

The following summary of the Streamlined Sales Tax meeting in Indianapolis is being distributed by the Equipment Leasing Association (ELA) with the permission of CCH and its author/editor Dan Schibley.

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Proposals to roll back the destination sourcing requirements in the Streamlined Sales and Use Tax (SST) Agreement were defeated and certified service providers (CSPs) were approved at a meeting of the SST Governing Board in Indianapolis, April 18-19, 2006. The actions were consistent with input provided the previous day (April 17) at a meeting of the SST Implementing States, a larger group of states charged with advising the Board. In other actions, the Board gave final approval to a uniform exemption certificate and four interpretation requests, including one concerning the proper application of the definition of “prepared food.”

Member states: The Governing Board is made up of full member states and associate member states. The full members are in full conformity with the Agreement and have exclusive authority to amend it. Currently, the full members are Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, New Jersey, North Carolina, North Dakota, Oklahoma, South Dakota, and West Virginia. The associate members have either enacted full conformity legislation that is not yet in effect or they have made most but not all of the required changes to their laws. The associate members are Arkansas, Nevada, Ohio, Tennessee, Utah, and Wyoming.

Sourcing Amendments Defeated

The Agreement requires states to source most sales on a destination basis. This requirement has generated a great deal of opposition to the SST effort, especially among small businesses and local jurisdictions in states that traditionally sourced sales on an origin basis. Alternative proposals to amend the Agreement to allow continued origin sourcing were introduced by two states in which the opposition has been most fierce: Ohio and Texas. These proposals were debated and ultimately rejected in Indianapolis.

The Ohio proposal would have allowed states to source intrastate sales on an origin basis and sales into the state from out-of-state locations on a destination basis or at a single statewide rate, at the option of the seller. A refund mechanism would have allowed consumers to recover the difference if the single statewide rate exceeded the actual rate where the product was received. The Texas proposal would have allowed states to source intrastate sales and leases on an origin basis, without any provision for an optional single rate for interstate sales.

State perspectives: Ohio State Senator Ronald Amstutz said that he, and many others, had assumed that the Board was going to provide small businesses with technical support to implement the sourcing changes and states' laws were changed pursuant to that understanding. Now that it has become apparent that CSP compensation is not going to be mandated for sellers with nexus in a state, Amstutz said that “something has to give.”

The shortfall on CSP compensation has put the project “out of balance” and, without a compromise on sourcing, “there could be a parallel project and we could go to Congress that way,” Amstutz suggested. Representatives of Texas and Virginia added that the current destination sourcing provisions are a roadblock to their states, and others, joining the Agreement and to Congress mandating collection authority.

Secretary Joan Wagnon, Kansas Department of Revenue, responded that her state, where the sourcing change was very controversial, has developed its own software to assist sellers and that other states with similar problems should do likewise. West Virginia State Delegate John Doyle said that if either proposal was approved, enemies of the SST effort could go to Congress and say that states cannot streamline their systems.

Private sector perspectives: Not approving these proposals “will create a whole new set of enemies,” replied John Kroll, who represents a group of local governments, most in Texas. Stephen Woods, National Federation of Independent Business, said that he would seek to add specificity to the provision in pending federal legislation that would require states to offer reasonable compensation to sellers in return for Congress mandating collection on remote sales.

However, most of the speakers representing the private sector strongly opposed the Ohio and Texas proposals. Stephen Kranz, Council On State Taxation (COST), said that businesses had given up their demand for one-rate-per-state partly in return for destination sourcing. He added that the Ohio proposal was not really a criticism of the sourcing provisions but, rather, of the Board's refusal to compensate CSPs for nexus sellers. The problem in Texas, according to Kranz, is the state's unwillingness to reallocate revenue among local governments. “Lowering the bar” might add member states but it would increase opposition in Congress to overturning *Quill*, he concluded.

