DEPARTMENT OF STATE REVENUE

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Supplemental Memorandum of Decision: 04-20200186R; 04-20200187R; 04-20200188R; 04-20200189R
Gross Retail and Use Tax
For the Years 2013, and 2015 to 2017

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 Supplemental Memorandum of Decision.

HOLDING

To the extent that Insurance Company timely filed a sales or use tax refund claim on transactions in which the vendor provided only exempt services, the Department agreed that Insurance Company was entitled to that refund; the Department disagreed with Insurance Company that it was entitled to refunds paid on transactions in which the vendor provided Insurance Company software or taxable software access.

ISSUE

I. Gross Retail and Use Tax - Exempt Service Agreements.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-1-27; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-5-4-1; IC §§ 6-2.5-5 et seq.; *Indiana Dep't of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480 (Ind. Tax Ct. 2012); *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138 (Ind. Tax Ct. 2010); *Indiana Dep't of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454 (Ind. Ct. App. 1988); *Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96 (Ind. Ct. App. 1974); 45 IAC 2.2-3-14(2); 45 IAC 2.2-4-2; 45 IAC 2.2-5-3(b); 45 IAC 2.2-5-6(a); 45 IAC 2.2-5-8(a); 45 IAC 2.2-5-9(a); 45 IAC 2.2-5-10(a); Sales Tax Information Bulletin 8 (December 2016); Sales Tax Information Bulletin 8 (November 2011); Sales Tax Information Bulletin 8 (May 2002).

Taxpayer argues that it is entitled to an additional refund of sales and use tax paid on the purchase of "software" and "maintenance agreements" because these particular transactions were for exempt services and that these purchases did not involve the acquisition of tangible personal property.

STATEMENT OF FACTS

Taxpayer is an out-of-state company which provides various insurance services including individual policies, retirement plans, and group policies. Taxpayer submitted four refund requests seeking the return of approximately $20,000, $150,000, $180,000, and $480,000 in sales and use tax paid on the purchase of computer software and associated maintenance agreements.

The Indiana Department of Revenue ("Department") reviewed Taxpayer's claims granting the refunds in part and denying them in part.

Taxpayer disagreed with that portion of the Department's decisions denying the refund amounts and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representatives explained the basis for the protests.

The Department issued four different decisions consisting of two Final Orders Denying Refund and two Memoranda of Decision sustaining Taxpayer's objections in part and denying in part Taxpayer's claim that it was entitled to additional refund amounts. Memorandum of Decision 04-20170602R (December 31, 2019); Final Order Denying Refund 04-20191059R (December 31, 2019); Final Order Denying Refund 04-20191060R (December 31, 2019); Memorandum of Decision 04-20170601R (December 31, 2019).

Taxpayer disagreed with the December 31 decisions and submitted a timely rehearing request. The request was granted, and a supplemental hearing was conducted during which Taxpayer's representatives provided additional documentation and explained the basis for Taxpayer's continued objections.

Those objections have been consolidated and are addressed in this single Supplemental Memorandum of Decision, which incorporates by reference the applicable statement of facts and laws set out in the above-mentioned Final Orders Denying Refund and Memoranda of Decision.

I. Gross Retail and Use Tax - Exempt Service Agreements.

DISCUSSION

The issue is whether Taxpayer has provided sufficient information to establish that a variety of its purchases of computer software and software maintenance agreements were exempt from sales and/or use tax because the purchase agreements called for the vendors to supply strictly exempt services.

In the previous Final Orders Denying Refund and Memoranda of Decision, Taxpayer raised alternate reasons for seeking the refunds it did.

Taxpayer originally sought refunds of sales tax paid on the purchase of computer software purchased and paid for by Taxpayer, an Indiana entity, but then made use of by Taxpayer's employees in several states. Taxpayer believed it was entitled to apportion the sales tax liability based on and calculated by comparing the number of employees located in Indiana and the number of employees located outside Indiana. Taxpayer concluded that it was entitled to a refund based on the number of users who accessed the software from outside Indiana. The Department concluded Taxpayer was wrong.

