

Business Tax Tip #29

Sales of Digital Products and Digital Code

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Introduction

Effective March 14, 2021, the Maryland sales and use tax applies to the sale or use of a digital product.¹ The statutory references contained in this publication are not effective until March 14, 2021. At that date, the applicable sales and use tax rate on a sale of a digital product shall be 6%. If you have questions or comments on Business Tax Tip #29, please contact the Comptroller’s office at sut@marylandtaxes.gov.

¹ Tax Tip #30 Sales of Digital Products and Digital Codes was published on March 9, 2021.

Retail Sale and Use of a Digital Product or Digital Code

Retail Sale

A tax is imposed on a retail sale in Maryland.² The definition of a retail sale means:

- tangible personal property;
- a taxable service; or
- a digital product.³

The sales and use tax applies to a sale of a digital product obtained or delivered electronically by an end user⁴ if sold:

- With rights of permanent⁵ use;
- With rights of less than permanent use; or
- With rights of use conditioned on continued payment by the subscriber or buyer; or
- As a subscription to, access to, streaming of, or the purchase of a digital code for receiving or accessing digital products.

Use

A tax is imposed on a use in Maryland of tangible personal property, a digital product, or a taxable service.⁶ Use means an exercise of a right or power to use, consume, possess, or store that is acquired by a sale for use of tangible personal property, a taxable service or a digital product.⁷ A use does not include:

- resell the digital product in the form that the buyer receives or is to receive the digital product;⁸
- use or incorporate the digital in a production activity as a material or part of other tangible personal property or another digital product to be produced for sale;⁹
- an exercise of a right or power over a digital code to receive or access a digital product;¹⁰
- an exercise of a right or power over a digital product acquired by a sale for use if the buyer is not an end user;¹¹

² Tax-General Article § 11-102(a)(2).

³ Tax-General Article § 11-101(h)(1).

⁴ An “end user” means any person other than a person who receives by contract a digital product transferred electronically for further commercial broadcast, rebroadcast, transmission, retransmission, retransmission, licensing, relicensing, distribution, redistribution, or exhibition of the product, in whole or in part, to another person. Tax-General Article § 11-101(c-5).

⁵ Permanent means perpetual or for an indefinite or unspecified length of time. Tax-General Article § 11-101(c-8).

⁶ Tax-General Article § 11-102(a)(2).

⁷ Tax-General Article § 11-101(n)(1).

⁸ Tax-General Article § 11-101(n)(3)(ii).

⁹ Tax-General Article § 11-101(n)(3)(iii).

¹⁰ Tax-General Article § 11-101(n)(3)(iv).

¹¹ Tax-General Article § 11-101(n)(3)(v).

- the use or transfer of a digital product or digital code by the transferor and obtained by the end user free of charge.¹²

Definition of Digital Product or Digital Code

Digital Product

A digital product means a product that is obtained electronically by the buyer or delivered by means other than tangible storage media using technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.¹³ Digital products include the following:

- A work that results from the fixation of a series of sounds that are transferred electronically, including prerecorded or live music or performances, readings of books or other written materials, and speeches;
- Audio greeting cards sent by e-mail;
- A digitized sound file such as ring tone, that is downloaded onto a device and may be used to alert the user of the device with respect to a communication;
- A series of related images that, when shown in succession, impart an impression of motion, together with any accompanying sounds that are transferred electronically, including motion pictures, musical videos, news and entertainment programs, live events, video greeting cards sent by e-mail, and video or electronic games;
- A book, generally known as an “e-book”, that is transferred electronically; and
- A newspaper, magazine, periodical, chat room discussion, weblog, or any other similar product that is transferred electronically.¹⁴

The following is a non-exclusive list of digital products¹⁵ the sale of which is subject to the sales and use tax *if* obtained or delivered by electronic means:

- | | |
|---|---|
| ▪ A book or e-book | ▪ A digitized sound file that may be downloaded onto a device and may be used to alert the user to a communication or information |
| ▪ Newspaper | ▪ A sale, subscription or license to access content online |
| ▪ Magazines, periodicals, or any other publication | ▪ A sale, subscription or license to use a software application |
| ▪ A digital download or stream of a motion picture, music video, news and entertainment program, live event, sporting event, tutorial, etc. | |

¹² Tax-General Article § 11-101(n)(3)(VI).

