DEPARTMENT OF STATE REVENUE

04-20210107.MOD

Memorandum of Decision: 04-20210107R
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 Memorandum of Decision.

HOLDING

In large part, Management Company was not entitled to a refund of sales tax paid on the purchase of prewritten computer software obtained from various out-of-state vendors and utilized in part by Company's out-of-state employees; Company was not entitled to a refund of sales tax paid on the purchase of software maintenance agreements because Company failed to establish the underlying software was exempt or that the provision of post-purchase services was not part-and-parcel of the same agreement under which the underlying purchase was made.

ISSUE

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

Authority: IC § 6-2.5-1-27; IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-4-17; IC §§ 6-2.5-5 et seq.; IC § 6-2.5-13-1; *Indiana Dep't of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Ind. Dep't of State Revenue, Ind. Revenue Bd., Ind. Gross Income Tax Division v. Colpaert Realty Corp*., 109 N.E.2d 415 (Ind. 1952); *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); *Miles, Inc. v. Indiana Dept's of State Revenue*, 659 N.E.2d 1158 (Ind. Tax Ct. 1995); *USAir v. Indiana Dep't of State Revenue,* 623 N.E.2d 466 (Ind. Tax Ct. 1993); *Montgomery Ward & Co. v. Gregg*, 554 N.E.2d 1145 (Ind. Ct. App. 1990); *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 2.2-3-21; 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; Sales Tax Information Bulletin 8 (December 2019); Sales Tax Information Bulletin 8 (July 1, 2018); Sales Tax Information Bulletin 8 (December 2016); Sales Tax Information Bulletin 8 (November 2011; Letter of Findings 04-20110234 (March 1, 2013); Buzzfile Scoutpoint, LLC, https://www.buzzfile.com/business/Scoutpoint,-LLC; SHI International Corp., shi.com; Tripwire (company) - Wikipedia, https://en.wikipedia.org/wiki/Tripwire_(company); Cybersecurity and Compliance Solutions, Tripwire.Com.; DCI DSS Compliance Checklist, Secure Link, https://www.securelink.com.; Enterprise Management Cloud, workday.com.

STATEMENT OF FACTS

Taxpayer is an Indiana company in the business of owning, developing, and managing 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 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 explained the basis for its protest. This Memorandum of Decision results.

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

Hardware.

DISCUSSION

The issue is whether Taxpayer has established that it is entitled to an additional refund of sales/use tax paid on the purchase and/or use of pre-written computer software, related maintenance agreements, and IT hardware.

A. The Department's Audit Analysis and Conclusions.

(1) Computer Software.

The Department's "Explanation of Adjustments" (EOA) acknowledges that Taxpayer was initially seeking a refund of sales/use tax on purchases of "software licenses and software maintenance agreements, information services, and IT hardware used outside Indiana."

The EOA found that Taxpayer had purchased computer software - including the promise of updates and enhancements - which was shipped/delivered to Indiana. As such, the EOA concluded that the documentation established that Taxpayer acquired "'[t]angible' personal property for consideration and [that the] purchases were taxable retail transactions in Indiana."

(2) Maintenance Agreements.

Likewise, the EOA also found that the Taxpayer's purchases of software maintenance agreements were taxable transactions because the agreements called for the vendors to supply "computer software updates or upgrades" which were then delivered to Indiana.

Noting that some of the software and maintenance vendors were located outside Indiana, the EOA determined that these vendors had collected, and Taxpayer had paid *sales* and not *use* tax - a distinction which is relevant to Taxpayer's refund claim.

(3) Sales or Use Tax / The Temporary Storage Exemption.

The sales/use tax distinction, mentioned above, becomes relevant because Taxpayer pointed out that some of the software, some of the hardware, and some of the maintenance agreements were utilized - in part - at locations outside Indiana. Although the sales/use tax distinction was relevant to Taxpayer's refund request, the EOA disagreed with that fundamental precept as follows:

> The [T]axpayer thus properly paid sales tax on these Indiana retail transactions and did not pay use tax to these vendors or remit additional use tax on these purchases . . . . *Sales tax* was paid to the vendor at the time of purchase on the Indiana retail transactions. (*Emphasis added*).

. . . .

> The exemption for tangible personal property only temporarily stored in Indiana is only available for use tax, there is no corresponding "temporary storage" exemption for sales tax.

(4) Software as a Service (SaaS).

