

Memorandum of Decision: 04-20211001
Gross Retail Sales and Use Tax
For The Years 2017 and 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

The Department agreed that Company was entitled to a refund of Indiana sales tax paid on transactions with software Vendors that occurred prior to July 1, 2018, for which Company did not acquire a possessory interest in the software. In addition, Company is entitled to a refund on use taxes paid for services provided by Vendors but only to the extent that the Department can verify the payment of use tax.

ISSUES

I. Gross Retail and Use Tax - Prewritten Computer Software and Software as an Exempt Service.

Authority: IC § 6-2.5-1-27; IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-4-17; IC §§ 6-2.5-5 et seq.; IC § 6-2.5-13-1; *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480 (Ind. Tax Ct. 2011); *Indiana Dep't of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Mynsberge v. Department of State Revenue*, 716 N.E.2d 629 (Ind. Tax Ct. 1999); *State Bd. of Tax Comm'rs v. Jewell Grain Co.*, 556 N.E.2d 920 (Ind.1990); *Tri-States Double Cola Bottling Co. v. Department of State Revenue*, 706 N.E.2d 282 (Ind. Tax Ct. 1999); [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 (December 2016); Sales Tax Information Bulletin 8 (July 2018).

Taxpayer argues that it is entitled to a refund of Indiana sales tax paid on transactions for the acquisition or use of prewritten computer software.

II. Gross Retail and Use - Information and Professional Services.

Authority: IC § 6-2.5-3-1; IC § 6-8.1-5-1; IC § 6-2.5-3-2; *Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014).

Taxpayer claimed a refund of use tax for information and personal services fees that were remitted to the Department.

STATEMENT OF FACTS

Taxpayer is an Indiana based company. Taxpayer submitted a claim for a refund for sales tax paid on transactions involving pre-written computer software and use tax paid on Information Services and Professional Services.

The Indiana Department of Revenue ("Department") denied the refund stating that Software as a Service ("SaaS") is considered taxable. The Department referred Taxpayer to Information Bulletin 8 for further details. Taxpayer disagreed with the denial and submitted a protest to that effect. An administrative hearing was held during which Taxpayer's representative explained the basis for the protest. This Memorandum of Decision results. Additional facts will be provided as necessary.

I. Gross Retail and Use Tax - Prewritten Computer Software and Software as an Exempt Service.

DISCUSSION

Taxpayer filed a claim for refund of sales and/or use tax paid in 2017 and 2018 on transactions involving software. The Department denied the claim and Taxpayer filed a protest of that denial. The issue is whether Taxpayer was

entitled to a refund of sales tax paid on software purchases executed prior to July 1, 2018.

The taxpayer is required to provide documentation explaining and supporting its challenge that the Department's position is wrong; 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. 2011). 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). "When the product is received by the purchaser at a business location of the seller, the sale is sourced to that business location." IC § 6-2.5-13-1(d)(1). When a 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 occurs. IC § 6-2.5-13-1(d)(2).

Indiana also imposes a complementary excise tax called "the use tax" 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(a). "Use" means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a).

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.

A person who acquires property in a retail transaction (a "retail purchaser") is liable for the tax on the transaction. IC § 6-2.5-2-1(b). As to any of Taxpayer's Vendor's agreements to supply software maintenance or software updates, IC § 6-2.5-4-17 provides:

A person is a retail merchant making a retail transaction when the person enters into a computer software maintenance contract to provide future updates or upgrades to computer software.

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

In considering Taxpayer's argument that the purchase of software services is not subject to sales tax, the Department bears in mind that IC § 6-2.5-2-1 is a tax imposition statutory provision and therefore, is strictly construed against the imposition of tax. *Mynsberge v. Department of State Revenue*, 716 N.E.2d 629, 633 (Ind. Tax Ct. 1999). See *also* State Bd. of Tax Comm'rs v. Jewell Grain Co., 556 N.E.2d 920, 921 (Ind. 1990); *Tri-States Double Cola Bottling Co. v. Department of State Revenue*, 706 N.E.2d 282, 285 n. 9 (Ind. Tax Ct. 1999).

