

The draft apportionment rules for receipts from sales of digital products have changed since the first draft posted in October 2015. While most changes were minor, notable changes include an inquiry safe harbor for certain taxpayers, a retail location exception for receipts from digital products, clarifications of the rules for intermediary transactions, and rules for sourcing for digital products delivered via physical means.

1 Reg. Sec 4-2.3 Receipts from the Sale of, License to Use, and Granting of Remote Access to Digital  
2 Products (Tax Law, Sec. 210-A(4)).  
3

4 (a) General Principles of Application. A taxpayer's sourcing of receipts from digital products must be  
5 consistent with the principles set out below.  
6

7 (1) Section 210-A(4) of the Tax Law provides various sourcing rules that apply sequentially in a  
8 hierarchy. A taxpayer must annually exercise due diligence in attempting to apply the  
9 primary rule of the customer's primary use location, as described in subdivision (c) of this  
10 section. It may abandon such primary rule only if it lacks sufficient information to apply that  
11 rule, in which case it must use the location where the digital product is received by the  
12 customer, as described in subdivision (d) of this section. If a taxpayer cannot apply the rules  
13 in subdivisions (c) and (d) after exercising due diligence, it must then use the rules in  
14 subdivision (e) of this section for the receipts for the preceding taxable year. Lastly, if the  
15 taxpayer cannot apply the rules in subdivisions (c), (d), or (e) of this subdivision after  
16 exercising due diligence, it must then use the rules in subdivision (f) for the receipts for the  
17 current year. For intermediary transactions, a taxpayer should refer to the rules in subdivision  
18 (g) prior to applying the hierarchy. A taxpayer's method of sourcing its receipts, including  
19 the use of a method of approximation where applicable, must reflect an attempt to comply  
20 with the regulatory standards set forth herein rather than an attempt to minimize the  
21 taxpayer's tax liability.  
22

23 (2) In exercising due diligence, all of the following standards apply:

- 24 (i) A taxpayer's application of the regulatory standards set forth in this section must be  
25 based on objective criteria and should consider all sources of information reasonably  
26 available to the taxpayer at the time of filing its original tax return including, without  
27 limitation, the taxpayer's books and records, including its contracts or agreements  
28 with its customers, kept in the normal course of business. Taxpayers may, in good  
29 faith, rely on information provided by their customers.
- 30 (ii) A taxpayer's method of sourcing its receipts must be determined in good faith,  
31 applied in good faith, and applied consistently with respect to similar transactions.
- 32 (iii) A taxpayer must retain records that explain the determination and application of its  
33 method of sourcing its receipts used in completing the return, including its underlying  
34 assumptions, and must provide such records to the Commissioner upon request.
- 35 (iv) If applying a level of the hierarchy other than subdivision (c), records must also  
36 document the steps taken before abandoning each level of the hierarchy. When  
37 abandoning a level of the hierarchy, the standard of due diligence is not satisfied if a  
38 taxpayer merely relies on the fact that its existing systems of recording transactions  
39 or the current format of its books and records do not capture the information required  
40 by these rules.

- 41 (3) At any point in the hierarchy where there is a presumption, the presumption may be  
42 overcome by either the taxpayer or the Department.
- 43 (i) The presumption may be overcome by the taxpayer if the taxpayer can prove, by  
44 clear and convincing evidence, that the method it proposes to use better reflects the  
45 intent of the applicable rule of the hierarchy. In such a case, the location to which  
46 the receipts from the digital product will be sourced will be based on the evidence  
47 accumulated by the taxpayer. If the taxpayer believes it has overcome the  
48 presumption and uses an alternative method, upon audit the Department may  
49 examine the taxpayer's alternative method to determine if the presumption has been  
50 overcome and, if so, whether it was applied in a consistent manner.
- 51 (ii) The presumption may be overcome by the Department if the Department can prove,  
52 by clear and convincing evidence, that the method it proposes to use better reflects  
53 the intent of the applicable rule of the hierarchy, and that the taxpayer had access to,  
54 or could have obtained upon reasonable inquiries when required, information at the  
55 time it filed its original return that could have been used to apply the Department's  
56 method.
- 57
- 58 (4) Sourcing of commingled receipts.
- 59
- 60 (i) When a digital product is comprised of both digital property and a digital service, the  
61 receipt cannot be divided into separate components for purposes of the application of  
62 these rules, and is considered to be one receipt regardless of whether the components  
63 are separately stated for billing purposes.
- 64 (ii) When a sale, rental or license to use includes both a digital product that would  
65 otherwise be sourced under these rules and tangible personal property commingled  
66 into one receipt, the entire receipt will be sourced as tangible personal property or  
67 rentals and royalties under the rules for section 210-A(2)(a) of the Tax Law and  
68 section 4-2.1 of this Subpart, or section 210-A(3) of the Tax Law and section 4-2.2 of  
69 this Subpart, as applicable. This rule does not apply to sales or rentals of a digital  
70 product when the tangible personal property is incidental to the digital product; such  
71 sales must be sourced under these rules instead of section 210-A(2)(a) of the Tax  
72 Law and section 4-2.1 of this Subpart, or section 210-A(3) of the Tax Law and  
73 section 4-2.2 of this Subpart, as applicable.
- 74 (iii) When a sale, rental or license to use includes both a digital product that would  
75 otherwise be sourced under these rules and a service or other business activity  
76 sourced under the rules for section 210-A(10) of the Tax Law commingled into one  
77 receipt, the entire receipt will be sourced as a service or other business activity under  
78 the rules for section 210-A(10) of the Tax Law and section 4-2.15 of this Subpart.  
79 This rule does not apply to sales of a digital product when the service or other  
80 business activity is incidental to the digital product; such sales must be sourced under  
81 these rules instead of the rules for section 210-A(10) of the Tax Law and section 4-  
82 2.15 of this Subpart.

