

**Business Advisory Council
Petition For Resolution and Reconsideration**

**Nebraska Is Not In Substantial Compliance
With The Streamlined Sales And Use Tax Agreement**

Hearing Requested

Petition For Resolution

Pursuant to Rule 905 of the Streamlined Sales and Use tax Agreement (“SSUTA”) and Subsections (B), (C) and (F) of Section 1002 of the SSUTA, petitioner, the Business Advisory Council (“BAC”), formally petitions the Governing Board to invoke the issue resolution process from the Governing Board’s action of not finding Nebraska out of compliance with the SSUTA and not initiating the sanctions process under Section 809 by proposing a resolution to sanction Nebraska. As required by Rule 1001.A.2, the BAC hereby states it is not aware that this matter is pending in any state or local administrative or judicial process and the BAC requests a hearing with regard to this petition.

Issue for Resolution and Reconsideration

Section 805 states: “[a] member state is in compliance with the Agreement if the effect of the state’s laws, rules, regulations, and policies is substantially compliant with each of the requirements set forth in the Agreement.” Nebraska has admitted in its certificate of compliance that it is not substantially compliant with section 333, first effective January 1, 2010, by affirmatively answering “yes” that Nebraska is taxing “electronic mailing lists” in its definition of tangible personal property. This is prohibited by section 333 which clearly states:

A member state shall not include any product transferred electronically in its definition of “tangible personal property.” “Ancillary services”, “computer software”, and “telecommunication services” shall be excluded from the term

“products transferred electronically.” For purposes of this section, the term “transferred electronically” means obtained by the purchaser by means other than tangible storage media.

Emphasis added. Nebraska is not in substantial compliance with each provision of the SSUTA and it should have issued a statement of non-compliance when conducting its annual recertification pursuant to section 803.¹ Additionally, the Compliance Review and Interpretations Committee (“CRIC”) and, subsequently, the Governing Board should have found Nebraska was not substantially compliant with sections 332 and 333.

Pertinent Facts

To better understand why Nebraska should have been found out of substantial compliance with the SSUTA, some pertinent facts are provided below. The first set of pertinent facts address a Nebraska tax case (*American Business Information*) relied upon by the Nebraska Department of Revenue to assert mailing lists delivered electronically constitute “tangible personal property.” Next, a subsequent revision to a sales and use tax regulation based on that case is provided. Following that discussion, a brief summary of how Nebraska imposes its sales and use tax is provided along with the effective dates of sections 332 and 333 and it being clear a state’s laws (including case law) were not grandfathered. Lastly, an explanation on how Nebraska’s lack of substantial compliance with sections 332 and 333 creates a burden on business is provided; concluding with a summary of how CRIC and Governing Board voted on Nebraska’s substantial compliance with the SSUTA.

¹ Nebraska’s recertification statement dated July 19, 2010 is posted on the website of the Streamlined Sales Tax Governing Board.

Case Law - *American Business Information, Inc. v. Egr*, 650 N.W.2d 251 (Neb. 2002)

1. The Supreme Court of Nebraska in this case addressed whether a taxpayer's delivery of online data was considered a sale of tangible personal property for apportioning a multijurisdictional business's corporate income tax. The Court held a taxpayer could include its sales of online data in its sales factor as a sale of "tangible personal property."
2. The applicable statute being interpreted was not for sales tax, but was for Nebraska's income tax. Like many other states, Nebraska's income tax law specifies "Any term used in sections [Nebraska's income tax sections] shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required."² Analyzing the Internal Revenue Code, the Supreme Court of Nebraska concluded the sale of online data was "tangible personal property."
3. Nebraska had (and continues to have) a separate definition of "tangible personal property" for purposes of its sales and use tax. *See* former Neb. Rev. Stat. § 77-2702.20. That section was subsequently transferred and amended in 2003 to Neb. Rev. Stat. § 77-2701.39 to comply with the SSUTA's definition of "tangible personal property." That definition is independent of Nebraska's income tax and it did not, and still does not, have a reference to the "laws of the United States relating to federal income taxes" in its definition. In compliance with the definition of "tangible personal property in the SSUTA's Library of Definitions, Neb. Rev. Stat. § 77-2701.39 states the following:

Tangible personal property means personal property which may be seen, weighed, measured, felt, or touched or which is in any other manner

² Neb. Rev. Stat. § 77-2714.

perceptible to the senses. Tangible personal property includes electricity, water, gas, steam, and prewritten software.

4. Accordingly, there is no direct basis for the Nebraska Department of Revenue asserting “tangible personal property” for sales and use tax purposes includes an interpretation of “tangible personal property” for purposes of how a multijurisdictional business apportions its corporate income using Nebraska’s sales factor.

Nebraska’s Regulation 1-080.05 Pre and Post *American Business Information*

5. Before the *American Business Information* case, Nebraska’s regulation addressing mailing lists read as follows:

080.05 Mailing lists provided in the form of labels are taxable. Mailing lists that are provided on magnetic media or in an electronic format are not taxable.

