DEPARTMENT OF STATE REVENUE

04-20221012.LOF

Memorandum of Decision Number 04-20221012
Indiana Gross Retail Tax
For the Year 2017

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 part, Management Company was entitled to a refund of sales tax paid on the purchase of prewritten computer software in which Company did not acquire an ownership interest in the software; Company was not entitled to a refund of sales tax paid on the purchase of software maintenance agreements because the Department rejected Company's argument that the maintenance agreements' sales tax liability could be apportioned based on the number of the software's in-state and out-of-state users.

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 (July 1, 2018); Sales Tax Information Bulletin 8 (December 2016); Sales Tax Information Bulletin 8 (November 2011).

Taxpayer argues that it is entitled to a refund of sales tax paid on the purchase of certain software on the ground that it was paying for the right to use or simply access that software.

II. Gross Retail and Use Tax - Software Maintenance Agreements.

Authority: IC 6-2.5-1-14.5; IC 6-2.5-4-17; *Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96 (Ind. Ct. App. 1974); Sales Tax Information Bulletin 8 (January 1, 2023).

Based on the location of in-state and out-of-state software users, Taxpayer argues that it is entitled to an apportionable portion of the sales tax it paid on the purchase of software maintenance agreements.

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 a form GA-110L (Claim for Refund) seeking a refund 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. As explained in the resulting "Explanation of Adjustments" ("EOA"). "[T]he transactions in question represent software used outside Indiana." In addition, the EOA explains that Taxpayer sought "a refund of sales tax paid for [software] maintenance contracts associated with these software licenses used outside of Indiana . . . ."

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 EOA.

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. This Memorandum of Decision results.

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 pre-written computer software.

A. The Department's Audit Analysis and Conclusions.

The Department's EOA acknowledges that Taxpayer was seeking a refund of sales/use tax on purchases of software licenses and software maintenance agreements.

According to the EOA, the computer software was delivered to or located on Taxpayer's Indiana "server farm." As explained in the EOA, "[T]he software is on the Indianapolis server before the software is assigned (or allocated) to particular users within the [Taxpayer] group of related companies."

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 84.07 percent of the software was accessed by out-of-state users. As a result, Taxpayer concluded that it was entitled to a refund of 84.07 percent of the sales tax or use tax it paid Indiana.

At the outset, the EOA explained that the Department was unable to verify the 84.07 percent calculation. In addition, the EOA explained that Taxpayer failed to establish that it *paid* tax on approximately 70 invoices. The EOA explained:

> Obviously, a refund of sales tax paid cannot be made until confirmation of tax has been paid. No proof of payment of tax has been provided for [70] invoices.

The EOA concluded that, based on the Department's analysis, "[T]his refund is being denied in its entirety."

B. Taxpayer's Response to the Department's Analysis.

Taxpayer takes a somewhat different approach in this protest than it did when Taxpayer first submitted the refund. Instead of claiming an allocated refund of tax based on the instate/out-of-state location of the software users, 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.

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).

C. 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).

D. 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 these 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 software. For purchases which took place 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//20190424-IR-045190227NRA.xml.html (last visited March 13, 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; i.e., 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.

E. 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).

F. Taxpayer's Software Purchases.

Taxpayer purchased - or paid for the right to utilize - prewritten computer software from various vendors such as Oracle, Adobe, and IBM. Taxpayer maintains that it did not purchase tangible "software" from these vendors but that it purchased computer software-based exempt "services." In other words, it paid for the right to remotely access software owned by someone else. Under those circumstances, Taxpayer concludes that it is entitled to a refund of sales or use tax paid on these service-based transactions.

Taxpayer points out that "prewritten computer software maintained on computer servers outside of Indiana is subject to tax when accessed electronically via the Internet." As authority for its position, Taxpayer necessarily relies on the Department's Sales Tax Information Bulletin 8 (December 2016), 20170125 Ind. Reg. 045170026NRA.

> Charges for accessing software maintained on a vendor or third party's server is not subject to tax when accessed electronically through 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 of the server. Sales Tax Information Bulletin 8 (December 2016).

According to Taxpayer, this Bulletin supports its position that "[p]rewritten software maintained on computers outside of Indiana that are not accessed electronically in Indiana . . . are not subject to Indiana tax." In the case of the transactions which took place prior to July 1, 2018, and 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 transactions and is dispositive of software 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).

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

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

In support of its argument, Taxpayer provided copies of vendor invoices along with description of the computer software and the services or functionality provided by the software.

