

- For Information
- For Discussion
- For Decision Making

BOARD OF GOVERNANCE  
**INFORMAL ISSUE PAPER**

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**Streamlined Sales and Use Tax Agreement (SSUTA)**

***Proposal 4 – Motion to Amend Section 312, Multiple Points of Use (MPU)***

**I. Issue**

Should the Board of Governance grant authority to its representative to vote on the motion to amend SSUTA Section 312, as proposed by Mr. Stephen Kranz of Washington D. C.?

Should the Board of Governance vote to amend Section 312 to delete the word *electronically* to allow business purchasers of “tangible” computer software to issue a MPU certificate to the seller? Businesses issuing a MPU certificate would be allowed to purchase tangible and intangible computer software without the payment of tax to the seller. Instead, these businesses would be responsible for paying tax on their purchases of tangible and intangible software to the jurisdictions where the software will be considered concurrently available for use. (Exhibit 1 provides the language of Section 312, including the proposed deletion. Exhibit 2 provides the motion.)

**II. Staff Recommendation**

Staff recommends the Board of Governance authorize its representative to vote on the motion to amend SSUTA Section 312.

Staff also recommends the Board of Governance vote “no” on the motion to amend Section 312 to delete the word “electronically.”

**III. Background**

SSUTA Section 312 provides that a business purchaser that does not hold a direct payment permit shall issue a MPU certificate to the seller when purchasing digital goods, services, or electronically delivered computer software if the purchaser knows at the time of purchase that the digital goods, services or computer software will be concurrently available for use in more than one jurisdiction. Business purchasers issuing a MPU certificate will be allowed to purchase the digital goods, services, or electronically delivered computer software

## **Proposal 4**

### **Amend Section 312**

without the payment of tax to the seller. Sellers in receipt of a MPU certificate from the business purchaser are relieved of all obligations to collect, pay, or remit the applicable tax.

Some business representatives have expressed concern with the fact that the provisions of Section 312 applying to computer software apply only to software delivered electronically. They believe the provisions of Section 312 should be expanded to include computer software delivered in tangible form since the purchaser has the same ability to use the software in multiple jurisdictions as does a purchaser of electronically delivered software by virtue of uploading the software to the purchaser's server.

It is staffs' understanding the current MPU computer software provision was approved for electronically delivered software only because of the unique difficulty in sourcing the sale; a difficulty not present in sourcing sales of tangible personal property. Sales of tangible computer software are sourced in the same manner as other sales of tangible personal property following the sourcing rules of SSUTA Section 310. Under Section 310, sales of tangible computer software are generally sourced to the place where the software is received.

Under California's current laws and regulations, charges for goods transferred in an intangible manner such as electronically delivered computer software are generally not subject to sales or use tax. The current language of Section 312 and the related MPU provisions relating to electronically delivered computer software would generally not have an impact on transactions occurring in California. However, if the proposal to apply the provisions of Section 312 to all sales of computer software to businesses were adopted, this would not be the case.

#### **IV. Summary**

Amending SSUTA Section 312 to apply the provisions of the section to tangible and intangible transfers of computer software alike would impact California. Businesses purchasing tangible computer software that will be concurrently available for use in multiple jurisdictions in California would be subject to different sourcing rules than that generally applicable to other purchases of tangible products for use in California. This would have an impact on California's current policies and procedures and would generally create additional sourcing requirements for business purchasers.

For the reasons stated above, staff recommends a "no" vote on the proposed amendment.

Prepared by Lynda Cardwell, Sales and Use Tax Department  
Current as of March 29, 2005

**Section 312: MULTIPLE POINTS OF USE**

Notwithstanding the provisions of Section 310, a business purchaser that is not a holder of a direct pay permit that knows at the time of its purchase of a digital good, computer software delivered **electronically**, or a service that the digital good, computer software delivered **electronically**, or service will be concurrently available for use in more than one jurisdiction shall deliver to the seller in conjunction with its purchase a form disclosing this fact ("Multiple Points of Use or MPU" Exemption Form).

