

41 N.J.R. 1716(a)

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RULE PROPOSALS

**TREASURY -- TAXATION
DIVISION OF TAXATION**

41 N.J.R. 1716(a)

Proposed New Rules: N.J.A.C. 18:24B

Sales and Use Tax

Authorized By: Cheryl Fulmer, Acting Director, Division of Taxation.

Authority: N.J.S.A. 54:32B-24 and 54:50-1.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2009-121.

Submit written comments by June 19, 2009 to:

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The agency proposal follows:

Summary

Effective October 1, 2005, through the enactment of P.L. 2005, c. 126, New Jersey joined a national coalition of states in conforming the New [page=1717] Jersey Sales and Use Tax Act to the provisions of the Streamlined Sales and Use Tax Agreement (SSUTA). The SSUTA was developed over the course of several years through the joint effort of the many states participating in the Streamlined Sales and Use Tax Project (Project). The underlying purpose of the SSUTA is to simplify and modernize the administration of the sales and use tax laws of the member states in order to assist in tax administration and compliance. New Jersey chose to participate in the SSUTA in order to help New Jersey businesses that operate in multiple states

because the SSUTA simplifies the sales and use tax burdens for such businesses. New Jersey has been involved as a participating state since 2001, when the State Treasurer was authorized, pursuant to P.L. 2001, c. 421 (N.J.S.A. 54:32B-44 et seq.) to enter into multistate discussions concerning the SSUTA to provide a streamlined sales tax system.

The two parts to the Project's proposed streamlined sales tax system are: 1. a uniform sales and use tax administration system to reduce the burden of tax compliance for all sellers and all types of commerce and 2. a sales tax law simplification and uniformity system. These simplifications apply to all sellers. Sellers who do not have a physical presence (or "use tax collection nexus") are not required to collect sales and use taxes unless the United States Congress should choose to require collection from all sellers for all types of commerce. However, absent Congressional action, sellers without a physical presence can volunteer to collect under the simplifications proposed in the SSUTA.

Instead of incorporating the proposed rules into the existing sales and use tax chapter, the proposed rules are contained in a new chapter because rather than impacting the taxability of property or services, these rules are purely administrative and procedural in nature. The adoption of these rules is necessary in order for New Jersey to be in compliance with the SSUTA. The language of the new rules is derived directly from the SSUTA and the Division is proposing these procedures as required in order to remain in compliance with the SSUTA.

The proposed new rules assist sellers and purchasers by clarifying and explaining the administrative aspects of the law. These rules contain: definitions, the administration of exemption certificates, the filing of tax returns, rules for remitting funds, certification of service providers and automated systems, seller participation, State review and approval of certified automated system software and certain liability relief and confidentiality and privacy protections under Model 1 (Model 1 refers to a seller that has selected a certified service provider as its agent to perform all the seller's sales and use tax functions, other than the seller's obligation to remit tax on its own purchases).

As the Division has provided a 60-day comment period on the notice of proposal, this notice is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The Streamlined Sales and Use Tax Rules and Procedures are proposed to provide sellers and purchasers with guidance and assistance in the administration and implementation of the SSUTA. As a member state, New Jersey is required to be in compliance with the SSUTA through the incorporation of its provisions, including these rules and procedures, into New Jersey law, rules and policies.

The proposed rules are an administrative action to codify the administrative policies and procedures that have been developed and approved by the Streamlined Sales Tax Governing Board to implement the SSUTA. The proposed rules implementing P.L. 2005, c. 126, and subsequent additions to the SSUTA will have a positive effect in clarifying the extensive changes enacted in 2005. They enable taxpayers and their advisors to learn about the changes in sales tax procedures and to keep up with the details of policy changes that were required to be made based on interpretations

issued by the Streamlined Sales Tax Governing Board. These rules are intended to assist sellers, purchasers and their tax advisors by clarifying these detailed tax administration policies. The new rules will thus facilitate public compliance by clarifying sales tax obligations, sales tax exemption procedures and administrative and privacy issues. The rules implementing these changes have a beneficial social impact on taxpayers because they simplify the procedures for compliance.

