

**NCSL Executive Committee  
Task Force on State and Local Taxation**

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**DIGITAL GOODS UPDATE**

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# Agenda

1. 2018 Legislative Developments
2. OTR Notice 2017-06
3. Digital Tax Litigation Update

# Digital Goods and Services Taxation

## 2018 Legislative Developments

### ■ Arizona

- 2017 Ad Hoc Joint Committee on the Tax Treatment of Digital Goods and Services
- Result: HB 2479 and SB 1392
  - Provides that prewritten computer software regardless of delivery method and digital goods transferred electronically are taxed under the retail classification of TPT or the use tax.
  - But would exclude from the state and municipal TPT, as well as the use tax, the gross proceeds from the sale, lease or licensing of specified digital services (including cloud-based services, hosting services, data processing and information services, streaming services, etc.) and digital goods that are remotely accessed by customers.
  - Passed House on Feb. 28; third/final reading in Senate pending.

# Digital Goods and Services Taxation

## 2018 Legislative Developments

### ■ Indiana

- DOR rulings on SaaS causing confusion and headaches for businesses.
- Senate Enrolled Act No. 257
  - Adds a new section to the Indiana Code chapter on retail transactions that specifically provides that “[a] transaction in which an end user purchases, rents, leases, or licenses the right to remotely access prewritten computer software over the Internet, over private or public networks, or through wireless media: (1) is not considered to be a transaction in which prewritten computer software is delivered electronically; and (2) does not constitute a retail transaction.” The new law will also clarify that the sale, rental, lease or license of prewritten computer software “delivered electronically” (*i.e.*, downloaded software) is subject to the Gross Retail and Use Taxes.
- Signed by Gov. Holcomb yesterday; effective July 1, 2018.

# Digital Goods and Services Taxation

## 2018 Legislative Developments

### ■ Georgia

- Communications Services Tax Act (HB 887) initially would have taxed digital goods and services. Prior to passage in House, digital tax expansion language was removed from bill.

### ■ Iowa

- Senate tax reform bill (SF 2383) initially included broad digital goods and services tax expansion. Struck via floor amendment in Senate prior to passage.

### ■ Kansas

- House Committee on Taxation bill (HB 2756) includes broad new tax on “digital property” and subscriptions thereto. Advanced out of committee, but no vote yet from House.

# Digital Goods and Services Taxation

## 2018 Legislative Developments

### ■ Rhode Island

- Budget bill (H. 7200) would create a new tax on “vendor-hosted prewritten computer software.”

### ■ South Carolina

- Senate bill (S. 1093) introduced that would exclude “video streaming services received by the customer over the Internet” from the sales and use tax imposition on communication services.

### ■ Virginia

- Two bills were passed by indefinitely at the committee level.
  - House bill (HB 1051) would have subjected audio and video streaming services and prepaid calling to the communications sales and use tax.
  - Senate bill (SB 390) would have created a broad new tax on digital goods and services to pay for a 1% corporate income tax rate cut.

# Digital Goods and Services Taxation

## Notable Administrative Development

### ■ District of Columbia

- Office of Tax and Revenue Notice 2017-06 (Oct. 5, 2017).
  - OTR published guidance on taxation of various digital goods.
  - Takes the position (for the first time publicly) that “streaming video services” are not subject to the 5.75% sales tax in the District of Columbia; however, streaming video service providers are subject to the 10% gross receipts tax on cable and satellite TV and other video service providers.

## ■ City of Chicago

- On June 5, 2017, the Entertainment Software Association (ESA) filed a complaint in Cook County Circuit Court challenging the City of Chicago's Amusement Tax Ruling # 5 (2015), which administratively expands the city's 9 percent Amusement Tax to online amusements, including streaming gaming, movies, television and music.
- Basis for lawsuit is violation of federal Internet Tax Freedom Act (ITFA), which prohibits state and local governments from imposing multiple or discriminatory taxes on electronic commerce.
- ESA is requesting declaratory judgment and permanent injunction enjoining the city from enforcing Ruling # 5.
- Liberty Justice Center has a similar lawsuit pending on the same issue.

## ■ Kentucky

- In 2015, the Board of Tax Appeals (BTA) held that Netflix’s video streaming service is not comparable to taxable “multichannel video programming services” (defined to include cable, satellite and IP TV).
  - *See Netflix, Inc. v. Finance and Administration Cabinet Dep’t of Revenue*, Order No. K-24900 (Bd. Tax App. Sept. 23, 2015)
- In August 2016, a Kentucky Circuit Court affirmed the BTA order.
  - *See* No. 15-CI-01117 (Franklin Cty. Cir. Ct., Aug. 23, 2016).
- DOR filed notice of appeal on Sept. 20, 2016.
  - Attempted to transfer the case to Kentucky Supreme Court, but ultimately withdrew the motion and the case was dismissed earlier this year.
- The Circuit Court decision holding that Netflix’s services are not within the scope of the cable/satellite imposition is now final.

# Comments? Questions?

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