

SLAC Remote Access to Prewritten Computer Software Workgroup

Utah Meeting - September 18, 2012

I. Question: Can a State tax the remote access to pre-written computer software as the sale or use of tangible personal property under the SSUTA?

II. Answer: The SSUTA allows States to tax remote access to pre-written computer software by taxing it as a sale or use of tangible personal property.

III. Discussion:

A. BAC Position: 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.

B. Workgroup Response: A State may impose a sales tax on prewritten computer software however transferred under SSUTA’s definition of tangible personal property. It is up to each individual State to determine what is necessary to trigger the imposition of that State’s sales/use tax, whether it is a physical copy or an electronically accessed or transferred copy. The definition of Tangible Personal Property is uniformly defined in all Governing Board States. The fact that an individual state chooses to impose its sales or use tax on a defined product is not a violation of the SSUTA or the Sales and Use Tax Administration Act passed by each Governing Board State.

1. Tangible Personal Property Issue Paper dated April 15, 2002 Below is an excerpt:

“It is recommended that the project adopt the definition of tangible personal property in Alternative 3, substituting the already defined term of “prewritten” for “canned” and eliminating the last sentence. The recommended definition will read 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. To exclude prewritten software delivered electronically from taxation, a state must draft an exemption for “prewritten computer software delivered electronically.”

2. September 2003 -Draft Document Digital Equivalent of Tangible Personal Property Issue Paper.

Footnote 2 - Prewritten computer software, regardless of the form in which it is transferred, falls within the meaning of “tangible personal property” included in the Streamlined Sales and Use Tax Agreement. The definition reads, “‘Tangible Personal Property’ means personal property that can be seen, weighed, measured, felt, or touched, or that is any other manner perceptible to the senses. ‘Tangible personal property’ includes electricity, water, gas, steam, and prewritten computer software.” Thus, digitally delivered forms of this software are tangible personal property even though they may also satisfy the elements of a “digital equivalent of tangible personal property.

C. Proposed Solution:

1. Amendments to Agreement (in red):

a. Add to the end of the definition of “prewritten computer software” in Appendix C Part II:

“A member state may tax or exempt "pre-written computer software" regardless of how delivered or transferred.”

b. Section 311 – General Sourcing Definitions

i. 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.

ii. “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.

2. 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 (if taxable, indicate if taxed as tpp, a service or a digital good.			
• 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			