

**Letter of Findings Number: 04-20100546**  
**Sales/Use Tax**  
**For Tax Years 2007-08**

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**ISSUE**

**I. Sales/Use Tax--Software.**

**Authority:** IC § 6-8.1-5-1(c); IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-1-27; IC § 6-2.5-1-24; IC § 6-2.5-1-14.

Taxpayer protests the imposition of use tax on software.

**STATEMENT OF FACTS**

Taxpayer, an Indiana S-corporation, is a registered retail merchant that serves as a contractor in mechanical and electrical work. Following an audit, Taxpayer protested two software purchases that were assessed use tax in the audit. Further facts will be supplied as required below.

**I. Sales/Use Tax--Software.**

**DISCUSSION**

The Department initially notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

Indiana imposes a sales tax on retail transactions and a complementary use tax on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-2-1; IC § 6-2.5-3-2.

Regarding computer software, IC § 6-2.5-1-27 states:

"Tangible personal property" means personal property that:

- (1) can be seen, weighed, measured, felt, or touched; or
- (2) is in any other manner perceptible to the senses.

The term includes electricity, water, gas, steam, and prewritten computer software.

(Emphasis added).

IC § 6-2.5-1-24 defines "prewritten computer software" as follows:

Subject to the following provisions, "prewritten computer software" means computer software, including prewritten upgrades, that is not designed and developed by the author or other creator to the specifications of a specific purchaser:

- (1) The combining of two (2) or more prewritten computer software programs or prewritten parts of the programs does not cause the combination to be other than prewritten computer software.
- (2) Prewritten computer software includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than the purchaser.
- (3) If a person modifies or enhances computer software of which the person is not the author or creator, the person is considered to be the author or creator only of the person's modifications or enhancements.
- (4) Prewritten computer software or a prewritten part of the software that is modified or enhanced to any degree, where the modification or enhancement is designed and developed to the specifications of a specific purchaser, remains prewritten computer software. However, where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for such a modification or enhancement, the modification or enhancement is not prewritten computer software.

Finally, the Department notes that IC § 6-2.5-1-14 states that: "'Computer software' means a set of coded instructions designed to cause a computer or automatic data processing equipment to perform a task." With relevant law in mind, the Department now turns to an examination of Taxpayer's arguments.

Taxpayer states that both Taxpayer, and the software company (hereinafter "SC"), have common owners. Taxpayer further asserts:

[SC]'s software programmers developed an in-house software to fill the need specifically designed by [an individual], Owner of both entities. Upon completion of the software development, the costs associated with the software development were transferred via intercompany invoices(s) from [SC] to [Taxpayer]. No tax was charged or accrued as the cost of development was transferred to the [Taxpayer].

Taxpayer also argues via a question, "Can owners of one company ([Taxpayer]) be charged tax when purchasing an item from themselves, or ([SC])?" The Department notes that Taxpayer and SC are each separate legal entities. Additionally, the invoices of SC show "Bill To" the Taxpayer—with a balance due on the invoices. (Although one of the two invoices shows only "LABOR" costs, the Department notes that the invoice also has a line stating quantity "1.00" and it being for "Service [ ] Software.").

Taxpayer also asserts that the software was "[i]n house software developed specifically for [Taxpayer]." Although Taxpayer asserts this, Taxpayer also stated in a telephone conversation that the software was sold by

SC to other contractors and that tax was collected on those sales. Taxpayer did not provide any documentation that would establish that the software was not prewritten software. Thus regarding Taxpayer's above arguments, Taxpayer failed to meet its burden of proof, as required by IC § 6-8.1-5-1(c).

**FINDING**

Taxpayer's protest is denied

*Posted: 05/25/2011 by Legislative Services Agency*

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