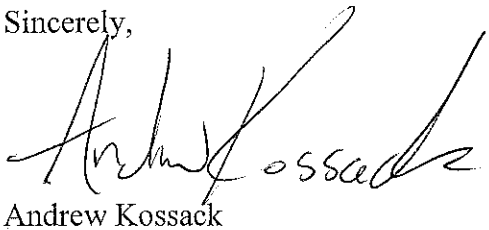
BAC Report Comment: The Indiana Department of State Revenue has issued rulings, e.g., Revenue Ruling #2009-03 ST (released 4/29/2009), taking the position that prewritten software that is licensed for use and available from a remote server is taxable. Indiana's attempt to tax access to prewritten software (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,



Andrew Kossack
Commissioner