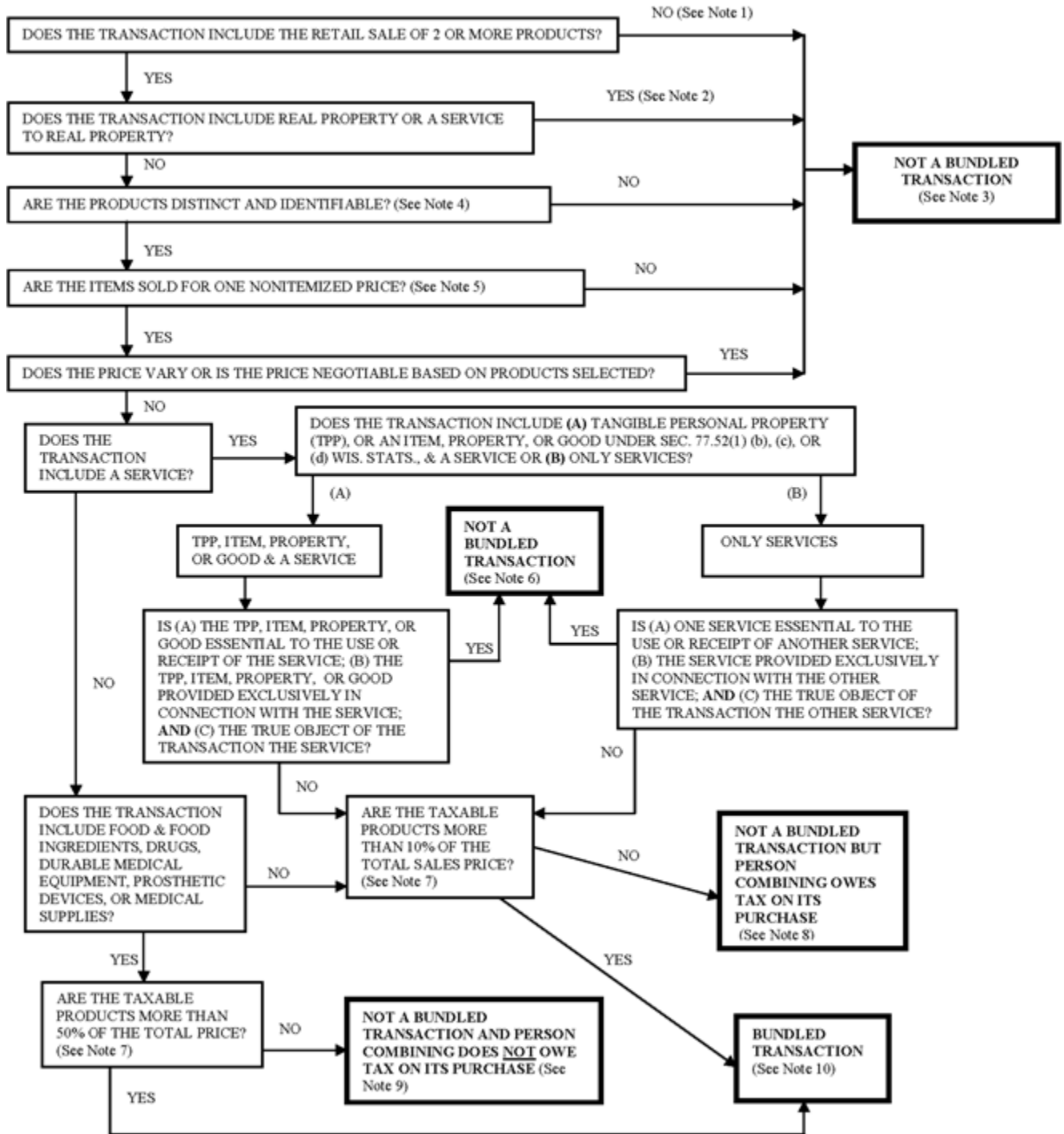


# MTC Project on Taxing Digital Products

## Study Group Bundling Exercise – Streamlined Rules

### BUNDLED TRANSACTION FLOWCHART<sup>1</sup>

TO DETERMINE IF THE RETAIL SALE OF 2 OR MORE PRODUCTS IS A BUNDLED TRANSACTION



<sup>1</sup> Wisconsin Sales and Use Tax Information, Publication 201, Appendix H, Wisconsin Department of Revenue, January 2019.