- 83 (iv) The rules for commingled receipts provided for in subparagraphs (ii) and (iii) of this  
84 paragraph do not apply if each component of the transaction is separately stated and  
85 the total receipt is reasonably allocated between the components.  
86

87  
88 (b) General Definitions.  
89

90 (1) *Billing address* means the location indicated in the books and records of the taxpayer as the  
91 primary address with respect to a customer's account as kept in good faith in the normal course of  
92 business.  
93

94 (2) *State where a contract is managed by the customer* means the primary location at which an  
95 employee or other representative of a customer serves as the person with responsibility for monitoring  
96 or managing the contract of sale, rental, license to use, or granting of remote access with the taxpayer.  
97

98 (3) *Customer* means the party who enters into a transaction with the taxpayer for the purchase of,  
99 rental or license to use a digital product from the taxpayer. A customer can be either an individual  
100 customer or a business customer. A business customer may also be an intermediary.  
101

102 (4) *Individual customer* means a customer whose purchase from the taxpayer is for personal use, and  
103 not for a business purpose. In any instance in which the taxpayer, acting in good faith, cannot  
104 reasonably determine whether the customer is an individual customer, the taxpayer must treat the  
105 customer as a business customer.  
106

107 (5) *Business customer* means a customer that is not an individual customer, including, but not limited  
108 to, a sole proprietor, S corporation, limited liability company, limited partnership, limited liability  
109 partnership, general partnership, corporation, non-profit organization, trust, the U.S. Government, any  
110 foreign, state, or local government, or any agency or instrumentality of such government. In any  
111 instance in which the taxpayer, acting in good faith, cannot reasonably determine whether the  
112 customer is an individual customer or business customer, the taxpayer must treat the customer as a  
113 business customer.  
114

115 (6) *Intermediary* means the business customer of a taxpayer that indicates, as part of its contract or  
116 other agreement with the taxpayer, that the digital product will be primarily utilized by a consumer.  
117

118 (7) *Consumer* means a party, other than the intermediary, primarily utilizing the digital product  
119 provided by the taxpayer either "through" an intermediary or "on behalf of" an intermediary.  
120

121 (8) *Intermediary transaction* means a transaction in which the customer's primary use location of a  
122 digital product or the location at which a digital product is received is the location of the consumer  
123 rather than the location of the customer itself. Such a transaction is sourced under the rules in  
124 subdivision (g) of this section.  
125

126 To be considered an intermediary transaction, the digital product, pursuant to the terms of a contract  
 127 or other agreement between the taxpayer and intermediary, must be: (a) provided by the taxpayer, at  
 128 the direction of the intermediary, directly to the consumer; or (b) sold by the taxpayer to the  
 129 intermediary, who then passes on the digital product to the consumer.

130  
 131 In intermediary transactions where the intermediary passes on the digital product to the consumer, the  
 132 taxpayer must actively maintain or interact with the product after the consumer receives it from the  
 133 intermediary, or the taxpayer is obligated under the agreement to perform at least a substantial portion  
 134 of the service after the tangible personal property or digital product that the service relates to is  
 135 delivered by the intermediary to the consumer.

136  
 137 (9) *Digital product* means any property or service, or combination thereof, of whatever nature  
 138 delivered to the customer, or the consumer in an intermediary transaction, through the use of wire,  
 139 cable, fiber-optic, laser, microwave, radio wave, satellite or similar successor media, or any  
 140 combination thereof. Digital product also includes, but is not limited to, an audio work, audiovisual  
 141 work, visual work, electronic book or literary work, graphic work, electronic database, game,  
 142 information or entertainment service delivered via the means articulated in the preceding sentence or  
 143 storage of digital products. In addition, digital product includes computer software by whatever  
 144 means delivered, including physical media. The term “delivered to” includes furnished or provided to  
 145 or accessed by.

146  
 147 A digital product does not include professional services regardless of means transmitted. Professional  
 148 services are services that require specialized knowledge and in some cases require a professional  
 149 certification, license or degree. Professional services include, but are not limited to, legal, medical,  
 150 accounting, architectural, research, analytical, educational, engineering or consulting services  
 151 provided by the taxpayer that require a significant degree of ongoing interaction between the  
 152 customer and the taxpayer.

153  
 154 A digital product does not include property listed in the second sentence of this paragraph delivered  
 155 via physical media or any means other than those listed in the first sentence of this paragraph. In such  
 156 cases, if the property is: (i) sold for personal use, or for purposes of resale for personal use, such  
 157 receipt will be sourced as tangible personal property under the rules for section 210-A(2) of the Tax  
 158 Law and section 4-2.1 of this Subpart; (ii) rented for personal use, such receipt will be sourced using  
 159 the rules for rentals of tangible personal property in section 210-A(3)(a) of the Tax Law and section  
 160 4-2.3(a) of this Subpart; or (iii) sold with the license to broadcast, right to sublicense the work to third  
 161 parties for other than personal use, or license to otherwise distribute the work, such receipt will be  
 162 sourced as rentals and royalties under the rules in section 210-A(3)(b) of the Tax Law and 4-2.3(b) of  
 163 this Subpart.

164  
 165 (c) Primary Use Location.

166  
 167 (1) General rule. A taxpayer must include a receipt in New York receipts when the digital product is  
 168 primarily used by the taxpayer’s customer in New York. The primary use location is the location  
 169 or locations where the customer derives the value from the digital product purchased from the

170 taxpayer. Unless enumerated in the specific type of transaction set forth in paragraph (2) of this  
171 subdivision for prewritten software sold at retail locations, determining the primary use location  
172 depends on whether the customer is an individual customer as defined in paragraph (4) of  
173 subdivision (b) of this section or business customer as defined in paragraph (5) of subdivision (b)  
174 of this section.

