DEPARTMENT OF STATE REVENUE

04-20210107.SMOD

Supplemental Memorandum of Decision: 04-20210107
Gross Retail and Use Tax
For the Year 2015 to September 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 Supplemental Memorandum of Decision.

HOLDING

Management Company failed to establish that it was entitled to an additional refund of sales or use tax paid on the purchase of prewritten computer software; Management Company failed to establish that out-of-state vendors voluntarily collected use tax from Management Company in a manner that permitted Management Company claim the "temporary storage" exemption; Management Company failed to establish that the Department's application of the law and facts - as outlined in the Department's Sales Tax Information Bulletins - was either arbitrary or incorrect.

ISSUE

I. Gross Retail and Use Tax - Prewritten Computer Software, Maintenance Agreements, and Computer Hardware.

Authority: IC § 1-1-4-1; IC § 6-2.5-1-2; IC § 6-2.5-1-24; 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 § 6-2.5-3-4; IC § 6-2.5-4-1; IC § 6-2.5-4-1; IC § 6-2.5-9-3; IC § 6-2.5-13-1; IC § 6-2.5-13-2; *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2020); *Indiana Dep't of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Department of State Revenue v. Horizon Bancorp*, 644 N.E.2d 870 (Ind.1994); *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); *Rhoade v. Ind. Dep't of State Revenue*, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); *Jefferson Smurfit Corp. v. Indiana Dep't of State Revenue*, 681 N.E.2d 806 (Ind. Tax Ct. 1997); *UACC Midwest, Inc. v. Indiana Dep't of State Revenue,* 629 N.E.2d 1295 (Ind. Tax Ct. 1994); *USAir v. Indiana Dep't of State Revenue,* 623 N.E.2d 466 (Ind. Tax Ct. 1993); *F.A. Wilhelm Const. Co., Inc. v. Ind. Dep't of State Revenue*, 586 N.E.2d 953 (Ind. Tax Ct. 1992); *Leehaug v. State Bd. of Tax Comm'rs*, 583 N.E.2d 211 (Ind. Tax Ct. 1991); *C & C Oil v. Ind. Dep't of State Revenue*, 570 N.E.2d 1376 (Ind. Tax Ct. 1991); *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 2.2-3-4; 45 IAC 2.2-3-14; 45 IAC 2.2-3-21; 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 2.2-8-12; Sales Tax Information Bulletin 8 (December 2019); Sales Tax Information Bulletin 8 (July 2018); Sales Tax Information Bulletin 8 (December 2016); Sales Tax Information Bulletin 8 (November 2011); Sales Tax Information Bulletin 37 (May 2016); Sales Tax Information Bulletin 37 (June 2007); Memorandum of Decision 04-20210107 (January 22, 2022); Memorandum of Decision 04-20150211 (December 9, 2015); Rev. Ruling 2019-04ST (November 8, 2019).

STATEMENT OF FACTS

Taxpayer is an Indiana company in the business of developing, owning, and managing commercial real estate properties in multiple states. Taxpayer submitted a claim for a refund of approximately $1.7 million dollars in sales and/or use tax Taxpayer paid on its purchases of software licenses, software maintenance agreements, information services, and Information Technology ("IT") hardware. In part, Taxpayer maintained the purchases were exempt because the licenses, agreements, services, and IT hardware were intended for use outside Indiana.

The Indiana Department of Revenue ("Department") reviewed the request and granted a refund of sales tax paid on the purchase of VoIP (Voice over Internet) services. However, the Department did not agree that Taxpayer's purchases of prewritten software and computer hardware were exempt. As a result, the Department denied any portion of the original refund request attributable to those particular software and hardware transactions.

Taxpayer did not agree with the Department's decision denying the remaining refund amount and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representatives further

explained the basis for its protest. A January 2022 Memorandum of Decision was issued denying Taxpayer's protest in part and sustaining it in part.