Taxpayer originally sought refunds of sales tax paid on the purchase of computer software maintenance agreements which provided vendor service for computer software then utilized by persons located in Indiana and persons located outside Indiana. Taxpayer reasoned that it was entitled to apportion the sales or use tax liability on the maintenance agreements based on and calculated by comparing the number of its Indiana employees to the number of its out-of-state employees. Taxpayer concluded that it was entitled to a refund based on the number of users who accessed the maintained software from outside Indiana. The Department concluded Taxpayer was wrong.

In this Supplemental Memorandum of Decision, Taxpayer argues that it has provided information purporting to establish that the transactions were for vendor-supplied services only and that the transactions did not lead to the provision of any form of tangible, personal property.

There are nine transactions at issue which are listed here. The quoted characterizations of the transactions were provided by Taxpayer.

- **Oracle T&M**, May 2017, $5,888, "Consulting Service;"
- **ePlus Technology**, June 2016, $158,145, "Consulting Service;"
- **ePlus Technology**, December 2016, $0.00, "Consulting Service;"
- **ePlus Technology**, January 2015, $66,178, "Services Only;"
- **AMAX Information Technologies**, June 2016, $35,786, "Maintenance Agreement;"
- **Ariba, Inc.**, September 2014, $0.00, "Software/Software as a Service" (SAS);"
- **Ariba, Inc**., November 2017, $2,690,000/$151,200, "Software/SAS/Consulting Services;"
- **Reveal.Com**, August 2005, $180,000, "Software;"
- **Ultimate Software/Utilipro**, $69,520 June 11, 2011, "Software/SAS."

A. Agreements Calling for Vendor to Provide Services Only.

When a taxpayer challenges taxability in a specific instance, the taxpayer is required to provide documentation explaining and supporting its challenge. Poorly developed and non-cogent arguments are subject to waiver. *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012). When an agency is charged with enforcing

a statute, the jurisprudence defers to the agency's reasonable interpretation of that statute "over an equally reasonable interpretation by another party." *Indiana Dep't of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014).

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. IC §§ 6-2.5-5 et seq. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-1-2; 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.

However, 45 IAC 2.2-4-2 contains a provision exempting the purchase of services from sales tax. 45 IAC 2.2-4-2(a) states that, "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." However, "Where, in conjunction with rendering professional services . . . the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail . . . ." *Id.*

B. Taxpayer's Burden in Claiming a Refund.

As a general rule, all purchases of tangible personal property - including computer software - are subject to sales or use tax unless specifically exempted by statutes or regulations. 45 IAC 2.2-5-3(b); 45 IAC 2.2-5-6(a); 45 IAC 2.2-5-8(a); 45 IAC 2.2-5-9(a); 45 IAC 2.2-5-10(a). Various tax exemptions are outlined in IC §§ 6-2.5-5 et seq. which are applicable to both sales tax and use tax. 45 IAC 2.2-3-14(2).

A statute which provides any tax exemption - such as the "services" exemption - is strictly construed against the taxpayer. *Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." *Id.* at 101 (internal citations omitted). In applying any tax exemption, the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." *Indiana Dep't of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988).

C. Nine Transactions for Which Taxpayer Seeks a Refund of Sales/Use Tax.

1. Oracle T&M May 2017.

In the case of the first transaction listed above, Oracle T&M May 2017, the Department agrees that this vendor agreed to provide Taxpayer exempt services consisting of "consulting assistance." The agreement specifically states the vendor "will provide Services only, and no Deliverables will be provided." The Oracle T&M May 2017 transaction is exempt and - to the extent that Taxpayer paid sales or use tax and Taxpayer timely requested a refund of those amounts - Taxpayer is entitled to that refund.

2. ePlus Technology June 2016.

In the case of the second transaction listed above, ePlus Technology dated June 2016, the Department agrees that this vendor agreed to provide Taxpayer exempt services. The agreement between the vendor and Taxpayer called for ePlus to "provide Services only, and no Deliverables will be provided" except for certain documentation outlining the design and implementation of the services. The ePlus Technology June 2016 transaction is exempt and - to the extent that Taxpayer paid sales or use tax and Taxpayer timely requested a refund - Taxpayer is entitled to that refund.

