

4/28/2009

Interpretive Rule related to proposed amendment AM08014A01

Rule ____ - Prohibition of Replacement Taxes

1. This rule provides guidance in applying the prohibition against replacement taxes in Section ____ of the Agreement. A “prohibited replacement tax” is a tax imposed outside a state’s general sales and use tax, on or with respect to a product or products that are defined in Part II or Part III(B) of the Library of Definitions (except alcoholic beverages or tobacco), that has the effect of avoiding the intent of the Agreement. A Governing Board determination whether a particular replacement tax is a “prohibited replacement tax” shall be based upon an examination of all the facts and circumstances according to the procedure established herein.

2. To determine that a tax is a replacement tax, the following must be found by the Governing Board by affirmative vote of three-fourths of the full member states, excluding the member state that is the subject of the question which shall not vote on the question:

a. at the time of the adoption of the tax, the tax was specifically imposed on or with respect to a product that was defined in Part II or Part III(B) of the Library of Definitions, or on products subsumed within such definitions, except alcoholic beverages and tobacco, and;

b. either:

i. at the time the state initiated action to become a member state, a tax was imposed upon such product by statutes which are subject to the requirements of the Agreement as identified in the state’s Petition for Membership filed with the Governing Board, or;

ii. after the state became a member state, a tax was imposed upon such product by statutes which are subject to the requirements of the Agreement as identified in the state’s Petition for Membership filed with the Governing Board, and;

c. the tax imposes an additional administrative burden on sellers of the product which would not be imposed if such tax were subject to all of the requirements of the Agreement with regard to sales and use taxes.

3. To determine that a replacement tax, as provided in subsection 2, is a prohibited replacement tax, as provided in Section ____ of the Agreement, the Governing Board must find that the replacement tax has the effect of avoiding the intent of the Agreement, considering the following factors:

a. whether the tax contains both a sales and a use tax component;

- b. any other factors related to the fundamental purpose expressed in Section 102 of the Agreement that the Board considers relevant.

Such finding shall be by affirmative vote of three-fourths of the full member states, excluding the member state that is the subject of the question which shall not vote on the question

4. Taxes that are not prohibited replacement taxes include, but are not limited to:
 - a. taxes on alcoholic beverages or tobacco;
 - b. in general, taxes based on measures other than price, such as weight or volume;
 - c. lodging or hotel occupancy taxes;
 - d. in general, broad-based business activity or privilege taxes, and;
 - e. taxes existing prior to the state initiating action to become a member state.

5. Examples:

Example 1 – Prior to joining SST, a member state imposed its sales tax on formal wear, but exempted clothing generally. As part of its legislation to conform to the Agreement, the state made the decision to exempt all clothing. After being approved as a member state, the state imposes a tax specifically on the sale of formal wear at the same or a different rate than the state's general rate of sales and use taxation. "Formal wear" is included within the definition of "clothing" in Part II of the Library of Definitions. The new tax has a use tax component and requires sellers to file a separate return. This tax is a prohibited replacement tax.

Example 2 – A state authorizes local governments to impose a separate restaurant tax on "all prepared food or beverages sold by restaurants," as defined by ordinance. The restaurant tax has no use tax component. The local government also imposed its generally applicable sales tax on prepared food. Prior to the state's admission to the Governing Board, the sales tax definition of "prepared food" was modified to conform to the SST definition. The additional tax, however, continues to be imposed by local jurisdictions within the state just on sales by restaurants. Thus, restaurants still pay both the generally applicable sales tax and the restaurant tax on their meals. Grocery stores, however, and other non-restaurants, just pay the sales tax on any prepared food they sell. The restaurant tax is not a prohibited replacement tax.