175  
176 (i) Individual customer. In the case where the taxpayer's customer is an individual, the primary  
177 use location is presumed to be at the billing address of the customer in the taxpayer's records.  
178 If the taxpayer does not have the customer's billing address, it is not required to make  
179 reasonable inquiries to the customer, and instead must use reasonable approximation, as  
180 described in subparagraph (iv) of this paragraph.

181  
182 (ii) Business customer. In the case where the taxpayer's customer is a business, the primary use  
183 location is presumed to be in New York to the extent the taxpayer's books and records kept in  
184 the normal course of business, without regard to the billing address of the taxpayer's  
185 customer, indicate the customer's use of the digital product is in New York. The digital  
186 product is primarily used at the location of a third party (i.e. the customer's customer) only in  
187 the case of an intermediary transaction.

188  
189 (A) Reasonable Inquiries.

190 (1) If the taxpayer cannot determine where the digital product was primarily used  
191 by the customer based upon such books and records, the taxpayer must, in  
192 exercising due diligence, make reasonable inquiries to the customer to  
193 determine where the digital product was primarily used.

194 (2) Inquiry Safe Harbor. Reasonable inquiries are not required if the taxpayer has  
195 more than 250 business customers purchasing substantially similar digital  
196 products that would be sourced under this section and no more than 5% of  
197 receipts from such digital products are from one customer.

198 (B) If, after satisfying the requirements of subclause (1) or (2) of clause (A), the  
199 taxpayer does not have adequate information to determine where the digital product  
200 is primarily used by the customer, the taxpayer must use reasonable approximation,  
201 as described in subparagraph (iv) of this paragraph.

202  
203 (iii) Primary use both within and without New York. Where the digital product was primarily  
204 used by the customer in New York and at least one other location, the taxpayer should source  
205 the receipts based on the value derived by the customer in each primary use location as a  
206 percentage of the total value derived by the customer.

207  
208 (iv) Reasonable approximation. Where a taxpayer cannot adequately determine the location or  
209 locations and/or the percentage of total value derived at each location from the taxpayer's  
210 books and records kept in the ordinary course of business, and after making reasonable  
211 inquiries to the customer when required, then reasonable approximation must be used to  
212 make that determination.

213

- 214 (A) Definition. Reasonable approximation is an alternative method used to determine the  
215 location at which a customer primarily uses a digital product in instances in which:  
216 (I)(i) the location or locations where the digital product is primarily used and/or the  
217 value of use attributable to each location as a share of the total value derived  
218 cannot be determined, or  
219 (ii) obtaining the location or locations where the digital product is primarily used  
220 and/or the value of use attributable to each location as a share of the total  
221 value derived would require the taxpayer to expend undue effort and expense  
222 beyond the standard amount of due diligence as required by (a)(2)(iv) of this  
223 section; and  
224 (II) the taxpayer has sufficient information to reasonably approximate the location  
225 or locations where the digital product is primarily used and/or the value of use  
226 attributable to each location as a share of the total value derived. If the  
227 taxpayer does not have sufficient information to use reasonable  
228 approximation, the taxpayer must source its receipts under the next level of  
229 the hierarchy, where the digital product is received, as described in  
230 subdivision (d) of this section.  
231
- 232 (B) Rules for reasonable approximation. (I) In an instance where a taxpayer is required  
233 under this subparagraph to reasonably approximate, the taxpayer must use a method  
234 that is intended to approximate the results that would be obtained under the  
235 applicable rules or standards set forth to determine the primary use location of the  
236 digital product.  
237
- 238 (II) In any instance where a taxpayer can ascertain the location or locations where a  
239 substantial portion of similar receipts are sourced (“sourced receipts”), but not all of  
240 such receipts, and the taxpayer reasonably believes, based on all available  
241 information, that the geographic distribution of the remainder of such receipts is  
242 substantially similar to that of the sourced receipts, it may source such receipts in the  
243 same proportion as its sourced receipts.  
244
- 245 (III) In any case in which a taxpayer uses a method of approximation to source its  
246 receipts and the Commissioner determines that the method of approximation  
247 employed by the taxpayer is not reasonable, the Commissioner may substitute a  
248 method of approximation that the Commissioner determines is appropriate.  
249
- 250 (IV) In any case in which the Commissioner determines that a taxpayer’s method of  
251 approximation is reasonable, but that it has not been applied in a consistent manner  
252 with respect to similar transactions, the Commissioner may require that the taxpayer  
253 apply its method of approximation in a consistent manner.  
254
- 255 (V) In any case in which, after reasonable inquiries are made when required, the only  
256 available information regarding where the digital product is primarily used is that the  
257 digital product is used by the general population of multiple states, the entire country,

258 or multiple countries, and the taxpayer does not have more specific information to  
259 determine how to divide the receipt between these multiple locations, the taxpayer  
260 may not use reasonable approximation based on population to determine the location  
261 at which a customer primarily uses a digital product. In such circumstances, the  
262 taxpayer must instead source its receipts under the next level of the hierarchy, where  
263 the digital product is received, as described in subdivision (d) of this section.  
264

265 (2) Exception to primary use location for purchases of prewritten software sold at retail locations.

266 (i) An exception applies to receipts from the sale of prewritten software:

267 (A) sold at a physical retail location to a purchaser who takes possession of the  
268 software at the retail location; and

269 (B) the retail location sells more than one type of digital product and/or a  
270 combination of digital products and products that are not digital products; and

271 (C) the prewritten software is non-customized.

