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RP07001

Interpretative Rules

Sec. 332.1 Digital Products

A. Section 332 A and B provide that for purpose of Section 327(C) and the taxability matrix, the subcategories “Digital Audio-Visual Works”, “Digital Audio Works”, and “Digital books” are separate definitions and that a member state may exclude “Digital Audio-Visual Works”, “Digital Audio Works”, or “Digital Books” from its definition of “Digital Products”.

If a state imposes its tax on “digital products” then the tax applies to all three subcategories of digital products. However, the digital products definition does not require that a state tax or exempt all of its subcategories. A state may choose to impose its tax on one or more subcategories and exempt the remainder. For instance, a state may choose to impose its tax only on “digital audio-visual works” and exempt “digital audio works” and “digital books.”

Example 1: State A’s imposition statute provides that “digital products” are subject to sales tax except for “digital books.” This imposition statute is sufficient to impose a sales tax only on “digital audio works” and “digital audio-visual” works.

Example 2: State B’s imposition statute provides “digital audio-visual works” and “digital audio works” are subject to sales tax. This imposition statute is sufficient to exclude from tax “digital books.”

B. Section 332 C provides that digital products are not tangible personal property. This provision requires that if a state legislature chooses to impose its sales tax on digital products or the subcategories it must use a separate imposition statute using the term “digital products” or one or more of the subcategories; it may not rely upon a regulatory or judicial interpretation of the definition of tangible personal property. Additionally, a state may not rely upon an imposition statute (or other provision) that is imposed based on the method of delivery of the product in order to tax a digital product.

Example 1: State U, has a sales tax imposition statute that applies to “tangible personal property.” It also has a court case holding that electronically delivered music is tangible personal property under the state’s definition of tangible personal property. The judicial interpretation of the definition of tangible personal property does not comply with the Agreement’s definition of tangible personal property and is barred by Section 332 C. In order to comply with the requirements of the Agreement and to impose its tax on electronically delivered music, State U’s legislature must enact a specific tax imposition on “digital audio works.”

Example 2: State K has a definition of tangible personal property that provides that it applies regardless of the method of delivery. State K’s definition of tangible personal property, if it is interpreted as including digital products, would not comply with the Agreement’s definitions of (and usage of) either tangible personal property or digital products.

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C. Section 332 D provides that “nothing in this section or the definition of “digital products” limits a state’s treatment of other products or services that are outside the definitions of “tangible personal property” or “digital products.”” The section recognizes that states have broad freedom to determine those products that are within and without their tax bases. While the definitions of “tangible personal property” and “digital products” must be used consistently by the Member States, they do not bar a Member State’s ability to otherwise impose tax on products the Member State’s legislature may choose to impose its sales and use tax. However, consistent with Section 332 C, a state may not include, by whatever means, within the terms “tangible personal property” or “digital products” any other products not otherwise meeting the definition of those terms.

Example 1: State A has a statute that imposes its sales tax on transactions involving digital images that are delivered electronically. Because a digital image is not a “audio-visual work” and “audio work” or a “book,” it is not within the definition of “digital product.” Also, because the tax is on digital images that are delivered electronically, the product would not be within the definition of “tangible personal property.” However, because State A has a special imposition that does not implicate either the definition of “tangible personal property” or “digital product,” its statute does not cause State A’s sales and use tax laws to be noncompliant with the SSUTA.

Example 2. State B has a statute that imposes its sales and use tax on “digital products.” However, its definition of “digital products” deviates from the SSUTA definition in that it includes electronically delivered “digital images” within the category of products within “digital products.” State B’s inclusion of digital images in its “digital products” definition does not comply with the SSUTA.

Example 3: State C does not impose its sales and use tax on “digital products.” However, State C has a revenue ruling that interprets its definition of “tangible personal property” as including electronically delivered digital images. Because the SSUTA definition of “tangible personal property” does not include electronically delivered products, State C’s interpretation of that term as including electronically delivered digital images does not comply with the SSUTA.

D. Section 332 E provides that a state may treat a subscription to “digital products” differently than a non-subscription purchase of such products. The purpose of this section is to give states a means to maintain neutrality with items within the subcategories that are not delivered electronically. A state may choose to tax (or exempt) a single, over the counter purchase of a product within one of the subcategories but exempt (or tax) a subscription of the same product.

Example 1: State A imposes its sales tax on books sold at retail in an over-the-counter transaction. However, State A exempts from sales tax a fee paid to join a club that provides the customer with one book per month by mail. In order to maintain parity with physical deliveries of books, State A imposes its sales tax on single electronic deliveries of books but exempts from tax a subscription that provides customers with electronic book deliveries on a monthly basis.

E. Section 332 F provides that the tax treatment of a “Digital Code” shall be the same as the tax treatment of the “Digital Product” to which the “Digital Code” relates and that the retail sale of the “Digital Code” shall be considered the transaction for purposes of the Agreement. Under this section, whether or not the sale of a digital code is taxable will depend on whether the “digital product” which the digital code allows the purchaser to obtain is taxable. Additionally, the

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transfer of the digital code to the customer is the taxable event; no taxable event occurs when the purchaser later exercises the digital codes and takes electronic delivery of the “digital product.”

Example 1: State A does not tax any of the subcategories of “digital products.” Customer in State A purchases a digital code that allows the electronic delivery of a single song. The sale of the digital code is not subject to tax and no taxable event occurs when the customer uses the digital code to download a song.

Example 2: State B imposes its sales tax on digital audio works. Customer in State B purchases a digital code that allows the electronic delivery of a single song (which constitutes a digital audio work). The purchase of the digital code is subject to tax because State B taxes digital audio works. However, when the customer takes electronic delivery of the digital audio work, no taxable event occurs; the customer has already paid the tax due with respect to the sale of the digital audio work.