Economic Impact

New Jersey chose to participate in the SSUTA in order to help New Jersey businesses that operate in multiple states, because the SSUTA simplifies the sales and use tax burdens for such businesses. The SSUTA provides a uniform sales and use tax administration system to reduce the burden of tax compliance for all sellers and all types of commerce and a sales tax law simplification and uniformity system.

Enactment of these rules would generally be revenue neutral. These rules conform New Jersey's Sales and Use Tax Act to the administrative provisions of the SSUTA. In the long term, these rules will protect the current sales tax base and will result in increased ability to collect sales tax that is due to the State since taxpayer compliance will be facilitated by explaining sales tax obligations, sales tax exemption procedures and administrative and privacy issues.

Federal Standards Statement

A Federal standards analysis is not required. The rulemaking authority is based on N.J.S.A. 54:32B-24 of the New Jersey Sales and Use Tax Act. There are no Federal regulatory requirements or standards that affect this rulemaking. Therefore, no Federal standards analysis is required. The rules are derived from New Jersey's membership in the SSUTA, which is a compact between a number of states and does not involve the Federal government. Currently 22 states are either full or associate members of the Streamlined Project.

Jobs Impact

The Division does not anticipate that jobs will be generated or lost as a result of the proposed new rules.

Agriculture Industry Impact

The proposed new rules will not have an impact on the agriculture industry.

Regulatory Flexibility Analysis

New Jersey chose to participate in the SSUTA in order to help New Jersey businesses that operate in multiple states because the SSUTA simplifies the sales and use tax burdens for such businesses. The SSUTA provides a uniform sales and use tax administration system to reduce the burden of tax compliance for all sellers and all types of commerce and a sales tax law simplification and uniformity system.

The proposed rules are procedural in nature. The proposed rules implementing P.L. 2005, c. 126 and subsequent additions to the SSUTA will have a positive effect in clarifying the extensive changes enacted in 2005. They enable taxpayers and their advisors to learn about the changes in sales tax procedures and to keep up with the

details of policy changes that were required to be made whenever new interpretations are issued by the Streamlined Sales Tax Governing Board. These rules are intended to assist sellers, purchasers and their tax advisors by clarifying these detailed tax administration policies and procedures. The rules should not require any reporting, recordkeeping or compliance requirements beyond those already required under existing law. Professional services, including legal and accounting services, may be required in order to comply with the rules, but the extent needed, if at all, would vary based on the circumstances of the particular seller. However, as noted in the Social Impact and Economic Impact statements above, the rules should make compliance easier for sellers by facilitating public compliance by clarifying sales tax obligations, sales tax exemptions, administrative and privacy issues.

The Sales and Use Tax Act applies to all sellers of tangible personal property and services. Thus, all businesses have the same duties whether or not they are a small business as the term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Any exemption for small businesses would not be in compliance with the statute.

Since sellers are already required to file returns and remit New Jersey sales tax, these rules do not impose any new burden. Certain sellers (Model 1, 2 or 3, as defined in the rules) will be permitted to file returns using a simplified format, which is one of the cornerstones of the Streamlined effort.

Smart Growth Impact

The proposed rules will not have an impact on the achievement of smart growth and the implementation of the State Development and Redevelopment Plan.

Housing Affordability Impact

The proposed rules will not result in a change in the average costs associated with housing. The proposed rules have no impact on any aspect of housing because they deal with sales and use taxation.

Smart Growth Development Impact

The proposed rules would not result in a change in the housing production within Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan. The basis for this finding is that the proposed amendments have nothing to do with housing production, either within Planning Areas 1 or 2, within designated centers, or anywhere in the State of New Jersey. The proposed amendments only deal with sales and use taxation.

