DEPARTMENT OF STATE REVENUE

04-20221259.SMOD
04-20221012.SMOD

Supplemental Memorandum of Decision: 04-20221259 and 04-20221012
Indiana Gross Retail 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 Supplemental Memorandum of Decision.

HOLDING

Management Company was entitled to an additional refund of sales tax paid on the purchase of prewritten computer software from three vendors. The information provided established that Company paid for exempt services; Company failed to establish that it was entitled to a refund of sales tax paid on the purchase of software delivered to or hosted at a location outside Indiana.

ISSUES

I. Gross Retail and Use Tax - Remotely Accessed Prewritten Computer Software.

Authority: IC 6-2.5-1-27; IC 6-2.5-2-1; IC 6-2.5-4-16.7; 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); *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); *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 2.2-3-14; 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); Memorandum of Decision 04-20210015 (March 31, 2023); Final Order Denying Refund 04-20221259 (May 16, 2023).

Taxpayer argues that it is entitled to a refund of sales tax paid on pre-July 1, 2018, purchases of pre-written software on the ground that Taxpayer was paying for the right to use or simply access that software.

II. Gross Retail and Use Tax - Tangible Personal Property Delivered to and Hosted at a Location Outside Indiana.

Authority: Indiana Sales Tax Information Bulletin 8 (July 2018); Indiana Sales Tax Information Bulletin 8 (January 2023); IC 6-2.5-13-1.

Taxpayer maintains that it is entitled to a refund of sales tax paid on the purchase of software licenses some of which were licenses for software delivered to and installed on locations outside Indiana.

STATEMENT OF FACTS

Taxpayer is an Indiana company which provides administrative services to its parent company and to the parent company's various affiliates. Taxpayer provides these parties accounting, information technology, procurement, and financial services.

Taxpayer submitted multiple GA-110Ls (Claims for Refund) seeking refunds of sales or use tax it paid on the purchase of computer software. Taxpayer explained that it had erroneously paid sales tax to the software vendors during the year 2017 and the first six months of 2018.

A. 2017 Refund Request.

The Department responded to the multiple refund requests separately. In the 2017 refund request, Taxpayer sought a total refund of approximately $630,000. The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's refund request.

Following that review, the Department issued a September 2021 letter stating, "DOR has reviewed the claim and denies the claim in full in the amount of [$630,000] based upon the reason(s) below." Those reasons were set out in a six-page Explanation of Adjustments. Taxpayer disagreed with the Department's decision denying the $630,000 refund and submitted a protest to that effect. An administrative hearing was conducted by telephone during which Taxpayer's representatives explained the basis for its protest. Memorandum of Decision 04-20210015 (March 31, 2023) was issued sustaining Taxpayer in part and denying Taxpayer in part. The Department agreed that Taxpayer was entitled to an additional refund of sales tax paid on the purchase of computer software but was not entitled to a refund of sales tax paid on the purchase of software maintenance agreements.

Taxpayer requested a rehearing addressing these companion conclusions on the ground that it was now able to provide additional documentation which, had it been available at the time of the original hearings, would have led to different conclusions.

B. 2018 Refund Request.

As mentioned, Taxpayer also sought a refund of sales tax paid on the purchase of computer software and other items purchased from its vendors during the year 2018.

In this second request, Taxpayer sought a refund of approximately $470,000. Taxpayer explained that "[T]he transactions in question represent software used outside Indiana." In addition, the accompanying "Investigative Findings" explains that Taxpayer seeks "a refund of sales tax paid for [software] maintenance contracts associated with these software licenses used outside of Indiana....."

In its initial review of this second refund request, the Department first issued the "Investigation Findings" stating, "DOR has reviewed the claim and denies the claim in part in the amount of [approximately $434,000] based upon the reason(s) below." Those reasons" were set out in the five-page IF. In part, the Department explained that a number of the software invoices did not include sales tax, Taxpayer failed to provide vendor contracts implementing the software purchases, Taxpayer failed to establish that it paid sales tax on a number of software purchases, some of the invoices reflected the payment of sales tax calculated at a rate other than Indiana's seven-percent rate, Taxpayer did not provide proof it paid tax on a number of the invoices, and Taxpayer failed to provide vendor invoices for all transactions.

