

Business Advisory Council
Petition For Resolution and Reconsideration

West Virginia Is Not In Substantial Compliance
With The Streamlined Sales And Use Tax Agreement

*** Hearing Requested ***

Petition for Resolution

Pursuant to Rule 1001 of the Streamlined Sales and Use tax Agreement (“SSUTA”) and Section 1002 (B), (C), and (F) of the SSUTA, petitioner, the Business Advisory Council (“BAC”), hereby petitions the Governing Board to invoke the issue resolution process to review the Governing Board’s action finding West Virginia not out of compliance with the SSUTA. As required by Rule 1001.A.2 of the SSUTA, the BAC hereby states it is not aware that this matter is pending in any state or local administrative or judicial process and the BAC requests a hearing regarding this petition.

Issue for Resolution and Reconsideration

Section 805 states: “[a] member state is in compliance with the Agreement if the effect of the state’s laws, rules, regulations, and policies is substantially compliant with each of the requirements set forth in the Agreement.” West Virginia is not substantially compliant with Section 332 D.2 and D.3. Each provision requires that a “**statute specifically imposes and separately enumerates the tax on a sale**” “with the right less than permanent use granted by the seller” (Sec. 332 D.2) and “which is conditioned upon continued payment from the purchaser.” (Sec. 332 D.3). *See also* Rule 332.1. No such West Virginia statutes exist, which clearly results in West Virginia’s lack of substantial compliance.

While the Compliance Review and Interpretations Committee (“CRIC”) found West Virginia out of substantial compliance, the Governing Board failed to find West Virginia out of substantial compliance with those provisions on October 5, 2022.

West Virginia’s lack of substantial compliance with section 332.D.2 and D.3 creates a burden on business. When Section 332 was added to the SSUTA, businesses (including the BAC) wanted certainty that a state’s legislature would act before imposing its sales/use tax on specified digital products “with less than permanent use” and the tax “was conditioned on continued payment.” West Virginia’s lack of statutory guidance fails to meet these SSUTA’s requirements, which also makes it unclear if West Virginia’s Legislature truly wanted its sales/use tax imposed on certain specified digital products. If West Virginia was found out of substantial compliance, the State’s Legislature would be put on notice that it has a SSUTA compliance issue it needs to fix. The West Virginia Legislature could easily clarify that its sales/use tax does (or does not) apply to non-permanent use and/or conditioned on continuous payment of specified digital products (or only select components), or other means compliant with the SSUTA.¹

Section 332 D.2 and D.3 ensure that a state’s tax agency is not able to impose tax on these items solely by administrative fiat and still retain its compliance with the SSUTA; however, that is precisely what has occurred in West Virginia. A spokesperson for the West Virginia State Tax Department confirmed the BAC’s concern with the lack of statutory guidance and indicated that West Virginia’s Legislature was not interested in imposing anything that looks like a new tax.² This is why the Department has, using solely administrative action, ignored the requirements of Section 332 D.2 and D.3 and imposed its sales/use tax on some specified digital products without the prerequisite statutory authority required by those provisions. If the West Virginia Legislature wanted to tax these specified digital products, it could have chosen to do so.

¹ Alternatively, the Department could retract its position that its sales/use tax applies to certain specified products that do not meet the statutory requirements imposed by Section 332 D.2 and D.3 of the SSUTA.

² See Amy Hamilton, *Digital Products Almost Knock West Virginia Out of Compliance with the SSUTA*, Tax Notes; and Paul Williams, *W.Va Survives Pact Compliance Vote Over Streaming Tax*, Law360 Tax Authority. Both articles posted on October 6, 2022 – copies attached.

Importantly, all the other SSUTA states taxing specified digital products are compliant with Section 332 D.2 and D.3. South Dakota, which has the broadest sales/use tax base of any SSUTA state, made the necessary changes to comply with the SSUTA’s specified digital tax provisions. And, more recently, Rhode Island was held by the Governing Board to be out of compliance and therefore made amendments to its laws on specified digital products to fix compliance issues (which were similar to West Virginia’s). Just as Rhode Island fixed its substantial compliance issue, West Virginia should be held to the same standard. A finding that West Virginia does not comply with the SSUTA properly puts both the Department and its Legislature on notice that the State needs to address a SSUTA compliance issue.

Sections 332 Did Not Grandfather States’ Prior Laws/Interpretations

Sections 332 was added to the SSUTA on September 20, 2007. While section 332 was effective January 1, 2008, the states were given until January 1, 2010, to comply with all the terms of that section. Section 332 D.2 and D.3 clearly do not provide any grandfathering language to allow a state that had a law that may tax certain specified digital products, including products transferred electronically, to continue to do so after January 1, 2010, without fully complying with all of Section 332 of the SSUTA requirements. The fact that West Virginia did not modify its taxability matrix until August 2021 does not change those requirements. While West Virginia has a broad sales/use tax base that applies to non-professional services, its imposition of tax on certain specified digital products (including those transferred electronically) are still covered by the requirements of Section 332 D.2 and D.3 of the SSUTA.

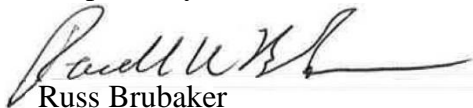
Requested Resolution

As required by Section 805, West Virginia is clearly not in substantial compliance with each provision of the SSUTA. West Virginia does not substantially comply with section 332 D.2 and D.3 of the SSUTA. The Issue Resolution Committee should recommend to the Governing

Board that it find West Virginia out of substantial compliance with Section 332 D.2 and D.3 of the SSUTA.

