

Memorandum of Decision: 04-20211003
Gross Retail and Use Tax
for the Periods January 1, 2017, to June 30, 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 Indiana Company was entitled to a refund of sales tax paid on transactions with several vendors; Indiana Company was entitled to a refund of tax on transactions under which Company obtained software services, that occurred between January 1, 2017, and June 30, 2018, and under which Company did not acquire a possessory interest in the vendor's software.

ISSUE

I. Gross Retail and Use Tax - Refund.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-1-14; IC § 6-2.5-1-14.5; 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 § 6-2.5-4-17; IC § 6-2.5-9-3; IC § 6-2.5-13-1; IC § 6-8.1-9-1; *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); *Rhoades v. Indiana Dep't of State Revenue*, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); *USAir, Inc. v. Indiana Dep't of State Revenue*, 623 N.E.2d 466 (Ind. Tax Ct. 1993); *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); *Medco Health Sols., Inc. v. Indiana Dep't of State Revenue*, 9 N.E.3d 263 (Ind. Tax Ct. 2014); [45 IAC 2.2-3-4](#); [45 IAC 2.2-3-14](#); [45 IAC 2.2-4-2](#); [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](#); [45 IAC 15-9-2](#); Sales Tax Information Bulletin 8 (December 2016); Sales Tax Information Bulletin 8 (June 2018).

Taxpayer claimed that it was entitled to a refund of tax paid on various purchases concerning remotely accessed software hosted on third-party servers located outside of Indiana, Software-as-a-Service, and non-taxable services.

STATEMENT OF FACTS

Taxpayer is a company doing business in Indiana. In December 2020, Taxpayer submitted a claim for refund, Form GA-110L, for sales and/or use tax paid on transactions with vendors for acquisition or use of pre-written computer software and services. The Indiana Department of Revenue ("Department") reviewed the request and denied the refund in full.

Taxpayer protested the 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 - Refund.

DISCUSSION

To properly claim a refund for an overpayment of tax, Taxpayer was required to substantiate its refund request and clearly state "the amount of the refund," provide "a detailed explanation of the basis of the claim such that the department may determine its correctness," list "the tax period for which the overpayment is claimed," and designate "the year and date of the overpayment." IC § 6-8.1-9-1(a); see also [45 IAC 15-9-2](#); *Medco Health Sols., Inc. v. Indiana Dep't of State Revenue*, 9 N.E.3d 263, 266 (Ind. Tax Ct. 2014).

Taxpayer, in this instance, requested a total refund of \$233,874.31 (\$61,796.53 for 2017 and \$172,077.78 for 2018) for sales tax that vendors invoiced Taxpayer for transactions that occurred during 2016, 2017, and 2018. As a preliminary matter, it should be noted that Taxpayer's refund claim was filed in December 2020. As such,

Taxpayer's refund request concerning payments made or retail transactions concluded in 2016 was not timely pursuant to IC § 6-8.1-9-1(a).

Also, several invoices seemingly suggested that vendors probably invoiced for products sold or services rendered but subsequently revised the initial charges or issued different invoices instead. Regardless of the circumstances or reasons, if the customers (i.e., purchasers) do not pay tax, there is no overpayment to be refunded.

With the above preliminary requirements in mind, this determination addresses the issues raised by Taxpayer, as follows:

A. The Department's Initial Decision

During the initial review, the Department considered Taxpayer's request, and denied the refund in full, on the basis of software-as-a-service. The Department explained in its June 2, 2021, letter, in relevant part:

The taxpayer is located in Indianapolis, Indiana. A GA110L Claim for Refund was filed for the sales tax paid on software as a service (SaaS). The taxpayer has several vendors in question regarding SaaS.

According to Information Bulletin #8:

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 not considered an electronic transfer of computer software and is not considered a retail transaction. In other words, transactions for prewritten computer software remotely accessed 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, are not considered retail transactions, and therefore the purchase, rental, lease, or license of that software is not subject to Indiana sales or use tax.

...

However, prior to July 1, 2018, the software was considered taxable. All invoices provided to support the refund requested, for SaaS, dated prior to July 1, 2018, are considered taxable. Therefore, tax is due on all invoices regarding SaaS in this review. . . .

Based on Taxpayer's invoices, the Department determined that Taxpayer purchased taxable prewritten computer software to be used in Indiana. As such, the vendors properly collected Indiana sales tax.

B. Taxpayer's Protest

Taxpayer protested the refund denial. Specifically, Taxpayer raised the following issues:

- Issue 1: Remotely accessed Software hosted on a Third-party servers located outside of Indiana
- Issue 2: Software-as-a-Service
- Issue 3: Non-taxable services

On Issue 1, Taxpayer claimed that it was entitled to a refund of sales tax paid on its purchases of computer software from several vendors, including SAP America Inc., Microsoft Corp., Oracle America Inc., and Softchoice Corp. Taxpayer explained that in 2016, it contracted with a third-party vendor located outside of Indiana, which provides hosting service and Infrastructure-as-a-service (IaaS). As such, Taxpayer asserted that its purchases in question had been delivered, shipped, or downloaded to the out-of-state servers of its vendor and were not transactions subject to Indiana tax.

