

DEPARTMENT OF STATE REVENUE

Revenue Ruling #2015-15ST
November 4, 2016

NOTICE: Under [IC 4-22-7-7](#), this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the department's official position concerning a specific issue.

ISSUES

Sales and Use Tax - Electronic Mobile Tablet Devices with Preloaded Software

Authority: [IC 6-2.5-1-24](#); [IC 6-2.5-1-26.5](#); [IC 6-2.5-1-27](#); [IC 6-2.5-1-27.5](#); [IC 6-2.5-1-28.5](#); [IC 6-2.5-2-1](#); [IC 6-2.5-2-2](#); [IC 6-2.5-4-1](#); [IC 6-2.5-4-6](#); [IC 6-2.5-4-10](#); [IC 6-2.5-4-16.4](#); [45 IAC 2.2-1-1](#); [45 IAC 2.2-4-2](#); [45 IAC 2.2-4-27](#); Streamlined Sales and Use Tax Agreement (May 16, 2016); Black's Law Dictionary (10th ed. 2014)

A taxpayer ("the Company") is seeking a determination as to whether the Company's products are services that are not subject to the Indiana sales and use tax when sold to clients located in Indiana. Specifically, the Company seeks a ruling regarding the following:

1. Whether monthly service charges and commissions paid to a vendor, who retains title to devices used at the Company's restaurants, are subject to tax as the rental of tangible personal property? If so, and the vendor is not registered to collect and remit this tax, can the Company self-accrue use tax on the amount deemed as rental payments to the vendor?
2. Based on the information provided, would the following fees charged for access to the premium content be subject to sales tax:
 - a. Fee for unlimited access to games that are stored on the device; if so, are such fees properly categorized as a rental or license to use tangible personal property or specified digital good?
 - b. Fee for unlimited access to current news events and social media from the device; if so, are such fees properly categorized as either Internet access or a telecommunications service or specified digital good?
 - c. Fees for songs that are selected to be played in the restaurant from the device; if so, are such fees properly categorized as a rental or license to use tangible personal property, a specified digital good or a telecommunications service?
3. If a single premium content fee is charged for unlimited access to games stored on the device and unlimited access to current news events and social media, will this single charge be subject to sales tax?
4. If the premium content fees are determined to be taxable in accordance with [IC 6-2.5-4-10\(a\)](#), does the Department consider the Company's use of each device to include both a license to use the device and taxable business use, in which case both revenue streams would be subject to tax?

STATEMENT OF FACTS

Company provides the following facts regarding its request for a revenue ruling:

The Company is one of the largest full service casual dining companies with restaurant locations in most states including Indiana. The Company has initiated a pilot program incorporating the use of a mobile point of sale device (herein "Mobile Point of Sale Device" or "Device") at its restaurant locations. The Device accommodates tabletop menu, ordering, and payment in some of its Indiana locations. The Device is an Android tablet with a touch screen interface that is located at each table. It provides pictures/detailed descriptions of the menu items and allows customers to place drink, appetizer, and entree orders, and pay their check directly through the Device. The customer has the option to pay their guest check by credit card, debit card, or gift card on the Device. Alternatively, it can be paid through their server/wait staff if preferred.

The Mobile Point of Sale Device also allows restaurants the option to enhance the customer experience by allowing access to premium content located on the Device. This content could include news, sports, access to social media, selecting songs to be played on the restaurant's playlist as well as access to interactive games. The Company will charge separate fees for access to games on the Device, access to current news and social media, and for song selections. The game application software resides within each Device. The Device is operated on a closed system, meaning it does not provide restaurant guests with Internet access. During the pilot phase, the Company will charge only for game fees, and the use of the Device to access

news content will be free.¹ The premium content fee will be included as a line item on the customer's food and beverage bill. The vendor or owner ("Vendor") of the Mobile Point of Sale Device has indicated to the Company that at the average restaurant over 80% of the restaurant customers use the Device for ordering and/or payment at the end of the meal, while only 12-20% of the customers access any premium content located on the Device.

