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November 18, 2009

Via Email to: Scott.Peterson@sstgb.org

Compliance Review and Interpretations Committee
Streamlined Sales Tax Governing Board
Attn: Scott C. Peterson, Executive Director
4205 Hillsboro Pike, Suite 305
Nashville, Tennessee 37215

Re: Public Comment to CRIC Recertification Review of Washington

Dear Committee Members:

As you are aware, the purpose of the Streamlined Sales and Use Tax Agreement ("SSUTA") is to substantially reduce the burden of tax compliance by, among other things, creating a uniform tax base. This uniform tax base is created, in part, through the adoption of major tax base definitions and the requirement that member states utilize these uniform definitions when imposing tax or exempting products from tax. This simplification is reinforced with the requirement that exemptions conform to the requirements of SSUTA § 316.

As stated by Washington in its response dated November 10, 2009 the legislation at issue provides in pertinent part as follows:

> [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.

2009 Wa. Ch. 535 § 502. Our comments focused on Section 502(2)(b) of the legislation, which provides an exemption for the sale of pay-per-program programming by cable television providers and taxes such sales by satellite and other radio or television broadcasters.

At issue is whether the exemption at issue meets the requirements of Section 316 of the Agreement relating to the enactment of entity-based exemptions. The potentially applicable provisions of SSUTA § 316 C are as follows:

SSUTA:	**Relevant Language:**
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.
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.
316 C (3)	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.

Washington asserts that SSUTA § 316 C (3) is the correct provision under which the exemption at issue should be analyzed. In particular, Washington states that:

> 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 broadcaster liable for a franchise fee – for undefined subsets of defined products.

The applicable defined terms within the SSUTA provide in pertinent part as follows:

> **"Specified digital products"** means electronically transferred:
>
> **"Digital Audio-Visual Works"** which means a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any,
>
> **"Digital Audio Works"** which means works that result from the fixation of a series of musical, spoken, or other sounds, including ringtones[.]

It is respectfully submitted that the exemption at issue should be analyzed under SSUTA § 316 C (2). In particular, the requirement under SSUTA § 316 C (2) that the member state utilizes in the exemption the product definition in a manner consistent with SSUTA § 327 should be enforced. Recognizing that SSUTA § 332 F permits a member state to treat subscriptions to products "transferred electronically" differently than a non-subscription purchase of such product, SSUTA § 327 C requires that a member state either impose tax on all products or services included with a SSUTA defined term or exempt from tax all products or services within such definition.

Washington's position frustrates the spirit and purpose of the SSUTA. States should not be able to circumvent the obligation to adopt a SSUTA definition by using a different term to describe a concept that is encompassed by, or intersects with, the SSUTA definition. By allowing this type of circumvention, it is possible for states to craft an entity-based exemption that is in reality a product-based definition, thus avoiding the stricter requirements for adopting product-based exemptions. Furthermore, SSUTA § 316 C (2) is rendered moot by this interpretation.

Under Washington's rationale, states are essentially permitted to ignore SSUTA defined terms by freely crafting entity-based exemptions for undefined subsets of defined products. The

suggested interpretation has the practical effect of removing any restriction on the adoption of entity-based or product-based exemptions.

For example, SSUTA § 316 B requires product-based exemptions to incorporate all SSUTA defined terms and specifically prohibits any carve-outs addressing specific items included within a SSUTA defined term. Nonetheless, under Washington's interpretation of SSUTA § 316 C (3), a member state is free to impose a tax on a product defined in the SSUTA, such as "candy" and then adopt an entity-based exemption such as "chocolate bars and gum drops sold by a retailer that has a physical presence in the member state." These types of entity-based exemptions would lead to the type of complexity in the tax base that the SSUTA is designed to mitigate and would frustrate the goal of federal-level legislation in this area.

Therefore, it is respectfully submitted that the proper analysis of the exemption at issue is under SSUTA § 316 C (2), and further, that SSUTA § 327 C requires imposition on all pay-per-program programming or no pay-per-program programming.

Sincerely,

AKERMAN SENTERFITT

H. Timothy Gillis