

SUTHERLAND

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March 7, 2012

VIA HAND DELIVERY

Senator Les Donovan
Chair, Committee on Assessment and Taxation

Re: Opposition to SB 376 Tax on Digital Goods/Cloud
Computing Services

Dear Senator Donovan:

I write to express broad concern regarding the proposed tax on digital products in Senate Bill 376 ("SB 376"). I am a partner at Sutherland Asbill & Brennan LLP where I specialize in state and local taxation of digital goods and cloud computing services. This new tax will hurt the Kansas economy and create an incentive for high-tech businesses to locate in states that do not tax digital products or cloud computing services, like Missouri and Oklahoma. In addition, the proposed new tax suffers from a lack of clear sourcing rules for electronically transferred goods and services and thus may subject Kansas residents to double taxation.

Because of the substantial lack of clarity and the uncertainty that would be created by SB 376, the Legislature will create an unfriendly atmosphere for businesses that sell "digital goods" in Kansas. For example, by attempting to tax "sounds, images, data, facts or information, or any combination thereof, transferred electronically, including but not limited to, specified digital products and other products transferred electronically not included within the definition of specified digital products," the legislation may inadvertently impose multiple levels of tax on information and other services purchased and sold by Kansas businesses. Furthermore, because appropriate federal and state guidance for sourcing digital goods and services sold in interstate commerce do not currently exist, the legislation may lead to Kansas consumers being taxed twice for the same transaction. For instance, a Kansas resident may purchase a digital movie through an account with a Kansas address, but make that purchase while visiting family in Nebraska.

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Attachment # 28

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Because of potentially inconsistent sourcing rules, that Kansas resident may face use tax obligations in both states.

Like digital goods, cloud computing services are not sold and delivered to customers in a manner similar to tangible personal property. Often users are scattered over multiple states and even internationally, thus making it difficult to determine the situs of delivery. Furthermore, such services are provided to customers under a wide range of licensing and contractual arrangements that should not be characterized as tangible personal property. Simply put, imposing tax on remotely accessed software services should only be done through a well-thought-out statutory scheme that addresses the particular challenges such services present to businesses and taxing authorities.

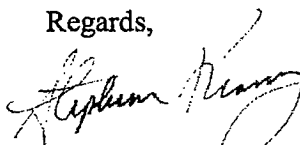
Moreover, Kansas does not presently impose sales tax on the sale of digital goods or cloud computing services. Such goods and services are extremely price-sensitive, and the location of a business in a particular state may hinge on whether the sales of digital goods are subject to tax. This is especially true when a viable, tax-free alternative for consumers is a screen tap away. SB 376 sends a clear message to existing and start-up businesses: locate in a more digital-friendly state if you want to sell your goods or services without charging Kansas sales tax. Kansas is surrounded by states that do not tax digital goods. A Kansas entrepreneur could easily decide to locate his start-up digital business in Missouri, where the sales tax climate for such a business would be much more attractive if SB 376 is enacted. Simply put, enacting this bill may ultimately damage the vitality of the Kansas economy by targeting a high-growth high-tech industry.

Rather than rushing to tax digital goods and cloud computing services, we respectfully request this Committee recommended a moratorium on taxing electronically transferred goods and services in order to study how any new taxes imposed thereon would affect the Kansas economy. In so doing, Kansas will have the needed time to invest in and develop this rapidly growing portion of the economy. Like many states, Kansas is hungry for good jobs for its citizens. The digital goods and cloud computing industries are well situated to add important jobs to the Kansas economy, and with this legislation, Kansas may squander that opportunity. Enacting SB 376 is akin to placing a digital "not open for business" sign over the entire state.

I appreciate the Committee's serious consideration of the issues arising from the proposed new tax on electronically transferred goods and services. For the above-stated reasons, I respectfully request that the tax on digital goods and cloud computing services proposed in SB 376 be rejected. I look forward to additional discussions on this important issue.

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Regards,



Stephen P. Kranz

cc: Senator Pat Apple, Vice-Chair, Committee on Assessment and Taxation
Senator Tom Holland, Ranking Minority Member, Committee on
Assessment and Taxation