DEPARTMENT OF STATE REVENUE

Revenue Ruling #2015-11ST
November 21, 2016

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ISSUES

Sales and Use Tax - Webcasting and Virtual Communications

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 6-2.5-4-16.4; 45 IAC 2.2-1-1; 45 IAC 2.2-4-2; Asplundh Tree Expert Co. v. Indiana Dep't of State Revenue, 38 N.E.3d 744 (Ind. T.C. 2015); Sales Tax Information Bulletin #8 (November 2011); Streamlined Sales and Use Tax Agreement (May 16, 2016)

A taxpayer ("Company") is seeking an opinion as to whether Company's product is a service that is not subject to the Indiana sales and use tax when sold to clients located in Indiana. Specifically, Company seeks a ruling regarding whether "the charges by Company for its online webcasting solution and usage fees associated with such solution [are] subject to Indiana's state's sales and use tax."

STATEMENT OF FACTS

Company is a California corporation. Company provides the following facts regarding its request for a revenue ruling:

> [Company] owns no data centers but it does utilize large data centers located outside [Indiana].
>
> . . .
>
> The Company is a provider of a cloud-based solution for webcasting and virtual communications [the "product"]. Their industry-leading platform helps organizations to communicate with employees, clients, prospects and partners with measurable and greater impact. [Company's] webcasting solutions provide corporations with the power to engage global audiences with interactive, live content for marketing, training and corporate communications. The Company's solution is primarily used by their customers for presentations relating to product launches, company town hall meetings and user conferences.
>
> The Company charges their customers an Annual Subscription Fee that will entitle the customer to host a certain number of webcast events per year. The more events purchased the more expensive the annual subscription. The Company guarantees that their annual subscription to their web-hosted solution will be:
>
> 1. Hosted and maintained by the Company.
> 2. Operational and available for use and access by the customer at all times (excluding periods for scheduled maintenance).
>   a. Up to a maximum amount of streaming minutes purchased
>   b. Up to a maximum amount of viewer access purchased
>   c. The customer will have access to their digital storage
>   d. The customer will have access to technical support and training for problem solving and hosting issues
> 3. Subject to customer fee reductions or credits if the access/availability of the system or operational performance does not meet the promised standards. For example, failed web-cast events or unscheduled downtimes.

DISCUSSION

Based on the foregoing facts, Company requests a ruling as to whether its product is a non-taxable service. Company states that Company contracts with their customers to provide network hosting, storage, IT and computing maintenance services to their customers. Company asserts that the service provided is more closely

related to a web-hosting service commonly referred to as an Infrastructure as a Service (IaaS).

Pursuant to IC 6-2.5-2-1(a) and IC 6-2.5-2-2(a), 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. 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.

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. It is important to note that "ancillary services," "computer software," and "telecommunication services" are not restricted by the phrase "product transferred electronically." 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.

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.

(**Emphasis added**).

"Ancillary Services" is defined in IC 6-2.5-1-11.3 as follows:

> "Ancillary services" means services that are associated with or incidental to the provision of telecommunication services, including the following:
> (1) Detailed telecommunications billing.
> (2) Directory assistance.
> (3) Vertical services.
> (4) Voice mail services.

With regard to the taxability of remotely accessed software, the Department in Sales Tax Information Bulletin #8 (November 2011) ("STIB 8") provides the following guidance:

> Prewritten computer software maintained on computer servers outside of Indiana also is subject to tax when accessed electronically via the Internet (i.e., "cloud computing"). The accessing of prewritten computer software by Indiana residents constitutes a transfer of the software because the customers gain constructive possession and the right to use, control, or direct the use of the software.

Even though software may be located outside Indiana, the Indiana Tax Court has indicated that something need not necessarily be physically present in Indiana for it to be "used" in Indiana. Asplundh Tree Expert Co. v. Indiana Dep't of State Revenue, 38 N.E.3d 744, 748 (Ind. T.C. 2015) (quoting Fisher & Co., Inc. v. Dep't of Treasury, 282 Mich.App. 207, 769 N.W.2d 740, 743 (2009). Further, the Court stated the following:

> Indiana's statutory definition of a taxable use is broad and leads to a very low threshold of taxability. See USAir Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466, 469 (Ind. Tax Ct.1993). Moreover, this Court has explained that the location of tangible personal property is not dispositive of whether the use tax applies because it would impermissibly limit the definition of a taxable use to either the intended or the ultimate use of the property. See id. at 471. . . . [T]herefore, the imposition of use tax does not necessarily depend on whether the subject property is physically present in the taxing state. Id.

