

“Digital Goods and Services Tax Fairness Act of 2013”
Section by Section Analysis

Section 1 – Short Title

Section 2 – Multiple and Discriminatory Taxes Prohibited

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

Section 3 – Sourcing Limitations

Provides that *only* the jurisdiction that encompasses the customer’s tax address can impose taxes on the sale of digital goods and digital services.

Section 4 – Customer Tax Address

Seller Obligation – provides that a seller must obtain and maintain the customer tax address in the ordinary course of business and collect and remit taxes to the assigned jurisdiction when required to do so by law. Provides that for “separate and discrete” transactions, a seller is not required to solicit the “primary use” location to determine the customer’s tax address. Instead, the seller can use the location or the customer address obtained by the seller in the ordinary course of business to satisfy the customer tax address requirements. Also identifies that for transactions that are not “separate and discrete,” a seller must use reasonable efforts to obtain the customer tax address where the customer will primarily be using the digital good or digital service.

Reliance on Customer-Provided Information – provides that any information provided by the customer in good faith can be relied on by the seller to determine the customer tax address, unless binding notice has been given to change such address in accordance with the provisions set forth below.

Address Correction – provides that a state or local jurisdiction is authorized to change the customer tax address if a different address would have been determined in accordance with the rules set forth in the legislation if the seller had additional information provided by the state or local jurisdiction. This change can only be prospective, requires agreement among the impacted jurisdictions if the dispute is among local jurisdictions and allows the customer the opportunity to support the original assignment was correct.

Coordination with Sourcing of Mobile Telecommunications Service – provides that the sourcing provisions as set forth in the federal Mobile Telecommunications Sourcing Act govern the sale of digital goods or services made by a provider of mobile telecommunications service or any sales billed and delivered by a provider of mobile telecommunications services on behalf of another party.

Multiple Locations –

(1) In general, provides that if a digital good or service is sold to a customer and available for use at multiple locations the seller may use a reasonable and consistent method to determine the address of use as provided by and determined in agreement with the customer.

(2) Direct Customer payment - provides that each state and local jurisdiction shall establish procedures that permit the direct payment by a qualified customer of the taxes that would have been imposed on the sale of digital goods and services by the seller directly to the jurisdictions. When a qualified customer elects to pay the taxes directly, the seller shall have no obligation to obtain and maintain the customer tax address nor will the seller be liable for such tax.

Section 5 – Treatment of Bundled Transactions & Digital Codes

Bundled Transactions – provides that if a charge for a distinct and identifiable digital good or digital service is aggregated with and not separately stated from other distinct and identifiable goods and services (which may include other digital goods or services) and any part of the aggregated amount is subject to taxation then the entire aggregation may be subject to taxation except to the extent the seller can reasonably identify and verify the nontaxable charges for its books and records kept in the regular course of business.

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.

Rules of Construction – provides that the sale of the digital code is the sales transaction for purposes of this Act.

Section 6 – No Inference

Customer Liability – subject to the prohibition in Section 2, provides that nothing in this Act modifies, impairs or supersedes any law allowing a state or local jurisdiction to collect taxes directly for a customer for their use of a digital good or service in such jurisdiction.

Non-Tax Matters - provides that the Act shall not be construed to apply or affect any non-tax regulatory or other matters.

State Tax Matters – provides that the definitions used within this Act are intended to be used to interpret the Act and nothing shall prohibit a state or local jurisdiction from using different nomenclature to enforce the provisions of the Act.

Section 7 – Definitions

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

“Customer” means the person that purchases the digital good, digital service or digital code.

“Customer’s tax address”

(A) in general means the term “customer tax address” means:

(i) 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.

(ii) if subparagraph (i) does not apply, then the primary use location if known to the seller.

(iii) if subparagraph (i) and (ii) don’t apply, then the location where the digital good or digital service is received by the customer if that address is known to the seller and maintained in the ordinary course of business.

(iv) if subparagraph (i) through (iii) do not apply, it will be the location indicated by an address for the customer available from the business records of the seller maintained in the ordinary course of business, provided use of such address does not constitute bad faith.

(v) if subparagraph (i) through (iv) do not apply, it will be the location identified by an address 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), provided use of such address does not constitute bad faith.

(vi) if subparagraph (i) through (v) do not apply then it will be the address of the seller from which the digital good was first available for transmission to the customer (excluding the location that merely provides for the transfer of the product sold) or from which the digital service was provided to the customer.

(B) Exclusion – for purposes of this paragraph, the term “location” does not include the location of the server, machine, or device, including an intermediary server, that is simply used for routing or storage.

“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 conveys only the right to obtain a digital good or digital service without making further payment.