## NOTES TO BUNDLED TRANSACTION FLOWCHART

1. If a transaction does not contain the retail sale of 2 or more products, the transaction is not a bundled transaction and the tax treatment of the transaction follows the tax treatment of the individual product being sold.  
"Retail Sale" means any sale, license, lease or rental for any purpose other than resale, sublease, or subrent, regardless of whether the product sold is taxable or nontaxable.  
"Product" includes tangible personal property, and items, property, and goods under sec. 77.52(1) (b), (c), and (d), Wis. Stats., and services.
2. A transaction that includes real property or services to real property is specifically excluded from the definition of a bundled transaction. See secs. Tax 11.67 and 11.68, Wis. Adm. Code, to determine the tax treatment of these transactions.
3. The tax treatment of the transaction follows the tax treatment of the individual product(s) being sold.
4. "Distinct and identifiable product" does not include (a) packaging, including containers, boxes, sacks, bags, bottles, and envelopes and other materials, including wrapping, labels, tags and instructional guides that accompany and are incidental or immaterial to the retail sale of any product, and (b) a product that is provided free of charge to the consumer in conjunction with the required purchase of another product if the sales price does not vary depending on whether the product provided free of charge is included in the transaction. (Note: If a transaction is not a bundled transaction because one product is provided free of charge with the required purchase of another product, the person providing the free product is the consumer of the free product and is required to pay the applicable Wisconsin sales or use tax on his or her purchase price of that product.)
5. "One nonitemized price" does not include a price that is separately identified by product on a binding sales document or other sales-related document that is made available to the customer in paper or electronic form, including an invoice, a bill of sale, a receipt, a contract, a service agreement, a lease agreement, a periodic notice of rates and services, a rate card or a price list. (**Note:** If the products are not sold for one nonitemized price, the transaction is not a bundled transaction and the tax treatment of the price associated with each of the products follows the tax treatment of each individual product being sold.)
6. The tax treatment of the transaction depends on the service being provided. However, in either case, the service provider is the consumer of the tangible personal property, items, property, or good under sec. 77.52 (1) (b), (c), or (d), Wis. Stats., or other service provided that is not the true objective of the transaction and is required to pay the applicable Wisconsin sales or use tax on his or her purchase price of that property, item, good, or service.
7. The percentage of taxable items included in a transaction is computed by the seller using either the seller's purchase price or sales price, but not a combination of both, or, in the case of a service contract, the full term of the service contract.
8. The transaction is not subject to Wisconsin sales or use tax per sec. 77.54 (51), Wis. Stats. However, the first person combining the products is required to pay the applicable Wisconsin sales or use tax on his or her purchase price of the taxable products included in the transaction.
9. The transaction is not subject to Wisconsin sales or use tax per sec. 77.54 (52), Wis. Stats., and the first person combining the products is NOT required to pay Wisconsin sales or use tax on his or her purchase price of the taxable products included in the transaction.
10. The entire sales price is subject to Wisconsin sales or use tax. Exception: If the retailer can identify, by reasonable and verifiable standards from its books and records that are kept in the ordinary course of its business, the portion of the sales price that is attributable to products that are not subject to Wisconsin sales or use tax, the retailer may, at its option, not charge Wisconsin sales or use tax on that portion of the transaction. However, the retailer does not have this option if the transaction contains food and food ingredients, drugs, durable medical equipment, mobility-enhancing equipment, prosthetic devices, or medical supplies.

## **Essential Streamlined Rules**

This section contains excerpts from the Streamlined Agreement and administrative rules on bundling that are essential to the example here. The full Streamlined Agreement and the current administrative rules are on the Streamlined website, here: [Streamlined Library](#).

### **Streamlined Agreement – Appendix C – Library of Definitions – Part I (definition of “bundled transaction”)**

A “bundled transaction” is the retail sale of two or more products, except real property and services to real property, where (1) the products are otherwise distinct and identifiable, and (2) the products are sold for one non-itemized price. A “bundled transaction” does not include the sale of any products in which the “sales price” varies, or is negotiable, based on the selection by the purchaser of the products included in the transaction.