Taxpayer continued to disagree with the denial of any portion of the originally requested refund and submitted a rehearing request. Taxpayer's request was granted, a supplemental hearing conducted, and this Supplemental Memorandum of Decision results.

I. Gross Retail and Use Tax - Prewritten Computer Software, Maintenance Agreements, and Computer Hardware.

DISCUSSION

Taxpayer disagrees with the Memorandum of Decision 04-20210107 (January 22, 2022), 20220330 Ind. Reg. 045220082NRA. Broadly speaking, Taxpayer challenges the Department's analysis of the "temporary storage" exemption because the exemption "was not defined nor mentioned in the Indiana Code."

Taxpayer maintains that the Department is glossing over the significance of Rev. Ruling 2019-04ST and the applicability and relevance of Sales Tax Information Bulletin 37. According to Taxpayer, the pre-*Wayfair* Bulletin 37 establishes that the out-of-state vendors voluntarily collected Indiana use tax. (See *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2020) holding that instate physical presence is no longer required in order to require out-of-state sellers to collect and remit the home state's *sales* tax.)

Taxpayer explains: The Department incorrectly relied on successive versions of Sales Tax Information Bulletin 8 while ignoring Sales Tax Information Bulletin 37 which, unlike the successive Information Bulletins 8, "was consistent with the statutes during the time period." Taxpayer asserts that the Department has rummaged through the various bulletins ("cherry picking") to arrive at conclusions which are inconsistent with the facts and the law.

A. Out-of-State Vendors Collecting Sales and/or Use Tax.

Taxpayer believes that the Department has fundamentally misinterpreted and misapplied the legal distinction between sales and use tax. Taxpayer maintains that - in the pre-*Wayfair* era - when out-of-state vendors sold Taxpayer computer software, these vendors collected "use tax" from Taxpayer. That being said, Taxpayer maintains that it is therefore entitled to take advantage of the "temporary storage" exemption applicable to Indiana's use tax. According to Taxpayer, this is how Indiana sales/use tax works:

- Out-of-state vendor sells Indiana Taxpayer computer software;
- Out-of-state vendor collects Indiana **use** tax from Taxpayer;
- Taxpayer distributes computer software to employees outside Indiana or installs the software on servers located outside Indiana;
- Because the software (or an allocated portion of the software) was "temporarily" stored in or delivered to Indiana, Taxpayer is entitled to a whole or partial refund of the use tax Taxpayer paid the out-of-state vendor.

According to the Department, this is how Indiana sales/use tax works:

- Under the Indiana State Gross Retail and Use Taxes, General Sourcing Rules, when a product is not received by the purchaser at the seller's business location, the sale is sourced to the location where receipt by the purchaser occurs, including the location indicated by instructions for delivery to the purchaser (seller). Out of state vendor ships and delivers the pre-written software to Indiana. The Indiana taxpayer receives and accepts the shipment or delivery. The software transactions are deemed subject to Indiana sales and any tax collected on that transaction is presumed to be Indiana **sales** tax (by operation of law and evidenced by the vendors' invoices). Indiana taxpayer is the purchaser and is responsible for paying the tax on its purchase under Indiana law.
- Out of state vendor, which meets the requirements of not doing business in Indiana and not required to collect Indiana sales tax, sells Indiana Taxpayer computer software;
- Out-of-state vendor which meets of requirements of not doing business in Indiana and not required to collect Indiana sales tax could volunteer to collect Indiana **use** tax from Taxpayer;
- Taxpayer accepts delivery in Indiana and then distributes the software to employees outside Indiana or installs the software on servers located exclusively outside Indiana;
- Taxpayer seeks but is denied a refund of use tax because the temporary storage exemption is not applicable to the manner in which Taxpayer utilized or sourced the software;
- Alternatively or in addition, the refund is denied because use tax paid on software is not apportionable based on the relative number of users located in Indiana compared to the number of users located outside Indiana.

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

> "Tangible personal property" means personal property that:
> (1) can be seen, weighed, measured, felt, or touched; or
> (2) is in any other manner perceptible to the senses.
> The term includes electricity, water, gas, steam, and prewritten computer software. (*Effective Jan. 1, 2004*).

