

SLAC Workgroup – Remote Access to Prewritten Computer Software

I. BAC Issue.

Statement of the underlying facts: Seller develops computer software (or, alternatively, licenses computer software from a third party), buys land, builds a data center, buys computer and communications equipment and installs the equipment in the data center (or alternatively, contracts with a third party data center provider). The seller loads the computer software on its computer equipment and connects the equipment to the Internet. Seller also hires personnel to maintain the computer software and equipment and monitor their performance. Customer signs a contract allowing it access to the seller's computer software and equipment, paying the seller a monthly fee for each of its employees that will be allowed access to the computer software and equipment using the Internet. Customer's employees input customer's data into the seller's computer software and equipment and receive back summaries of the data. Customer's employees have no right to enter the building where the computer software and equipment are located, nor do they ever receive any copy of the software. State A has a sales and use tax imposition statute limited to sales of tangible personal property, which includes prewritten computer software, including prewritten computer software that is delivered electronically. State A claims the transaction between seller and customer is a sale of electronically delivered prewritten computer software subject to the sales tax.

Issue: Whether a state's interpretation of a sales and use tax imposition statute limited to sales of "tangible personal property" as reaching transactions where there is no "receipt" of any tangible personal property by the purchaser complies with the SSUTA.

Argument: 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. "Tangible personal property" includes electricity, water, gas, steam, and **prewritten computer software**. The Agreement also defines the term "delivered electronically" as "delivered to the purchaser by means other than tangible storage media." Section 311.A of the agreement defines the terms receipt, for purposes of the sourcing rules, as "taking possession of tangible personal property." The BAC asserts that a state may not tax a sale of "tangible personal property," including "prewritten computer software," until such time as the tangible personal property (or, under the facts at issue, prewritten computer software) comes into the actual, physical possession of the customer.

The Agreement's regime pertaining to "specified digital products" and "products transferred electronically," (see Sec. 332) does not apply to either "tangible personal property" or "prewritten computer software." See Sec. 333. Also, the concept of "transferred electronically"

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which is broader than “delivered electronically, does not apply to either tangible personal property or prewritten computer software. *Id.*

Conclusion: Under the facts as presented, because no tangible personal property comes into the possession of the customer, there has not been a sale of tangible personal property or prewritten computer software, a species of tangible personal property. A state cannot tax as the sale of tangible personal property or prewritten computer software under SSUTA's definition of tangible personal property, a transaction where no prewritten computer software or other tangible personal property comes into the possession of the customer. Any state doing so is not in compliance with the SSUTA.

II. Survey - Statistical Summary: Thirty-one (31) states responded to the survey. Of the thirty-one (31), twelve (12) states indicated they do tax the remote access to prewritten computer software. Nineteen (19) states responded that they do not currently tax the remote access to prewritten computer software (included in this number is one state that has a moratorium on the collection of the tax). Of the twelve (12) states that tax remote access, seven (7) tax it under their sales and/or use tax, and five (5) tax it as a service.

III. Options:

A. Amendments to Agreement:

1. Section 311 – General Sourcing Definitions

Definition – For the purposes of Section 310, subsection (A), the terms "receive" and "receipt" mean:

- A. Taking possession of or making first use of tangible personal property,
- B. Making first use of services, or
- C. Taking possession or making first use of digital goods, whichever comes first.

2. “**Delivered electronically**” means delivered to the purchaser by means other than tangible storage media. For the purposes of this definition pre-written computer software delivered electronically may include products which are remotely accessed by the purchaser.

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B. Disclose Treatment on Taxability Matrix:

| Computer related products | Taxable | Exempt | Statute/Rule Cite/Comment |
|---|----------------|---------------|----------------------------------|
| • Computer | | | |
| • Prewritten computer software | | | |
| • Prewritten computer software delivered electronically | | | |
| • Prewritten computer software accessed remotely | | | |
| • Prewritten computer software delivered via load and leave | | | |
| • Non-prewritten (custom) computer software | | | |
| • Non-prewritten (custom) computer software delivered electronically | | | |
| • Non-prewritten (custom) computer software delivered via load and leave | | | |

C. **Toggle.** Permit states to tax prewritten computer software however delivered as tangible personal property, a service or a digital good and require that states reflect their treatment on the taxability matrix.

D. **Others?**

IV. Attachments.

SSUTA Section 332

SSUTA Section 333

SSUTA Section 311

SSUTA Rule 332.1

SSUTA Rule 332.2

7/18/12 Omaha Meeting

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SSUTA Rule 333

Definition of “Delivered electronically”

V. Participation in Digital Products Sourcing Workgroup