272 (ii) Receipts from prewritten software sold under the conditions of the exception described in  
273 subparagraph (i) must be sourced to the location of the retail store where the purchaser  
274 took possession of the prewritten software.  
275

276 (3) Examples of where the Digital Product is Primarily Used.  
277

278 Example 1: Book Corp sells electronic books and physical books through their website. Book  
279 Corp is based in State A, but has warehouses in multiple states including New York. When an  
280 individual customer purchases only an electronic book, it is available for immediate download by  
281 the customer. When an individual customer purchases only a physical book, the book is shipped  
282 to the customer. Customers may also purchase a bundle of both an electronic and physical book,  
283 the price of which includes a discounted price of the electronic and physical book but the  
284 breakdown is not separately stated. For bundled purchases, the electronic book is available for  
285 immediate download by the customer and the physical book is shipped from Book Corp to the  
286 customer.  
287

288 Customer A lives in New York and has a billing address in New York. Customer A purchases an  
289 electronic book from Book Corp and downloads it onto his e-reader. Purchases of electronic  
290 books from Book Corp are considered digital products that are sourced under these rules.  
291 Therefore, Book Corp will include the receipt from the electronic book purchase in New York  
292 receipts because this purchase was made by an individual customer with a billing address located  
293 in New York. Book Corp will include the receipt from Customer A in everywhere receipts.  
294

295 Customer B lives in New York and has a billing address in New York. Customer B purchases a  
296 physical book and a bundled purchase of an electronic and a physical book commingled into one  
297 receipt. Purchases of physical books only and bundled purchases of electronic and physical  
298 books commingled into one receipt are both sourced as tangible personal property under the rules  
299 for section 210-A(2)(a) of the Tax Law and section 4-2.1 of this Subpart. Therefore, Book Corp  
300 will include the receipts from these purchases in New York receipts to the extent the tangible

301 books were shipped to addresses located in New York. Book Corp will include the receipt from  
302 Customer B in everywhere receipts.

303

304

305 Example 2: Software Corp sells accounting software to individuals through its website. When  
306 individual customers purchase the software, they have the option to download it directly onto  
307 their computer, or to receive the software on a disk shipped to their address. Customer A  
308 purchases the software and opts to have it shipped to her billing address in New York. Software  
309 Corp ships a box to Customer A that contains the software on a disk and a user manual explaining  
310 how the software works and troubleshooting tips. Computer software by whatever means  
311 delivered is considered to be a digital product and therefore receipts from the software are  
312 sourced under these rules. Because the product is purchased online, it does not qualify for the  
313 retail location exception. Although the sale of the software to Customer A includes the user  
314 manual, which is tangible personal property, the user manual is incidental to the actual sale of the  
315 software, and therefore the entire receipt is sourced as a digital product. It is presumed that  
316 Customer A derives the value from the software at his or her billing address which is located  
317 within New York. Software Corp will include the receipt in New York receipts and everywhere  
318 receipts.

319

320 Example 3: Develop Corp, a software development corporation located in State A, enters into a  
321 contract with a business customer, Purchaser Corp, which is physically located in both New York  
322 and State A, to develop software to be licensed to Purchaser Corp's business. Develop Corp  
323 delivers the software electronically from its office in State A to Purchaser Corp. Purchaser Corp  
324 will derive the value from the software at the location where its employees utilize the software.  
325 Develop Corp's books and records indicate that Develop Corp is providing Purchaser Corp 100  
326 licenses to use the software at Purchaser Corp's New York location and 300 licenses to use the  
327 software at Purchaser Corp's State A location, for a total of 400 licenses. The sale of the software  
328 is a digital product, and twenty five percent of the receipt (100/400) is included in New York  
329 receipts. One hundred percent of such receipt is included in everywhere receipts.

330

331 Example 4: Online Corp, a corporation located in State B, has developed a web-based game.  
332 Online Corp earns fees from granting access to the game on its website to its customers. In  
333 certain instances, employees of Online Corp. assist its customers in troubleshooting problems  
334 with the game. These customers access the website on electronic devices mostly in their states of  
335 residence, but sometimes they access it while traveling in other states. Online Corp's grants of  
336 access to its website are digital products, and its customers provide their billing addresses when  
337 paying the fee. Online Corp determines the primary use location of each individual customer to  
338 be at the customer's billing address. Online Corp should determine the amount of its New York  
339 receipts by multiplying the receipts it receives from individual customers by a fraction, the  
340 numerator of which is the sales attributable to individual customers with billing addresses located  
341 within New York and the denominator of which are the total sales to all individual customers.  
342 All of Online Corp's receipts from individual customers for grants of access to the game are  
343 included in everywhere receipts.

344

345 Example 5: Travel Support Corp, located in New York, provides travel information services  
346 over the telephone to its customers, who are individuals located throughout the United States,  
347 through a call center located in New York. The contract between Travel Support Corp and its  
348 customers provides that, for a fee per call, the customer can call Travel Support Corp for  
349 information regarding hotels, restaurants and other travel related information. Because the  
350 service is delivered via means specified in the definition of a digital product in section 210-  
351 A(4)(a) of the Tax Law and (b)(9) of this section, Travel Support Corp must source its receipts  
352 from this service under the digital product rules.

353  
354 Travel Support Corp's books and records maintained in the regular course of business indicate  
355 that fifteen percent of its customers have a billing address in New York. However, Travel Support  
356 Corp's books and records indicate that only seven percent of the calls handled by the call center  
357 originate from New York. Because Travel Support Corp's books and records show where the  
358 digital service is primarily used based on the origination location of the calls, this measure better  
359 reflects where the value is derived from the service by Travel Support Corp's customers than the  
360 billing address presumption. Travel Support Corp may overcome the billing address presumption  
361 by using its books and records to include seven percent of its receipts from the support services  
362 provided by the call center in New York receipts. Travel Support Corp must include one hundred  
363 percent of its receipts from the support services provided by the call center in everywhere  
364 receipts.