To reorient the reader, Taxpayer is an Indiana company which purchased tangible personal property from out-of-state vendors otherwise who were - according to Taxpayer - not required to collect Indiana's sales tax. In some instances, the software was "shipped" to and paid for by Taxpayer but was - according to Taxpayer - thereafter used or accessed by persons outside Indiana, stored on servers located outside Indiana, but in whatever case was only "temporarily stored" in Indiana.

The Department here notes, and agrees with Taxpayer, that for sales and use tax purposes "computer software" is tangible personal property even though "software" is demonstrably and fundamentally different from bricks, chairs, or radiators because intangible "software" cannot be wrapped in a box or shipped on a pallet. Nonetheless, the Indiana legislature made clear its intention to tax the sale and purchase of "software" as tangible personal property.

1. Indiana's Sales 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). A "[r]etail transaction" is "a transaction of a retail merchant that constitutes selling at retail as described in IC [§] 6-2.5-4-1 [or] . . . in any other section of IC 6-2.5-4." 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).

IC § 6-2.5-1-27 states that "'[t]angible personal property' means personal property that . . . is in any other manner perceptible to the senses . . . including . . . prewritten computer software." The retail merchant shall collect the tax as agent for the state." *Id*.

A purchaser "who acquires property in a retail transaction is liable for the tax on the transaction and . . . shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction." IC § 6-2.5-2-1(b). If the retail merchant fails to collect the sales tax, the retail merchant "is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state." IC § 6-2.5-9-3; 45 IAC 2.2-8-12.

To determine if a retail transaction, namely "retail sale . . . of a product" is an Indiana retail transaction and thus subject to Indiana sales tax, IC § 6-2.5-13-1(d) incorporates the destination principle, which provides, in relevant part, "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, including the location indicated by instructions for delivery to the purchaser . . . known to the seller." IC § 6-2.5-13-1(d)(2).

2. Indiana's Use Tax.

On the other hand, Indiana use tax is a "complement" to state's sales tax. In effect and practice, the use tax is *generally* (but not wholly) functionally equivalent to the sales tax. *See Rhoade v. Ind. Dep't of State Revenue*, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002). Unlike Indiana's sales tax, Indiana's use tax allows an exception for the "temporary storage" of tangible personal property delivered into Indiana but destined for use entirely outside the state. IC § 6-2.5-3-2(e).

Indiana use tax is imposed on a person's storage, use, or consumption of tangible personal property - including prewritten computer software - 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); IC § 6-2.5-1-24; IC § 6-2.5-1-27. "Use" means the "exercise of any right or power of ownership over tangible personal property" including pre-written computer software. IC § 6-2.5-3-1(a). The use tax is generally functionally equivalent to the sales tax. *See Rhoade*,774 N.E.2d at 1047.

A purchaser's acquisition of tangible personal property from a vendor in a retail transaction triggers the imposition

of Indiana use tax. IC § 6-2.5-3-2(a); *USAir, Inc.*, *v. Indiana Department of State Revenue*, 623 N.E.2d 466, 468 - 69 (Ind. Tax Ct. 1993. A taxable retail transaction occurs when: (1) a party acquires tangible personal property as part of its ordinary business for the purpose of reselling the property; (2) that property is then exchanged between parties for consideration; and (3) the property is used in Indiana. *See* IC § 6-2.5-1-2; IC § 6-2.5-4-1(b) and (c); IC § 6-2.5-3-2(a).

By complementing the sales tax, the use tax ensures that non-exempt retail transactions (particularly out-of-state retail transactions) that escape sales tax liability are nevertheless taxed. *Rhoade*, 774 N.E.2d at 1048; *USAir, Inc.*, 623 N.E.2d at 468 - 69. The use tax ensures that, after such goods arrive in Indiana, the retail purchasers of the goods bear their fair share of the tax burden. *Rhoade*, 774 N.E.2d at 1050.