Vote results: Ultimately, both proposals were rejected. At the Board level, with only full members allowed to vote, Michigan was the only state to support the Ohio proposal and no state backed Texas. In the previous advisory vote taken by the larger Implementing States group, Ohio received support from Michigan, New York, Tennessee, Texas, Utah, and Virginia. At that level, the same states, minus Michigan and Tennessee, indicated their support for the Texas proposal.

CSPs Approved

The Board approved the terms of a contract to be entered into between it and any company approved as a CSP (an agent certified to perform all of a seller's sales and use tax functions). Because of contracting limitations in the laws of Kansas and North Carolina, the Executive Committee of the Board was directed to enter into side agreements with those two member states in substantially the same form as the contract. The Board also directed the Executive Committee to enter into the approved contract with two companies that have successfully completed the testing to become CSPs. A contract will be signed with a third company if its testing is successfully completed by June 30, 2006. No other CSPs will be approved for the ensuing two-year period.

Compensation: CSP compensation had been the greatest impediment to completion of the contract. As finally agreed, a CSP will be compensated from taxes due from each volunteer seller for which it performs services according to a formula based on the amount of taxes due from the seller. Because of existing limitations in North Dakota law, a special, lower rate of compensation is provided for taxes due it on sales made before July 1, 2007. Ohio was the only member state to vote against approval of the contract, objecting to the compensation model and the carve-out for North Dakota.

The compensation provided for in the contract is the only compensation that CSPs may receive for providing services for volunteer sellers. A “volunteer seller” in a member state is a seller that registers through the SST web site and (1) does not have a legal requirement to register in the state, or, during the 12 months preceding registration, had (2) no fixed place of business for more than 30 days in the state, less than \$50,000 of property in the state, less than \$50,00 of payroll in the state, and less than 25% of its total property or payroll in the state.

Joseph Van Devender, Indiana Department of Revenue, expressed a concern that nonmember states could “piggyback” on the work the member states have done to make CSPs available and negotiate compensation terms with those CSPs that were more favorable to the nonmember state. As a result, a “most-favored-nation” clause was added to the contract providing that if a CSP enters into a contract with a nonmember state it must offer to provide services to member states on the same terms.

Study of sourcing changes: For those states concerned about the effect of the sourcing changes on small businesses, Jerry Johnson, Oklahoma Tax Commission, proposed negotiating a second compensation schedule with CSPs in the future under which a state could compensate all sellers, not just volunteer sellers. Dan Noble, Wyoming Department of Revenue, countered with a proposal to compensate any seller that makes a sale outside of its own taxing jurisdiction, even if this is a sale to another local taxing jurisdiction in the same state. With urging from the private sector, the Board agreed to conduct a study to determine the effect of the sourcing changes on businesses and local governments. The State and Local Advisory Council (SLAC) will be asked to provide input.

CASs: The Board also voted to begin accepting applications immediately for certified automated systems (CASs) (software certified to calculate the tax imposed, determine the amount to remit, and maintain a record of the transaction). Documentation to certify CASs is the group's next priority, according to Kansas's Wagnon, and will probably take the form of a CAS contract. The CAS certification process should be much quicker than the CSP process and should take no more than 90 days, Wagnon said.

Exemption Certificate

The Board gave final approval to a uniform exemption certificate and its accompanying instructions. Member states are not required to eliminate their pre-existing exemption certificates but are strongly encouraged to do so, according to Cathy Wicks, Minnesota

Department of Revenue. The full member states must now accept the uniform certificate for all exemptions they allow. Among the associate member states, Arkansas, Nevada, Utah, and Wyoming said that they also will accept the uniform certificate.

Interpretation Requests

The Board approved four interpretation requests that had been vetted by its Compliance Review and Interpretations Committee. Interpretations require a three-fourths vote of the entire Board to be approved and are considered part of the Agreement, with the same effect as the Agreement itself.

