

Revised September 19, 2007

A motion by Oklahoma and Tennessee to amend the Agreement by adopting a new section relating to the use of specified digital products and amending Section 328 relating to digital products and the state taxability matrix:

Section 332

Specified Digital Products

- A. A member state shall not include “specified digital products”, “digital audio-visual works”, “digital audio works” or “digital books” within its definition of “ancillary services”, “computer software”, “telecommunication services” or “tangible personal property.” This restriction shall apply regardless of whether the specified digital product is sold to a purchaser who is an end user or with less than the right of permanent use granted by the seller or use which is conditioned upon continued payment from the purchaser.

Until January 1, 2010, the exclusion of specified digital products from the definition of tangible personal property shall have no implication on the classification of ~~digital~~ products transferred electronically which are not included within the definition of specified digital products as being included in, or excluded from, the definition of tangible personal property. ~~Whenever a general definition of digital products or additional definitions of digital product categories are made a part of this Agreement, such definition(s) shall not be included within the definition of tangible personal property.~~

~~If, in the absence of a general definition of digital products under the Agreement:~~

- ~~1. a state adopts a definition of digital products outside the definition of tangible personal property; and~~
- ~~2. imposes sales or use tax on those products~~

~~that state will not be required to separately impose sales or use tax on any specified digital product for which:~~

~~1. the definition of the specified digital product has not been made part of the Agreement at the time the state adopts its definition of digital products; and~~

~~2. the specified digital product falls within the state's definition of digital products.~~

B. For purpose of Section 327(C) and the taxability matrix, “Digital Audio-Visual Works”, “Digital Audio Works”, and “Digital Books” are separate definitions.

C. ~~Except as provided in subsection A of this Section a member state imposing a sales or use tax on “specified digital products,” “digital audio visual works,” “digital audio works” or “digital books” shall use those terms in its imposition statutes and shall enact or adopt the definition of those terms set forth in the Library of Definitions, in Appendix C of this Agreement. If 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.~~

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 ~~specified digital~~ product transferred electronically for further commercial broadcast, rebroadcast, transmission,

retransmission, licensing, relicensing, distribution, redistribution or exhibition of the ~~specified digital~~ product, in whole or in part, to another person or persons.

A person that purchases ~~specified digital~~ 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 ~~digital~~ 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.

3. 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 which is not conditioned upon continued payment from the purchaser unless the statute specifically imposes and separately enumerates the tax on a sale which is conditioned upon continued payment from the purchaser.

4. A member state which imposes a sales or use tax on the sale of a ~~specified digital~~ product transferred electronically to a person other than end user or on a sale with the right of less than permanent use granted by the seller or which is conditioned upon continued payment from the purchaser shall so indicate in its taxability matrix in a format approved by the Governing Board.

- E. Nothing in this section or the definition of “specified digital products” shall limit a state’s right to impose a sales or use tax or exempt from sales or use tax any products or services that are outside the definition of “specified digital products.”
- F. A state may treat a subscription to ~~“specified digital products transferred electronically”~~ differently than a non-subscription purchase of such product. For purposes of this section, “subscription” means an Agreement with a seller that grants a consumer the right to obtain ~~“specified digital products transferred electronically”~~ from within one or more ~~specified digital~~ product categories having the same tax treatment, in a fixed quantity or for a fixed period of time, or both.
- G. The tax treatment of a “Digital Code” shall be the same as the tax treatment of the “Specified Digital Product” to which the “Digital Code” relates. The retail sale of the “Digital Code” shall be considered the transaction for purposes of the Agreement. For purposes of this section, “Digital Code” means a code, which provides a purchaser with a right to obtain one or more specified digital products from within one or more specified digital product categories having the same tax treatment. A digital code may be obtained by any means, including email or by tangible means regardless of its designation as “song code”, “video code”, or “book code.”
- H. Notwithstanding the provisions of Section 316 of this Agreement, a member state may provide a product based exemption for specific items within the definition of “specified digital products”, provided such items which are not transferred electronically must also be granted a product based exemption by the member state.
- I. For purposes of this section, the term “transferred electronically” means obtained by the purchaser by means other than tangible storage media.

328: TAXABILITY MATRIX

- A. To ensure uniform application of terms defined in the Library of Definitions each member state shall complete a taxability matrix adopted by the governing board. The member state's entries in the matrix shall be provided and maintained in a database that is in a downloadable format approved by the governing board. A member state shall provide notice of changes in the taxability of the products or services listed in the taxability matrix as required by the governing board.
- B. ~~Until such time as sufficient additional definitions are adopted to provide for a uniform application of the definition of tangible personal property, each member state shall certify to the Governing Board its tax treatment of photographs delivered electronically. This information shall be included in the taxability matrix. A uniform application of the definition of tangible personal property requires an amendment to Section 327 of this Agreement. Notice of changes in the taxability of such goods shall be made in the same manner as required for notice of changes in the taxability of other products or services listed in the taxability matrix.~~
- C. A member state shall relieve sellers and CSPs from liability to the member state and its local jurisdictions for having charged and collected the incorrect amount of sales or use tax resulting from the seller or CSP relying on erroneous data provided by the member state in the taxability matrix ~~or in the certification of the state's tax treatment of photographs delivered electronically.~~
- D. ~~If a state levies sales and use tax on a specified digital product and provides an exemption for an item within the definition of such specified digital product pursuant to Section 332 (H) of this Agreement, such exemption must be noted in the taxability matrix.~~
- E. ~~Each state that provides for a sales tax holiday pursuant to Section 322 of this Agreement shall, in a format approved by the Governing Board, give notice in the taxability matrix of the products for which a tax exemption is provided.~~

F. For purposes of this section, the term “transferred electronically” means obtained by the purchaser by means other than tangible storage media.

This amendment shall be effective 1/1/08.

A motion by Oklahoma and Tennessee to amend the Agreement by adopting a new section relating to the use of specified digital products:

A member state shall not include any product transferred electronically in its definition of tangible personal property. Ancillary services, computer software, and telecommunication services shall be excluded from the term products transferred electronically.

For purposes of this section, the term “transferred electronically” means obtained by the purchaser by means other than tangible storage media.

This amendment shall be effective 1/1/10.