

- For Information
- For Discussion
- For Decision Making

BOARD OF GOVERNANCE
INFORMAL ISSUE PAPER

Streamlined Sales and Use Tax Agreement (SSUTA)

Proposal 14 – Motion to Amend Draft Definition of a Bundled Transaction

I. Issue

Should the Board of Governance grant authority to its representative to vote on the motion to amend the Streamlined Sales Tax Project’s (SSTP) draft definition of a “bundled transaction,” as proposed by Mr. Stephen Kranz of Washington D. C.?

Should the Board of Governance vote to amend the SSTP draft definition of a bundled transaction? The proposed amendment deletes the third paragraph from Section (A), adds a new paragraph to Section (C), and adds Section (D). Section (A) identifies products that are not considered “distinct and identifiable.” Section (C) identifies the types of transactions not considered bundled and adds a paragraph to include bundled sales of taxable and nontaxable tangible personal property, under certain circumstances, as excluded transactions. Section (D) provides a “books and records” provision for bundled sales that include any of the following: telecommunications services, ancillary services, internet access, or video programming. (Exhibit 1 provides the language of the draft definition, including the proposed revision. Exhibit 2 provides the motion.)

II. Staff Recommendation

Staff recommends the Board of Governance authorize its representative to vote on the motion to amend the SSTP draft definition of a bundled transaction.

Staff also recommends the Board of Governance vote “no” on the motion to amend the SSTP draft definition of a bundled transaction.

III. Background

After several years of work, the SSTP reached consensus regarding the definition of a bundled transaction during the March 2005 meetings. It is staffs’ understanding a revised draft definition will be forwarded to the Implementing States for consideration; however, staff has yet to receive a copy. Although we understand some

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Adopt Revised Draft Definition of Bundled Transaction

compromises were made, it appears the revised draft definition of a bundled transaction is still contrary to the proposal offered by Mr. Stephen Kranz.

It is staffs' understanding the revised draft definition applies a "true object test" to bundled transactions that contain service components only and, except for certain tangible personal property, a "de minimis test" to bundled sales of taxable and nontaxable products, which includes tangible personal property. Whether Mr. Kranz and other business representatives supporting his proposal are in agreement with the SSTP revised draft definition is not clear.

Based on preliminary information received from a representative of the Equipment Leasing Association, as a compromise to applying a true object test to transactions that include tangible personal property components only, the SSTP revised draft definition of a bundled transaction includes a "primary test" in place of the true object test. Under the primary test, a sale that otherwise meets the definition of a bundled transaction will not be considered a bundled transaction if the transaction is the retail sale of nontaxable and taxable tangible personal property and the sale includes (1) specified tangible personal property; and (2) the selling price or purchase price of the taxable tangible personal property is 50% or less of the total price of the bundled tangible personal property.

"Specified" tangible personal property means and includes food and food ingredients, a drug, durable medical equipment, mobility enhancing equipment, an over-the-counter drug, prosthetic device, and medical supplies. All but the term medical supplies are defined in the SSUTA.

The proposal offered by Mr. Kranz also includes the addition of Section (D) to the definition of a bundled transaction. Section (D) adds a "books and records" rule under which a provider of specified services can establish from its books and records the portion of the total bundled price attributable to nontaxable services. Specified services are "telecommunication services," "ancillary services," "internet access," and "video programming services," all of which are currently being defined by the SSTP.

Although the addition of a books and records rule would not be contrary to California's policies and procedures, a vote to add Section (D) would also require the adoption of Mr. Kranz's proposed definition for a bundled transaction, which includes the amendments to Sections (A) and (C). It is also staffs' understanding the SSTP revised draft definition includes a books and records rule, which takes into consideration Mr. Kranz's proposed Section (D) language.

IV. Summary

Since it appears the SSTP has reached consensus regarding the definition of a bundled transaction, which appears to include provisions for bundled transactions of tangible personal property components only and also appears to contain a books and records rule, the proposal to amend the draft definition of a bundled transaction does not appear necessary. Additionally, it appears the SSTP revised draft definition of a bundled transaction is more consistent with California's policies and procedures than that proposed by Mr. Kranz.

For the reasons stated above, staff recommends a "no" vote on the proposed amendment.

Bundled Transaction

Draft Definition:

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 ~~such the~~ products included in the transaction.