What follows are the software transactions which - according to Taxpayer - represent software or software services purchased during 2017 and for which Taxpayer explains that it did not "gain constructive possession and the right to use control or direct the use of the software." Sales Tax Information Bulletin 8 (December 2016). For these transactions, Taxpayer provided a copy of the original invoice, verified that Taxpayer paid the tax, and quoted from the licensing agreement relied upon to explain the nature of the transaction. In certain cases, the Agreement identifies the purchaser/buyer/Taxpayer as "Claimant." In each instance, it is important to distinguish between Taxpayer's explanation and what each Agreement specifically provides. The Department here has **highlighted** what it determines is particularly relevant.

1. IBM Cognos Analytics Standard on Cloud Software.
Taxpayer explains that IBM provided it a cloud service hosted in a SoftLayer data center and that has access to the most current functionality of IBM's software.

2. SAP Hybris Commerce, Conversion, Browse Management Software.
Pursuant to the SAP Hybris Commerce Cloud Supplemental Terms and Conditions, "physical Cores, each Core of a physical CPU that runs at least parts of the Cloud Service . . . hosted infrastructure to run the Cloud Service."

3. Concur Expense and Expenseit Pro Software.
"BMC will provide [Taxpayer] with access to BMC's subscription service[]. BMC hereby grants the **non-exclusive, non-transferable, non-sublicensable, limited license to access** . . . BMC, its Affiliates or *licensors* **retain all right, title and interest to the services**."

4. Remedyforce Service Desk Software.
Taxpayer explains that the software provides "[r]emote access to Concur Analysis or Analytics Essentials (depending on the Customer's configuration of the SAP Concur Service), the web-based, ad-hoc query and formatted report authoring that includes single sign on from within the SAP Concur Home page . . . ."

5. Ultimate CPQ And X Author Software.
Taxpayer offers its own explanation of this purchase. Taxpayer stated that CPQ software provides price quotes in real time. Taxpayer further explains that "[p]ursuant to the Apptus Master Services Agreement provided, providing the Subscription Services, "Conga may utilize (A) Apttus Corporation and Conga marks and brands . . . . Conga Technology is covered by intellectual property rights owned or licensed by Conga (collectively, 'Conga IP Rights'). Other than as expressly set forth in this Agreement, no Statement of Grounds [Vendor] 2022, Page 3 license or other rights in or to the Conga Technology or Conga IP Rights are granted to Customer, and all such licenses and rights are hereby expressly reserved."

6. SAP Successfactors Learning Subscriptions.
This is how Taxpayer explained these subscriptions. "Claimant never received control or ownership of the underlying software utilized by the vendor to provide the services purchased by the Claimant."

7. Informatica Cloud Customer 360 Software.
Taxpayer paid for "non-exclusive, world-wide royalty-free license to use, copy and authorize others to use such pre-existing material . . . such material was delivered and in accordance with the terms of this

Agreement [e]xcept 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."

8. Oracle Account Reconciliation Cloud Service.

Taxpayer explains that as "claimant" it has "the non-exclusive, non-assignable, royalty free, worldwide limited right to access and use the Service . . . [the Claimant] acknowledge that Oracle has no delivery obligation for Oracle Programs and will not ship copies of such programs to [the Claimant] as part of the Services. **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."

9. [Vendor] Software Subscription.

Taxpayer explains that this program is cloud-hosted software that provides a business management system for medical providers.

10. Oracle Taleo Platform Cloud Service.

Claimant has "[t]he **non-exclusive, non-assignable, royalty free, worldwide limited right to access and use the Services**. [the Claimant] acknowledge that Oracle has no delivery obligation for Oracle Programs and will not ship copies of such programs to [the Claimant] as part of the Services . . . . 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."

11. Getting Contracts Done Software.

Claimant is "granted limited, personal, non-exclusive, revocable, non-transferable, worldwide rights to use the public areas of this site. [Taxpayer is] **not authorized to resell, sublicense, transfer, assign, or distribute the site, its services or content**."

12. Oracle Enterprise Planning and Budgeting Cloud Service.

Claimant has "[t]he non-exclusive, non-assignable, royalty free, worldwide limited right to access and use the Services. [Claimant] acknowledge[s] that Oracle has no delivery obligation for Oracle Programs and will not ship copies of such programs to [the Claimant] as part of the Services. 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."

13. Sales Cloud Lightning CRM Software.

The Agreement states that Claimant "has the right to access and use applicable Content subject to the terms of applicable Order Forms, this Agreement, and the Documentation. **Providers reserve all their right, title and interest in and to the Services and Content**, including all of their related intellectual property rights. **No rights are granted to Customer** hereunder other than as expressly set forth herein . . . ."

14. Microsoft Azure Software.

The Microsoft agreement states that "This agreement only gives [claimant] some rights to use the application. If Microsoft disables the ability to use the applications on your devices pursuant to your agreement with Microsoft, **any associated license rights will terminate**. The application publisher reserves all other rights. Unless applicable law gives you more rights despite this limitation, you may use the application only as expressly permitted in this agreement."

