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June 21, 2005

Senator Angela Z. Monson
2300 North Lincoln Boulevard, Room 428
Oklahoma City, Oklahoma 73105

Commissioner R. Bruce Johnson
Utah Tax Commission
210 North 1950 West
Salt Lake City, Utah 84134

Re: Response to COST comments on Ohio's Petition for Membership in the Streamlined Sales and Use Tax Agreement

Dear Senator Monson and Commissioner Johnson:

This is in response to the public comment on Ohio's petition for Membership in the Streamlined Sales and Use Tax Agreement, dated May 26, 2005, submitted by Stephen Kranz of the Council on State Taxation (COST) and the comments presented in a paper prepared by Ernst & Young for the Equipment Leasing Association (ELA). This response will address each group's comments separately.

COST COMMENTS

The comments from COST are divided into two groups: General Concerns and Specific Concerns.

General Concerns

1. The first General Concern deals with regulations (rules) that a state uses to adopt some of the provisions of the Streamlined Agreement. The stated concern is:

In numerous states, many regulations have not yet been promulgated and preexisting regulations have not been repealed. In addition, a concern exists that states may promulgate regulations without having the proper underlying statutory authority to do so.

This is a general concern addressed to all states. No specific problems with Ohio rules have been cited. Sections 5739.05(A) and 5741.06 of the Ohio Revised Code provide the Tax Commissioner with authority to promulgate "such rules as the commissioner deems necessary to administer" the sales and use taxes, respectively.

2. The second General Concern is expressed as follows:

Pursuant to §§ 303 and 401, each state is required to participate in the Agreement's registration system. This system must be operational by October 1, 2005 for the states to be in compliance with the Agreement.

Again, this comment is not specifically addressed to Ohio, and no single state could respond to it. Sections 303 and 401 of the Streamlined Agreement require member states to establish and participate in an online registration system. Ohio will be ready to accept registrations from the Streamlined registration system by October 1, 2005.

3. The third comment relates to taxability matrices filed by the various petitioning states. The Comment states:

All states have developed taxability matrixes, required by § 328 of the Agreement. In addition, there is a lack of consistency in the approach to completing these matrixes when they are compared state-to-state. Sales price, delivery charge, direct mail, medical definitions, and installation charges are areas where the lack of consistency is most noticeable. Does "N/A" mean that an item is exempt or that the defined term is not necessary because the state taxes everything?

This comment cites no specific problem with the Ohio matrix. If there are inconsistencies in the states interpretations of items in the matrix, this will require clarification by the Streamlined Conforming States or Governing Board. The "N/A" response does not appear in Ohio's matrix.

Specific Concerns

1. The first expressed concern is:

Ohio does not currently meet the uniform remittance of funds requirements under § 319 of the Agreement relating to the data accompanying remittance. Ohio can come into compliance, however, if the Department of Taxation promulgates a rule that conforms to this section's requirements.

Division F of section 319 of the Agreement provides that each member state shall:

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Require that any data that accompanies a remittance be formatted using uniform tax type and payment type codes approved by the governing board.

In the Ohio Certification of Compliance checklist, the response to question 309F is given as "N/A." The response also cites Information Release ST 2005-03 dated May 2005. That release, titled "Electronic Payment Methods," includes the following provision:

Streamlined Sales Tax Project Requirements

Ohio is participating in the Streamlined Sales Tax Project and will petition to become a "member state" under the Streamlined Sales and Use Tax Agreement (Agreement). Section 319(F) of the Agreement provides that each member state must require any data that accompanies a remittance to be formatted using uniform tax type and payment type codes approved by the governing board. Until the Agreement becomes effective, which will not be before October 1, 2005, the governing board is not operational. When the governing board approves the uniform tax type and payment codes, this Department and/or the Treasurer of State will issue guidance on the use of those codes.

We believe this addresses the issues raised by section 319F of the Agreement.

2. The second specific concern is stated as follows:

In R.C. 5739.02(B)(19), Ohio provides, "Sales of prosthetic devices, durable medical equipment for home use, or mobility enhancing equipment, when made pursuant to a prescription and when devices or equipment are for use by a human being." The Agreement does not allow the "for use by a human being" limitation on any of the Agreement definitions except Drugs.