(A) “Distinct and identifiable products” does not include:

1. Packaging – such as . . .
2. A product provided free of charge with the required purchase of another product. A product is “provided free of charge” if the “sales price” of the product purchased does not vary depending on the inclusion of the product “provided free of charge.”
3. Items included in the member state’s definition of “sales price,” pursuant to Appendix C of the Agreement. [NOTE: “Sales price” has a lengthy definition under the Streamlined Agreement and includes such things as delivery and installation and also provides for variation under state law.]

(B) The term “one non-itemized price” does not include a price that is separately identified by product on binding sales or other supporting sales-related documentation made available to the customer in paper or electronic form including, but not limited to an invoice, bill of sale, receipt, contract, service agreement, lease agreement, periodic notice of rates and services, rate card, or price list.

(C) A transaction that otherwise meets the definition of a “bundled transaction” as defined above, is not a “bundled transaction” if it is:

- (1) The “retail sale” of tangible personal property and a service where the tangible personal property is essential to the use of the service, and is provided exclusively in connection with the service, and the true object of the transaction is the service; or
- (2) The “retail sale” of services where one service is provided that is essential to the use or receipt of a second service and the first service is provided exclusively in connection with the second service and the true object of the transaction is the second service; or
- (3) A transaction that includes taxable products and nontaxable products and the “purchase price” or “sales price” of the taxable products is de minimis.
  - (a) De minimis means the seller’s “purchase price” or “sales price” of the taxable products is ten percent (10%) or less of the total “purchase price” or “sales price” of the bundled products.
  - (b) Sellers shall use either the “purchase price” or the “sales price” of the products to determine if the taxable products are de minimis. Sellers may not use a combination of the “purchase price” and “sales price” of the products to determine if the taxable products are de minimis.
  - (c) Sellers shall use the full term of a service contract to determine if the taxable products are de minimis; or
- (4) . . . [Note: This subsection provides special rules for food and certain medical products.]

## Streamlined Agreement Section 330: Bundled Transactions

- A. . . . [Requires the use of the definition of “bundled transaction” above.]
- B. . . . states are not restricted in their tax treatment of bundled transactions except as otherwise provided in the Agreement. . . .
- C. In the case of a bundled transaction that includes any of the following: telecommunication service, ancillary service, internet access, or audio or video programming service<sup>2</sup>:
  - 1. If the price is attributable to products that are taxable and products that are nontaxable, the portion of the price attributable to the nontaxable products may be subject to tax unless the provider can identify by reasonable and verifiable standards such portion from its books and records that are kept in the regular course of business for other purposes, including, but not limited to, non-tax purposes.
  - 2. If the price is attributable to products that are subject to tax at different tax rates, the total price may be treated as attributable to the products subject to tax at the highest tax rate unless . . . .
  - 3. The provisions of this section shall apply unless otherwise provided by federal law.
- D. In the case of a transaction that includes an “optional computer software maintenance contract” for prewritten computer software and the state otherwise has not specifically imposed tax on the retail sale of computer software maintenance contracts, the following provisions apply . . . . [NOTE: the example in this exercise does not include a software maintenance contract so the provisions in this section have been omitted, but note that the agreement addresses these types of maintenance contracts in some detail.]

