

“Digital Goods and Services Tax Fairness Act”
Section by Section Analysis

Provided by Stacey Sprinkle

Section 1 – Short Title

Section 2 – Findings

Finds that Congress is exercising its constitutional authority to establish a National Framework for the state and local taxation of such goods and services to ensure fair, consistent and equitable taxation and finds an analogy to the circumstances that previously motivated Congress to address discriminatory State and local taxation of railroads by enacting section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (the “4-R Act”).

Section 3 – Prohibition against Multiple and Discriminatory Taxes

Provides that no State or local jurisdiction shall impose multiple or discriminatory taxes on digital goods and digital services.

Reference: Section 1101(a)(2) of the Internet Tax Freedom Act provides that “no State or political subdivision thereof shall impose multiple or discriminatory taxes on electronic commerce.”

Section 4 – Retail, Sourcing, and Other Limitations and Rules

Retail limitation – Provides that taxes are to be imposed only on the retail sale, use or provision of a digital good or digital service to the customer. This provision prevents the “pyramiding” of State and local taxes that might otherwise occur through repeated taxation of digital transactions, such as content and other business inputs that are transferred electronically in the chain of commerce.

Taxpayer limitation – Provides that taxes on or with respect to the sale of digital goods and digital services may only be imposed on and collected from the customer or a seller. This provision ensures that only the seller and the customer are ultimately liable for any taxes imposed on the sale and/or use of digital goods and digital services.

Reference: Fundamental concept underlying any consumption tax, including international VAT taxes and U.S. State and local sales and use tax statutes.

Sourcing limitation –

- (1) In general - provides that **only** the jurisdiction that encompasses the customer’s tax address can impose taxes on digital goods and digital services.
- (2) Multiple locations – provides that if the sale of digital goods and digital services is made to the customer at more than one location, then the seller may use the location of use of such digital goods or digital services provided by the customer.
- (3) Seller held harmless – provides that if a seller relies in good faith on the information provided by the customer to determine the customer’s tax address, the seller will not be held liable for any additional tax liability that results from a different determination of a customer’s tax address.

Limitation on expansive interpretations of taxes – Provides that taxes imposed on tangible personal property, telecommunication service, Internet access services or audio or video programming service cannot be retroactively “construed” to have also been imposed on digital goods and digital services through administrative ruling, regulation or similar pronouncement. This provision also prevents tax administrators from construing taxes imposed on digital goods to also apply to digital services through administrative ruling, regulation or similar pronouncement and further provides that the provision of any digital good that does not result in the transfer or delivery of a complete copy of the digital good shall be considered a digital service. This provision does not impact any construction of a statute approved by judicial interpretation made prior to the date of enactment of this Act.

Treatment of bundled goods and services –

(1) In general – provides, subject to paragraph (2) below, that if digital goods and digital services are bundled or provided with other goods and services, they may be taxed at the same rate as the other goods and services unless the seller can reasonably identify the charges for them from their books and records kept in the normal course of business. This provision is consistent with the bundling provisions in MTSA and the Internet Tax Freedom Act (ITFA.)

Reference: Section 123(b) of the Mobile Telecommunications Sourcing Act and Section 1106(a) of the Internet Tax Freedom Act (as amended in 2004).

(2) Charges for delivery and transport – provides that if the charge for a digital good or digital service is bundled with a charge for electronically delivering or transporting the digital good or providing the digital service than the seller can use paragraph (1) above or treat the service of electronic delivery or transport as a non-severable and incidental component of the digital good or digital service.

Treatment of digital codes – Provides that the tax treatment of a digital code shall be the same as the tax treatment of the digital good or digital service to which it relates. It also provides that the sale of the digital code is the sales transaction for purposes of this Act.

Section 5 – Definitions

Provides the definitions and other rules that apply under the Act:

“Customer” means –

(A) In general – the person that purchases the digital good or digital service for a purpose other than reselling it.

(B) End user – for purposes of determining the customer’s tax address under section 5 (2)(A) the term customer means the “end user” of the purchased digital good or digital service as defined in the Mobile Telecommunications Sourcing Act (MTSA).

“Customer’s tax address” means:

(A) if provided by a provider of wireless service will be the customer’s place of primary use, which is either the customer’s primary residence or business street address, in accordance with 4 U.S.C. § 117 of the MTSA.

Reference: Adopts sourcing rules from Section 117 of the Mobile Telecommunications Sourcing Act.

(B) the business location of the seller if the digital good or digital service is sold to the customer at the business location of the seller.

(C) the location where the digital good or digital service is received by the customer if that address is known to the seller.

(D) if (A) through (C) do not apply, it will be the address known to the seller or obtained by the seller during the course of the transaction, such as the address associated with the customer's payment instrument (i.e. credit card billing address).