Full text of the proposed new rules follows:

CHAPTER 24B

STREAMLINED SALES AND USE TAX RULES AND PROCEDURES

SUBCHAPTER 1. STREAMLINED SALES AND USE TAX RULES AND PROCEDURES

18:24B-1.1 Definitions

The following words and terms, when used in this chapter, shall have the following meanings:

"Agent" means a person appointed by a seller to represent the seller before the member states.

"Agreement" or "SSUTA" means the Streamlined Sales and Use Tax Agreement.

"Certified automated system" or "CAS" means software certified under the Agreement to calculate the tax imposed by each jurisdiction on a transaction, determine the amount of tax to remit to the appropriate state and maintain a record of the transaction.

"Certified service provider" or "CSP" means an agent certified under the Agreement to perform all the seller's sales and use tax functions, other than the seller's obligation to remit tax on its own purchases.

"Division" refers to the New Jersey Division of Taxation within the Department of the Treasury.

"Entity-based exemption" means an exemption based on who purchases the product or who sells the product. An exemption that is available to all individuals shall not be considered an entity-based exemption.

"Governing Board" refers to the Streamlined Sales Tax Governing Board, Inc., which is comprised of representatives of the states that are members of the Agreement.

"Model 1 seller" means a seller that has selected a CSP as its agent to perform all the seller's sales and use tax functions, other than the seller's obligation to remit tax on its own purchases.

"Model 2 seller" means a seller that has selected a CAS to perform part of its sales and use tax functions, but retains responsibility for remitting the tax.

"Model 3 seller" means a seller that has sales in at least five member states, has total annual sales revenue of at least 500 million dollars, has a proprietary system that calculates the amount of tax due each jurisdiction and has entered into a performance agreement with the member states that establishes a tax performance standard for the seller. As used in this definition, a seller includes an affiliated group of sellers using the same proprietary system.

"Person" means an individual, trust, estate, fiduciary, partnership, limited liability company, limited liability partnership, corporation or any other legal entity.

"Product-based exemption" means an exemption based on the description of the product and not based on who purchases the product or how the purchaser intends to use the product.

"Purchaser" means a person to whom a sale of personal property is made or to whom a service is furnished.

"Registered under the Agreement" means registration by a seller with the member

states under the central registration system provided in Article IV of this Agreement.

"Seller" means a person making sales, leases or rentals of personal property or services.

"Use-based exemption" means an exemption based on a specified use of the product by the purchaser.

18:24B-1.2 Administration of exemptions

(a) The Division shall require the following provisions when a purchaser claims an exemption:

1. The seller shall obtain identifying information of the purchaser and the reason for claiming a tax exemption at the time of the purchase as determined by the Governing Board;
2. A purchaser is not required to provide a signature to claim an exemption from tax unless a paper exemption certificate is used;
3. The seller shall use the standard form for claiming an exemption electronically as adopted by the Governing Board;
4. The seller shall obtain the same information for proof of a claimed exemption regardless of the medium in which the transaction occurred;
5. The Division may utilize a system wherein the purchaser, exempt from the payment of the tax, is issued an identification number that shall be presented to the seller at the time of the sale;
6. The seller shall maintain proper records of exempt transactions and provide them to the Division when requested;
7. The Division shall administer use-based and entity-based exemptions when practicable through a direct pay permit, an exemption certificate or another means that does not burden sellers; and/or
8. In the case of drop shipment sales, the Division will allow a third-party vendor (for example, drop shipper) to claim a resale exemption based on an exemption certificate provided by its customer/reseller or any other acceptable information available to the third-party vendor evidencing qualification for a resale exemption, regardless of whether the customer/reseller is registered to collect and remit sales and use tax in the state where the sale is sourced.

