DEPARTMENT OF STATE REVENUE

04-20191189R.MOD

Memorandum of Decision: 04-20191189R
Gross Retail and Use Tax
For the Years 2015 - 2018

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 Manufacturer's purchases of multi-state point of use software were exempt from Indiana sales tax when that software is initially accessed via electronic download outside of Indiana. Two of the five transactions of "research and development" software qualified for the sales tax research and development exemption, while three did not. Purchases of software as a service "SaaS" made after July 1, 2018 were not taxable, nor were those purchases of SaaS made between December 2016 and June 30, 2018. However, Manufacturer's purchase of SaaS made before December, 2016 were taxable.

ISSUES

I. Gross Retail and Use Tax - Computer Software.

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 § 6-2.5-4-1; IC §§ 6-2.5-5 et seq.; IC § 6-2.5-13-1; *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; 45 IAC 2.2-5-3; 45 IAC 2.2-5-6; 45 IAC 2.2-5-8; 45 IAC 2.2-5-9; 45 IAC 2.2-5-10; Sales Tax Information Bulletin 8 (November 2011); Sales Tax Information Bulletin 8 (December 2016).

Taxpayer argues that the Department erred in denying it a refund of tax on the purchase of computer software and software maintenance agreements claiming that the software was accessed and used by many of its employees located outside Indiana.

II. Gross Retail and Use Tax - Research and Development Exemption.

Authority: IC §§ 6-2.5-5 et seq.; IC § 6-2.5-5-40 (effective March 15, 2018); IC § 6-2.5-5-40 (effective January 1, 2016 to March 14, 2018); IC § 6-2.5-5-40 (July 1, 2013 to December 31, 2015); *Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp.,* 310 N.E.2d 96 (Ind. Ct. App. 1974); *Indiana Dep't of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988); 45 IAC 2.2-5-3; 45 IAC 2.2-5-6; 45 IAC 2.2-5-8; 45 IAC 2.2-5-9; 45 IAC 2.2-5-10; 45 IAC 2.2-3-14; Sales Tax Information Bulletin 75 (April 2017).

Taxpayer argues that they are entitled to a refund of sales tax paid on the purchase of computer software used for research and development.

III. Gross Retail and Use Tax - Software as a Service.

Authority: IC § 6-2.5-4-16.7 (effective July 1, 2018); Sales Tax Information Bulletin 8 (November 2011); Sales Tax Information Bulletin 8 (December 2016).

Taxpayer states it is entitled to a refund of sales tax paid on exempt, service-only transactions.

STATEMENT OF FACTS

Taxpayer is in the security and workforce productivity business. Taxpayer is headquartered in Indiana but has employees throughout the United States. Taxpayer filed a Claim for Refund ("GA-110L") claiming sales and use tax refunds for purchases of multi-state point of use software, software as a service, and software purchased for research and development. Taxpayer's refund request totaled $819,828.38. Of that amount, the Indiana Department of Revenue ("Department") denied $778,734.26.

Taxpayer filed a timely protest and an administrative hearing was held during which Taxpayer's representatives explained the basis for the protest. This Memorandum of Decision results.

I. Gross Retail and Use Tax - Computer Software.

DISCUSSION

The issue is whether Taxpayer has established that it was entitled to a refund of sales tax paid on the purchase of software which was downloaded to and hosted on third-party servers located outside of Indiana during tax years 2015 - 2018.

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).

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A retail transaction is a transaction made by a retail merchant that constitutes "selling at retail." IC § 6-2.5-1-2(a). Selling at retail occurs when a person "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration." IC § 6-2.5-4-1(b). A person who acquires tangible personal property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b).

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.

Thus, transactions involving prewritten computer software are considered retail transactions.

It is important to distinguish sales tax from use tax. Indiana use tax is "[a]n excise tax . . . [that] is imposed 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 (**emphasis added**). Sales tax is a tax on the purchase of tangible personal property and is levied on purchases that are sourced to Indiana. In the instant case, Taxpayer is protesting sales tax imposed on the purchase of computer software.

As a general rule, all purchases of tangible personal property - including computer software - are subject to sales 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 sales tax exemptions are outlined in IC §§ 6-2.5-5 et seq. 45 IAC 2.2-3-14(2). A statute which provides any tax exemption, however, 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).

Taxpayer states that it "paid Indiana sales tax on its multi-state point of use software stored on servers outside of Indiana and used by employee users outside of Indiana . . . Taxpayer purchased said software, which was first downloaded to and have remained on a third-party's server located [outside Indiana]. At no point [was the software] downloaded and/or stored within Indiana. [The software was and is] used by employee users located within and outside of Indiana." As such, Taxpayer argues that "tax is due only on the portion used within Indiana" and that Taxpayer should be refunded the tax it paid on the portion of software used outside of Indiana. According to the GA-110L, Taxpayer performed a thorough analysis which indicated that only sixteen percent of its users

were located in Indiana, thus eighty-four percent of the sales tax paid, or, $202,198.25, should be refunded as it represents out of state use.

In support of this claim, Taxpayer provided a log of its contested software purchases. Contained in this log are fifteen purchase invoices, dated between March of 2015 through May of 2018, from one particular vendor that Taxpayer claims fall into the Multi-State Point of Use Software" category. Taxpayer does note that the "Ship To" address on these invoices was Taxpayer's Indiana headquarters, but explains that this is "inaccurate" and that "[i]t is not an uncommon practice for a software vendor to note the 'Ship To' address as the Vendor's headquarters address, rather than determining in advance where a customer's servers are located, or where their users sit."

After the initial denial of the GA-110L, Taxpayer reached out to the Department for a technical explanation of the denial. In the technical explanation, the Department noted that Taxpayer was asked to provide the following: copies of the vendor sales contracts for all invoiced items; a copy of the thorough analysis in which Taxpayer calculated the percentage of use inside and outside Indiana; details regarding where the software licenses were deployed and; documentation verifying use tax was accrued and paid to the outside state which hosts the servers. The technical explanation stated that Taxpayer did not provide the thorough analysis requested and that the supporting documentation Taxpayer did provide suggested Indiana use of just over twenty-one percent rather than sixteen percent. Further, Taxpayer failed to provide documentation showing that use tax was accrued in and paid to the outside state. Taxpayer did, however, provide the Master Agreement between itself and its software provider.

Based on the information provided, the technical explanation addressed sourcing of the Multi-State Point of Use Software. The sourcing rules for retail sales are found in IC § 6-2.5-13-1. Under IC § 6-2.5-13-1:

> (a) As used in this section, the terms "receive" and "receipt" mean:
> (1) taking possession of tangible personal property;
> (2) making first use of services; or
> (3) taking possession or making first use of digital goods;
> whichever comes first. The terms "receive" and "receipt" do not include possession by a shipping company on behalf of the purchaser.
>
> (b) This section:
> (1) applies regardless of the characterization of a product as tangible personal property, a digital good, or a service;
> (2) applies only to the determination of a seller's obligation to pay or collect and remit a sales or use tax with respect to the seller's retail sale of a product; and
> (3) does not affect the obligation of a purchaser or lessee to remit tax on the use of the product to the taxing jurisdictions of that use.
> . . .
>
> (d) The retail sale . . . of a product shall be sourced as follows:
> (1) When the product is received by the purchaser at a business location of the seller, the sale is sourced to that business location.
> (2) When the product is not received by the purchaser at a business location of the seller, the sale is sourced to the location where receipt by the purchaser (or the purchaser's done, designated as such by the purchaser) occurs, including the location indicated by instructions for delivery to the purchaser (or donee), known to the seller.
> (3) When subdivisions (1) and (2) do not apply, the sale is sourced to the location indicated by an address for the purchaser that is available from the business records of the seller that are maintained in the ordinary course of the seller's business when use of this address does not constitute bad faith.
> (4) When subdivisions (1), (2), and (3) do not apply, the sale is sourced to the location indicated by an address for the purchaser obtained during the consummation of the sale, including the address of a purchaser's payment instrument, if no other address is available, when use of this address does not constitute bad faith.
> (5) When none of the previous rules of subdivision (1), (2), (3), or (4) apply, including the circumstance in which the seller is without sufficient information to apply the previous rules, then the location will be determined by the address from which tangible personal property was shipped, from which the digital good or the computer software delivered electronically was first available for transmission by the seller, or from which the service was provided (disregarding for these purposes any location that merely provided the digital transfer of the product sold).

