

**Final Order Denying Refund: 04-20181551R**  
**Gross Retail (Sales) Tax and Use Tax**  
**For the 2014 Tax Year**

**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 Final Order Denying Refund.

**HOLDING**

Indiana Company failed to substantiate its purchases and was not entitled to additional refund of sales tax it paid on its purchases of tangible personal property and corresponding maintenance agreements because Indiana Company's purchases were shipped to its headquarters in Indiana. They were Indiana sales subject to Indiana sales tax.

**ISSUE**

**I. Sales and Use Tax – Refund.**

**Authority:** IC § 6-2.5-1-2; IC § 6-2.5-1-14; IC § 6-2.5-1-24; IC § 6-2.5-1-14.5; 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 § 6-2.5-4-6; IC § 6-2.5-4-17; IC § 6-2.5-13-1; IC § 6-2.5-9-3; IC § 6-8.1-9-1; *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480 (Ind. Tax Ct. 2012); *Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96 (Ind. Ct. App. 1974); *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 v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *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); *Miles, Inc. v. Indiana Dep't of State Revenue*, 659 N.E.2d 1158 (Ind. Tax Ct. 1995); [45 IAC 2.2-3-4](#); [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](#); [45 IAC 2.2-8-12](#); Sales Tax Information Bulletin 8 (November 2011); Sales Tax Information Bulletin 8 (December 2016); University of North Carolina at Greensboro, *Software Licensing Process*.

Taxpayer protests the denial of its claim for refund of the sales tax it paid on various purchases that were "shipped to" its Indiana headquarters.

**STATEMENT OF FACTS**

Taxpayer is a company headquartered in Indiana with business locations throughout the United States. To conduct its business, during 2014, Taxpayer purchased tangible personal property including computer hardware and prewritten computer software with updates and upgrades. Taxpayer also purchased corresponding maintenance agreements. In addition, Taxpayer purchased Voice Over IP products and Customer Relationship Management ("CRM") software applications. Those purchases were "shipped to" Taxpayer's Indiana headquarters in Indiana. Vendors collected sales tax upon delivery.

On December 29, 2017, Taxpayer filed a GA-110L refund claim form (Claim Number 1667997), stating that it was entitled to the refund of sales tax, in the amount of \$393,907.56, which it paid to vendors on various purchases. The Indiana Department of Revenue ("Department") granted a partial refund and denied the remainder, in the amount of \$305,655.46.

Taxpayer protested a portion of the refund denial, claiming that it was entitled to a reduced refund claim, totaling \$274,343.05. Taxpayer, referencing an Excel Spreadsheet summary enclosed within a May 2018 protest letter, stated that it requested a refund of \$274,343.05 and continued protesting the refund denial of that amount. An administrative hearing was held, during which Taxpayer's representatives explained the basis of Taxpayer's protest. This Final Order Denying Refund results, addressing Taxpayer's protest of the refund denial. Further facts will be supplied as needed.

**I. Sales and Use Tax – Refund.**

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**DISCUSSION**

To properly claim a refund for an overpayment of tax, Taxpayer was required to clearly state "the amount of the refund," provide "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). In this instance, in its initial refund request on December 29, 2017, Taxpayer claimed that it was entitled to a refund of \$393,907.56 for sales tax it paid to vendors on purchases during 2014.

**A. The Department's Decision**

Upon initial review, on March 23, 2018, the Department denied Taxpayer's refund claim in part. The Department found that, among the invoices provided regarding approximately thirty plus vendors, Taxpayer failed to substantiate that it was entitled to a refund of its purchases of tangible personal property (including hardware and prewritten software) and corresponding maintenance agreements. Specifically, the Department explained that it denied the refund because (1) Taxpayer failed to substantiate it was entitled to "temporary storage" exemption, (2) Taxpayer's "[i]nternal document provided does not show proof that item[s] w[ere] shipped out of state" or (3) Taxpayer provided "[n]o invoice to substantiate claim."