¹³ Tax-General Article § 11-101(c-4)(1).

¹⁴ Tax-General Article § 11-101(c-4)(2).

¹⁵ The statutory language of Tax-General Article § 11-101(c-4)(2) states that digital products include the listed items but does not state that digital products are limited to those items. The term “specified” was also removed from the statutory language “specified digital products” in Tax-General Article § 11-101(c-3)(1)(II). The statutory language is unclear on whether “Internet Access” as defined by 47 U.S.C. 151 (note) is a digital product.

- Access to a chat room, discussion, weblog, or any other venue that permits users to communicate electronically in real time
- An online class, instruction, or similar product
- Access to or use of video or online games
- Access to or use of virtual items, such as skins, renders and in-app purchases, purchased for use in a video or online game
- Audio or video greeting cards sent by email, text or any other electronic means
- Customer lists, mailing lists, medical records, and similar products
- Design files, models, and templates, such as 3D design files, 3D models, CNC templates, and virtual/alternate reality templates
- Photographs, artwork, illustrations, graphics and similar products
- Prerecorded or live music
- Prerecorded or live performances
- Prerecorded or live audio books or other written materials
- Prerecorded or live speeches including commentaries, dissertations, and lectures

Digital Code

Digital code is defined under Maryland law as code that:

- may be obtained by any means, including;
 1. in a tangible form, such as a card; or
 2. through e-mail; and
- provides a buyer with a right to obtain one or more digital products.¹⁶

Digital code can be obtained by any means including:

- Electronically through computer-mediated communications such as email, text, or messaging; or
- tangible form such as a card, imprint on a product or other storage product.

A “digital code” does *not* include a gift certificate or gift card with a monetary value that may be redeemable for an item other than a digital product.¹⁷

Subscriptions

The sale of subscription to, access to, streaming of, or the purchase of a digital code for receiving or accessing digital products to an end user is a retail sales and thus subject to the sales and use tax.¹⁸ A subscription means an arrangement with a vendor that grants a buyer the right to obtain

¹⁶ Tax-General Article § 11-101(c-3)(1).

¹⁷ Tax-General Article § 11-101(c-3)(2).

¹⁸ Tax-General Article § 11-101(h)(2)(V).

digital products from within one or more product categories having the same tax treatment, in a fixed quantity or for a fixed period of time or both.¹⁹

An annual, periodic, or monthly membership is a subscription subject to sales and use tax. It is not necessary that the product be delivered to the purchaser. As long as the purchaser is permitted access to the product, it will be considered to have been electronically transferred to the purchaser.

Services Performed Electronically

Taxable Services

Taxable service means fabrication, printing, or production of tangible personal property or a digital product.²⁰

Non-Taxable and Professional Services

The sales and use tax does not apply to the sale of a non-taxable service performed electronically unless the service results in a digital product.

Bundled Transactions

A bundled transaction is the retail sale of two or more items if the items are not separately stated and sold for one price, including tangible personal property, taxable or non-taxable services, or a digital product. The entire charge for a bundled transaction that involves the sale of a digital product and a non-taxable service or non-taxable tangible personal property is subject to the sales and use tax. However, the sales and use tax does not apply to a charge for a personal, professional, or insurance service that is not a taxable service but involves a sale of digital product as an inconsequential element for which no separate charge is made.²¹

Taxable Price of a Digital Product

The sales and use tax is computed on the "taxable price" of a digital product. In general, the taxable price of a digital product is the purchase price. However, taxable price is broadly defined by statute to include, with certain specific exceptions, the total consideration for the transaction, which may be either in the form of money, rights, property, promises or anything else of value, or by exchange or barter.²² The use or transfer of a digital product is not subject to sales and use tax if provided by the transferor and obtained by the end user free of charge.

¹⁹ Tax-General Article § 11-101(j-4).

²⁰ Tax-General Article § 11-101(m)(1).

²¹ Tax-General Article § 11-219(a).

