

**Petition for Resolution and Reconsideration
Recommendation Relating to Substantial Compliance of West Virginia – Section 332**

BEFORE THE ISSUES RESOLUTION COMMITTEE

STREAMLINED SALES TAX GOVERNING BOARD

In the Matter of Substantial Compliance of the State of West Virginia	Decision No. 2023- 1
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Presiding:

Larry Molnar, Chair
Mike Walsh
Laura Stanley
Tim Reilly
Michael Hale

Appearances:

For the Business Advisory Council: Fred Nicely, Council on State Taxation (COST)
Pat Reynolds, COST

For the State of West Virginia: Tim Waggoner, Staff Attorney, WV Tax Division
Stacy Acree, Director of Tax Account Administration,
WV Tax Division

STATEMENT OF THE CASE

This matter came before the Issues Resolution Committee (“IRC”) for a Hearing pursuant to Section 1002.B. of the Streamlined Sales Tax Agreement (“the Agreement” or “SSUTA”). On October 5, 2022, pursuant to a properly listed agenda item, the Compliance Review and Interpretations Committee (“CRIC”) presented a report to the Governing Board (“GB”) of its annual review of

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member states' compliance with the Agreement. In its report, CRIC recommended that West Virginia (“WV”) be found out of compliance. Richard Dobson of Kentucky moved to find West Virginia out of compliance on the issue of how West Virginia taxes streaming services. The motion failed on a Governing Board roll call vote of full member states with fifteen voting yes, six voting no, and one state absent.¹

By Petition dated December 2, 2022, Russ Brubaker, President of the Business Advisory Council (“BAC”), filed a Petition for Resolution and Reconsideration of the Governing Board action of not finding West Virginia out of compliance with the Agreement (“Petition”). Craig Johnson, Executive Director of the Governing Board, published the Petition on the Governing Board website on December 5, 2022, and requested public comment as required by Rule 1001.B. Neither Craig Johnson nor the IRC received additional written comments during the public comment period. The IRC conducted a public hearing on March 2, 2023. Fred Nicely and Pat Reynolds represented the Business Advisory Council. Tim Waggoner and Stacy Acree represented the State of West Virginia.

ISSUE PRESENTED

The BAC again alleges that West Virginia is not in compliance with the Agreement because it is not substantially compliant with Section 332 D.2 and D.3. The respective provisions require that a “statute specifically imposes and separately enumerates the tax on a sale” “with the right [of] 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).²

¹ Streamlined Sales Tax Governing Board, Meeting Minutes, Nashville, TN, October 5-6, 2022 (MM22004)(“October 2022 GB Meeting Minutes”), pp. 3-4, available at <https://www.streamlinedsalestax.org/docs/default-source/gb-minutes/gb-minutes-2022-10-5-6-nashville-tn.pdf>; see also SSUTA, Section 805.1, available at <https://www.streamlinedsalestax.org/docs/default-source/agreement/ssuta/ssuta-as-amended-through-12-22-22.pdf> (requiring that for a motion to pass to find a state out of compliance, it requires the affirmative vote of ¾ of the entire Governing Board).

² Business Advisory Council, Petition for Resolution and Reconsideration, December 2, 2022 (IR22001)(“BAC Petition”), page 1,

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In its response, West Virginia asserts that the SSUTA does not allow BAC to bring the issue of West Virginia's compliance to the Issue Resolution Committee for a determination. "The [BAC] Petition provides no additional arguments or facts. This issue has already been fully argued and decided by the Governing Board. BAC should not get another attempt to find West Virginia out of compliance."³

ANALYSIS

During its annual compliance review and certification in 2021, West Virginia first indicated on its taxability matrix the state's taxation of streaming services. Prior to CRIC's review and compliance determination in 2021, the business community raised issues regarding West Virginia's imposition of tax on these services. Before the annual Governing Board meetings in October 2021, West Virginia made additions to the "Comments" section in its matrix to provide guidance and clarity. In the subsequent Governing Board meetings held in Bloomington, Minnesota, the Governing Board, by unanimous voice vote, approved a motion that West Virginia was not out of compliance with the SSUTA.⁴

During CRIC's annual compliance review and certification for 2022, the BAC again submitted comments requesting that West Virginia be found not in compliance with Sections 332 D.2 and D.3 of the SSUTA.⁵ West Virginia responded by stating that because West Virginia imposes tax on the product they seek to tax, have separately stated and enumerated the imposition of tax in the applicable

available at <https://www.streamlinedsalestax.org/docs/default-source/public-notice/60-day-public-comment-period-west-virginia-compliance.pdf> (citing SSUTA, Section 332).

³ West Virginia State Tax Department, West Virginia's Response to Business Advisory Council's December 02, 2022, Petition for Resolution and Reconsideration - West Virginia's Compliance with Section 332.D.2 and D.3 of the Streamlined Sales and Use Tax Agreement, February 3, 2023, p. 3, available at <https://www.streamlinedsalestax.org/docs/default-source/issue-resolutions/west-virginia-response-to-petition-for-reconsideration.pdf>.