## Streamlined Rules Section 330.1: Definition of a Bundled Transaction

- A. **Application and Severability of the Definition.** Member states shall adopt and use all parts of the definition of a “bundled transaction” to determine whether a transaction is a bundled transaction and none of the definition’s parts shall be severable when making such a determination. Except as provided in this rule, a transaction that does not comply with any single part of the definition shall not be a bundled transaction.
- B. **Types of Products Included in a Bundled Transaction.** For purposes of the definition of bundled transaction, “products” shall include all types of products except real property and services to real property. Types of products include: tangible personal property, services, intangibles, digital goods, and products that a member state has directly imposed tax on the retail sale thereof but the imposition of tax on the retail sale of such products may not itself be considered tangible personal property, services, or digital goods. Member states may continue current sales and use tax treatment for transactions that include real property or services to real property. . . .
  - 1. **Distinct and Identifiable Products.** A bundled transaction is a retail sale of two or more products that are “distinct and identifiable.” Packaging that accompanies the retail sale of a product, products provided free of charge and items included in a member state’s definition of “sales price” and “purchase price” are not distinct and identifiable products.
    - a. Packaging is not a separate and distinct product . . . .
    - b. A product provided free of charge is not a separate and distinct product. A product shall be considered to be provided free of charge in a retail sale if, in order to obtain the product, the purchaser is required to make a purchase of one or more other products and the price of the purchased products does not change based on the seller providing a product free of charge. Such products provided free of charge with the necessary purchase of another product (e.g. a free car wash with the purchase of gas or free dinnerware with the purchase of groceries) shall be

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<sup>2</sup> These terms are defined in the Streamlined Agreement.

considered “promotional products” . . . [Note: The rule here goes on to describe how states may treat promotional products.]

- c. A retail sale is not considered to be for “two or more distinct and identifiable products” if the items are included in a member state’s definition of “sales price” and “purchase price.” For example, if a member state includes delivery charges, whether separately itemized or not, in its definition of sales price, the retail sale of a product and the delivery of that product for a single price shall not be considered a bundled transaction because the delivery charges are included in the sales price of the product under the definition of “sales price” adopted by the member state.
2. **One Non-itemized Price.** The sales price or purchase price of a bundled transaction is for one non-itemized price. If a retail sale of two or more products is not made for “one nonitemized price,” then the retail sale is not a “bundled transaction.” A transaction shall not be considered to be a bundled transaction if, by negotiation or otherwise, the sales price varies with the purchaser’s selection of the distinct and identifiable products being sold. A retail sale shall not be considered made for one non-itemized price if the purchaser has the option of declining to purchase any of the products being sold and, as a result of the purchaser’s selection of products, the sales price varies or a different price is negotiated.
  - a. A retail sale shall not be considered a bundled transaction if the price is separately identified by product on binding sales documents or other supporting sales-related documentation made available to the purchaser because the sale is not being made for “one non-itemized price.” The sales-related documents made available to a purchaser in paper or electronic form shall provide enough information for the purchaser to determine the price of taxable and exempt products.
  - b. A transaction shall not be considered a bundled transaction if a seller bills or invoices one price for the sale of distinct and separate products but the price invoiced is equal to the total of the individually priced or itemized products contained in supporting sales related documentation, such as a catalog, price list, or service agreement.
  - c. If the seller bills or invoices one price for a transaction that includes a bundle of products and also includes one or more additional products that are individually priced or itemized in a catalog or price list, the additional products individually priced or itemized shall not be considered to be a part of the bundled products sold for one non-itemized price.
  - d. If a transaction does not qualify as a bundled transaction because of the provisions in this subsection, the transaction shall not be considered a bundled transaction as a result of the seller offering a subsequent discount of the total sales price without itemizing the amount of the discount for each product. In such a situation, if there is no sales-related documentation showing the allocation of the discount, the discount shall be considered to be allocated pro rata among the otherwise separately itemized products.
3. **Records Required to be Maintained by the Seller.** . . . [Note: This rule requires the seller to maintain necessary reliable records.]
4. **Exclusions of Transactions that Otherwise Would Qualify as Bundled Transactions.** Part C of the definition of a “bundled transaction” contains exclusions for transactions that would otherwise qualify as bundled transactions. For transactions that include tangible personal property and a service, or multiple services, sellers may utilize Part C-1 and C-2 of the definition or Part C-3 of the definition to determine if the transaction qualifies as a bundled transaction. Part C-1 does not apply to transactions that include only tangible personal property. Part C-3 may be applied to transactions that include all types of products to determine whether the transaction qualifies as a bundled transaction. Part C-4 does not apply to transactions that include products that are not tangible personal property.
5. **True Object Part C-1 and C-2.** “True object,” as the term is used in Part C-1 or C-2 of the definition, shall mean the main product or item in the transaction. If as a result of applying

Part C-1 or C-2 a transaction is not a bundled transaction, then the transaction shall be considered a retail sale of the service that is the object of the transaction.