The EOA further disagreed that Taxpayer's software transactions represented the acquisition of exempt "services" which - as acknowledged in the EOA - are exempt pursuant to 45 IAC 2.2-4-2(a). Instead, the EOA explained as follows:

> The [T]axpayer did not purchase a service [along] with software that was incidental to the service. The [T]axpayer's purchase was for prewritten software. Prewritten computer software purchased by an Indiana taxpayer which is accessed electronically via the internet from the vendor's or a third party's computer servers electronically via the internet from the taxpayer's computer constitutes a transfer of the software because the taxpayer gains constructive possession and the right to use, control, or direct the use of the software.

(5) Computer Hardware.

Taxpayer purchased computer hardware and paid sales tax to the vendors. Taxpayer sought a refund of that tax because - as explained in the EOA - the hardware was "subsequently used outside Indiana." Taxpayer describes these purchases and the manner in which the hardware was acquired as follows:

> The transactions in 2015-2018 are for IT hardware initially delivered to [Taxpayer's] Indiana headquarter location, inventoried, assigned to specific out-of-state [retail locations] and subsequently shipped out of state.

The EOA found that Taxpayer was not entitled to the refund because the purchases represented "retail transactions made in Indiana." The EOA explained that "remote sellers" collected Indiana sales tax on purchases of tangible personal property "shipped to the [T]axpayer's Indiana headquarters. That is, the [T]axpayer accepted the goods in Indiana headquarters, not outside Indiana."

Rejecting Taxpayer's above-mentioned temporary storage argument, the EOA held that the out-of-state hardware vendors did not collect use tax but collected sales tax. Unlike use tax, the EOA concluded again that "there is no corresponding 'temporary storage' exemption for sales tax."

B. Taxpayer's Arguments.

(1) Sales or Use Tax / The Temporary Storage Exemption.

Taxpayer argues that the out-of-state vendors collected use tax and, as a result, Taxpayer was entitled to claim the "temporary storage" exemption on software and hardware shipped to or delivered to its Indiana headquarters but thereafter transferred to or utilized at its out-of-state business locations. To that end, Taxpayer points to the General Assembly's 2017 adoption of IC § 6-2.5-2-1 which, according to Taxpayer, requires out-of-state vendors "without a physical presence in Indiana (a 'remote seller') to obtain a registered retail merchant's certificate and remit applicable sales tax if a seller meets certain economic thresholds." Taxpayer concludes:

> [T]he out-of-state vendors could not have collected Indiana sales tax prior to October 1, 2018 [and] it was not until 2020 that Indiana amended its registration statutes to remove reference[s] to out-of-state vendors and collecting use tax.

Taxpayer cites to the Indiana Tax Court's decisions in *USAir v. Indiana Dep't of State Revenue,* 623 N.E.2d 466 (Ind. Tax Ct. 1993) and *Miles, Inc. v. Indiana Dept's of State Revenue*, 659 N.E.2d 1158 (Ind. Tax Ct. 1995) as authority for its position that the purchases of software and hardware - made prior to October, 2018 - were entitled to the temporary storage exemption. According to Taxpayer, both the *USAir* and *Miles* decisions stand for the proposition that "[i]f the software licenses are only briefly stored in Indiana and are subsequently used outside Indiana, Indiana sales and use tax should not apply."

(2) 2016-2018 Purchases of Software Which Provided Taxpayer Exempt Services (SaaS).

In support of its protest, Taxpayer first explains that software acquired between December 2016 and July 1, 2018, may or may not be subject to sales/use tax. Taxpayer states:

> [Software is taxable] depending on the degree of control or possession the buyer exerts over the software. Historically, the Department attempted to determine if the purchaser is buying software or if the purchaser is paying for the right to make use of the software that belongs to someone else.

Thereafter, according to Taxpayer, the Department has utilized several factors to determine whether or not a software purchaser did or did not acquire an ownership or possessory interest in the software. In part, the factors include whether the purchaser "obtains or is granted the right to access or download copies of the software to the customer's own computers, servers, or networks." Another of the factors asks whether the purchaser "gains or is granted the right to make copies of the prewritten software for the [purchaser's] own use."

In this instance, Taxpayer specifies the software transactions did not "meet all factors to qualify the transaction[s] as non-taxable [SaaS]."

Taxpayer's position here takes a different tack. According to Taxpayer, it "does not need to meet all factors to qualify the transaction as non-taxable." Taxpayer explains:

> [C]loud-based service subscriptions purchased from vendors do not fall within the context of Indiana sales or use tax imposition statutes under Indiana Code, and therefore are not subject to Indiana sales or use tax. In

> applying the factors [referenced above] to the specific facts and circumstances of the cloud-based service subscriptions, the Department should [now] find the 2016-2018 transactions to be non-taxable in nature.

