

MINUTES
STREAMLINED SALES TAX GOVERNING BOARD
December 5, 2008

President John Doyle called the meeting to order at 1:30pm. All states were present except New Jersey and Ohio.

Approval of minutes:

Secretary Joan Wagnon moved adoption of the minutes from the September 4-5, 2008 meeting. The motion was approved on a voice vote.

Final action on amendments from previous meeting:

Delivery Charges – AM08016:

Ms. Sherry Harrell reminded the Board that this proposal amended the definition of delivery charges by adding: “The exclusion of “delivery charges” for “direct mail” shall apply to any sale involving the delivery or mailing of “direct mail” or printed material that would otherwise be direct mail that results from a transaction that a state considers the sale of a service.” She moved that the proposal be approved. The motion was approved on a roll call vote with 15 states voting yes, Minnesota abstaining, and 3 states absent.

Software maintenance – AM08020A02:

Mr. Richard Dobson reminded the Board that this proposal creates product definitions for software maintenance contracts, amends the definition of a bundled transaction to account for software maintenance contracts and provides directions to states on how to use the definitions. In response to a question from Ms. Mary Cameron, Mr. Dobson said this proposal would not require Arkansas to change their law if they tax all maintenance contracts. Mr. Dobson moved that the proposal be approved. The motion was approved on a roll call vote with 15 states voting yes, Michigan abstaining, and 3 states absent.

Reports of committees:

Finance Committee:

Mr. Dobson presented the financial report for the first quarter of FY09 (FR08004). He said that telecommunication was the only item over budget, and that was because of the cost of the webinar subscription service that was not planned when the budget was developed. He also said that meeting income would probably not be met because of expected reduced meeting attendance.

Executive Committee:

President Doyle reported that the Executive Committee discussed ways of getting more legislator involvement, including paying their expenses to attend meeting. Secretary Wagnon reported on the federal legislative advocacy committee that she and Senator Dwight Cook co-chaired. She explained that the federal legislation would be introduced early in 2009 and would most likely include the video and cable industry in the section requiring simplification of local communication taxes. She said that the states should start evaluating the communication language to determine what taxes will be impacted. In response to a question from Ms. Susan Mesner, Secretary Wagnon stated that the federal bill will be posted on the website when it is introduced.

State and Local Advisory Council (SLAC):

Ms. Harrell reported that SLAC was drafting a rule to go along with the direct mail amendment. She said the sourcing task force was working, but going slowly because it would require all states to make changes. She said the task force on replacement taxes seemed to be making progress but there are unresolved issues.

Issue Resolution Committee:

Commissioner Bruce Johnson explained that the committee was required to meet within 60-160 days of the public notice on the New Jersey issue. He said the committee would likely meet on February 13, 2009. He said each group would have time to speak and then the committee would meet in a closed session to arrive at recommendation for the Governing Board.

In response to a question from Mr. Nicely about meeting in closed session, Mr. Bruce Johnson stated the committee felt it would hinder their ability to discuss the issue if it were done in open meeting. Mr. Nicely said the committee needed to develop process rules. Commissioner Bruce Johnson moved that the Governing Board suspend its rules on open meeting so that the committee's post hearing negotiations can be in a closed meeting. The motion passed on a voice vote. After further discussion about whether the open meeting requirements were in the Governing Board's rules or in the Streamlined Sales and Use Tax Agreement, Commissioner Bruce Johnson asked that his motion be withdrawn.

Luxury Clothing/Essential Clothing -- AM08018A02:

Representative Mark Falzone explained that this proposal would allow a state to have a threshold on essential clothing. He said the proposal would require Massachusetts to change the way it currently administered their threshold so that it was done in the same manner as is used by New York and Connecticut. He said Massachusetts was committed to joining the Governing Board. He reported that there was unanimous approval from SLAC.

Ms. Navjeet Bal reported that the Governor of Massachusetts hopes they can join the Board in 2009, but this amendment is critical to their success. She said that neither taxing nor exempting all clothing was politically possible.

Mr. John Phillips, staff for United States Senator John Kerry, said that Senator Kerry urged support of the Massachusetts amendment. He said Senator Kerry is hopeful it will add more states like Massachusetts to the Board.

Mr. Mike Wasser said that if the Board did nothing businesses would have to deal with the Massachusetts issue the same way they have in the past. He said this proposal will let a state use the principles found in sales tax holidays year around. He said the Board had made other accommodations for essentials, such as the lower rate on food and drugs, and this is sound policy that is consistent with what has been done in the past.

Ms. Maureen Riehl stated that the National Retail Federation was opposed to the amendment because it does not further the goal of simplification. She said that Senator Kerry had not been an active supporter of Streamline for a while. She explained that this isn't the only issue that Massachusetts has to overcome and the Governing Board needs to stick with its simplification principles.

