



Software Finance & Tax Executives Council

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Petition For Resolution and Reconsideration Of The Governing Board's May 12, 2009 Decision Adopting Interpretative Opinion 2009-01

Hearing Requested

Pursuant to Section 1002.E of the Streamlined Sales and Use Tax Agreement ("SSUTA") and Rules 1001 and 1002 of the Rules and Procedures of the Streamlined Sales Tax Governing Board ("Governing Board"), the Software Finance and Tax Executives Council ("SoFTEC"), by and through its undersigned counsel, hereby petitions the Governing Board for resolution and reconsideration of its May 12 decision adopting Interpretative Opinion 2009-01 holding that the purchase of intangible software license upgrades should be treated the same as the original purchase of a software license. SoFTEC asserts that the Interpretative Opinion is devoid of any legal analysis, is erroneous as a matter of law, is not a proper interpretation of any provision of the SSUTA and its adoption by the Governing Board should be reversed. Copies of SoFTEC's Request for Interpretation and the Governing Board's Interpretative Opinion are attached as Exhibits A and B and are incorporated herein by reference. In support of this petition, SoFTEC shows as follows:

1. The SSUTA defines the term "tangible personal property" as follows"

[P]ersonal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses. "Tangible personal property" includes electricity, water, gas, steam, and prewritten computer software.

2. The SSUTA defines the term "computer software" as "a set of coded instructions designed to cause a "computer" or automatic data processing equipment to perform a task."
3. SoFTEC's request for interpretation is based on fact patterns under which a purchaser acquires computer software subject to a license that only allows the purchaser to make a specific number of copies of the software, allows a specific number of concurrent users or to load the software onto a computer with a specified computing power. If the purchaser wants to exceed the limits specified in the license, it must obtain additional rights from the seller and pay an additional license fee.

4. Under the fact patterns set forth in the Request for Interpretation, when the purchaser pays the additional license fee, the seller provides the purchaser with an alphanumeric code that facilitates the transfer of the additional rights to use the software.

5. The Interpretative Opinion correctly holds that:

Although no physical software or other tangible personal property is distributed in the fact pattern, the additional license to use the software is the essence of the transaction, not the alphanumeric code. The alphanumeric code merely facilitates the additional use of the software.

6. However, the Interpretative Opinion concludes that “[t]he additional license to use the software should be treated the same as the original purchaser of the software license.”

7. The software license upgrades described in the Request for Interpretation are not within the SSUTA’s definition of “computer software.”

8. The software license upgrades described in the Request for Interpretation are not within the SSUTA’s definition of “tangible personal property.”

9. The software license upgrades described in the Request for Interpretation are intangible personal property.

10. There is no basis in the SSUTA for treating intangible personal property the same as “computer software” or “tangible personal property” as those terms are defined in the SSUTA.

11. Nor is there any basis in the law, upon the facts presented in the Request for Interpretation, for treating the software license upgrades described therein the same as the original purchase of the software license.

12. SoFTEC asserts that Interpretative Opinion 2009-01 is not a proper interpretation of the SSUTA.

13. This petition does not relate to any matter pending in any state or local administrative or judicial process.

14. Pursuant to Rule 1001.A.2, the BAC requests a hearing with regard to this petition.

WHEREFORE petitioner respectfully requests the following relief:

1. That the Governing Board reconsider its decision of May 12, 2009 adopting Interpretative Opinion 2009-01.

2. That the Governing Board not adopt Interpretative Opinion 2009-01 as an interpretation of the SSUTA.

3. That the Governing Board issue an interpretative opinion finding that the software license upgrades described in the Request for Interpretation are intangible personal property, are neither “tangible personal property” nor “computer software” as those terms are described in the SSUTA and that there is no basis within the SSUTA for treating them the same as “computer software” or “tangible personal property.”
4. That the Governing Board issue such other and further relief as it deems appropriate.

Respectfully submitted,



Mark E Nebergall
President
Software Finance and Tax Executives
Council
Attorney for Petitioner

Dated: July 10, 2009

UNSWORN DECLARATION UNDER PENALTY OF PERJURY

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

Executed on: July 10, 2009



Mark E. Nebergall

Exhibit A

SoFTEC's Request for Interpretation

Streamlined Sales Tax Governing Board, Inc.
Compliance Review and Interpretations Committee

INTERPRETATION/DEFINITION REQUEST

Complete each section

1. **Name(s) of Requestor(s):** Software Finance & Tax Executives Council

2. **Contact Person:** **Name** Mark Nebergall
Address 1150 17th St., NW,
Suite 601
Telephone (202) 331-9533
Email mnebergall@softwarefinance.org

3. **Agreement Section(s) involved:** Definitions of "Tangible Personal Property" and "Computer Software"

