



Dave Hardy
Secretary of Revenue

Matthew Irby
Tax Commissioner

STATE TAX DEPARTMENT

February 3, 2023

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'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.
Petition 22001

Dear Mr. Johnson:

This letter is in response to the Business Advisory Council's (BAC) Petition for Resolution and Reconsideration dated December 2, 2022.

Statement of the Case:

This case originated from the Compliance Review and Interpretations Committee (CRIC). CRIC completed its annual recertification review of member states in accordance with Rule 803 of the Streamlined Sales and Use Tax Agreement (the Agreement). Pursuant to Section 803, "[e]ach member state shall annually re-certify that such state is in compliance with the Agreement." West Virginia submitted its submission of its statement of compliance and updated its online certificate of compliance and taxability matrix pursuant to this Section.

Under the Agreement, CRIC is "responsible for reviewing each state's annual recertification filings, determining any needs for re-assessment and recommending to the Governing Board findings of non-compliance." Rule 803(B) of the Rules and Procedures of the Streamlined Sales Tax Governing Board, Inc. (the Rules).

The purpose of CRIC, under the Agreement is to provide recommendations to the Board on the issues of compliance and interpretation of the Agreement:

The Compliance Review and Interpretations Committee has the dual responsibility for: (1) recommending rules to the Governing Board to respond to

statements of non-compliance, making recommendations to the Governing Board on applications of states for compliance with the Agreement, maintaining a Compliance Review Guide, reviewing all compliance review reports to determine any needs for reassessment, recommending findings of non-compliance to the Governing Board, and fulfilling such other responsibilities as specified in the Agreement or assigned to them by the Executive Committee; and (2) making recommendations to the Governing Board on matters involving interpretations, definitions, revisions or additions to the Agreement.

Article 7, Section 2 of the Bylaws of the Streamlined Sales Tax Governing Board, Inc. (the Bylaws).

Prior to the public hearing, CRIC provided the states and the public the opportunity to provide written comments. 803(C)(2) of the Rules. On August 30, 2022, and September 9, 2022, BAC provided comments to CRIC seeking a determination that West Virginia's sales tax statutes are not in substantial compliance with Section 332.D.2 and D.3 of the Agreement. The BAC contended that West Virginia is not in substantial compliance with the Agreement, because "West Virginia does not specifically impose and separately enumerate tax on the sale of products transferred electronically that are sold with the grant by a seller of less than the right of permanent use or conditioned upon payment from the purchaser." This is the exact argument that BAC has provided in its current Petition.

CRIC held a public hearing on September 13, 2022, during which each state responded to the CRIC members, Governing Board staff and the public regarding any questions or issues of possible noncompliance. The public was also given an opportunity to comment or raise other concerns with states' compliance. During that hearing, BAC argued that West Virginia was not in compliance for the same reasons articulated in its current Petition. The result of the CRIC hearing was that the vote was divided and the matter was sent to the full Governing Board for consideration.

On September 26, 2022, CRIC submitted its report to the Streamlined Sales Tax Governing Board pursuant to Rule 803(C)(4), reporting the results of the September 13, 2022, hearing.

On September 29, 2022, a memo from BAC was distributed to the Streamlined Sales Tax Governing Board (Governing Board) delegates prior to the upcoming Governing Board Meeting. The memo contained BAC's position with respect to West Virginia's compliance with Section 332.D of the SSUTA, as it relates to the imposition of tax on streaming services. These arguments are the same in the current Petition.

On October 5, 2022, the Governing Board voted on a motion to find West Virginia not in compliance with Section 332 of the SSUTA. The motion failed. The Board considered the arguments from CRIC and BAC at the time of making that decision.

Now BAC has filed a Petition for Resolution and Reconsideration related to this decision on December 2, 2022, under Section 1001 of the Agreement. West Virginia is providing this public comment under Rule 1001(B) of the Rules.

Issue Presented: The BAC contends in its Petition for Resolution and Reconsideration that West Virginia “is not substantially compliant with Section 332 D.2 and D.3.” This is the same argument that BAC articulated in its memo submitted to CRIC on August 30, 2022, and September 9, 2022, and its memo submitted to the Governing Board delegates on September 29, 2022. It is also the same argument that it made during the CRIC’s public hearing on September 13, 2022, and at the Governing Board meeting on October 5, 2022. The 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.

The basis of this contention is BAC’s claim that West Virginia’s “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.” West Virginia does not believe that Subsections 332 D.2 and D.3 are applicable in this matter. However, even if they are applicable, West Virginia is not out of compliance.

Conclusion: West Virginia is not substantially out of compliance with Section 332.D.2 and D.3 of the Agreement.