Utensils provided by seller: One of the Agreement's definitions for "prepared food" is "food sold with eating utensils provided by the seller . . ." Member states that exempt most food sales but tax sales of prepared food were applying this definition in different ways, leading to this request for interpretation from the food industry. The Board approved an interpretation consistent with that developed by the SLAC. Generally, if prepared food (as otherwise defined) is more than 75% of a seller's total sales, utensils are "provided" if they simply are made available. If prepared food is 75% or less of a seller's total sales, utensils are "provided" only if the seller's practice for the item is to give or hand the utensil to the purchaser. An issue paper prepared by the SLAC gives detailed instructions for applying this interpretation.

SLAC chair Diane Hardt, Wisconsin Department of Revenue, admitted that this interpretation adds complexity but said that it at least provides an administrable standard and is supported by the food industry. The interpretation ultimately was approved unanimously with the qualification that member states that need to change their statutes have until January 1, 2008, to make the change, and states that need to promulgate a rule or regulation have until August 1, 2006, to do so.

The Board also approved the following interpretations:

- A seller that has collected, but failed to remit, tax in a member state may obtain amnesty for taxes not collected in accordance with the Agreement, so long as the seller remits the collected tax with applicable penalty and interest.
- A seller applying to register to use a CSP or CAS is not registered under the Agreement and obligated to begin collecting tax in a member state until the first day of the calendar quarter after 60 days notice that adequate CSP or CAS services are available. Such seller will be denied the proffered amnesty only if it received notice of an audit before it applied to register. This interpretation is consistent with previous positions taken by the Board and was given to satisfy Michigan's concerns that it needed a formal interpretation to satisfy provisions in state law concerning the compromise of taxes.
- Payments received at the inception of a lease (down payments, rebates, or other potentially taxable receipts) for motor vehicles, trailers, semi-trailers, and aircraft are sourced to the primary property location, the same as subsequent periodic payments.

Digital goods: COST's Kranz said that the business community may seek an interpretation of the definition of “tangible personal property” if the Board does not act on a definition of “digital goods” at its next meeting. Businesses want to prohibit states from taxing digital goods as part of tangible personal property. Hardt said that she did not think the SLAC agreed with business on this issue, while Oklahoma's Jerry Johnson said that the states may be ready to move on a narrow definition of digital goods soon but he does not support an attempt to exclude the category from tangible personal property.

Other Board Action

The Board approved several other motions, among which were the following:

— A state may impose an additional sales and use tax rate on a product if federal law prohibits the imposition of local tax on a product that is subject to state tax, provided the additional rate achieves tax parity for similar products. Commissioner Loren Chumley, Tennessee Department of Revenue, explained that this was intended to allow states to tax satellite television at a rate equivalent to the combined state and local rates imposed on cable television services.

— The Agreement's definition of “state” was amended to add the Commonwealth of Puerto Rico, which is preparing to enact a sales tax in conformity with the Agreement in place of its current excise tax.

— The Business Advisory Council was formally recognized by the Board.

Status of Conformity Legislation

Utah recently repealed the legislation that would have brought it into full conformity with the Agreement on July 1, 2006. However, Commissioner Bruce Johnson, Utah State Tax Commission, said that a conservative reading of the Agreement will allow Utah to remain as an associate member either until it reenacts conformity legislation or January 1, 2008 (the deadline for associate members to complete conformity). Vermont, which enacted conformity legislation some time ago, is expected to petition to join the Agreement in the near future.

Conformity legislation that passed the Washington Senate died in the House with the Legislature's recent adjournment. Also, it was reported that conformity legislation that passed the Hawaii Senate has stalled in the House.

Upcoming Meetings

The next meeting of the SLAC is set for May 11-12, 2006, in Des Moines, Iowa. The SLAC work groups will meet in Memphis, Tennessee, on July 19-20, 2006, in conjunction with the meeting of the Southeastern Association of Tax Administrators

(SEATA). The Governing Board will meet August 28-31, 2006, in Bismarck, North Dakota. The Implementing States may meet during the first day of that session.

Streamlined Sales Tax Implementing States and Governing Board Meetings, Indianapolis,
April 17-19, 2006