

Sales tax on prewritten software

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Current Vermont Law

Vermont sales tax applies to the retail sale of tangible personal property, unless an exemption applies. 32 V.S.A. § 9771(1).

- Tangible personal property includes prewritten software:
 - “Tangible personal property” means personal property which may be seen, weighed, measured, felt, touched, or in any other manner perceived by the senses. “Tangible personal property” includes electricity, water, gas, steam, and prewritten computer software. 32 V.S.A. § 9701(7).
- Unlike tangible personal property, charges for a service are generally not taxable, unless specifically enumerated. 32 V.S.A. § 9771.

What are we talking about

Prewritten computer software

Purchased on storage media in Vermont = taxable

Downloaded to a computer in Vermont = taxable

Accessed remotely via the internet = not taxable

How did Vermont get here?

Streamlined Sales and Use Tax Agreement (SSUTA)

- The SSUTA has definitions for “tangible personal property,” “prewritten software,” “delivered electronically,” and “load and leave.”
- The SSUTA allows states to exempt prewritten software “delivered electronically” or by “load and leave.”
- Vermont regulations currently include these SSUTA definitions and a number of other related definitions.

Vermont Sales Tax Regulations

“Prewritten computer software” means computer software, including prewritten upgrades, which is not designed and developed by the author or other creator to the specifications of a specific purchaser. The combining of two or more prewritten computer software programs or prewritten portions thereof does not cause the combination to be other than prewritten computer software. Prewritten computer software includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than the specific purchaser. Where a person modifies or enhances computer software of which the person is not the author or creator, the person shall be deemed to be the author or creator only of such person’s modifications or enhancements. Prewritten computer software or a prewritten portion thereof that is modified or enhanced to any degree, where such modification or enhancement is designed and developed to the specifications of a specific purchaser, remains prewritten computer software; provided, however, that where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for such modification or enhancement, such modification or enhancement shall not constitute prewritten computer software. Vt. Reg. § 1.9701(7)-2.

Legislative context

- 2010: Dept. of Taxes issued a technical bulletin interpreting the law as imposing sales tax on prewritten software regardless of how accessed.
- 2012, Act 143, Sec. 52
 - Imposed moratorium on sales tax on prewritten software accessed remotely until July 1, 2013, and
 - allowed refunds of tax paid from Jan. 1, 2007-July 1, 2013.
- 2013-2014: Dept. issued guidance outlining taxation/exemption of remotely accessed prewritten software, then circulated draft regulations for comment.
- 2015: Act 51 created a session law exemption for prewritten computer software accessed remotely.
- 2019: Act 71 required Dept. to do outreach and education for tech sector on industry responsibilities under current law and under a possible repeal of the exemption.

Other states

18 States + D.C. Tax	27 States Exempt	5 States ≠ Sales Tax
1 Arizona	Alabama**	Alaska
2 Connecticut	Arkansas	Delaware
3 Hawaii*	California	Montana
4 Iowa	Colorado	New Hampshire
5 Mississippi	Florida	Oregon
6 Massachusetts	Georgia	
7 New Mexico	Idaho	
8 New York & NYC	Illinois	
9 Ohio	Indiana**	
10 Pennsylvania	Kansas	
11 Rhode Island**	Kentucky*	
12 South Carolina	Louisiana	
13 South Dakota	Maine*	
14 Tennessee	Maryland*	
15 Texas	Michigan	
16 Utah	Minnesota	
17 Washington	Missouri	
18 Washington DC	Nebraska	
19 West Virginia*	Nevada*	
20	New Jersey	
21	North Carolina	
22	North Dakota	
23	Oklahoma**	
24	Vermont	
25	Virginia	
26	Wisconsin	
27	Wyoming	

Bold = SSUTA full member states

*Little or no guidance

**Recent changes:

Alabama: Ex parte Russell Cty. Cmty. Hosp., LLC, No. 1180204, 2019 WL 2150922 (Ala. May 17, 2019) (holding that all software, including custom software created for a particular user, is taxable tangible personal property. However, nontaxable services that can accompany the conveyance of software include "determining a particular software user's needs, designing and programming new software for a particular user, modifying or configuring existing software programs to meet a particular user's needs, installing software, and training users to operate software. If the costs of such services are separately stated and invoiced, they are nontaxable. Charges for the software itself trigger the imposition of sales tax at the time the sale closes and the software is transferred to the purchaser.").