However, Indiana's use tax - not sales tax - allows an exception for the "temporary storage" of tangible personal property delivered into Indiana but destined for use outside the state. IC § 6-2.5-3-2(e). That specific, narrow use tax exemption is found at IC § 6-2.5-3-2(e).

> Notwithstanding any other provision of this section, the ***use tax is not imposed*** on the keeping, retaining, or exercising of any right or power over tangible personal property, if:
> (1) the property is delivered into Indiana by or for the purchaser of the property;
> (2) the property is delivered in Indiana for the sole purpose of being processed, printed, fabricated, or manufactured into, attached to, or incorporated into other tangible personal property; and
> (3) the property is ***subsequently transported out of state for use solely outside Indiana.*** (Effective March 24, 2016) (***Emphasis added***).

IC § 6-2.5-3-2(e) requires a taxpayer, *in the business of processing, printing, fabricating, manufacturing, or incorporating*, meet all three requirements: (1) delivered to Indiana; (2) for the sole purpose listed; (3) then transported for exclusive use outside Indiana.

In support of its foundational argument that the out-of-state vendors collected use tax, Taxpayer cites to the Department's Sales Tax Information Bulletin 37, (May 2016), 20160629 Ind. Reg. 045160254NRA (deleted July 2018); (*see also*, Sales Tax Information Bulletin 37 (June 2007), 20070620 Ind. Reg. 045070337NRA). Both versions of the Bulletin provide:

> An out-of-state merchant not required to register as an Indiana Retail Merchant may voluntarily register for an Out-of-State ***Use Tax*** Collection and Remittance Permit. Holders of such permits must collect and remit Indiana ***Use Tax*** to the Department on sales of tangible personal property subject to ***use tax. (Emphasis added***).

3. Evaluating, Interpreting, and Applying Exemptions.

The overarching sales and use tax principle is that *all* purchases of tangible personal property - such as prewritten computer software - are taxable 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). For example, an exemption from the use tax is granted for transactions where the sales tax was paid at the time of purchase pursuant to IC § 6-2.5-3-4 and 45 IAC 2.2-3-4. *See also* 45 IAC 2.2-3-14(1). There are various tax exemptions available outlined in IC § 6-2.5-5 which are applicable to both sales tax and use tax. 45 IAC 2.2-3-14(2).

A statute, such as IC § 6-2.5-3-2(e), which provides the "temporary storage" use 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).

When, as here, a taxpayer challenges the taxability of an item of tangible personal property, 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). Also, "all statutes are presumptively constitutional." *Indiana Dep't of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 587 (Ind. 2014) (citing *UACC Midwest, Inc. v. Indiana Dep't of State Revenue,* 629 N.E.2d 1295, 1299 (Ind. Tax Ct. 1994)). 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." *Caterpillar, Inc.*, 15 N.E.3d at 583.

4. Sales Information Bulletin 37 - Pre-*Wayfair*

Taxpayer argues that the Department erred by not paying sufficient deference to the Department's own sales/use tax distinctions. Starting at "VII Voluntary Collection by Out-of-State Merchants," Bulletin 37 provides:

> An out-of-state merchant not required to register as an Indiana Retail Merchant may voluntarily register for an Out-of-State ***Use Tax*** Collection and Remittance Permit. Holders of such permits must collect and remit Indiana ***Use Tax*** to the Department on sales of tangible personal property subject to ***use tax***. Registration may be completed online at: www.in.gov/dor/electronic. Another method for an out-of-state merchant to register is through the Streamlined Sales & ***Use Tax*** Agreement Web site, www.streamlinedsalestax.org. Registering on this Web site automatically registers the retail merchant to voluntarily collect tax for 15 full member and 6 associate member states. For more information concerning the Streamlined Sales & Use Agreement and voluntary registration, refer to Commissioner's Directive 27 at www.in.gov/dor/reference/comdir/index.html. No fee is charged for either method of registration by an out of state seller. Sales Tax Information Bulletin 37 (June 2007) 20070620 Ind. Reg. 045070337NRA.