Taxpayer further explains that its "[v]endors maintain control and possession of the code, the platform, and any applicable software used to create the cloud-based service for the Taxpayer." Taxpayer continues; "The Taxpayer is merely granted a subscription to upload its data and information across locations in real-time to a cloud-based platform."

(3) Software Purchases During 2015.

Taxpayer recognizes that software purchases executed during 2015 fall under a different taxing regime.

For software transactions occurring in 2015, Taxpayer necessarily relies on the Department's position by referencing Sales Tax Information Bulletin 8 (November 2011), 20111228 Ind. Reg. 045110765NRA.

> [A]s a general rule, transactions involving computer software are not subject to Indiana sales or use tax provided the software is in the form of a customer program specifically designed for the purchaser. However, prewritten programs that are not specifically designed for one purchaser, developed by the seller for sale or lease on the general market in the form of tangible personal property, and sold or leased in the form of tangible personal property are subject to tax.

. . . .

> The software maintained on computer servers outside of Indiana also is subject to tax when accessed electronically via the Internet (*i.e.,* "cloud computing").

Taxpayer summarizes the Department's interpretation explaining that the "[a]ccessing of cloud-based 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."

Taxpayer disagrees with the Department's interpretation detailed above. Taxpayer maintains that, under the terms of the 2015 transaction agreements, Taxpayer never acquired "constructive possession" of the software, purchased outside the state, for the following reasons:

- The Department has "not proven constructive possession took place with the 2015 transactions."
- "[T]he software and service in question are not property so they cannot be possessed."
- "There is no exchange of property in the contract between the vendors and the Taxpayer."
- "The Taxpayer does not get to keep the vendors' software and the vendors do not get to keep the Taxpayer's data."
- Taxpayer had "no control asserted over the software or the data."
- Taxpayer is simply paying a "subscription fee" to access the software and has no "exclusive dominion and control over the software."
- Under the 2015 vendor agreements, Taxpayer is not permitted to edit the software, "does not receive a copy of the code, cannot make a copy, and does not have control over the software to sell it to someone else."

Taxpayer concludes that the 2015 transactions are not subject to sales or use tax because the Department has not established that Taxpayer exercised any form of constructive possession over the licensed software and that the 2015 transactions "[do] not meet any of the elements of constructive possession found in Indiana law."

(4) Software Maintenance Agreements.

Taxpayer argued that it was not required to pay sales or use tax on transactions entered into with vendors which supplied Taxpayer with software maintenance services.

Taxpayer explains that the portion of the cost of any maintenance agreements related to software utilized outside Indiana should not be subject to Indiana sales/use tax. Taxpayer cites to the Department's Letter of Findings 04-20110234 (March 1, 2013) 20130327 Ind. Reg. 045130099NRA, as support for its position that "while software maintenance agreements are taxable, such agreements are taxable only to the extent that the underlying software is used in Indiana."

C. Taxpayer's Burden in Claiming a Refund.

When a taxpayer challenges taxability in a specific instance, the taxpayer is required to provide documentation explaining and supporting its challenge. Poorly developed and non-cogent arguments are subject to waiver. *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012). When an agency is charged with enforcing a statute, the jurisprudence defers to the agency's reasonable interpretation of that statute "over an equally reasonable interpretation by another party." *Indiana Dep't of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014).

D. 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).

E. Indiana's Complementary Use Tax.

Indiana also imposes a complementary excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). "Use" means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a).

In effect and practice, the use tax is generally 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). 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).

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**. (**Emphasis added**).

F. 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.

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). IC § 6-2.5-4-17 further provides:

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

G. Sales and Use Tax Exemptions.

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).

A 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).

H. Taxpayer's Agreements with Software Vendors.

Taxpayer protested the audit findings concerning the following eleven vendors but provided the underlying agreements. In certain instances, Taxpayer provided copies of the underlying contract, written agreement, or terms of use.

(1) salesforce.com, inc.

Taxpayer entered a "Master Subscription Agreement" with "salesfore.com, inc." ("SFCI".) The Agreement was effective July 16, 2010. The Agreement called for SFCI to provide "services" to a specified number of persons authorized by Taxpayer to receive those services. A review of the invoices established that SFCI provided Taxpayer with "sandboxes," "social accounts," "Premier Success Plan (Support)," "Social Study Pro.," "Sender Authentication Package," "MobileConnect MMS Package," "Additional Contacts," "email service provider," and the like.

The SFCI Agreement reserved for itself "all rights, title and interest in and to the Services, including all related intellectual rights. No rights are granted to [Taxpayer] hereunder other than as expressly set forth herein."