[Vendor] charges the Company a monthly service fee for the use of the Devices. Per the agreement between the Vendor and the Company, the Company will be responsible for the collection of the revenue generated by accessing the premium content and collection/remittance of any applicable state or local taxes imposed on the transactions. Additionally, the Vendor may also charge monthly commissions to the Company as a percentage of the premium content income. The Company will be required to pay to the Vendor a portion (or potentially all) of the revenue generated by these premium content fees.

In a possible alternative scenario, the Vendor will not charge the Company a monthly service fee for use of the devices, but will instead receive from the Company all of the premium content fees up to a maximum amount, at which time the fees in excess of such amount will be shared with the Company.

The Mobile Point of Sale Device was developed specifically for the restaurant industry. The primary purpose of the Device is to facilitate (1) order placement, (2) order add-ons, (3) checkout/payment, and (4) customer satisfaction surveys. The benefits of the Device to the restaurant industry include increased food and beverage sales, a quicker table turnover, and increased guest loyalty and satisfaction. To achieve these desired results, the Company will provide one Mobile Point of Sale Device at each individual table within each restaurant. The average restaurant will typically contain 50 tables, and on average 50 Mobile Point of Sale Devices would then be used at each establishment.

It is the Company's intent that access to premium content (including news, videos, sports, educational items, and interactive games) is ancillary to the true purpose of the Device as part of the Company's established point of sale order and payment system.

DISCUSSION

Pursuant to [IC 6-2.5-2-1\(a\)](#) and [IC 6-2.5-2-2\(a\)](#), "the state gross retail tax" (or "sales tax") is imposed on retail transactions made in Indiana. A retail transaction is defined in [IC 6-2.5-4-1\(b\)](#) as the transfer, in the ordinary course of business, of tangible personal property for consideration. Indiana also imposes a complementary excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." [IC 6-2.5-3-2\(a\)](#).

[IC 6-2.5-4-1\(c\)](#) goes on to provide in pertinent part:

For purposes of determining what constitutes selling at retail, it does not matter whether:

- ...
- (2) the property is transferred alone or in conjunction with other property or services . . .

"Tangible personal property" is defined in [IC 6-2.5-1-27](#) as:

. . . 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.

Pursuant to [IC 6-2.5-4-10\(a\)](#), "[a] person, other than a public utility, is a retail merchant making a retail transaction when he rents or leases tangible personal property to another person other than for subrent or sublease." [IC 6-2.5-4-10\(b\)](#) continues: "[a] person is a retail merchant making a retail transaction when the person sells any tangible personal property which has been rented or leased in the regular course of the person's rental or leasing business."

[IC 6-2.5-1-21\(a\)](#) defines, in pertinent part, "rental" or "lease" to include "any transfer of possession or control of tangible personal property for a fixed or indeterminate term for consideration and may include future options to purchase or extend." Pursuant to the same statute, a rental or lease does not include "a transfer of possession or control of property under an agreement that requires the transfer of title upon completion of required payments

and payment of an option price that does not exceed the greater of one hundred dollars (\$100) or one percent (1%) of the total required payments[.]"

The Department's regulation, found at [45 IAC 2.2-4-27\(c\)](#), provides:

In general, the gross receipts from renting or leasing tangible personal property are subject to tax. The rental or leasing of tangible personal property constitutes a retail transaction, and every lessor is a retail merchant with respect to such transactions. The lessor must collect and remit the gross retail tax or use tax on the amount of actual receipts as agent for the state of Indiana. The tax is borne by the lessee, except when the lessee is otherwise exempt from taxation.

Pursuant to [45 IAC 2.2-4-27\(d\)\(2\)](#), sales tax is due on the rental payments:

For purposes of the imposition of the gross retail tax or use tax on rental or leasing transactions, each period for which a rental is payable shall be considered a complete transaction. In the case of a weekly rate, each week shall be considered a complete transaction. In the case of a continuing lease or contract, with or without a definite expiration date, where rental payments are to be made monthly or on some other periodic basis, each payment period shall be considered a completed transaction.