In its technical explanation, the Department examined the Master Agreement between Taxpayer and the software vendor. According to the Master Agreement, Taxpayer has the "non-exclusive, non-assignable, royalty free, perpetual (unless otherwise specified in the order), limited right to use the [software] and receive any [software]-related Service Offerings [Taxpayer] ordered solely for [Taxpayer's] internal business operations and subject to the terms of the Master Agreement." Section Nine of the Agreement pertains to the "Order Logistics" of the software. Under this section:

> 9.1.1 [Taxpayer is] responsible for installation of the [software] unless the [software has] been pre-installed by [vendor] on the Hardware [Taxpayer is] purchasing under the order or unless [Taxpayer] purchase[s] installation services from [vendor] for [the software].
>
> 9.1.2 Vendor has made available to [Taxpayer] for electronic download at the electronic delivery web site . . . the [software] . . . . Through the Internet URL, [Taxpayer] can access and electronically download to [Taxpayer's] location the latest production release[s] . . . .

Taxpayer also provided the "Executable Quote" with the Master Agreement. The Quote lists Taxpayer's name and Indiana location under the purchaser information. The Quote also states:

> [Taxpayer is] responsible for installation of the [software]. . . .[Vendor] has made available to [Taxpayer] for electronic download at the electronic delivery web site located at [Internet URL] the [software] listed in the . . . order. Through the Internet URL, [Taxpayer] can access and electronically download to [Taxpayer's] location the latest production release as of the effective date below of the software and related [documentation]. . . . [Taxpayer] may continue to download the [software].

Based on the documentation provided, the Department concluded that Taxpayer could "direct the electronic download of the digital goods anywhere it chooses to. . . ." Therefore, the transaction cannot be sourced under IC § 6-2.5-13-1(d)(1) because the software was not received by Taxpayer at the business location of the seller. Rather, the transactions could be sourced under IC § 6-2.5-13-1(d)(2) and/or (d)(3), depending on when "receipt" occurred. If receipt occurred upon execution of the Master Agreement, then sourcing under IC § 6-2.5-13-1(d)(2) is appropriate. The software was not received at Vendor's location, thus the sale would be "sourced to the location where receipt by the purchaser (or the purchaser's donee, designated as such by the purchaser) occurs, including the location indicated by instructions for delivery to the purchaser (or donee), known to the seller." Taxpayer's Indiana address is listed on the Master Agreement, Executable Quote, and each relevant invoice. Thus, under IC § 6-2.5-13-1(d)(2), the transactions were properly sourced to Indiana. Alternatively, the technical explanation suggests that the transactions could be sourced under IC § 6-2.5-13-1(d)(3), under which the sale is "sourced to the location indicated by an address for the purchaser that is available from the business records of the seller that are maintained in the ordinary course of the seller's business. . . ."

The technical explanation concluded that the Department could not agree that Indiana sales tax was incorrectly charged to the transactions in question. The Department explains:

> The vendor is obligated as a retail merchant, of this state and others, to appropriately source 100[percent] of the transaction amount. The vendor is under no obligation to attempt to source a transaction subsequent to its completion. . . . [T]axpayer has not provided a justification as to why they assert the vendor incorrectly charged it sales tax for the transactions."

Taxpayer responded, relaying its incorrect assumption that the Department relied on Sales Tax Information Bulletin 8 effective December 2016 in its technical explanation. Specifically, Taxpayer points to the section which states: "If a taxpayer purchases multiple software licenses from a vendor for software that is stored on the taxpayer's employee's hard drive and accessed from the hard drive" the purchases are sourced per IC § 6-2.5-13-1. Sales Tax Information Bulletin #8 (December 2016), 20170125 Ind. Reg. 045170026NRA. If those employee's computers are located outside of Indiana, use tax is not applicable, but sales tax paid is not refundable (IC 6-2.5-3.2). *Id.* Taxpayer also refers to IC § 6-2.5-3-2, which states "as well as other guidance coming from this statute that denies a refund of state gross retail tax," and determined that the Department "is using the same line of reasoning for denying a refund of state gross retail tax as that of Indiana's temporary storage exemption." The temporary storage exemption found under IC § 6-2.5-3-2 provides a use tax exemption for items that are temporarily stored in Indiana and ultimately shipped out of state. There is no corresponding exemption applicable to sales tax.

Taxpayer argues that the only portion of Sales Tax Bulletin 8 that applies to the transactions at hand is that which states: "If a taxpayer purchases multiple software licenses from a vendor for software that is stored on taxpayer's

server and accessed from the server . . . sales tax is sourced per IC 6-2.5-13-1." Because the Bulletin "states nowhere that sales tax paid on licenses that are stored outside of Indiana are not refundable . . . [and] these software licenses were never downloaded nor stored within Indiana, even temporarily, but rather downloaded and stored on a third-party's server outside of Indiana," Taxpayer believes it is entitled to a refund of sales tax paid on those purchases. Along with its response, Taxpayer included a signed affidavit from its Vice President of Information Technology stating that the software in question was never electronically downloaded or housed in Indiana, but is housed in another state.

In the instant case, the tax at issue is *Indiana sales tax* paid on purchases of software which took place from March of 2015 through May of 2018. Taxpayer correctly points out that the sourcing statute in affect to for that time period was IC § 6-2.5-13-1. The most current version of IC § 6-2.5-13-1 is effective as of July 1, 2013; thus, it applies to all of the transactions at issue. However, there were two versions of Sales Tax Information Bulletin #8 in affect over the span of the transactions. The first was effective as of November 2011. This version of the Bulletin states:

> 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). Sales Tax Information Bulletin 8 (November 2011), 20111228 Ind. Reg. 045110765NRA.

The second version of the Bulletin came into effect in December of 2016. According to this version of the Bulletin:

> The purchase of software sometimes comes with licenses for multiple users. In 2007, the Indiana General Assembly repealed a limited 'multiple point of use exemption' from sales tax for certain digital goods transactions, including computer software transactions that were delivered electronically. Since this provision was repealed, the general sourcing rules found in IC 6-2.5-13-1 apply[.] Sales Tax Information Bulletin #8 (December 2016), 20170125 Ind. Reg. 045170026NRA.

Thus, according to the November 2011 Bulletin, access of prewritten software, maintained on computer servers outside of Indiana is taxable in Indiana when accessed electronically via the Internet by Indiana residents. However, according to the December 2016 Bulletin, the sourcing statute must be reviewed in order to determine the taxability of a transaction. We will refer to that statute to analyze the transactions in the instant case.

From the documentation provided, it is clear that the software vendor made the software available to Taxpayer "for electronic download at the electronic delivery website. . . ." Thus, the vendor transferred the software to the third-party servers before Taxpayer was able to access and download the software for its use. Therefore, the transaction at issue is the transfer of the software to the third-party servers. Though Taxpayer's Indiana address was listed on the Master Agreement and the Executable Quote, neither document had any indication that the software would be delivered to Taxpayer at that address. Rather, both documents referred to electronic download of the software. The Indiana address used in the documents is the address of Taxpayer's headquarters, and the location from which the agreements were negotiated. Taxpayer's Indiana address was included in the documents for negotiation and contact purposes; not as an indication of where the software would be delivered.

Turning to the sourcing statute, IC § 6-2.5-13-1(d)(1) states that when tangible personal property is received by the purchaser at a business location of the seller, the sales is sourced to that location. Here, the software was downloaded to a third-party server located outside of Indiana at neither Taxpayer nor seller's business location. Thus section (d)(1) cannot be used to source the transaction.

IC § 6-2.5-13-1(d)(2) dictates that when the tangible personal property is not received by the purchaser at seller's location, the sale is sourced to the location where purchaser receives the property. The property was downloaded to third-party servers located outside of Indiana. At that point, Taxpayer was able to access the software and download it. The sale ended when the software was downloaded to the third-party servers. Use began when Taxpayer downloaded that software to its individual computers. Thus, for *Indiana sales tax purposes*, receipt occurred at the third-party servers. Because those servers are located outside of Indiana, Indiana sales tax is not applicable to the retail transaction.