Relevant documents, which contain additional facts/information, previously submitted by the BAC and known to be submitted by the West Virginia State Tax Department are attached.

Respectfully submitted,



Russ Brubaker
President, Business Advisory Council

Dated: December 2, 2022

Contact Information

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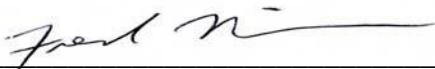
Additional Contact

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Affirmation

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

Executed on December 2, 2022



Fred Nicely
Sr. Tax Counsel, Council On State Taxation

Attachments

- A. BAC Revised Letter Concerning WV Compliance (9/9/22)
- B. BAC one-pager distributed at October 2022 Gov. Bd. Meeting
- C. WV State Tax Department Letter dated (9/9/22)
- D. Law360 Tax Authority Article (10/5/22)
- E. Tax Notes Article (10/6/22)

Attachment A

Date: September 9, 2022 (Revised letter from August 30, 2022)

To: Craig Johnson, Executive Director

From: Business Advisory Council's Compliance Subcommittee

Re: West Virginia is Not in Substantial Compliance with SSUTA Section 332.D.2 and D.3.

The Business Advisory Council ("BAC") Compliance Subcommittee seeks a determination from the Compliance Review and Interpretations Committee ("CRIC") that West Virginia's sales tax statutes are not in substantial compliance with Section 332.D.2 and D.3 of the Streamlined Sales and Use Tax Agreement ("SSUTA"). West Virginia construes its statutes as imposing tax on audio and video streaming services subscriptions. However, because no West Virginia statute specifically imposes and separately enumerates tax on sales of products transferred electronically that are sold with the grant by a seller of less than the right of permanent use or conditioned upon continued payment from the purchaser, West Virginia is not in substantial compliance with the SSUTA.¹

Background:

Prior to August 2, 2021, West Virginia's taxability matrix, in response to the question whether the State imposed tax on products transferred electronically (item 31000) was "no." On that date it changed its response to that item from "no" to "yes" and added a comment to digital audio visual works "sold with rights of use less than permanent use" (item 31050) with a comment that "the provision of streaming services is subject to this tax." A similar comment was also made to the State treatment of subscriptions to products "transferred electronically" (item 31121). However, other than those comments, the State's responses to both those items on the taxability matrix are still "no."²

On September 1, 2021, the West Virginia State Tax Department ("Department") published a general information notice clarifying the sales and use tax obligations of entities selling streaming services in West Virginia (TSD-445 - attached). The notice states that the sale of streaming services is subject to West Virginia sales and use tax because sales of services in the West Virginia are subject to tax unless a specific exception or exemption applies, and no such exception or exemption is available for streaming services.

On September 20, 2021, West Virginia again amended its taxability matrix by adding to the comments sections for digital audio works and digital books language like what it added on August 2, 2021, indicating that streaming services of those products also would be subject to tax. Additionally to comply with Section 328 of the Agreement, the Department clarified the enforcement date for those changes made in the taxability matrix was October 1 or November 1.³

These changes were made by the Department with no recent intervening change in any relevant West Virginia sales and use tax statutes.

¹ The BAC takes no position here whether West Virginia's sales tax legally applies to streaming services. These comments are limited solely to whether West Virginia is out of compliance with the SSUTA.

² The BAC does not raise West Virginia's "no" answer as a compliance issue under Sec. 332.D.4; however, it is not clear when a state should answer "yes" or "no" when a state partially imposes a tax on some products "transferred electronically." Clarification from the Governing Board on this issue would be appreciated.

³ While not effecting West Virginia's substantial compliance with Section 332 of the SSUTA, the BAC Compliance Subcommittee appreciates the State complying with Section 328 of the SSUTA.

Applicable West Virginia Statutes:

While neither the West Virginia taxability matrix nor the information notice cite any specific statute as authority for their position that internet streaming services are subject to the sales tax, the following appear relevant to their position:

Section 11-15-3 of the West Virginia Code generally imposes the sales tax as follows:

- a) Vendor to collect. – For the privilege of selling tangible personal property or custom software and for the privilege of furnishing certain selected services defined in sections two and eight of this article, the vendor shall collect from the purchaser the tax as provided under this article...

Section 11-15-2(18) of the West Virginia Code defines “service” or “selected service” as including:

all nonprofessional activities engaged in for other persons for a consideration, which involve the rendering of a service as distinguished from the sale of tangible personal property or custom software, but does not include contracting, personal services or the services rendered by an employee to his or her employer or any service rendered for resale...

The West Virginia statutes contain no specific definitions of or tax imposition on sales of specified digital products or products transferred electronically. Contrastingly with Section 332 of the SSUTA, the Department does not consider “sales or rentals” of specified digital products as taxable, apparently based on those not constituting a “nonprofessional service.”

Relevant Provisions of the Streamlined Sales and Use Tax Agreement and Rules and Procedures:

Agreement:

Section 332: SPECIFIED DIGITAL PRODUCTS

D.2. A statute imposing a tax on “specified digital products,” “digital audio-visual works,” “digital audio works” or “digital books” and, after January 1, 2010, on any other product “transferred electronically” shall be construed as only imposing tax on a sale with the right of permanent use granted by the seller **unless the statute specifically imposes and separately enumerates the tax on a sale with the right of less than permanent use granted by the seller.**

D.3. A statute imposing a tax on “specified digital products,” “digital audio-visual works,” “digital audio works” or “digital books” and, after January 1, 2010, on any other product “transferred electronically” shall be construed as only imposing tax on a sale which is not conditioned upon continued payment from the purchaser **unless the statute specifically imposes and separately enumerates the tax on a sale which is conditioned upon continued payment from the purchaser.**

805. For purposes of this section, the term “transferred electronically” means obtained by the purchaser by means other than tangible storage media.