Except for certain enumerated services, sales of services generally are not retail transactions and are not subject to sales or use tax. [45 IAC 2.2-4-2](#) clarifies the taxability of services as follows:

- (a) Professional services, personal services, and services in respect to property not owned by the person rendering such services are not "transactions of a retail merchant constituting selling at retail", and are not subject to gross retail tax. Where, in conjunction with rendering professional services, personal services, or other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail unless:
 - (1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property;
 - (2) The tangible personal property purchased is used or consumed as a necessary incident to the service;
 - (3) The price charged for tangible personal property is inconsequential (not to exceed 10%) compared with the service charge; and
 - (4) The serviceman pays gross retail tax or use tax upon the tangible personal property at the time of acquisition.
- (b) Services performed or work done in respect to property and performed prior to delivery to be sold by a retail merchant must however, be included in taxable gross receipts of the retail merchant.
- (c) Persons engaging in repair services are servicemen with respect to the services which they render and retail merchants at retail with respect to repair or replacement parts sold.
- (d) A serviceman occupationally engaged in rendering professional, personal or other services will be presumed to be a retail merchant selling at retail with respect to any tangible personal property sold by him, whether or not the tangible personal property is sold in the course of rendering such services. If, however, the transaction satisfies the four (4) requirements set forth in [subsection (a)], the gross retail tax shall not apply to such transaction.

A unitary transaction is clarified in [45 IAC 2.2-1-1\(a\)](#) as follows:

Unitary Transaction. For purposes of the state gross retail tax and use tax, such taxes shall apply and be computed in respect to each retail unitary transaction. A unitary transaction shall include all items of property and/or services for which a total combined charge or selling price is computed for payment irrespective of the fact that services which would not otherwise be taxable are included in the charge or selling price.

Sales of specified digital products are also included in the definition of retail transactions. [IC 6-2.5-4-16.4\(b\)](#) provides that a person engages in making a retail transaction when the person (1) electronically transfers specified digital products to an end user; and (2) grants to the end user the right of permanent use of the specified digital products that is not conditioned upon continued payment by the purchaser. "Specified digital products," as currently defined by [IC 6-2.5-1-26.5](#), include only digital audio works (e.g., songs, spoken word recordings, ringtones), digital audiovisual works (e.g., movies), and digital books. Products "transferred electronically" are defined at [IC 6-2.5-1-28.5](#) to mean products that are "obtained by a purchaser by means other than tangible storage media."

Pursuant to Section 333 ("Use of Specified Digital Products," effective Jan. 1, 2010) of the Streamlined Sales and

Use Tax Agreement ("SSUTA," effective May 16, 2016), of which Indiana is a signatory, "A member state shall not include any product transferred electronically in its definition of 'tangible personal property.'" Pursuant to the same section of the SSUTA, "ancillary services," "computer software," and "telecommunication services" are excluded from the term "products transferred electronically."

In order to stay in conformity with the SSUTA, Indiana may not impose sales tax on a product transferred electronically by basing the product's taxability on inclusion of the product in the definition of tangible personal property. However, [IC 6-2.5-1-27.5\(c\)\(8\)](#) explicitly excludes ancillary services from the definition of telecommunication services, which are taxable under [IC 6-2.5-4-6](#). Accordingly, ancillary services are not subject to sales tax in Indiana either.

Based on the foregoing, Indiana may impose sales tax on products transferred electronically only if the products meet the definition of specified digital products, pre-written computer software, or telecommunication services.

"Prewritten computer software" is defined in [IC 6-2.5-1-24](#) 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.