Mr. Phillips explained that while it was too late this year for the federal legislation Senator Kerry would be much more likely to support the legislation if this amendment was adopted. He said that Senator Kerry would be happy to work with Senator Enzi on getting federal legislation passed for SST. He said that Senator Kerry would like to see the legislation passed.

Representative Falzone said having Senator Kerry on the Finance Committee was good for SST. He said that Massachusetts is ready to change its law if this amendment is approved.

Mr. Wayne Zakrzewski said that JC Penney is impacted by the amendment. He said it does add complexity to collecting sales and use taxes, but that his company wanted the Governing Board to think big like it did with origin based sourcing. He said his company supported that measure because of the benefit to the organization, and he thinks this amendment will have a similar effect. He said he isn't sure how this proposal will affect the passing of federal legislation, but it will allow a state to join. He said that they will continue to support Streamline with or without the Massachusetts amendment, but urged the Board to make a decision based on what will move them forward.

Mr. John Cmelak explained that Verizon supports this amendment because it is important to get new states to join which will further enhance the passing of federal legislation. Mr. Terry Ryan said that Apple also supports this amendment for the same reasons.

Mr. Frank Julian said that Macy's does not support the amendment. He explained that this isn't like a sales tax holiday that lasts only a short period of time, but will be a year round exemption that will cause a lot of difficulty with some retailers. He said it was a

bad precedent to amend the SSUTA to get one state, and wondered what the Governing Board will do when the next time one or more states come forward and say they can join if there is a change. In response to question from Mr. Joseph VanDenvender, Mr. Julian said they do business in Massachusetts, and this is something that is very difficult to manage.

Mr. Sean Nichols stated that Target agrees with both Mr. Zakrzewski and Mr. Julian on the difficulties the clothing thresholds cause for retailers. He said he supported the thoughts of Mr. Zakrzewski on moving the federal legislation forward and is in support of this amendment for that reason. He added that a grandfather clause for the three states is a good idea.

Secretary Wagon said that when she was asked why she voted for origin sourcing she was comfortable saying that it was a compromise that provided one rule for origin sourcing and one for destination. She said she was concerned that there would be three different caps and hoped that it would be possible to have only one cap.

In response to a question from Delegate Doyle, Mr. Zakrzewski said his company's goals were uniformity and simplification and moving the SST agreement forward. He said that they are neutral because the amendment meets at least one of their goals.

Mr. Richard Dobson said asking Massachusetts to use multiple sales tax holidays to achieve the same result would create a great deal of complexity. He said he would like to see a result that would create uniformity.

In response to a question from Ms. Sherry Harrell on whether or not the federal legislation allow for thresholds in holidays, Mr. Scott Peterson said the federal legislation says the SSUTA should contain rules and procedures for holidays which presumably could include caps and thresholds.

Commissioner Bruce Johnson moved that AM08018A02 be amended by the addition of "For states that have a cap or threshold on clothing before January 1, 2006 the provisions of this section do not apply to sales or use tax thresholds for exemptions that are based on the value of "essential clothing" except as provided in the Library of Definitions."

Ms. Harrell stated that the amendment was written to provide uniformity in the way the caps and thresholds are administered. Mr. Russ Brubaker expressed Washington's support for Massachusetts.

Senator Orv Smidt wondered what the answer would be if federal legislation had passed last year. He said that we need to keep this as uniform and simple as possible.

Representative Steven Constantino said that grandfather amendment would not help Rhode Island. He said that Rhode Island is being hit very hard by the recession and to balance their budget Rhode Island might have to impose sales tax on clothing. He said the only politically possible way they could impose tax on clothing would be to include a

threshold. He said it would be very unfortunate if the Governing Board's amendment allowed clothing thresholds only for those with a current threshold.

Mr. VanDevender suggested that it be a forward date instead of a backward date so that if a state doesn't conform by a certain point they could not use the threshold. Representative Constantino said if Mr. VanDevender's suggestion were adopted Rhode Island could support the amendment.

Representative Constantino moved to change the language to state that all member states and future member states adopt a cap or threshold by Dec. 31, 2009. The motion failed on a tie vote.

Commissioner Bruce Johnson's motion passed on a voice vote.

Senator Dwight Cook moved that the amendment be required to have a second vote. Commissioner Jerry Johnson said he supported Senator Cook's idea to have a second vote as it would give states the opportunity to think more about the amendment. Representative Mark Falzone urged support of Senator Cook's motion and said that in the meantime he would propose legislation to pass everything they need to come into compliance with the SSUTA. The motion to have a second vote was passed on a voice vote.

Commissioner Bruce Johnson moved that amendment AM08018A02 as amended and requiring a second vote be approved. That motion was approved on a roll call vote with 16 states voting yes, Minnesota abstaining, Rhode Island voting no, and New Jersey absent.

President Doyle announced that he would call a special meeting of the Governing Board for the sole purpose of having the second vote. He said such meeting would be held by teleconference.

