

DEPARTMENT OF STATE REVENUE

Revenue Ruling #2019-09ST
October 2, 2020

NOTICE: Under [IC 4-22-7-7](#), this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the department's official position concerning a specific issue.

ISSUES

Sales and Use Tax - Sales of Electronically Delivered Goods

Authority: [IC 6-2.5-1-26.5](#); [IC 6-2.5-1-27](#); [IC 6-2.5-1-28.5](#); [IC 6-2.5-2-1](#); [IC 6-2.5-2-2](#); [IC 6-2.5-4-1](#); [IC 6-2.5-4-16.4](#); [IC 6-2.5-5-8](#); [IC 6-2.5-5-16](#); [IC 6-2.5-5-25](#); [45 IAC 2.2-5-24](#); [45 IAC 2.2-5-55](#); *Streamlined Sales and Use Tax Agreement* (September 20, 2019).

A taxpayer ("Company") is seeking an opinion as to whether Company should collect sales tax from its sale of digital course materials to tax-exempt educational institutions, which are ultimately resold to and used by students.

STATEMENT OF FACTS

Company is an out-of-state corporation that operates a chain of retail locations on behalf of a number of two- and four-year colleges and universities in Indiana (the "Clients"), which are tax-exempt educational institutions. Company provides the following information, reproduced exactly as submitted in its request for a ruling with certain details redacted:

[Company] aggregates all course materials for each course offering at Client institutions and sells or rents for the semester those materials to students. These course materials can be either in physical or digital form. [Company] collects and remits sales tax to the State of Indiana on the sales of course materials and other products sold in the stores it manages on behalf of Clients.

Very recently, [Company] and several Client institutions have developed a new approach to selling course materials. The program ["Program"] . . . is an inclusive access delivery model that operates broadly in the following manner. The Client informs the [Company] of the number of students in a particular course and also confirms the textbook and other course materials required for that course. [Company] then makes available digital versions of these required course materials in the Client learning management system ("LMS"). Through the LMS, each student in the particular class has access to the digital course materials for the duration of that class (typically, one semester). [Company] invoices the Client for the total cost of the materials related to that course. The Client includes a course materials charge on each student's tuition bill as appropriate. The benefits of [Program] solution are two-fold. First, it ensures that each student has access to the required course materials [when the course begins]. Second, the price of the course materials is significantly discounted. This latter benefit is significant given the ever-increasing costs of education.

By way of an example, assume that there are 150 students in an Introduction to Psychology course that has been selected for participation in [Program] by a Client. Assume further that the cost of the required course materials is \$100 per student. [Company] grants the Client the required licenses to the digital course materials and those materials are placed in each student's LMS account. After confirmation of the number of students, [Company] invoices the Client \$15,000 (i.e., \$100 times the 150 students). The Client then charges each student's account. While it is likely that the Client will charge each student \$100, it is possible that the Client will charge a different amount. [Company] has no control over this element of the transaction.

. . .

[S]tudents might be using funds from federal- and state-based financial assistance programs to cover the [Program] charges that the Client assesses. In addition, [Company] may not have access to the identities of the students in each class, some of whom may not themselves be subject to sales tax. For example, a student may have a diplomatic exemption to sales tax. Alternatively, another tax-exempt entity may be covering the cost of the materials for a particular student. This situation is not uncommon, particularly where

a high school student is taking a college level course through a dual credit program.

DISCUSSION

Based on the foregoing facts, Company requests a ruling as to whether it should assess sales tax on the course materials as described above. Pursuant to [IC 6-2.5-2-1\(a\)](#) and [IC 6-2.5-2-2\(a\)](#), sales tax is imposed on retail transactions made in Indiana. A retail transaction is defined in [IC 6-2.5-4-1\(b\)](#) as the transfer, in the ordinary course of business, of tangible personal property for consideration.

"Tangible personal property" is defined in [IC 6-2.5-1-27](#) as:

. . . personal property that:

- (1) can be seen, weighed, measured, felt, or touched; or
- (2) is in any other manner perceptible to the senses.

The term includes electricity, water, gas, steam, and prewritten computer software.

The course materials are perceptible to the senses, but they are transferred electronically. Regarding the sales of items transferred electronically, pursuant to Section 333 ("Use of Specified Digital Products," effective Jan. 1, 2010) of the *Streamlined Sales and Use Tax Agreement* ("SSUTA;" September 20, 2019), of which Indiana is a signatory, "[a] member state shall not include any product transferred electronically in its definition of 'tangible personal property.'" Section 332 of the *SSUTA* provides that "[a] member state shall not include 'specified digital products', 'digital audio-visual works', 'digital audio works' or 'digital books' within its definition of 'ancillary services', 'computer software', 'telecommunication services' or 'tangible personal property.'"

Section 332 also provides that a state is not prohibited from imposing a sales or use tax on specified digital products. "Specified digital products," as defined by [IC 6-2.5-1-26.5](#), include only digital audio works (e.g., songs, spoken word recordings, ringtones), digital audiovisual works (e.g., movies), and digital books (meaning "works that are generally recognized in the ordinary and usual sense as books" pursuant to [IC 6-2.5-1-16.4](#)). Products "transferred electronically" are defined at [IC 6-2.5-1-28.5](#) to mean products that are "obtained by a purchaser by means other than tangible storage media."