- A. Upon receipt of the MPU Exemption Form, the seller is relieved of all obligation to collect, pay, or remit the applicable tax and the purchaser shall be obligated to collect, pay, or remit the applicable tax on a direct pay basis.
- B. A purchaser delivering the MPU Exemption Form may use any reasonable, but consistent and uniform, method of apportionment that is supported by the purchaser's business records as they exist at the time of the consummation of the sale.
- C. The MPU Exemption Form will remain in effect for all future sales by the seller to the purchaser (except as to the subsequent sale's specific apportionment that is governed by the principle of subsection (B) and the facts existing at the time of the sale) until it is revoked in writing.
- D. A holder of a direct pay permit shall not be required to deliver a MPU Exemption Form to the seller. A direct pay permit holder shall follow the provisions of subsection (B) in apportioning the tax due on a digital good or a service that will be concurrently available for use in more than one jurisdiction.

**AMENDMENT # 4 – OFFERED BY STEPHEN KRANZ, WASHINGTON, D.C.**

**Motion to amend Section 312 of the Agreement to strike the term “delivered electronically” in the two places it appears in that Section.**

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**STREAMLINED SALES TAX PROJECT**

**SOURCING COMPUTER SOFTWARE AND RELATED SERVICES**

(Draft for Discussion only - December 31, 2004)

**Background**

Section 312 of the Agreement requires a business purchaser of a digital good, services or electronically delivered computer software to deliver to the seller a Multiple Points of Use Exemption Form (“MPU”) when the purchaser knows at the time of the sale that the digital good, service or electronically delivered software will be available for use concurrently in more than one jurisdiction. Upon receipt of the MPU, the seller is relieved of any obligation to collect sales or use tax on the transaction and the buyer is charged with responsibility for allocating the digital good, services or software among the various jurisdictions where it will be used and remitting the corresponding amount of tax.

Industry representatives have expressed concerns with the provisions of Section 312 with respect to sales of software and related services. The industry proposes two amendments to the sourcing rules in Section 312. First, industry believes that the rules should apply to all software transactions, regardless of the method of delivery. Second, industry believes that the Agreement should include a rule defining the responsibilities of the seller in situations where the purchaser is required to deliver an MPU to the seller but fails to.

**ISSUE**

1. Should the sourcing rules be amended to allow use of the MPU for all computer software regardless of the form in which the software is delivered?

**Issue 1 – Computer Software**

Generally speaking, tangible personal property (TPP) is not subject to the current MPU regime. Although TPP can be used in multiple locations it is not “concurrently” available for use in multiple locations. MPU’s are considered appropriate with respect to digital goods and services because it is recognized that a

purchaser can make concurrent use of these items in more than one jurisdiction. Section 312, however, expands the use of MPU's to transactions involving sales of TPP in the form of electronically delivered software.

The Agreement defines the term "tangible personal property" to include prewritten computer software. The definition makes no exceptions or distinctions based on the method by which prewritten computer software is delivered.

The Agreement defines "delivered electronically" as delivered to the purchaser by means other than tangible storage media. The Agreement further provides that a state may exempt prewritten computer software that is delivered electronically or by load and leave to allow states that treat software delivered electronically as either a service or the delivery of an intangible to continue to exclude it from their sales tax base.

**Industry comments:** The industry believes that limiting the MPU rule of Section 312 to prewritten computer software only when it is delivered electronically is too narrow; it should be expanded to computer software regardless of the delivery method. Industry believes that the problems with regard to electronically delivered software that animated the drafters of Section 312 to include it are associated with software generally.

A purchaser of computer software who takes delivery on a tangible storage medium such as a disk has the same ability to use the software in multiple jurisdictions as does a purchaser who takes delivery electronically. A couple of simple examples illustrate this point:

**Example 1: Electronically Downloaded Software**

Purchaser is a large multinational business with employees in several states and countries. It obtains a license from software seller to use the seller's software on the desktop computers of all of its employees worldwide. Purchaser downloads the software from the seller's site in New York to its server located in New Hampshire. From the server in New Hampshire, purchaser uploads copies of the software to the desktop computers of its employees worldwide. While the seller knows that the purchaser intends to distribute copies of the software to computers in many locations, it has not specific information regarding how many copies of the software will be going to any particular jurisdiction. Purchaser gives seller a MPU and purchaser uses it books and records to determine how much tax to remit to any particular jurisdiction based on the number of copies going into each jurisdiction and such jurisdiction's tax laws. Seller has no tax collection or remittance obligation because it has received a MPU from the purchaser.