Analysis:

This issue has already been decided by the Governing Board. Pursuant to Rule 803(D)(2)(b), “[i]f an issue of a state’s compliance has previously been raised against a state for which it was found in compliance that was the subject of a prior unsuccessful challenge under this paragraph, such state need only respond that it previously was held in compliance on that same issue.”

BAC has filed this appeal from the Governing Board’s decision, but has provided no additional reasons or arguments as to why the outcome should differ from the earlier decision by the Governing Board. There is no additional basis for the Governing Board to reconsider its decision.

Pursuant to Section 1002 of the Agreement,

Any member state or person may petition the Governing Board to invoke the issue resolution process to resolve matters of: A. Membership of a state under Article VIII; B. Matters of compliance under Section 805; C. Possibilities of sanctions of a member state under Section 809; D. Amendments to the Agreement under Section 901; E. Interpretation issues, including differing interpretations among the member states, under Section 902; or F. Other matters at the discretion of the Governing Board.

BAC appears to have filed its Petition due to “matters of compliance under Section 805.”

While West Virginia understands that BAC has traditionally been permitted to file appeal Petitions, it is unclear whether BAC is an appropriate entity to file such a Petition under these circumstances. BAC is not a member state. It is unclear if BAC is a “person”

under the Agreement. Under Rule 1001A, the Rules state “[a]ny party dissatisfied with a decision of the Governing Board may file an appeal with the Governing Board to request consideration of the decision.” The term “party” also does not appear to be defined.

The purpose of BAC under the Agreement, Rules, and Bylaws appears to be as an advisory council to the Governing Board. Article 8A, Section 1 of the Bylaws and Section 811 of the Agreement provides that the “[t]he “Governing Board shall recognize a Business Advisory Council to advise it on matters pertaining to the administration of the Agreement, including but not limited to, admission of states into membership, noncompliance, interpretations, and revision or additions to the Agreement.” BAC has already fulfilled its obligations under the Agreement.

BAC has fully argued its position to CRIC and the Governing Board on this very issue. BAC is attempting to require a re-vote on a matter that has already been decided by the Governing Board, without providing any additional arguments.

However, if the Issues Resolution Committee decides to review this matter further, West Virginia maintains that it is not out of compliance.

It is important to note that under Rule 803(D)(2)(b), “[a] **member state is presumed to be in compliance.**” [Emphasis added.] The test whether a member state is in compliance with the Agreement is “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.***” 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.

The Governing Board's Issues Resolution Committee has twice issued decisions on the issue of “substantial compliance” . . . not what it means but what it doesn't mean. As set forth in *In the Matter of Substantial Compliance of the State of Nebraska* (IRC Dec. No. 2011-1), and in *In the Matter of the Substantial Compliance of the State of Nevada* (IRC Dec. 2010-1), “substantial compliance does not mean exact compliance. . . a state may depart from the exact terms of the Agreement if it does not increase the burden on any taxpayer or the burden is *de minimis*.” The Committee noted further “that the mere imposition of a tax, though clearly a burden on any taxpayer, is not enough.” *In the Matter of Substantial Compliance of the State of Nebraska* (IRC Dec. No. 2011-1).

We do not believe that Subsections 332 D.2 and D.3 are applicable in this matter. Section 332 relates to the imposition of a tax on products “transferred electronically,” not on the provision of services, in this case “streaming services.”

Subsections 332 D.2 and D.3 read as follows:

Section 332: SPECIFIED DIGITAL PRODUCTS

...

D. 1. 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 the tax on a sale to a purchaser who is an end user unless the statute specifically imposes and separately enumerates the tax on a sale to a purchaser who is not an end user. For purposes of this paragraph, an “end user” includes any person other than a person who receives by contract a product “transferred electronically” for further commercial broadcast, rebroadcast, transmission, retransmission, licensing, relicensing, distribution, redistribution or exhibition of the product, in whole or in part, to another person or persons.

A person that purchases products “transferred electronically” or the code for “specified digital products” for the purpose of giving away such products or code shall not be considered to have engaged in the distribution or redistribution of such products or code and shall be treated as an end user.

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. For purposes of this paragraph “permanent” means perpetual or for an indefinite or unspecified length of time. A right of permanent use shall be presumed to have 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.

Rule 332.1 provides guidance on the purpose of Section 332 of the Agreement:

Section 332A provides that specified digital products and the subcategories thereof are not within the definition of ancillary services, computer software, telecommunication services or tangible personal property. With regard to tangible personal property, the purpose of Section 332A is to make it clear that specified digital products and the subcategories are a separate class of property outside of tangible personal property. States are not free to interpret the definition of tangible personal property as including any item within the definition of specified digital product.