It should also be noted that in the original refund claim, Taxpayer stated that it requested the Department refund the "sales tax" paid to its vendors based on its purchase invoices. Those invoices in question showed that the items it purchased were "billed to" and "shipped to" Taxpayer's Indiana headquarters. Vendors collected sales tax on those retail transactions.

**B. Taxpayer's Protest**

Taxpayer protested the partial refund denial. Taxpayer stated that it was entitled to additional tax refund, totaling \$274,343.05. Taxpayer specifically protested the following issues with which it disagreed with the Department's 2018 letter of refund denial.

- Issue 1 - Software Licenses & Maintenance Agreements Utilized Outside Indiana
- Issue 2 - Cloud-Based Service Subscription Purchases
- Issue 3 - Hardware Shipped Outside the State
- Issue 4 - Missing invoices

On Issue 1, Taxpayer maintained that it was entitled to a refund of the "use tax," not "sales tax," it paid to various vendors for purchases of "Software License / Maintenance Agreement." Taxpayer further claimed that 70 percent of the total purchases were used outside of Indiana based on its own estimated headcount information.

On Issue 2, Taxpayer protested the refund denial of sales tax paid to 8x8 Inc., Exact Target Inc., and Salesforce.com, Inc. ("Salesforce"). Taxpayer claimed that it purchased cloud service and the Customer Relationship Management ("CRM") applications, which were delivered by means of "cloud computing." Taxpayer thus asserted that it purchased "Cloud-Based Service Subscription[s]" which were not subject to tax.

As to Issue 3 and Issue 4, Taxpayer stated that it purchased various computer hardware and those items were subsequently shipped to its business locations outside of Indiana and the missing invoices were related to the same basis for its refund.

In addition to the issues related to its supporting documentation, such as "Hardware Shipped Outside the State" and "Missing Invoices," Taxpayer's protest breaks down into the following issues - (1) whether Taxpayer demonstrated that it was entitled to the refund of tax on purchases of hardware during 2014 because, according to Taxpayer, "[i]tems shipped out of state within 180 days" are not subject to tax and it could substantiate its claim, (2) whether Taxpayer demonstrated that it was entitled to the refund of tax it paid to various vendors on its purchases during 2014, which were "shipped to" Taxpayer's Indiana headquarters (and corresponding maintenance agreements) which it claimed were used outside of Indiana, and (3) whether it was entitled to a refund of sales tax on purchases of cloud services and the CRM software applications, which Taxpayer claims were used in the "Cloud" and purely services.

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

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](#). Therefore, to determine if a retail transaction, namely a "retail sale . . . of a product," is an Indiana retail transaction and subject to Indiana sales tax, 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).

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\(1\)](#). Further, 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." *Caterpillar, Inc.*, 15 N.E.3d at 583.

**D. Hearing Analysis**

As mentioned above, Taxpayer is required to provide documentation explaining and supporting its challenges concerning the taxability. Poorly developed and non-cogent arguments are subject to waiver. As such, upon review, Taxpayer is not entitled to any refund concerning the following transactions based on the reasons provided:

<b>G/L Date</b>	<b>Vendor</b>	<b>Description of Item</b>	<b>Reasons</b>
02/06/14	Granite Telecommunic	No description	No tax shown collected
02/26/14	Granite Telecommunic	"Southshore Wifi"	Not Indiana tax
03/25/14	Granite Telecommunic	No invoice found	No invoice
08/25/14	Granite Telecommunic	Construction materials Indianapolis	No tax on invoice
10/06/14	Insightsoftware.com Inc	No invoice found	No invoice
10/07/14	8x8 Inc.	No invoice	No invoice
10/07/14	8x8 Inc.	No invoice	No invoice
03/17/14	PCM - PC Mall	Duplicate line item	Duplicate line item

Also, in this instance, Taxpayer did not self-assess and remit use tax to Indiana. Rather, Taxpayer's supporting documents, including invoices and agreements, showed that those purchases were "shipped to" its Indiana headquarters. Thus, as a threshold matter, it is a rebuttal presumption that Taxpayer paid sales tax on the sales in question because the purchases were delivered to Indiana. As such, they were subject to Indiana sales tax under Indiana law. These vendors correctly collected sales tax on the invoices at the time of the retail transactions.