15. Adobe Creative Cloud Software.

The Agreement provides that "Adobe grants to [Claimant] a **non-exclusive, non-transferable, revocable right to access and use the Service** according to the terms and conditions of this Agreement and the applicable License Metrics. [Claimant] acknowledge[s] that **Adobe and its licensors own all right, title, and interest** in: (a) the Service; (b) any Adobe software provided in connection with the Service."

The Department agrees that payments made pursuant to the following software agreements are not subject to sales tax because there is sufficient information to verify that Taxpayer was not paying for tangible personal property; instead, Taxpayer was paying for the right to use or access the software.

- Concur Expense and Expenseit Pro Software;
- Remedyforce Service Desk Software;
- Ultimate CPQ And X Author Software;
- Informatica Cloud Customer 360 Software;
- Oracle Account Reconciliation Cloud Service;
- Oracle Taleo Platform Cloud Service;
- Getting Contracts Done Software;
- Oracle Enterprise Planning and Budgeting Cloud Service;
- Sales Cloud Lightning CRM Software;
- Microsoft Azure Software;
- Adobe Creative Cloud Software.

For the remaining software transactions, the Department is unable to verify that Taxpayer did not acquire prewritten software in a retail transaction. Taxpayer's claim for refund is therefore denied for those transactions.

FINDING

Taxpayer's protest addressed in Part I is sustained in part and denied in part.

II. Gross Retail and Use Tax - Software Maintenance Agreements.

DISCUSSION

Taxpayer seeks a refund of use tax paid on the purchase of software maintenance agreements. Taxpayer explains that the "software maintenance services [are] performed on software installed on hardware outside of Indiana." Taxpayer further explains that it "did not receive control or ownership of the updates in Indiana provided during execution of the maintenance services provided by the vendor." Taxpayer "respectfully requests a refund of all taxes paid on the software maintenance services listed below."

In effect, Taxpayer continues to rely on the same argument originally put forward. Taxpayer utilizes a "instate/out-of-state" analysis as the basis for its argument that it is entitled to a refund of sales tax paid on the purchase of these agreements. As explained by Taxpayer, "[T]axpayer provides the below listing of software maintenance services performed on software installed on hardware outside of Indiana." Taxpayer "did not receive control or ownership of the updates in Indiana provided during execution of the maintenance services . . . ."

> **1. Arrow Hardware and Software Maintenance.**
> Taxpayer explains that the Arrow maintenance services were provided to software hosted in Indiana, another state, and on a server located outside the United States. Taxpayer explains the basis for its refund claim. "Based on the locations of the data centers, a refund allocation rate of 66.67 percent has been applied to the purchase of hardware and software maintenance purchases."
> **2. Cisco Smartnet Software Support.**
> Taxpayer explains that it is entitled to a refund of [] percent of the sales tax paid on this transaction. The "[same] percent has been applied to the purchases of Cisco software as a reasonable rate of allocation based on [Taxpayer's] global employee locations" and that its refund is predicated "on purchases of software maintenance on software located out of Indiana."

IC 6-2.5-1-14.5 defines "Computer software maintenance contract" as "a contract that obligates a person to provide a customer with future updates or upgrades of computer software."

Indiana law, 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*).

Sales Tax Information Bulletin 8 (January 1, 2023), 20230125 Ind. Reg. 045230018NRA, refers to the Department's *current* position on the issue recognizing an exemption under certain limited circumstances. In small part, the Bulletin provides:

> If the software maintenance only applies to prewritten computer software included in the contract which is strictly remotely accessed, then the transaction is not a retail transaction because the software maintenance only applies to remotely accessed software.

In addressing Taxpayer's argument, the Department concludes that Taxpayer's argument fails because the Department does not agree that Taxpayer has established that the underlying computer software is exempt. The Department does not agree that the taxability of maintenance agreements is apportionable based on the apportioned taxability of the software itself. In addition, Taxpayer has not established that the maintenance agreements fall within the exemption provided in instances in which the agreement does not call for updates, patches, or "fixes."

The Department is mindful of the rule that "[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." *Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96, 101 (Ind. Ct. App. 1974). The Department is unable to

agree that a taxpayer's bare assertion as to the taxability of its maintenance agreements when there is no documentation and no clear legal argument to buttress that assertion.

FINDING

Taxpayer's protest addressed above in Part II is respectfully denied.

SUMMARY

Taxpayer is entitled to a portion of the sales tax it paid on the purchase of computer software. However, Taxpayer failed to meet its burden of establishing that its purchases of software maintenance agreements were exempt from sales tax.

March 31, 2023

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An html version of this document.