²² Tax-General Article § 11-101(l); COMAR 03.06.01.08.

Advertising Agencies

An advertising agency is selling digital products when the transaction with the client is for the production and electronic delivery of specific property, including property that the client uses:

- In its business, signage, letterhead stationery, business cards, annual reports, or audio or video tapes;
- To convey its commercial message, such as brochures, flyers, posters, displays, or finished artwork; or
- Any digital products including but not limited to photographs, artwork, illustrations, graphics, and videos.

An advertising agency shall pay sales and use tax on purchases of digital products that it uses or consumes in providing advertising services unless the digital product will be incorporated as component or part of a sale of tangible personal property, a taxable service or a digital product. An advertising agency may claim the resale exclusion for purchase of digital products solely for resale to a client in the same form in which it receives the digital product.

Education

Charges for Continuing Education Classes, Seminars or Conferences that are Delivered in Person and not Delivered Electronically

A charge for attending a continuing education class, seminar or conference in-person is not subject to sales and use tax. The provider must pay the sales and use tax on the purchase of educational materials that it provides incidentally with the nontaxable educational program.

Charges for Continuing Education Classes, Seminars or Conferences Delivered Electronically

Charges for viewing or attending continuing education classes, seminars or conferences that are delivered electronically are subject to sales and use tax. Under Maryland law, “prerecorded or live music or performances, readings of books or other written materials, and speeches” delivered electronically are a digital product. There is no exemption from sales and use tax under Maryland law for the sale of a digital product on the basis that the product would have been exempt from sales and use tax if it had been delivered in tangible form or by other means.

Unlike with an in-person class, the provider is not required to pay the sales and use tax on the purchase of educational materials that it provides incidentally with the taxable educational program. The educational materials are resold to the customer.

Charges by Non-Profits and Tax-Exempt Organizations for Continuing Education Classes, Seminars or Conferences Delivered Electronically

A charge for viewing or attending continuing education classes, seminars or conferences provided electronically are subject to sales and use tax even if sold by a non-profit or tax-exempt organization. There is no general exemption under Maryland law for charges for continuing education classes by a non-profit or tax-exempt organization for educational purposes.²³

Charges for Online Courses and Lectures by a College or Graduate School

Digital products include “a work that results from the fixation of a series of sounds that are transferred electronically, including prerecorded or live music or performances, readings of books or other written materials, and speeches if delivered electronically.” A charge for viewing a course or lecture online by a college or graduate school is subject to the sales and use tax.²⁴

Charges for the Sale of Textbooks

The sale of a textbook, whether in tangible form or delivered electronically, is subject to the Maryland sales and use tax. The purchase of an access code to view and/or download an electronic book is also taxable as the sale of a digital book. Unless a specific exemption applies, sales tax must be charged whether the sales is made by an educational institution or a commercial vendor.

Entertainment

Pre-recorded Audio and Video Content

A charge to download or access pre-recorded audio and video content is subject to the sales and use tax.

Streaming Audio and Video Services

A monthly charge for streaming audio and video is subject to sales and use tax. Sales, licenses, and subscriptions of digital products and digital codes to end users are subject to the 6% sales and use tax regardless if that use is limited to a specific time period or for permanent use. For example, a charge of \$9.99 per month that allows a consumer to receive the right to stream and view movies and television shows on an unlimited basis, is subject to the sales and use tax.

²³ Please see Tax-General Article § 11-204(b).

²⁴ It is unclear from the legislative history or the statutory language whether charges for tuition at a college or graduate school are subject to sales and use tax if the school either partially or wholly delivers lectures electronically.

Cable Television

A monthly charge to view cable television is subject to a franchise fee but not subject to the sales and use tax.²⁵ However, a charge for a movie rental or purchase through a cable television system is subject to the sales and use tax. Pay-per-view television is a taxable service under Maryland law and subject to Maryland sales and use tax.²⁶

Satellite Television and Radio Services

A monthly charge for satellite television service is not subject to sales and use tax.²⁷ An example of a satellite television service is Dish or Direct TV.

A monthly charge for satellite radio services is subject to Maryland sales and use tax.²⁸ An example of a satellite radio service is Sirius XM.