3. ePlus Technology December 2016 (First).

In the case of the third transaction listed above, ePlus Technology dated December 2016, the Department agrees that this vendor agreed to provide Taxpayer exempt services. The agreement between the vendor and Taxpayer called for vendor to "provide Services only, and no Deliverables will be provided" except for certain documentation outlining the design and implementation of the services. The agreement stipulates that "hardware and/or software products are sold separately and [are] not deliverables." The ePlus Technology June 2016 transaction is exempt and - to the extent that Taxpayer paid sales or use tax and timely requested a refund of those amounts - Taxpayer is entitled to that refund.

4. ePlus Technology December 2016 (Second).

In the case of the fourth transaction listed above, ePlus Technology also dated December 2016, the Department agrees that this vendor agreed to provide Taxpayer exempt services. The agreement between the vendor and Taxpayer called for vendor to "provide Services only, and no Deliverables will be provided" except for certain documentation outlining the design and implementation of the services. The agreement stipulates that "hardware and/or software products are sold separately and not deliverables." The ePlus Technology June 2016 transaction is exempt and - to the extent that Taxpayer paid sales or use tax and timely requested a refund of those amounts - Taxpayer would presumably be entitled to a refund. However, the agreement specifically states that Taxpayer pay $0.00 for these exempt services; given that amount, Taxpayer has not explained why it paid tax on this second ePlus transaction or the amount it did pay.

D. Maintenance Agreement; **AMAX Information Technologies June 2016.**

Taxpayer argues that its agreement with the fifth vendor listed above, AMAX Information Technologies June 2016, is exempt from sales and use tax because AMAX agreed to provide only services. The June 2016 agreement calls for AMAX to provide "support service" for Taxpayer's own Indiana data system with AMAX acting as "an onsite service provider." The AMAX agreement states that if Taxpayer requires "spare parts," AMAX agrees to assist Taxpayer "in providing options to replace the failed part." However, nothing in the agreement or attached statement of work calls for AMAX to provide tangible personal property. The AMAX Information Technologies June 2016 transaction is exempt and - to the extent that Taxpayer paid sales or use tax and timely requested a refund of those amounts - Taxpayer is entitled to that refund.

E. Computer Software as an Exempt Service.

IC § 6-2.5-1-27 incorporates "prewritten computer software" in the definition of tangible personal property subject to sales/use tax:

> "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. (effective Jan. 1, 2004).

A person who acquires property in a retail transaction (a "retail purchaser") is liable for the tax on the transaction. IC § 6-2.5-2-1(b).

2. Ariba September 2014.

Taxpayer maintains that its agreement to access software from the sixth vendor listed above, Ariba, Inc. September 2014, is exempt because the agreement called for Ariba to provide only remotely sourced software services and that Ariba provide no tangible personal property.

The written agreement tends to support Taxpayer's general characterization of the agreement. Ariba agreed to provide Taxpayer "[c]loud Materials include[ing] materials created for or in cooperation with [Taxpayer]." Ariba agreed to provide "the hosting, management, and operation of the Service Software for remote access and use by [Taxpayer] and its Authorized Users."

In this case, regardless of ownership interest, sourcing rules, or delivery location, the Department's guidance on this issue is found at Sales Tax Information Bulletin 8 (November 2011), 20111228 Ind. Reg. 045110765NRA, (*superseded by Sales Tax Information Bulletin 8 (December 2016)*), which was in effect at the time of this transaction and is dispositive of the 2014 Ariba software issue raised here by Taxpayer.

> 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. Sales Tax Information Bulletin 8 (November 2011).

Taxpayer - as an "Indiana corporation" - purchased and paid for access to computer software provided by Ariba. Although the Department takes note of the fact that the 2011 Information Bulletin has since been superseded, the transaction was executed September 2014 and is governed by the Department's interpretation in effect at the time of the transaction. Taxpayer's written agreement with Ariba does not include a price. Whatever that price,

Taxpayer is not entitled to the requested refund.