Indiana: eff. July 1, 2018, transactions involving the remote access of prewritten software over the internet, private or public networks, or through wireless media, are not considered to be "delivered electronically," and do not constitute a retail transaction. I.C. § 6-2.5-4-16.7, as added by 2018 Ind. S.B. 257, eff. July 1, 2018; Indiana Tax Information Sales Tax Bulletin 8; Indiana Department of Revenue, New Laws in Effect from 2018 Session; Indiana Commissioner's Directive 41.

Rhode Island: eff. Oct. 1, 2018, vendor-hosted prewritten computer software is subject to Rhode Island's sales tax. Rhode Island considers sales of such software to be SaaS transactions. R.I. Gen. Laws § 44-18-7(15), as added by 2018 R.I. H. 7200, eff. July 1, 2018; Rhode Island Advisory 2018-38 (Sept. 4, 2018); Rhode Island Tax News First Quarter 2019; see Rhode Island Dept. of Rev., Summary of Legislative Changes (July 12, 2018).

Other terms

“Software as a Service” (“SaaS”), “Infrastructure as a Service”(“IaaS”), and “Platform as a Service”(“PaaS”)

- These terms are not uniformly defined in law (or in the computing industry):
 - SaaS is a service provider hosting software applications over the internet for a customer.
 - IaaS is a service provider owning, maintaining, operating, and housing equipment (such as hardware, servers, network components, etc.) used to support a customer's operations, which the customer accesses via the internet in order to use the equipment.
 - PaaS is a service containing elements of both IaaS and SaaS.
- All are currently treated as tax exempt in Vermont.

What happens if exemption is repealed?

What is Taxable and Nontaxable?

Product	Taxable	Nontaxable
Custom software written exclusively for the customer's business		✓
Prewritten software on tangible storage media	✓	
Prewritten software downloaded from the internet	✓	
Prewritten software accessed remotely on the internet or SaaS	✓	✓
Infrastructure as a Service (IaaS)		✓
Platform as a Service (PaaS)		✓
Development and technical support services		✓
Digital photographs		✓
Digital audio-visual works	✓	
Digital audio works	✓	
Digital books	✓	
Ringtones	✓	

What happens if exemption is repealed?

Software as a Service becomes taxable and subject to the 6% sales tax

- Example: TurboTax over the internet
 - Generally, any “canned” software that can be accessed over the cloud becomes taxable

What stays non-taxable?

- **Infrastructure as a Service:** access to computer infrastructure where the customer does not own the infrastructure, or pays an IT contractor to operate it
 - Example: Amazon Cloud Services
- **Platform as a Service:** service that gives consumer hardware or software tools that consumers can use to develop, run, or manage own software.
 - Example: Squarespace website design

Fiscal Impact

H.954 as amended by HWM has effective date of January 1, 2021

- \$2.7 million in FY21 (half year collections)
- \$7.6 million in FY22, growing to \$9.5 million in FY24

Strong growth in this industry

- Estimate from May 2019 was \$5 million
- Based upon national data on software sales to consumers and businesses from the Bureau of Economic Analysis
 - Estimated total sales of U.S. prepackaged software: \$266 billion
 - Up from \$235 billion in 2017
- Assumes that 30% of all software purchased by businesses and consumers is accessed remotely
 - US cloud service revenue: at least \$50 billion and growing fast (Gartner Consulting)

Assumes a modest downward adjustment for compliance ramp up in first year.