Taxpayer disagreed with the Department's decision denying a portion of the original refund and submitted a protest to that effect. In its protest, Taxpayer challenged the Department's refund denial of approximately $310,000 in sales tax. In reviewing Taxpayer's argument, the Department noted that Taxpayer did not challenge the denial of the originally disputed $430,000 but challenged a portion of that amount.

An administrative hearing was conducted by telephone during which Taxpayer's representatives explained the basis for its protest. Final Order Denying Refund 04-20221259 (May 16, 2023) was issued because the Department "[did] not agree that Taxpayer [] established that it is entitled to an additional refund of sales tax."

C. 2017 and 2018 Supplemental Review.

This Supplemental Decision revisits Memorandum of Decision 04-20210015 and Final Order Denying Refund 04-20221259. This decision incorporates the facts, law, and analysis contained in those earlier documents but addresses the 2017 and 2018 issues separately.

I. Gross Retail and Use Tax - Remotely Accessed Prewritten Computer Software.

DISCUSSION

The issue is whether Taxpayer - as an Indiana company - has established that it is entitled to a refund of sales/use tax paid on the purchase and/or use of two items of pre-written computer software.

A. Software Purchased During 2017.

Taxpayer argues that it purchased software from two companies and paid sales tax when it made those purchases. The first purchase was for IBM Cognos Standard on Cloud. The second purchase was for SAP Hybris Commerce Software.

Taxpayer argues that it was entitled to a refund of sales tax paid for these computer programs.

As in the original Memorandum of Decision ("MOD"), Taxpayer maintains that these items are exempt because the tax was paid on "hosted services for which [Taxpayer] did not receive ownership of the underlying services....." In other words, Taxpayer explains that it did not pay tax on "tangible personal property" but erroneously paid the tax on the purchase of exempt services.

1. Taxpayer's Burden.

When a taxpayer challenges taxability in a specific instance, that 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).

2. 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).

3. Computer Software and Indiana's Sales/Use Tax.

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*. (*Emphasis added*).

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). In part, the statute provides.

> The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction.

The Department here takes note of IC 6-2.5-4-16.7 (Effective July 1, 2018), 20180725 Ind. Reg. 045180312NRA, which provides:

> (a) Except as provided in subsection (b), a person is a retail merchant making a retail transaction when the person sells, rents, leases, or licenses for consideration the right to use prewritten computer software delivered electronically.
> (b) A transaction in which an end user purchases, rents, leases, or licenses the right to remotely access prewritten computer software over the Internet, over private or public networks, or through wireless media:
> (1) is not considered to be a transaction in which prewritten computer software is delivered electronically; and
> (2) *does not constitute a retail transaction*. (*Emphasis added*).

IC 6-2.5-4-16.7 provides an exemption - or exclusion - from sales tax because such transactions are not "retail transactions."

IC 6-2.5-4-16.7 is not directly relevant to the 2017 transactions because these 2017 transactions at issue each took place before July 1, 2018. IC 6-2.5-4-16.7 has no "look back" effect.

Instead, the 2017 transactions are governed under IC 6-2.5-1-27 which simply incorporates "prewritten computer

software" in the definition of tangible personal property subject to sales/use tax.

Taxpayer argues that the 2017 transactions at issue are not subject to sales/use tax because it never gained a possessory (ownership) interest in any of the software. For purchases which took place after December 2016 and before July 1, 2018, the issue Taxpayer raises is addressed in Sales Tax Information Bulletin 8 (December 2016), 20170125 Ind. Reg. 045170026NRA, available at http://iac.iga.in.gov/iac//20230628-IR-045230454NRA.xml.html (last visited August 17, 2023).