2. Ariba, Inc. November 2017.

Taxpayer maintains that its agreement to access software provided by the seventh vendor listed above, Ariba, Inc. November 2017, is exempt because the agreement called for Ariba to provide only software services and that no tangible personal property was provided Taxpayer.

In this case, the transaction is governed by the Department's Sales Tax Information Bulletin 8 (December 2016).

> Charges for accessing prewritten software maintained on [a] vendor or third party's computer 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 on the server.

The parties' written agreement calls for Ariba, Inc. to supply "SAP Cloud Services" and "Consulting Services." The agreement provides that the "Customer Data realms" and the "Ariba network" software will be "hosted in the United States." The cost to Taxpayer for these services is governed by the "Usage Metrics" stipulated in the agreement; in other words, the amount paid Ariba is governed by the number of occasions in which Taxpayer accesses the software. There is nothing in the agreement calling for Ariba, Inc. to provide Taxpayer software and there is nothing in the agreement which grants Taxpayer a possessory interest in this remotely accessed software.

The Department agrees that Taxpayer has provided sufficient information to establish that the 2017 Ariba, Inc. written agreement memorialized the purchase of exempt computer services by means of remotely accessed software.

3. Reveal.Com August 2006.

Taxpayer purchased the right to connect to Reveal.Com's network (eighth on the list) and to pay Reveal.Com for "licensing costs and maintenance fees for . . . software." Essentially, Taxpayer was paying for Reveal.Com's electronic services associated with the right to access Reveal.Com's software and to conduct electronic financial transactions on an electronic platform hosted by Reveal.Com.

In the case of this 2005 transaction, the question is governed by Sales Tax Information Bulletin 8 (May 2002), 25 Ind. Reg. 3934, which provides as follows:

> As a general rule, transactions involving computer software are not subject to Indiana Sales or Use Tax provided the software is in the form of a custom program **specifically designed for the purchaser**. Pre-written programs, not specifically designed for one purchaser, developed by the seller for sale or lease on the general market in the form of tangible personal property and sold or leased in the form of tangible personal property **are subject to tax** irrespective of the fact that the program may require some modification for a purchaser's particular computer.

(**Emphasis added**).

The 2002 Bulletin provides this illustration. "A firm develops and sells pre-written application programs which are available to any of the firm's potential customers. The sales of these programs are subject to tax." *Id.* The Bulletin makes no mention of the nature, delivery, or accessing of the subject software. In this case and in this simpler time, Reveal.Com sold and Taxpayer bought. The transaction is subject to tax.

In addition, Taxpayer has provided no explanation as to why it is statutorily entitled to raise a refund claim for sales tax or use tax paid on a transaction which occurred in August 2005. On its face, any claim to tax paid on a fifteen-year-old transaction is barred by the three-year statute of limitations. *See* IC § 6-8.1-9-1.

4. Ultimate Software/Utilipro, June 2011.

Taxpayer entered into a transaction with Ultimate Software/Utilipro dated June 2011. Taxpayer maintains that this ninth transaction is exempt from sales/use tax because it constitutes an agreement to pay the vendor for "software as a service." The agreement calls for Ultimate Software to provide "software, support, and SAAS services" on a subscription basis. Essentially, Ultimate Software, provides Taxpayer with access to Ultimate

Software's computer software program. Again, because the agreement was executed in June 2011, the taxability of the transaction is governed by Sales Tax Information Bulletin 8 (May 2002) which provides that sales of software - without regard to method of access or ownership interest - is subject to sales and use tax.

Taxpayer is not entitled to a refund of sales or use tax paid on this software transaction.

FINDING

Taxpayer's protest is sustained in part and denied in part.

SUMMARY

To the extent that Taxpayer paid sales or use tax and timely requested a refund on tax for these five specific transactions, Taxpayer's protest is sustained: Oracle T&M May 2017; ePlus Technology June 2016; ePlus Technology December 2016 (First); AMAX Information Technologies June 2016; Ariba, Inc. November 2017. Taxpayer's protest is denied in all other respects.

August 5, 2020.

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