(b) The Division shall relieve sellers that follow the requirements of this section from the tax otherwise applicable if it is determined that the purchaser improperly claimed an exemption and will hold the purchaser liable for the nonpayment of tax. This relief from liability does not apply to a seller who fraudulently fails to collect tax, to a seller who solicits purchasers to participate in the unlawful claim of an exemption or to a seller who accepts an exemption certificate when the purchaser claims an entity-based exemption when:

1. The subject of the transaction sought to be covered by the exemption certificate is

actually received by the purchaser at a location operated by the seller; and

2. The state in which that location resides provides an exemption certificate that clearly and affirmatively indicates that the claimed exemption is not available in that state (for example, striking out exemption reason types on the uniform form and posting it on a state's web site is an indicator).

(c) For sales made after January 1, 2008, the Division shall relieve a seller of the tax otherwise applicable if the seller obtains a fully completed exemption certificate or captures the relevant data elements required under the Streamlined Agreement within 90 days subsequent to the date of sale.

1. If the seller has not obtained an exemption certificate or all relevant data elements as provided in this section or (b) above, the seller may, within 120 days subsequent to a request for substantiation by the Division, either prove that the transaction was not subject to tax by other means or obtain a fully completed exemption certificate from the purchaser, taken in good faith. For purposes of this section, the Division may continue to apply its own standards of good faith until such time as a uniform standard for good faith is defined in the Agreement.

2. Nothing in this section shall affect the ability of the Division to require purchasers to update exemption certificate information or to reapply with the State to claim certain exemptions.

3. Notwithstanding the aforementioned, the Division shall relieve a seller of the tax otherwise applicable if it obtains a blanket exemption certificate for a purchaser with which the seller has a recurring business [page=1719] relationship. The Division may not request from the seller renewal of blanket certificates or updates of exemption certificate information or data elements when there is a recurring business relationship between the buyer and seller. For purposes of this section, a recurring business relationship exists when a period of no more than 12 months elapses between sales transactions.

18:24B-1.3 Administration of tax returns

(a) Only one tax return is required to be filed for each taxing period for each seller.

(b) Returns are due on the 20th day of the month following the month in which the transaction occurred.

(c) Any Model 1, 2 or 3 seller may submit its sales and use tax returns in a simplified format that does not include more data fields than permitted by the Governing Board. Additional informational returns may be required to be submitted not more frequently than every six months under a staggered system developed by the Governing Board.

(d) Sellers that are registered under the Agreement, who do not have a legal requirement to register with the Division but voluntarily choose to register with the Division, and are not a Model 1, 2, or 3 seller, may submit its sales and use tax returns as follows:

1. Upon registration, the required returns will be provided to the seller;

2. A seller may be required to file a return anytime within one year of the month of initial registration, and future returns may be required on an annual basis in succeeding years; and

3. In addition to the returns required in subsection (d)2 above, sellers may be required to submit returns in the month following any month in which they have accumulated State and local tax funds in the amount of 1,000 dollars or more.

(e) The Division may participate with other member states in developing a more uniform sales and use tax return that, when completed, would be available to all sellers.

(f) Model 1, 2 and 3 sellers are required to file returns electronically.

18:24B-1.4 Rules for remittance of tax

(a) Only one remittance is required for each return, except as provided in this subsection. If any additional remittance is required, it will only be required from sellers that collect more than 30,000 dollars in sales and use taxes in New Jersey during the preceding calendar year. The amount of the additional remittance will be determined through a calculation method rather than actual collections and will not require the filing of an additional return.

(b) Remittances from sellers under Models 1, 2 and 3 are to be remitted electronically.

(c) Electronic payments by both automated clearing house (ACH) Credit and ACH Debit are permitted.

(d) An alternative method for making "same day" payments if an electronic funds transfer fails is permitted.

(e) If a due date falls on a legal banking holiday in New Jersey, the taxes are due to on the next succeeding business day.

(f) Any data that accompanies a remittance is to be formatted using uniform tax type and payment type codes approved by the Governing Board.

18:24B-1.5 Certification of service providers and automated systems

(a) The Governing Board shall certify automated systems and service providers to aid in the administration of sale and use tax collections.

