

**STREAMLINED SALES AND USE TAX AGREEMENT COMPLIANCE REVIEW  
AND INTERPRETATIONS COMMITTEE**

Interpretive Opinion 2015-2

This Interpretive Opinion recommendation is made to the Governing Board by the Compliance Review and Interpretations Committee this 9th day of July, 2015, in accordance with Article IX, Rule 902 of the Rules and Procedures adopted by the Streamlined Sales Tax Governing Board, Inc. Mr. Val Gibson of AMCS, LLC requested the interpretation on June 16, 2015. Mr. Gibson requested expedited consideration under Streamlined Sales Tax Governing Board (SSTGB) Rule 902, subsection H.

**Issue:**

The central issue is whether there is any transportation occurring during the delivery of ready mix concrete based on the facts provided. Four questions were asked:

1. Does the term “transportation” as stated in the definition of “delivery charges” as defined by the Streamlined Sales and Use Tax Agreement (SSUTA) include ready mixed concrete as defined below? If not, how and where is it excluded?
2. Can “transportation” as stated in the definition of “delivery charges” in the SSUTA be separately stated? If not, why?
3. Do the terms “handling, crating, packing, preparation for mailing or delivery, and similar charges” contained in the definition of “delivery charges” in the SSUTA include the term manufacturing? If so, why and where is that stated?
4. If a state’s sales and use taxability matrix indicates that the state excludes “transportation, shipping, postage, and similar charges” from the definition of “sales price,” does this mean that the transportation of concrete is excluded from the sales price if it is separately stated? If not, why?

(Note: AMCS has asked the Nevada Department of Taxation if the delivery of ready mixed concrete is subject to tax. According to Mr. Gibson, the response from the Department of Taxation, as confirmed by the Commissioners of the Department of Taxation, is that there is no delivery in ready mixed concrete, only manufacturing and therefore, delivery cannot be separately stated because there is no delivery. Since AMCS does not believe this is correct or in compliance with the SSUTA, they felt answers to the above questions need to be clearly provided. Mr. Gibson has also filed a complaint with the Executive Director of the SSTGB alleging that Nevada is not in compliance with the SSUTA relating to this issue.)

**Background Provided by Mr. Gibson (Summarized):** The company owns and operates a couple of ready mixed concrete locations in the Las Vegas, Nevada area. The company has plants that are mixer plants (wet batched plants) where the concrete is fully mixed and then dumped into the truck for transport to the purchaser. It also has plants where ingredients are dumped into the truck where various types of mixing have been done and the truck then completes the mixing process at the plant (dry batch plants). Once the mixing has been completed the truck then transports the concrete to the purchaser. In both cases, the trucks agitate the concrete during the transportation. In both cases, there are a number of methods that can be used to transport the concrete to the purchaser, but the most common method is a mixer truck, which is the method used in this case. A mixer truck keeps the material in an unhardened state contained within the drum. The other methods do not have that ability. The mixer truck can unload the material in a method more suitable to the purchaser than the other methods of transporting concrete. In all cases, the purchaser of the concrete has the ability to arrange or transport the material.

**Public Comment:**

Nevada Department of Taxation (Summarized) - The Nevada Department of Taxation provided comments on the request by Mr. Gibson. The Department noted that Mr. Gibson had sent two requests for advisory opinions regarding the delivery of concrete and appealed the decision of the Department. The Department's ruling has been upheld by the Commissioners. Efforts to resolve the issue have been unsuccessful.

The batching of ready mixed concrete is an exacting process. All of the processes must be performed so that the concrete has the required strength. Once it is batched, concrete cannot be transported without some processing during the transportation process. Courts in other states find that the processing of concrete is not complete until the concrete has been poured and molded into its final form at the jobsite. Most states have found that the manufacturing of concrete takes place in the mixer truck during delivery. It is also very telling that when a state offers a tax exemption for equipment used in the manufacturing process, the ready mix concrete industry argues that the mixer trucks should be exempt because the mixing is part of the manufacturing process. Under Nevada law, delivery charges which include preparation and delivery is a taxable event, and only delivery charges which are solely transportation may be tax exempt when separately stated. Any service that is part of the sale or necessary to complete a sale, is subject to tax. In addition, handling is a taxable service when associated with a sale. Both the applicable Nevada statutes and regulations dictate that delivery charges are not always non-taxable even if they are separately stated. Reading all the statutes together,

delivery charges are considered a tax exempt service only when they are not part of the sale or necessary to complete the sale of tangible personal property. Only when delivery charges do not include any services that are part of the sale or necessary to complete the sale, would the delivery charges not be subject to tax if they are separately stated. In other words, if the delivery charges are separately stated and only include "transportation" they would not be subject to tax. At this point, the Nevada Tax Commission has affirmed the Advisory Opinions as they were written. However, the Department has suggested to the Requestor and the Requestor's counsel that the proper procedure to change a regulation is through the regulatory process.

