

**OHIO ISSUES GUIDANCE ON TAXABILITY OF EIS,
ADP AND EPS DUE TO ITFA GRANDFATHERING
ELIMINATION**

JUNE 11, 2020



RICHARD C. FARRIN, JD
MEMBER



JOHN R. TRIPPIER, CPA
DIRECTOR, MULTISTATE TAXES
(NON-ATTORNEY PROFESSIONAL)

On June 8, 2020, the Ohio Department of Taxation issued Sales Tax Information Release ST 2020-01: Internet Tax Freedom Act Summary – June 2020, which provides the Department’s interpretation of the impact the elimination of the “grandfathering clause” of the Internet Tax Freedom Act (ITFA) will have on the taxability of electronic information services (EIS), automatic data processing (ADP), and electronic publishing services (EPS)¹.

ITFA Background

ITFA, P.L. 105-277, was enacted in 1998 and implemented a three-year moratorium preventing state and local governments from taxing Internet access or imposing multiple or discriminatory taxes on electronic commerce. ITFA also included a grandfather clause that allowed certain states which had already imposed and collected a tax on Internet access before October 1, 1998, to continue implementing those taxes. The moratorium was extended eight times before being made permanent with P.L. 114-125 (enacted 2/24/2016). The grandfathering clause is set to expire effective 7/1/2020. As a result, the states that have been grandfathered since 1998 will no longer be able to tax “Internet access service.” The states in question are Hawaii, New Mexico, North Dakota, Ohio, South Dakota, Texas, and Wisconsin.

¹ EIS, ADP, and EPS are only taxable for business use. Non-business use of EIS, ADP, and EPS is not subject to sales tax.

Ohio's Guidance

Based on ST 2020-01, the Department believes the elimination of the grandfathering clause will have a limited impact on the current taxable services (EIS, ADP, and EPS). ST 2020-01 relies on its interpretation that the definition of "Internet access" as provided by ITFA only covers a service that enables users to connect to the Internet to access (1) content, (2) information, or (3) other services offered over the Internet (see Section 1105(5)(A) of ITFA).

At issue is whether the services currently taxed as EIS, ADP, and EPS meet the definition of Internet access services provided in ITFA. The Department believes that Internet Access Providers (IAP) that provide business customers with access to the Internet will no longer be providing taxable EIS as it relates to the Internet access effective 7/1/2020.

Additionally, On-line Service Providers (OSP) that provide access to the Internet along with other certain proprietary services that are incidental to the provision of the Internet access are providing a nontaxable service effective 7/1/2020. The Department requires an analysis to determine if the other proprietary services are, in fact, incidental to the Internet access service. OSPs that provide certain proprietary services but not Internet access will need to determine whether taxing the activity would result in a multiple or discriminatory tax on electronic commerce.

ST 2020-01 also notes that services sold over the Internet (i.e., electronic commerce) are subject to the prohibition against multiple or discriminatory taxes and such prohibition will need to be addressed on a case by case basis.

ZHF Considerations - Definition of Internet Access v. EIS, ADP, or EPS

Taking a deeper look into ITFA's definitions of "Internet access" or "Internet access service", some of the services (other than just Internet access) being taxed as EIS, ADP, or EPS may also be prohibited from being taxed. ITFA's definition includes a service that enables users to connect to the Internet to access content (public or proprietary), information, electronic mail, electronic storage capacity or other services offered over the Internet. Based on the Department's rule (Ohio Administrative Code 5703-9-46) and Information Release ST 1999-04 (Updated September 2016), some of the items defined as Internet access are being taxed as EIS, ADP, or EPS.

ZHF Considerations – Discriminatory Taxes

Businesses should consider that electronic commerce (which means any transaction conducted over the Internet or through Internet access, comprising the sale, lease, license, offer, or delivery of property, goods, services, or information, whether or not for consideration, and includes the provision of Internet access) cannot be taxed if a state does not tax transactions involving similar property, goods, services, or information accomplished through other means (see Section 1105(2)(A) of ITFA). "Through other means" is not defined in ITFA

and appears to be a very broad concept. The discriminatory prohibition is not tied to or has nothing to do with grandfathering clause in Section 1104 of ITFA and is not tied to the definition of Internet access.

As a result, businesses may be able to argue that taxing certain types of EIS, ADP, or EPS is prohibited because the tax is discriminatory against electronic commerce.

If you would like to discuss ST 2020-01, ITFA or any other state and local tax matter, please contact John Trippier, Rich Farrin or any other ZHF professional.

ZAINO HALL & FARRIN LLC

ATTORNEYS AT LAW

WWW.ZHFTAXLAW.COM

614-326-1120

855-770-1120 (toll-free)

RON AMSTUTZ

(non-attorney professional)
614-782-1545(Direct)
330-347-3533 (Mobile)
ronamstutz@zhfconsulting.com

DAN DODD

614-782-1554 (Direct)
740-973-5930 (Mobile)
dandodd@zhfconsulting.com

STEPHEN K. HALL

614-349-4812 (Direct)
614-284-1253 (Mobile)
shall@zhftaxlaw.com

PHILLIP L. LAWLESS

(non-attorney professional)
614-349-4821 (Direct)
614-565-6098 (Mobile)
plawless@zhftaxlaw.com

BRAD W. TOMLINSON

(non-attorney professional)
614-349-4818 (Direct)
btomlinson@zhftaxlaw.com

JENNIFER R. TURNER

(non-attorney professional)
614-782-1642 (Direct)
502-594-9297 (Mobile)
jturner@zhftaxlaw.com

THOMAS M. ZAINO

614-349-4810 (Direct)
614-598-1596 (Mobile)
tzaino@zhftaxlaw.com

RICHARD S. BITONTE

(non-attorney professional)
614-782-1555 (Direct)
rbitonte@zhfconsulting.com

RICHARD C. FARRIN

614-349-4811 (Direct)
614-634-3130 (Mobile)
rfarrin@zhftaxlaw.com

DEREK K. HEYMAN

614-349-4814 (Direct)
(614) 353-0878 (Mobile)
dheyman@zhftaxlaw.com

DEBORA D. MCGRAW

614-349-4813 (Direct)
614-595-5560 (Mobile)
dmcgraw@zhftaxlaw.com

JOHN R. TRIPPIER

(non-attorney professional)
614-349-4815 (Direct)
614-203-4173 (Mobile)
jtrippier@zhftaxlaw.com

JASON W. WALKER

(non-attorney professional)
614-349-4817 (Direct)
916-533-1626 (Mobile)
jwalker@zhftaxlaw.com