

Memorandum of Decision: 04-20211042
Gross Retail 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 in part that Company was entitled to a refund of sales tax paid on transactions with one software vendor; Company was entitled to a refund of tax on transactions under which Company obtained software services, that occurred prior to July 1, 2018, and under which Company did not acquire a possessory interest in the vendor's software.

ISSUE

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; *Indiana Dep't of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *State Bd. of Tax Comm'rs v. Jewell Grain Co.*, 556 N.E.2d 920 (Ind.1990); *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); *Mynsberge v. Department of State Revenue*, 716 N.E.2d 629 (Ind. Tax Ct. 1999); *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 (July 1, 2018); Sales Tax Information Bulletin 8 (December 2016).

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 and corresponding maintenance agreements.

STATEMENT OF FACTS

Taxpayer is a company doing business in Indiana. Taxpayer submitted a claim for refund, Form GA-110L, for sales and/or use tax paid on transactions with vendors for the acquisition or use of pre-written computer software.

The Indiana Department of Revenue ("Department") reviewed the request and granted a partial refund of sales tax paid on purchases of software completed after July 1, 2018. However, the Department did not agree that Taxpayer's purchases of prewritten software made before July 1, 2018, were exempt from tax. As a result, the Department denied a portion of the original refund request attributable to those pre-July 1, 2018, transactions. The Department explained in a letter dated June 8, 2021.

As of July 1, 2018, prewritten computer software sold, rented, leased, or licensed for consideration that is remotely accessed over the internet, over private or public networks, or through wireless media, is considered an electronic transfer of computer software and is not considered a retail transaction.

....

All invoices provided to support the refund requested for SaaS [software as a service], dated prior to July 1, 2018 are considered taxable. Therefore, tax is due on all invoices regarding SaaS in this review prior to July 1, 2018 and exempt after this date.

Taxpayer protested the partial refund denial. An administrative hearing was conducted during which Taxpayer's representatives explained the basis for its protest. This Memorandum of Decision results.

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 between January 1, 2017 and June 30, 2018 on transactions involving software. The Department denied the claim and Taxpayer filed a protest of that denial.

The issue is whether Taxpayer has provided sufficient information establishing that it is entitled to a refund of sales tax paid on software purchases executed prior to July 1, 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).

A. Indiana's Gross Retail Tax.

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 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 . . . occurs" IC § 6-2.5-13-1(d)(2).

B. Indiana's Complementary Use Tax.

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 agreement 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.

C. Presumption For and Against Imposition of the Tax.

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).

D. Taxpayer's Agreements with Software Vendors.

Taxpayer protested the audit findings concerning the following vendors and provided documentation to support its

argument. In certain instances, Taxpayer provided copies of the underlying contract, written agreement, invoices, or terms of use.

1. Adam Systems

The invoices (Numbers 21202, 21457, 21070009, 21070010, 21591, 21070011, 21070012, 21070013, 21709, 21070014, 21070016, 21070018, 21070019, and 21070020) are labeled as bills for "Xcelerate connectivity & support, Elaw form; and Software maintenance." The vendor collected seven percent tax on Elaw form and Software maintenance. To support its protest, Taxpayer - the Licensee - provided the Software License Agreement and Software maintenance Agreement.

The Software License Agreement, Section 2.05, in relevant part, states:

Site Only: Licensee shall use the Software only on the Computer(s) and only at the listed in this agreement. Licensee shall prevent Remote Access unless agreed by Licensor in writing.

Taxpayer did not provide any written agreement from Licensor to demonstrate that the Licensor has agreed to grant Taxpayer the Remote Access.

2. CDW Computer Centers, Inc.

The invoices (Numbers HFB4407 and LXR5200) are labeled as bills for various Adobe software products including Adobe VIP Acrobat Pro, Adobe Creative Cloud, Adobe Illustrator, and Adobe Photoshop" which were shipped via "electronic distribution." The vendor collected seven percent tax on the transactions.

Taxpayer provided a copy of standard Adobe General Terms, referencing "Sales Order," which means either "(1) executed between Adobe and [Taxpayer]; or (2) executed between [Taxpayer] and the Adobe Partner." The standard Adobe General Terms further explains "[t]he Sales Order will prevail over the applicable Product Specific Licensing Terms, which will prevail over the General Terms (to the extent of any inconsistency)."