- (A) “Distinct and identifiable products” does not include:
- (1) Packaging – such as containers, boxes, sacks, bags, and bottles – or other materials – such as wrapping, labels, tags, and instruction guides – that accompany the retail sale of the products and are incidental or immaterial to the retail sale thereof. Examples of packaging that are incidental or immaterial include grocery sacks, shoeboxes, dry cleaning garment bags and express delivery envelopes and boxes.
 - (2) A product provided free of charge with the required purchase of another product.
 - (a) 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) ~~Products that are part of the sales price as defined in Appendix C of the Agreement, so long as those items are included in the Member State’s definition of “sales price” of the product.~~
- (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 non-taxable tangible personal property and taxable tangible personal property where the taxable tangible personal property is essential to the use of the non-taxable tangible personal property, and is provided exclusively in connection with the non-taxable tangible personal property, and the true object of the transaction is the non-taxable tangible personal property; or
 - ~~(2)~~(3) 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.

~~(3)~~(4) 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.

(D) Books and Records.

(1) In the case of a bundled transaction that includes any of the following: telecommunication services, ancillary service, internet access or video programming service, 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 reasonably identify such portion from its books and records kept in the regular course of business.

(2) In the case of a bundled transaction that includes any of the following: telecommunication service, ancillary service, internet access or audio or video programming services, 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 the provider can reasonably identify the portion of the price attributable to the products subject to tax at the lower rate from its books and records kept in the regular course of business.

(3) This section does not create any customer right to require that, for purposes of determining the amount of tax applicable to a transaction, the provider allocate or attribute the sales price to the different portions of such transaction in order to minimize the amount of tax charged to the customer.

AMENDMENT # 14 – OFFERED BY STEPHEN KRANZ, WASHINGTON, D.C.

Motion to adopt the SSTP Bundled Transaction definition.

TO: DIANE HARDT/SCOTT PETERSON
Co-Chairs, Streamlined Sales Tax Project

From: Interested Member of the Business Community

Re: SSTP Bundled Transaction Definition

Date: February 1, 2005

I. Introduction

As you know, the government and business representatives participating within the Streamlined Sales Tax Project (SSTP) have devoted a significant amount of effort in developing a workable definition of a Bundled Transaction. While the SSTP has achieved consensus on several important components of the definition, there are some significant issues that remain unresolved. At the SSTP meeting that took place November 17-18 in Chicago, Illinois, you requested that the business representatives submit in writing suggestions for improving the Bundled Transaction definition for consideration. This memorandum is submitted on behalf of business representatives in response to that request. A draft of this memorandum was previously submitted at the SSTP meeting in January. This version reflects the consensus viewpoint of all participants in the business caucus.

Exhibit A reflects the business representatives' suggested amendments to the draft definition of a Bundled Transaction. **We request that the revised draft of the Bundled Transaction definition be adopted during the March SSTP meeting.**

II. Use of the True Object Test

A. Background

The current draft definition of a Bundled Transaction employs a True Object Test (TOT) with respect to only two of the three types of Bundled Transactions. The TOT applies to Bundled Transactions that contain taxable tangible personal property and a non-taxable service as well as to Bundled Transactions that contain a taxable service and a non-taxable service. However, the TOT does *not* apply to those Bundled Transactions that contain taxable tangible personal property and non-taxable tangible personal property.

While sales of services continue to grow in importance in the U.S. economy, most state and local sales and use tax systems within the U.S. are applied to only a limited number of services. Not surprisingly, sales of tangible personal property make up the largest share of the sales and use tax base. Thus, the tax characterization afforded a Bundled Transaction containing taxable and non-taxable tangible personal property is of the utmost importance to the business representatives.¹ Set forth below are rationales for amending the definition of a Bundled Transaction to

¹ In previous SSTP meetings, questions have been raised regarding the magnitude of Bundled Transactions containing taxable and non-taxable tangible personal property. The business representatives have responded to those queries with specific examples (e.g., bundles of taxable tangible personal property with tangible personal property qualifying for the manufacturing exemption, resale exemption, or a pollution control exemption). Add more examples, software? Candy? Jim Ervin document on software may help.

utilize the TOT in cases where a Bundled Transaction contains taxable and non-taxable tangible personal property, as well as other issues.