Response to State's Comment Provided by Mr. Val Gibson (Summarized) - Mr. Gibson provided a rebuttal to the state's comments. He noted that Paulina Oliver, who has represented the state on every call, has stated that there is transportation, yet no written response has indicated that. That is why he is requesting the interpretive opinion, so both parties have an understanding of if there is transportation in the ready mix industry. In the request, the transportation charges are separately stated and that is the only requirement that the state of Nevada requires for the transportation to not be taxable. The State of Nevada describes the moving of the ready mix from the seller's location to the purchaser's location as manufacturing and not transportation. Therefore, we are coming before this committee to have them answer the question according to the definitions adopted in the SSUTA on whether there is transportation or not. The State of Nevada is stating that the delivery of ready mix is a necessary part of the sale. And because it is so required it is taxable. Yes it is true that delivery and specifically transportation is a part of every sale. If the product can never be transported from the seller's location to the purchaser's location, how could a sale ever take place? That would be true for any product. The term necessary to complete the sale usually does not include delivery because the purchaser has the right to pick up the product. We are asking in our private letter ruling about the taxation of transportation and or delivery of ready mix. If a purchaser picks up the product (ready mixed concrete) at the seller's location, there is no delivery, so the taxation of delivery is not a question because it is not applicable. The State of Nevada states that a purchaser does not have the right or ability to pick it up at the seller's location. This is simply not true and it does happen, but it is just not what we are asking an opinion on. If the purchaser can pick the product up at the seller's location then the transportation is simply not, nor can it be, a requirement to make the sale. The state is relying upon the fact that the Nevada Tax Commission ruled that the private letter ruling is accurate in that there is no transportation or delivery in ready mix. Again, as outlined above, there has to be delivery and transportation in the manufacturing of ready mixed concrete. The mere fact that the Nevada Tax Commission has said that there is no transportation does not make it so. If that were the case, there would be no appeal rights to their decisions and there would be no

cases remanded back to them to correct their decision from higher courts. Having cases remanded back to the Nevada Tax Commission happens on regular basis. Having this interpretative opinion clarifies the issue of if there is transportation in the ready mix industry.

**Recommendation:**

By a unanimous vote of the members present, the Compliance Review and Interpretations Committee (CRIC) submits to the Governing Board a recommendation that the interpretation proposed by the requestor be accepted in part. With respect to the first question, CRIC recommends that the Governing Board find that transportation does include ready mix concrete. With respect to the second question, CRIC recommends that the Governing Board find that the transportation as a component of delivery charges can be separately stated. CRIC did not feel that a ruling could be made with respect to the third question in its current form as the term “manufacturing” is not defined in the Agreement. Finally, with respect to the fourth question, CRIC recommends that the Governing Board find that if a state’s taxability matrix indicates that it excludes transportation from the definition of “sales price,” then transportation would be excluded if it is separately stated. With respect to the second and fourth questions, this answer does not mean that CRIC agrees that there is a separately stated charge solely for “transportation” under the facts provided. The determination of whether there is something more than transportation included in this charge with respect to ready mix concrete would need to be determined by the individual state.

**Rationale:**

1. “Transportation” is not defined in the Agreement. However, the Merriam-Webster Dictionary defines transportation to be the act or process of moving people or things from one place to another. Nevada does not deny there is movement of product in the delivery of ready mix concrete. The concrete has to be moved from the plant to the purchaser’s location. Therefore, “transportation” is involved when ready mix concrete is delivered from the plant to the customer’s location.
2. The Agreement defines “sales price” to mean “...the measure subject to sales tax and means the total amount of consideration, including cash, credit, property, and services, for which personal property or services are sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for the following:
  - A. The seller's cost of the property sold;
  - B. The cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller;

- C. Charges by the seller for any services necessary to complete the sale, other than delivery and installation charges;
- D. Delivery charges;
- E. Installation charges; and
- F. Credit for any trade-in, as determined by state law.

States may exclude from “sales price” the amounts received for charges included in paragraphs (C) through (F) above, if they are separately stated on the invoice, billing, or similar document given to the purchaser.”

The Agreement defines “delivery charges” to mean “...charges by the seller of personal property or services for preparation and delivery to a location designated by the purchaser of personal property or services including, but not limited to, transportation, shipping, postage, handling, crating, and packing.

A. A member state may exclude all delivery charges from the sales price of all personal property and services, or choose to exclude from the sales price of personal property or services one or more of the following components, and may amend the definition of delivery charges accordingly:

1. Handling, crating, packing, preparation for mailing or delivery, and similar charges; or
2. Transportation, shipping, postage, and similar charges.”

It is clear from the definitions that “transportation” as a component of delivery charges can be separately stated. (Note: Although CRIC agreed that “transportation” of ready mix concrete can be separately stated, CRIC is not addressing whether the amounts indicated in the facts presented are (1) solely for “transportation” or (2) for a combination of “transportation” and other services/elements of sales price. That determination needs to be made by the individual state.)

3. The Agreement does not define “manufacturing.” Manufacturing is defined differently on a state-by-state basis. Therefore, CRIC is not able to answer this question. A uniform definition of “manufacturing” would first need to be developed and added to the Agreement, which is beyond the scope of the CRIC process.

4. The Taxability Matrix provides information on how the state treats products for which a definition is in the Agreement. In Section 328 of the Agreement, it provides that a “member state shall relieve sellers and CSPs from liability to the member state and its local jurisdictions for having charged and collected the incorrect amount of sales or use tax resulting from the seller or CSP relying on erroneous data provided by the member state in the taxability matrix.

Section A of the Taxability Matrix requires the state's to indicate whether "transportation, shipping, postage and similar charges" are included in or excluded from "sales price." If a state's Taxability Matrix excludes transportation, then transportation would be excluded if it is separately stated on the invoice or similar billing document given to the purchaser. (Note: Although CRIC agreed that "transportation" of ready mix concrete can be separately stated, CRIC is not addressing whether the amounts indicated in the facts presented are (1) solely for "transportation" or (2) for a combination of "transportation" and other services/elements of sales price. That determination needs to be made by the individual state.)

**Participating Committee Members:**

Myles Vosberg, Tom Atchley, Dan Noble, Richard Cram, David Steines and Tim Jennrich