The 2016 Bulletin serves as a useful guide in determining whether software transactions were subject to Indiana sales/use tax. Sales Tax Information Bulletin 8 (December 2016) explains, in relevant part, as follows:

> The taxability of software that can be electronically accessed via the internet, either by remote access 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, is not specifically addressed in the Indiana Code. Whether a transaction involving the use of "cloud-based" software is subject to Indiana sales or use tax depends on the facts and circumstances of each transaction, particularly with regards to the amount of *control or possession the purchaser is granted* in the software, the object of the transaction, and the ownership rights, if any, the purchaser has in the software.
>
> Depending on the factors of the transaction and arrangement, SaaS [Software as a Service] *may or may not be subject to tax*. Charges for accessing prewritten computer software maintained on the vendor's or a third party's computer or 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 or the server.
>
> . . . .
>
> Prewritten computer software purchased by an Indiana taxpayer, which is accessed by the Indiana taxpayer from the vendor's or a third party's computer servers electronically via the internet from the taxpayer's computer *could constitute a transfer of the software* because the taxpayers gain constructive possession and the right to use, control, or direct the use of the software. As such, this transaction would be subject to sales tax.....(*Emphasis added*).

As explained, remotely accessed software may or may not be subject to Indiana's sales/use tax depending on the degree of control or possession the buyer exerts over the software. Is the purchaser buying tangible personal property - in the form of software - or is the purchaser paying for the right to simply use software that belongs to someone else? To make that determination, Sales Tax Information Bulletin 8 (December 2016), provides as follows:

> 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.

4. Sales and Use Tax Exemptions in General.

As a general rule, all purchases of tangible personal property - including 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).

Any statute which provides any 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).

As noted, Taxpayer bought software during 2017. Taxpayer bought the following:

1. IBM Cognos Standard.

Taxpayer bought this software in 2017 from a company called Ciber Global.

Taxpayer explains that this purchase was exempt because IBM Cognos is "a cloud service in a SoftLayer data center." Taxpayer explains that it purchased "access not ownership." According to Taxpayer, "At no time did the Taxpayer have possession of IBM software or hardware with the purchases of the cloud services."

Taxpayer provided a copy of the IBM Cognos Standard "service description." The description makes it clear that the software is "hosted" in the cloud, but the question of "ownership" is not directly addressed. The agreement does explain that Taxpayer has rights to the "base offering" software and that Taxpayer has the option to "create a subscription to the Cloud Service compromised of one or more user accounts." Each of the tiers allows Taxpayer's users various reporting, compilation, and search capabilities. Unlike software agreements previously addressed, there appears no hard and fast ownership provision such as vendor "grants the **non- exclusive, non-transferable, non-sublicensable, limited license to access** . . . [vendor], its Affiliates or *licensors* **retain all right, title and interest to the services**." Similarly, another vendor's agreement provides "**We grant no other license(s) to any of our intellectual property and no transfer of our intellectual property** is made hereunder." (**Emphasis added**).

Taxpayer bought more software during 2017. On two occasions, Taxpayer bought the following:

2. SAP Hybris Commerce, Conversion, Browse Management Software.

In this instance, Taxpayer explains that "SAP deploys the environments based on the customer needs. In other words, SAP is providing the [infrastructure as a structure]/cores that are providing the cloud services being purchased." The agreement specifies that Taxpayer is acquiring a "product" which melds Taxpayer's data with its own, allowing Taxpayer to analyze and manage that data. The product description touts the software's ability to "integrate everything, automate and transform - on a single platform [providing] connectivity that empowers everyone across your business." However, the question of ownership or "possessory interest" is not directly addressed. There is no clear and overarching provision which states - such as in the case of the Oracle software addressed in the original Memorandum of Decision - "**Oracle or its licensors retain all ownership and intellectual property rights** to the Services, including Oracle Programs and Ancillary Programs, and derivative works thereof, and to anything developed or delivered by or on behalf of Oracle under this Agreement." (**Emphasis added**).