Rules and Procedures: (See Appendix A)

Background of Streaming Products:

Some sellers provide their customers, on a subscription basis, access to libraries or catalogs of a variety of digital content, including movies, television shows, live content, music, audio books, and other products that fall within the SSUTA's definitions of "digital audio-visual works," "digital audio works," and "digital books." Rather than permitting subscribers to download (temporarily or permanent) copies of the digital content to their devices for viewing or listening, a seller supplies the content on a "streaming" basis. The stream permits to customer to watch or listen to any video or audio content on a real time basis and any copy of the content is resident on the customer's device for only a transitory period. Content can be "streamed" only when the customer's device is connected to the internet. Some sellers allow the customer to download a limited amount of the content for viewing or listening while off-line.

These sellers allow access to their libraries and catalogs of digital content only on a subscription basis. The firms charge a monthly subscription fee that renews automatically. If the customer cancels the subscription or fails to complete payment, the customer loses all access not only to the remotely accessible libraries or catalogs of content, but also access to any copies of such content that might have been downloaded to the customer's device. Because the customer's right of access to the digital content is contingent on maintaining a current subscription, such rights are not permanent.

West Virginia Department's Apparent Position:

West Virginia Department's position, as explained in its September 1, 2021, notice, is:

A streaming services provider is generally a supplier of entertainment (music, movies, video games, etc.) or other content delivered electronically, usually by an internet, satellite or cable connection to the subscriber's computer, television, mobile device or any other device suitable for accessing such content.

Streaming services differ from sales of digital products. A digital product is a discrete identifiable item. For example, a consumer may buy or rent a movie at a specified price for the download and will thereby have bought or leased a digital product. This [notice] does not cover sales of digital products, only the sales of streaming services.

When a consumer purchases streaming services, the consumer has generally bought access to curated entertainment content in the streaming service's inventory, it has not procured a right to any specified digital product.

BAC's Compliance Subcommittee Position on West Virginia's Substantial Compliance with the SSUTA:

Section 805.A of the SSUTA addresses what constitutes substantial compliance with the SSUTA. It states the following:

A member state is in compliance with the Agreement if the effect of the state's laws, rules, regulations, and policies is substantially compliant *with each of the requirements* set forth in the Agreement, even though the state uses different words than those contained in the Agreement. These requirements shall include the rules, interpretive opinions, and appendices adopted by the Governing Board. (Emphasis added.)

West Virginia is not in substantial compliance with the requirements imposed by Section 332.D.2 and D.3 of the SSUTA, as explained below.

First, the Department cites no statute as authority for its position that sales of streaming services are subject to tax. However, there are no West Virginia statutes that comply with the requirements of Section 332.D.2 and D.3 of the SSUTA. The State's imposition of tax on sales of services contained in Sections 11-15-3 and 11-15-2(18) is general in nature and, while subject to numerous exemptions, the Department notes that none of the exemptions apply to streaming services. Because no West Virginia imposition statute **specifically imposes and separately enumerates** a tax on sales of products transferred electronically with less than permanent use (required by Sec. 332.D.2) or on sales conditions on continued payment (required by Sec. 332.D.3), West Virginia is not in substantial compliance with those requirements. Those provisions clearly indicate a SSUTA member state is required to construe their imposition statutes as inapplicable to such sales unless "the statute specifically imposes and separately enumerates the tax" on such sales.

The BAC Compliance Subcommittee is not aware of any streaming services sold on a non-subscription basis. Because the Department interprets its imposition statutes as reaching these products, the State does not comply with the requirements of Section 332.D.2 and D.3 of the SSUTA.

While Section 332.C allows a SSUTA member state to impose a tax on products "transferred electronically" if it is separate from the state's imposition of tax on tangible personal property and not use the "specified digital products" definitions in that situation, that does not remove the specific requirements imposed by Section 332.D.2 and D.3. of the SSUTA when a state imposes a tax "**on any other product "transferred electronically."**" Importantly, while the SSUTA does not require a state to use the definition in Section 332.I of the SSUTA for products "transferred electronically," the state must still comply with Section 332.D.2 and D.3 when it imposes such a tax on products meeting the definition of "transferred electronically."

The streaming services West Virginia taxes are products "transferred electronically," which means "*obtained* by the purchaser by means other than tangible storage media." [Italics added]. This definition of "transferred electronically" contrasts with the separate definition applicable to computer software of "delivered electronically," which means "*delivered* to the purchaser by means other than tangible storage media." [Italics added.] "Delivered electronically" requires a download while "transferred electronically" is broader, it does not require a download and includes mere access to a product, such as that provided by streaming services. See Rule 332.2.B.4, "So long as the purchaser may access the product, it will be considered to have been electronically transferred to the purchaser." There is no sound basis in in the SSUTA for the position that a state imposing a sales tax generally on nonprofessional services, which picks up products "transferred electronically," falls outside the requirements of Section 332.D.2 and D.3 of the SSUTA. Again, the definition of "transferred electronically" in Section 332.I of the SSUTA is clear along with both Section 332.D.2 and D.3 noting their requirements apply to "any other product "transferred electronically"."

Conclusion:

For the foregoing reasons, the BAC's Compliance Subcommittee asserts that CRIC should find West Virginia not in substantial compliance with Section 332.D.2, and D.3 of the SSUTA.