**(1) Hardware Shipped Outside the State and corresponding maintenance agreements**

On the issue of its purchases of computer hardware and the corresponding maintenance agreements, Taxpayer's supporting documentation, such as invoices, stated that these items were "shipped to" its Indiana headquarters. Thus, the vendors, such as Bottomline Technologies, CDW Direct LLC Inc., Computex Technology Solutions, Dewpoint, Netech Corporation, PCM - PC Mall, Proofpoint, Shi International Corp., and Software AG USA Inc., properly collected sales tax on the sales of tangible personal property at the time of the retail transactions. The Department repeatedly requested that Taxpayer substantiate its claim that the items in question were shipped to locations outside of Indiana. But Taxpayer simply provided a summary sheet allocating the costs to each of its business locations. The summary sheet in question failed to provide any verifiable and auditable mechanism as to the actual locations of those items. Given the totality of the circumstances, in the absence of verifiable supporting documentation, the Department properly denied Taxpayer's refund. Taxpayer's reliance of *Miles, Inc. v. Indiana Dep't of State Revenue*, 659 N.E.2d 1158 (Ind. Tax Ct. 1995), IC § 6-2.5-3-1 *et. seq.*, and IC § 6-2.5-8-1 to support its position is misplaced.

**(2) Software Licenses & Maintenance Agreements Utilized Outside Indiana**

According to Taxpayer, it paid use tax, not sales tax, and was entitled to the refund of use tax "with regard to the purchase of software licenses utilized outside Indiana as well as the apportioned cost of software maintenance agreements related to the out-of-state usage of such licenses." Taxpayer argued that these "software licenses" and "corresponding maintenance agreements" were used by its employees both in Indiana and outside of Indiana and thus the "temporary storage" exemption from use tax should be applied to the out-of-state use.

Taxpayer offered an estimate of its employee headcounts by its business locations, claiming that approximately 70 percent of its employees purportedly worked outside of Indiana during 2014. As such, Taxpayer asserted that it was entitled to a refund of 70 percent of sales tax paid to its vendors. Those vendors include CA Inc., CDW Direct LLC, Inc., Computex Technology Solutions, Dewpoint, EMC Corporation, Fishnet Security, Inc., Innovative Integration Inc., Meridian Systems, Microsoft Corp., NE-Inc., Office Essentials Inc., Onx USA LLC, Oracle America, Inc., Proofpoint, SHI International Corp., Sirius Computer Solutions, Inc., and Software AG USA Inc. (Collectively *hereinafter*, "Vendors"; *separately*, "Vendor") to conduct its business.

Upon review, however, the Department is not able to agree that Taxpayer was entitled to the refund. First, Taxpayer stated that it purchased "software licenses," but its documentation demonstrated otherwise. A "software license" is "a legally binding agreement that specifies the terms of use for an application and defines the rights of the software producer and of the end-user." UNCG, <https://its.uncg.edu/Software/Licensing/> (last visited February 3, 2022). Taxpayer obtained the software licenses - i.e., the right to use the software - by purchasing the software,

including the updates and upgrades. In addition, Taxpayer is headquartered in Indiana. Taxpayer's supporting documents showed that it purchased various items, including "prewritten software" which were "shipped to" Taxpayer's Indiana headquarters. As a result, Taxpayer purchased "tangible personal property" for consideration. These purchases were taxable retail transactions subject to sales tax under Indiana law.

Further, sales of "computer software maintenance agreements" are taxable retail transactions. IC § 6-2.5-4-17; IC § 6-2.5-1-2. In this case, Taxpayer's supporting documentation showed that Vendors' maintenance agreements (including computer software updates or upgrades) were "shipped to" Taxpayer's Indiana headquarters; Vendors were not required to perform maintenance and install updates of computer software to individual machines separately, in Indiana or otherwise.