"Telecommunication services" is defined in [IC 6-2.5-1-27.5](#) as follows:

- (a) "Telecommunication services" means electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points.
- (b) The term includes a transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission, conveyance, or routing regardless of whether the service:
 - (1) is referred to as voice over Internet protocol services; or
 - (2) is classified by the Federal Communications Commission as enhanced or value added.
- (c) The term does not include the following:
 - (1) Data processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a purchaser whose primary purpose for the underlying transaction is the processed data or information.
 - (2) Installation or maintenance of wiring or equipment on a customer's premises.
 - (3) Tangible personal property.
 - (4) Advertising, including but not limited to directory advertising.
 - (5) Billing and collection services provided to third parties.
 - (6) Internet access service.
 - (7) Radio and television audio and video programming services, regardless of the medium, including the furnishing of transmission, conveyance, and routing of the services by the programming service provider. Radio and television audio and video programming services include cable service as defined in 47 U.S.C. 522(6) and audio and video programming services delivered by commercial mobile radio service providers, as defined in 47 CFR 20.3.
 - (8) Ancillary services.
 - (9) Digital products delivered electronically, including the following:
 - (A) Software.
 - (B) Music.
 - (C) Video.
 - (D) Reading materials.
 - (E) Ring tones.

Company's first question is whether the monthly service charges for the Devices paid to the Vendor, who retains title to the Devices, are subject to Indiana sales or use tax as the rental of tangible personal property. Company pays a monthly service fee for the devices. Under the terms of the "Service Agreement," the vendor provides the Devices to the Company during the term of the agreement "for use solely with the . . . Service." Under the terms of the fee and payment schedule, the fees are collected and remitted as follows:

[Company] shall pay an amount equal to [redacted amount] per [Company] Billing Period per installed Restaurant (based on . . . Displays per installed Restaurant) (" . . . Service Fees"). Service Fees shall be: (i) adjusted by [redacted amount] per . . . Display per [Company] Billing Period if the total number of . . . Displays per installed Restaurant is less than or greater than . . . Displays per installed Restaurant, as the case may be; and/or (ii) prorated if a . . . Display has been installed for less than a full customer Billing Period.

Company's agreement for the Devices meets the definition of a lease or rental, as Company is paying a monthly fee (i.e., "consideration") for a "transfer of possession or control of tangible personal property for a fixed or indeterminate term." [IC 6-2.5-1-21\(a\)](#).

Regarding the self-assessment of use tax if the Vendor has not registered as a retail merchant with the Department, based on the facts presented it is likely that Vendor would be "engaged in business in Indiana" and, if so, would need to register as a retail merchant and collect sales tax. See [IC 6-2.5-3-1](#). Nevertheless, if it is the case that vendor is not engaged in business in Indiana and does not register as a retail merchant, then [IC 6-2.5-3-6](#) provides in pertinent part as follows:

- (a) For purposes of this section, "person" includes an individual who is personally liable for use tax under [IC 6-2.5-9-3](#).
- (b) **The person who uses, stores, or consumes the tangible personal property acquired in a retail transaction is personally liable for the use tax.**
- (c) The person liable for the use tax shall pay the tax to the retail merchant from whom the person acquired the property, and the retail merchant shall collect the tax as an agent for the state, if the retail merchant is engaged in business in Indiana or if the retail merchant has departmental permission to collect the tax. **In all other cases, the person shall pay the use tax to the department. (Emphasis added).**

Since [IC 6-2.5-3-6](#) requires a person to assess and remit use tax to the Department when the retail merchant is not registered in the state, Company would then remit use tax on its monthly sales tax return.

Company next questions whether the premium content fees are subject to Indiana sales tax if they are related to any of the following: games; accessing news or social media content; and songs. The Company is required to pay to the Vendor a portion (or potentially all) of the revenue generated by the optional premium content fees that are paid by restaurant guests to the Company. The "Service Agreement" provides the following stipulation under "Premium Content Revenue Share Rights:" "The revenues resulting from Premium Content shall be shared between the parties as set forth in Appendix One." Under the terms of the fee and payment schedule, the premium content fees are collected and remitted as follows:

Premium Content Fees: If Customer's Premium Content Revenues collected in any Customer Billing Period exceeds the total amount of all . . . Service Fees payable with respect to such Customer Billing Period, Customer shall pay an amount equal to [redacted amount]% of such excess ("Premium Content Fees").