To be certain, we will examine the remaining section of the sourcing statute. IC § 6-2.5-13-1(d)(3) and (4) source sales to the purchaser's location as indicated in seller's business records or as obtained during the consummation of the sale. Because Taxpayer and seller negotiated the download of software to a third-party outside of Indiana, these sections do not apply.

IC § 6-2.5-13-1(d)(5) states that "the location will be determined . . . from which the digital good or the computer software delivered electronically was first available for transmission by the seller, or from which the service was provided. . . ." In this case, that location again is the third-party servers. Seller transmitted the software to those servers, making the software available for electronic download to Taxpayer. The location of Taxpayers' use of the software is irrelevant; the software was made available to Taxpayer at a location outside of Indiana and it was from that location which Taxpayer took possession of the software. Thus, Taxpayer is entitled to a refund of all Indiana sales tax paid on the purchases at issue.

FINDING

Taxpayer's protest is sustained.

II. Gross Retail and Use Tax - Research and Development Exemption.

DISCUSSION

Taxpayer claims to have paid Indiana sales tax on purchases of software used for research and development activities. Specifically, "[t]he software is used for front-end new product development, creating design schematics for mechanical products, and for housing design data." The issue is whether these purchases are exempt from the Indiana sales tax by virtue of their "research and development" nature.

As noted above, the general rule is that all purchases of tangible personal property - including computer software - are subject to sales 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 sales tax exemptions are outlined in IC §§ 6-2.5-5 et seq. 45 IAC 2.2-3-14(2). A statute which provides any tax exemption, however, 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).

In its GA-110L, Taxpayer claimed $79,740.68 in refundable sales tax under the research and development exemption. In support of its claim, Taxpayer provided a log of software transactions which took place over the course of years at issue. Taxpayer marked eighteen transactions with various vendors which took place between February of 2015 and June of 2018 which it believes qualifies for the research and development exemption. In the letter accompanying the GA-110L, Taxpayer cites to IC § 6-2.5-5-40 as the authority for its claim.

IC § 6-2.5-5-40 has gone through three iterations relevant to the questions at issue: IC § 6-2.5-5-40 (effective March 15, 2018); IC § 6-2.5-5-40 (effective January 1, 2016 to March 14, 2018); IC § 6-2.5-5-40 (July 1, 2013 to December 31, 2015). For reference, the most current version of IC § 6-2.5-5-40 (effective March 15, 2018) states:

> (a) As used in this section, "research and development activities" includes design, refinement, and testing of prototypes of new or improved commercial products before sales have begun for the purpose of determining facts, theories, or principles, or for the purpose of increasing scientific knowledge that may lead to new or enhanced products. The term does not include any of the following:
> (1) Efficiency surveys.
> (2) Management studies.
> (3) Consumer surveys.
> (4) Economic surveys.
> (5) Advertising or promotions.
> (6) Research in connection with nontechnical activities, including literary, historical, social sciences, economics, humanities, psychology, or similar projects.
> (7) Testing for purposes of quality control.
> (8) Market and sales research.
> (9) Product market testing, including product testing by product consumers or through consumer surveys for evaluation of consumer product performance or consumer product usability.
> (10) The acquisition, investigation, or evaluation of another's patent, model, process, or product for the purpose of investigating or evaluating the value of a potential investment.
> (11) The providing of sales services or any other service, whether technical or nontechnical in nature.

(b) As used in this section, "research and development equipment" means tangible personal property that:
(1) consists of or is a combination of:
(A) laboratory equipment;
(B) computers;
(C) computer software;
(D) telecommunications equipment; or
(E) testing equipment;
(2) has not previously been used in Indiana for any purpose; and
(3) is acquired by the purchaser for the purpose of research and development activities devoted directly to experimental or laboratory research and development for:
(A) new products;
(B) new uses of existing products; or
(C) improving or testing existing products.
(c) As used in this section, "research and development property" means tangible personal property that:
(1) has not previously been used in Indiana for any purpose; and
(2) is acquired by the purchaser for the purpose of research and development activities devoted to experimental or laboratory research and development for:
(A) new products;
(B) new uses of existing products; or
(C) improving or testing existing products.
(d) For purposes of subsection (c)(2), a research and development activity is devoted to experimental or laboratory research and development if the activity is considered essential and integral to experimental or laboratory research and development. The term does not include activities incidental to experimental or laboratory research and development.
(e) For purposes of subsection (c)(2), an activity is not considered to be devoted to experimental or laboratory research and development if the activity involves:
(1) heating, cooling, or illumination of office buildings;
(2) capital improvements to real property;
(3) janitorial services;
(4) personnel services or accommodations;
(5) inventory control functions;
(6) management or supervisory functions;
(7) marketing;
(8) training;
(9) accounting or similar administrative functions; or
(10) any other function that is incidental to experimental or laboratory research and development.
(f) A retail transaction:
(1) involving research and development equipment; and
(2) occurring after June 30, 2007, and before July 1, 2013;
is exempt from the state gross retail tax.
(g) A retail transaction:
(1) involving research and development property; and
(2) occurring after June 30, 2013;
is exempt from the state gross retail tax.
(h) The exemption provided by subsection (g) applies regardless of whether the person that acquires the research and development property is a manufacturer or seller of the new or existing products specified in subsection (c)(2).

Sales Tax Information Bulletin 75 (October 2013) explains that the IC § 6-2.5-5-40 amendments were meant "to clarify that certain activities are not considered research and development activities and to clarify that certain activities are considered incidental to research and development activities." 20170726 Ind. Reg. 045170335NRA. The common theme running through each iteration of IC § 6-2.5-5-40 is that exemptions for research and development equipment and research and development property apply only to equipment or property purchased for the purpose of research and development activities.

After reviewing Taxpayer's GA-110L, the Department denied $44,656.20 of the $79,740.68 claimed. The $44,656.20 is comprised of five invoices from two vendors. Taxpayer requested a technical explanation from the Department. The Department obliged and confirmed the denial based on two things; the accounting behind the purchases and the information on the documentation provided.

We first look at the accounting behind the purchases. Taxpayer provided the Department with a list of their

general ledger accounts "indicating that said 'R&D Software' was expensed to Taxpayer's New Product Engineering account or IT Shared Services account. Taxpayer explained their process for "purchasing and maintaining software." According to Taxpayer, "all new software is initially procured by the engineering team and is expensed to the engineering [general ledger] account in year one. In subsequent years, the renewal and support payments are managed by IT and expensed to an IT [general ledger] account." Though expensed by IT, "the software is still solely utilized by the engineering team." A study of the general ledger accounts shows that the accounts had names such as "Computer Equip-Software Maintenance," "Computer Equip-Software Purchase/Rental/Lease," "Computer Equip/Software-Non Capitalized, and "Other Expense R&D." The accounts appear to be expense accounts pertaining to software and license transactions. The technical explanation, however determined that "[n]one of the expenses associated with the five invoices denied were allocated to research and development projects . . . expense accounts, or new product development accounts." In its protest, Taxpayer argues that despite what cost center the expenses are recorded in, that does not change the fact that "the R&D [S]oftware is solely utilized by the engineering team." Further, to deny the GA-110L "on [the] grounds that Taxpayer did not allocate such R&D [S]oftware expense to a cost center specifically stating 'R&D' or 'new product development' in the name . . . puts 'the tail before the dog' in that the Department seems to be advancing the position that tax reasoning should drive Indiana taxpayers' accounting or business decisions in order to reap the benefits of such exemption. . . ." The Department agrees. To deny an exemption based solely on Taxpayer's accounting lexicon is not enough; we must also look at the use of the purchased software.

As stated above, the denial is comprised of five invoices between two vendors. In preparing the technical explanation, the Department requested additional documentation regarding these five transactions. Taxpayer supplied the purchase orders/executive summaries for the transactions. Three of the executive summaries related to the invoices for one vendor ("Vendor A"). The summaries listed "On Going Expenses" as the project and the description of purchase indicated that the software was for "sustaining CAD application for older product designs and tooling fixturing." Based on this explanation, the Department determined that the software was not purchased for research and development purposes.