As mentioned earlier, "[w]hen 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). Taxpayer's supporting documentation stated that its purchases were "shipped to" Taxpayer's Indiana headquarters. That is, Taxpayer accepted the goods in Indiana at its Indiana headquarters, not outside of Indiana. This is where the retail transaction concludes, i.e., upon delivery. [45 IAC 2.2-3-21](#). Thus, Taxpayer's purchases were Indiana sales subject to Indiana sales tax and Vendors properly collected the sales tax at the retail transactions. See also Sales Tax Information Bulletin 8 (November 2011), 20111228 Ind. Reg. 045110765NRA, 3-4. Therefore, Taxpayer's reliance of the temporary storage exemption (at 70 percent) was misplaced.

In short, the sales tax was properly paid, and Taxpayer was not entitled to additional refund on its purchases of items, including pre-written software programs, updates, upgrades, as well as corresponding "maintenance agreements."

### **(3) Cloud-Based Service Subscription Purchases**

Taxpayer further claimed that its purchases of "Cloud-Based Service Subscription[s]" were not subject to sales tax under the 2016 Streamlined Sales and Use Tax Agreement ("SSUTA") and the Department's Sales Tax Information Bulletin 8 (December 2016), 20170125 Ind. Reg. 045170026NRA.

Again, it should be noted that Taxpayer erroneously relied on the 2016 Information Bulletin and the SSUTA, which were not applicable to retail transactions that occurred in 2014. The Department denied Taxpayer's refund request for sales tax paid to Exact Target Inc. and Salesforce (on the CRM software application). The Department determined that Taxpayer purchased and used the prewritten computer software in Indiana.

Specifically, [45 IAC 2.2-4-2\(a\)](#) explains:

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 unless:

- (1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property;
- (2) The tangible personal property purchased is used or consumed as a necessary incident to the service;
- (3) The price charged for tangible personal property is inconsequential (not to exceed 10[percent]) compared with the service charge; and
- (4) The serviceman pays gross retail tax or use tax upon the tangible personal property at the time of acquisition.

Taxpayer's supporting documentation failed to substantiate that its purchases of the CRM applications satisfied the above-mentioned requirements. Rather, Taxpayer in its protest letter stated that it purchased and used the CRM applications which included the following:

- Data Storage - cloud storage of Taxpayer's data
- File Storage - cloud storage of Taxpayer's data including attachments, files home, and CRM content
- Mobile - access to SaaS via a mobile app interface v. the mobile web browser
- Premier Success Plan (Enterprise Edition) & (Sales Cloud) & Support including access to a library of interactive training videos - PaaS which provides configuration for data management and analytics and

support

- Sales Cloud (Enterprise Edition) & (Restricted Use) - CRM SaaS with various applications allowing Taxpayer "to store data, monitor leads and progress, forecast opportunities, gain insights through relationship intelligence and collaborate around any sale."
- Sandbox (Configuration) 1, 2, & 3 (Full Copy) 1 & 2 - PaaS intended for development and testing in an isolated environment.
- XRA13 Force.com Enterprise Edition & Premier Success Plan Support - Salesforce's PaaS to allow customers to build applications
- Marketing Cloud (Buddy Media) & Additional Social Account (Buddy) - SaaS enabling companies to plan, personalize and optimize one-to-one customer interactions across email, mobile, social, web and connected products. Allows companies to segment and target audiences to power precise digital marketing.
- Radian6 (Standard Edition) & (Additional Platform User) - this is part of the "Marketing Cloud"

Based on Taxpayer's supporting documents and publicly verifiable information, Salesforce has been selling various CRM applications, i.e., products which contained prewritten software applications - including Professional Edition, Enterprise Edition, and Unlimited Edition - to businesses, such as Taxpayer here. Although Salesforce charges its customers based on monthly subscriptions, Taxpayer did not simply purchase services; rather, Taxpayer paid for its use of the CRM Enterprise Edition or Standard Edition (i.e., prewritten software applications) to conduct its business during the tax year at issue. The purchase of prewritten computer software is purchase of tangible personal property subject to Indiana sales tax.