5. Revenue Ruling 2019-04ST.

Taxpayer maintains that the Department glosses over its own decision in Revenue Ruling 2019-04ST (November 8, 2019) 20200226 Ind. Reg. 45200041NRA. In that ruling, the Department responded to a printing company's ("Company") question. "Is Company required to collect Indiana sales tax from [Customer] for the sale and transfer of title to catalogs in Indiana?" Moreover, Company asked the tax consequences if the catalogs were not sold to "locations outside the State of Indiana and title to the catalogs passes to [Customer] while in transit." The Department concluded as follows:

> [E]ither Company would be responsible for collecting sales tax on the transaction (Indiana sales tax on the entire transaction, or the portion delivered to Indiana recipients), or [Customer] would be responsible for remitting use tax only on the portion that represents gross retail income from catalogs that will be shipped to Indiana customers.
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> . . . .
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> [D]epending on the information [Customer] provides, either Company or [Customer] would be responsible for remitting tax on the catalogs shipped to . . . . customers in Indiana.

6. Taxpayer's Analysis and Taxpayer's Conclusion.

Taxpayer has reviewed the law and considered the facts attendant to each of the software transactions. Having done so, Taxpayer concludes that it is entitled to a refund of sales (or use) tax paid to the out-of-state vendors who sold Taxpayer prewritten computer software. Taxpayer arrives at this conclusion because: (1) prewritten computer software is tangible personal property; (2) the out-of-state vendors were voluntarily collecting Indiana use tax; (3) the software was or is stored on servers outside Indiana or; (4) was or is used by employees located in multiple out-of-state locations. Even though Taxpayer is an Indiana company which purchased the software, the "property [was] subsequently transported out of state for use solely outside Indiana." IC § 6-2.5-3-2(e).

7. The Department's Analysis and Conclusion.

For illustrative purposes and as an intellectual exercise, the Department can hypothesize a situation in which a taxpayer would be entitled - under a plain and ordinary reading of the law - to a refund of use tax paid on the purchase of prewritten computer software.

Assuming an out-of-state vendor, with no brick-and-mortar Indiana presence and not obligated to collect Indiana sales tax, voluntarily charged, collected, and remitted Indiana use tax as provided under Department's Sales Tax Information Bulletin 37, (May 2016), 20160629 Ind. Reg. 045160254NRA (deleted July 2018) during the periods between May 2016 and July 2018. Assuming that the software was downloaded to a specific server located outside Indiana "for use solely outside Indiana" as set out in IC § 6-2.5-3-2(e), in this set of specific circumstances, the Department assumes, as a matter of fact and law, that that the purchaser of software which never crossed the border into Indiana and - of course - never used in Indiana by the Indiana purchaser, would be

entitled to a refund of that use tax.

Alternatively, and again assuming an out-of-state vendor with no Indiana physical presence downloaded computer software to the purchaser's out-of-state employees' computers and the purchaser never used the software in Indiana, the Department again presumes as a matter of fact and law that that the software purchaser, never having made use of the software in Indiana, would be entitled to a refund of that use tax.

Finally, assuming that the software *was* delivered to Indiana in the electronic equivalent of a box, barrel, or pallet but was then transported part-and-parcel to an out-of-state location to be used exclusively in that out-of-state location, the Department again agrees that the software purchaser would be entitled to a refund of the use tax voluntarily paid the vendor.

However in the examples cited above, the Department hypothesizes a narrow set of circumstances which reasonably lead to invoking the exemption because the interpretations above work in the hypothetical taxpayer's favor even when "strictly construed against the taxpayer" and the circumstances are "clearly within the exact letter of the law." *RCA Corp.*, 310 N.E.2d at 97, 101.

If the exemption is to be had, the transaction must fall squarely within the four corners of IC § 6-2.5-3-2(e) including the "corner" which requires that the tangible personal property be "transported out of state for use solely outside Indiana." *Id.* In this case, it is unclear whether the software is now being used "solely outside Indiana."