In this context, the games, and the ability to access news, sports information, and social media content, would properly be classified as software, which is considered tangible personal property. Although Company's customers have use of the software, the customers do not exercise control over the software. The customers, in other words, are not transferred "possession" of the software. "Possession" means, "The fact of having or holding property in one's power; the exercise of dominion over property." Black's Law Dictionary (10th ed. 2014). "Possession . . . is evidence of ownership; the possessor of a thing is presumed to be the owner of it, and may put all other claimants to proof of their title." *Id.* The customers do not take "possession" of the software. They merely have the right to use the software for a period of time. In that sense, the software is analogous to electronic games found in video arcades. A video game customer pays for the privilege of using the game without interference from other customers and controls the manner in which the game is played. The video game customer may have the exclusive right to use the video game for a short period, but the video game customer does not take "possession" of the device.

In contrast, a person who rents or leases a car is entitled to take possession of the car and to continue to exercise that possessory interest for a fixed period of time. The person who visits a local tool rental store and arranges to rent a lawn mower over the weekend, takes "possession" of the lawn mower for the weekend. The automobile rental business and the local rental store purchase the car and the lawn mower without paying sales tax pursuant to [IC 6-2.5-5-8](#) but must thereafter collect sales tax from their customers each time the car or lawn mower is rented. (See [IC 6-2.5-4-10](#)).

In this instance, Company is providing a service to its customers who access the premium content in the form of games or the ability to access news or social media content on the Devices; that service consists of permitting its customers to use - not truly possess - software on the Devices for a fixed period of time. Although the transitory "use" of the software has qualities which are similar to the attributes of "possession," the customers do not acquire uninhibited possession of the software. Because Company provides a service to its customers, Company would not collect sales tax from its customers for the use of this premium content, and therefore sales tax would not be owed on the commissions either.

Further, the service would not qualify as a "telecommunications service." The software is already on the device, so it is not "electronically transmitted or conveyed." Furthermore, any telecommunication service involved in transmitting data or information to the device is presumably provided by Company's internet service provider. Company is merely providing access to games, news, sports information, and social media content, and not themselves routing data or information from one place to another.

Finally, the games, news, sports information, and social media content would not be considered specified digital products, because "specified digital products" only includes digital audio works, digital audiovisual works, and digital books, and in no way would news, sports information, and social media content fit with any of those categories. [IC 6-2.5-1-26.5](#).

The songs accessed from this device would be classified as specified digital products, as songs would be considered digital audio works. As such, they would also be considered tangible personal property, but only if they are provided for permanent use. Since a user is only granted a temporary use of the songs, they would not be subject to sales tax either. Similar to the game software or software to access news, sports, or social media content, Company is providing a service. This would also not be considered a telecommunication service, because music delivered electronically is specifically excluded from the definition of "telecommunication service" under [IC 6-2.5-1-27.5](#).

Given that the premium content fees relate to the provision of a service whether the fees relate to games, accessing news, sports information, and social media content, or songs, if the fee includes access to a combination of the items under a single charge, it would still not be subject to Indiana sales tax.

Finally, since the premium content fees have not been determined to be taxable in accordance with [IC 6-2.5-4-10\(a\)](#), the Department would not consider the Company's use of each device to include both a license to use the device and taxable business use.

RULING

Company is renting or leasing the Devices from Vendor. As such, the rental or lease payments are subject to Indiana sales tax. If the Vendor is not registered as an Indiana retail merchant and does not collect the sales tax, Company may self-assess use tax. Finally, Company is providing a non-taxable service when its customers access premium content on the Devices. Therefore, the fees for such services are not subject to Indiana sales or use tax, even if different types of premium content are accessed under a single charge.

CAVEAT

This ruling is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances as stated herein are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. However, other taxpayers with substantially identical factual situations may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material respect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this ruling a change in statute, regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection.

¹ This fee structure is intended to be employed solely for the pilot program. Following the conclusion of the program, the Company may elect to charge a fee for access to any premium content on the Device.

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