While Salesforce utilized advanced cloud computing technology to facilitate its operation, Taxpayer essentially paid for the right to use the prewritten software applications to conduct its business during the tax year at issue. In other words, Taxpayer purchased the right to use the CRM prewritten software applications to compile, analyze, report, and maintain sales data it gathered during the course of its business. In turn, Taxpayer used prewritten CRM software applications to enhance its marketing strategies based on the sales report results. Thus, Taxpayer purchased the right to use the prewritten computer software even though it did not own the applications. Taxpayer essentially leased and used the prewritten computer software, the use or lease of which is a taxable retail transaction.

As discussed earlier, Salesforce properly collected Indiana sales tax, not Indiana use tax, on its CRM prewritten software applications (including updates) pursuant to IC § 6-2.5-13-1(d)(2). It is undisputed that the CRM applications were shipped to and used by Taxpayer at its Indiana headquarters. Even if, *arguendo*, Taxpayer made a cloud purchase, it nonetheless made its purchase in Indiana and thus its purchase was subject to Indiana sales tax pursuant to the Department's Sales Tax Information Bulletin 8 (November 2011), which applied here, in relevant part, provides:

## **II. Computer Software**

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### **b. Application of Sales Tax to the Sale, Lease, or Use of Computer Software**

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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. . . .

Taxpayer's documentation clearly stated Taxpayer was the "Customer" which purchased a package of the CRM prewritten software applications (including updates), which was periodically "shipped to" Taxpayer's Indiana headquarters. Taxpayer obtained possession and the right to use, control, or direct the use of the prewritten software applications. Thus, Salesforce properly collected Indiana sales tax.

In short, given the totality of the circumstances, in the absence of other supporting documentation, the Department is not able to agree that Taxpayer was entitled to the refund on its purchase of "Cloud-Based Service Subscription" because Taxpayer did not purchase a non-taxable service. Taxpayer purchased and used the Enterprise (or Standard) Edition of the CRM applications, which were prewritten software applications and thus its purchases were subject to sales tax.

Although it does not apply to Taxpayer's purchases here, a recently published Information Bulletin 8 (December 2016) may further serve as a useful guide to determine whether similar transactions were subject to Indiana sales/use tax going forward. The 2016 Information Bulletin 8 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 . . . .

Finally, Taxpayer claimed that it was entitled to an approximately \$900 refund of sales tax on "CLOUD SERVICE - VoIP TELEPHONY [sic] SERVICES" paid to 8x8 Inc. Upon review, the Department is not able to agree. IC § 6-2.5-4-6(a) provides,

A person is a retail merchant making a retail transaction when the person:

- (1) furnishes or sells an intrastate telecommunication service; and
- (2) receives gross retail income from billings or statements rendered to customers.

Taxpayer here only provided invoices and did not provide any verifiable signed agreement or contract with 8x8 Inc. Taxpayer's invoices demonstrated that the vendor is in the business of selling intrastate telecommunication service and receiving gross retail income from billings or statements rendered to customers. As such, the vendor is a retail merchant making a retail transaction and it properly collected sales tax on the retail transactions concluded at Taxpayer's Indiana headquarters.

In conclusion, for 2014, Taxpayer's documentation demonstrated that its various purchases of tangible personal property were "shipped to" Taxpayer's Indiana headquarters and, therefore, they were Indiana sales subject to Indiana sales tax. Taxpayer's vendors properly collected sales tax on the retail transactions. Taxpayer is not entitled to the refund.

### FINDING

Taxpayer's protest of the Department's refund denial is respectfully denied.

February 21, 2022

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An [html](#) version of this document.