
DIGEST

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HB 642 Original

2023 Regular Session

Jenkins

Abstract: Provides for the levy of sales and use taxes on certain digital products, provides for administration of sales and use taxes, and provides for exclusions and exemptions from sales and use taxes.

Present law imposes state sales and use taxes on the sale, use, lease, or rental of tangible personal property and on sales of services pursuant to the following levies in the following amounts:

R.S. 47:302 - 2%
R.S. 47:321 - 1%
R.S. 47:321.1 - .45%
R.S. 47:331 - .97%
R.S. 51:1286 - .03%

Proposed law adds digital products to the tax levies. Defines "digital product" as a product that is transferred electronically or delivered by means other than tangible storage media through the use of technology having electrical, digital, magnetic, wireless, optical or electromagnetic, or similar capabilities.

Proposed law provides that "digital product" includes, but is not limited to, all of the following:

- (1) Sounds, images, data, facts, or information, or any combination of these.
- (2) Computer software as defined in present law and proposed law.
- (3) Charges made to customers for the right to access and use prewritten computer software, where possession of the software is maintained by the seller or a third party regardless of whether the charge for the service is on a per use, per user, per license, subscription or some other basis.
- (4) Digital codes (as defined in proposed law).

Proposed law provides that "digital product" does not include any of the following:

- (1) Any intangible such as a patent, stock, bond, goodwill, trademark, franchise, or copyright.
- (2) Telecommunications services and ancillary services as those terms are defined in present

law and proposed law.

- (3) Internet access service charges.
- (4) The representation of a professional service, as described in present law, in an electronic form, such as an electronic copy of an engineering report prepared by an engineer that primarily involves the application of human effort, and the human effort originated after the customer requested the service.
- (5) Subscription sales of magazines or periodicals transferred electronically to the buyer.
- (6) Newspapers transferred electronically if the exclusion in present law is in effect.

Present law defines "sales of services" for purposes of sales and use taxes. Proposed law retains present law and additionally provides that "sales of services" includes the furnishing of a digital automated service. Defines "digital automated service" as any service transferred electronically that uses one or more software applications either prewritten or custom, as well as components that are similar to stand-alone digital products.

Proposed law provides that "digital automated service" does not include any of the following:

- (1) Any service that primarily involves the application of human effort, and the human effort originated after the customer requested the service.
- (2) The loaning or transferring of money or the purchase, sale, or transfer of financial instruments. "Financial instruments" includes cash, accounts receivable and payable, loans and notes receivable and payable, debt securities, equity securities, as well as derivative contracts such as forward contracts, swap contracts, and options.
- (3) Dispensing cash or other physical items from a machine.
- (4) Payment processing services.
- (5) Pari-mutuel wagering or fantasy sports betting.
- (6) Telecommunications services and ancillary services as those terms are defined in present law and proposed law.
- (7) Internet access service charges.
- (8) Online educational programs provided by any of the following:
 - (a) A public or private elementary or secondary school.
 - (b) An institution of higher education as defined in present federal law (20 U.S.C. 1001

and 1002), as existing on July 1, 2009, if the online educational program is encompassed within the institution's accreditation.

- (9) Travel agent services, including online travel services, and automated systems used by travel agents to book reservations.
- (10) Live presentations, such as lectures, seminars, workshops, or courses, where participants are connected to other participants via the internet or telecommunications equipment, which allows audience members and the presenter or instructor to give, receive, and discuss information with each other in real time.
- (11) A service that allows the person receiving the service to make online sales of products or services, digital or otherwise, using the service provider's website.
- (12) Advertising services. Defines "advertising services" to mean all services directly related to the creation, preparation, production, or the dissemination of advertisements. Provides that "advertising services" includes layout, art direction, graphic design, mechanical preparation, production supervision, placement, and rendering advice to a client concerning the best methods of advertising that client's products or services. "Advertising services" also includes online referrals, search engine marketing and lead generation optimization, web campaign planning, the acquisition of advertising space in the internet media, and the monitoring and evaluation of website traffic for purposes of determining the effectiveness of an advertising campaign. "Advertising services" does not include web hosting services and domain name registration.

Present law provides additional definitions applicable to sales and use taxes. Proposed law amends various definitions including "cost price", "dealer", "gross sales", "lease or rental", "purchaser", "retail sale", and "sales price" to include digital products.

Proposed law provides that for purposes of taxes imposed under present law (Chapter 2, 2-A or 2-C of Title 47), whenever the words "property" or "personal property" are used, those terms shall be construed to include any digital product unless:

- (1) It is clear from the context that the term "personal property" is intended to refer only to tangible personal property.
- (2) It is clear from the context that the term "property" is intended to refer only to tangible personal property, real property, or both.
- (3) To construe the term "property" or "personal property" as including any digital product would yield unlikely, absurd, or strained consequences.