The other two invoices also pertained to one particular vendor ("Vendor B"). The invoices were "the largest . . . and together combine for more than 50[percent] of the total refund claimed [under the research and development] category." While Taxpayer provided the executive summary for only one invoice, copies of both invoices were provided. The executive summary listed the project as "On Going Expenses." The description of the purchase states that "The . . . suite of applications covers Product Lifecycle Management and Product Design for [Taxpayer's Parent] Globally." No effort was made to separate out the line items on the invoices, "thus it was not possible for the Department to determine which product might be for design and which were for "Product Lifecycle Management." Because management or supervisory functions do not qualify for the research and development exemption, the Department determined that this invoice was not exempt.

Overall, the Department concluded that "Taxpayer's supporting documentation . . . demonstrated that the equipment/[tangible personal property] was not purchased for the sole initial purpose of research and development activities," but were also used for "testing for quality control, management or supervisory functions, and other functions incidental to experimental or laboratory research." When used in that capacity, the equipment purchased does not qualify for the research and development exemption.

Taxpayer disagreed with the technical explanation and filed a protest. In its protest Taxpayer states the Department "seems to have only looked at the generalized descriptions of the R&D software listed within the invoices, and drew its conclusions regarding taxability without taking Taxpayer's explanations of the true reason for purchasing and using such software into account." Taxpayer explained that the "R&D Software was not purchased for a specific project [but] is used in the R&D function across several product lines." For example the "R&D Software" is used for: "electronic product development for creating schematics and circuit board[s]"; "development of mechanical products"; "product development data analysis"; "design creation for mechanical products"; and "CAD design tool for housing product designs." In protest, Taxpayer asked the Department to look at "Taxpayer's reasoning for purchasing and using such software, as provided through Taxpayer's explanation and documentation."

We start with the purchases from Vendor B. According to Taxpayer, the two invoices from Vendor B pertain to software "used for design creation for mechanical products[.]" The two invoices in question are an invoice ending in 182 ("Invoice 182") dated December of 2016 representing sales tax of $14,127.21 and an invoice ending in 754 ("Invoice 754") dated January 2018, representing sales tax of $29,464.99. Invoice 182 covers the time period of December 30, 2016 - December 30, 2017, while Invoice 754 covers the time period of January 1, 2018 - January 1, 2019. Taxpayer provided an Executive Summary for Invoice 182. The summary states that the invoice covers the "On Going Expenses" for an "Annual Renewal Order." The summary also states that the software applications

purchased "cover Product Lifecycle Management and Product Design efforts for [Taxpayer] Globally. This suite of tools manages the creation of product designs, change process flow, viewing of designs, analysis, etc. . . ." The Requestor Name listed on the summary is that of Taxpayer's Vice President and Chief Engineer. Taxpayer included an affidavit from this individual in which he states that the software and licenses listed in the summary "were not previously used in Indiana for any purpose, and were acquired for the purpose of R&D activities devoted directly to experimental or laboratory R&D for new products, new uses of existing products, or improving or testing existing products. . . ."

Copies of Invoice 182 and Invoice 754 were included with Taxpayer's documents. Those invoices list over thirty line items each with little description as to what the item does. The line items are described in a log of contested software purchases Taxpayer provided with its GA-110L. The log states that the items involve "3 tools: 1) "Creo" [a] software used as a primary mechanical design tool to create mechanical designs for all products in the Americas 2) "Mathcad Global" a software tool used for mathematical analysis for design products 3) "Windchill Product for Solidworks & Creo" a software tool used for product lifecycle management, with a primary use of design and data storage[.]" According to Taxpayer, "'Creo' and 'Mathcad Global' are used to develop new products and make design changes or enhancements to old/legacy products." "'Windchill' is used as the 'single source of truth' for CAD data, which is the essential to designing a product ad documenting the design's process. Windchill deals with updating and change control in product development, as it maintains the CAD data as Taxpayer opens new design projects for modifying or enhancing existing products, adding new functions, or creating new products."

Taxpayer provided a copy of the Licensing Agreement between Taxpayer and Vendor B. The Licensing Agreement makes clear that Taxpayer had use of Vendor B's software and that any "R&D" type work product created from that use belonged to Taxpayer.

We now look at the three Vendor A invoices claimed as exempt on Taxpayer's log. The three invoices will be referred to as Invoice 469, Invoice 2074, and Invoice 644. According to Taxpayer, all three invoices pertain to "computer-aided design (["]CAD") design tool for housing product designs." All three invoices are for maintenance contracts, for 2016, 2017, and 2018. Taxpayer provided the executive summaries for all three invoices. Each summary states that the purchases are for "On Going Expenses" on an "Annual Renewal Order." The description states that the items purchased are "the sustaining CAD application for older product designs and tooling fixturing." While the affidavit Taxpayer supplied applies to the three Vendor A invoices, copies of these invoices were not provided. Taxpayer did, however, provide a copy of the Software License and Services Agreement between Taxpayer and Vendor A. The Agreement gives Taxpayer a "nonexclusive, nontransferable, limited license to install, access and use the [Software] for [Taxpayer's] own internal business." Any confidential information exchanged between the parties is to remain confidential. Further, per the Agreement, Taxpayer retains "all rights in any software, ideas, concepts, know-how, development tools, techniques or any other proprietary material . . . developed" after use of Vendor's software.

The Department agrees that the purchases made from Vendor B qualify for the research and development exemption. The software purchased is used to develop new products and to make design changes/improvements. This use falls squarely within the definition of "research and development activities" outlined in IC § 6-2.5-5-40. The purchases from Vendor A are less convincing. The purchases are essentially maintenance contract renewals sustaining CAD application for older product designs and tooling fixturing. Nothing in the documentation provided indicate that any "research and development" activities are occurring in relation to this software.

Taxpayer's protest is sustained in relation to the two purchases from Vendor B, but is denied in relation to the three purchases from Vendor A. This file will be sent back to the audit division to adjust the refund amount based on these findings.

FINDING

Taxpayer's protest is sustained in relation to the two purchases from Vendor B, but is denied in relation to the three purchases from Vendor A.

III. Gross Retail and Use Tax - Software as a Service.

DISCUSSION

In its initial GA-110L refund claim Taxpayer stated that it "accesses various provider's software applications on a cloud infrastructure as a service." Because Taxpayer "does not have control or have possessory interest in the

underlying software or cloud infrastructure[,]" Taxpayer requested refunds of sales tax paid on those purchases as they were "purely Software as a Service[.]" Along with the GA-110L Taxpayer provided a schedule of purchases which included transactions categorized as "Software as a Service" or "SaaS." Taxpayer describes these as transactions for "cloud-based software products and licenses in which Taxpayer did not obtain a possessory or ownership interest. . . ." The schedule shows 171 SaaS transactions made between January 15, 2015 and November 18, 2018.

There was no statutory guidance as to the taxability of remote access to prewritten software until the Indiana General Assembly promulgated an amendment to the Indiana code, IC § 6-2.5-4-16.7 (effective July 1, 2018) which provides in part:

> (a) Except as provided in subsection (b), a person is a retail merchant making a retail transaction when the person sells, rents, leases, or licenses for consideration the right to use prewritten computer software delivered electronically.
> (b) A transaction in which an end user purchases, rents, leases, or licenses the right to remotely access prewritten computer software over the Internet, over private or public networks, or through wireless media.
> (1) is not considered to be a transaction in which prewritten computer software is delivered electronically; and
> (2) does not constitute a retail transaction.

Thus, effective July 1, 2018, the sale of prewritten computer software which is only accessed remotely is not taxable; it does not matter if the software is sold, leased, rented, or licensed.

Of the 171 transactions, three occurred on or after July 1, 2018. The Department granted a $2,100 exemption on one of the transactions, but denied the $1,145.18 exemption on the remaining two transactions. Both of those transactions are for subscription services for "[a] web based software that is a globally designated contact center platform across all customer care call centers, accessed via the web." It is not clear why the Department denied the refund on these transactions. The transactions allow Taxpayer to access software through the internet and fall squarely within IC § 6-2.5-4-16.7(b) above. Thus, the remaining two transactions which took place after July 1, 2018 are deemed exempt.