Live Music Performances

A charge to view a live performance of any type that is accessed electronically is subject to sales and use tax.²⁹ However, a charge to view a live performance of any type in-person is not subject to sales and use tax. A charge to view a live performance in-person may be subject to Maryland's admissions and amusement tax.³⁰

Newspapers

The sale of a newspaper whether delivered electronically or in tangible form for a charge is subject to sales and use tax.³¹ The sale of a newspaper that is distributed by the publisher at no charge is not subject to the sales and use tax whether delivered electronically or in tangible form.

Photography and Video

The sale of a photograph, stock photographs or stock artwork, clip art, portrait and wedding photography, pictures and similar products are digital products if delivered electronically.

²⁵ Multichannel video programming service was removed from the list of taxable services in Tax-General Article § 11-101(m). Multichannel video programming service included a cable service, as defined in 47 U.S.C. § 522(6).

²⁶ Tax-General Article § 11-101(m)(8).

²⁷ Multichannel video programming service was removed from the list of taxable services in Tax-General Article § 11-101(m). Multichannel video programming service included a direct-to-home satellite services, as defined in 47 U.S.C. § 303(V).

²⁸ Direct-to-home satellite services, as defined in 47 U.S.C. § 303(V), was removed from HB 932. Direct-to-home satellite services was placed in the categories of Multichannel video programming service.

²⁹ Tax-General Article § 11-101(c-4)(2)(1)(i)(1).

³⁰ For more information about Maryland's admissions and amusement tax on charges on in-person live performances, please see the following [webpage](#).

³¹ Tax-General Article § 11-101(c-4)(2)(V).

Motion picture and videotaping production is a digital product and the sale of electronically delivered video is subject to the sales and use tax.

Software

The sale of canned or commercial off-the-shelf (“COTS”) software if delivered in tangible form is subject to the sales and use tax. Effective March 14, 2021, the sale of canned or COTS software if obtained electronically by the buyer is a digital product and is subject to the Maryland sales and use tax.³² The sale of software as a service (SaaS) is also subject to the sales and use tax.³³

Exemptions for Software

Customized Software

The sales and use tax does not apply to a sale of custom computer software services relating to procedures and programs that:

- otherwise are subject to sales and use tax;
- are to be used by a specific person;
- are created for that person or contain standard or proprietary routines that incorporate significant creative input to customize the procedures and programs for that person; and
- do not constitute a program, procedure, or documentation that is mass produced and sold to the general public or persons associated in a trade, profession, or industry.³⁴

A canned or commercial off the shelf (“COTS”) software package that is adapted to the needs of a particular user does not qualify as a custom computer software service. The sale of software that contains standard or proprietary routines must incorporate significant creative input to customize the procedures and programs for that person to qualify as custom software services. In determining whether software is customized computer software exemption, vendors should consider the cost of the customization as compared to the cost of the COTS software.

Computer Programs for Resale

The sales and use tax does not apply to a sale of a computer program that is legally permitted to be and is intended to be reproduced for sale or incorporated in whole or in part into another computer program intended for sale.³⁵

³² See https://mgaleg.maryland.gov/2020RS/fnotes/bil_0002/hb0932.pdf (“The advent of the digital age has contributed to the erosion of the sales tax base as consumers have transitioned from purchasing tangible goods to digital goods, such as computer software, music, videos, and other electronic files.”)

³³ A digital product means a product that is obtained electronically by the buyer or delivered by means other than tangible storage media using technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities. Tax-General Article § 11-101(c-4)(1).

³⁴ Tax-General Article § 11-219.

³⁵ Tax-General Article § 11-225.

Exclusions for Resale of a Digital Product

Sales and use tax only applies to the sale or use of digital product by an end user.³⁶ Thus a person other than an end user, may claim the resale exclusion and avoid payment of the sales and use tax on the purchase of a digital product if purchased with the intention of:

- reselling the digital product in the same form that the buyer receives or is to receive the digital product;³⁷
- incorporating the digital product into another digital product intended for resale;³⁸
- transferring that digital product to a buyer in the form of a taxable service;³⁹ or
- incorporating the digital product into a physical product.⁴⁰

The same requirements for obtaining, use, and record retention of resale certificates for tangible personal property applies to digital products. For more information on Maryland's resale certificate requirements, please see [COMAR 03.03.06.01.14](#).