(b) The Governing Board may certify a person as a CSP if the person meets all of the Governing Board's requirements:

(c) The Governing Board may certify a software program as a CAS if the Governing Board determines that the program meets all of the Governing Board's requirements:

(d) The Governing Board may establish one or more sales tax performance standards for Model 3 sellers that meet the eligibility criteria set by the Governing Board and that developed a proprietary system to determine the amount of sales and use tax

due on transactions.

18:24B-1.6 Registration of sellers

(a) The Division in conjunction with the Governing Board shall provide an online registration system that allows sellers to register in all the member states.

1. By registering, the seller agrees to collect and remit sales and use taxes for all taxable sales into the member states, including member states joining after the seller's registration. Withdrawal or revocation of a member state shall not relieve a seller of its responsibility to remit taxes previously or subsequently collected on behalf of the state.

(b) If the seller has a requirement to register prior to registering under the Agreement, the seller may be required to provide additional information to complete the registration process or the seller may choose to register directly with the Division.

(c) A seller may be registered by an agent. Such appointment must be in writing and submitted to the Division, upon request.

(d) If New Jersey withdraws or is expelled from the Agreement, it will not use registration with the central registration system and the collection of sales and use taxes in New Jersey as a factor in determining whether the seller has nexus with New Jersey for any tax at any time.

18:24B-1.7 State review and approval of certified automated system software and certain liability relief

(a) The Division shall review software submitted to the Governing Board for certification as a CAS under Section 501 of the SSUTA. Such review shall include determination that the program accurately reflects the taxability of the product categories included in the program. Upon approval by the Division, the Division shall certify to the Governing Board its acceptance of the determination of the taxability of the product categories included in the program.

(b) The Division shall relieve CSPs and Model 2 sellers from liability for not collecting sales or use taxes resulting from the CSP or Model 2 seller relying on the certification provided by the Division.

(c) The Division shall provide relief from liability to CSPs for not collecting sales and use taxes in the same manner as provided to sellers under the provisions of N.J.A.C. 18:24B-1.2.

(d) The Governing Board and the Division shall not be responsible for classification of an item or transaction within the product categories certified. The relief from liability provided in this section shall not be available for a CSP or Model 2 seller that has incorrectly classified an item or transaction into a product-based category certified by the Division. This subsection shall not apply to the individual listing of items or transactions within a product definition approved by the Governing Board or the member states.

(e) If the Division determines that an item or transaction is incorrectly classified as

to its taxability, it shall notify the CSP or Model 2 seller of the incorrect classification. The CSP or Model 2 seller shall have 10 days to revise the classification after receipt of notice from the Division of the determination. Upon expiration of the 10 days, CSP or Model 2 seller shall be liable for the failure to collect the correct amount of sales or use taxes due and owing to the Division.

18:24B-1.8 Confidentiality and privacy protections under Model 1

(a) This section sets forth the Division's policy for the protection of the confidentiality rights of all participants in the system and of the privacy interests of consumers who deal with Model 1 sellers.

(b) As used in this section, the term "confidential taxpayer information" means all information that is protected under the State of New Jersey's laws, rules, and privileges; the term "personally identifiable information" means information that identifies a person; and the term "anonymous data" means information that does not identify a person.

(c) A CSP shall perform its tax calculation, remittance and reporting functions without retaining the personally identifiable information of consumers, except that the CSP's collection, use and retention of personally identifiable information will be permitted to the limited extent as required by the Division to ensure the validity of exemptions from taxation that are claimed by reason of a consumer's status or the intended use of the goods or services purchased and for documentation of the correct assignment of taxing jurisdictions.