The question now becomes how transactions, which took place prior to July 1, 2018, should be treated. Without specific statutory guidance, these types of transactions were governed by Sales Tax Information Bulletin 8. There are two versions of that Bulletin which are relevant here; the version effective November of 2011, and the version effective December of 2016. The November 2011 version of the Bulletin states:

> 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.
>
> 20111228 Ind. Reg. 045110765NRA.

Thus, under the 2011 Bulletin, remotely accessed software is subject to tax regardless of whether the software constitutes a service or whether the software user has a degree of ownership in the software. In other words, the November 2011 Bulletin simply provides that remotely accessed software is subject to tax because remote access of the software always constitutes "constructive possession." Of Taxpayer's 171 SaaS transactions, 111 occurred prior to December 2016. These transactions are taxable under the November 2011 Bulletin. Taxpayer's protest is denied in relation to these transactions.

Sales Tax Bulletin 8 was updated effective December 2016. Under the 2016 Bulletin, remotely accessed software may be subject to sales tax if the circumstances specifically point to a degree of "constructive" ownership of the software. Sales Tax Information Bulletin 8 (December 2016) explains, in relevant part, as follows:

> The taxability of software that can be electronically accessed via the internet, either by remote access from a hosted computer or server or through a pool of shared resources from multiple computers and servers ("cloud computing"), without having to download the software to the user's computer, is not specifically addressed in the Indiana Code. 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.

> 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.
>
> . . .
>
> Prewritten computer software purchased by an Indiana taxpayer, which is accessed by the Indiana taxpayer from the vendor's or a third party's computer servers electronically via the internet from the taxpayer's computer could constitute a transfer of the software because the taxpayers gain constructive possession and the right to use, control, or direct the use of the software. As such, this transaction would be subject to sales tax . . . .
>
> 20170125 Ind. Reg. 045170026NRA.

Thus, between December 2016 and July 1, 2018, transactions for remotely accessed software may or may not be subject to the state's sales/use tax depending on the degree control or possession the buyer exerts over the software; i.e. is the purchaser buying software or is the purchaser paying for the right to make use of software that belongs to someone else? In order to make that distinction, Sales Tax Information Bulletin 8 (December 2016) provides as follows:

> In order to determine whether a purchaser obtains a possessory or ownership interest in pre-written software, the following factors that indicate a possessory or ownership interest should be considered:
>
> • Whether the Indiana customer obtains or is granted the right to access or download copies of the software to the customer's own computers, servers, or network;
> • Whether the Indiana customer gains or is granted the right to modify or customize the pre-written software;
> • Whether the Indiana customer gains or is granted the right to make copies of the pre-written software for the customer's own use;
> • Whether the Indiana customer is required to pay additional amounts for enhancements, modifications, or updates to the software;
> • Whether the provider has a policy of providing a duplicate copy of the software at minimal or no charge if the customer loses or damages the software;
> • Whether the Indiana customer gains or obtains the right to use, deploy, or access the software for an unlimited or indeterminate period of time;
> • Whether the software must be returned or destroyed at the end of a specifically limited license period;
> • The relative price paid for accessing or using the software compared to the price charged for obtaining a possessory or ownership interest in that same, similar, or comparable software.

Of the SaaS transactions claimed, sixty occurred between December 2016 and June 30, 2018. Along with its GA-110L Taxpayer provided a letter explaining that it did not obtain a possessory or ownership interest in the software at issue because Taxpayer:

> 1) Never obtained or was granted the rights to access or download copies of the software to the company's own computers, servers, or network;
> 2) Never obtained or was granted the right to customize the pre-written software;
> 3) Never gained or was granted the right to make copies of the pre-written software for the customer's own use;
> 4) Never obtained or was granted the right to use, deploy, or access the software for an unlimited or indeterminable period of time; and
> 5) Never received a duplicate copy of the software at minimal or no charge.

Taxpayer states that it "retained ownership of its own data managed, stored, and manipulated by its vendor's software, but the vendors retained ownership of its own software modules which performed those functions. Taxpayer made periodic [] subscription payments in order to access its vendor's software modules, but the vendors retained sole and exclusive ownership of the modules along with the right to terminate Taxpayer's access to the software."

After review of Taxpayer's GA-110L, the Department denied the refund on all of Taxpayer's purchases which took place prior to July 1, 2018. The Department provided a technical explanation at Taxpayer's request. In the technical explanation, the Department stated that prior to July 1, 2018, "'paying a fee to use prewritten computer software that is maintained on the vendor's or a third party's computer servers for a defined period of time constitutes a lease of the software, and is therefore subject to tax if the customer has access to and control of the software or the server when accessed electronically via the internet.'" The Department reviewed "substantively all" of the vendor contracts at issue. From that review, the technical explanation determined that "it is clear that the Taxpayer is using and accessing prewritten computer software in all instances contained in this category." Taxpayer provided an eight-factor analysis based on Sales Tax Information Bulletin 8. Per the technical explanation, "[f]or every single vendor in dispute, [Taxpayer] stated that [it] was paying to access and use the prewritten computer software, which . . . per [Sales Tax Information Bulletin 8] is the definition of a taxable lease of prewritten computer software." Additionally, "[t]he invoices and contracts demonstrated that substantively all of the prewritten computer software purchased by the [T]axpayer was also subject to tax due to the inclusion and/or combination with a software maintenance agreement stipulating automatic updates to the software under contract." Taken altogether, the technical explanation maintained the taxability of the pre-July 1, 2018 purchases.

In its protest, Taxpayer again asks the Department to reconsider the transactions in light of the December 2016 Sales Tax Information Bulletin 8 factors. Taxpayer had SaaS transactions with twelve vendors between December 2016 and June 30, 2018. Taxpayer provided some of the vendor agreements, which are discussed below:

A. Anaqua

Taxpayer explains that "Anaqua is a patent search tool that gives its users the ability to analyze and forecast global patent data. It allows users to search for patent documents, patent trends[,] and identify licensing and patenting opportunities." Over one hundred of Taxpayer's employees use Anaqua. Employees use the software to "input invention disclosures and to keep track of worldwide patent filings. Additionally, Anaqua gives Taxpayer the ability to request nondisclosure agreements." Taxpayer accesses the Anaqua applications via subscriptions which can only be accessed through the internet via an online client portal.

The "Subscription Agreement" between Anaqua and Taxpayer grants Taxpayer "a limited and non-exclusive license to access and [u]se the Software and Content during the Term, via the Internet." The license and agreement are non-transferrable, and Anaqua maintains ownership of "[a]ll Software, Content, Methodologies, Deliverables, and Documentation. . . ." Taxpayer does not acquire any "right, title or interest . . . in any Software, Content, Methodologies, Deliverables, or Documentation." Taxpayer does maintain ownership of its own data. Taxpayer cannot copy, download, modify, import, export, any part of the software, content, methodologies, deliverables or documentation. Taxpayer is required to pay an additional fee for any additional modules. The Agreement renews yearly, but if the Agreement were to terminate, Taxpayer would lose all access to the software.

The terms of the Subscription Agreement, as well as Taxpayer's use of the software, as applied to the factors in Sales Tax Bulletin 8 (December 2016) make it clear that ownership and control are not passed on to Taxpayer. To the extent that Taxpayer purchased Anaqua software between December 2016 and June 30, 2018, Taxpayer is sustained as Taxpayer had no degree of constructive ownership in the software itself.

B. Cision

According to Taxpayer, "Cision Media Monitoring is intended to be used by subscribers to monitor and track their brands by utilizing the most complete collection of online news, blogs, social, print, and broadcast channels, utilizing over seven million sources. Said software-as-a-service provides complete metrics regarding unique viewers per month, publicity value, lead generation, and website traffic. It is closer to a media database and tracking tool than a software platform." Taxpayer has one main user of Cision's software in the United States, but it has other users throughout the world in marketing communication. Taxpayer uses the software to "track news coverage, Google alerts, and setup e-mail alerts."