Exemptions to the Sale of Digital Products

The sale of a digital product is subject to the sales and use tax unless an exemption applies to the transaction. A sales and use tax exemption applies to the sale of a digital product unless the exemption statute specifically exempts tangible personal property, a taxable service or a specific item.

Construction with other tax laws

HB 932 amended Tax-General Article § 11-221 to state that the retail sale of a digital product subject to Title 11. Sales and Use Tax does not include the retail sale that is subject to tax in accordance with any other provision of the Tax-General Article.⁴¹ However, Tax-General Article § 11-221(c) was not revised to expand the exemption for sales of tangible personal property or taxable services acquired by a buyer who pays another state a tax on a sale or gross receipts from a sale before entering Maryland to sales of digital products. Therefore, a buyer who pays another state a tax on a sale or gross receipts from a sale of a digital product before entering Maryland must also pay use tax for a use in Maryland of a digital product.

³⁶ Tax-General Article § 11-101(c-5).

³⁷ Tax-General Article § 11-101(n)(3)(ii)(1).

³⁸ Tax-General Article § 11-101(h)(3)(ii)(3); Tax-General Article § 11-101(n)(3)(ii)(2).

³⁹ Tax-General Article § 11-101(h)(3)(ii)(3); Tax-General Article § 11-101(n)(3)(ii)(3).

⁴⁰ Tax-General Article § 11-101(h)(3)(ii)(2).

⁴¹ Tax-General Article § 11-221(d).

Exempt organizations

There is no general exemption for all sales made by exempt organizations under Maryland law. Therefore, unless a specific exemption exists,⁴² exempt organizations must charge sales tax on a sale of a digital product.

An exempt organization may purchase a digital product tax-free if the exempt organization has a valid exemption certificate issued by the Maryland Comptroller's office.⁴³

Government Sales

The sale of a digital product or digital code to the federal government, the State or a political subdivision of the State is exempt from the sales and use tax.⁴⁴

Production Activity

The definition of "production activity" is narrowly defined under Maryland law.⁴⁵ Production activity is limited to certain activities⁴⁶ defined by statute, including "assembling, manufacturing, processing, or refining tangible personal property for resale."⁴⁷ Production activity has not historically included the creation of digital products and HB 932 did not alter the definition of production activity to include digital products. Therefore, the purchase of tangible personal property used to create digital products and digital code does not qualify for the exemption for sales of tangible personal property used in a production activity.

In addition, the purchase of a digital product used to create tangible personal property does not qualify for the exemption. However, the sales and use tax does not apply to the sale of a digital product in a production activity as a material or part of other tangible personal property or another digital product to be produced for sale.⁴⁸

Property for Use in Another State

Except for that portion of the purchase price allocable to intended viewing in Maryland, the sales and use tax does not apply to a sale of a series of images stored on video tape or in other optical or digital forms or electronic signals generated from these images to a cable or other nonbroadcast television network, if the images are intended for viewing by television viewers located outside of Maryland.⁴⁹

⁴² Tax-General Article § 11-204(b).

⁴³ *Please see* Tax-General Article § 11-204.

⁴⁴ Tax-General Article § 11-220(a).

⁴⁵ Tax-General Article § 11-101(f)(1).

⁴⁶ Tax-General Article § 11-101(f)(1)(ii-vii).

⁴⁷ Tax-General Article § 11-101(f)(1)(i).

⁴⁸ Tax-General Article § 11-101.

⁴⁹ Tax-General Article § 11-216(a)(3).

