

DISCLAIMER: THE FOLLOWING IS A DISCUSSION DRAFT AND NOT INTENDED TO REPRESENT A FORMAL POSITION OF THE AWB. THE DOCUMENT IS STILL UNDER REVIEW BY AWB MEMBERS. THE FORMAL POSITION OF AWB IS DESCRIBED IN OUR LEGISLATIVE OBJECTIVE FOR 2009.

AWB Draft Language for Major Provisions of a Digital Goods Bill

Key definitions

The following definition section would be a new statute in the B&O tax chapter. The definitions would also apply to the sales and use taxes. This section defines the terms “digital code,” digital goods, and “transferred electronically/electronically transferred.” Digital goods are defined to include “Specified Digital Products” and “Other Digital Goods”. Specified digital products include digital audio-visual works, digital audio works, and digital books. The definitions of these terms are consistent with the definitions as provided in the Streamlined Sales and Use Tax Agreement (SSUTA), in which the state of Washington is currently a full member.

Proposed bill language for a new section defining key terms:

- (1) “Digital Goods” means “Specified Digital Products” and “Other Digital Goods”.
- (2) “Digital code” means a code that provides a purchaser with the right to obtain one or more digital goods having the same sales and use tax treatment. A digital code may be obtained by any means, including e-mail or by tangible means regardless of its designation as song code, video code, or book code.
- (3)(a) “Specified Digital Products” means electronically transferred:
 - (i) Digital audio-visual works, which means a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any;
 - (ii) Digital audio works, which means works that result from the fixation of a series of musical, spoken, or other sounds, including ringtones; and
 - (iii) Digital books, which means works that are generally recognized in the ordinary and usual sense as “books”.
- (b) For purposes of the definition of “digital audio works”, “ringtones” means digitized sound files that are downloaded onto a device and that may be used to alert the customer with respect to a communication.
- (4) “Electronically transferred” or “transferred electronically” means obtained by the purchaser by means other than tangible storage media. It is not necessary that a copy of the product be physically transferred to the purchaser. So long as the purchaser may access the product, it will be considered to have been electronically transferred to the purchaser.
- (5) “Other Digital Goods” means:
 - (a) electronically delivered standard information and,
 - (b) “on demand software services”
- (6) For purposes of subsection (4)(a), “standard information” means any collection of data or facts, not generated or compiled for a specific customer

DISCLAIMER: THE FOLLOWING IS A DISCUSSION DRAFT AND NOT INTENDED TO REPRESENT A FORMAL POSITION OF THE AWB. THE DOCUMENT IS STILL UNDER REVIEW BY AWB MEMBERS. THE FORMAL POSITION OF AWB IS DESCRIBED IN OUR LEGISLATIVE OBJECTIVE FOR 2009.

including, but not limited to, financial market data, bond ratings, credit ratings, deposit, loan, or mortgage reports, statistical reports, and data or information on weather, labor, economics, health, sports, or entertainment. It does not include any representation of a professional service in electronic form, such as an electronic copy of an engineering report prepared by an engineer. It does not include digital goods, digital codes, or reports furnished as part of a service described in RCW 82.04.050(3).

(7) For purposes of subsection (4)(b), on-demand software service is the service of providing the right to consumers to access and use of 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.

Sales and use tax imposition statutes

RCW 82.04.050, which defines the term “retail sale” for purposes of B&O, sales, and use taxation, would be amended to include the sale of Specified Digital Products and digital codes to consumers who are end users, regardless of the user rights received by the buyer and method of payment. RCW 82.04.050 would also be amended to define retail sale to include the sale of Other Digital Goods which would specifically include electronically delivered standard information to consumers and the service of providing consumers with access to prewritten computer software, which will be referred to as “on-demand software services” throughout this document.

The retail sales tax imposition statute (RCW 82.08.020) would not need to be amended, because that statute simply imposes sales tax on all “retail sales” as defined in RCW 82.04.050. The use tax imposition statute (RCW 82.12.020) needs to be amended to specifically impose use tax on the use of specified digital products digital codes, and other digital goods.

Proposed bill language to make the sale of digital goods and digital codes a retail sale by amending RCW 82.04.050:

(a) The term [retail sale] also includes the following sales to consumers of specified digital products, digital codes and other digital goods:

- (i) Sales to end users;
- (ii) Sales in which the seller has granted the purchaser the right of permanent use;
- (iii) Sales in which the seller has granted the purchaser a right of use that is less than permanent;

DISCLAIMER: THE FOLLOWING IS A DISCUSSION DRAFT AND NOT INTENDED TO REPRESENT A FORMAL POSITION OF THE AWB. THE DOCUMENT IS STILL UNDER REVIEW BY AWB MEMBERS. THE FORMAL POSITION OF AWB IS DESCRIBED IN OUR LEGISLATIVE OBJECTIVE FOR 2009.

