



Feb. 23, 2022

The Honorable Vanessa E. Atterbeary, Chair
Ways and Means Committee
House Office Building
Annapolis, Md. 21401

Re: HB 791, “Sales and Use Tax – Digital Product – Definition”
Favorable

Dear Chairman Atterbeary and members of the Committee,

The Maryland Association of Certified Public Accountants (MACPA), founded in 1901, has nearly 9,000 members who work in public accounting, industry, government and education. Our members serve thousands of individual and business clients throughout the state.

The MACPA and our members wholeheartedly support HB 791. The Bill provides needed and helpful clarifications to the definition of “digital product” for determining what items are subject to Maryland’s sales tax, or not.

Members of the MACPA were part of a group of approximately three dozen tax professionals -- business tax directors, tax attorneys and CPAs -- who worked together on sharing information as we all attempted to implement Maryland’s new sales tax on digital products that was enacted in the 2021 General Assembly session. Our group also shared information and suggestions for topics to be addressed by the Comptroller’s Office in their Tax Tip #29 for providing guidance to the public on the new provisions of Maryland tax law.

HB 791 addresses two categories of items that have resulted in many questions and much controversy in the law’s application as discussed in the aforementioned group, by clarifying that the two items are outside of the definition of taxable digital products. The Bill picks up where amendments in 2021 left off by adding clarifying language for the two items: 1) enterprise software used by a business or other organization, and 2) self-created marketing materials.

The Bill should be scored as “revenue neutral” because its provisions are simply clarifications of the definitions of items that the legislature intended are not subject to sales tax, as evidenced in the proceedings for last year’s Bills.

Enterprise software is software that is used to satisfy the needs of an entire organization rather than individual users; they are software programs that collectively form the computer-based information system that serves the organization as a whole (businesses, schools, governments, etc.), and as such the enterprise software must be installed and used in such a way as to work

with all of the components of the organization's information system. This is what differentiates it from the downloaded software that is the equivalent of what a user would formerly have purchased on a disc for installation on his/her computer from the disc. The current statute wording such as "requiring significant creative input to customize, configure, or modify the procedures and programs" has created much conflict through differing interpretations, resulting in compliance burdens for the sellers and purchasers trying to come to agreement on what is taxable. Enterprise software was intended not to be subject to tax, per the record for last year's enacted legislation; however, because the phrase is not included in the statutory language, HB791 clarifies that intent by adding the phraseology. The downloaded software that is the equivalent of the prior tangible disc version and is not enterprise software remains subject to the sales tax, the same as the tangible disc would have been taxed when purchased.

Digital products used solely for commercial purposes including advertising or other marketing activities are also addressed in HB791 as being outside the definition of taxable products. These are digital items that a commercial entity has commissioned to be created for use in their own, or their related entities', commercial activities such as advertising, marketing, and e-commerce, and that the entity ends up owning a property interest in the digital product (through copyright, etc.). The digital products are not sold to the general public or end users. They are therefore distinguishable from digital stock photos, digital videos, digital music, and other publicly available digital products that are sold to end users, whether purchased by businesses or individuals; these digital items remain subject to the sales tax.

The passage of HB791 will provide much clarity for the sellers and purchasers of these items, as well, we believe, for the Comptroller's Office, in administration of the sales tax on digital products. The clarity will prevent more of the additional time and stress that has been expended in discussing various parties' differing interpretations of the law's provisions, which to CPAs is a very good thing.

We appreciate your consideration and request a favorable report for HB791.

Should you have any questions, please contact Mary Beth Halpern at the MACPA at marybeth@macpa.org or 443-632-2330.

Sincerely,

MACPA State Tax Committee

cc: Nick Manis, Manis Canning & Associates