Taxpayer was not permitted to "create derivative works based on the [SFCI] Services" or "copy, frame or mirror any part or content of the Services [except for Taxpayer's] own intranets or otherwise for its own internal business purposes." Likewise, Taxpayer was not permitted to make use of SFCI's Services to "build a competitive product or service or [] copy any features, functions, or graphics of the Services."

Thereafter, Taxpayer paid SFCI regular payments for the "Services" described in the Agreement. These invoices were directed to Taxpayer's Indiana headquarters. Taxpayer paid the SFCI invoices during 2015. Taxpayer paid SFCI invoices during 2016. Taxpayer paid SFCI invoices during 2017. Taxpayer paid SFCI invoices beginning January 2018 through July 2018. The line items contained on the invoices indicated that certain line-item charges included a seven-percent sales tax amount while other line items indicated zero-percent tax.

Taxpayer calculated an "allocation" of the SFCI costs called for under the Agreement. The allocation parsed out the usage and cost of the services to Taxpayer's business locations. Taxpayer allocated equally the cost of services based on the number of its business sites. In other words, each location was apportioned an equal amount of the total cost.

(2) Anaplan

Taxpayer entered into a "SaaS Subscription Agreement" with a California company called Anaplan. The Agreement was effective April 30, 2014, calling for Anaplan to provide Taxpayer access to Anaplan's "proprietary software and other technology provided via the Service including any enhancements, modifications and derivate works . . ." Under the terms of the Agreement's "service," Taxpayer was granted a "non-exclusive, non-sublicenseable nontransferable right to access and use the hosted Service and display the Anaplan Technology . . ." Taxpayer was not permitted to "sell, transfer, assign, distribute or otherwise commercially exploit the Service of Anaplan Technology . . ." Taxpayer was not permitted to "copy any features, functions or graphics" or "allow User subscriptions to be shared or used by more than one individual . . ."

Under the Agreement, Taxpayer would "receive all updates and upgrades to the Service made generally available to Anaplan clients for production use at no additional fee." Upon termination of the Agreement, Anaplan was entitled to immediately "delete [Taxpayer's] account" but would grant Taxpayer "limited access to the Service for several days for the sole purpose of permitting [Taxpayer] to retrieve [Taxpayer] data."

Anaplan sent its invoices to Taxpayer's Indiana headquarters. On an invoice dated May 2015, Anaplan billed Taxpayer Indiana sales tax. Certain of the subsequent 2015, 2016, 2017, 2018, and 2019 invoices include a seven-percent sales tax charge.

As above, Taxpayer has provided a written "allocation" of expenses attributable to the Agreement. The allocation

parsed out the usage of the services to Taxpayer's business locations. Taxpayer allocated the cost of services based on the number and location of its business sites.

(3) Chrome River Technologies, Inc.

On June 29, 2015, Taxpayer entered into a "Subscription Master Agreement" with a company called Chrome River Technologies ("CRT"). Under the terms of that Agreement, CRT granted Taxpayer a "non-exclusive, non-transferable license . . . to access the Services in the Order through the User IDs and to operate the features of such services according to the documentation under normal circumstances."

In turn, CRT reserved to itself "all right, title and interest in the Service Documentation and all other material by Chrome . . ."

Taxpayer simultaneously entered into an "Agreement for Consultant Services" with CRT. The Agreement called for CRT to provide "consulting and professional services for [Taxpayer]."

Thereafter, CRT sent Taxpayer's Indiana headquarters bills for "Transactional Monthly Subscription[s]." Taxpayer has provided CRT invoices from 2015 to 2018. Each invoice contained a seven-percent sales tax charge.

(4) documentum

In September 2002, Taxpayer entered into an Agreement with a software vendor named "documentum." The Agreement is entitled "Software End User License Agreement" and called for documentum to license software programs such as "CPU License[s]," "Developer Studio," "Documentum Content Server," and licenses for "Desktop Client."

The Agreement restricted Taxpayer's use of the software programs. Taxpayer was not entitled to copy, modify, reverse engineer, distribute, disclose, rent the programs to third parties, or "disclose any source code." If that were not sufficiently exact, the Agreement stipulated that documentum would retain "all right, title and in the Software, Updates, and Documentation and any copies thereof."

Simultaneously, Taxpayer entered into an Agreement with documentum for "standard support and maintenance . . . for the Software licensed." Included under that maintenance Agreement was the provision that documentum would fix software "bugs" and provide "software modifications," "fixes," and "modifications that enhance the functionality of the product."