⁴ Streamlined Sales Tax Governing Board, Meeting Minutes, Bloomington, MN, October 5-6, 2021 (MM21004) ("October 2021 GB Meeting Minutes"), p. 4, available at <https://www.streamlinedsalestax.org/docs/default-source/gb-minutes/gb-minutes-2021-10-5-6-bloomington-mn.pdf>.

⁵ Streamlined Sales Tax Governing Board Compliance Review and Interpretations Committee, 2022 State Annual Compliance Review Report, September 26, 2022 (CI22004), p. 7, available at <https://www.streamlinedsalestax.org/docs/default-source/comm-cric/cric-documents/cric-2022/2022-compliance-review-report---final.pdf>.

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statute and have complied with the SSUTA regarding the recitation of this position in the taxability matrix, West Virginia “has substantially complied with the SSUTA.”⁶ After reviewing the respective materials and after further discussions, on a vote of 3 – 2, CRIC recommended that West Virginia be found not in compliance with the Agreement.⁷

CRIC presented its compliance report to the Governing Board in the October 2022 meetings in Nashville, Tennessee. Both the BAC and West Virginia presented the same arguments during the meetings. Governing Board members asked each of the parties and CRIC questions related to the compliance report. After additional discussions within the Governing Board during the open GB meeting, Kentucky’s board member made a motion to find West Virginia not in compliance with Section 332 of the SSUTA. When a voice vote did not result in a unanimous decision, the Governing Board held a roll call vote among the GB members: 15 members voted “yes,” 6 members voted “no”, with one member absent. Under Section 805.1 of the SSUTA, for a motion to find a state out of compliance to pass, it requires the affirmative vote of three-quarters (75%) of the entire Governing Board.⁸ The Executive Director of the Governing Board verified that there were no irregularities with the voting procedures or the final count.⁹

The SSUTA Library of Definitions provides the following:

“Specified digital products” means electronically transferred:

“Digital Audio-Visual Works” which means a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any,

“Digital Audio Works” which means works that result from the fixation of a series of musical, spoken, or other sounds, including ringtones, and

⁶ *Id.*, p. 8.

⁷ *Id.*, pp. 7-8.

⁸ October 2022 GB Meeting Minutes, pp. 3-4; *see also* SSUTA, Section 805.1; Bylaws of the Streamlined Sales Tax Governing Board Inc., Article Four, Section 6, available at <https://www.streamlinedsalestax.org/docs/default-source/agreement/bylaws/bylaws.pdf>. The member state that is the subject of such a motion cannot vote on that motion.

⁹ *Id.*, p. 4.

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“Digital Books” which means works that are generally recognized in the ordinary and usual sense as “books.”¹⁰

The definition includes the following: “[f]or purposes of the definitions of ‘specified digital products,’ ‘transferred electronically’ means obtained by the purchaser by means other than tangible storage media.”¹¹

Both the BAC and West Virginia use “streaming services” to describe the object of the transaction. The IRC submits the following examples of definitions of “streaming services”:

a service that sends video, music, etc., over the internet so that people can watch or listen to it immediately rather than having to download it, or rather than having to watch or listen at a particular time when something is broadcast.¹²

An online provider of entertainment (music, movies, etc.) that delivers the content via an Internet connection to the subscriber's computer, TV or mobile device.¹³

[A]ny digital streaming service offering “video on demand” (“VOD”), linear and/or live event programming direct-to-consumer via Internet-connected devices, set-top boxes, platforms and/or applications, including subscription, ad-based and/or transactional VOD streaming services, streaming services for authenticated subscribers of MVPDs, vMVPD streaming services and “over the top” streaming services.¹⁴

All three definitions identify one or more of the “specified digital products.” And all three definitions denote transmission via the Internet. Streaming services are not “ancillary services,” “computer software,” “telecommunication services” or “tangible personal property.”¹⁵ Streaming services are both a digital product and a service.

Section 332.D.2 states that:

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

¹⁰ SSUTA Product Definitions, p. 112.

¹¹ Id.

¹² Cambridge Dictionary, available at <https://dictionary.cambridge.org/us/dictionary/english/streaming-service> (visited May 8, 2023)(emphasis added).

¹³ PC Magazine, available at <https://www.pcmag.com/encyclopedia/term/streaming-service> (visited May 8, 2023)(emphasis added).

“Netflix, Amazon Prime Video, Hulu, Spotify and Apple Music are high-profile examples. However, there are several others. In the May 2019 issue of Consumer Reports, a description of no-cost movie and TV services included Amazon Freeview, Hoopla, Kanopy, Pluto TV, Roku Channel, Snagfilms, Sony Crackle, Tubi TV, VUDU and Xumo.”

¹⁴ Law Insider, available at <https://www.lawinsider.com/dictionary/streaming-service> (visited May 8, 2023)(emphasis added).

¹⁵ See SSUTA (as amended through December 22, 2022), Library of Definitions, pp. 122-123, available at <https://www.streamlinedsalestax.org/docs/default-source/agreement/ssuta/ssuta-as-amended-through-12-22-22.pdf>.