Proposed Rules:

Mr. Richard Dobson moved adoption of three rules relating to software maintenance contracts (RP08010A01). The motion was approved on a voice vote.

Ms. Sherry Harrell moved to refer the rules relating to delivery charges (RP08007) to SLAC. The motion was approved on a voice vote.

Reports of committees:

Small Seller/Compensation Task Force:

Mr. Harley Duncan reported that the task force spent nine months discussing the small seller threshold and vendor compensation as envisioned in the federal SST legislation. He explained that the task force gathered as much information as possible, identified the

relevant issues and developed principles for the Governing Board's use. Mr. Duncan said that all the issues need to be considered in relation to technology and additional simplifications. He said there must be proven technology and the states have to be serious about paying for the technology. Mr. Duncan said that the task force would recommend some sort of small seller exception to rationalize the difference between the cost and benefit in collecting as there is some level of sales below which it doesn't make sense to require collection. He said that over time the threshold should move toward an occasional seller/sales threshold, and that the threshold must be plain, simple and straightforward. He said sellers should not be in doubt as to whether or not they were required to collect. He said the task force would recommend that the threshold be based on gross remote sales that is determined on the basis of a seller and its affiliates and not on a separate company threshold as in the current legislation.

In response to a question from Ms. Mesner about whether the federal legislation would be held up waiting for the Governing Board determined the appropriate language, Secretary Wagnon said she would prefer that the federal legislation contain a process instead of a number. She said the previous legislation included a specific small seller cap and it was controversial because some thought it was too high and some thought it was too low.

Mr. Duncan explained that the Joint Cost of Collection Study pointed out what drives the cost of collecting by businesses of different sizes. He said it would be helpful to have additional information on large sellers, the effect of SST simplifications, and the relationship between various costs and the amount of tax collected. He said an unanswered question was whether one compensation system could take into account the relationship between types of cost and the amount collected. He said the task force suggested the Board consider only those costs incurred directly in collecting sales tax and perhaps not those mixed costs that serve other business purpose. He said the task force believes compensation should reflect the size of retailers and the economies of scale that are present. He said the task force had not reached a conclusion on whether it is reasonable to place a maximum limit on total compensation. He said the task force recommended that the compensation system should be the same for state or local taxes.

Ms. Mesner expressed concern about negative state responses to a system that does not differentiate on the basis of nexus. She said Vermont doesn't currently give vendor compensation and this may not be popular.

Senator Cook said he was one who has long argued for the absolute least possible compensation. He said compensating nexus sellers was the right thing to do, but that he hoped that compensating nexus sellers is not a condition of compliance. Ms. Kristi Magill said that the task force recognized that vendor compensation should depend on the type of vendor and what they sell. Mr. Zakrzewski said Senator Cook's comments were well founded if the states provided compensation for their cost.

Audit Committee:

Mr. Bruce Christensen reported that the Audit Committee had been working with the CSP's preparing for their audit in the summer of 2009. He said they need one more state to provide an auditor.

Compliance Review and Interpretations Committee:

Mr. Andy Sabol reported on the committee's annual state compliance review. He said this was the first review since the Governing Board adopted a rule requiring each state to update their certificate of compliance. He explained that Mr. Peterson and Ms. Pam Cook identified compliance questions after reviewing each state's certificates and laws. He said that the committee created a 30 day public comment period for those interested in reviewing the list of items the staff felt needed to be addressed. Mr. Sabol said the committee held 4 teleconferences and went through each state one at a time to discuss whether or not each state was in compliance. He said that 15 states were found in compliance and 5 were not. Mr. Sabol said he felt comfortable with the decisions of the committee and would provide a written report the Governing Board could take up in May.

Mr. Fred Nicely commended the Committee, Ms. Cook and Mr. Peterson on all of their hard work. He said he felt that some of states found in compliance should not have been. He said he understood the reluctance of some on the committee to find a state out of compliance given the lack of guidelines defining compliance. In response to a question from President Doyle about whether he would rather have a set sanction applied to a particular type of transgression instead of having the Governing Board pick a sanction, Mr. Nicely said that is exactly what he thinks is necessary. He said the likelihood of sanctions should not be a consideration when conducting the evaluation as it could color the decision. He said the Board sends the wrong message when it says a state is in compliance when it is not in compliance.

Mr. VanDevender said that Indiana is very grateful that someone let them know what they missed. Mr. Dobson said that Kentucky agrees that this process shouldn't be viewed in a bad way. He said that Kentucky was found out of compliance and it was a matter of interpretation and they are looking to clarify their language. Mr. Sabol said that he understood this took time, but this was the committee's first time.

President Doyle announced that Senator Orv Smidt was leaving the Board and thanked him for his dedication to Streamline.

President Doyle adjourned the meeting at 9:54 AM.