According to Taxpayer, the relevant invoices were issued by "exacttarget marketing cloud." The invoices were sent to Taxpayer's Indiana headquarters and paid during 2014, 2015, and 2016 and included charges for sales tax.

(5) Logicalis

In November 2014, Taxpayer entered into an Agreement entitled "Project Change Request" which amended an earlier "Statement of Work." The Agreement called for Logicalis to provide a "Dedicated Helpdesk." The accompanying documentation stated that Logicalis would provide a "portfolio of solutions allowing our customers to leverage the correct services that best meets their needs."

The Agreement called for Logicalis to provide call center support and "support and troubleshoot software requests." Logicalis committed itself to providing Taxpayer support for its Microsoft, Adobe, and Java software.

Logicalis sent Taxpayer bills to its Indiana headquarters during 2014 and 2015. A review of those invoices appears to be a disconnect from the November 2014 "Project Change Request" or the "Statement of Work." The invoices list charges for "Data Protection Advanced (DPA) Capacity Bundle" which is a software program/license employed to protect confidential data. Other invoices list charges for antennas, security software applications, and the like. The invoices list seven percent charges for "tax."

(6) Oracle

In August 2010, Taxpayer bought computer software programs from Oracle consisting of 70 "perpetual licenses." Along with the software itself, Oracle provided additional "program support." The purchase Agreement limited Taxpayer's use of the software; Taxpayer was granted "the non-exclusive, non-assignable, royalty free, perpetual

[but] limited right to use the programs and receive any services [Taxpayer] ordered solely for [Taxpayer's] internal business operations . . ."

Oracle thereafter billed Taxpayer for its sourcing, recruiting, talent acquisition and onboarding "cloud service." Oracle sent bills to Taxpayer's Indiana headquarters during 2015, 2016, 2017, and 2018 each of which included a seven-percent sales tax charge.

In Taxpayer's general ledger, a "subledger" is providing apportioning out the price paid Oracle to Taxpayer's individual business locations. In almost every instance, an equal portion of the Oracle expense was allotted to each of Taxpayer's numerous business locations. A few locations were allocated a reduced amount.

(7) ScoutPoint

Although Taxpayer did not provide a copy of an agreement or contract, Taxpayer paid money during 2016 to a company called ScoutPoint, LLC. According to publicly available information, ScoutPoint is an Indiana business which "primarily operates in the Computer Software Development and Application business/industry with the Business Services section." Buzzfile Scoutpoint, LLC, https://www.buzzfile.com/business/Scoutpoint,-LLC (Last visited December 29, 2021).

The one invoice, directed to Taxpayer's Indiana headquarters, indicated that Taxpayer was paying for "Pure Storage Flash/Array" and for "Pure 1 Premium Maintenance and Support." The single invoice indicates that Taxpayer was charged a seven-percent sales tax.

(8) SHI International Corp.

Although Taxpayer did not provide a copy of any agreement or contract, Taxpayer paid money during 2013, 2014, 2015, 2016, and 2017 to a company called SHI International Corp. Publicly available information indicates that SHI sells computer hardware such as laptops, desktops, tablets, printers, and monitors. SHI International Corp., shi.com (Last visited December 29, 2021). In addition, SHI provides "Cloud, End User, and security solutions."

The SHI invoices sent to Taxpayer's Indiana headquarters indicate that SHI provided Taxpayer with Microsoft Windows, Microsoft SQL, Visual Studio software, along with "software assurance." Taxpayer's own corresponding purchase order indicates that Taxpayer was paying for a renewal of "Microsoft Select Plus." The invoice provided by Taxpayer indicates that SHI was charging a seven percent "sales tax."

(9) Sirius Computer Solutions

Taxpayer entered into an Agreement with Sirius dated December 2016. The Agreement called for Sirius to "arrange for shipment and delivery of the Products listed in [an] applicable Order to the installation site." The Agreement also called for Sirius to provide Taxpayer a subscription for "IBM Software" and support for that software.

In the Agreement, Sirius described itself as "IBM's largest software reseller" accompanied with the professed ability to provide "around the clock and around the world" software support.

Sirius billed Taxpayer's Indiana headquarters during 2016, 2017, and 2018 for numerous line-item costs including charges for IBM products, software subscriptions, software leases, and software support costs. Some, but not all, of the Sirius invoices indicate that Sirius was collecting seven-percent sales tax.

As before, Taxpayer has provided information from its general ledger indicating that Taxpayer allocated the Sirius expenses to multiple accounts and - presumably - multiple locations inside and outside Indiana.

(10) Tripwire, Inc.