6. Apparently with the *American Business Information* case as the authority for the 180 degree modification, Nebraska’s regulation addressing mailing lists subsequent to that case currently reads as follows:

080.05 Mailing lists and prospect lists provided in the form of labels, magnetic media, diskette, electronic or any other format are taxable.

7. While the BAC disagrees with the legal premise of using the *American Business Information* case to hold electronically delivered mailing lists constitute “tangible personal property” for sales and use tax purposes in Nebraska, the change in Nebraska’s regulation switching electronically delivered mailing lists (and prospect lists) from not taxable to taxable is based on that position. It was not based on the mailing lists being taxable as a “service.”

Imposition of Nebraska’s Sales & Use Tax

8. A spokesperson for the Nebraska asserted when Nebraska’s substantial compliance with the Agreement was reviewed by CRIC and the Governing Board that the regulation did not address whether Nebraska was imposing its sales and use tax on electronically delivered mailing lists as “tangible personal property” or a “service.” That is partially true; the regulation does not specify that electronically delivered mailing lists are taxable as “tangible personal property.” However, the facts clearly indicate Nebraska is attempting to impose its tax on the electronically delivered mailing lists as “tangible personal property.” (And, admitted to by Nebraska in its Certificate of Compliance.) Similar to many other states, Nebraska’s sales and use tax is broadly imposed on all sales of tangible personal property and is limited to select (aka enumerated) services. The following is Neb. Rev. Stat. § 77-2703(1) that imposes Nebraska’s sales and use tax:

(1) There is hereby imposed a tax at the rate provided in section 77-2701.02 upon the gross receipts from **all sales of tangible personal property sold at retail in this state**; the gross receipts of every person engaged as a public utility, as a community antenna television service operator, or as a satellite service operator, any person involved in the connecting and installing of the services defined in subdivision (2)(a), (b), (d), or (e) of section 77-2701.16, or every person engaged as a retailer of intellectual or entertainment properties referred to in subsection (3) of section 77-2701.16; the gross receipts from the sale of admissions in this state; the gross receipts from the sale of warranties, guarantees, service agreements, or maintenance agreements when the items covered are subject to tax under this section; beginning January 1, 2008, the gross receipts from the sale of bundled transactions when one or more of the products included in the bundle are taxable; the gross receipts from the provision of services defined in

subsection (4) of section 77-2701.16; **and the gross receipts from the sale of products delivered electronically as described in subsection (9) of section 77-2701.16.** Except as provided in section 77-2701.03, when there is a sale, the tax shall be imposed at the rate in effect at the time the gross receipts are realized under the accounting basis used by the retailer to maintain his or her books and records.

Emphasis added. Subsection (9) of Neb. Rev. Stat. § 77-2701.16, highlighted above, was added to impose the tax on certain specified products. That provision reads as follows:

(9) Gross receipts includes the retail sale of digital audio works, digital audiovisual works, digital codes, and digital books delivered electronically if the products are taxable when delivered on tangible storage media. A sale includes the transfer of a permanent right of use, the transfer of a right of use that terminates on some condition, and the transfer of a right of use conditioned upon the receipt of continued payments.

Based on Nebraska's imposition statute, above, electronically delivered mailing lists is not one of the enumerated services subject to Nebraska's sales and use tax.

9. Nebraska could have imposed (and still can) a tax on electronic mailing lists; however, to do so and be in substantial compliance with the SSUTA it must follow the requirements of the SSUTA. Specifically, Nebraska must comply with sections 332 and 333 when imposing its tax on any product delivered electronically (unless excluded; mailing lists are not excluded). To be clear, the BAC believes Nebraska is in substantial compliance with the SSUTA in imposing its tax on the sale of electronically delivered digital audio works, digital audio visual works, digital codes. However, for some unknown reason, Nebraska is asserting it does not have to comply with section 333 when imposing its sales and use tax on mailing lists delivered electronically. For example, when Nebraska enacted its tax on certain digital

goods, it could have also imposed the tax on “mailing lists and prospect lists transferred electronically.”

Sections 332 and 333 Did Not Grandfather States’ Prior Laws/Interpretations

10. Sections 332 and 333 were added to the SSUTA on September 20, 2007. While section 332 was effective January 1, 2008, the states were given until January 1, 2010 to comply with all the terms of that section. The states were given until January 1, 2010 to comply with section 333. Thus, what constitutes substantial compliance with these sections was first subject to the annual compliance review in 2010.
11. Sections 332 and 333 clearly do not provide any grandfathering language to allow a state that previously taxed products transferred electronically to continue to do so after January 1, 2010. Section 333 was intentionally inserted into the SSUTA to address, and to try and prevent, the situation Nebraska presently faces. Unless excluded (*e.g.*, ancillary services), SSUTA member states after January 1, 2010, can no longer impose their tax on certain products delivered electronically based on it being part of the state’s “tangible personal property” tax definition. This applies regardless of whether the imposition is based on statutory law, case law, a regulation or written policy of a state.