As an example, the Department here cites to Memorandum of Decision 04-20150211 (December 9, 2015) in which the Department agreed that an Indiana insurance company's argument was "clearly within the exact letter of the law" and was entitled to a refund of tax paid to an out-of-state vendor from which the Indiana company purchased computer software.

> [T]he software was delivered electronically or by means of a storage device to a third-party service provider. The third-party operates computer servers in Texas. The software Taxpayer purchased is "housed" on the third-party's servers. Taxpayer's Indiana employees access the software by means of the Internet.
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> . . . .

Given the circumstances, the Department concluded:

> Taxpayer's substantive legal position is correct; it is entitled to a refund of the Indiana sales tax paid to the out-of-state vendors when it purchased software delivered to the Texas service provider. Under IC § 6-2.5-3-5, Taxpayer is entitled to a refund of the tax equal to the amount of sales tax paid to Texas.

Taxpayer's analysis and circumstances do not fit so neatly "within the exact letter of law." The "temporary storage exemption" requires that the purchased item be used "solely outside Indiana." IC § 6-2.5-3-2(e). Taxpayer seeks a refund of tax paid on "tangible personal property" which is used outside Indiana but is also used to a lesser or greater extent within Indiana. Taxpayer did not purchase discrete slices of prewritten computer software; it purchased tangible personal property in the form of computer software and now seeks a refund on the ground that an equitable apportionment of the software - based on multistate usage - seems to be a reasonable way in which to "spread" the tax consequences between Indiana and multiple out-of-state locations.

While the approach suggested does have a certain logic, it requires reading into the law an interpretation nowhere to be found within the plain meaning of the statute. Instead, the Department finds that the phrases "tangible personal property" and "for use solely outside Indiana" are "plain and unambiguous." As such, the Department has no power to "construe the statute for the purpose of limiting or extending its operation." *F.A. Wilhelm Const. Co., Inc. v. Ind. Dep't of State Revenue*, 586 N.E.2d 953, 955 (Ind. Tax Ct. 1992) (citing *C & C Oil v. Ind. Dep't of State Revenue*, 570 N.E.2d 1376, 1380 (Ind. Tax Ct. 1991)).

Taxpayer seeks to create from whole cloth a contemporary analog to the Multiple Point of Use ("MPU") exemption formerly found under IC § 6-2.5-13-2 (repealed effective Jan. 1, 2008) which provided:

> (a) Notwithstanding section 1 of this chapter, a business purchaser that:
> (1) is not a holder of a direct pay permit; and
> (2) knows at the time of its purchase of a digital good, computer software delivered electronically, or a service that the digital good, computer software delivered electronically, or service will be concurrently available for use in more than one (1) jurisdiction;

shall deliver to the seller in conjunction with its purchase a form disclosing this fact ("multiple points of use" or "MPU" exemption form).
(b) Upon receipt of the MPU exemption form, the seller is relieved of all obligation to collect, pay, or remit the applicable tax and the purchaser shall be obligated to collect, pay, or remit the applicable tax on a direct pay basis.
(c) A purchaser delivering the MPU exemption form may use any reasonable, but consistent and uniform, method of apportionment that is supported by the purchaser's business records as they exist at the time of the consummation of the sale.

Taxpayer may well have found a "method of apportionment that is supported by the purchaser's business records" but the MPU exemption no longer exists and has not existed for the last 14 years. The enacting and repealing of IC § 6-2.5-13-2 unambiguously establishes that the Indiana General Assembly understood the MPU concept, considered the concept, inculcated the concept into 2003 to 2008 Indiana law, and then eliminated it entirely in 2008.

