

**Memorandum of Decision: 04-20190969R
Gross Retail Tax
For the Years 2013**

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 is provided for the convenience of the reader and is not part of the analysis contained in this document.

HOLDING

Indiana Company provided sufficient documentation to show it is entitled to a refund of sales tax.

ISSUE

I. Sales and Use Tax—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 § 6-2.5-4-16.4; [45 IAC 2.2-1-1](#); [45 IAC 2.2-4-2](#).

Taxpayer protests the Department's refund denial.

STATEMENT OF FACTS

Taxpayer is a corporation with locations in Indiana. Taxpayer requested a refund of sales tax. The Indiana Department of Revenue ("Department") denied Taxpayer's refund request in part because Taxpayer did not provide documentation to support its position. Taxpayer protested the partial denial and an administrative hearing was held. This Memorandum of Decision ensues, and additional facts will be provided as requested.

I. Sales and Use Tax—Software.

DISCUSSION

Taxpayer is part of a group of companies that perform diagnostic medical testing. Taxpayer provides software interface services between its related companies ("Related") that actually perform the testing and the various doctors ("Doctors") who requested the testing. This software interface service allows the software used by Doctors to interact and communicate with the software used by Related.

In order to provide these software interface services, Taxpayer paid two third-party software vendors ("Vendors") used by Doctors for the right to access their software platforms. In other words, Vendors charged Taxpayer for the right to interact with Vendors' software. Vendors charged sales tax on those transactions and Taxpayer claimed a refund of that sales tax. The Department denied this portion of the refund claim on the basis that Taxpayer had not established that it was paying for access to software and not for ownership of software. In the course of the protest process, Taxpayer provided documentation including software agreements with Vendors which it believes established that it only paid for access to and not ownership of the software.

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[percent]) 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."

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.

After review of the supporting documentation supplied in the protest process, the highlighted vendors do not appear to transfer any "prewritten computer software." The interface software is never transferred to Taxpayer or the medical facilities. Taxpayer utilizes its own software, the medical facilities utilize their own systems, and the vendors do not transfer any software to Taxpayer. Neither Taxpayer nor any medical facility has the right to access, control, or use the interface software, nor do they ever hold title in the interface software. Thus, Taxpayer only purchased access to the Vendor's software without the rights to manipulate or control the software.

Taxpayer's purchases appear to be of 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 purchase 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." Vendors are transmitting, conveying, or routing information; however, "telecommunication services" do 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 the third parties' interface services perform.

Based on the information provided, the transactions at issue are not the purchase of tangible personal property, prewritten computer software, or telecommunication services. Rather, these transactions are only for the right to access Vendor's software. Thus, Taxpayer is entitled to the refund of sales tax from the two protested vendors.

FINDINGS

Taxpayer's protest is sustained.

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