

111TH CONGRESS
2^D SESSION

H. R. 5649

To promote neutrality, simplicity, and fairness in the taxation of digital goods and digital services.

IN THE HOUSE OF REPRESENTATIVES

JUNE 30, 2010

Mr. BOUCHER (for himself and Mr. SMITH of Texas) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To promote neutrality, simplicity, and fairness in the taxation of digital goods and digital services.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Digital Goods and
5 Services Tax Fairness Act of 2010”.

6 **SEC. 2. FINDINGS.**

7 The Congress finds the following:

8 (1) Consumers, businesses, and other partici-
9 pants engaged in electronic commerce may be sub-
10 ject to multiple, confusing, and burdensome taxation

1 because of inconsistent rules among thousands of
2 State and local jurisdictions and disparate treatment
3 of digital goods and digital services.

4 (2) A consistent framework for taxation is
5 needed that will not impede electronic commerce and
6 the sale of digital goods and digital services, by pre-
7 venting multiple taxation, and providing greater cer-
8 tainty and simplicity.

9 (3) Neutrality should guide tax policy and ad-
10 ministration in this area. Transactions involving
11 similar types of goods and services should be taxed
12 fairly, regardless of the method and means of dis-
13 tribution, whether through electronic transfer or
14 through other channels of commerce. New or dif-
15 ferent taxes on electronic transactions should be
16 barred.

17 (4) To ensure neutrality and avoid multiple tax-
18 ation, certain rules should be adapted to reflect the
19 unique nature of electronic commerce and how dig-
20 ital goods and digital services are provided.

21 (5) To recognize the critical role that online
22 health, energy management, and education services
23 will play in our economy, these services should be ex-
24 empt from all State and local taxes.

1 **SEC. 3. MULTIPLE AND DISCRIMINATORY TAXES PROHIB-**
2 **ITED.**

3 No State or local jurisdiction shall impose multiple
4 or discriminatory taxes on or with respect to the sale or
5 use of digital goods or digital services.

6 **SEC. 4. RETAIL, SOURCING, AND OTHER LIMITATIONS.**

7 (a) **RETAIL LIMITATION.**—Taxes on or with respect
8 to the sale or use of digital goods or digital services may
9 be imposed only on or with respect to a sale to, or use
10 by, a customer.

11 (b) **SOURCING LIMITATION.**—

12 (1) **IN GENERAL.**—Taxes on or with respect to
13 the sale or use of digital goods or digital services
14 may be imposed only by the State and local jurisdic-
15 tions whose territorial limits encompass the cus-
16 tomer’s tax address. This limitation shall be deemed
17 satisfied if sourcing is determined by a seller pursu-
18 ant to State sourcing rules adopted pursuant to the
19 Streamlined Sales and Use Tax Agreement.

20 (2) **TAX ADDRESS.**—The customer’s tax ad-
21 dress shall be—

22 (A) with respect to digital goods or digital
23 services that are sold to a customer by a pro-
24 vider of mobile telecommunications service that
25 is subject to being sourced under section 117 of
26 title 4 of the United States Code, and furnished

1 to the customer in conjunction with such pro-
2 vider's mobile telecommunications service, the
3 customer's place of primary use, as defined in
4 section 124 of title 4 of the United States Code;

5 (B) if subparagraph (A) does not apply,
6 and if the digital good or digital service is re-
7 ceived by the customer at a business location of
8 the seller, such business location;

9 (C) if neither subparagraph (A) nor sub-
10 subparagraph (B) applies, and if the location where
11 the digital good or digital service is received by
12 the customer is known to the seller, such loca-
13 tion;

14 (D) if none of subparagraphs (A) through
15 (C) applies, the customer's address that is ei-
16 ther known to the seller or, if not known, ob-
17 tained by the seller during the consummation of
18 the transaction, including the address of the
19 customer's payment instrument if no other ad-
20 dress is available;

21 (E) if an address is neither known nor ob-
22 tained as provided in subparagraph (D), the ad-
23 dress of the seller from which the digital good
24 or digital service was sold; and

1 (F) notwithstanding subparagraphs (A)
2 through (E), for digital goods or digital services
3 that are delivered to a person other than the
4 customer, including advertising services, the de-
5 livery location if known or, otherwise, the cus-
6 tomer's address determined under subpara-
7 graph (D) or (E).