- a. Parts C-1 and C-2 of the definition of a bundled transaction are subjective in nature and shall be applied on a case-by-case basis to the particular facts involved in each situation. Examples, not intended to be all inclusive, of factors that might be considered are as follows:

- The business in which the seller is engaged.
- The purchaser's object in engaging in the transaction.

...

- c. A member state shall not limit the application of the true object test under Part C-1 and C-2 of the definition by using any of the following methods:

- i. Placing a cap on the price of the transactions to which the test would apply.
- ii. Using thresholds for the purpose of taxing a portion of the sales price of a transaction in which taxable products are determined to not be the true object of the transaction.
- iii. Taxing the total sales price or total purchase price of a transaction that includes both taxable products and non-taxable products and the taxable products are determined to not be the true object of the transaction.
- iv. Requiring sellers to separately price or itemize on a purchaser's invoice the taxable products that are not the true object from the non-taxable products included in the transaction for purposes of subjecting the sales price of the taxable products to tax.

6. **De minimis Test Part C-3.** A seller may use the sales price or the purchase price of each product in the transaction to measure or quantify whether the taxable products are de minimis under Part C-3. A seller shall not use the sales price for some products in the transaction and the purchase price for other products in the transaction to measure or quantify whether the taxable products in the transaction are de minimis.

- a. If services have been sold under a service contract, the full contract price for the services shall be used to determine whether products in the transaction are de minimis regardless of the time period covered by the service contract. For the purpose of determining whether services in the transaction are de minimis, the price of the services shall not be prorated based on the term of the service contract.

- b. b. When the taxable products in a transaction are determined to be de minimis, the transaction is not a "bundled transaction."

- c. c. A member state shall not limit the application of the de minimis test under Part C-3 of the definition by using any of the following methods:

- i. Placing a cap on the price of the transactions to which the test would apply.
- ii. Using thresholds for the purpose of taxing a portion of the sales price of a transaction in which taxable products are determined de minimis.
- iii. Taxing the total sales price or total purchase price of a transaction that includes both taxable products and non-taxable products and the taxable products in the transaction are de minimis.

7. **Primary Test Part C-4.** A seller may use the sales price or the purchase price of each product in the transaction to measure or quantify whether the taxable products in the transaction are the primary products (more than 50% of the total sales price or purchase price) under Part

C4. A seller shall not use the sales price for some of the products in the transaction and the purchase price for other products in the transaction to measure or quantify whether the taxable products in the transaction are the primary products.

- a. Part C-4 may be applied only to transactions that contain multiple products that are only tangible personal property and at least one product is: food and food ingredients including soft drinks, candy, and dietary supplements; drugs including over-the-counter and grooming and hygiene products; durable medical equipment; mobility enhancing equipment; prosthetic devices, all of which are defined in the Agreement; and medical supplies. The term “medical supplies” is not a defined term under the Agreement. Member states may define “medical supplies” according to its state laws for purposes of applying Part C-4.
- b. When the taxable products in the transaction are not the primary products (more than 50%) under Part C-4, then the transaction is not a bundled transaction.
- c. A member state shall not limit the application of the primary products (more than 50%) test under Part C-4 by using any of the following methods:
  - i. Placing a cap on the price of the transactions to which the test would apply.
  - ii. Using thresholds for the purpose of taxing a portion of the sales price of a transaction in which exempt products are determined to be the primary products (more than 50%) of the transaction.
  - iii. Taxing the total sales price or total purchase price of a transaction that includes only tangible personal property and at least one of the products is a product specified in Part C-4(a) and the taxable products are not the primary products (more than 50%) in the transaction.
  - iv. Requiring sellers to separately price or itemize on a purchaser’s invoice the taxable products that are not the primary products (more than 50%) of the retail sale under Part C-4 for purposes of subjecting the otherwise taxable products to tax.

**Streamlined Rules section 330.2: How to use the bundled transaction definition** [Note: This rule is omitted for the purpose of this example.]

**Streamlined Rules section 330.3: Allocations with respect to Prewritten Computer Software Maintenance Contracts** [Note: This rule is omitted for the purpose of this example.]