4. **Statement of Background Facts** (be succinct): Purchaser acquires prewritten computer software under a license that limits its ability to use the software in one of three ways: (1) the license only permits the purchaser to make a set number of copies, (2) the license only permits a set number of users to use the software concurrently, or (3) the license only permits the purchaser to load the software onto a computer with a specified computing power. If the purchaser wants to make additional copies of the software, allow additional users to use the software concurrently, or to migrate the software to more powerful computer, it must upgrade the license and pay an additional license fee. Once the fee is paid, the seller provides the purchaser by telephone with an alphanumeric code which, when entered into the computer, permits the making of additional copies of the software, permits additional concurrent users, or causes the software to function on the more powerful machine. The seller delivers no additional software to the purchaser.

5. **Issues:** Does a software license upgrade (as opposed to an upgrade of the software itself) constitute "tangible personal property" or "computer software" where the only thing delivered to the purchaser is an alphanumeric code.

6. **Proposed Interpretation:** A software license upgrade (as opposed to an upgrade of the software itself) does not constitute "tangible personal property" or "computer software" where the only thing delivered to the purchaser is an alphanumeric code .

7. **Is expedited consideration requested?** X No Yes

8. **Date this Request is submitted:** January 11, 2007

Submit to: Scott Peterson, Executive Director
Streamlined Sales Tax Governing Board, Inc.
4205 Hillsboro Pike, Suite 305
Nashville, TN 37215

**MEMORANDUM IN SUPPORT OF SOFTEC'S REQUEST FOR INTERPETATION
OF THE DEFINITIONS OF "TANGIBLE PERSONAL PROPERTY"
AND "PREWRITTEN COMPUTER SOFTWARE"**

This memorandum is submitted in support of the request for interpretation of the definitions of "tangible personal property" ("TPP") and "computer software" in the Streamlined Sales and Use Tax Agreement ("Agreement"). This interpretation request is submitted in accordance with Section 902 of the Agreement and Rules 902 and 903.2 of the Rules and Procedures.

The Software Finance and Tax Executives Council (SoFTEC) believes that an upgrade of a software license that does not involve the delivery of any additional computer software to the purchaser is a transaction involving intangible personal property and does not involve either "computer software" or "tangible personal property" as those terms are used in the Agreement. It is important to distinguish between a license upgrade, which typically will only require the delivery of an alphanumeric code or "key" and a software-upgrade which will require the delivery of additional software object code which enhances or changes the functionality of the software. A software upgrade will allow the software to cause the computer onto which it is loaded to perform more and/or different functions. By contrast, a license upgrade permits broader distribution through or use in the purchaser's business of the software's existing functionality or capability and does not require the delivery of any additional software code.

Facts:

The following examples illustrate situations involving software license upgrades:

Example 1: Purchaser acquires from seller a copy of prewritten computer software subject to a license. The license permits the purchaser to make 500 copies of the software for use in the purchaser's business. The software is such that when the 500th copy is made, it will not permit the making of additional copies without entry of a special alphanumeric code or "key." Subsequent to the acquisition of the software, purchaser's business expands and it needs additional copies of the software. Purchaser contacts the seller and, as part of a separate transaction, pays an additional fee and receives the key over the telephone. Purchaser enters the key into the software which now will allow the making of additional copies.

Example 2: Purchaser acquires from seller a copy of prewritten computer software subject to a license. The license permits the purchaser to load the software onto a server that allows purchaser's employees concurrent use of the software. However, the software only will permit access to 500 users at a time. Later, purchaser's business expands and it needs to allow more than 500 users concurrent access to the software on its server. Purchaser contacts the seller and, as part of a separate transaction, pays an additional fee and receives the key over the telephone. Purchaser enters the key into the software which allows additional users concurrent access to the software.

Example 3: Purchaser acquires from seller a copy of prewritten computer software subject to a license. The license only permits the purchaser to load the software onto a computer with a certain data processing capacity. Later, purchaser's business expands and it needs additional data processing capacity. Purchaser buys a computer with added data processing power. However, in order to load the seller's software onto the new computer, it needs to upgrade its license. Purchaser contacts seller and, as part of a separate transaction, pays an additional fee and receives an alphanumeric "key" over the telephone. Purchaser loads the software onto the new computer and enters the key which allows the software to function.

There likely are other fact patterns that involve software keys. The examples above are only designed to illustrate a few of the myriad possible situations where a software key, where no delivery of any additional software code occurs, might be used.

Argument:

The Agreement defines "computer software" as follows:

"Computer software" means a set of coded instructions designed to cause a "computer" or automatic data processing equipment to perform a task.