(iv) Sales in which the purchaser is not obligated to make continued payment as a condition of the sale; and

(v) Sales in which the purchaser is obligated to make continued payment as a condition of the sale.

(b) A retail sale of specified digital products, digital codes, or other digital goods under this subsection includes any services provided by the seller exclusively in connection with the sale of the digital goods or digital codes, whether or not a separate charge is made for such services.

(c) For purposes of this subsection, the following definitions apply:

(i) “End user” means any purchaser other than a purchaser who receives by contract a digital good for further commercial broadcast, rebroadcast, transmission, retransmission, licensing, relicensing, distribution, redistribution or exhibition of the product, in whole or in part, to another person or persons. A person that purchases digital goods or digital codes for the purpose of giving away such products or codes will not be considered to have engaged in the distribution or redistribution of such products or codes and will be treated as an end user.

(ii) “Permanent” means perpetual or for an indefinite or unspecified length of time. A right of permanent use is 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.

Proposed bill language to impose use tax on the use of digital goods, amending RCW 82.12.020:

(1) There is hereby levied and there shall be collected from every person in this state a tax or excise for the privilege of using within this state as a consumer:

(a) Article of tangible personal property purchased at retail, or acquired by lease, gift, repossession, or bailment, or extracted or produced or manufactured by the person so using the same, or otherwise furnished to a person engaged in any business taxable under RCW 82.04.280 (2) or (7), including tangible personal property acquired at a casual or isolated sale, and including byproducts used by the manufacturer thereof, except as otherwise provided in this chapter, irrespective of whether the article or similar articles are manufactured or are available for purchase within this state¹;

(b) Prewritten computer software, regardless of the method of delivery, but excluding prewritten computer software that is either provided free of charge or is provided for temporary use in viewing information, or both;

¹ This underlined language is not new to the statute. Moving the language to subsection (1)(a) will improve the readability of the statute.

DISCLAIMER: THE FOLLOWING IS A DISCUSSION DRAFT AND NOT INTENDED TO REPRESENT A FORMAL POSITION OF THE AWB. THE DOCUMENT IS STILL UNDER REVIEW BY AWB MEMBERS. THE FORMAL POSITION OF AWB IS DESCRIBED IN OUR LEGISLATIVE OBJECTIVE FOR 2009.

- (c) Service defined as a retail sale in RCW 82.04.050 (2)(a), (3)(a), or [on-demand software services, excluding on-demand software services that are provided free of charge];
- (d) Extended warranty; or
- (e) Digital good.

Business inputs and other key exemptions and exclusions from the tax base

Sales and use taxes on digital goods, digital codes, and other digital goods -only apply to transactions involving consumers. For purposes of B&O, sales, and use taxes, the term “consumer” is defined in RCW 82.04.190. Business inputs are excluded from the tax base through an exclusion from the definition of consumer.

Proposed bill language to exclude certain business inputs from the tax base by amending the definition of consumer in RCW 82.04.190:

- (10) [Consumer means] Any person who purchases, acquires, or uses a digital good other than for the purpose of:
 - (a) Further commercial broadcast, rebroadcast, transmission, retransmission, licensing, relicensing, distribution, redistribution or exhibition of the product or service, in whole or in part, to others. A person that purchases, acquires, or uses digital goods for the purpose of giving away such products or services will not be considered to have engaged in the distribution or redistribution of such products or services;
 - (b) Consuming the digital good in producing for sale a new product, where the digital good becomes an ingredient or component of the new product. A digital code becomes an ingredient or component of a new product if the digital good acquired through the use of the digital code becomes an ingredient or component of a new product;
 - (c) Making the digital good, including a digital good acquired through the use of a digital code, available free of charge for the use or enjoyment of others on that person’s website;
 - (d) In the case of other digital goods any use in carrying on a business activity.

There are certain digital goods and standard information that are not bought and sold. These types of digital goods and standard information would not be subject to sales tax because they are not sold. However, the use of these kinds of digital goods and standard information would be subject to use tax if use is by a consumer, absent an exemption.

DISCLAIMER: THE FOLLOWING IS A DISCUSSION DRAFT AND NOT INTENDED TO REPRESENT A FORMAL POSITION OF THE AWB. THE DOCUMENT IS STILL UNDER REVIEW BY AWB MEMBERS. THE FORMAL POSITION OF AWB IS DESCRIBED IN OUR LEGISLATIVE OBJECTIVE FOR 2009.

Proposed bill language to provide a use tax exemption for certain digital goods and standard information for which no charge is made:

- (1) The provisions of this chapter do not apply in respect to the use of digital goods that are:
 - (a) Of a non-commercial nature;
 - (b) Created solely for an internal audience; or
 - (c) Created solely for the business needs of the person who created the digital good is not the type of digital good that is offered for sale.
- (2) This section does not apply to the use of any digital goods purchased by the user, the user's donor, or anybody on the user's behalf.