Although Taxpayer did not provide a copy of any agreement or contract, Taxpayer paid money during 2017 and 2018 to a company called Tripwire, Inc. Publicly available information indicates that Tripwire "is a software company based in Portland, Oregon that develops, markets and sells information technology (IT) for security and compliance automation." Tripwire (company) - Wikipedia, https://en.wikipedia.org/wiki/Tripwire_(company), (Last visited December 29, 2021). *See also* Cybersecurity and Compliance Solutions, Tripwire.Com. (Last visited December 29, 2021).

Tripwire's invoices, directed to Taxpayer's Indiana headquarters, indicate that Taxpayer was being charged for "PureCloud for PCI Annual Subscription[s]." PCI stands for "Payment Card Industry Security Standard." DCI DSS Compliance Checklist, Secure Link, https://www.securelink.com. (Last visited December 29, 2021). The invoices from Tripwire indicate that it was collecting seven-percent sales tax.

(11) Workday, Inc.

Taxpayer entered into a "Master Subscription Agreement" with California based Workday, Inc. Publicly available information indicates that Workday "is an American on-demand financial management and human capital management software vendor." Enterprise Management Cloud, workday.com. (Last visited December 30, 2021).

The Agreement was signed July 20, 2015 and became effective that day. Under that Agreement, Workday provided Taxpayer payroll, human relations, finance services "including related software and technology." In particular, Taxpayer subscribed to software programs entitled "Human Capital Management," "Cloud Connect for Benefits," "Payroll for United States," and "Time Tracking."

The Agreement specifies that Workday is providing Taxpayer "services." The Agreement defines "Services" as "Workday's software-as-a-service applications as described in the Documentation and subscribed to under an Order Form."

The Agreement specifies that "Workday and its licensors own all right, title and interest in and to the Service, Documentation and other Workday Intellectual Property rights . . ." Taxpayer was not permitted to "modify, copy or create any derivative works based on the Service or documentation." Taxpayer was not permitted to make available the "Service or documentation" to any third-party.

Upon termination of the Agreement, Taxpayer was required to "immediately cease accessing and otherwise utilizing the applicable Service . . . ." In return, Taxpayer was given 30 days in which to retrieve its own "Customer Data."

Subsequently, Workday invoiced Taxpayer's Indiana headquarters for "Workday Enterprise Cloud Application Subscription Fee." The invoices were billed to Taxpayer's Indiana headquarters. The invoices charged seven-percent Indiana sales tax. Taxpayer paid invoices dated 2015, 2016, 2017, and 2018.

Along with the Workday invoices, Taxpayer provided information from its general ledger indicating that Taxpayer allocated the Workday expenses to multiple accounts and - presumably - multiple locations inside and outside Indiana.

I. Application of Law and Conclusions.

(1) Temporary Storage Exemption.

Taxpayer argues that its out-of-state vendors collected *use* tax. As such, Taxpayer argues that it is entitled to a refund of tax paid on the purchase of software and hardware which were shipped to or eventually delivered to one of Taxpayer's numerous out-of-state locations. In doing so, Taxpayer relies on the General Assembly adoption of amended IC § 6-2.5-2-1(d) which provides:

> A retail merchant that does not have a physical presence in Indiana shall, as an agent for the state, collect the gross retail tax on a retail transaction made in Indiana, remit the gross retail tax as provided in this article, and comply with all applicable procedures and requirements of this article as if the retail merchant has a physical presence in Indiana, if the retail merchant meets either of the following conditions for the calendar year in which the retail transaction is made or for the calendar year preceding the calendar year in which the retail transaction is made. (*Effective July 1, 2020*).

IC § 6-2.5-2-1(d) requires that out-of-state vendors, selling to customers in Indiana or executing transactions in Indiana, collect Indiana's "gross retail" tax on behalf of Indiana. Taxpayer assumes that because out-of-state vendors were not *required* to collect sales tax prior to July 1, 2020, any tax amount collected consisted of *use* tax. Taxpayer then relies on the use tax provision set out in IC § 6-2.5-3-2 and the Tax Court's decisions in *USAir*, 623 N.E.2d 466 (Ind. Tax Ct. 1993), and *Miles, Inc.*, 659 N.E.2d 1158 (Ind. Tax Ct. 1995), as support for its position that because Taxpayer's out-of-state vendors collected use tax, Taxpayer, in turn, was entitled to rely on the temporary storage exemption found at IC § 6-2.5-3-4.

Taxpayer is mistaken; as mentioned above, Indiana imposes sales tax on retail transactions made in Indiana, which include out-of-state vendors who sell and ship (or deliver) the tangible personal property (such as software) to Indiana purchasers. Under the various agreements, Taxpayer is the buyer, is headquartered in Indiana, and accepted the software and hardware here in Indiana. 45 IAC 2.2-3-21. Taxpayer in this instance did not accept hardware and software outside Indiana.