The alphanumeric code or key that facilitates a software license upgrade is not a set of instructions that causes a computer to perform a task. The "key" is only a mechanism that allows the seller to control the use of its software by the customer. The "key" is merely a bit of data used by the software's preexisting coded instructions that changes some operating parameter.

Nor is the alphanumeric key "tangible personal property." The agreement defines "tangible personal property" as follows:

"Tangible personal property" means personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses. "Tangible personal property" includes electricity, water, gas, steam, and prewritten computer software.

The alphanumeric codes or keys at issue here have no intrinsic value and merely represent the delivery to the customer of the right to use the software in ways in which the customer previously was restricted. Under the facts presented about, the keys were read to the purchaser's employees over the telephone; but it would make no difference whether the keys were delivered on a piece of paper, in an email message or directly inserted into the purchaser's computers remotely by the seller. Once the key is entered, it is no longer needed and can be discarded.

We assert that the alphanumeric code or key is merely a representation of the delivery to the purchaser of the enhanced license rights and has no intrinsic value of its own, meeting the definition of "intangible personal property." Black's Law Dictionary defines "intangible property" as "property as has no intrinsic and marketable value, but is merely the representative or evidence of value, such as certificates of stock, bonds, promissory notes, copyrights, and franchises" or "property that is a 'right' such as a patent, copyright, trademark, etc.." Here,

delivery of the alphanumeric code or key is merely the mechanism through which the increased license rights are transferred to the purchaser.

In addition, even though in the fact patterns described above the software keys were delivered by telephone, the method of delivery of the keys is not relevant to their essential character as intangible property. It would not matter whether the keys were printed on a piece of paper mailed to the customer, sent by email, retrieved from a website or delivered using some other method.

Last, it would make no difference whether the software to which the keys relate was delivered on disk or electronically; there is no software delivered in the separate “key” transactions described in the fact patterns. Software “keys” are not tangible or intangible depending on how the underlying software was delivered; they are always representative of intangible property rights.

Conclusion:

As has been shown, a software license upgrade, facilitated through the use of an alphanumeric code or key, is not a transaction involving either computer software or tangible personal property. The Governing Board should grant the interpretation request.

EXHIBIT B

Interpretative Opinion 2009-01

STREAMLINED SALES AND USE TAX AGREEMENT
COMPLIANCE REVIEW AND INTERPRETATIONS COMMITTEE

Interpretative Opinion 2009-01

This Interpretative Opinion recommendation is made to the Governing Board by the Compliance Review and Interpretations Committee this day of January 15, 2009 in accordance with Article IX, Rule 902 of the Rules and Procedures adopted by the Streamlined Sales Tax Governing Board, Inc.

The party requesting the interpretation is Software Finance & Tax Executives Council (SoFTEC) represented by Mark Nebergall. The request was made on January 11, 2008.

Issue

SoFTEC raises an issue associated with the purchase of additional software licenses. The fact pattern presented involves a purchaser acquiring prewritten computer software under a license that limits its ability to use the software in one of three ways: (1) the license only permits the purchaser to make a set number of copies, (2) the license only permits a set number of users to use the software concurrently, or (3) the license only permits the purchaser to load the software onto a computer with a specified computing power. If the purchaser wants to make additional copies of the software, allow additional users to use the software concurrently, or to migrate the software to more powerful computer, it must upgrade the license and pay an additional license fee. Once the fee is paid, the seller provides the purchaser by telephone with an alphanumeric code which, when entered into the computer, permits the making of additional copies of the software, permits additional concurrent users, or causes the software to function on the more powerful machine. The seller delivers no additional software to the purchaser. The issue presented is whether a software license upgrade (as opposed to an upgrade of the software itself) constitute “tangible personal property” or “computer software” where the only thing delivered to the purchaser is an alphanumeric code. The requester proposes that an interpretation be made that a software license upgrade (as opposed to an upgrade of the software itself) does not constitute “tangible personal property” or “computer software” where the only thing delivered to the purchaser is an alphanumeric code.

Public Comment

No state or public written comments were received.

Recommendation

By a unanimous vote, the Compliance Review and Interpretations Committee submits to the Governing Board a recommendation that the interpretation proposed by the requester not be accepted.

Rationale

The Agreement defines “**Tangible personal property**” as “personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses” and “includes electricity, water, gas, steam, and prewritten computer software.” Although no physical software or other tangible personal property is distributed in the fact pattern, the additional license to use the software is the essence of the transaction, not the alphanumeric code. The alphanumeric code merely facilitates the additional use of the software. The additional license to use the software should be treated the same as the original purchase of the software license.

Participating Committee Members

Larry Wilkie, Myles Vosberg, Andy Sabol, Tony Mastin, Joe Van Devender.