Fred Nicely, Chair of the BAC's Compliance Subcommittee

APPENDIX A

(Excerpts of Relevant Rules)

Rule 332.1 – Products Transferred Electronically

C. 1. Sections 332.C. and D. address how states may impose tax on or exempt specified digital products and the subcategories.

2. Examples of imposition statutes which conform to the requirements of 332C:

a. There is hereby imposed a tax of 5% on the sales price of sales of specified digital products to an end user with the right of permanent use granted by the seller which is not conditioned upon continued payment from the purchaser.

b. There is hereby imposed a tax of 5% on the sales price of all sales of products transferred electronically.

To be consistent with the Agreement both of these examples would have to be construed to only impose a tax on “specified digital products” sold to an end user with the right of permanent use for a transaction that is not conditioned upon continued payment by the purchaser. These requirements do not have to be contained in the imposition statutes. They may be in a separate statute or in an administrative rule.

D. States remain free to incorporate terms such as “digital audio visual works,” “digital audio works” and “digital books” within their sales and use tax statutes and to tax or exempt those products when they do not otherwise meet the end user, permanent use or continued payment restrictions. For instance, a state may impose a tax on “digital books” purchased by someone who receives less than a right of permanent use. However, such imposition must be specifically imposed and separately enumerated.

2. a. Unless a statute specifically imposes and separately enumerates a tax on a sale of a product transferred electronically for less than permanent use, a statute which imposes a tax on such a product will not be construed as imposing tax on the sale unless the purchaser is granted by the seller the right to permanently use the product.

b. Even though the transaction might result in the ability of the purchaser to permanently retain a copy of the product, the transaction will not meet the permanent use requirement May 20, 2021, unless the seller grants the purchaser the right to view, listen to read or otherwise use the product in perpetuity. A right of permanent use has been granted unless the agreement between the seller and the purchaser specifies or the circumstances surrounding the transaction suggest or indicate that the right to use terminates on the occurrence of a condition subsequent. A state would be in compliance with the Agreement if, for example, through its sale for resale provisions or other exemptions, it administered its sales tax statutes in a manner that implemented the “sold to an end user” limitations imposed by Section 332D(1).

c. Further, placing time limits on the purchaser’s continuing future use will result in not satisfying the “right of permanent use” and the transaction will not meet the permanent use requirements.

d. Even though a purchaser might obtain a right of permanent use under a statutory right or common law regime such as “fair use” or similar doctrine, such rights are not “granted by the seller”; the presence of such a permanent use right would not be sufficient to come within the definition of permanent use set forth in the Agreement.

Example 1: A cable company offers its customers basic and premium cable services which provide scheduled programming for a monthly fee. In addition to the scheduled programming, the premium level service provides an "on-demand" feature included in the monthly fee. This on-demand feature allows the customer to select the time when certain specified programs are delivered to the viewing screen. The cable company may also permit the customer to watch additional single programs such as movies, concerts and sporting events on a "pay-per-view" basis with viewing limited to a set time period. The time period limitation may be set forth on-screen, online or in the subscriber agreement. The company does not authorize the customer to permanently retain the programming. For these reasons, none of the cable company's basic, premium and pay per view services meet the permanent use requirement. Further, because the cable company's basic and premium services require monthly payments, these services require “continued payments” and do not satisfy the permanent use requirement (see below regarding discussion of the “continued payment” provision).

The fact that a customer uses a recording device, such as a VCR or DVR, does not result in the cable company's programming services (i.e., basic, premium, on demand, or pay per view) being characterized as meeting the permanent use requirement since any rights granted to access the services offered by the cable company terminate upon discontinuation of payment to the cable company and no permanent right to keep the programming was ever allowed, granted or authorized by the cable company. Any right to maintain the programming on a DVR or any other recording device, if it exists at all, is provided by other law.

e. Example of an imposition statute that imposes a tax on “specified digital products” sold with the right of permanent use and on “specified digital products” sold with a right of use which is less than permanent but is more than 24 hours which conforms to 332D.

“There is hereby imposed a sales tax of 5% of the sales price of sales (i) of specified digital products to end users with the right of permanent use granted by the seller which is not conditioned upon continued payment from the purchaser; and (ii) of specified digital products to an end user with the right of more than 24 hours of access granted by the seller which is not conditioned upon continued payment from the purchaser.”

f. Example of an imposition statute that imposes a tax on “specified digital products” sold with the right of permanent use and on “specified digital products” sold with a right of use which is less than permanent but is more than 24 hours which does not conform to 332D: “There is hereby imposed a tax of 5% on the sales price of sales of specified digital products with the right to use for more than 24 hours granted by the seller which is not conditioned upon continued payment from the purchaser.”

3. Unless a state specifically imposes and separately enumerates a tax on the sale of products transferred electronically which is conditioned upon continued payment by the purchaser, a transaction is not taxable if the purchaser's right to use the product is conditioned on continued payment by the purchaser. If the purchaser's right to use the property ends upon the cessation of the purchaser's payment, the transaction is not a taxable transaction.

Example 1: A purchaser makes a purchase that allows the purchaser to download music to a device owned and controlled by the purchaser. The purchaser is required to pay a monthly fee and connect the device monthly to a computer or the downloaded music becomes disabled. The transaction would not be taxable as the sale of “digital audio works” or “specified digital products” unless the statute imposing the taxes specifically imposed and separately enumerated a tax on “digital audio works”, the use of which is conditioned on continued payment by the purchaser.