B. Rationale for Including TOT

(1) The 11% Problem

Perhaps the most significant reason for applying the TOT to Bundled Transactions of taxable and non-taxable tangible personal property is the inadequacy of the current draft. The current definition of a Bundled Transaction includes a de minimis test for situations where the taxable component is 10% or less. Thus, if the taxable tangible personal property component of the bundle is 10% or less, then the transaction is not considered a Bundled Transaction. However, if the taxable tangible personal property component is 11% or greater, then the transaction is considered a Bundled Transaction. This result is troublesome, because classification as a Bundled Transaction will, in conjunction with many states' existing taxability rules, lead to the result that the *entire* Bundled Transaction is subject to tax (even though the taxable component represents only 11% of the value of the bundle). The business representatives have termed this scenario the "11% Problem." Taxing 100% of a transaction when only 11% is taxable contravenes the intent of the sales and use tax statutes.

Application of the TOT to Bundled Transactions that include taxable and non-taxable tangible personal property components will ameliorate this problem. In most situations where only 11% of the value of the bundle relates to taxable tangible personal property, application of the TOT will result in the transaction not being classified as a Bundled Transaction.

(2) Added Complexity

Another issue associated with prohibiting application of the TOT to bundles of taxable and non-taxable property is the confusion created by affording differing treatment to one of the three defined categories of Bundled Transactions. The current draft definition of a Bundled Transaction applies the TOT to bundles of services and to a service bundled with tangible personal property. Therefore, it would be important to accurately characterize whether the components of the bundle are tangible property, intangible property or a service. Taxpayers that sell a variety of different bundles will need to adopt different methodologies for determining whether a Bundled Transaction exists under the current draft definition of a Bundled Transaction. Doing so will put even greater stress on tax departments, billing systems and taxability matrices. This added complexity runs counter to the mission of the Streamlined Sales Tax Project and undermines the significant simplification achievements contained in the Streamlined Sales and Use Tax Agreement. The business representatives urge you to take the added complexity contained in the current draft into consideration.

(3) TOT is Well Developed

While the business representatives acknowledge that the TOT is not a perfect rule and can lead to some unclear results, it is the best rule in existence. Most state taxing authorities and taxpayers are aware of the TOT and have had experience interpreting it and applying it in a variety of settings. An ample body of case law, regulations, rulings, articles and other interpretations of the TOT serves to assist in its application. Abandoning the TOT will render this authority useless for a significant percentage of transactions.

The current draft definition of a Bundled Transaction does not create a better rule than TOT. Rather, it abdicates the responsibility to develop a better rule by creating a definition that results in the 11% Problem described above. No one can argue with the proposition that the current draft will sweep in more transactions as "Bundled Transactions" than the TOT. In fact, the current draft's treatment is only slightly better than the "tainting rule" – a rule which leads to classification of a transaction as a Bundled Transaction if only a trivial amount of taxable property is bundled with non-taxable property.

(4) Application of Objective Standards

The business representatives were asked to consider employing objective standards in defining a Bundled Transaction of taxable and non-taxable tangible personal property. The business representatives believe that objective standards can be used to define the true object in applying the TOT to these Bundled Transactions. As described above, the 11% problem occurs when the bundle of taxable and non-taxable tangible personal property is comprised of 11% (or more) of taxable property. The percentage for purposes of determining qualification under the de minimis rule is determined by reference to the relative purchase price or sales price of the bundled products. Similar objective standards can be used to apply the TOT to bundles of taxable and non-taxable tangible personal property. An objective application of the TOT would identify values of the bundled components by reference to formal documents, including the seller's books and records (wholesale purchase data, labor costs, etc.).

Further, there is ample precedent for using an objective standard within the context of sales of bundles of taxable and non-taxable tangible personal property. For instance, under a North Dakota rule if a package contains both food and nonfood products, the entire package is subject to tax if the value of the taxable, nonfood items exceeds 50% of the selling price. Rule 81-04.1-03-03. In Wisconsin, the total selling price of combined food packages is exempt from Wisconsin sales and use tax if the combination is packaged together with other goods by a person other than a retailer before sale to the final consumer and 50% or more of the sales price of the package is attributable to goods that are exempt from sales and use tax. However, if less than 50% of the sales price is attributable to goods that are tax exempt, that portion of the selling price attributable to the taxable items is subject to sales and use tax. *Tax Report No. 2-98*, Dept. of Revenue, released in *Tax Bulletin No. 110*, July 1998. Thus, there is precedent for the use of objective standards.