365  
366 Example 6: Same facts as Example 5 except the contract between Travel Support Corp and its  
367 customers provides for a set monthly fee, regardless of whether the customer makes any calls for  
368 travel support. Because each customer pays the same amount regardless of usage, and fifteen  
369 percent of Travel Support Corp's customers are located in New York, the fact that only seven  
370 percent of the calls originate from New York does not overcome the presumption that the digital  
371 services are used primarily at the billing addresses of the individual customers. This is because  
372 the customers derive value from the service when they purchase the ability to call travel support,  
373 rather than when they exercise that option. Therefore, Travel Support Corp must include fifteen  
374 percent of its receipts from the support services provided by the call center in New York receipts.  
375 Travel Support Corp must include one hundred percent of its receipts from the support services  
376 provided by the call center in everywhere receipts.

377  
378 Example 7: Video Corp owns the copyrights to various entertainment programs that are ready to  
379 be broadcast by television stations or "streamed" via an online streaming service. Video Corp  
380 sells licenses to broadcast or redistribute its programs to various entities, and once Video Corp  
381 sells a license to its customer, its involvement with the product is complete. Therefore, this is not  
382 an intermediary transaction.

383  
384 Video Corp enters into a contract with Network Corp for the license to use one of Video Corp's  
385 programs so that Network Corp may transmit it to Network Corp's customers. Pursuant to the  
386 contract, the program is transmitted to Network Corp via satellite, thus the receipts Video Corp  
387 receives from Network Corp are receipts from the license to use a digital product. Such receipts

388 are sourced to the location where the digital product is primarily used, which is the location from  
389 which Network Corp originates the broadcast.

390  
391 Video Corp also enters into an agreement with Online Corp to provide programs to Online Corp  
392 for electronic streaming by Online Corp's customers. The contract between Video Corp and  
393 Online Corp provides that these programs will be provided to Online Corp on a DVD. Delivery  
394 by a DVD, a physical medium, is not one of the methods specifically provided for in section 210-  
395 A(4) of the Tax Law and (b)(9) of this section, so it is not considered a digital  
396 product. Therefore, Video Corp's receipts received pursuant to this contract are not from the  
397 license to use a digital product. Instead, the receipts are royalties from the use of copyrights  
398 because Online Corp's customers are allowed to stream the programs and, as such, these receipts  
399 should be sourced pursuant to the rules for section 210-A(3) of the Tax Law and section 4-2.2 of  
400 this Subpart.

401  
402 Example 8: Movie Corp sells movies for personal use to individual customers that may either be  
403 downloaded from the internet or received via DVD, a physical medium. Customer A purchases a  
404 digital download for a movie and pays with his credit card that has a billing address in State  
405 A. Movie Corp's receipt from Customer A's download is a receipt from a digital product and the  
406 digital product is presumed to be primarily used at Customer A's billing address in State A.  
407 Therefore, the receipt from this sale is not included in New York receipts. The receipt from this  
408 sale is included in everywhere receipts.

409  
410 Customer B purchases a DVD and requests it be shipped to an address in New York. A DVD is  
411 not one of the methods specifically provided for in section 210-A(4) of the Tax Law and (b)(9) of  
412 this section, so it is not considered a digital product. Therefore, Video Corp's receipt from  
413 Customer B is a receipt from the sale of tangible personal property and, as such, should be  
414 sourced pursuant to the rules for section 210-A(2)(a) of the Tax Law and section 4-2.1 of this  
415 Subpart.

416  
417 Example 9: Cable TV Corp, a corporation that is located outside of New York, sells monthly  
418 subscriptions for cable television to individual customers in New York and other states. Cable  
419 TV Corp provides cable television through cables that are installed at the location of each  
420 customer's television that will be receiving service. Cable TV Corp also has a billing address on  
421 file for each of its customers. While many of Cable TV Corp's customers have the service  
422 installed at their home address, which is also their billing address, a substantial portion of Cable  
423 TV Corp's customers have Cable TV Corp's services installed at an address other than their  
424 billing address. The cable television subscription sold by Cable TV Corp is a digital product.  
425 The presumption is that a digital product is primarily used at an individual customer's billing  
426 address. However, either Cable TV Corp or the Commissioner can overcome this presumption  
427 through clear and convincing evidence as to where the cable service is installed, which better  
428 reflects where the digital product is primarily used than the use of the presumption.

429  
430 Example 10: Security Corp sells cyber security software to 1,000 business customers, including a  
431 federal agency XYZ. Its customers use that software by downloading it from Security Corp's

432 website. XYZ has its headquarters located in Washington D.C., and 12 regional offices relatively  
433 similar in size located in 12 different states, one of which is New York. Security Corp has a  
434 contact person at XYZ's headquarters, but Security Corp provides cyber security software to  
435 XYZ's entire network, which is utilized by XYZ employees at all of the 13 locations. The books  
436 and records of Security Corp do not specify more detailed information, such as the number of  
437 computers or the number of licenses provided to each location. Since Security Corp has over 250  
438 business customers and not more than five percent of its receipts are from one customer, it is not  
439 required to make reasonable inquiries to determine where the digital product is primarily utilized.  
440 Therefore, Security Corp chooses to exercise the inquiry safe harbor (see 4-2.3(c)(1)(ii)(A)(2) of  
441 this section) and uses reasonable approximation to include 1/13 of the receipts from their cyber  
442 security software in New York receipts. One hundred percent of such receipts are included in  
443 everywhere receipts.

444  
445 Example 11: Office Corp, an office supply retailer, has a physical store located in New York.  
446 Office Corp sells a variety of office supplies, including a multitude of prewritten computer  
447 software programs sold on disks. When customers purchase items from Office Corp, they take  
448 possession of the purchased items immediately. In the case of software purchases, the customers  
449 use the disks to install the programs at the location of their home or work computers or computer  
450 networks. However, information as to the type of customer—business or individual—or the  
451 location where the software is installed or primarily used is never known to the clerk at the time  
452 of purchase. Office Corp's sale of prewritten software qualifies for the retail location exception.  
453 Therefore, Office Corp must include the receipts from the sale of the software in New York  
454 receipts to the extent the location of the retail store where the customer takes possession of the  
455 prewritten software is in New York. Office Corp must include one hundred percent of such  
456 receipts in everywhere receipts.

