

Memorandum of Decision Number: 04-20170483R
Gross Retail Tax
For Tax Years 2014, 2015, and 2016

NOTICE: IC § 4-22-7-7 permits the publication of this document in the Indiana Register. The publication of this document provides the general public with information about the Indiana Department of Revenue's official position concerning a specific set of facts and issues. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Memorandum of Decision.

HOLDING

Indiana Professional Association was entitled to a refund of sales tax paid on online software database subscription because the transactions involved purchases of a service and not taxable tangible personal property.

ISSUE

I. Gross Retail Tax—Software as a Service.

Authority: IC § 6-2.5-1-27; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-4-1; IC § 6-2.5-4-16.4; *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); Sales Tax Information Bulletin 8 (November 2011); Sales Tax Information Bulletin 8 (December 2016).

Taxpayer protests the refund denial of sales tax paid on online software database subscription.

STATEMENT OF FACTS

Taxpayer is a professional association that provides trade services to individuals who are members of the organization ("Members"). One service that Taxpayer provides to its Members is access to an online database of real property listings, which it contracts with a vendor ("Vendor") to provide. Members submit information to Vendor via the internet about real property Members have listed for sale, Vendor uses the software to standardize the format of the information, and the reformatted data is made accessible to Taxpayer, Members, and other authorized users within a searchable database via the internet or a mobile application. Vendor provides similar services to other organizations.

Taxpayer submitted a claim for refund of the sales tax it paid on the fees paid to Vendor during 2014, 2015, and 2016, which was denied by the Indiana Department of Revenue ("Department"). Taxpayer protested the sales tax refund denial. An administrative hearing was held and this Memorandum of Decision results. Additional facts will be addressed as necessary.

I. Gross Retail Tax—Software as a Service.

DISCUSSION

Taxpayer protests the refund denial, arguing that the online software database subscription fees were not subject to sales tax because Taxpayer received a service from Vendor, not tangible personal property. The Department denied the claim after review of Taxpayer's invoices and contract with Vendor, stating, "The taxpayer submitted a contract that states the taxpayer is receiving licenses and/or receiving access to software license(s). Per [45 IAC 2.2-3-4](#), these licenses are taxable." Thus, the Department found that the transactions at issue involved the transfer of tangible personal property in a retail transaction.

Taxpayer argues that the software usage at issue does not involve the transfer of tangible personal property, as Taxpayer is not receiving the software itself. Rather, Taxpayer argues that it is merely receiving a service from Vendor through reformatting and providing access to data Taxpayer's Members submit to Vendor. The issue is therefore whether Taxpayer received tangible personal property under the terms of its agreement with Vendor, or whether Taxpayer purchased a service from Vendor.

As an initial matter, the Department notes that, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing . . . [courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind.

2014). Thus, all interpretations of Indiana tax law contained within this decision, as well as the initial refund determination, shall be entitled to deference.

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-4-1. A complementary excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. IC § 6-2.5-3-2(a). An exemption from the use tax exists for transactions where the gross retail tax was paid at the time of purchase pursuant to IC § 6-2.5-3-4(a).

The definition of "tangible personal property" in IC § 6-2.5-1-27 provides:

"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).**

Sales Tax Information Bulletin 8 (November 2011), 20111228 Ind. Reg. 045110765NRA, which provides Departmental guidance for the periods in which Taxpayer requests a refund, provides in relevant part:

The sale of statistical reports, graphs, diagrams, or any other information produced or compiled by a computer and sold or reproduced for sale in substantially the same form as they are so produced is considered to be the sale of tangible personal property **unless the information from which such reports was compiled was furnished by the same person to whom the finished report is sold. The charge for reports compiled by a computer exclusively from data furnished by the same person for whom the data is prepared is considered to be for a service and is not subject to sales or use tax unless it is part of a unitary transaction subject to sales or use tax.**

Note: **When statistical reports, graphs, diagrams, or any other information produced or compiled by a computer are transferred electronically to a customer, the transaction is not subject to sales tax.** For more information on the application of Indiana sales tax to products transferred electronically, please refer to Section III below [applicable only to transfers of "specified digital products"] or Commissioner's Directive #41, available online at www.in.gov/dor/3617.htm. **(Emphasis added).**

The updated version of Sales Tax Information Bulletin 8 (December 2016), 20170125 Ind. Reg. 045170026NRA, further clarifies:

SaaS [Software as a Service] is defined as a service provider hosting software application over the internet for a customer.

...

Depending on the factors of the transaction and arrangement, SaaS 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.

...

A subscription to an online database that allows the customer to download reports, documents, and other information, is not subject to tax if the customer does not gain control of the underlying software of the database. **(Emphasis added).**

Accordingly, a taxpayer purchases a service when a service provider takes the taxpayer's information, reorganizes it into a new format, and returns the newly organized information to the taxpayer, and where the taxpayer does not have an ownership interest in or control over the software. The fact that software is used to perform this service and the results are delivered via the software platform does not convert the software into tangible personal property in the form of prewritten computer software. The transactions at issue do not involve the transfer of "specified digital products" taxable under IC § 6-2.5-4-16.4. Therefore the transactions must involve the transfer of prewritten computer software in order to be subject to sales tax.

To support its protest, Taxpayer provided a copy of the agreement between Vendor and Taxpayer. Under the terms of the agreement, Taxpayer does not take possession of the software at issue - actual or constructive - and Taxpayer has no ability itself to use, control, or direct the use of the software. Section 5 of the agreement provides

that Vendor is the sole and exclusive owner of the software and Taxpayer has no ownership interest of any kind in the software. Section 6 of the agreement further states that Taxpayer has exclusive ownership of the data that is inputted into the software database, and Vendor may not transfer this information to a third-party with the exception of Taxpayer's Members and other authorized users. Section 7 provides that Taxpayer pays Vendor based upon the number of Members utilizing the database each month, and Taxpayer is not charged a flat fee for access to and use of the software itself.

Taxpayer has demonstrated that agreement between it and Vendor is not for the transfer of prewritten computer software or any other form of tangible personal property. Rather, Taxpayer received a database service from Vendor. Taxpayer maintains ownership of the data provided to Vendor for processing, and the reports from Vendor are received by the same entity that provided the data in the reports. The transactions at issue do not satisfy the definition of a taxable retail transaction under IC § 6-2.5-3-2(a), and Taxpayer therefore is entitled to a refund of sales tax paid on these transactions.

FINDING

Taxpayer's protest is sustained.

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