The TOT can be described with more detail in the Bundled Transaction definition so that it is clear that the true object is defined based on the relative purchase prices or sales prices of taxable and non-taxable tangible personal property. Alternatively, a Bundled Transaction White Paper can provide examples of specific applications of the TOT based on the relative purchase prices or sales prices.

III. Election to Use Books and Records

The treatment of bundled transactions has been evolving. Today, at least twenty-four states² have enacted provisions allowing vendors of bundled telecommunication services to use a "books and records" approach to determine the taxable and non-taxable components of bundled sales. Further, the books and records application to bundled transactions has been adopted in two federal statutes concerning state taxation.

The Mobile Telecommunications Sourcing Act,³ a federal law concerning sourcing rules of mobile telecommunications services for state and local tax purposes, contains the following provisions that approve the use of a books and records approach:

(b) Additional Taxable Charges. - If a taxing jurisdiction does not otherwise subject charges for mobile telecommunications services to taxation and if these charges are aggregated with and not separately stated from charges that are subject to taxation, then the charges for nontaxable mobile telecommunications services may be subject to taxation unless the home service provider can reasonably identify charges not subject to such tax, charge, or fee from its *books and records* that are kept in the regular course of business.

² AL, AZ, AK, CO, CT, DC, GA, HI, IL, IN, KS, MD, MI, MS, MO, MT, NC, OH, SC, SD, TN, TX, VA, WA. Legislation has been introduced in DE and NH. Iowa and Utah execute agreements based on books and records.

³ 4 U.S.C. section 116 *et. seq.*

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(c) Nontaxable Charges. - If a taxing jurisdiction does not subject charges for mobile telecommunications services to taxation, a customer may not rely upon the nontaxability of charges for mobile communications services unless the customer's home service provider separately states the charges for nontaxable mobile telecommunications services from taxable charges or the home service provider elects, after receiving a written request from the customer in the form required by the provider, to provide verifiable data based upon the home service provider's *books and records* that are kept in the regular course of business that reasonably identifies the nontaxable charges.⁴

Thus, for purposes of state and local taxation of mobile telecommunications, tax authorities must allow a vendor to use a books and records approach to allocate between taxable and non-taxable services and impose tax only on the taxable components. If a vendor cannot so allocate based on books and records, then the bundled charge may be 100% taxable.

The recently enacted Internet Tax Nondiscrimination Act,⁵ which extends the protections afforded in the Internet Tax Freedom Act until November 1, 2007, is a second example of federal legislation providing for a books and records approach to state and local taxation of certain bundled transactions. Specifically, the law states:

SEC. 1106. ACCOUNTING RULE.

(a) IN GENERAL- If charges for Internet access are aggregated with and not separately stated from charges for telecommunications services or other charges that are subject to taxation, then the charges for Internet access may be subject to taxation unless the Internet access provider can reasonably identify the charges for Internet access from its *books and records* kept in the regular course of business.⁶

Thus, this federal law, which passed Congress and was signed by the President subsequent to the most recent Streamlined Sales Tax Project meeting, also includes a provision allowing a vendor to charge tax only on the taxable component(s) of a bundled transaction as supported by the vendor's books and records. If the vendor cannot so allocate based on books and records, then the bundled charge may be 100% taxable.

There are several rationales for including a books and records provision within the bundled transaction definition. First, many businesses, including several of the businesses represented by individuals who have provided substantial assistance to the SSTP, will be using a books and records approach as provided in the laws of at least twenty-four states and as authorized by the federal government in two statutes. Without such a provision a service provider may use a books and records approach (as authorized by the Internet Tax Nondiscrimination Act) when bundling sales of high speed Internet access and other services, but cannot when selling bundles of services that do not include high speed Internet access. Providing differing bundled transaction rules will create substantial confusion among consumers (e.g., some customer bills will have tax based on a portion of the selling price while other customer bills issued by the same taxpayer will not). Further, there will be significant pressure on vendor billing systems to ensure that the correct bundled transaction methodology is applied. As a result, the business representatives request that the SSTP definition of a Bundled Transaction include a provision that allows vendors that provide telecommunications or cable services with the authority to charge tax on only taxable products based on the vendor's books and records.