On Issue 2, Taxpayer claimed that it was entitled to a refund of sales tax paid on its purchases of computer software - Software as a Service - from several vendors, including Ariba Inc., Avalara Inc., Proquire LLC, and SAP America Inc. Taxpayer stated that these purchases in question qualified as SaaS. Thus, Taxpayer maintained that its purchases were not subject to Indiana tax pursuant to the Department Sales Tax Information Bulletin 8.

As to Issue 3, Taxpayer claimed that it contracted with Softchoice Corporation, which provided information technology solutions. Taxpayer explained that "this purchase is for professional installation, configuration, and IT management services." Thus, Taxpayer maintained that it was entitled to a refund of sales tax paid on the non-taxable service.

C. The Law

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). Professional or personal services generally are not "transactions of a retail merchant constituting selling at retail" unless the service provider "also transfers tangible personal property for a consideration" in conjunction with rendering the services. [45 IAC 2.2-4-2](#)(a).

IC § 6-2.5-1-27 further defines that "'[t]angible personal property' means personal property that . . . is in any other manner perceptible to the senses . . . including . . . **prewritten computer software.**" (**Emphasis added**). "Computer software" means a set of coded instructions designed to cause a computer or automatic data processing equipment to perform a task." IC § 6-2.5-1-14. "Computer software maintenance contract" means a contract that obligates a person to provide a customer with future updates or upgrades of computer software." IC § 6-2.5-1-14.5. "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." IC § 6-2.5-4-17.

IC § 6-2.5-2-1(b) mandates that the retail merchant, remote or otherwise, shall collect the tax as agent for the state. Physical presence is not required for Indiana to mandate the remote sellers to collect the sales tax on retail transactions which concluded in Indiana where purchasers reside. The 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." *Id.* 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 a "retail sale . . . of a product," is an Indiana retail transaction and subject to Indiana sales tax, the sourcing rule, IC § 6-2.5-13-1(d) provides:

The retail sale, excluding lease or rental, 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 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.
- (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).

The Indiana use tax, on the other hand, 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." IC § 6-2.5-3-1(a). The use tax is generally, but not always, functionally equivalent to the sales tax. See *Rhoades v. Indiana Dep't of State Revenue*, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002). 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. *Rhoades*, 774 N.E.2d at 1048; *USAir, Inc. v. Indiana Dep't of State Revenue*, 623 N.E.2d 466, 468-69 (Ind. Tax. Ct. 1993). 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. *Rhoades*, 774 N.E.2d at 1050. To trigger imposition of Indiana's use tax, tangible personal property must (as a threshold matter) be acquired in a retail transaction. IC § 6-2.5-3-2(a); *USAir, Inc.*, 623 N.E.2d at 468-69. 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).

Accordingly, all purchases of tangible personal property are taxable unless specifically exempted under Indiana law. [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\(a\)](#). 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\(1\)](#). It should be noted that when the sales tax is collected on a particular retail transaction upon delivery, the sale is concluded. As such, the "temporary storage" exemption under use tax is not available under sales tax.

A statute which provides a tax exemption 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 a taxpayer challenges the taxability, 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). 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." *Id.* at 583.

D. Hearing Analysis

Throughout the process of appeals, Taxpayer protested the Department's refund denial, asserting that it was entitled to the refund of tax on the following purchases on the ground that they were not subject to Indiana sales and use tax: (1) Remotely accessed Software hosted on Third-party servers located outside of Indiana, (2) Software-as-a-Service, and (3) Non-taxable services. The Department initially denied Taxpayer's refund because Taxpayer's invoices clearly stated that Taxpayer purchased those items which were "ship[ped] to" Taxpayer's Indiana location. As such, there is a rebuttable presumption that Taxpayer's purchases were subject to Indiana sales tax. The issue thus is whether Taxpayer provided sufficient and verifiable documents to support its refund claim.

1. Remotely accessed Software hosted on Third-party servers located outside of Indiana

Taxpayer in this instance explained that, in 2016, it contracted with a third-party vendor located outside of Indiana, which provides hosting service and Infrastructure-as-a-service (IaaS). As such, Taxpayer maintained that its purchases of computer software, including SAP America Inc., Microsoft Corp., Oracle America Inc., and Softchoice Corp., were delivered to, shipped to, downloaded to, and installed at the out-of-state servers of its vendor and were not transactions subject to Indiana tax. To support its protest, Taxpayer provided additional supporting documents, including a copy of the contract and statements corroborating the arrangements.