457  
458 (d) Where the Digital Product is Received.

- 459  
460 (1) Where a taxpayer, after exercising due diligence, cannot determine or reasonably approximate  
461 where the customer has primarily used the digital product, it should include the receipt in New  
462 York receipts where the digital product is received by the customer within New York.  
463 Determining the location where the digital product is received depends on whether the customer  
464 is an individual or business customer.  
465  
466 (i) Individual Customer. The location at which the digital product is received is determined  
467 based on evidence available to the taxpayer, including, but not limited to, sales records or an  
468 IP address. The Department may examine the taxpayer's evidence and other evidence the  
469 Department deems to be relevant to determine whether such evidence reasonably reflects the  
470 location where the product was received and whether the method was applied in a consistent  
471 manner. If, after applying due diligence, the taxpayer does not have adequate information to  
472 determine where the digital product is received, the taxpayer must apply the next level of the  
473 hierarchy, the receipts for the preceding taxable year, as described in subdivision (e) of this  
474 section.  
475

476 (ii) Business Customer. The location where the digital product is received is presumed to be the  
477 location at which the contract of sale is managed by the customer. If the taxpayer cannot  
478 determine the location where the contract of sale is managed by the customer, then the  
479 location where the digital product is received is presumed to be the billing address of the  
480 customer. If, after applying due diligence, the taxpayer does not have adequate information  
481 to determine where the digital product is received, the taxpayer must apply the next level of  
482 the hierarchy, the receipts for the preceding taxable year, as described in subdivision (e) of  
483 this section.

484  
485 (2) Examples of where the digital product is received.  
486

487 Example 12: Game Co, an online gaming company based in New York, sells monthly  
488 subscriptions to individual customers. The majority of Game Co's customers do not pay with a  
489 credit card. They instead use an online payment transfer service to pay their bills, and therefore  
490 do not provide Game Co with a billing address. To subscribe, individuals need to only provide a  
491 first name, screen name, password, and online payment information. As such, Game Co does not  
492 have enough information to determine the primary use location or to use reasonable  
493 approximation and, because Game Co's customers are individuals, Game Co does not need to  
494 make inquiries as to individuals' billing addresses. Therefore Game Co must source receipts  
495 based on where the digital product is received. Although Game Co does not have personal  
496 information for most of its subscribers, it can use IP address information to determine where the  
497 individual customers log into the website. Therefore, Game Co should use this information to  
498 include receipts from subscribers to New York to the extent subscribers log into its game from IP  
499 addresses located within New York. Game Co must include one hundred percent of such receipts  
500 in everywhere receipts.  
501

502 Example 13: Software Corp sells case management software to 200 large corporations. Business  
503 Corp purchases software from Software Corp to be installed on laptops used by Business Corp's  
504 employees. The contract between Business Corp and Software Corp is managed at Business  
505 Corp's office in State A, but Business Corp's employees spend the majority of their time working  
506 throughout the country, including in New York. Software Corp's books and records do not  
507 provide any information on the amount of time that Business Corp's employees spend working in  
508 other states to determine where the software is primarily used. Software Corp does not qualify  
509 for the inquiry safe harbor (see (c)(1)(ii)(A)(2) of this section) because it has only 200 customers,  
510 so it must ask Business Corp where its employees utilize the software. If Business Corp does not  
511 provide that information to Software Corp, Software Corp does not have adequate information to  
512 determine the primary use locations or reasonably approximate such locations. In such instance,  
513 it therefore must source the receipt to where the digital product is received, which is considered to  
514 be at the location where the contract is managed. Business Corp manages the contract with  
515 Software Corp at its office in State A; therefore the receipt is not included in New York receipts.  
516 One hundred percent of the receipt is included in everywhere receipts.  
517

518 (e) Receipts for the Preceding Taxable Year.  
519

520 (1) Where a taxpayer, after exercising due diligence, cannot determine or reasonably approximate the  
521 primary use location, nor determine where the digital product is received, it should source its  
522 receipts from that digital product to New York based on receipts from the sales of that type of  
523 digital product for the preceding taxable year. The amount included in New York receipts for the  
524 current taxable year is determined by multiplying such receipts by a fraction, the numerator of  
525 which is the amount included in New York receipts from the sales of that type of digital product  
526 in the preceding taxable year and the denominator of which is the amount included in everywhere  
527 receipts from the sales of that type of digital product in the preceding taxable year. This level of  
528 the hierarchy cannot apply in a taxpayer's first taxable year beginning on or after January 1, 2015  
529 and before January 1, 2016, nor to a taxpayer's first taxable year in New York. In such tax year,  
530 a taxpayer must reject this method and move directly to the method described in subdivision (f).  
531

532 (2) Example of receipts for the preceding taxable year.  
533

534 Example 14: Sales Corp provides only one type of digital product to approximately 200 business  
535 customers. In tax year 2017, all of its receipts were sourced using the rules in subdivision (c) of  
536 this section, and, as a result 45 percent of Sales Corp's receipts were included in New York  
537 receipts. In tax year 2018, Sales Corp continues to provide only one type of digital product to its  
538 customers. At the end of tax year 2018, Sales Corp's computer system crashes and it is unable to  
539 recover information it had obtained on where the digital product was primarily used or where it  
540 was received. Upon reasonable inquiries to its known customers, Sales Corp still cannot obtain  
541 information on where the digital products were primarily used or where they were received.  
542 Therefore, Sales Corp must include 45 percent of its 2018 receipts in its 2018 New York receipts.  
543 One hundred percent of receipts from this type of digital product are included in everywhere  
544 receipts.  
545