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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.¹⁶

West Virginia currently does not have a statute that specifically imposes and separately enumerates the tax on the sale of the right of less than permanent use by the seller to streaming services.

Section 332.D.3 states that:

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.¹⁷

West Virginia currently does not have a statute that specifically imposes and separately enumerates the tax on the sale which is conditioned upon continued payment from the purchaser.

West Virginia imposes and separately enumerates a tax on streaming services as a “service.” West Virginia noted this distinction from the provisions in Section 332.¹⁸ West Virginia imposes a sales tax on the provision of services.¹⁹ The provision of streaming services is subject to this tax. BAC does not oppose West Virginia’s imposition of sales tax on streaming services. Rather, BAC asserts that West Virginia, because it has not promulgated statutes according to the aforementioned provisions in Section 332, is not in compliance with SSUTA requirements.²⁰

A purchaser of streaming services in any member state is buying specified digital products but may also be purchasing a service. Because streaming services can be classified as both “specified digital products” or a service West Virginia may be found in substantial compliance with Section 332 requirements. Because of this distinction, West Virginia should be found not out of compliance with the

¹⁶ SSUTA, supra note 15 , Article III, Section 332, p. 60.

¹⁷ Id.

¹⁸ West Virginia's Response to Business Advisory Council's December 02, 2022, supra note 3.

¹⁹ W.Va. Code § 11-15-8.

²⁰ Business Advisory Council, Petition for Resolution and Reconsideration, supra note 2.

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SSUTA. Additionally, a member state must properly inform sellers that tax is due on the service on its taxability matrix, as West Virginia did here. Finally, the Governing Board vote should not be overturned.

PROCEDURAL OBSERVATIONS OF THE IRC

Section 805.1, in Article VIII, allows a member state to bring a petition to IRC if that member state is found out of compliance. The same Article VIII does not allow BAC or any other person to file a petition against a Governing Board finding that such member state is found not out of compliance.²¹ In addition, Section 1003 in Article X states that the Governing Board’s decision after received from an IRC recommendation “shall, as with all other matters under the Agreement, be final and not subject to further review.”²² Section 1002 provides a non-exclusive list of matters the IRC may be called upon to review at the direction of the Governing Board, which includes “[m]atters of compliance under Section 805” and “[p]ossibilities of sanctions of a member state.”²³ Interestingly, Section 1002 does not specifically enumerate matters already determined by the Governing Board as subject to IRC review.²⁴ A reasonable reading of the SSUTA indicates that the IRC does not have jurisdiction to review matters that have already been decided by the Governing Board but that IRC should be invoked by the Governing Board to review matters of compliance prior to a vote of the Governing Board.

While Rule 1001 allows any party dissatisfied with a decision of the Governing Board to file an appeal with the Governing Board to request reconsideration of the decision,²⁵ Rule 1001 does not supersede Sections 805.1, 1002, or 1003 in the SSUTA. The SSUTA Rules do not supersede the provisions in the SSUTA. Section 1001’s grant of rulemaking authority does not mean the

²¹ SSUTA, Article VIII, Section 805.1 (emphasis added).

²² SSUTA, supra note 15, Article X, Section 1003, p. 88 (emphasis added).

²³ SSUTA, supra note 15, Article X, Section 1002, p. 88.

²⁴ See SSUTA, supra note 15, Compilers notes, p. 294 (documenting the adoption of Section 805.1 on September 16, 2015. Article X and its Sections remains unchanged since adoption of the original SSUTA).

²⁵ Streamlined Sales Tax Governing Board. Rules and Procedures (as revised October 6, 2022), Rule 1001(A), 149, available at <https://www.streamlinedsalestax.org/docs/default-source/agreement/ssuta-rules/rules-as-amended-2022-10-06.pdf>.

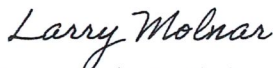
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promulgated rules nullify or trump other provisions of the Agreement. If the Governing Board wishes to allow the IRC to review its votes at the request of the BAC or another person, the Governing Board should resolve the conflict between Rule 1001, Sections 805.1, 1002, and 1003 by amending the Agreement.

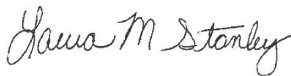
RECOMMENDATION

We believe that West Virginia, pursuant to the timely and proper procedures followed, and determination made, by CRIC and the Governing Board for the issues presented by the BAC during the above-referenced reviews and determinations, is not out of compliance with section 332 of the Agreement. Pursuant to Article X of the Agreement, and the rules promulgated thereunder, we recommend that the Governing Board forego any further analysis or vote in response to the BAC Petition, in favor of the Governing Board's vote in the October 2022 meetings that found West Virginia not out of compliance with the Agreement, and that it notify the Business Advisory Council and the appropriate West Virginia authorities of its decision.

Signed in counterparts on the date indicated.



Larry Molnar, Chair
Date: May 15, 2023



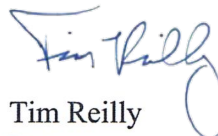
Laura Stanley
Date: May 15, 2023



Mike Walsh
Date: May 15, 2023



Michael Hale
Date: May 15, 2023



Tim Reilly
Date: May 15, 2023