Example 2: A purchaser makes a purchase that allows the purchaser to download music to a device owned and controlled by the purchaser. The purchaser is required to pay a monthly fee in order to have the right to continue to play the music for more than a month. The device is not disabled if the purchaser fails to make the continued payment. This transaction would not be taxable as the sale of “digital audio works” or “specified digital products” unless the statute imposing the taxes specifically imposed and separately enumerated a tax on “digital audio works”, the use of which is conditioned on continued payment by the purchaser. It is the contractual right to continue to use the product which is legally significant and not the physical ability of the purchaser to use the product.

Rule 332.2 – Digital Products Definitions

A. General Purpose — The general purpose of this rule is to describe the scope and operation of the provisions of the “digital products definitions” section of Appendix C, Part II of the Streamlined Sales and Use Tax Agreement.

B. Specified Digital Products

4. Transferred electronically--means obtained by the purchaser by means other than tangible storage media. It is not necessary that a copy of the product be physically transferred to the purchaser. So long as the purchaser may access the product, it will be considered to have been electronically transferred to the purchaser. The term “transferred electronically” has a broader meaning than the term “delivered electronically” used in the computer related definitions.

Attachment B

BUSINESS ADVISORY COUNSEL

SSUTA COMPLIANCE SUBCOMMITTEE

THE GOVERNING BOARD SHOULD HOLD WEST VIRGINIA OUT OF COMPLIANCE WITH SECTION 332.D OF THE AGREEMENT

At its upcoming meeting in Nashville, the Governing Board will vote on whether to approve the CRIC recommendation that West Virginia be found out of compliance with Sections 332.D.2 and 3 of the Agreement. Those sections require that a state's statute imposing tax on sales of specified digital products or other products transferred electronically be construed as only imposing tax on a sale with the right of permanent use granted or not conditioned on continued payment unless the statute specifically imposes and separately enumerates the tax on a sale with the right of less than permanent use" or "conditioned upon continued payment." West Virginia recently published guidance and updated its taxability matrix construing its general imposition of tax on sales of "all nonprofessional"... "services," as reaching the streaming of movies, music and audio books." The Governing Board should hold West Virginia's interpretation of its tax on services does not comply with the specificity requirements of Sections 332.D.2 and 3 of the Agreement.

- **Imposition statutes are to be construed as reaching only permanent downloads:** Section 332.D.2 and 3 require that statutes imposing tax on sales of digital products and other products transferred electronically construed as only reaching downloads where the customers right to the product is perpetual and not dependent on future payments unless the statute specifically states to the contrary. Thus, unless the statute provides to the contrary, a rental of a movie for a single payment would not be subject to sales tax because the customers right to the movie is time limited. The same is true with subscriptions to streaming services where the customer's access to a library of movies or songs also depends on making the monthly subscription payments.
- **West Virginia is an outlier:** Excluding West Virginia and Kansas, most member states (14) impose their sales tax on streaming services; a significant number (9) do not. The imposition statutes of all fourteen states that impose their sales tax on streaming services comply with the specificity requirements of Section 332.D.2 and 3. For instance, South Dakota's the imposition statute applies to "all sales, leases, or rentals of any product transferred electronically" if the "seller grants the right of permanent or less than permanent use" or "the sale is conditioned or not conditioned upon continued payment." The imposition statutes of the other member states that impose tax on streaming services are worded similarly. Only West Virginia claims it's statute imposing tax on all nonprofessional services complies with the specifically requirements of Sec. 322.D.
- **Failure to find West Virginia out of compliance would write Secs. 332.D.2 and 3 out of the Agreement:** Because West Virginia's general imposition on sales of all non-professional services makes no mention of specified digital products, products transferred electronically, non-permanent use or conditioned on continued payment, its interpretation of its statute as reaching movies, music and audio book streaming services does not comply with the interpretation rules of Sec. 332.D.2 and 3. Should the Governing Board find West Virginia not out of compliance, it would effectively read those statutory specificity requirements out of the Agreement.

Attachment C



Dave Hardy
Secretary of Revenue

STATE TAX DEPARTMENT

Matthew Irby
State Tax Commissioner

September 9, 2022

Sent by email to: Craig.Johnson@sstgb.org

Craig Johnson, Executive Director
Streamlined Sales Tax Governing Board, Inc.
100 Majestic Drive, Suite 400
Westby, WI 54667

RE: West Virginia is in Substantial Compliance with SSUTA Section 332.D.2 and D.3.

Dear Mr. Johnson:

This letter is in response to the issue raised by the Business Advisory Council ("BAC") Compliance Subcommittee in a memorandum to you, dated August 30, 2022, relating to the imposition of sales and use tax on the provision of streaming services. The BAC requested a "determination from the Compliance Review and Interpretations Committee ('CRIC') that West Virginia's sales tax statutes are not in substantial compliance with Section 332.D.2 and D.3 of the Streamlined Sales and Use Tax Agreement ('SSUTA')." The BAC, however, appears to have narrowed that request to apply only to West Virginia's imposition of our sales and service tax "on audio and video streaming services subscriptions." The basis of BAC's contention is "those statutes do not specifically impose and separately enumerate tax on sales of products transferred electronically that are sold with the grant by a seller of less than the right of permanent use or conditioned upon continued payment from the purchaser."

At the outset, it is important to note the test whether a member of state is in compliance with the SSUTA appears to be if "the state's laws, rules, regulations, and policies is substantially compliant with each of the requirements set forth in the Agreement, **even though the state uses different words than those contained in the Agreement.**" Section 805 [Emphasis added.] The Agreement itself does not define the term "substantially compliant."

