

DEPARTMENT OF STATE REVENUE

Revenue Ruling #2015-08ST
March 7 2017

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 It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register.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 - Texting Service & Printer Rental Fees

Authority: [IC 6-2.3-1-4](#); [IC 6-2.3-1-13](#); [IC 6-2.3-1-14](#); [IC 6-2.3-2-1](#); [IC 6-2.5-1-21](#); [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 6-2.5-3-2](#); [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](#); *Asplundh Tree Expert Co. v. Indiana Dep't of State Revenue*, 38 N.E.3d 744 (Ind. T.C. 2015); *Grand Victoria Casino & Resort, LP v. Indiana Dep't of State Revenue*, 789 N.E.2d 1041 (Ind. T.C. 2003); *Sales Tax Information Bulletin #8* (December 2016); *Streamlined Sales and Use Tax Agreement* (May 16, 2016).

A taxpayer ("the Company") is seeking a determination as to whether the Company's cloud-based services are 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. Are cloud-based software texting services subject to sales or use tax in Indiana?
2. Are separately listed printer usage fees subject to sales or use tax in Indiana?
3. Would these services be subject to any other Indiana taxes, other than sales/use tax?

STATEMENT OF FACTS

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

[Company], whose business is based in [California], will be providing a texting service. This is a cloud based software service and does not require any downloads or tangible software installation for use.

To illustrate how the texting (or "mobile messaging") service works, Company provides an example of a hotel (Company's client in this scenario) and its customers utilizing the texting service:

[T]he hotel's customers can text in a request for anything from an order to a question to a service request such as a room reservation request. The hotel receives the text (through [Company's] cloud based software service) and the business is able to respond to their customer via text with a custom message or preset reply. The customer receives confirmation of their order or question via text.

Regarding the printer service, Company states:

Additionally, if [Company's] customers need to print [Company] provides a printer for this purpose. [Company] purchases these printers ex-tax and provides them to their customers for a separately stated "Usage Fee[.]"

Company does not currently have nexus in Indiana, but plans to operate in Indiana in the future.

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. 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](#) when they are intrastate, meaning "that the transmission must originate and terminate within Indiana." *Grand Victoria Casino & Resort, LP v. Indiana Dep't of State Revenue*, 789 N.E.2d 1041, 1045 (Ind. T.C. 2003). 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 first issue, Company asks whether cloud-based software texting services are subject to sales or use tax in Indiana. The Department in Sales Tax Information Bulletin #8 (December 2016) ("STIB 8") provides the following guidance concerning the taxability of remotely accessed software:

Whether a transaction involving the use of "cloud-based" software is subject to Indiana sales or use tax depends on the facts and circumstances of each transaction, particularly with regards to the amount of control or possession the purchaser is granted in the software, the object of the transaction, and the ownership rights, if any, the purchaser has in the software.

STIB 8 goes on to provide guidance with regard to situations where a vendor uses cloud-based software on a client's behalf:

Depending on the factors of the transaction and arrangement, [Software as a Service]¹ may or may not be subject to tax. Charges for accessing prewritten computer software maintained on the vendor's or a third party's computer or servers are not subject to tax when accessed electronically via the Internet if the customer is not transferred the software, does not have an ownership interest in the software, and does not control or possess the software or the server.

Example #3: An Indiana resident pays an hourly rate to utilize a vendor's software resources, which are maintained on the vendor's computer servers located outside of Indiana. The purchaser never uses, receives or has control of the software. Instead, the vendor uses the software to perform services on the Indiana resident's behalf. The transaction is not subject to sales tax.

Further, a purchaser may contract with a business in order to receive services, and as part of those services,

tangible personal property in the form of software is provided. If the software provided to the customer is merely incidental to the provision of services (less than 10% of the total price of the transaction), then the service transaction may not be subject to sales tax as a unitary transaction.

Example #4: An Indiana business contracts with a service provider who will perform the business's IT functions. As part of the service, the Indiana business downloads the service provider's prewritten software onto the business's computer. However, the Indiana business does not use the software; rather, the service provider uses the software remotely in order to perform its IT services. The cost of the software is incidental (less than 10% of the total price of the transaction) to the service, so the transaction with the business customer is exempt from sales tax. The service provider, however, is subject to Indiana sales/use tax on the purchase of this 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.*

In the case at hand, Company's texting service is facilitated using proprietary software controlled by Company, operated remotely, and maintained outside Indiana. Company's software allows its clients (the "Clients") to receive text messages from their customers (the "Customers"). Clients do not download the cloud-based software, and neither Clients nor Customers need to download any other software in order to use the texting feature (such as a mobile app). Company's Clients instead register their Customers' phone numbers using Company's texting service. Customers then receive a welcome message on their phone from a dedicated phone number, to which the Customer can then reply for any requests they would like to make of Company. When a Customer sends a text message to a Client, it is routed by Company's software, and received by electronic mobile devices or computers of the Client or Client's employees. For instance, if a Customer wanted a towel, he or she would send a text message via the dedicated phone number, after which the Client gets an alert, which shows up as a text message on the Client's computer and/or phone.