With regard to both durable medical equipment and "mobility enhancing equipment," the definitions of those terms in the Agreement expressly indicate a "human use" limitation. Part C of the Agreement definition of "durable medical equipment" contains a limitation that such equipment "Generally is not useful to a person in the absence of illness or injury." Part B of the definition of "mobility enhancing equipment" limits the term to an item which "Is not generally used by persons with normal mobility." Section 208 of the Agreement provides a definition of "person" that includes individuals (who would be human beings) and various legal persons such as trusts, estates, partnerships and corporations.

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While not excluded by the language of section 208, it is difficult to conceive of one of these non-human persons suffering illness or injury or having impaired mobility. Furthermore, non-human animals are not considered to be "persons" under section 208. Therefore, the definitions of durable medical equipment and mobility enhancing equipment are clearly intended to apply to equipment for human use.

There is no similar language referring to use by a "person" in the definition of "prosthetic device." However, there is nothing that affirmatively states an intention that the definition covers items for use on non-human animals. There is no reason to believe that such a result was contemplated in the adoption of the definition of a "prosthetic device." Since the limitation can clearly be found in the definitions of "durable medical equipment" and "mobility enhancing equipment" we believe the human use limitation was contemplated for all the medical equipment definitions.

In addition, the Agreement allows limitations on the medical equipment definitions to allow exemption only where the item is covered by Medicare or Medicaid. These programs only cover human use. This further supports the position that a human use limitation is within the contemplation of the Agreement.

None of this is to say that a state could not, if it chose, extend an exemption to medical equipment for use by animals, but we do not believe the Agreement requires that result.

In any event, we believe a human use limitation on the exemptions for medical equipment is a reasonable limitation on the exemption and does not render our statutory provision substantially non-compliant.

ELA COMMENTS

The Ernst and Young paper for ELA raised three areas of concern for Ohio. The comments in the report were made with reference to language adopted by the Ohio General Assembly in H.B. 95, which was the Biennial Budget bill for fiscal years 2004 and 2004 [July 1, 2003 through June 30, 2005]. The comments will be addressed in the order they were raised.

1. The first comment is "H.B. 95 does not adopt the SSUTA definition of retail sales." The Appendix to the report, on page 29, quotes the Streamlined definition of a retail sale as follows:

"Retail sale or Sale at retail" means any sale, lease, or rental for any purpose other than for resale, sublease, or subrent.

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For sales tax purposes, R.C. 5739.01(E) provides:

"Retail sale" and "sales at retail" include all sales, except those in which the purpose of the consumer is to resell the thing transferred or benefit of the service provided, by a person engaging in business, in the form in which the same is, or is to be, received by the person.

While Ohio's definition does not specifically mention leases or rentals, such transactions are considered to be "sales" under Ohio law within the meaning of R.C. 5739.01(B). For both leases and rentals, tangible personal property is transferred to a consumer for a consideration. Our definition also limits exception to the definition of a "retail sale" to sales for resale, which would include resale by rental or lease. Thus, while the language used is not identical to the language of the Streamlined Agreement, Ohio feels its definition of a "retail sale" complies with the definition found in the Agreement.

The Appendix to the report also cites an Ohio definition of "retail sale" from R.C. 4929.01(L) as being not in compliance with the Agreement. This section is part of the Pharmacy chapter of the Ohio Revised Code and has no bearing on the application of Ohio sales tax.

2. The second issue raised in the ELA paper is, "HB 95 does not adopt the full SSUTA definition of lease or rental. The bill does not include the sentence dealing with the sale-leaseback exemption in *Subsection D*."

It was indicated on page 14 of the report, that the industry does not consider this to be a substantial consideration. Ohio has no special provisions for sale-leaseback and would not need the language in question.

3. The final issue raised by ELA is. "HB 95 does not adopt the full language of the SSUTA sourcing rules."

The general sourcing rules of the Streamlined Agreement were first adopted in H.B.143, enacted in 2002. The effective date of these provisions was delayed until 2003. Ohio adopted the Streamlined sourcing rules for leasing in H.B. 95; however, the bill delayed the effective date of these changes, and the general sourcing provisions for sales to January, 2004. Subsequently, implementation of the Streamlined sourcing provisions has been further delayed by the General Assembly.