Company's webcasting and virtual communications platform is operated using proprietary software controlled by Company and maintained outside Indiana. In order for a customer to organize an event, they open Company's website from a web browser on a computer. In that respect, customers are using software electronically via the internet.

To distinguish Company's software from the guidance in STIB 8, Company maintains that it offers a web hosting service. The Department in a prior Revenue Ruling (Revenue Ruling 2008-16ST, (November 14, 2008), 20081217 Ind. Reg. 045080927NRA) held in part that web hosting fees are a service charge and are not subject to sales and use tax in Indiana. Similarly, Company's Customers can host "Audio Events," "Video Events," "Web Conferences," all through the webcasting and virtual communications platform on Company's website, and can upload their own content from Company's website to the cloud.

Further, in another prior Revenue Ruling (Revenue Ruling 2011-05ST, (December 9, 2011) 20111130 Ind. Reg. 045110713NRA), the Department concluded that a taxpayer's charges for online access to an information database were not taxable, but charges for the use of certain add-on remotely hosted software applications were taxable under the assumption that the customer obtained a possessory interest in the applications. With regard to the access to the database, the Ruling held that "Taxpayer's sales of access to its online database and its upgraded data packages via the Internet are not subject to Indiana sales and use tax." Regarding the workflow add-ons, however, the Ruling held that "customers are purchasing access to prewritten computer software for which they, the customers, have a possessory interest. On that basis, Taxpayer's sales of access to its workflow add-ons to end-user customers via the Internet are subject to Indiana sales and use tax when provided to customers located in Indiana."

In the case at hand, Company's software allows its customers to upload files and host various types of web-based communication, which has the same limited functionality as the database as the above-mentioned Ruling; however, the software also features certain "widgets" that can be used by the host to conduct surveys, allow viewers to submit questions, display videos or images, and so on. Having said that, the basic platform of the software is strictly to allow a customer to host events. The customization available through the widgets can be differentiated from the workflow add-ons in the Ruling in that the add-ons were separately purchased software features which performed functions beyond the database access at issue in the Ruling, whereas the widgets are

part of Company's software platform and perform enhancements to the basic webhosting and virtual communication platform.

Furthermore, the serviceperson test found at 45 IAC 2.2-4-2 applies in this instance. Company satisfies all of the requirements of 45 IAC 2.2-4-2(a) for finding that the webcast hosting services provided by Company are non-taxable. First, Company is primarily in the business of webcast hosting and virtual communications, and not selling tangible personal property. 45 IAC 2.2-4-2(a)(1). Second, the software is for the purpose of enabling Company's customers to upload files and run events incident to Company's webcast hosting and virtual communications service. 45 IAC 2.2-4-2(a)(2). Third, customers are not charged for the software, but for the minutes of meeting time they use. 45 IAC 2.2-4-2(a)(3). Fourth, the software was created by Company, and thus Company did not have to pay sales tax when it was created or purchased. 45 IAC 2.2-4-2(a)(4). Company's software is available to Company's customers incident to the service provided, which is hosting a webcast event. Company retains ownership of the software. Customers are not granted any rights to the software. They are sold the ability to run events which Company hosts.

Company has shown that its clients do not acquire the software for their own independent use, that they are granted a limited right to access the software, that the software functionality is limited and primarily provides the ability to host events as part of the webcast hosting service, and the software is available to its clients incident to the service provided. For all of these reasons, the Department concludes that the fee for the software is exempt.

Company's product appears to be a service under 45 IAC 2.2-4-2, and not a sale, lease, license, or other transfer of software or other tangible personal property. Additionally, the product would not meet the definition of a "telecommunication service," which again is defined in IC 6-2.5-1-27.5 as "electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points." Company is transmitting, conveying, or routing information; however, "telecommunication services" does not include "[d]ata 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," which is what Company's service performs.

Customers pay an annual subscription fee, which allows them to run a number of events per the "subscription year." The "Master Service Agreement" goes on to state that "[a]ny additional Events, Minutes, Attendees, On-demand Access or other Services ordered by Client shall be billed monthly at the rate set forth in the Fee Schedule." The "Master Service Agreement" does contain separately stated charges, but they all appear to be for services.

Based on the information provided, the product is not subject to sales or use tax, as it is a service and does not constitute or include sales of tangible personal property, specified digital products, prewritten computer software, or telecommunication services.

RULING

Company's product is a service as enumerated in 45 IAC 2.2-4-2, and it is not a "telecommunication service." Therefore, Company's' service is not subject to Indiana sales and use tax.

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.

Posted: 12/28/2016 by Legislative Services Agency
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