8 (c) LIMIT ON EXPANSIVE INTERPRETATION.—No tax
9 on or with respect to the sale or use of tangible personal
10 property, telecommunications service, Internet access serv-
11 ice, or audio or video programming service may be con-
12 strued by any regulation, administrative ruling, or other-
13 wise, to be imposed on or with respect to the sale or use
14 of a digital good or a digital service. No tax on or with
15 respect to the sale or use of a digital good may be con-
16 strued by any regulation, administrative ruling, or other-
17 wise, to be imposed on or with respect to the sale or use
18 of a digital service. The limitations provided by this sub-
19 section shall not apply to any construction that was ap-
20 proved by a judicial determination made on or before June
21 30, 2010.

22 (d) CERTAIN TAXES PROHIBITED.—No tax shall be
23 imposed on or with respect to the sale or use of digital
24 medical services, digital education services, or digital en-
25 ergy management services.

1 **SEC. 5. BUNDLED GOODS AND SERVICES.**

2 If charges for digital goods or digital services are ag-
3 gregated with, and not separately stated from, charges for
4 other goods or services, then the charges for digital goods
5 or digital services may be taxed for purposes of this Act
6 at the same rate and on the same basis as charges for
7 the other goods or services unless the seller can reasonably
8 identify the charges for the digital goods or digital services
9 from its books and records kept in the regular course of
10 business.

11 **SEC. 6. DEFINITIONS AND OTHER SPECIAL RULES.**

12 For the purposes of this Act, the following definitions
13 and rules apply:

14 (1) CUSTOMER.—The term “customer” means
15 a person that purchases a digital good or digital
16 service, for a purpose other than resale. For the pur-
17 pose of determining a place of primary use under
18 section 4(b)(2)(A), “customer” means the “end
19 user”, as such term is used in section 124 of title
20 4 of the United States Code, of the purchased dig-
21 ital good or digital service. For purposes of this defi-
22 nition, purchase for resale includes purchase of a
23 digital good or digital service for further commercial
24 broadcast, rebroadcast, transmission, retransmission,
25 licensing, relicensing, reproduction, copying, dis-
26 tribution, redistribution, or exhibition of the digital

1 good or digital service, in whole or in part, to an-
2 other person.

3 (2) DELIVERED OR TRANSFERRED ELECTRONI-
4 CALLY.—The term “delivered or transferred elec-
5 tronically” means delivered or transferred to the
6 customer by means other than tangible storage
7 media. It is not necessary that the product or service
8 be physically transferred to the customer, provided
9 that the customer may access or remotely use the
10 product or service.

11 (3) DIGITAL GOOD AND DIGITAL SERVICE.—
12 The term “digital good” means any good or product
13 that is delivered or transferred electronically to the
14 customer, including software, information main-
15 tained in digital format, digital audio-visual works,
16 digital audio works, and digital books; and the term
17 “digital service” means any service that is delivered
18 or transferred electronically to the customer, includ-
19 ing the provision of remote access to or use of a dig-
20 ital good, but the term “digital service” does not in-
21 clude telecommunications service, Internet access
22 service, or audio or video programming service. For
23 purposes of this section, “audio or video program-
24 ming” means programming provided by, or generally
25 considered comparable to programming provided by,

1 a radio or television broadcast station. “Video pro-
2 gramming” shall not include interactive on-demand
3 services, pay-per-view services, or services generally
4 considered comparable to such services regardless of
5 the technology used to provide such services.

6 (4) DIGITAL EDUCATION SERVICE.—The term
7 “digital education service” means a primary, sec-
8 ondary, undergraduate, postgraduate, or professional
9 educational service delivered or transferred electroni-
10 cally to a practitioner or student.

11 (5) DIGITAL ENERGY MANAGEMENT SERVICE.—
12 The term “digital energy management service”
13 means a service that utilizes digital information to
14 manage a customer’s energy use, to allow a cus-
15 tomer to respond to energy market information or
16 circumstances, or to identify customer demand with
17 particular energy supply.

18 (6) DIGITAL MEDICAL SERVICE.—The term
19 “digital medical service” means a health care, health
20 information, or health education service that is deliv-
21 ered or transferred electronically to a practitioner,
22 researcher, or patient.

23 (7) DIGITAL CODE.—The term “digital code”
24 means a code that conveys to a customer only the
25 right to obtain a digital good or digital service. A

1 digital code may be obtained by any means, includ-
2 ing by email or by tangible means regardless of its
3 designation as “song code”, “video code”, or “book
4 code”. The tax treatment of the sale or use of a dig-
5 ital code shall be the same as the tax treatment of
6 the digital good or digital service to which the digital
7 code relates. The sale of the digital code shall be
8 considered the sale transaction for purposes of this
9 Act.