Taxpayer's invoices referenced purchase order numbers TWH030817 and AC3618. Taxpayer, however, did not provide such documents to support its protest.

3. Kronos

In addition to hardware purchases, Taxpayer's 24 invoices are labeled as bills for various software products, such as Workforce Timekeeper V8, Workforce Accruals V8, Workforce Employee V8, Workforce Manager V8, Workforce Attendance Timekeeper V8. Each invoice references the contract number 1196304, but Taxpayer did not provide that contract. Rather, Taxpayer offered a copy of Workforce Ready® - Software as a Service Terms and Conditions.

The invoices show that the vendor collected seven percent tax on the transactions. Taxpayer explained that it only requested the refund of tax paid on the software as a service. It did not request a refund on the purchase and use of hardware.

4. LogMein USA Inc.

The invoices (Numbers 1207175269, 1207205116, and 1207208404) are labeled as bills for "GoToWebinar Service - Pro, GoToMeeting Corporate Service, OpenVoice Audio Service and OpenVoice Integrated." Each invoice references the purchase order TWH-07172017, but Taxpayer did not provide that purchase order. Rather, Taxpayer offered a copy of vendor's "Terms of Service."

Each invoice specifically states that "[a]ll OpenVoice audio conferencing services are provided by LogMein Audio LLC which is the telecommunications provider and is responsible for the rates and Terms of Service. LogMein USA, Inc. presents the invoices and collects on behalf of LogMein Audio LLC." A telecommunications provider is statutorily required to collect the "Universal Service Fund (USF)" under federal law. The invoices further explain "USF applies only to the telecommunications services offered by LogMein Audio LLC. USF does not apply to any GoTo Services" and "[t]he telecom fees are applicable only to OpenVoice Services."

The vendor collected the sales tax at seven percent on GoToWebinar Service - Pro and GoToMeeting Corporate Service. Separately, the vendor collected USF at a rate of 18.4 percent on OpenVoice Services only. In this

instance, Taxpayer's refund claim requested the USF to be refunded.

5. Network Solutions, Inc.

The invoices (Numbers 33861, 34581, 34757, 41201 and 41381) are labeled as bills for hardware and software. Some invoices reference contract number 3478058 and some invoices reference PO number AC122117-1. The vendor collected tax on the transactions.

Taxpayer explained that it only requested a refund of tax paid on the software as a service, such as "Meraki MR42 Cloud Managed AP," "Meraki MX65 Enterprise license and support," and "Umbrella Insights." The invoices, together with publicly verifiable information, indicate that Meraki MR42 Cloud Managed AP is a piece of equipment. The invoices provide a serial number for each Meraki MR42 Cloud Managed AP.

To support its protest, Taxpayer offered a copy of standard Cisco End User License Agreement, but it did not provide the above-mentioned signed contract and purchase order. The standard Cisco End User License Agreement does not reference any software products such as Meraki MX65 Enterprise license and support or Umbrella Insights. Taxpayer also did not provide its eight-factor analysis concerning the transactions with respect to the purchase in question.

E. Analysis and Conclusions.

Software transactions which occurred prior to July 1, 2018, are governed by the Department's information bulletins which represented the Department's review and analysis at the time of the transaction.

Sales Tax Information Bulletin 8 (July 1, 2018) 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 transactions which occurred during and after December 2016 are governed by Sales Tax 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] vendor or third party's computer servers are not subject to tax when accessed electronically via the Internet if the customer is not transferred the software, does not have an ownership interest in the software, and does not control or possess the software on the server.

In deciding whether or not 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.

Based on the documentation provided, the Department is prepared to agree that transactions with LogMein USA Inc. regarding GoToWebinar Service - Pro and GoToMeeting Corporate Service were not subject to Indiana's sales tax pursuant to the above-mentioned 2016 Bulletin 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.

In the absence of verifiable supporting documentation, the Department is unable agree that Taxpayer is entitled to a refund of transactions with Adam Systems, CDW Computer Centers, Inc., Kronos, and Network Solutions, Inc. because the information provided is ambiguous or contrary to Taxpayer's claim or the nature of the transaction is unclear.

Finally, the Department is unable to agree that Taxpayer is entitled to a refund of USF collected under the federal law. USF is beyond the scope of the Indiana sales tax.

FINDING

To the extent specified in this Memorandum of Decision, Taxpayer's protest is sustained in part and denied in part.

June 6, 2022

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