(d) The Governing Board may certify a CSP only if that CSP certifies that:

1. Its system has been designed and tested to ensure that the fundamental precept of anonymity is respected;

2. Its personally identifiable information is only used and retained to the extent necessary for the administration of Model 1 with respect to exempt purchasers and proper identification taxing jurisdictions;

[page=1720] 3. It provides consumers clear and conspicuous notice of its information practices, including what information it collects, how it collects the information, how it uses the information, how long, if at all, it retains the information and whether it discloses the information to member states. Such notice shall be satisfied by a written privacy policy statement accessible by the public on the official web site of the CSP; and

4. Its collection, use and retention of personally identifiable information will be limited to that required by the Division to ensure the validity of exemptions from taxation that are claimed by reason of a consumer's status or the intended use of the goods or services purchased and for documentation of the correct assignment of taxing jurisdictions.

(e) When any personally identifiable information that has been collected and retained is no longer required for the purposes set forth in (d)4 above, such information shall no longer be retained by the Division.

(f) When personally identifiable information regarding an individual is retained by or

on behalf of the Division, the Division shall provide reasonable access by such individual to his or her own information in the Division's possession and a right to correct any inaccurately recorded information.

(g) If anyone other than a member state, or a person authorized by that state's law or the SSUTA, seeks to discover personally identifiable information, the state from whom the information is sought should notify the individual of such request.

(h) This privacy policy is subject to enforcement by New Jersey's Attorney General or other appropriate State government authority.

(i) New Jersey's laws and rules regarding the collection, use and maintenance of confidential taxpayer information remain fully applicable and binding. Without limitation, the Agreement does not enlarge or limit the Division's authority to:

1. Conduct audits or other review as provided under the SSUTA and State law;
2. Provide records pursuant to New Jersey's Open Public Records Act, N.J.S.A. 47:1A-1 et seq., disclosure laws with governmental agencies or other rules;
3. Prevent, consistent with New Jersey law, disclosures of confidential taxpayer information;
4. Prevent, consistent with Federal law, disclosures or misuse of Federal return information obtained under a disclosure agreement with the Internal Revenue Service; or
5. Collect, disclose, disseminate or otherwise use anonymous data for governmental purposes.

(j) This privacy policy does not preclude the Governing Board from certifying a CSP whose privacy policy is more protective of confidential taxpayer information or personally identifiable information than is required by the SSUTA.

18:24B-1.9 Relief from certain liability for purchasers confidentiality and privacy protections under Model 1

(a) The Division will relieve a purchaser from liability for penalty for having failed to pay the correct amount of sales or use tax in the following circumstances:

1. A purchaser's seller or CSP relied on erroneous data provided by the Division on tax rates, boundaries, taxing jurisdiction assignments or in the taxability matrix completed by the Division;
2. A purchaser holding a direct pay permit relied on erroneous data provided by the Division on tax rates, boundaries, taxing jurisdiction assignments or in the taxability matrix completed by the Division;
3. A purchaser relied on erroneous data provided by the Division in the taxability matrix completed by the Division; or
4. A purchaser using databases pursuant to subsections (F), (G) and (H) of Section 305 of the SSUTA (Local Rate and Boundary Changes) relied on erroneous data

provided by the Division on tax rates, boundaries or taxing jurisdiction assignments. After providing adequate notice as determined by the Governing Board, the Division may provide an address-based database for assigning taxing jurisdictions pursuant to Section 305 of the SSUTA, subsection (G) or (H) and may cease providing liability relief for errors resulting from the reliance on the database provided by the Division.

(b) Except where prohibited by the New Jersey Constitution, the Division will also relieve a purchaser from liability for tax and interest for having failed to pay the correct amount of sales or use tax in the circumstances described in (a) above, provided that, with respect to reliance on the taxability matrix completed by the Division, such relief is limited to the Division's erroneous classification in the taxability matrix of terms included in the Library of Definitions as "taxable" or "exempt," "included in sales price" or "excluded from sales price" or "included in the definition" or "excluded from the definition."

(c) For purposes of this section, the term "penalty" means an amount imposed for noncompliance that is not fraudulent, willful or intentional, which is in addition to the correct amount of sales or use tax and interest.

(d) The Division may allow relief on terms and conditions more favorable to a purchaser than the terms required by this section.