Taxpayer protested the refund investigation's findings concerning programs sold by Vendors and provided documentation in the form of contracts, written agreements, and invoices to support its argument.

Under the agreement with Vendors, Taxpayer purchased a subscription for certain programs from Vendors. Taxpayer was not permitted to make any service or content available to anyone other than Taxpayer or its Affiliates without express permission from Vendors. Taxpayer was also not allowed to "sell, resell, license, sublicense, distribute, make available, rent or lease" any service or content. Taxpayer did not physically possess the software.

Either Taxpayer or Vendors may terminate the agreement with written notice. Upon termination, Vendor agrees to make Taxpayer's data available to export or download. As previously mentioned, because the agreement with vendors provides a subscription to Taxpayer, there is no software to return or destroy. The Vendors maintain and reserve all rights, titles, and interests in and to its property.

Software transactions which occurred prior to July 1, 2018, are governed by the Department's information

bulletins which represent the Department's review and analysis at the time of the transaction.

Sales Tax Information Bulletin 8 (July 1, 2018), 20180725 Ind. Reg. 045180312NRA, is clear on the relevance and application of the 2011 and 2016 Bulletins:

[T]ransactions involving remotely accessed software occurring prior to July 1, 2018, will need to be analyzed using guidance published in the prior version of this bulletin.

As such, the vendor's transactions which occurred during and after December 2016 are governed by Sales Information Bulletin 8 (December 2016), 20170125 Ind. Reg. 045170026NRA. Information Bulletin 8 provides guidelines for distinguishing transactions in which a customer is purchasing taxable, pre-written software or the customer is paying for access to and use of software the customer does not own. As explained in Sales Tax Information Bulletin 8 (December 2016):

Charges for accessing prewritten software maintained on [a] Vendors' or third party's computer servers are not subject to tax when accessed electronically via the Internet if the customer is not transferred the software, does not have an ownership interest in the software, and does not control or possess the software on the server.

In deciding whether the buyer has acquired "an ownership interest" in the software, the 2016 Bulletin further provides:

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.

Considering the documentation provided, the Department agrees that transactions with the Vendors were not subject to Indiana's sale tax because the transactions called for the provision of software services and granted Taxpayer no possessory interest in the underlying pre-written software during or after the subscription term.

FINDING

Taxpayer's protest is sustained.

II. Gross Retail and Use - Information and Professional Services.

DISCUSSION

Taxpayer claims it purchased items that would be categorized as information services which included credit reporting searches and research and other database access. Taxpayer argues that it paid use tax on these services and furthermore those services are exempt from use tax because they are not specifically enumerated as taxable.

As a threshold issue, it is Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Indiana Dept. of State Revenue v. Rent-A-Center East*,

Inc., 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing. . .[courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014). Thus, all interpretations of Indiana tax law contained within this decision, as well as the preceding audit, shall be entitled to deference.

Indiana imposes a complementary excise tax called "the use tax" 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(a). "Use" means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a).

[45 IAC 2.2-4-2](#) contains a provision exempting the purchase of services from sales tax. [45 IAC 2.2-4-2\(a\)](#) states that, "Professional services, personal services, and services in respect to property not owned by the person rendering such services are not transactions of a retail merchant constituting selling at retail, and are not subject to gross retail tax." However, "Where, in conjunction with rendering professional services. . . the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of retail merchant constituting selling at retail. . ." *Id.*

The Department agrees with Taxpayer's argument that those services are not enumerated and thus not subject to use tax. In addition, [45 IAC 2.2-4-2](#) is clear that purchases of services are exempt from sales tax. Although Taxpayer has demonstrated its transactions with various Vendors were exempt from use tax, the refund is only due to the extent use tax was paid. In addition, a refund is not due on taxes which have previously been refunded.

FINDING

Taxpayer is sustained to the extent described above.

SUMMARY

Taxpayer is sustained and entitled for a refund for the software as a service transactions as they were not subject to Indiana sales tax. Taxpayer is sustained regarding services rendered to the extent that the Department can verify use taxes have been paid.

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