

COMMISSIONER'S DIRECTIVE # 41

OCTOBER 2011

- DISCLAIMER:** Commissioner's directives are intended to provide nontechnical assistance to the general public. Every attempt is made to provide information that is consistent with the appropriate statutes, rules, and court decisions. Any information that is not consistent with the law, regulations, or court decisions is not binding on either the Department or the taxpayer. Therefore, the information provided herein should serve only as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein.
- SUBJECT:** The Taxability of Products Transferred Electronically
- REFERENCES:** IC 6-2.5-1-11.3; IC 6-2.5-1-16.2; IC 6-2.5-1-16.3; IC 6-2.5-1-16.4; IC 6-2.5-1-24; IC 6-2.5-1-26.5; IC 6-2.5-1-27.5; IC 6-2.5-1-28.5; IC 6-2.5-2-1; IC 6-2.5-2-2; IC 6-2.5-4-1; IC 6-2.5-4-16.4; *Streamlined Sales and Use Tax Agreement (Sept. 20, 2009)*
- EFFECTIVE:** Upon Publication

INTRODUCTION

Prior to the publication of this document, the Department imposed sales and use tax on products transferred electronically based on whether the products were taxable in their tangible forms. However, to achieve compliance with the Streamlined Sales and Use Tax Agreement on a going-forward basis, the Department may impose sales and use tax on products transferred electronically only if the products meet the definition of specified digital products, prewritten computer software, or telecommunication services.

APPLICATION OF NEW POLICY

Pursuant to IC 6-2.5-2-1(a) and IC 6-2.5-2-2(a), sales tax is imposed on retail transactions made in Indiana. Except for certain enumerated services, sales of services generally are not retail transactions and are not subject to sales or use tax. A retail transaction is defined in IC 6-2.5-4-1(b) as the transfer, in the ordinary course of business, of tangible personal property for consideration.

Also included in the definition of a retail transaction are specified digital products. IC 6-2.5-4-16.4(b) provides:

- A person is a retail merchant making a retail transaction when the person:
- (1) electronically transfers specified digital products to an end user; and
 - (2) grants to the end user the right of permanent use of the specified digital products that is not conditioned upon continued payment by the purchaser.

Specified digital products, as defined by IC 6-2.5-1-26.5, IC 6-2.5-1-16.2, IC 6-2.5-1-16.3, and IC 6-2.5-1-16.4, currently includes only *digital audio works* (e.g., songs, spoken word recordings, and ringtones), *digital audiovisual works* (e.g., movies), and *digital books*. Pursuant to IC 6-2.5-4-16.4(b), Indiana imposes sales and use tax only on specified digital products that are transferred electronically along with the right of permanent use that is not conditioned on continued payment by the purchaser. Products transferred electronically are defined in IC 6-2.5-1-28.5 to mean products that are “obtained by a purchaser by means other than tangible storage media.”

Pursuant to Section 333 (“Use of Specified Digital Products,” effective Jan. 1, 2010) of the Streamlined Sales and Use Tax Agreement (“SSUTA,” effective Sept. 20, 2009), of which Indiana is a signatory, “A member state shall not include any product transferred electronically in its definition of ‘tangible personal property.’” Pursuant to the same section of the SSUTA, “ancillary services,” “computer software,” and “telecommunication services” are excluded from the term “products transferred electronically.” However, IC 6-2.5-1-27.5(c)(8) explicitly excludes ancillary services from the definition of telecommunication services, which are taxable under IC 6-2.5-4-6. Accordingly, ancillary services are not subject to sales tax in Indiana.

Based on the above authority, Indiana may no longer impose sales tax on a product transferred electronically by basing the product’s taxability on inclusion of the product in the definition of tangible personal property. It is important to note that “computer software” and “telecommunication services” are not restricted by the phrase “product transferred electronically.”

Effective upon the publication of this document, the Department will impose sales and use tax on products transferred electronically only if the products meet the definition of specified digital products, prewritten computer software, or telecommunication services. Note: this document has no retroactive application. A claim for refund based on this document for a transaction subjected to tax prior to the publishing of this document will be denied.

A handwritten signature in black ink that reads "John Eckart". The signature is written in a cursive, flowing style with a large loop at the beginning of the word "John".

John Eckart
Commissioner