The "Master Services Agreement" between Taxpayer and Cision licenses Taxpayer access to Cision's Media Databases, which includes access to media contacts and data. Through Cision's software Taxpayer is able to gain insights and access to news, trends, and "influencer" data. Specifically, "Taxpayer was given "access to Cision's online platform comprised of tools, databases, APIs, and software solutions . . ., which allows access to certain proprietary or licensed information, data and materials[.]" Taxpayer accesses the software through Cision's web portal. Users "can search for different reporters or topics . . . whereupon users can download, export, or have

e-mailed to them relevant lists of information. . . ."

Taxpayer has a "nonexclusive, non-sublicensable, . . . non-transferable, non-assignable, . . . revocable, limited right to allow [Taxpayer], to [] access and use the Software only for [Taxpayer's] own business use. . . ." Taxpayer cannot modify or reproduce the software, nor can it "decompile, disassemble, reverse engineer, distribute, publish, display, perform, modify, create derivative works from, transmit, or in any way exploit any part of the [software], except that [Taxpayer] may make print copies exclusively for [Taxpayer's use]." Taxpayer does not have ownership rights in the software and the license renews annually unless Taxpayer indicates its desire to do otherwise. Taxpayer pays a subscription fee that covers the services. If desired, Taxpayer can purchase additional services in a separate order for additional fees, but there is no charge if Cision alters, deletes, or replaces the software. Taxpayer's access to the software will be terminated and deactivated at the end of the Agreement term or if Taxpayer fails to make payments."

Taxpayer uses Cision's software for information gathering purposes and the software appears to act as a database from which users can request certain types of information. Ownership is not transferred to Taxpayer and Taxpayer cannot modify the software itself. Thus, the Cision software is licensed to Taxpayer as SaaS and meets the eight factors described in the December 2016 Sales Tax Information Bulletin 8. Taxpayer is sustained in regards to Cision purchases made between December 2016 and June 30, 2018.

C. CoStar Real Estate Manager

Taxpayer states that "Costar is a web-based portfolio management software that tracks owned and leased properties, automates lease verification and streamlines lease abstracting. Costar provides market data and intelligence that helps users maximize real estate investment opportunities." Specifically, Taxpayer uses CoStar to "monitor leased and owned property contracts." Taxpayer also "uses the web-based [software] to update their rent, taxes, and other data on electronic lease files." The software is used on a subscription basis and users login through CoStar's website.

Taxpayer's agreement with CoStar is governed by an "Application Services and Professional Services Agreement," in which CoStar licensed a "nonexclusive and nontransferable, limited subscription license to (i) access and use [CoStar's software] . . . via Internet connection to [CoStar's servers] solely for purposes of managing its real estate portfolio and related projects, (ii) display and print information, data and content generated through such use of the [s]oftware, and (iii) use the [d]ocumentation in connection with the foregoing." Further, Taxpayer and CoStar agree that the software is the sole property of CoStar; ownership rights were not granted to Taxpayer. Taxpayer cannot "modify, transfer, rent, lease, reverse engineer, sublicense, decompile or disassemble" the software. Nor can Taxpayer download copies of the software to its own computers, servers or networks. Upgrades and enhancements are included in the subscription fees paid by Taxpayer. The Agreement term is one year with automatic renewals unless either party indicates otherwise. Further, upon termination of the Agreement, CoStar will cease providing services to Taxpayer, but will supply Taxpayer with a compact disk containing all of Taxpayer's information.

Based on the Agreement, Taxpayer's use of CoStar's software qualified as non-taxable SaaS. Taxpayer is sustained in regards to its CoStar purchases made between December 2016 and June 30, 2018.

D. Five9 Inc.

Per Taxpayer, "Five9 is a provider of cloud-based contact center software. Five9 is a completely cloud-based contact center service, where agents can access such software-as-a-service from anywhere using a headset, computer, and internet." Taxpayer has approximately 230 users of the software in their customer care area. Users access the software through a web portal using unique usernames and passwords. The software is utilized for calls, e-mails, and other contact capabilities. Taxpayer uses the service in three data centers, all located outside of Indiana.

The Department reviewed the Master Services Agreement between Taxpayer and Five9 Inc. Per the Agreement, Taxpayer was granted a "software subscription," which it cannot "(i) license, sublicense, sell, resell, transfer, assign, distribute or otherwise commercially exploit . . . to any unaffiliated third party; (ii) modify, translate or make derivative works based upon the [software]; (iii) create unauthorized Internet "links" to the [software]. . . (iv) reverse engineer, decompile, or dissemble any or all of the [software]; or (v) use the [software] for any purpose other than to support its internal call center or business process outsourcing businesses." Five9 provided the "serviced as a hosted service and the services are delivered on an 'as is' and 'as available' basis." There is a clause in the Agreement which specifically states that the software, "including any modifications, customizations

or derivative works are owned exclusively by Five9. . . ." The Agreement renews automatically unless the parties agree otherwise. Upon termination, Five9 will suspend or terminate Taxpayer's access to the software.

The Five9 Agreement shows that Taxpayer had a license to access Five9's software through the internet. Taxpayer cannot copy or download the software, nor was it granted an ownership right or right to control the software. Thus, Taxpayer's Five9 purchases made from December 2016 to June 30, 2018 are sustained.

E. Heat Software USA, Inc.

Heat Software "provides web-based application software services to simplify and automate business processes to improve service quality, while managing and securing endpoints to detect and protect against threats to business continuity. Heat automates software delivery, reduces complications with login performance and integrates actions with multiple IT solutions." Taxpayer uses the software as a "cloud-based end point management security solution for enterprise cyber security."

According to the Agreement between the parties, Taxpayer was granted a "non-exclusive, non-transferable . . . License to the [software], without right of sublicense, to [u]se the [software], solely for [Taxpayer's] business purposes." The license is renewable on an annual basis. The license agreement specifically states that "[Taxpayer does] not own, and [Software Provider] retains title to, any copies of the [software]. [Taxpayer] shall not [u]se, copy, modify, display, rent, lease, loan, transfer, distribute, download, merge, make any translation or derivative work or otherwise deal with the [software], except as expressly provided in this License." Taxpayer may make archival copies of the "machine-readable" portion of the software for backup purposes and Taxpayer's use only, so long as Taxpayer "reproduce[s] . . . all copyright, patent and other proprietary rights notices included on the originals of the [software product]." Upon termination, Taxpayer's access to software is terminated and Taxpayer cannot retain copies of the software. This particular license was purely for Taxpayer's access to SaaS. Application of the eight factors laid out in the December 2016 Sales Tax Information Bulletin 8 show that no ownership was transferred. Thus, Taxpayer's protest is granted in relation to Heat Software purchases made between December 2016 and June 30, 2018.

F. JDA Software, Inc.

JDA Software Group, Inc. is a "provider of end-to-end, integrated retail and supply chain planning and execution solutions. . . ." JDA's Marketplace software "is intended to connect suppliers and customers via a network of secure public and private exchanges to access the JDA solutions from the Internet. [The] Marketplace enterprise solution is hosted by JDA within a data center located [outside Indiana]. [The software] requires an annual subscription and is intended to be used for order management purposes." Taxpayer also uses JDA's Space Planning software. This software "is deployed via JDA cloud services, and is intended to enable the user t construct, manage, analyze, optimize, and distribute detailed in-store planograms to retailers or trade partners." Space Planning also requires an annual subscription.

Taxpayer has indicated that it uses JDA's Marketplace software for order management and replenishment purposes for some of its retail customers. Taxpayer has to login to the software via a client portal where there is a total of three series of logins in order to access their customer's order management systems. Taxpayer and its customers are connected via a network of secure public and private exchanges in order to access the JDA Marketplace solution from the Internet

Taxpayer uses JDA's Space Planning software for space management purposes. This software is used to assist in building retail aisle planning, and gives Taxpayer the ability to visualize aisle space with Taxpayer's product on its customer's shelves. Taxpayer must login to the software via a client portal. Access enables Taxpayer to create space plans and communicate the plans to its retail customer. The software is deployed via JDA Cloud Services.