Upon review, Taxpayer's supporting documentation demonstrated that it worked with its out-of-state vendor, which provided IaaS and webhosting service to Taxpayer. Based on the contractual arrangements, Taxpayer's software purchases from SAP America Inc. and Microsoft Corp. - also out-of-state vendors - were subsequently delivered to, shipped to, downloaded to, and installed at the out-of-state servers of its vendor and were not delivered to Taxpayer's Indiana location as stated in the invoices. Therefore, based on the verifiable information provided, the Department is prepared to agree that Taxpayer is entitled to a refund of tax paid on the software purchases from SAP America Inc. and Microsoft Corp., which were not transactions subject to Indiana tax. However, Taxpayer is not entitled to a refund of tax paid on the software purchases from Oracle America Inc. and Softchoice Corp. Without verifiable documentation to support Taxpayer's arrangements concerning its purchases from Oracle America Inc. and Softchoice Corp., both vendors properly collected tax on the invoices because the transactions were Indiana transactions subject to Indiana tax.

2. Software-as-a-Service

Taxpayer claimed that it was entitled to a refund of sales tax paid on its purchases of computer software - Software as a Service - from several vendors, including Ariba Inc., Avalara Inc., Proquire LLC, and SAP America

Inc. Taxpayer stated that these purchases in question qualified as SaaS. As such, Taxpayer asserted that its purchases were not subject to Indiana tax pursuant to the Department Sales Tax Information Bulletin 8. To support its protest, Taxpayer offered additional documents including contracts as well as the "Terms and Conditions" for use of the pre-written software in question.

As an agency charged with enforcing a statute, the Department is tasked to provide and publish nontechnical assistance to the general public concerning its interpretation on "Application of Sales Tax to the Sale, Lease, or Use of Computer Hardware, Computer Software, and Digital Goods." As such, software transactions are governed by the Department's information bulletins which represented the Department's review and analysis at the time of the transaction. For software transactions which occurred prior to July 1, 2018, Sales Tax Information Bulletin 8 (June 2018, effective beginning July 1, 2018), 20180725 Ind. Reg. 045180312NRA, is clear on the relevance and application of the bulletin published in December 2016:

[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.

Accordingly, the transactions, which occurred during and after December 2016 and prior to July 1, 2018, are governed by Sales Tax Information Bulletin 8 (December 2016), 20170125 Ind. Reg. 045170026NRA ("Information Bulletin 8").

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 Information Bulletin 8:

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 determining whether the buyer has acquired "an ownership interest" regarding the pre-written software purchase, Information Bulletin 8 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 additional verifiable information provided by Taxpayer, the Department is prepared to agree that Taxpayer is entitled to a refund of tax paid on Ariba Inc., Avalara Inc., Proquire LLC, and SAP America Inc. pursuant to the Information Bulletin 8 and applicable Indiana law as in effect during the tax years at issue.

3. Non-taxable services

Taxpayer claimed that it contracted with Softchoice Corporation, which provided information technology solutions. Taxpayer explained that "this purchase is for professional installation, configuration, and IT management services." Thus, Taxpayer maintained that it was entitled to a refund of sales tax paid on the non-taxable service (Invoice Number 4786819). In addition to the invoice, Taxpayer offered the "Statement of Work" and "Terms and Conditions" to support its protest.

Upon review, Taxpayer's supporting documentation demonstrated that Taxpayer entered into a contract to complete a project, which the vendor provided information technology solutions and invoiced Taxpayer on the basis of time and materials. Taxpayer's supporting documentation also demonstrated that the project took place primarily in Indiana. Nonetheless, the vendor in this instance provided a managed service and invoiced Taxpayer for the managed service only. As mentioned earlier, providing services only in general are not "transactions of a retail merchant constituting selling at retail" unless the service provider "also transfers tangible personal property for a consideration" in conjunction with rendering the services. [45 IAC 2.2-4-2\(a\)](#). Therefore, based on the additional verifiable information provided by Taxpayer, the Department is prepared to agree that Taxpayer is entitled to a refund of tax paid on the service (Invoice Number 4786819).

In short, based on the above, the Department is prepared to agree that Taxpayer was entitled to a refund of tax *paid* (1) on its purchases from SAP America Inc. and Microsoft Corp. because the purchases were shipped to and installed at the servers of its vendor, located outside of Indiana; (2) on its purchases from Ariba Inc., Avalara Inc., Proquire LLC, and SAP America Inc. between January 1, 2017 and through June 30, 2018 because Taxpayer provided sufficient and verifiable supporting documents to demonstrate that it met the requirements outlined in the Information Bulletin 8; and (3) on the Softchoice Corporation, Invoice Number 4786819, for the managed service.

FINDING

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

August 29, 2022

Posted: 05/17/2023 by Legislative Services Agency
An [html](#) version of this document.