



STATE OF WASHINGTON
DEPARTMENT OF REVENUE
OFFICE OF THE DIRECTOR

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November 10, 2009

Compliance Review and Interpretations Committee
Streamlined Sales Tax Governing Board
4205 Hillsboro Pike
Suite 305
Nashville, Tennessee 37215-3339

Dear Committee Members:

This letter is sent in response to comments submitted by Mr. Timothy Gillis on September 26, 2009, concerning Washington's compliance with the SSUTA.

Washington believes it is in compliance with the SSUTA. A detailed response is contained in the enclosed document.

Sincerely,

Russ Brubaker
Senior Assistant Director of Tax Policy

Enclosure

cc: Scott Peterson, Executive Director, Streamlined Sales Tax Governing Board
Pam Cook, Consultant, Streamlined Sales Tax Governing Board



Background

A public comment has been submitted to the Compliance Review and Interpretations Committee (CRIC) asserting that Washington is out of compliance with the Streamlined Sales and Use Tax Agreement (SSUTA). The comment, submitted October 26, 2009, by H. Timothy Gillis, asserts that legislation enacted in Washington in 2009 (Section 502 of Engrossed Substitute House Bill 2075) conflicts with Section 316 C of the SSUTA.

The section in question is set out in full below:

NEW SECTION. Sec. 502 A new section is added to chapter 82.08 RCW to read as follows:

(1) Except as provided in subsection (2) of this section, the tax imposed by RCW 82.08.020 does not apply to sales of audio or video programming by a radio or television broadcaster.

(2)(a) Except as provided in (b) of this subsection, the exemption provided in subsection (1) of this section does not apply in respect to programming that is sold on a pay-per-program basis or that allows the buyer to access a library of programs at any time for a specific charge for that service.

(b) Notwithstanding (a) of this subsection, the exemption provided in this section applies to the sale of programming described in (a) of this subsection if the seller is subject to a franchise fee in this state under the authority of Title 47 U.S.C. Sec. 542(a) on the gross revenue derived from the sale.

(3) For purposes of this section, "radio or television broadcaster" includes satellite radio providers, satellite television providers, cable television providers, and providers of subscription internet television.

This section is part of a bill which generally applies sales tax to sales of products delivered electronically, including, among others, digital audio works and digital audio-visual works as defined in the SSUTA. Mr. Gillis' public comment focuses specifically on the exemption from retail sales tax for entities that sell pay-per-program programming that is subject to franchise fees. The comment states:

- "Since cable operators, and not satellite operators or other providers, are entitled to an exemption on pay-per-program programming, the Entity-Based Exemption established by this legislation is in direct conflict with Section 316.C. of the Streamlined Sales and Use Tax Agreement[]."

The section in question (Section 502(2)(b)) provides that an exemption applies to the sale of "programming that is sold on a pay-per-program basis or that allows the buyer to access a library of programs" if the sale is made by a seller subject to a franchise fee on the gross revenue from the sale.

The effect of the section is to exempt sales of pay-per-program programming or access to a library of programs by cable television providers and to tax such sales by satellite and other radio or television broadcasters. This is because at this time only cable providers are subject to a franchise fee.

Washington position

Washington believes that the legislation in question does not violate any provision of the SSUTA and does not violate Section 316 C in particular. Washington asserts the statutory language referenced by Mr. Gillis is compliant with and permitted under Section 316 C (3) of the SSUTA.

Section 316 C (3) provides:

- A member state may enact an entity-based exemption for an item if Part II of the Library of Definitions does not have a definition for such item but has a definition for a product that includes such item.

Pay-per-program programming and items within a library of programs are not defined in Part II of the Library of Definitions. These items are within either digital audio works or digital audio-visual works, both of which are defined in Part II of the Library of Definitions. Both digital audio works and digital audio-visual works include items in addition to pay-per-program programming or access to a library of programs. Thus, Washington has enacted an exemption based on an entity—radio or television broadcasters liable for a franchise fee—for undefined subsets of defined products.

Finally, Washington believes that Section 316 C (1), (2), (4), or (5) do not apply in the present circumstances. The following table sets forth these provisions and an explanation as to why the provisions do not apply:

SSUTA:	Relevant language:	Washington Comment:
316 C (1)	A member state may enact an entity-based or a use-based exemption for a product without restriction if Part II of the Library of Definitions does not have a definition for such product.	Subsection (1) of Section 316 C does not apply because, while the products being exempted on an entity basis are undefined, subsection (3) deals specifically with the situation of an undefined item within a defined product category.
316 C (2)	A member state may enact an entity-based or a use-based exemption for a product if Part II of the Library of Definitions has a definition for such product and the member state utilizes in the exemption the product definition in a manner consistent with Part II of the Library of Definitions and Section 327 of this Agreement.	Subsection (2) of Section 316 C does not apply because the entity-based exemption in question does not apply to the entire product category.
316 C (4)	A member state may not enact a use-based exemption for an item which effectively constitutes a product-based exemption if Part II of the Library of Definitions has a definition for a product that includes such item.	Subsection (4) of Section 316 C does not apply because the exemption in question is not a use-based exemption.

316 C (5)	A member state may enact a use-based exemption for an item if Part II of the Library of Definitions has a definition for a product that includes such item, if not prohibited in Subsection (C) (4) of this section and if consistent with the definition in Part II of the Library of Definitions	Subsection (5) of Section 316 C does not apply because the exemption in question is not a use-based exemption.