



MULTISTATE TAX COMMISSION

NOTES of MEETING - DRAFT

MTC Work Group – Sales Taxation of Digital Products

September 22, 2022

I. Welcome and Introductions –

Gil Brewer, Washington, Chair of the Work Group, convened the meeting.

II. Initial Public Comment –

Gil noted that the group had received written comments from Jeff Friedman of the Eversheds Sutherland law firm. Those comments are posted on the project page. There were no other initial public comments.

III. Review of background information on the project –

Gil gave background information on the project. He noted that the goal of the project is to draft a white paper on the state taxation of digital products. He also recounted that what led the MTC to take up the project was a presentation and discussion of the experiences of Washington state in applying its sales tax to digital products. He emphasized that it was not Washington's goal to tell other states what to do, but to share those experiences.

Mark Nebergall spoke, commenting that he would challenge Gil's statement as not accurate in that it omitted the experience that Washington had as part of the Streamlined project and the work Streamlined had done on the definitions of digital products.

Gil responded that he agreed that Washington had also participated in Streamlined and continues to do so. But he noted that Washington had applied its sales tax to a broader category of digital goods than were covered by the Streamlined definitions. Gil also noted the issues that Washington had to address as a result, including sourcing where there are multiple points of use of the digital product and how to treat bundled sales of taxable and nontaxable items. He emphasized that the work group's goal is not to create conflicts with Streamlined.

Nancy Prosser, General Counsel, MTC, gave additional background on the project including a summary of the stakeholder interviews conducted by MTC staff over the last year.

(Summaries of those interviews are contained in reports to the uniformity committee posted on the project page.) Additional interviews are being conducted as the opportunity arises.

IV. Review of proposed detailed outline of white paper –

Helen Hecht, Uniformity Counsel, MTC, reviewed a copy of the draft outline of the white paper – using the September 1, 2022 draft, available on the project webpage. She emphasized that this draft is a first attempt to capture and organize issues for discussion and further analysis, and that input on additional issues to include as well as other comments or suggestions are welcome.

V. Solicitation of public input on the issues to be covered

VI. Discussion – questions to be circulated and other feedback of work group participants

Comments received:

- Josh Pens, Colorado, noted that the section summarizing limitations on state taxing ability should include a section on any potential dormant commerce clause limitations, including, in particular, issues that might arise as to multiple points of use sourcing. Also, he noted that, whereas the current system largely eliminates risk of double taxation for traditional products, it may not do so for digital products.
- Mark Nebergall also noted that in terms of possible transactions involved in the sale of digital products, the granting of access may need to be listed separately.
- Bruce Johnson noted that while the outline addresses sales taxes and while sales and use taxes are complementary, use taxes are imposed differently and may raise different issues. This relates to the multiple points of use issue as well, and increases the complexity associated with that issue. Things can be used in different places over time—depending on how long a period is at issue. States might therefore consider some type of limit similar to a statute-of-limitations on the assessment of use tax.
- Mark Nebergall noted that we should look at the multiple points of use research done by Streamlined which was part of a rule that was adopted but later repealed. He also noted that when it comes to “use,” software presented difficult issues and that states should consider where the copyright for the software resides.
- Diane Yetter raised the issue of distinguishing services performed on tangibles from those performed on software or digital products—especially software as a service. She noted that this can come up both in questions of imposition and in questions of how exemptions for “fabrication” services are treated. Diane also noted that bundling is an important issue since many products these days have apps or software, creating overlap in categories, including communications. She also noted that educational type products raise unique issues where, depending on the way in which the education is communicated, it may or may not be taxable.
- Ray Langenberg raised the issue of enterprise software that also interacts with or provides communications services, which raise other issues of sourcing. He noted that inventory tracking software is similar and can have attributes of multiple types of products.
- Mark Nebergall raised the issue of whether data is or is not property and whether that effects taxation and sourcing. He referred the group to the case of *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (1991), which found public information contained in telephone books could not be copyrighted.
- Gil asked Craig Johnson from Streamlined to weigh in with any thoughts. Craig noted that he agreed that both the MTC and Streamlined are committed to communicating with and helping each other and since both want to foster useful uniformity, they can work together. He also noted the long experience of Streamlined with uniform definitions.

VII. Next steps and scheduling

Gil noted that those state representatives who wish to participate regularly should let Helen know – hhecht@mtc.gov – and that staff will be sending out additional information and polling those regular participants on future meeting schedules. Helen also encouraged those on the call who wished to submit information to feel free to contact her.

VIII. Adjourn