As to the disputed 2017 software purchases, the Department is unable to agree that Taxpayer has met its burden of establishing that it is entitled to a refund of sales tax paid on the 2017 purchases. The product description and vendor agreements are unclear as to what ownership rights Taxpayer obtained when it bought the software and is equally unclear as to what ownership rights were specifically reserved to either IBM Cognos Standard or SAP.

B. Computer Software Purchased in 2018.

Taxpayer purchased computer software during 2018. Taxpayer believes that these purchases were exempt and that the Department's decision to the contrary was wrong.

Computer software is, as described above, tangible personal property and Taxpayer is still required to establish that any statutory exemption applies to these particular software purchases.

It is important to note here that the Department addressed separately transactions which occurred before July

2018 and transactions that took place during the second half of 2018. In addressing Taxpayer's protest, the Department points out that "the requested refund for invoices paid **within the first six (6) months of 2018** is being denied." (**Emphasis in original**). Therefore, "[T]he requested refund for invoices paid within the last six (6) months of 2018 is being allowed." However, "[T]he entire [amount] requested for the last six (6) months of 2018 is not being permitted due to additional concerns with the filed refund" Simply put, the Department denied refunds for transactions that occurred in the first six months of 2018 but granted refunds for transactions that took place during the last six months of 2018.

The Investigative Findings sets out reasons why certain post-July 1, 2018, transactions were being denied.

- No sales tax was paid on a portion of the post-July 1, 2018, transactions;
- Certain transactions were not during calendar year 2018;
- Other transaction invoices listed a tax rate other than Indiana's seven percent;
- Taxpayer was unable to confirm that it paid sales tax on a number of transactions.

Taxpayer originally based its claim on an allocation of its software users; some of the users were located in Indiana, and some were located outside the state. Taxpayer calculated that 85 percent of the software was accessed by out-of-state users. As a result, Taxpayer concluded that it was entitled to a refund of 85 percent of the sales tax or use tax it paid Indiana. The Department disagreed, rejecting the argument that sales tax liabilities could be apportioned between the location of the software users.

Taxpayer now argues that the software purchases were exempt for different reasons. Taxpayer explains that some transactions were exempt because Taxpayer was purchasing "Cloud Computing services." As explained in the original ODR:

> Taxpayer explains that it is entitled to a refund because the tax was paid on "hosted services for which [Taxpayer] did not receive ownership of the underlying services....." In other words, Taxpayer explains that it did not pay tax on "tangible personal property" but erroneously paid the tax on the purchase of exempt services made available by means of computer software it did not purchase.

That same ODR explained the Department's exemption standard.

> For purchases which took place between December 2016 and before July 1, 2018, the issue Taxpayer raises is addressed in Sales Tax Information Bulletin 8 (December 2016), 20170125 Ind. Reg. 045170026NRA.

As noted above, remotely accessed software purchased before July 1, 2018, may or may not be subject to Indiana's sales/use tax depending on the degree of control or possession the buyer exerts over the software. Again, Taxpayer must establish whether it bought tangible personal property - in the form of software - or if it paid for the right to simply use software that belongs to someone else.

Here are descriptions of the software at issue. These purchases occurred before July 1, 2018. The issue then turns on whether or not Taxpayer has established that it did not acquire any ownership interest in the tangible personal property.

1. IBM Cognos Analytics Standard on Cloud Software (2018).

Taxpayer provided a copy of IBM's July 2019 description of this product:

> The Cloud Service is hosted in a SoftLayer data center and Client has access to the most current functionality of IBM Cognos Analytics software. IBM Cognos Analytics on Cloud is the base offering, and Client may create a subscription to the Cloud Service Comprised of one or more user accounts, each which is assigned one of the tiers described below.

What follows are the different products/services which may or may not be one of the featured products purchased. For example, Taxpayer may purchase a service which "allows Client to develop interactive reports, ad-hoc queries, create new reports and schedule reports....." Another option is a "Service Level Agreement."