(E) if the address is not known, will be the address of the seller from which the digital good or digital services was first transmitted or accessed by the customer.

(F) if the digital good or digital service is provided to someone other than the customer, including advertising services, will be where delivery occurs if known, otherwise it will be sourced in accordance with subsection (D) or (E).

Reference: Is consistent with the sourcing provisions that are included in the Streamlined Sales and Use Tax Agreement.

“Delivered or transferred electronically; provided electronically” means delivered or transferred to the customer by a means other than tangible storage media and provided electronically” means provided remotely via electronic means.

“Digital code” means a code that provides a customer with a right to obtain or access a digital good or digital service.

“Digital good” means any good or product that is delivered or transferred electronically to the customer, including software, information maintained in digital format, digital codes, digital audio-visual works(videos,) digital audio works (music and ringtones,) and digital books.

“Digital service” means –

(A) In general – any service that is provided electronically, including the provision of remote access to or use of a digital good.

(B) Exception – In general – the term “digital service” does not include telecommunication service, Internet access service or audio or video programming service.

Audio or video programming – for purposes of this subclause means programming provided by, or generally considered comparable to, programming provided by a radio or television broadcast station.

Video programming – for purposes of this subclause the term shall not include interactive on-demand services, as defined in paragraph 12 of section 522 of title 47, United States Code, pay-per-view services, or services generally considered comparable to such services regardless of the technology used to provide such services.

“Discriminatory tax” In general - means any tax imposed by a state or local jurisdiction that is imposed on digital goods and digital services or sellers of digital goods and digital services at

- (1) a higher rate; or
- (2) on a broader tax base; or
- (3) is required to be collected by different sellers or under terms that are disadvantageous to those generally imposed upon other similar services or transactions involving tangible personal property; or
- (4) a higher rate on the fee to electronically deliver or transmit the digital good or provide the digital service than the rate imposed upon the delivery or shipping and handling charges applicable to tangible personal property.

Application – for purposes of this paragraph all taxes, tax rates, exemptions, deductions, credits, incentives, exclusions, and other similar factors shall be taken into account in determining whether a tax is a discriminatory tax. This definition is consistent with the language in the Wireless Tax Fairness Act of 2011 (WTFFA.)

Reference: Section 3 of H.R.1002 , which was introduced by Lofgren and Franks and is referred to as the “Wireless Tax Fairness Act of 2011”.

“Generally imposed” will not include a tax that is imposed only on specific services, specific industries or business segments, or specific types of property.

“Multiple tax” means any tax imposed by a jurisdiction, other than a jurisdiction that encompasses the customer’s tax address, that asserts its tax should apply to the same transaction. It does not include taxes imposed by State and local jurisdictions that encompass the customer’s tax address.

“Purchased for resale” means a digital good or digital service that is purchased for the purpose of reselling it, or using it as a component part of or integration into another digital good or service that is to be sold to another person.

“Sales and Purchase” means the various methods by which digital goods and digital services may be provided to the end-user customer.

“Seller” means the business charging for the provision of the digital good or digital service. It does not include a person that provides order taking, order fulfillment, billing, or electronic delivery or transport service with respect to the sale of such services on behalf of another person.

“State or local jurisdiction” means all governmental entities with the authority to assess, impose, levy or collect taxes or fees.

“Tax” means any charge imposed by a governmental entity for the purpose of generating revenue for governmental purposes except a tax on or measured by net income or an ad valorem tax.

Reference: Most of these definitions are from the Internet Tax Freedom Act, the Mobile Telecommunications Sourcing Act, the Wireless Tax Fairness Act and/or the Streamlined Sales and Use Tax Act.

Section 6 – Federal Jurisdiction

Provides that the Federal District Courts will have jurisdiction to grant relief for any violations that occur under the provisions of this Act. Federal court jurisdiction under this provision is concurrent with other jurisdiction of Federal and state courts. This provision is consistent with language in the CTFA and the Railroad Revitalization and Regulatory Reform Act (4-R.)

Reference: The Railroad Revitalization and Regulatory Reform Act of 1976.

Section 7 – Effective Date

Provides that the Act will take effect upon enactment. Provides that the Act will not impact any liabilities for taxes that were due and enforceable prior to enactment and will not impact ongoing litigation initiated before the date of enactment.

Section 8 – Sense of the Congress

Provides that each state shall take reasonable steps necessary to prevent the multiple taxation of digital goods and digital services when foreign countries have subjected the same digital goods and digital services to tax.

Section 9 – Savings Provision

Provides that if any provision or part of this Act is held to be invalid or unenforceable by a court of competent jurisdiction for any reason, such holding shall not affect the validity or enforceability of any other provision or part of this Act.