Taxpayer's use of the JDA software falls under an "Assignment of Software License." The License is "perpetual" with a one-year maintenance term. In the Agreement a third party "Assignor" assigned the software, which was previously licensed to the Assignor, to Taxpayer. Taxpayer was granted a "non-exclusive, non-transferable, license to use the [software] in object code form solely for [Taxpayer's] internal data processing operations." Use of the software was restricted to "the Number of Licenses set forth in [the Agreement] and each license is restricted to use on one single computer. . . ." Taxpayer's use of JDA software is also subject to an End User License Agreement or "EULA." The EULA repeats what is stated in the Assignment, and elaborates that Taxpayer's signature on the ordering document, and "opening the sealed disk package or clicking the "Yes" icon, [indicates that Taxpayer] agree[s] to be bound by the terms of the [EULA]." Taxpayer may "(a) use the Standard Software on a single computer; and (b) make one copy of the Standard Software for archival backup purposes."

However, Taxpayer cannot "copy, translate, rent, lease, sublicense, or otherwise transfer the [software], cause or permit reverse compilation or reverse assembly of all or any portion of the [software], provide information processing, computer service bureau, computer time sharing or similar services to any other party, or operate the [software] with a third-party's data." Further, Taxpayer cannot modify or customize JDA's underlying software. Taxpayer must purchase maintenance to receive updates. Taxpayer has access to the software for the duration of the license and is required to return any copies or relevant materials upon termination of the license.

Based on the Department's reading of the Software License, and the EULA, as well as Taxpayer's explanation, the Department determines that this particular license was purely for Taxpayer's access to SaaS. Application of the eight factors laid out in the December 2016 Sales Tax Information Bulletin 8 show that no ownership was transferred. Thus, Taxpayer's protest is granted in relation to JDA Software purchases made between December 2016 and June 30, 2018.

G. Kronos

Kronos is software that "monitors employee time and attendance [and performs] labor tracking and data collection. Kronos allows users to track, manage and control employee time with advanced automated solutions." Taxpayer uses Kronos to "track, record and approve time and attendance for hourly and salary non-exempt employees." "Hourly employees use their badges to clock-in and clock-out from the timeclocks located in Taxpayer's facilities, and salary non-exempt employees go through the web portal to enter their time. The data is pushed to Kronos servers, located in [outside Indiana], and managers, [Human Resource] leaders, and corporate . . . can login to the Kronos platform using cloud servers to view and approve the data collected. Users must login to the platform using a client web-based portal."

Taxpayer's use of the Kronos software is subject to a "Subscription Program Agreement." Per the Agreement, Taxpayer used "certain Kronos software applications in a hosted environment on a subscription basis and obtain[ed] related hardware and services. . . ." The software applications were hosted in the Cloud and Taxpayer was given a "non-exclusive, non-transferable, fee-bearing license (without the right to sublicense) to use the [software] solely for [i]nternal [u]se." The software could be used in "object code form only," and Taxpayer could not "reverse compile, disassemble or otherwise convert the [software] into uncompiled or unassembled code." Further, Taxpayer cannot download copies of the software. Unauthorized use or copying of the software was prohibited by law and could result in termination of the license. Enhancement, updates, and modifications are provided to Taxpayer at no additional cost.

The parties agreed that Kronos would "retain ownership of all right, title and interest to all portions of the [software], . . . all of which are protected by copyright and other intellectual property rights. . . ." Further, the parties agreed that Taxpayer would have no rights or ownership in the software. Upon expiration of the initial term, the Agreement automatically renewed for two successive one-year periods, unless Taxpayer indicated an intent not to renew. If and when a termination occurred for any reason, "Kronos shall return all data . . . and negotiate with [Taxpayer] a transition assistance plan, to support an orderly transition to another provider. . . ." During the transition period use and access rights would be charged on a pro-rated monthly basis.

The Kronos software is essentially a time-keeping and monitoring service. Taxpayer cannot modify the base software nor was it granted ownership rights in the software. Based on the terms of the Agreement as applied to the eight factors laid out in the December 2016 Sales Tax Information Bulletin 8, the Department determines that ownership/control was not transferred to Taxpayer. Therefore, Taxpayer's protest is granted in relation to Kronos Software purchases made between December 2016 and June 30, 2018.

H. LinkedIn Corporation

LinkedIn provides specific software as a Cloud based solution which can be accessed via the Internet. Taxpayer uses LinkedIn "for purposes of human resources and marketing." In regards to marketing, "Taxpayer utilizes [LinkedIn] for sponsored updates or ads for target demographics, social posts, ownership of Ad Space on employee profiles, and to display advertising . . . and showcase life pages to target audiences."

In terms of "human resources" Taxpayer contracted with LinkedIn to create a custom company page, reserve annual job postings, work with a recruiting team, receive enhance network search capabilities, and allow a certain number of monthly "InMails" per license. Any service updates LinkedIn provides are deemed included in the fees for the services ordered, however future incremental add-on or renewal orders would be at the list price at the time of purchase. Taxpayer was to use the services for employee recruitment only and could not assign use to a third party. The Corporate Subscription Agreement contains a clause in which the parties acknowledged that no

rights, title, or interest in any intellectual property was transferred, "except for [Taxpayer's] ability to access and use information regarding LinkedIn members. . . ." Copies of the software are not offered in the Agreement and the software cannot be downloaded. The Agreement is effective for twenty-four months or "until terminated." Upon termination, all of Taxpayer's access and use capabilities cease.

LinkedIn is essentially an enhanced, targeted social media application. Users must log into the software via LinkedIn's website. Ownership does not transfer to users and users cannot modify the underlying software. This is purely SaaS with no ownership/control transferred. Taxpayer's protest is granted in regard to LinkedIn purchases made between December 2016 and June 30, 2018.

I. Thomson Reuters

Thomson Reuters (Tax & Accounting) Inc. ("TRTA") "is a web-based software used for tax and accounting technology for corporations. TRTA provides global tax compliance, accounting, and financial reporting services. Taxpayer uses TRTA to create and file income tax returns for its entities. Taxpayer also uses the reporting services to prepare and analyze their tax provision data. All of Taxpayer's services with TRTA [software] accessed through the web, as such services are hosted by TRTA."

Taxpayer entered into a Master Agreement with TRTA which allows them "access and use [of] OneSource Products and Services. . . ." The Agreement "grants [Taxpayer], without right to sublicense, a nonexclusive, nontransferable license . . . for each copy of the [software and related materials] delivered to [Taxpayer]. . . ." Delivery takes place either when "TRTA has (i) delivered possession of said Software to a common carrier, FCA TRTA shipping dock or (ii) made the Software available via download to a Client computer system, whichever is applicable to the Software." The order form included with the Agreement state that TRTA delivered "access" to Taxpayer on a specific date, thus Taxpayer was not provided with copies of the software, but rather downloadable access. As such, TRTA will set up an account for Taxpayer which is installed and accessed from TRTA owned/controlled computer systems via the Internet.

Regardless of delivery method, "[Taxpayer] shall acquire only the right to use software and related material while the license is in effect and shall not acquire any rights including, without limitation, rights of ownership or title, in any said software or related TRTA materials." Under the Agreement, Taxpayer is permitted to "use Software and related TRTA Materials at a [Taxpayer] own and/or controlled site[,] . . . print from CD or download in pdf format the Product documentation in use in support of the Software[,] and make a reasonable number of copies of the Software in machine-readable form solely for the purpose of backup, live testing environments and/or failover and disaster recovery purposes. [Taxpayer] will include a copy of the proprietary notice . . . on all such copies." Taxpayer is not permitted to "export[,] . . . rent, lease, lend, sublicense, give, sell, resell, or otherwise transfer [the software]." Nor can Taxpayer "remove or obscure TRTA's proprietary rights notices . . . or modify, reverse engineer, decompile or disassemble or develop any software derivative of or interfacing with the [software]. . . ." Further, Taxpayer is not allowed to modify or copy the software, other than as a backup or for disaster recovery purposes. Taxpayer is not considered to an owner of any copy it makes for such purposes or any purpose. Any updates, enhancements, or modifications to TRTA's hosted software are part of the TRTA Materials and Taxpayer does not pay additional amounts for those. Upon termination, Taxpayer must return the software and any related materials. TRTA retains ownership and use rights in the software and related materials while Taxpayer retains ownership of its data.