If, as Taxpayer posits, the applicability of sales and use tax on computer software lends itself to some degree of ambiguity, the Department here assumes that the legislature meant what it intended when it dispensed with the MPU provision. The Department here finds that "for use solely outside Indiana" speaks clearly and in ordinary language. Taxpayer, of course, disagrees, but it is well-established that a statute is not ambiguous merely because of "[s]imple disagreement between the parties." *Leehaug v. State Bd. of Tax Comm'rs*, 583 N.E.2d 211, 212 (Ind. Tax Ct. 1991) (internal citations omitted). An unambiguous statute must be read to "mean what it plainly expresses, and its plain and obvious meaning may not be enlarged or restricted." *Jefferson Smurfit Corp. v. Indiana Dep't of State Revenue*, 681 N.E.2d 806, 811 (Ind. Tax Ct. 1997); *Department of State Revenue v. Horizon Bancorp*, 644 N.E.2d 870, 872 (Ind.1994).

The Department notes here that there is no indication that Taxpayer saw fit to report and/or pay use tax in any of the other states in which a "slice" of the tangible personal property (software) was utilized by its employees.

Unlike the Department's holding in Revenue Ruling 2019-04ST, computer software is not as easily apportionable as paper catalogs. Catalogs sold to and delivered in Indiana are subject to tax while catalogs sold by out-of-state vendor but delivered to another out-of-state location are not subject to the tax; the distinction is easily made by counting the catalogs, but computer software sold to an Indiana customer but then "used" by persons located in different states does not lend itself easily (or even rationally) to the same MPU distinction. If, as Taxpayer maintains, tangible personal property in the form of computer software, is apportionable based on an inherent MPU standard, the apportionment should be made by use and not by individual user. In such a theoretical MPU regime, an Indiana employee who makes minimal use of the software should not be given the same weight as an out-of-state "super-user" of the software.

Nonetheless, the Department does not agree that the transactions at issue involved the imposition and collection of "use" tax. As mentioned above, Indiana imposes sales tax on retail transactions made in Indiana, which include out-of-state software vendors who sell and ship (or deliver) the tangible personal property to Taxpayer. Taxpayer accepted the software in Indiana, not outside of Indiana. 45 IAC 2.2-3-21. Taxpayer purchased the software from vendors who are retail merchants doing business in Indiana and delivered the software to Indiana. Taxpayer's invoices demonstrated that the software was typically "delivered to" or "shipped to" Indiana or "downloaded" to Taxpayer's computers in Indiana and "installed" on servers at Taxpayer's Indiana headquarters. There is nothing to indicate that a common carrier delivered the software to an out-of-state location. In other words, Taxpayer in this instance did not accept software outside of Indiana and then made use of that software entirely outside Indiana. These retail transactions concluded when Taxpayer accepted software at its Indiana headquarters–the final destination. These transactions were retail transactions subject to Indiana sales tax because the sales were sourced to Indiana under IC § 6-2.5-13-1(d)(2) which provides:

When the product is not received by the purchaser at a business IC § 6-2.5-3-2 location of the seller, the sale is 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.

By operation of law, the sourcing rule IC § 6-2.5-13-1, "sources" these transaction to Indiana. When Taxpayer accepted the software at its Indiana headquarters, the invoices demonstrated that the vendor collected "sales tax" at the time of these sales; as a result, the temporary storage exemption was not applicable.

B. Computer Software as Tangible Personal Property or as an Exempt Service.

As noted above, prewritten computer software, although treated as tangible personal property, is under certain circumstances an intangible service and the distinction between the two can be elusive. The Department's past treatment of software issues acknowledges the rapidly evolving manner in which software is or was bought and sold. In years past, software was routinely packaged into boxes and then sold in retail stores in much the same way as one would buy a toaster or a book. The purchase of software typically involved the transfer of a physical medium such as 5.25-inch floppy disks, later 3.5-inch disks, still later CD-ROMs or DVDs even if what the customer was buying was, in actuality, the right to use the program and a method of installing it on one's computer. Once installed, the software product resided indefinitely on the buyer's computer. However, the concept of "software as a product" faded away as consumers downloaded software from the web and used the software by accessing a remote server.