2. SAP Hybris Commerce, Convergence, Browse Management.

Taxpayer provided a copy of "SAP Hybris Commerce Cloud Supplemental Terms and Conditions" dated "v.1-2018." In particular, Taxpayer pointed to a portion of the "terms and conditions" which provides the following:

> When counting physical Cores, each Core of a physical DPU that runs at least parts of the Cloud Services, including those that are temporarily assigned or scheduled to cover peak processing is considered and counted. If the Cloud Service will run in a pure virtual environment each virtual Core that runs at least parts of the Cloud Service.

3. Concur Expense and Expenseit Pro Software.

Taxpayer provided a copy of vendor's "Terms and Conditions" dated June 14, 2023. The terms and conditions contain a provision designated as "Ownership."

> Subject to the rights granted to you above, Concur and its licensors and suppliers own and retain all right, title, and interest in and to the following . . . the Service, the Site, and all other software, hardware, technology, documentation, content and information provided by Concur.

4. Remedyforce Service Desk Software (BMC).

Taxpayer explained that this software was purchased from a company called BMC. Taxpayer provided a copy of the "BMC Master Subscription Service Agreement." The agreement explains what it was the BMC was selling and what Taxpayer was buying.

> BMC will provide Customer with access to BMC's Subscription Service and with the Additional Service . . . as set forth in this Agreement and the applicable Order.

The agreement is not dated.

5. Informatica Cloud Customer 360 Software.

Taxpayer provided a copy of the "Informatica License and Services Agreement." That agreement explains what Informatic was selling and what Taxpayer was buying.

> [Informatica] own[s] and retains all right, title and interest in all such pre-existing material. You have a non-exclusive, world-wide royalty-free license to use, copy and authorize others to use such pre-existing material (other than commercially available Informatic Products, documentation and Informatica training materials) solely as part of the project where such material was delivered and in accordance with the terms of this Agreement. Except as otherwise expressly provided in this Agreement We grant no other license(s) to any of our intellectual property and no transfer of Our intellectual property is made hereunder.

The Department agrees that the 2018 Concur, 2018 BMC, and 2018 Informatica license and/or service agreements - contemporaneous with the purchases at issue - are clear on the ownership issue. Taxpayer was not buying tangible personal property but only a transitory ability to access the software.

FINDING

Taxpayer's protest is sustained in part and denied in part. Taxpayer was entitled to a refund of sales tax paid on the 2018 Concur, 2018 BMC, and 2018 Informatica software.

II. Gross Retail and Use Tax - Tangible Personal Property Delivered to and Hosted at a Location Outside Indiana.

DISCUSSION

Taxpayer maintains that some of the software was never received or installed at an Indiana location. Instead, these items of tangible personal property were delivered to or installed at a location outside Indiana. Taxpayer offers the explanation following:

- During the refund period, [Taxpayer] made purchases of software that were delivered to and installed at various data center locations maintained by [Taxpayer].
- During the audit of the refund claim, [Taxpayer] provided a list of server and data center locations maintained by [Taxpayer] [].
- [Taxpayer]obtained information from software product owners within [Taxpayer's] organization to determine the location the software was electronically delivered and installed.
- [Taxpayer] also relied on the ship to address on the invoice which aligns with server and data center

locations.
• [Taxpayer] requested a refund of Indiana sales tax paid on software not downloaded to computer hardware located in Indiana.

IC 6-2.5-13-1(d) addresses Indiana "sourcing" rule.

> 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 Department's Sales Tax Information Bulletin 8 (July 2018), 20230125 Ind. Reg. 045230018NRA, *See also* Indiana Sales Tax Information Bulletin 8 (January 2023), explains how a purchaser can document the sourcing issue.

> Purchasers should retain vendor invoices and other related documents, such as purchase orders. Purchasers also should retain contemporaneous details about where software licenses will be deployed, using employee rosters or computer/IP address details that indicate the location of the software usage. If a taxpayer has users (e.g., employees, but not customers) located both in and out of Indiana, the taxable portion is the ratio of Indiana users to all users.