“Digital good” means any software or good that is delivered or transferred electronically including sounds, images, data, facts, or combinations thereof, maintained in digital format, where such good is the true object of the transaction rather than the activity or service performed to create such good. The term also includes, as an incidental component, the charges for delivery and transfer of the digital good.

“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. The term also includes, as an incidental component, the charges for the electronic provision of the digital service to the customer.

(B) Exceptions – In general – the term “digital service” does not include a service that is predominantly attributable to the direct, contemporaneous expenditure of live human effort, skill or expertise (i.e. professional services,) telecommunications service, ancillary service, Internet access service, audio or video programming service, or a hotel intermediary service.

(C) Clarifying Definitions – For purposes of this subparagraph (B)

Ancillary service – means a service associated with or incidental to the provision of telecommunication services including but not limited to detailed telecommunications billing, directory assistance, vertical service and voice mail services.

Audio or video programming –

(i) means programming provided by, or generally considered comparable to, programming provided by a radio or television broadcast station.

(ii) 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.

Hotel intermediary service – means a service provided by a person that facilitates the sale, use, or possession of a hotel room or other transient accommodation to the general public. It does not include the purchase of a digital service by a person who provides a hotel intermediary service or by a person who owns, operates or manages hotel rooms or other transient accommodations.

Internet access service – means a service that enables users to connect to the Internet, as defined in the Internet Tax Freedom Act (47 U.S.C. 151 note), to access content, information, or other services offered over the Internet.

Telecommunications service –

- (i) means the electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points;
- (ii) includes such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code or protocol of the content for purposes of transmission, conveyance or routing, without regard to whether such service is referred to as voice over Internet protocol service; and
- (iii) does not include data processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a purchaser where such purchaser's primary purpose for the underlying transaction is the processed data or information.

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

- (A) that is not imposed on transactions involving similar property, goods and services; or
- (B) that is imposed at a higher rate than the rate imposed on transactions involving similar property, goods or services; or
- (C) that imposes an obligation to collect or pay the tax on a person, other than the seller, than would be imposed on persons of transactions involving similar property, goods or services; or
- (D) that creates a classification of digital goods and digital service providers for the purpose of establishing a higher tax rate to be imposed on such providers than the rate applied to providers of similar property, goods or services; or
- (E) that does not provide a resale or component part exemption for the purchase of digital goods or digital services in a manner consistent with the exemption applicable to the purchase of similar property, goods or services

“Multiple tax” means

(A) In general - 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.

(B) Exception – the term shall not include taxes imposed by the State and local jurisdictions (i.e. where both a state and local sales tax applies) that encompass the customer’s tax address. The term also does not include a tax on the persons engaged in selling digital goods and digital services (i.e. business taxes on the seller) which have also been subject to a sales or use tax.

“Primary use location”

(A) In general, means a street address representative of where the customer’s use of the digital good or digital service will primarily occur, which must be either the residential street address or the business street address of the actual end user of the digital good or digital service.

(B) For purposes of subparagraph (A,) if the customer is not an individual, then the primary use location will be determined by the customer’s employees or equipment that are making use of the digital good or digital service. This provision does not apply to the use of the digital good and digital service by a purchaser of a separate digital good or digital service from the customer (i.e. patients of medical monitoring services purchased directly from the doctor)

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

“Seller”

(A) In general, means the person making the sales of digital goods or digital services.

(B) Exceptions – the term does not include a person that provides electronic delivery or transport service with respect to the sale of such services on behalf of another unrelated person.

(C) Rules of Construction - Nothing in this provision shall preclude a person providing electronic delivery or transport of such services for contractually agreeing to take on the responsibilities of the seller on behalf of the true seller.

“Separate and discrete transaction” means a sale of a digital good, digital code or digital service sold in a single transaction, which does not involve any additional charges or continued payment in order to maintain possession of such good or service.

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

“Tax”

(A) In general, means any charge imposed by a governmental entity for the purpose of generating revenue for governmental purposes.

(B) Exclusions - The term does not include an ad valorem tax, a tax on or measured by capital, a tax on or measured by net income, apportioned gross income, or apportioned gross receipts or a state or local jurisdiction business occupation tax imposed on a broad range of activity in a State that enacted a state tax on gross receipts after January 1, 1932 and before January 1, 1936.

Section 8 – Effective Date; Application

General rule – provides that the Act will take effect 60 days after date of enactment.

Exceptions – provides that a state or local jurisdiction shall have two years from that date of enactment of this Act to modify any state or local statute enacted prior to date of enactment of this Act to conform to the provisions set forth in Sections 4 and 5 of this Act.

Application to liabilities and pending cases - provides that the Act will not impact any liabilities for taxes that were accrued and enforceable prior to the effective date and will not impact ongoing litigation.

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, provided the holding does not substantially impair the essential elements of the Act.