In discussing a books and records application to bundled transaction, the business representatives have heard some resistance from the SSTP members. One such concern relates to labeling the books and records approach as a "taxability rule." The business representatives steadfastly oppose the adoption of a taxability rule by the SSTP. Further, the business representatives do not view the books and records approach as a taxability rule. This approach is not intended, and does not in application dictate which products or services are subject to taxation. Rather,

⁴ 4 U.S.C. section 123 (emphasis added).

⁵ Public Law 108-435 (Dec. 3, 2004).

⁶ Public Law 108-435, Section 4(a) (emphasis added).

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decisions on whether to tax specific products or services should be left exclusively to the state legislative processes. However, once a state makes a decision as to the tax status of a product or service, the books and records approach allows the state to abide by that legislative decision to impose tax (or not) on telecommunication and cable services. In other words, the books and records approach will not in any circumstance result in taxation of an item that the legislature did not intend to tax (or vice-versa).

IV. Technical Corrections

Following are two corrections that are needed as a result of the current draft definition of a Bundled Transaction.

A. "Sales Price" Modification

The Streamlined Sales and Use Tax Agreement contains a definition of "Sales Price" which includes the following:

"Sales Price" applies to the measure subject to sales tax and means the total amount of consideration . . . without any deduction for the following:

(F) The value of exempt personal property given to the purchaser where taxable and exempt personal property have been bundled together and sold by the seller as a single product or piece of merchandise;

Streamlined Sales and Use Tax Agreement, Appendix C, Part I (6).

This definition, in part, addresses the taxation of Bundled Transactions. Because this definition pre-dates the draft definition of a Bundled Transaction and also creates a taxability rule, the business representatives request that subsection (F) be stricken from the definition of Sales Price. Further, by striking (F), the following language can be excluded from "Distinct and Identifiable Products" contained in the current draft definition of a Bundled Transaction:

Products that are part of the sales price as defined in Appendix C of the Agreement, so long as those items are included in the Member State's definition of "sales price" of the product.

(B) Insertion of "either"

The Bundled Transaction definition contains alternative exceptions in Part (C). Inserting the word "either" in the introduction to the alternatives will make it clearer that the exceptions are alternatives and are not to be construed as a single exception.

APPENDIX A – Revised Definition

Nothing contained herein represents a final position or opinion of the Streamlined Sales Tax Project, any of the participating or observing states, or any member of their staff. Readers should neither rely on any information herein nor make any **Draft Document Not For Publication But For Discussion Purposes Only** – inferences about final project positions or positions of participating or observing states or their members from the statements contained herein as this is a draft only and may change in response to comments and input from the public or private sector.

Bundled Transaction

Definition:

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:

- (4) Packaging – such as containers, boxes, sacks, bags, and bottles – or other materials – such as wrapping, labels, tags, and instruction guides – that accompany the retail sale of the products and are incidental or immaterial to the retail sale thereof. Examples of packaging that are incidental or immaterial include grocery sacks, shoeboxes, dry cleaning garment bags and express delivery envelopes and boxes.
- (5) A product provided free of charge with the required purchase of another product.
 - (a) 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.”
- ~~(6) Products that are part of the sales price as defined in Appendix C of the Agreement, so long as those items are included in the Member State’s definition of “sales price” of the product.~~

Note: Section F in the Sales Price definition must be removed otherwise it will trump the bundling definition. There must be a written agreement that the Sales Price definition will be amended at the same time this definition is approved. And (3) above can then be eliminated.

(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 EITHER:

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 non-taxable tangible personal property and taxable tangible personal property where the taxable tangible personal property is essential to the use of the non-taxable tangible personal property, and is provided exclusively in connection with the non-taxable tangible personal property, and the true object of the transaction is the non-taxable tangible personal property; or

(23) 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.

(34) 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.

(D) Books and Records.

(1) In the case of a bundled transaction that includes any of the following: telecommunication services, ancillary service, internet access or video programming service, 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 reasonably identify such portion from its books and records kept in the regular course of business.

(2) In the case of a bundled transaction that includes any of the following: telecommunication service, ancillary service, internet access or audio or video programming services, 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 the provider can reasonably identify the portion of the price attributable to the products subject to tax at the lower rate from its books and records kept in the regular course of business.

(3) This section does not create any customer right to require that, for purposes of determining the amount of tax applicable to a transaction, the provider allocate or attribute the sales price to the different portions of such transaction in order to minimize the amount of tax charged to the customer.