The term "substantial compliance" is defined by Webster's Dictionary as "compliance with the substantial or essential requirements of something (as a statute or contract) that satisfies its purpose or objective even though its formal requirements are not complied

with. *substantial compliance*. Merriam-Webster.com. Merriam-Webster, 2022. Web. 9 September 2022.

We believe the comments by BAC represent an overly technical reading of the provisions of the SSUTA and that West Virginia remains in substantial compliance.

To that end, of particular note, BAC states the following:

The State's imposition of tax on sales of services contained in Sections 11-15-3 and 11-15-2(18) is general in nature and, while subject to numerous exemptions, the Department notes that none of the exemptions apply to streaming services. Because no West Virginia imposition statute specifically imposes and separately enumerates a tax on sales of products transferred electronically with less than permanent use (required by Sec. 332.D.2) or on sales conditions on continued payment (required by Sec. 332.D.3), West Virginia is not in substantial compliance with those requirements.

The tax on services in West Virginia is certainly broad. All services are subject to the sales and service tax unless specifically excepted or exempted. See, W. Va. Code §11-15-6. The tax on services is provided for in W.Va. Code §11-15-8 which states:

The provisions of this article apply not only to selling tangible personal property and custom software, but also to the furnishing of **all services**, except professional and personal services, and except those services furnished by businesses subject to the control of the Public Service Commission when the service or the manner in which it is delivered is subject to regulation by the Public Service Commission. [Emphasis added]

This provision has been in the West Virginia Code since the inception of West Virginia's membership. It clearly provides a tax on the furnishing of all services. BAC seems to maintain that since the imposition of the tax is general, it does not meet the requirements of the Agreement to specifically impose and separately enumerate a tax on a sale with a right of less than permanent use. West Virginia disagrees with this statement.

BAC acknowledges that the SSUTA does not require West Virginia to use the definitions of "specified digital products" or "transferred electronically" in the imposition of the tax. SSUTA specifically states that "[i]f a state imposes a sales or use tax on products 'transferred electronically' separately from its imposition of tax on 'tangible personal property', that state will not be required to use the terms 'specified digital products', 'digital audio visual works', 'digital audio works', or 'digital books', or enact an additional or separate sales or use tax levy on any 'specified digital product'". SSUTA Sec. 332.C. A tax on services is separate from a tax on tangible personal property and, therefore, the specified terms do not need to be used in the imposing statute.

SSUTA only requires that the imposing statutes specifically impose and separately enumerate the tax on products conferring less than the right of permanent use or

conditioned upon continued payment from the purchaser. An imposition of tax on services clearly accomplishes this.

In the context of a general tax on services, West Virginia believes that the imposition itself of a tax on services clearly specifically imposes tax on a sale with the right of less than permanent use. Services by their very nature are for a right of less than permanent use as they involve payment for "activities engaged in for other persons for a consideration". See W.Va. Code §11-15-2(18). In this context, the failure to continue to provide consideration for an ongoing service will result in cessation of the service. It is difficult to conceive of a service which is not withdrawn upon the failure to continue to provide consideration.

Even more persuasive is that the very products at issue here ("streaming services") are referred to by leading industry members as "services"¹. Thus, to claim that West Virginia does not specifically impose and separately enumerate the type of product transferred electronically here, when the very name of the product itself is included in the imposition of the tax, is specious.

Further, the agreement goes on to provide in D.4.:

A member state which imposes a sales or use tax on the sale of a product "transferred electronically" to a person other than end user or on a sale with the right of less than permanent use granted by the seller or which is conditioned upon continued payment from the purchaser shall so indicate in its taxability matrix in a format approved by the Governing Board

SSUTA Sec. 332.D.4.

BAC acknowledges in its letter that West Virginia complied with this provision and the provisions in Section 328 of the SSUTA (related to the taxability matrix).

Given that West Virginia imposes a tax on the very product we are seeking to tax, have separately stated and enumerated the imposition of that tax in W.Va. Code §11-15-8, and complied with the Agreement regarding the recitation of this position in the taxability matrix, West Virginia has substantially complied.

¹ See <https://www.netflix.com> (visited 9/9/2022): What is Netflix? Netflix is a streaming service that offers a wide variety of award-winning TV shows, movies, anime, documentaries, and more on thousands of internet-connected devices.

AND

See https://www.amazon.com/gp/video/splash/t/getTheApp/ref=atv_dl_rdr (visited 9/9/2022): What is Amazon Prime Video? Prime Video is a streaming video service by Amazon. Prime Video benefits are included with an Amazon Prime membership. With your membership, you can watch hundreds of TV shows and movies on your favorite devices. To get started, visit Amazon.com/prime video, or download the Prime Video app on your mobile device.

For the reasons stated above, I respectfully ask that you find West Virginia in substantial compliance with the Streamlined Sales and Use Tax Agreement.

If you have any questions or concerns regarding this, please contact me at (304) 558-0751 or via email at Matthew.R.Irby@wv.gov.

Sincerely,



Matthew Irby
State Tax Commissioner

Cc: Fred Nicely, Esq.

