

Letter of Findings Number: 07-0173
Sales and Use Tax
For Tax Year 2004

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I. Sales and Use Tax—Exemptions.

Authority: IC § 6-2.5-4-6; Internet Tax Freedom Act § 1100-06, 47 U.S.C. § 151 note (2007).

Taxpayer protests the assessment of sales and use tax.

STATEMENT OF FACTS

Taxpayer is corporation with principal headquarters outside Indiana. Taxpayer provides a variety of services to customers throughout the United States, including customers located in Indiana. Taxpayer employs one individual residing in Indiana. Taxpayer is an application service provider (ASP) for the automotive dealer industry, supplying software applications and/or software-related services over the Internet. Taxpayer bills its customers for its services either on a per-use, or on a monthly or annual fee basis. The Indiana Department of Revenue ("Department") assessed sales and use tax for the 2004 tax year based upon the best information available regarding taxpayer's activity in Indiana. Taxpayer protested the Department's sales and use tax assessment, and a hearing was held. This Letter of Findings results.

I. Sales and Use Tax—Exemptions.

DISCUSSION

Taxpayer's point of protest concerns the usage fees it collects from customers that allow said customers access to the various software applications and software-related services offered by taxpayer over the Internet. Taxpayer believes that this is a non-taxable Internet service. Taxpayer asserts that it provides all services electronically, and that taxpayer does not provide any tangible product to any of its customers. For select services, a customer must temporarily download a software application in order to interact with taxpayer's servers. However, once the customer's interaction with taxpayer's servers closes, the customer loses the downloaded software; the customer must reload the software each time the customer wants access to taxpayer's servers.

The Department notes that Internet access is in fact subject to sales and use tax, under IC § 6-2.5-4-6, which, during the subject tax year, stated:

(a) As used in this section, "telecommunication services" means the transmission of messages or information by or using wire, cable, fiber optics, laser, microwave, radio, satellite, or similar facilities. The term does not include value added services in which computer processing applications are used to act on the form, content, code, or protocol of the information for purposes other than transmission.

(b) A person is a retail merchant making a retail transaction when the person:

- (1) furnishes or sells an intrastate telecommunication service; and
- (2) receives gross retail income from billings or statements rendered to customers.

(c) Notwithstanding subsection (b), a person is not a retail merchant making a retail transaction when:

- (1) the person provides, installs, constructs, services, or removes tangible personal property which is used in connection with the furnishing of the telecommunication services described in subsection (a);
- (2) the person furnishes or sells the telecommunication services described in subsection (a) to another person described in this section or in section 5 of this chapter;
- (3) the person furnishes telecommunications services described in subsection (a) to another person who is using a prepaid telephone calling card or prepaid telephone authorization number described in section 13 of this chapter; or
- (4) the person furnishes intrastate mobile telecommunications service (as defined in [IC 6-8.1-15-7](#)) to a customer with a place of primary use that is not located in Indiana (as determined under [IC 6-8.1-15](#)).

(d) Subject to [IC 6-2.5-12](#) and [IC 6-8.1-15](#), and notwithstanding subsections (a), (b), and (c), if charges for telecommunication services not taxable under this article are aggregated with and not separately stated from charges subject to taxation under this article, the charges for nontaxable telecommunication services are subject to taxation unless the service provider can reasonably identify the charges not subject to the tax from the service provider's books and records kept in the regular course of business.

Taxpayer states that the service is interstate in nature. Taxpayer also states that federal law prohibits the taxation of Internet service, under the Internet Tax Freedom Act. See Internet Tax Freedom Act § 1100-06, 47 U.S.C. § 151 note (2007). The information and explanation provided by the taxpayer shows that taxpayer provides telecommunications services defined under IC § 6-2.5-4-6 to another person, and therefore, supports its claim for exemption from sales and use tax.

FINDING

For the reasons stated above, the taxpayer's protest is sustained.

CONCLUSION

Based upon materials and information provided in taxpayer's protest and subsequent hearing, taxpayer provides a variety of services to customers throughout the United States, including customers located in Indiana. Taxpayer furnishes software application and software-related services for the automotive dealer industry over the Internet. Taxpayer bills its customers for its services either on a per-use, or on a monthly or annual fee basis. Taxpayer does not sell or transfer tangible personal property when supplying the above-described services to its customers. The services fall under exemptions from retail sales and use tax provided in IC § 6-2.5-4-6.

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