That being said, the second primary objection Taxpayer raises concerns the applicability and relevance of Sales Tax Information Bulletin 8 (November 2011), 20111228 Ind. Reg. 045110765NRA, Sales Tax Information Bulletin 8 (December 2016), 20170125 Ind. Reg. 045170026NRA, Sales Tax Information Bulletin 8 (July 1, 2018), 20180725 Ind. Reg. 045-180312NRA and Sales Tax Information Bulletin 8 (December 2019).

Sales Tax Information Bulletin 8 (November 2011), provided that prewritten computer software maintained on computer servers outside Indiana was subject to tax when accessed electronically.

> 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.

From November 2011 to December 2016 the Department ruled that purchasing software was subject to tax regardless of where the software was stored, downloaded, or utilized. Simply put, if you bought software, you paid tax on it.

Sales Tax Information Bulletin 8 (December 2016) provided that charges for accessing prewritten software maintained on the seller's or third party's computer servers were not subject to tax when accessed electronically by means of the internet if the customer did not transfer the software, did not have an ownership interest in the software, and did not control or possess the software on the server. The December 2016 bulletin was an attempt to reconcile the evolving nature of software transactions and Indiana's definition of software as "tangible personal property." Starting December 2016, the Department ruled that software accessed outside the state was subject to tax only if the purchaser gained an ownership interest in that software. The subsequent Bulletin, Sales Tax Information Bulletin 8 (July 1, 2018), attempted to define the applicability 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.

In the July 1, 2018, Bulletin, the Department clarified the applicability of the 2011 and 2016 Bulletins and defined the dividing line between purchases of software after November 2011 but before December 2016 (taxable) and purchases of software purchased after December 2016 (taxable if the purchaser "owns" the software).

The Department's position explained that in the case of transactions which occurred *prior* to December 2016, the tax is governed by the Department's then-current interpretation and application of the law regardless of ownership interest, sourcing rules, or delivery location. Thereafter Department's guidance on this issue was found at Sales Tax Information Bulletin 8 (November 2011), 20111228 Ind. Reg. 045110765NRA, which was in effect at the time of the pre-December 2016 transactions and is dispositive of issues raised here by Taxpayer.

> Prewritten computer software maintained on computer servers outside of Indiana also is subject to tax when accessed electronically via the Internet (i.e., "cloud computing"). The accessing of prewritten computer software by Indiana residents constitutes a transfer of the software because the customers gain constructive possession and the right to use, control, or direct the use of the software. Sales Tax Information Bulletin 8 (November 2011).

When, as here, 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." *Caterpillar, Inc.*, 15 N.E.3d at 583.

Taxpayer maintains that the Department has "cherry picked" its way through these Bulletins and discovered a

hybrid interpretation of the law which is unsupported by the law and facts. The Department must respectfully disagree. The Bulletins' iterations reflect the Department's attempt to uphold the "plain and ordinary meaning of the language used." *Leehaug*, 583 N.E.2d at 212 (Ind. Tax Ct. 1991). The retail sale of computer software has steadily evolved. The contractual relationship between the buyer and seller of software has evolved. The means by which software is acquired, stored, or accessed has evolved. What has not changed is Indiana's definition of software as tangible personal property subject to this state's sales and use tax and the exemptions attendant to those taxes. Taxpayer has not established that the Department has departed from the IC § 1-1-4-1 proscription that states in part:

> The construction of all statutes of this state shall be by the following rules, unless the construction is plainly repugnant to the intent of the legislature or of the context of the statute:
>
> (1) Words and phrases shall be taken in their plain, or ordinary and usual, sense. Technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import.

The Department stands by its previous decision finding that Taxpayer established it is entitled to a partial refund of tax paid on the purchase of tangible personal property.

FINDING

To the extent Taxpayer argues that it is entitled to a further refund of sales and/or use tax, Taxpayer's protest is denied. As stipulated in this Memorandum, the Department stands by its January 2022 finding that Taxpayer established it was entitled to a refund of sales and/or use tax.

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