Lack of Substantial Compliance with Section 333 Imposes Tax Burden

12. Nebraska’s failure to comply with section 333 imposes a burden on business. Because Nebraska is taxing products transferred electronically as tangible personal property, the protections provided to sellers and purchasers under section 332.D do not apply. That provision specifies the following:

D.1. A statute imposing a tax on “specified digital products,” “digital audio-visual works,” “digital audio works” or “digital books” and, after January 1, 2010, on any

other **product “transferred electronically” shall be construed as only imposing the tax on a sale to a purchaser who is an end user unless the statute specifically imposes and separately enumerates the tax on a sale to a purchaser who is not an end user.** For purposes of this paragraph, an “end user” includes any person other than a person who receives by contract a product “transferred electronically” for further commercial broadcast, rebroadcast, transmission, retransmission, licensing, relicensing, distribution, redistribution or exhibition of the product, in whole or in part, to another person or persons.

A person that purchases products “transferred electronically” or the code for “specified digital products” for the purpose of giving away such products or code shall not be considered to have engaged in the distribution or redistribution of such products or code and shall be treated as an end user.

2. A statute imposing a tax on “specified digital products,” “digital audio-visual works,” “digital audio works” or “digital books” and, after January 1, 2010, on any other **product “transferred electronically” shall be construed as only imposing tax on a sale with the right of permanent use granted by the seller unless the statute specifically imposes and separately enumerates the tax on a sale with the right of less than permanent use granted by the seller.** For purposes of this paragraph “permanent” means perpetual or for an indefinite or unspecified length of time. A right of permanent use shall be presumed to have been granted unless the agreement between the seller and the purchaser specifies or the circumstances surrounding the transaction suggest or indicate that the right to use terminates on the occurrence of a condition subsequent.

3. A statute imposing a tax on “specified digital products,” “digital audio-visual works,” “digital audio works” or “digital books” and, after January 1, 2010, on any other **product “transferred electronically” shall be construed as only imposing tax on a sale which is not conditioned upon continued payment from the purchaser unless the statute specifically imposes and separately enumerates the tax on a sale which is conditioned upon continued payment from the purchaser.**

4. A member state which imposes a sales or use tax on the sale of a product “transferred electronically” to a person other than end user or on a sale with the right of less than permanent use granted by the seller or which is conditioned upon continued payment from the purchaser shall so indicate in its taxability matrix in a format approved by the Governing Board.

Emphasis added. Additionally, another purpose of section 333 was to ensure a state’s legislators were imposing the tax on products transferred electronically and state tax administrators were not attempting to tax such products using tax policy or regulations holding the state’s tax on “tangible personal property” encompassed these products. Again, the BAC is not asserting that Nebraska cannot tax mailing lists transferred electronically; however, if Nebraska desires to do so it needs to substantially comply with all the provisions of the SSUTA.

CRIC and Governing Board Vote

13. Regarding Nebraska’s substantial compliance with the SSUTA, this issue of Nebraska being in compliance with section 333 was the primary issue raised by the BAC. By a 4-2 vote CRIC found Nebraska in substantial compliance with the SSUTA. CRIC representatives from South Dakota and Washington voted for Nebraska to be found out of substantial compliance with the SSUTA. Oklahoma and Washington at the Governing Board meeting held on December 13, 2010 were the only states to vote that Nebraska was not in substantial compliance with the SSUTA.

Requested Resolution

1. As required by Section 805, Nebraska is clearly not in substantial compliance with each provision of the SSUTA. Nebraska has substantial compliance issues with sections 332 and

- 333 of the SSUTA. The Governing Board should find Nebraska out of substantial compliance with each of the above sections of the SSUTA and other sections, as applicable.
2. In response to the annual recertification process conducted pursuant to Section 803 and Rule 905, the Governing Board should notify Nebraska that it should have filed a statement of noncompliance with the SSUTA.
 3. The Governing Board should determine that CRIC and the Board should have found Nebraska out of substantial compliance based on the foregoing; including Nebraska violating the SSUTA fundamental purpose section, Section 102 of the SSUTA.
 4. The Governing Board should initiate the sanctions process under Section 809 by proposing a resolution to sanction Nebraska, giving Nebraska a reasonable amount of time to comply.
 5. The Governing Board should take any other action it deems appropriate.

Respectfully submitted,

Meredith Garwood *fn*
Meredith Garwood
President, Business Advisory Council

Dated: February 11, 2011

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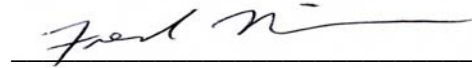
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Affirmation

Pursuant to Title 28 U.S.C., Section 1746(2), I, Fred Nicely, declare under penalty of perjury that the foregoing is true and correct.

Executed on February 11, 2011

A handwritten signature in cursive script, appearing to read "Fred Nicely", is written above a horizontal line.

Fred Nicely
Tax Counsel, Council On State Taxation