Indiana has enacted a statutory provision to impose sales tax on products transferred electronically if the products meet the definition of specified digital products. [IC 6-2.5-4-16.4\(b\)](#) provides that a person engages in making a retail transaction when the person (1) electronically transfers specified digital products to an end user; and (2) grants to the end user the right of permanent use of the specified digital products that is not conditioned upon continued payment by the purchaser. Because the course materials are only available to the student for the semester, they do not have permanent use of the specified digital products.

Furthermore, the purchases made by Clients could also be exempt because of one of two exemptions, depending on whether the university is a public institution or a private one. Indiana public universities can make exempt purchases under [IC 6-2.5-5-16](#), the exemption for purchases made by Indiana government agencies and instrumentalities, because Indiana public universities are considered instrumentalities of the state. Subsection (a) provides as follows:

Transactions involving tangible personal property, accommodations, public utility commodities, and public utility service are exempt from the state gross retail tax, if the person acquiring the property, accommodations, commodities, or service:

- (1) is the state of Indiana, an agency or **instrumentality of the state**, a political subdivision of the state, or an agency or instrumentality of a political subdivision of the state, including a county solid waste management district or a joint solid waste management district established under [IC 13-21](#) or [IC 13-9.5-2](#) (before its repeal); and
- (2) **predominantly uses the property, accommodations, commodities, or service to perform its governmental functions.**

(Emphasis added).

[45 IAC 2.2-5-24](#) clarifies this exemption in relevant part as follows:

(a) As used in this rule, "predominantly for use in the performance of a governmental function" means that the property acquired will be used for more than fifty percent (50%) for the performance of a governmental function.

(b) The state gross retail tax shall not apply to sales to the state of Indiana, its agencies and instrumentalities, all counties, townships, and municipal corporations, their respective agencies and instrumentalities, and all other state governmental entities and subdivisions of tangible personal property and public utility services and commodities predominantly for use in the performance of governmental functions.

Were an Indiana public university to purchase the course materials, it would be within its governmental function to do so. It would also appear that they would be using the course materials predominately in the performance of that function. Therefore, the purchase would be exempt as long as the university supplies Company with a properly completed Indiana General Sales Tax Exemption Certificate (Form ST-105).

If the Client is a private, nonprofit university, the exemption generally applicable to acquisitions made by nonprofit entities is found at [IC 6-2.5-5-25](#)(a), which provides as follows:

Transactions involving tangible personal property, accommodations, or service are exempt from the state gross retail tax, if the person acquiring the property, accommodation, or service:

- (1) is an organization described in section 21(b)(1) of this chapter;
- (2) primarily uses the property, accommodations, or service to carry on or to raise money to carry on its not-for-profit purpose; and
- (3) is not an organization operated predominantly for social purposes.

[45 IAC 2.2-5-55](#)(d) further clarifies this requirement by providing that:

"[t]his exemption will not apply if such property is primarily used for a purpose other than the not-for-profit purpose of the organization. As used in this section, 'primarily used in carrying out the not-for-profit purpose' means that the item or service is used more than fifty percent (50%) of the time to further the organization's not-for-profit purpose."

Furthermore, [45 IAC 2.2-5-55](#)(b)(3) provides that:

The article purchased must be used for the same purpose as that for which the organization is being exempted. Purchases for the private benefit of any member of the organization or for any other individual, such as meals or lodging, are not eligible for exemption.

Were a private university to purchase the course materials, it would be within its not-for-profit purpose to do so. It would also appear that they would be using the course materials primarily for that purpose. Therefore, the purchase of the course materials would be exempt if purchased by a private university exempt as long as the university supplies Company with a properly completed ST-105.

Additionally, the course materials would also be exempt under the "sale for resale" exemption at [IC 6-2.5-5-8](#). Clients purchase the content from Company, and then resell the content to their students. As such, the "sale for resale" exemption would be applicable as long as the university supplies Company with a properly completed ST-105.

Finally, regarding the fact that some students might be using funds from federal- and state-based financial assistance programs to purchase the course material from Clients would not be a factor into whether the purchase of the course materials by a university would be subject to sales tax, as there is no specific statutory exemption from sales tax for tangible personal property purchased with money from state or federal student assistance programs. It is also immaterial if the course materials will be purchased by another entity, such as a foreign mission or another nonprofit entity, from Clients on behalf of the student and which would be exempt from sales tax because that entity's purchase is eligible for another statutory exemption. As Company mentions, a Client does not know at the time it purchases the course materials who will be purchasing the materials, and furthermore, even if they did know whether a course material would be resold in an exempt transaction, a future exempt resale would not exempt the initial purchase. There are enough reasons stated above to show that the initial purchase by the university would be exempt from sales tax.

RULING

Based on the information provided, Company's sale of the course materials to its Clients is exempt because it is the sale of specified digital products without granting the user permanent rights to the products.

Alternatively, Company's sale of the course materials is exempt from Indiana sales tax either because the course

materials are purchased by a public university pursuant to [IC 6-2.5-5-16](#) or a private university that qualifies as a nonprofit pursuant to [IC 6-2.5-5-25](#), or because the course materials are being purchased for resale by the Client pursuant to [IC 6-2.5-5-8](#).

CAVEAT

This ruling is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances as stated herein are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. However, other taxpayers with substantially identical factual situations may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material respect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this ruling a change in statute, regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection.

Posted: 12/30/2020 by Legislative Services Agency
An [html](#) version of this document.