10 (8) DISCRIMINATORY TAX.—The term “dis-
11 criminatory tax” means any tax imposed by a State
12 or local jurisdiction—

13 (A) on or with respect to the sale or use
14 of any digital good or digital service at a higher
15 rate than is generally imposed on or with re-
16 spect to the sale or use of tangible personal
17 property or of similar services that are not de-
18 livered or transferred electronically;

19 (B) on or with respect to any seller of dig-
20 ital goods or digital services at a higher rate or
21 by incorporating a broader tax base than is
22 generally imposed on or with respect to sellers
23 in transactions involving tangible personal prop-
24 erty or involving similar services that are not
25 delivered or transferred electronically. This pro-

1 vision applies only to the extent that the higher
2 rate or broader tax base is attributable to the
3 fact that such person sells digital goods or dig-
4 ital services; or

5 (C) that is required to be collected with re-
6 spect to the sale or use of digital goods or dig-
7 ital services by different sellers or under other
8 terms that are disadvantageous to those applied
9 in taxing the sale or use of tangible personal
10 property or of similar services that are not de-
11 livered or transferred electronically.

12 For purposes of this subsection, all taxes, tax rates,
13 exemptions, deductions, credits, incentives, exclu-
14 sions, and other similar factors shall be taken into
15 account in determining whether a tax is a discrimi-
16 natory tax.

17 (9) GENERALLY IMPOSED.—A tax shall not be
18 considered “generally imposed” if it is imposed only
19 on specific services, specific industries or business
20 segments, or specific types of property.

21 (10) MULTIPLE TAX.—The term “multiple tax”
22 means any tax with respect to which no credit is
23 given for comparable taxes paid to other States or
24 local jurisdictions on the same transaction. Taxes
25 imposed by physically overlapping State or local ju-

1 jurisdictions shall not be considered to be multiple
2 taxes by reason of being applied within the overlap-
3 ping area.

4 (11) SALE AND PURCHASE.—The terms “sale”
5 and “purchase”, and all variations thereof, shall in-
6 clude “lease”, “rent”, and “license”, and cor-
7 responding variations thereof.

8 (12) SELLER.—The term “seller” means a per-
9 son making sales of tangible personal property, dig-
10 ital goods, digital services, or other services.

11 (13) STATE OR LOCAL JURISDICTION.—The
12 term “State or local jurisdiction” means any of the
13 several States, the District of Columbia, any terri-
14 tory or possession of the United States, a political
15 subdivision of any State, territory, or possession, or
16 any governmental entity or person acting on behalf
17 of such State, territory, possession, or subdivision
18 and with the authority to assess, impose, levy, or
19 collect taxes.

20 (14) TAX.—The term “tax” means any charge
21 imposed by any governmental entity for the purpose
22 of generating revenues for governmental purposes,
23 including any tax, charge, or fee levied by a taxing
24 jurisdiction as a fixed charge for each customer or
25 measured by gross amounts charged to customers,

1 regardless of whether such tax, charge, or fee is im-
2 posed on the vendor or customer and regardless of
3 the terminology used to describe the tax, charge, or
4 fee. The term “tax” does not include a tax on or
5 measured by net income or an ad valorem tax.

6 **SEC. 7. FEDERAL JURISDICTION.**

7 Notwithstanding section 1341 of title 28 of the
8 United States Code, and without regard to the amount
9 in controversy or citizenship of the parties, a district court
10 of the United States has jurisdiction, concurrent with
11 other jurisdiction of courts of the United States and the
12 States, to prevent a violation of this Act.

13 **SEC. 8. REGULATIONS.**

14 The Secretary of Commerce, in consultation with the
15 Secretary of the Treasury, shall prescribe such regulations
16 as may be necessary or appropriate to carry out the pur-
17 poses of this Act. In promulgating any regulations under
18 this Act, the Secretary shall also seek the consultation of
19 the Executive Director of the Governing Board of the
20 Streamlined Sales Tax Project.

21 **SEC. 9. EFFECTIVE DATE; APPLICATION.**

22 (a) GENERAL RULE.—This Act shall take effect on
23 the date of the enactment of this Act.

24 (b) APPLICATION TO LIABILITIES AND PENDING
25 CASES.—Nothing in this Act affects liability for taxes ac-

1 crued and enforced before the date of enactment of this
2 Act, or affects ongoing litigation relating to such taxes,
3 except as provided in section 4(c) of this Act.

4 **SEC. 10. SENSE OF THE CONGRESS.**

5 It is the sense of the Congress that each State shall
6 take reasonable steps necessary to prevent multiple tax-
7 ation of digital goods and digital services in situations
8 where a foreign country has imposed a tax on such goods
9 or services.

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