546 (f) Receipts for Current Taxable Year.  
547

548 (1) Where a taxpayer, after exercising due diligence, cannot determine or reasonably approximate  
549 the primary use location of a digital product nor where the digital product is received, or cannot  
550 use the receipts for the preceding taxable year for a certain type of digital product, it must source  
551 the receipt from that digital product to New York based on all those receipts for digital products  
552 that can be sourced using the methods in subdivisions (c) and (d) of this section. The amount  
553 included in New York receipts for the current taxable year is determined by multiplying such  
554 receipts by a fraction, the numerator of which is the amount included in New York receipts from  
555 all digital products using the methods in subdivisions (c) and (d) of this section for the current  
556 taxable year and the denominator of which is the amount included in everywhere receipts from  
557 digital products sourced using the methods in subdivisions (c) and (d) for the current taxable year.  
558

559 (2) Example of receipts for the current taxable year.  
560

561 Example 15: Taxpayer A has \$10,000 in receipts from a new type of digital product. After  
562 exercising due diligence, Taxpayer A cannot determine where the digital product is primarily  
563 used or where it was received. Therefore, Taxpayer A must determine the portion of the \$10,000

564 to include in New York receipts based on the receipts for digital products sourced under  
565 subdivisions (c) and (d) of this section in the current tax year. In the current tax year, Taxpayer A  
566 has \$150,000 in digital products receipts sourced under the methods outlined in subdivisions (c)  
567 and (d) of this section, of which \$75,000 (or 50 percent) are New York receipts. Therefore,  
568 Taxpayer A would include 50 percent of the \$10,000, or \$5,000, of receipts from the new type of  
569 digital product in New York receipts. One hundred percent of receipts from the new type of  
570 digital product are included in everywhere receipts.

571

572 (g) Rules for Intermediary Transactions.

573

574

(1) In the case of intermediary transactions, the location where the receipt is sourced is  
575 determined using the hierarchy of methods described in subdivisions (c) and (d) of this  
576 section based on the location of the individual or business consumers, rather than the  
577 intermediary.

578

579

(2) The taxpayer is required to make inquiries to the intermediary, but not to the consumers,  
580 when necessary to determine where the consumer primarily uses the digital product or where  
581 the digital product is received by the consumer regardless of the number of business  
582 customers the taxpayer has or the percentage of receipts from any one customer. Such  
583 inquiries may be fulfilled by the intermediary providing information from its books and  
584 records to the taxpayer that demonstrates the location of the consumer's primary use or, if  
585 that information is unavailable, where the consumer received the digital product.

586

587

(3) If, after exercising due diligence, the taxpayer has inadequate information to apply the  
588 hierarchy of rules described in subdivisions (c) and (d) of this section with reference to the  
589 location of the consumers, the taxpayer should apply the hierarchy of rules described in  
590 subdivisions (c) and (d) of this section based on the intermediary. If after exercising due  
591 diligence, the taxpayer has inadequate information to apply the hierarchy of rules described in  
592 subdivisions (c) and (d) of this section with reference to either the consumers or the  
593 intermediary, the taxpayer must then apply the hierarchy of rules described in subdivisions  
594 (e) and (f).

595

596

(4) Examples of intermediary transactions.

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Example 16: Website Corp (the taxpayer) designs custom software and Web applications for  
use by various businesses. Travel Corp, located in State A, provides hotel booking services  
to individual customers. Travel Corp wants to make its service accessible to its customers via  
the internet, so Travel Corp contracts with Website Corp to design software using Travel  
Corp's name and methodology, which will allow the customers of Travel Corp (consumers)  
to book hotels online for a fee. Under the contract, Travel Corp (the intermediary) will pay  
Website Corp a percentage of the fee it receives from each consumer who utilizes Travel  
Corp's services through Website Corp's software. To accomplish this, consumers will  
provide payment via Website Corp's website, and Website Corp will retain a small  
percentage of the fee as specified by the contract between Travel Corp and Website Corp

608 before remitting the remainder of the payment to Travel Corp. Website Corp is receiving  
609 receipts from Travel Corp under its contract by providing a digital product at the direction of  
610 Travel Corp to consumers who are primarily utilizing the digital service. Therefore, Website  
611 Corp includes receipts from Travel Corp in New York receipts to the extent that consumers of  
612 Travel Corp's service have billing addresses located in New York. One hundred percent of  
613 such receipts are included in everywhere receipts.

614  
615 Example 17: App Design Corp (the taxpayer), a corporation located in State B, provides  
616 phone application ("app") design services to its customer, Bank Corp (the intermediary),  
617 which has branches located in New York and other states. Bank Corp contracts with App  
618 Design Corp to design an app that will be readily available for free download by any of Bank  
619 Corp's account holders. App Design Corp will also provide periodic updates to ensure the  
620 app runs smoothly and the information transmitted through the app is secure. Although Bank  
621 Corp is the customer of App Design Corp, the app is provided through Bank Corp to Bank  
622 Corp's account holders (consumers) because App Design Corp sold the app pursuant to a  
623 contract that stipulated it would be passed on to the consumers and App Design Corp  
624 maintains updates to and involvement in consumers' use of the app. Therefore, App Design  
625 Corp should determine the amount to include its receipts to in New York receipts by  
626 multiplying the receipts it receives from Bank Corp by a fraction, the numerator of which is  
627 the number of New York account holders who download the app and the denominator of  
628 which is the number of all account holders who download the app. App Design Corp must  
629 include one hundred percent of its receipts from Bank Corp in everywhere receipts.

630  
631 App Design Corp cannot determine the primary use location or where the app is received by  
632 the consumers based on its own books and records, and therefore must make reasonable  
633 inquiries to Bank Corp for location statistics on account holders who download the app. If  
634 Bank Corp does not provide this information, but instead provides App Design Corp with the  
635 number of all account holders by state, App Design Corp can use reasonable approximation  
636 to assume that the percentage of account holders who download the app within New York is  
637 similar to the percentage of account holders within New York. In that case, it should  
638 multiply its receipts from Bank Corp by a fraction, the numerator of which is the number of  
639 all account holders within New York and the denominator of which is the number of all  
640 account holders within and without New York. If Bank Corp cannot provide App Design  
641 Corp with any information after reasonable inquiries, App Design Corp should look to  
642 publicly available information, such as the number of Bank Corp's bank branches located  
643 within and without New York and use this information to reasonably approximate the  
644 primary use location of the app.