Attachment D

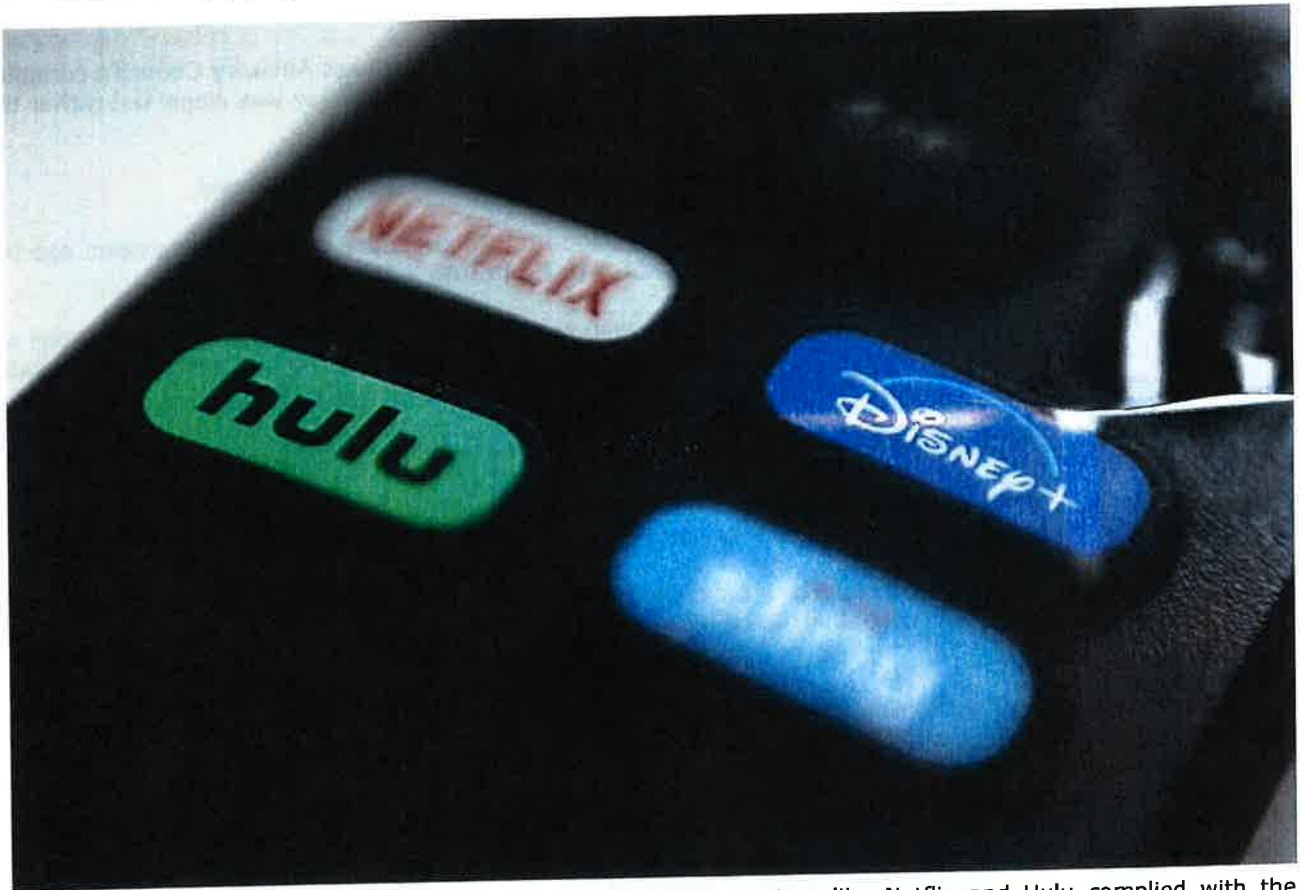


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W.Va. Survives Pact Compliance Vote Over Streaming Tax

By **Paul Williams**

Law360 (October 5, 2022, 7:46 PM EDT) -- West Virginia survived a vote Wednesday that sought to find the state out of compliance with the Streamlined Sales and Use Tax Agreement for failing to update its statutes before applying a tax on streaming services.



The dispute over whether West Virginia's tax on streaming services like Netflix and Hulu complied with the Streamlined Sales and Use Tax Agreement began about a year ago, when the State Tax Department issued a notice stating that streaming services were subject to sales tax. (AP Photo/Jenny Kane)

A vote from the Streamlined Sales Tax Governing Board to find West Virginia out of compliance with the tax-simplification compact failed to clear the three-fourth's majority required of the board's 24 member states by a 15-6 tally, with two states, including West Virginia, abstaining and one state absent. The vote occurred at the board's annual meeting, held in Nashville, Tennessee, and online.

The dispute over whether the state's tax on streaming services like Netflix and Hulu complied with the agreement **began brewing** about a year ago when the board's Business Advisory Council raised concerns about a **notice** from the West Virginia State Tax Department stating that streaming services were subject to sales tax. The council claimed that the agreement required the state to change its tax laws pertaining to taxing specified digital products and products transferred electronically before applying a tax on streaming services.

"This was purely an administrative decision, and that's exactly what the provisions in the agreement were meant to prevent," Patrick Reynolds, senior tax counsel at the Council on State Taxation, or COST, said during Wednesday's meeting.

The board's Compliance Review and Interpretations Committee **voted 3-2** in September to recommend that West Virginia be found out of compliance with the agreement. States that are noncompliant with the agreement can be hit with sanctions that range from restrictions on voting to expulsion, although no state has ever been removed from the compact.

During a roughly 30-minute debate on Wednesday, Mark Morton, the department's general counsel, defended the state. He said that West Virginia has had a broad tax on services on the books for years and that the department issued the notice in light of the U.S. Supreme Court's 2018 **Wayfair** decision, which allowed states to require out-of-state businesses to collect sales and use taxes.

"Our position is that video and audio streaming subscriptions have always been taxable," Morton said, later adding that Wayfair "enlarged nexus and taxing jurisdiction to cover a great number of things that were not previously covered." He said that most streaming services are provided from companies located outside of West Virginia.