Taxpayer's documentation apportioning the software expenses to different business locations is unavailing. IC § 6-2.5-13-1(d) incorporates the long-standing destination principle, which provides, in relevant part, "(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 . . . occurs, including the location indicated by instructions for delivery to the purchaser . . . known to the seller." IC § 6-2.5-13-1(d)(2). In this case, Taxpayer executed agreements which called for Taxpayer to acquire software and hardware. That is, Taxpayer accepted the goods in Indiana at its Indiana headquarters, not outside of Indiana. Indiana is where the retail transactions conclude; i.e., upon delivery. 45 IAC 2.2-3-21.

Although the Tax Court decisions do indeed establish that Indiana use tax incorporates a temporary storage exemption, the cases address transactions involving use tax. In this case, the software vendors collected sales tax and not the use tax provisions addressed in those Tax Court decisions. Although Taxpayer's software may be ultimately utilized by multiple users in multiple locations, the Department finds no support for the proposition that Taxpayer can now reallocate the tax paid based on the ultimate number of software users located within and outside Indiana. IC § 6-2.5-3-2(e) applies the exemption to "property" and contains no provision allowing the apportionment of the use tax due on "property" Taxpayer accepted and then first "used" in this state.

In short, sellers collect sales tax and buyers self-assess use tax. The Department here is mindful of the rule "that words and phrases be given their plain and ordinary meaning." *Montgomery Ward & Co. v. Gregg*, 554 N.E.2d 1145, 1155 (Ind. Ct. App. 1990). "This is particularly true if a word is well understood by the lay public and has been brought into the law from ordinary life experiences, not from legal treatises." *Ind. Dep't of State Revenue, Ind. Revenue Bd., Ind. Gross Income Tax Division v. Colpaert Realty Corp.*, 109 N.E.2d 415, 419 (Ind. 1952).The Department concludes the concepts of seller and buyer (retail merchant and retail customer) are well understood and warrant a "plain and ordinary meeting." (E.g., retailers sell and buyers buy).

(2) Pre-Written Computer Software and Software as a Service.

Taxpayer maintains it is entitled to an additional refund because, in part, what Taxpayer purchased from its vendors constituted exempt services. 45 IAC 2.2-4-2(a) does provide a sales/use tax exemption when the vendor sells and the customer buys services.

> Professional services, personal services, and services in respect to property not owned by the person rendering such services are not "transactions of a retail merchant constituting selling at retail", and are not subject to gross retail tax. Where, in conjunction with rendering professional services, personal services, or other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail . . . 45 IAC 2.2-4-2(a).

As long as "services" are distinct and severable from the provision of tangible personal property, the service costs are not subject to sales or use tax.

(a) Software Purchased Prior to December 2016.

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. The Department's guidance on this issue is 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 some of the 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).

Sales Tax Information Bulletin 8 (July 1, 2018) is clear on the application of the 2011 and 2016 Bulletins:

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

The vendor transactions which occurred during and after December 2016 are governed by Sales Tax Information Bulletin 8 (December 2016), 20170125 Ind. Reg. 045170026NRA.

> 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.

Taxpayer paid sales tax on purchases of software prior to December 2016. Those transactions are not exempt. This includes purchases - at least in part - from Anaplan, SHI International, documentum, Workday, Tripwire, and Chrome River.

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(b) Software Purchased after December 2016.

Purchases of prewritten software purchased after December 2016 are governed by Information Bulletin 8 (December 2016).

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

The 2016 Bulletin sets out standards for determining if a purchaser obtains a possessory (ownership) in the software.

> • 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.

Taxpayer's Agreement with salesforce.com, inc. ("Salesforce") reserved ownership rights to Salesforce. Although Taxpayer merged its own data with that of Salesforce, there is nothing in the Agreement which allows Taxpayer to exercise any ownership rights over the remotely accessed software programs owned by Salesforce. To the extent that Taxpayer paid sales tax to Salesforce subsequent to December 2016, Taxpayer is entitled to a refund of those amounts.

Similarly, and for the same reasons, the Department agrees that Taxpayer is entitled to a refund of sales tax paid on the post-2016 purchase of remotely accessed software provided by vendors Anaplan, SHI International, documentum, Workday, Tripwire, and Chrome River.