In this case Taxpayer chose to access TRTA's products/software through the internet. Copies may be made for back up and disaster recovery purposes, but Taxpayer does not own a copy of the software. Taxpayer is sustained for TRTA purchases made between December 2016 and June 30, 2018.

J. Workday Inc.

Taxpayer explains that "Workday is a cloud-based enterprise application that is intended to be used by human resources for workforce planning, recruiting, and talent management in one system, allowing users to gain complete visibility into their global workforces. Specifically, Workday's human resources management enterprise application gives users insight into and allows users to manage analytics, global compliance, audit and internal controls, workforce planning, recruiting, talent management, learning, compensation, benefits, payroll management, time and absence, expenses, people experience, and talent marketplace." Taxpayer uses the application "as a global human resources solution for all employees, as well as for recruiting." Users access the software through the Internet and Taxpayer pays a subscription fee for this access.

Taxpayer has a Master Subscription Agreement with Workday, Inc. ("Workday"), in which Workday provides the

subscription service to Taxpayer. The language of the Agreement refers to proving Taxpayer with access to "the Service," which under the Agreement means "Workday's software-as-a-service applications." The Agreement makes plain that Workday "own[s] all right, title and interest in and to the [Service]." No such rights were granted to Taxpayer. Rather, Taxpayer was granted a "non-exclusive, non-transferable, right to use the [Service], solely for the internal business purpose of [Taxpayer] and solely during the term, subject to the terms and conditions of [the Agreement] within scope of use defined in the relevant Order Form." Updates, improvements, enhancements, error corrections, bug fixes and the like are available to Taxpayer without additional charge.

Taxpayer cannot "(i) modify, copy, or create any derivative works based on the [Service]; (ii) license, sublicense, sell, resell, rent, lease, transfer, assign, distribute, time share, offer in a service bureau, or otherwise make the [Service] available to any third party; . . . (iii) reverse engineer or decompile any portion of the [Service]; . . . (iv) access the [Service] in order to build any commercially available product or service; or (v) copy any features, functions, integrations, interfaces, or graphics of the [Service]." Upon termination Taxpayer must cease accessing and utilizing the Service.

Again, in this Agreement Taxpayer has been granted access to SaaS with not ownership/control rights. Thus, Taxpayer's protest, as it pertains to Workday purchases made between December 2016 and June 30, 2018, is sustained.

K. Workvia

Workvia is a cloud software that provides users the ability to file SEC filings with extensive report collaboration and audit control features. Workvia optimizes the SEC filing process and assists users in complying with SEC regulations. Taxpayer houses all of its SEC documents on Workvia and uses the software to create, edit, and publish its SEC filings. The software is only accessible via the Internet and all of its servers are located outside of Indiana.

Taxpayer has as Master Subscription & Services Agreement with Workvia to "use or receive [Workvia's] Subscription and Services. . . ." Per the Agreement, "[u]nless otherwise agreed upon in the applicable order, neither the subscription nor the services are preformed or provided at [Taxpayer's] facilities, and are instead accessed by [Taxpayer] remotely via the internet." Taxpayer may only use and access the subscription "for [Taxpayer's] internal business use only, and not for the benefit of, or to provide services to, any third party." Taxpayer can "reproduce and distribute Webinar materials for its own internal, non-commercial, educational purposes, provided it identifies [Workvia] as the owner of the copyright of the material." However, the rights granted cannot be "sold, resold, assigned, leased, rented, sublicensed, or otherwise transferred or made available for use by [other parties]." "Each party's Confidential Information will remain property of that party[,]" and both parties agreed not to "use, or make any copies of, the Confidential Information of the other party. . . ." Nor can Taxpayer knowingly reproduce or copy the Licensed Software, in whole or in part." Taxpayer cannot "reverse engineer, decompile, or disassemble any Licensed Software or otherwise attempt to discover the source code to the Licensed Software. . . ." The Licensed Software is provided to Taxpayer "as-is" and Workvia can "change Webinar content at any time without providing notice to past, present, or future Webinar participants." Any enhancements, modification or updates to the software are provided at no additional cost to Taxpayer. Finally, the Agreement lasts until the "expiration or termination of the last term under the Subscription Orders to the Agreement." Upon termination, Taxpayer no longer has access to Workvia's software.

Overall, the Agreement shows that Workvia's software was offered as a cloud-based solution to be accessed by Taxpayer over the Internet. No ownership is transferred and Taxpayer is sustained in relation to Workvia purchases made between December 2016 and June 30, 2018.

L. Avalara

Avalara offers a variety of tax compliance solutions/services for its customers. The services are web-based; there is no software to deploy or maintain locally. According to Taxpayer, "Avalara has advanced geospatial systems intended to provide the most accurate assignment of address information to capture up-to-date sales tax jurisdictional boundaries and rates." Avalara also "offers advanced certificate management, returns preparation, and filing and remittance solutions."

Taxpayer specifically purchased licenses to Avalara's "CertCapture" product, which, according to Avalara's website, is a system which allows users to automate the exemption certificate management process and to "collect, validate, store, and renew compliance documents in the cloud securely and at scale." Taxpayer also purchased access to Avalara's AvaTax system, which is a "cloud-based sales and use tax calculation system."

Taxpayer explains that it uses "Avalara's web-based service to provide an efficient and up-to-date platform for maintaining and managing customers' exemption certificates, capturing sales tax information based on jurisdiction, and properly filing sales and use tax returns and remitting sales and use tax to each required jurisdiction." The Service Terms and Conditions states that Avalara delivers these solutions as "'software as a service' on a subscription basis" and Taxpayer "must login to said software-as-a-service via an online client portal . . . using a distinct user ID and password. . . ."

The Agreement states that Taxpayer's account was to be activated upon Avalara's receipt of the completed sales order; there is no mention of physical delivery of software. Rather, Taxpayer receives a "nonexclusive, nontransferable, worldwide right to access and use the Services during the Term, solely for [Taxpayer's] internal business operations." Taxpayer is forbidden from using the software for a third party's benefit. Nor can Taxpayer "(i) reverse assemble, reverse engineer, decompile, or otherwise attempt to derive source code from any of the Avalara Technology; (ii) reproduce, modify, create, or prepare derivative works of any of the Avalara Technology or Documentation; (iii) distribute or display any of the Avalara Technology or Documentation other than to [Taxpayer's] Authorized Users; (iv) share, sell, rent, lease, or otherwise distribute access to the Services . . . ; (v) alter, destroy, or otherwise remove any proprietary notices within the Avalara Technology or Documentation; or (vi) disclose the results of any benchmark tests to any third parties without Avalara's prior written consent."

Avalara and its licensors "retain and own all right, title, and interest in all Intellectual Property rights in the Avalara Technology and the Documentation, Avalara's Confidential Information, the Services, and all enhancements or improvements to, or derivative works of, the foregoing." The Agreement in no way "transfers or conveys to [Taxpayer] any ownership interest in the Avalara Intellectual Property." Likewise, Taxpayer retains all ownership rights in its own data and intellectual property rights.

The initial term of the Agreement was one year and the Agreement renews automatically. Upon termination of the Agreement, all of Taxpayer's rights are immediately terminated and each party has to return the other party's confidential information.

Based on the terms of the Agreement as applied to the eight factors laid out in the December 2016 Sales Tax Information Bulletin 8, the Department determines that ownership/control was not transferred to Taxpayer. Therefore, Taxpayer's protest is granted in relation to Avalara purchases made between December 2016 and June 30, 2018.

FINDING

Taxpayer's protest is sustained as it pertains to the SaaS purchases at issue made after July 1, 2018 as well as those purchases at issue made between December 2016 and June 30, 2018. Taxpayer is denied in relation to those SaaS purchases made before December, 2016.

SUMMARY

Taxpayer's purchases of multi-state point of use software were exempt from Indiana sales tax when that software is initially accessed via electronic download outside of Indiana. Two of the five transactions of "research and development" software qualified for the sales tax research and development exemption, while three did not. Purchases of SaaS made after July 1, 2018 were not taxable, nor were those purchases of SaaS made between December 2016 and June 30, 2018. However, Taxpayer's purchase of SaaS made before December, 2016 were taxable.

September 8, 2020

Posted: 12/02/2020 by Legislative Services Agency
An html version of this document.