Research and Development

The sales and use tax does not apply to a sale of tangible personal property or a digital product for use or consumption in research and development.⁵⁰

Marketplace Facilitators

A marketplace facilitator shall collect the applicable sales and use tax due on a retail sale or sale for use by a marketplace seller to a buyer in Maryland.⁵¹ The first requirement to qualify as a marketplace facilitator is that the person list or advertise tangible personal property for sale in a marketplace.⁵² A marketplace facilitator is required to collect sales tax on the sales of digital products and tangible personal property on behalf of the marketplace seller if the marketplace facilitator facilitates retail sales by listing or advertising for sale digital goods *and* tangible personal property in a marketplace. A marketplace facilitator may voluntarily collect sales tax on sales of digital products on behalf of the marketplace seller if the marketplace facilitator only facilitates retail sales by listing or advertising for sale digital goods in a marketplace.

Nexus

Out-of-State Vendors

A person who engages in the business of an out-of-State vendor shall collect and remit sales and use tax on all taxable sales of digital products for use in Maryland. A person engages in the business of an out-of-State vendor if the person meets the criteria of Maryland [COMAR 03.06.01.33](#).⁵³ An out-of-State vendor includes a person who sells digital products or digital code for delivery in Maryland if, during the previous calendar year or the current calendar year, the person satisfies either of the following criteria:

- (a) The person's gross revenue from the sale of digital products or digital code delivered in the State exceeds \$100,000.00; or
- (b) The person sold digital products or code for delivery into the State in 200 or more separate transactions.

⁵⁰ Tax-General Article § 11-217(b).

⁵¹ "Marketplace facilitator" means a person that: (i) facilitates a retail sale by a marketplace seller by listing or advertising for sale in a marketplace tangible personal property; and (ii) regardless of whether the person receives compensation or other consideration in exchange for the person's services, directly or indirectly through agreements with third parties, collects payment from a buyer and transmits the payment to the marketplace seller. Tax-General Article § 11-101(c-2)(1). "Marketplace seller" means a person that makes a retail sale or sale for use through a physical or electronic marketplace operated by a marketplace facilitator. Tax-General Article § 11-101(c-3).

⁵² Tax-General Article § 11-101(c-2)(1)(i).

⁵³ COMAR 03.06.01.33(B)(5).

If you are an out-of-state vendor and are required to register to collect sales and use tax, please file a combined registration application available [here](#).

Sourcing of Sales of Digital Products or Digital Codes

The retail sale of a digital code or digital product shall be presumed to be made in the state in which the customer tax address is located.⁵⁴

Customer Tax Address

The “customer tax address” for the sale of a digital product means:

1. the address of the vendor’s business location if the digital product is received by a buyer at the business location of the vendor;
2. the address of the primary use location if the buyer does not receive the digital product at the vendor’s business location and the vendor knows the primary use location of the digital product;
3. If item 1 and item 2 do not apply, the location where the digital product is received by the buyer or by a donee of the buyer if identified by the buyer and if known to the vendor and maintained in the ordinary course of the vendor’s business;
4. If items 1 through 3 do not apply, the location indicated by an address for the buyer that is available from the business records of the vendor that are maintained in the ordinary course of business, if the address does not constitute bad faith;
5. If items 1 through 4 do not apply, the location of the address of the buyer provided during the consummation of the sale, including the address of the buyer’s payment instrument, when use of the address does not constitute bad faith; or
6. If items 1 through 5 do not apply, including a circumstance in which a vendor does not have sufficient information to apply those items, one of the following locations as selected by the vendor, provided that the location is consistently used by the vendor for all sales to which this item applies:
 - The location in the United States of the headquarters of the vendor’s business;
 - The location in the United States where the vendor has the greatest number of employees; or
 - The location in the United States from which the vendor makes digital products available for electronic transfer.⁵⁵

⁵⁴ Tax-General Article § 11-103(C).

⁵⁵ Tax-General Article § 11-101(C-1).

Primary Use Location

Primary use location means the street address representative of where the buyer's use of a digital product will primarily occur, as determined by:

1. The residential street address or a business street address of the actual end user of the digital product, including, if applicable, the address of a donee of the buyer that is designated by the buyer; or
2. If the buyer is not an individual, the location of the buyer's employees or equipment that makes use of the digital product.⁵⁶

Primary use location does not include the location of a person who used a digital product as the purchaser of a separate good or service from the buyer.⁵⁷

⁵⁶ Tax-General Article § 11-101(E-1).

⁵⁷ Tax-General Article § 11-101(E-2).