The Department does not agree that Taxpayer is entitled to a refund of all post-2016 software taxes. In doing, so the Department bears in mind that the exemption is "strictly construed against a taxpayer" and that a taxpayer's evidence in support of the claim must be "clearly within the exact letter of the law." *RCA Corp.,* 310 N.E.2d at 97;*Kimball Int'l Inc.*, 520 N.E.2d at 456. The Department does not agree the purchases from Oracle are exempt because Taxpayer was purchasing "perpetual licenses" from that vendor; it does not apply to purchases from Sirius because Taxpayer purchased software licenses, leases, and "IBM Products"; it does not apply to purchases from Logicalis because Logicalis is in the business of developing, marketing, and selling security/compliance

software and because Taxpayer was paying to license software. In each of these cases, there is no indication that Taxpayer was paying for software licenses which are "stored on the vendor's or a third party's server and accessed from the server . . ." Sales Tax Information Bulletin 8 (December 2016). Taxpayer is not entitled to a refund for the remotely accessed service provided by ScoutPoint because the transaction took place before December 2016.

(c) Software Maintenance Agreements.

IC § 6-2.5-4-17, provides:

> A person is a retail merchant making a retail transaction when the person enters into a computer software maintenance contract to provide future updates or upgrades to computer software. (Effective July 1, 2010).

Although Sales Tax Information Bulletin 8 (December 2019) is not directly applicable to transactions occurred during 2015 - 2018, it provides a useful guide. An exemption for software maintenance agreements follows the exemption for the underlying software.

> 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. These contracts are therefore subject to sales tax. Additionally, if the software maintenance is contracted for and included as part of a transaction for prewritten computer software under a single, non-itemized price, the entire transaction is subject to sales tax unless: (1) the software maintenance contract and the other products included under a single price meets one of the statutorily enumerated exceptions to a bundled transaction; (2) the updates and upgrades are eligible for an exemption (e.g., they are directly used in direct manufacturing of tangible personal property for sale) as is the prewritten computer software transferred in the transaction; or (3) the software maintenance only applies to prewritten computer software included in the contract which is strictly remotely accessed software. Sales Tax Information Bulletin 8 (December 8, 2019).

As explained above - software maintenance agreements - which provide for updates and fixes - are subject to sales tax if the agreement calls for the vendor to provide services for taxable computer software. If the agreement calls for the vendor to maintain and update software which is itself exempt, then the maintenance agreement piggybacks on that exemption.

In this case, many of the vendor agreements call for the provision of after-market maintenance. In the case of the Logicalis Agreement, the vendor was obligated to provide a "dedicated helpdesk" and for the vendor to provide "consulting and professional services." In contrast, the Agreement with documentum specifically called for the vendor to provide after-sale "modifications," "fixes," and provide solutions to software "bugs."

However, there is no single transaction under which a vendor agreed to provide software support services. The services provided - such as by Logicalis - are bundled into and inseparable from the cost of the software itself. In addition, the Department finds no support for Taxpayer's argument that it paid the vendors use tax and that it is now possible to parcel out costs attributable to those services which were utilized at one of Taxpayer's out-of-state locations.

Of course, Taxpayer is entitled to an exemption from any portion of the post-2016 Anaplan, SHI International, documentum, and Workday transactions for maintenance charges which - in turn - are attributable to exempt computer software.

(d) Computer Hardware.

Computer hardware - monitors, wiring, hard drives, and the like - constitute tangible personal property and are subject to the same assessment and exemption standards. As explained in Sales Tax Information Bulletin 8 (December 2011):

> The sale or lease of computer hardware represents the transfer of tangible personal property and is a retail transaction subject to tax based on the total purchase price charged including, but not limited to, charges for instructional materials, installation charges, and internalized instruction codes that control the basic computer operations. *See also* Sales Tax Information Bulletin 8 (December 8, 2016).

Again, Taxpayer makes much of its proposition that out-of-state vendors collected use tax from Indiana-based Taxpayer. The Department must again disagree and finds no reason to depart from the simple proposition that

"retail merchants collect sales tax and retail customers self-assess use tax." Although the invoices make occasional reference to hardware such as "antennas," those references are few and far between. This is nothing to indicate that Taxpayer self-assessed use tax on the purchase of hardware which - by means of a transaction completed in Indiana - was only temporarily stored in this state but was then actually made use of by Taxpayer in another, out-of-state location

FINDINGS

To the extent set forth in this Memorandum of Decision, Taxpayer is sustained and is entitled to a refund of sales tax paid on a certain number of the post-December 2016 computer software purchases. The remainder of Taxpayer's protest is respectfully denied.

January 28, 2022

Posted: 03/30/2022 by Legislative Services Agency
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