West Virginia is not taxing digital products as part of a tax on tangible personal property. West Virginia is not including digital products under the definition of ancillary services, computers software or telecommunication services. The agreement is silent on whether a tax on all services, like West Virginia’s broad tax on services, is compliant with the

Agreement. The Agreement is clearly focused on a tax on “tangible personal property” not including digital products.

Sections 332 D.2 and D.3. provide requirements for when a state has a statute imposing a tax on “specified digital products.” West Virginia does not have such a tax. West Virginia has a tax on services, which would include streaming services, but West Virginia does not tax the sale of a digital product that is sold outside the context of these services.

If, however, the Issue Review Committee determines that Subsections 332 D.2 and D.3 apply to a tax on streaming services, West Virginia asserts that we are still in substantial compliance with the Subsections and the Agreement.

West Virginia has, at all relevant times, imposed a consumers sales and service tax. The State's imposition of tax on sales of services contained in Sections 11-15-2(18) and 11-15-3 is general in nature:

§11-15-2. Definitions.

...

(b) Definitions. –

...

(18) “Service” or “selected service” includes 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: Provided, That the term “service” or selected service” does not include payments received by a vendor of tangible personal property as an incentive to sell a greater volume of such tangible personal property under a manufacturer’s, distributor’s or other third party’s marketing support program, sales incentive program, cooperative advertising agreement or similar type of program or agreement, and these payments are not considered to be payments for a “service” or “selected service” rendered, even though the vendor may engage in attendant or ancillary activities associated with the sales of tangible personal property as required under the programs or agreements.

§11-15-3. Amount of tax; allocation of tax and transfers.

(a) *Vendor to collect.* – Unless otherwise provided in this article or provided in §11- 15A-1 *et seq.* of this code, for the privilege of selling tangible personal property or custom software and for the privilege of furnishing certain selected services defined in

§11-15-2 and §11-15-8 of this code, the vendor shall collect from the purchaser the tax as provided under this article and §11-15B-1 *et seq.* of this code, and

shall pay the amount of tax to the Tax Commissioner in accordance with the provisions of this article or §11-15B-1 *et seq.* of this code.

....

All services are subject to the sales and service tax unless specifically excepted or exempted. See, W. Va. Code §11-15-6:

§11-15-6. Vendor must show sale or service exempt; presumption.

The burden of proving that a sale or service was exempt from the tax shall be upon the vendor, unless the vendor takes from the purchaser an exemption certificate signed by and bearing the address of the purchaser and setting forth the reason for the exemption and substantially in the form prescribed by the Tax Commissioner.

To prevent evasion, it is presumed that **all** sales and services are subject to the tax until the contrary is clearly established.

(Emphasis added.)

The tax on services, as provided for in W.Va. Code §11-15-8, 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.

While the tax on services in West Virginia is certainly broad, it clearly provides a tax on the furnishing of all services, which would include "streaming 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 contention.

The Agreement does not require West Virginia to use the definitions of "specified digital products" or "transferred electronically" in the imposition of the tax. The Agreement 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'". Section 332.C. of the Agreement. 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.

The Agreement 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 of a tax on services clearly and 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.

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.

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.

In Closing:

West Virginia is extremely concerned about the ability of BAC to relitigate matters already decided by the full Governing Board related to compliance with the Agreement. A clear process for resolution of these issues is delineated in the Agreement, and protection for states who have already been determined to be in compliance is likewise clearly provided. To allow BAC to backdoor an additional review of a state's compliance with the Agreement, particularly when providing no additional facts or arguments, places all member states at risk of perpetual review and will only serve to compromise the stability of the Agreement (with no member state or even a taxpayer ever being assured of a state's compliance with the Agreement).

Even still, West Virginia remains in compliance with the Agreement (as previously determined by the Board) because the Agreement 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

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

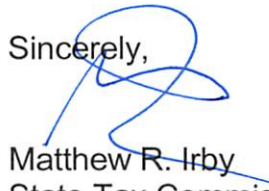
See <https://www.amazon.com/gp/video/splash/t/getTheApp/ref=atv> di rdr (visited 9/9/2022): What is Amazon Prime Video? Prime Video is a streaming video service by Amazon. Prime Video benefits are included with an Amazon Prime membership. With your membership, you can watch hundreds of TV shows and movies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

payment from the purchaser. West Virginia's imposition of tax on services clearly accomplishes this.

For the reasons stated above, I respectfully ask that you deny the Petition, and 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 R. Irby
State Tax Commissioner

Cc: Fred Nicely, Esq.