**Example 2: Software Delivered on Master Disk, Copies Uploaded**

Same facts as in Example 1 except that instead of the purchaser downloading a copy of the software onto its server in New Hampshire, seller sends a master disk to the purchaser's site in New Hampshire. Purchaser loads the software from the disk onto its server and uploads copies of the software to the desktop computers of its employees worldwide. Because the software was delivered on a disk and not delivered electronically, purchaser is not permitted to give the seller

a MPU. Seller sources the sale using Section 310(A)(2). Because New Hampshire has no sales tax, seller collects and remits no tax. The purchaser is obligated to remit use tax where it is due.

As can be seen in the examples above, a purchaser of software delivered either electronically or on a disk has equal ability to use the software in multiple locations under the terms of the license. Industry sees no reason why the purchaser should not be required to give the seller an MPU in either circumstance. For this reason, industry has asked that the Agreement be amended to eliminate the disparity of treatment dependent on the method of delivery.

Of concern to some may be the situation where prewritten software is purchased over-the-counter. It is not common for a business to purchase software over-the-counter that will be used in multiple locations. This is limited by the fact that a business would not be able to use an MPU to purchase a single copy or single license to use a computer program. Typically a business purchasing multiple copies of software or multiple licenses to use software will make that purchase from a company specializing in technology. However, in the event that a business does purchase multiple licenses to use software at the same time from a retail store, they should be allowed to use the MPU if the software will be concurrently available for use in more than one jurisdiction.

**MPU History:** In April 2000 Paull Mines provided the Sourcing Work Group with a copy of the Final Report of the Situs and Sourcing Subcommittee of the National Tax Association Communications and Electronic Commerce Tax Project issued April 10, 1988. According to the report, the purpose of the Subcommittee was to examine the issues involved in the situs of a sale in electronic commerce and sourcing that sale to the appropriate jurisdiction for tax purposes and to recommend a solution to those issues for transactions in electronic commerce. The Subcommittee consisted of Karen Boucher, Wally Hellerstein, Paull Mines, Andy Ottinger, Bruce Reid, Jim Schroeder, Peter Weiss and Harley Duncan, Chairman.

The report advocates destination based sourcing remarkably similar to the rules finally adopted in Section 310(A) as the General Sourcing Rules by the Project. Of special interest to this discussion is a section on “Information Used in Multiple Locations” which discusses how to source electronic information services including a computer program sold on a master disk. (A copy of this section of the report can be found in Appendix B.)

Early drafts of the sourcing rules referred to the use of an MPU for purchases of an “intangible or a service.” The Streamlined Sales and Use Tax Agreement as approved December 22, 2000 and amended January 24, 2001, referred to the use of an MPU for purchases of a “digital good or a service.” Even the most recent draft of the Sourcing Issue Paper dated January 2002 addresses the situation where a product that can be accessed or used by several persons in different locations at once, such as “software accessed by remote employees or a database accessed by various offices of a multistate firm.”

The words limiting the use of the MPU to computer software “delivered electronically” were added to Section 312 along with all of the computer related definitions and the definition of tangible personal property in the Agreement as adopted November 12, 2002. Software was not mentioned in Section 312 until the Project defined software as TPP. Then, since the MPU cannot be used to purchase TPP, the words “computer software delivered electronically”

were added to clarify that the MPU can still be used for purchases of software that might previously have been considered an “intangible” or a “digital good.”

**Recommendation:** Allow the use of the MPU for sourcing all computer software regardless of the delivery method.

The original intent (based on early drafts of the sourcing rules and the issue paper) was clearly to cover situations where software, regardless of delivery method, would be concurrently available for use in multiple jurisdictions. In addition, having differing sourcing rules for software delivered electronically from that delivered on tangible media may create confusion as to whether use tax is due. Since the MPU can only be used for software delivered electronically, the purchaser may incorrectly assume that tax is only due in the state of delivery when software is sold on a disk and that no use tax obligation exists in other states.