Furthermore, the serviceperson test found at [45 IAC 2.2-4-2](#) applies in this instance, and Company satisfies all of the requirements of [45 IAC 2.2-4-2\(a\)](#). First, Company is primarily in the business of mobile messaging, and not selling tangible personal property. [45 IAC 2.2-4-2\(a\)\(1\)](#). Second, the software is used by Company for the purpose of sending text message alerts from a Client to a Customer, or vice versa. [45 IAC 2.2-4-2\(a\)\(2\)](#). Third, customers are not charged for the software, but are instead charged for the mobile messaging service. [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. [45 IAC 2.2-4-2\(a\)\(4\)](#). Company's software is used by Company incidental to the service provided, which is mobile messaging. Company retains ownership of the software. Customers are not granted any rights to or control of the software.

Company has shown that its Clients do not acquire the software for their own independent use, that the Clients never access nor control the software, and that the software is used by Company on behalf of its Clients incidental to the service provided.

However, while 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, the product meets 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 data or information with the cloud-based mobile messaging software. Further, while "telecommunication services" does not include "[d]ata processing and information services," Company's mobile messaging service would not qualify as data processing. Furthermore, the services would not be considered "ancillary services," per [IC 6-2.5-1-11.3](#), because the services are not detailed telecommunications billing, directory assistance, vertical services, or voice mail services. Therefore, because Company's mobile messaging service is a telecommunication service, and the telecommunication service is intrastate, it is a retail transaction subject to Indiana sales and use tax per [IC 6-2.5-4-6](#).

Regarding the second issue, Company asks whether a separately stated "printer usage fee" is subject to Indiana sales or use tax. Company provides a printer to their Clients, and charges them a separately stated fee for the use of the printer. This would be considered a rental of tangible personal property, which is considered a gross retail transaction per [IC 6-2.5-4-10](#). [IC 6-2.5-1-21](#)(a) defines rentals and leases, in pertinent part, 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." The transaction for the printer would fit this definition.

[45 IAC 2.2-4-27](#)(a) goes on to state in relevant part that "the gross receipts from renting or leasing tangible personal property are taxable." Pursuant to [45 IAC 2.2-4-27](#)(d)(2), sales tax is due on the lease payments:

Rental or lease period. 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.

Therefore, the printer usage fee is subject to Indiana sales and use tax as a fee charged for renting tangible personal property.

Finally, regarding the third issue, Company seeks guidance as to whether Company's service is subject to any other Indiana taxes. Other than sales and use tax, the utility receipts tax ("URT") is imposed on telecommunication services. The URT is imposed pursuant to [IC 6-2.3-2-1](#) as follows:

An income tax, known as the utility receipts tax, is imposed upon the receipt of:

- (1) the entire taxable gross receipts of a taxpayer that is a resident or a domiciliary of Indiana; and
- (2) the taxable gross receipts derived from activities or businesses or any other source within Indiana by a taxpayer that is not a resident or a domiciliary of Indiana.

"Gross receipts" for purposes of the Indiana's URT is defined at [IC 6-2.3-1-4](#) as follows:

"Gross receipts" refers to anything of value, including cash or other tangible or intangible property that a taxpayer receives in consideration for the retail sale of utility services for consumption before deducting any costs incurred in providing the utility services.

"Utility service" includes the furnishing of "[t]elecommunication services." [IC 6-2.3-1-14](#). The definition of "telecommunication services" is slightly different for purposes of the URT. It is defined at [IC 6-2.3-1-13](#), which provides:

"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 any of the following:

- (1) 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.
- (2) Value added services providing text, graphic, video, or audio program content for a purpose other than transmission.
- (3) The transmission of video programming or other programming:
 - (A) provided by; or
 - (B) generally considered comparable to programming provided by; a television broadcast station or a radio broadcast station, including cable TV, direct broadcast satellite (DBS/DISH), and digital television (DTV).

Taxpayer's mobile messaging service meets this definition, as the software transmits messages by the means listed above. Therefore, Company is subject to URT on the gross receipts received for Company's mobile messaging service.

RULING

While the cloud-based software does not subject Company's mobile messaging service to Indiana sales and use tax, the fact that the service is a "telecommunication service" does subject the service to Indiana sales and use tax. Further, Company's "printer usage fee" is a charge for renting tangible personal property, and is therefore

subject to Indiana sales and use tax. Finally, Company is subject to Indiana utility receipts tax on the gross receipts received for Company's mobile messaging service.

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 STIB 8 defines "Software as a Service" as "a service provider hosting software application over the internet for a customer."

Posted: 04/26/2017 by Legislative Services Agency
An [html](#) version of this document.