Fredrick Nicely, senior tax counsel at COST and chair of the Business Advisory Council's compliance subcommittee, made clear that the council wasn't claiming that the tax was illegal but rather that the state didn't follow the agreement's standards to apply the tax.

"The Legislature needs to know that they have a compliance issue," Nicely said.

He likened the discrepancy to a compliance issue that Rhode Island faced a couple years ago before changing the state's digital goods tax statutes **to be in line** with the compact.

Utah Republican state Sen. Wayne Harper, who represented his state on the board and voted against finding West Virginia out of compliance, said he recognized there was some validity to both sides of the argument.

"Probably both are right, which means that we've got a problem here," Harper said.

He said he would find the state in compliance with the agreement but would encourage West Virginia lawmakers to clarify their tax law to remove any controversy over the tax.

Morton, though, said that such a technical bill would likely be a nonstarter in the state's Republican-heavy Legislature, which he said would be loath to pass any legislation that could be construed as imposing a new tax.

"I can go to my Legislature," Morton said. "I can also pretty much predict that it will not pass."

The agreement also allows states to remain in compliance even if they don't follow the exact words in the compact, he said.

Nicely told Law360 after the meeting that the Business Advisory Council was disappointed that the vote fell a few members short but said it indicated that the council will continue to pursue the topic. He said that they haven't yet made a determination about next steps but noted that the agreement allows for an "issue-resolution process" that could permit the governing board to revisit the matter.

"We're not done raising it as a compliance issue," he said.

Still, Nicely added that the council was grateful that West Virginia followed the agreement's 60-day liability relief period after it updated its taxability matrix to include streaming services last year.

During the meeting, the board also voted to find that Georgia and Nevada are out of compliance with the agreement. Georgia has **been noncompliant** for several years for deviating from the agreement in several ways, including having a restriction on which sellers can file a simplified electronic return. Nevada's noncompliance was sparked by a 2021 law that provided a tax exemption for certain members of the state National Guard because the agreement bars states from enacting entity-based exemptions.

A representative of West Virginia's tax agency did not immediately respond to a request for comment.

--Editing by Khalid Adad.

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Digital Products Almost Knock West Virginia Out of Compliance With SSUTA

Posted on Oct. 6, 2022

By Amy Hamilton

West Virginia's treatment of streaming subscriptions as services, rather than as electronically transferred digital products for less-than-permanent use, almost knocked the state out of compliance with the Streamlined Sales and Use Tax Agreement.

Streamlined Sales Tax Governing Board member states voted 15 to 6 on October 5 to find West Virginia out of compliance with the SSUTA. Even so, the motion failed.

To find a state not in compliance with the SSUTA requires a three-fourths majority of the entire governing board — that is, 18 votes. As it happened, there were two abstentions from the vote and one absence.

In September the governing board's Compliance Review and Interpretations Committee had voted 3 to 2 to recommend that West Virginia be found out of compliance after businesses — specifically, the Business Advisory Council (BAC) to the governing board — sought that determination.

The compliance issue [has been percolating](#) since 2021, when the West Virginia State Tax Department published a general information notice ([TSD-445](#)) clarifying that sales of streaming services are subject to the state's sales and use tax. West Virginia broadly imposes its sales and use tax on services, only specifying in statute those services that are exempt from the tax, and no exception exists for streaming services, the guidance said.

"Streaming services differ from the sales of digital products," the guidance said. It distinguished a digital product as "a discrete identifiable item" that a customer could purchase to own, whereas streaming services involve a consumer buying access to a catalog of content that the customer does not own.

"These changes were made by the Department with no recent intervening change in any relevant West Virginia sales and use tax statutes," the BAC said in a [memo outlining its concerns](#).

The SSUTA contains definitions for digital products that take the form of electronically transmitted music, books, and video. While member states must adopt the SSUTA definitions, each state maintains autonomy in deciding whether to tax any given digital product.

In September and October, a few points about what businesses wanted became clearer. First, the BAC has emphasized that it is taking no position on whether West Virginia's sales tax legally applies to streaming services — though Fred Nicely, chair of the BAC's compliance subcommittee, allowed that some of the businesses on their own might dispute whether the state can impose the tax.

Instead, the BAC's concerns "are limited solely to whether West Virginia is out of compliance" with provisions of the SSUTA.

The issue of whether the state is out of compliance turns out to be more nuanced than it might seem on the surface. The BAC argued that subscriptions to streaming services would be addressed under SSUTA's section on "Specified Digital Goods." That section contains provisions requiring a member state's sales tax imposition statute to include language when the state taxes products that are transferred electronically for less-than-permanent use or that are conditioned on continued payment. The problem is that West Virginia lacks such language in its imposition statute on services.

Nicely said the SSUTA provisions were put together this way over concern about whether a state's legislature had or had not authorized taxation of specified digital products. He told the governing board that the BAC is not asking for a penalty or sanctions against West Virginia. Instead, businesses sought a determination that the state is out of compliance with the SSUTA to put the State Legislature on notice to fix the problem by adopting language saying streaming services either are taxable or they are not.

West Virginia Tax Commissioner Matthew Irby argued in a [September letter](#) that the state is in substantial compliance with the SSUTA.

Mark Morton, general counsel for the West Virginia State Tax Department, said the agency could work with lawmakers but argued that the BAC's concern "looks like a technical compliance issue that is not going to be favored by my legislature as the political winds blow now."

"Frankly, I've got a legislature right now that just does not want to impose anything that looks like an additional tax," Morton said.