Proposed law provides that for purposes of the taxes imposed in present law and proposed law, the Dept. of Revenue may not consider a person's ownership of, or rights in digital products residing on servers located in this state in determining whether the person has substantial nexus with this state.

"Substantial nexus" means the requisite connection that a person has with a state to allow the state to subject the person to the state's taxing authority, consistent with the commerce clause of the U.S. Constitution

Proposed law provides that purchasers of digital products shall amnesty for failing to collect or pay state sales and use taxes accrued before July 1, 2023 on the sale or use of digital products. However, amnesty does not apply in cases where state sales taxes were collected from buyers but these taxes were not remitted to the department.

Proposed law provides that it shall not be construed as authorizing the refund of state sales and use taxes properly paid on the sale or use of digital products before July 1, 2023

Proposed law provides for applicability of proposed law relative to multiple points of use and bundled transactions and for sourcing for use tax purposes.

Proposed law authorizes the secretary of the Dept. of Revenue to promulgate rules and regulations in accordance with present law (Administrative Procedure Act) to implement the provisions of proposed law, including rules addressing the taxation of any and all digital products and services. Provides that any rule promulgated by the department shall be construed in favor of the secretary.

Present law provides for various exclusions and exemptions for sales and use taxes. Proposed law amends present law to include digital products in certain exclusions and exemptions, including those relative to sales, leases, or rentals of tangible personal property or digital products paid by or under the provisions of Medicare; tangible personal property or digital products that are sold or donated to a food bank; tangible personal property or digital products for resale as provided in present law (R.S. 47:301(10)(a)(i)); isolated or occasional sales of tangible personal property or digital products by a person not engaged in such business; an article traded in on the purchase of tangible personal property or digital product; credit for sales and use taxes paid to another state on tangible personal property or digital products imported in La.; transactions in interstate commerce and tangible personal property or digital products imported into this state, or produced or manufactured in this state, for export; sales, leases, and rentals of tangible personal property or digital products to Boys State of Louisiana, Inc. and Girls State of Louisiana, Inc.; sales of admissions, parking fees, and sales of tangible personal property or digital products at events sponsored by domestic, civic, educational, historical, charitable, fraternal, or religious nonprofit organizations; sales of tangible personal property or digital products and services at certain public facilities; and purchases of tangible personal property or digital products pursuant to the sales tax holiday as provided in present law (R.S. 47:305.74). Requires that digital products to be taxed in the same manner as any complementary tangible personal property or service included in present law.

Effective July 1, 2023.

(Amends R.S. 47:301(3)(a), (b), and (i)(ii)(aa)(I)(aaa), (4)(intro. para.), (a) through (e), (h), and (i), (5), (7)(a), (g), and (i), (8)(b), (9), (10)(a)(i), (ii), and (iii), (c)(ii)(bb), (j), (q)(i), (r), (s), (u), (ff), and (hh), (12), (13)(a), (14)(h), (i), (j), and (k), (15), (18)(a), (d)(i), (e), and (f), (19), and (29)(x)(ix), 302(A), (B), (D), (K)(1) and (2), (U), (V)(1)(intro. para.), (a), and (b)(intro. para.), (BB)(13), (17),

(25), (27), (30), (33), (56), (66), (81), (109), and (113), and (CC), 303(A)(2) and (3)(a) and (G), 303.1(A) and (B)(1)(c) and (2)(b), 304(B), 305(E), 305.10(A), (C)(intro. para.), (1), (2)(a), (b), and (c), and (3), (D), and (E), 305.14(A)(1)(a) and (5), 305.38, 305.53(A), 305.54(B) and (C)(1), 306.5(A)(1) and (2)(c), 307(A), (B), and (C), 309(A)(1), 309.1(B)(1) and (2)(b) and (D), 310(A), 312, 314, 315(A) and (B)(1), 315.3(A), 315.5(A), (B)(3), and (C)(1)(c), 321(A), (B), (P)(9), (17), (23), (25), (27), (30), (56), (66), (81), (109), and (114), and (Q), 321.1(A), (B), (I)(13), (17), (23), (25), (27), (30), (33), (56), (66), (81), (109), and (114), and (J), 331(A), (B), (V)(13), (17), (23), (25), (27), (30), (33), (56), (66), (81), (109), and (114), and (W), and 340.1(A)(3) and (5) and R.S. 51:1286(B); Adds R.S. 47:301(10)(c)(ii)(cc), (jj), and (kk), (14)(l), (32), (33), and (34), and 301.3; Repeals R.S. 47:301(16)(h) and (p) and (23))