645  
646 Example 18: Answer Corp (the taxpayer) is a corporation that operates call centers in  
647 multiple states, including New York, and facilitates mail order sales from unrelated  
648 businesses. Retail Corp (the intermediary), a corporation incorporated outside New York,  
649 sells tangible property through its retail stores located in New York and other states, and  
650 through a mail order catalog. Retail Corp contracts with Answer Corp to answer telephone  
651 calls from individuals placing orders for products found in Retail Corp's catalog (consumers).

652 Answer Corp charges Retail Corp a flat fee for its services. This is an intermediary  
653 transaction because Answer Corp is providing a digital service to Retail Corp's customers  
654 (the consumers of Answer Corp's service) at the direction of Retail Corp. The primary use  
655 location of this service is at the location of the consumers, which is determined when Answer  
656 Corp asks the consumers for their billing information, including billing address. Answer  
657 Corp must determine the amount to include in New York receipts by multiplying the receipts  
658 from Retail Corp by a fraction, the numerator of which is the number of consumers with  
659 billing addresses within New York and the denominator of which is the number of consumers  
660 with billing addresses within and without New York. Answer Corp must include one  
661 hundred percent of its receipts from Retail Corp in everywhere receipts.  
662

663 Example 19: Same facts as Example 18, except Answer Corp also receives calls for product  
664 inquiries. Ninety-five percent of the calls received by Answer Corp are for product orders for  
665 which Answer Corp documents a billing address. Therefore, Answer Corp must source 95  
666 percent of its receipts from Retail Corp by applying the fraction used in Example 18.  
667 However, 5 percent of the calls received by Answer Corp are for product inquiries for which  
668 Answer Corp does not collect billing information from the caller.  
669

670 Answer Corp should utilize the best information available to determine these values, such as  
671 the location of the area code used by the caller. If, after exercising due diligence, Answer  
672 Corp does not have any information as to where these calls originated, and Answer Corp  
673 believes the geographic distribution of these calls is substantially similar to the distribution of  
674 calls received for which they do have adequate information, Answer Corp must use  
675 reasonable approximation to source the remaining 5 percent of its receipts from Retail Corp.  
676 Answer Corp should determine the amount to include in New York receipts by multiplying  
677 the amount of receipts for which Answer Corp does not have billing information by a  
678 fraction, the numerator of which is the number of billing addresses received from within New  
679 York and the denominator of which is the number of billing addresses received from within  
680 and without New York. Answer Corp must include one hundred percent of its receipts from  
681 Retail Corp in everywhere receipts.  
682

683 Example 20: Database Corp (the taxpayer), a corporation located in State C, develops an  
684 internet-based information database and enters into a contract with Retail Corp (the  
685 intermediary) whereby Retail Corp will market and sell access to this database to its  
686 customers (consumers). Although Database Corp does not have active involvement with the  
687 consumers of its database, and in fact only receives receipts directly from Retail Corp,  
688 Database Corp actively maintains and updates the database for the benefit of the consumers.  
689 Therefore, Database Corp must source its receipts based on the consumers rather than Retail  
690 Corp. After reasonable inquiries to Retail Corp, Database Corp obtains the billing addresses  
691 of the consumers and must include receipts in New York receipts to the extent that consumers  
692 have billing addresses located in New York. Database Corp must include one hundred  
693 percent of its receipts from Retail Corp in everywhere receipts.  
694

695 (5) Examples of transactions that are not intermediary transactions.

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Example 21: Research Corp, a corporation located in State D, compiles a digital collection of treatises on a variety of subjects and sells a copy of its collection to University A, located in New York, with a contract that provides that University A will provide access to this copy to all enrolled students. However, Research Corp does not provide continuing support after the sale and, if Research Corp were to update any information, it would sell this as a separate product. Therefore, after Research Corp delivers the copy of the digital collection to University A, it maintains no interaction with the product and provides no further services in connection with the receipt. For this reason, although the ultimate consumers of the product are the students of University A, this is not considered an intermediary transaction. Research Corp will source the receipt based on the primary use location of the copy of the digital collection by University A. Research Corp's books and records indicate that University A will use the digital collection at its location in New York; therefore the entire receipt is included in both New York receipts and everywhere receipts.

Example 22: Images Corp, a corporation located in State E, maintains an online database of digital images that it licenses to customers to use in a variety of publications. The license to use these digital images is a digital product and therefore is sourced under these rules. Newspaper Corp, located in New York, enters into a contract with Images Corp whereby, in exchange for a monthly flat fee, Newspaper Corp receives a license to use an unlimited number of images from the online database in Newspaper Corp's print and digital publications which will be viewed by Newspaper Corp's subscribers worldwide. Although Images Corp actively maintains the online database of digital images from which Newspaper Corp selects the images it will use, once Newspaper Corp selects an image, Images Corp's active involvement with that image ceases for purposes of Newspaper Corp's use. Furthermore, once Newspaper Corp publishes the image to its subscribers, both in digital and paper formats, Images Corp has no active involvement with the image and Newspaper Corp's subscribers have no access to Images Corp's actively maintained database. Therefore, this is not an intermediary transaction and Images Corp must source the receipt it receives from Newspaper Corp to the primary use location of Newspaper Corp. Newspaper Corp uses the images it selects from the online database when composing articles; therefore Newspaper Corp's primary use location is where this editorial control is exercised. Newspaper Corp makes editorial decisions at its office located in New York; therefore the entire receipt is included in both New York receipts and everywhere receipts.