Bundling of products and/or services to be obtained through the use of a code that doesn't meet the definition of digital code

The definition of "digital code" does not include a code that that allows the purchaser to obtain more than one digital good that do not have the same sales and use tax treatment. One way to clarify the tax treatment of the sale of these types of codes is to treat them similar to a bundled transaction. A bundled transaction, with certain exceptions, is the retail sale of two or more distinct products and/or services for one nonitemized price. The tax treatment of bundled transactions is governed by RCW 82.08.195. Generally, a bundled transaction is subject to sales tax if any of the component products or services are subject to sales tax. However, in the case of a bundled transaction that includes telecommunications service, ancillary service, Internet access, or audio or video programming service and the price is attributable to services that are taxable and services that are not taxable, sales tax does not apply to the portion of the price attributable to nontaxable services if that portion of the price can be identified by reasonable and verifiable standards from the seller's books and records that are kept in the regular course of business for other purposes.

Proposed bill language amending RCW 82.08.195 to address the sales tax treatment of the sale of digital codes for multiple digital goods, and any other products and/or services, where the goods and services do not have the same sales and use tax treatment:

- (6) In the case of the sale of a digital code that provides a purchaser with the right to obtain more than one digital good, including a digital code that also provides the purchaser with the right to obtain other products or services, and all of the products and services, digital or otherwise, to be obtained through the use of the digital code do not have the same sales and use tax treatment, for purposes of the tax imposed by RCW 82.08.020:
 - (a) The transaction is deemed to be the sale of the products and services to be obtained through the use of the digital code; and

DISCLAIMER: THE FOLLOWING IS A DISCUSSION DRAFT AND NOT INTENDED TO REPRESENT A FORMAL POSITION OF THE AWB. THE DOCUMENT IS STILL UNDER REVIEW BY AWB MEMBERS. THE FORMAL POSITION OF AWB IS DESCRIBED IN OUR LEGISLATIVE OBJECTIVE FOR 2009.

(b)(i) The tax imposed by RCW 82.08.020 applies to the entire selling price of the digital code, except as provided in (ii) of this subsection (6)(b).

(ii) If the seller can identify by reasonable and verifiable standards the portion of the selling price attributable to the products and services that are not subject to the tax imposed by RCW 82.08.020 from its books and records that are kept in the regular course of business for other purposes including, but not limited to, nontax purposes, the tax imposed by RCW 82.08.020 does not apply to that portion of the selling price of the code attributable to the products and services that are not subject to the tax imposed by RCW 82.08.020.

Value of digital goods, digital codes, electronically delivered standard information, and on-demand software services for use tax purposes:

Under current law, use tax is calculated by multiplying the tax rate by the value of the product or service. Generally, the value of the product or service will correspond with its purchase price. However, where the purchase price does not reflect the true value of the product or service, or when the product or service was not acquired by purchase, value is determined based on the retail selling price at place of use of similar products or services of like quality and character.

Under this proposal, the definition of “value of the service used” in RCW 82.12.010(3) would be amended to clarify that the definition applies to on-demand software services in addition to other services. RCW 82.12.010 would also be amended to add a definition of “value of the digital good, digital code, or electronically delivered standard information used.”

Proposed bill language to provide that “value of the service used” includes on-demand software services by amending RCW 82.12.010(3):

(3) "Value of the service used" means the purchase price for the service including on-demand software service, the use of which is taxable under this chapter. If the service is received by gift or under conditions wherein the purchase price does not represent the true value thereof, the value of the service used shall be determined as nearly as possible according to the retail selling price at place of use of similar services of like quality and character under rules the department may prescribe;

Proposed bill language to provide a definition of “value of the digital good, digital code, or electronically delivered standard information used”:

(5) “Value of the digital good, digital code, or electronically delivered standard information used” means the purchase price for the digital good, digital code, or electronically delivered standard information, the use of which is taxable under this chapter. If the digital good, digital code, or electronically delivered

DISCLAIMER: THE FOLLOWING IS A DISCUSSION DRAFT AND NOT INTENDED TO REPRESENT A FORMAL POSITION OF THE AWB. THE DOCUMENT IS STILL UNDER REVIEW BY AWB MEMBERS. THE FORMAL POSITION OF AWB IS DESCRIBED IN OUR LEGISLATIVE OBJECTIVE FOR 2009.

standard information is acquired other than by purchase, the value of the digital good, digital code, or electronically delivered standard information shall be determined as nearly as possible according to the retail selling price at place of use of similar digital goods, digital codes, or electronically delivered standard information of like quality and character under rules the department may prescribe;

DRAFT