Taxpayer purchased the following items of tangible personal property (software):

A. Oracle Software.

Taxpayer explains that this software is "located in the Oracle's databases that reside in Indiana and [Amsterdam]." Taxpayer "has adjusted the requested tax refund for software installed at the [Amsterdam] data center."

B. IFS North America Inc. Software.

Taxpayer explains that this software is located in Michigan. "This information can be found in the 'delivery address' in the highlighted section of the invoice . . . previously provided in prior submission."

C. Ciber Global LLC Software.

Taxpayer explains that this software "is located in [Texas]. This information can be found in the 'ship to address' in the highlighted section of the invoice . . . previously provided in prior submission."

In each of the three instances cited above, Taxpayer has undertaken to "source" the software purchase outside Indiana. It does so based on the delivery location and/or the location of the servers on which that software was installed and is now hosted. Taxpayer also suggests that sales tax liability can be allocated between Indiana and other locations in which the software is housed (e.g., Indiana and Amsterdam). The Department continues to find no support for this argument that sales tax liability can be allocated between different locations.

The bare descriptions provided do not definitively resolve the issue. In order to meet its obligations to apply exemptions based on "sufficient evidence.....clearly with the exact letter of the law," the Department requires a step-by-step, link-by-link delivery, ownership, and location analysis such as that detailed in an unpublished Memorandum of Decision 04-20150211 (December 9, 2015). In that MOD, cited here for *illustrative purposes only*, the taxpayer/petitioner explained:

> [I]t purchased "canned" computer software from out-of-state vendors that was delivered to a Texas service provider. [Petitioner] states that it paid Indiana sales tax when it bought the software from the out-of-state vendors.
>
> According to [petitioner], the 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 [petitioner] purchased is "housed" on the third-party's servers.
>
> [Petitioner's] Indiana employees access the software by means of the Internet.
>
> [Petitioner] states that the software was subject to "Texas use tax which was timely remitted to Texas by the [petitioner] and which is a creditable tax against any use tax which would otherwise apply in Indiana."
>
> [Petitioner's] Indiana employees access the software by means of the Internet. As explained by [petitioner], "Only after installation and use in Texas was the Software made available for use by the [petitioner's] employees via the [I]nternet."
>
> [Petitioner] maintains it is entitled to a refund of the Indiana sales tax collected by the out-of-state software vendor. As explained by [petitioner]:
>
> The subsequent use in Indiana of previously taxed tangible personal property is not taxable in Indiana and [petitioner] is entitled to a credit of taxes paid to another state. Indiana sales or use tax collected and remitted by the vendor or paid by the [petitioner] does not apply and is hereby requested to be refunded to the [petitioner].

In making its argument, [petitioner] provided specific, independent verification from the vendor, the hosting service, and the petitioner's own IT department. As a result, Department agreed with the petitioner as follows:

> [Petitioner'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, [petitioner] is entitled to a refund of the tax equal to the amount of sales tax paid to Texas.
>
> The Department's Audit Division is requested to review [petitioner] documentation and - subject to that review - issue a refund warranted by that documentation. The Audit Division is requested to verify that the out-of-state vendors collected Indiana sales tax, that [petitioner's] records confirm that [petitioner] self-assessed the Texas tax, and that amount of refund requested is justified by the documentation provided.

In the case of Taxpayer's Oracle, IFS North America Inc., Ciber Global LLC, software purchases, the Department is unable to agree that the information provided constitutes "sufficient evidence.....clearly with the exact letter of the law" sufficient to grant Taxpayer's protest.

FINDING

As to Part II above, Taxpayer's protest is respectfully denied.

SUMMARY

Taxpayer's protest is sustained in part and denied in part. Taxpayer is entitled to a refund of sales tax paid on the 2018 Concur, 2018 BMC, and 2018 Informatica software.

September 25, 2023

Finding Replaces: New

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An html version of this document.