

Memorandum of Decision: 04-20210118
Gross Retail and Use Tax
For the Years 2017 and 2018

NOTICE: IC § 4-22-7-7 permits the publication of this document in the Indiana Register. The publication of this document provides the general public with information about the Indiana Department of Revenue's official position concerning a specific set of facts and issues. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Memorandum of Decision.

HOLDING

The Department agreed in part that Company was entitled to a refund of sales tax paid on transactions with various software vendors; Company was entitled to a refund of tax on transactions under which Company obtained software services, that occurred prior to July 1, 2018, and under which Company did not acquire a possessory interest in the vendors' software.

ISSUE

I. Gross Retail and Use Tax - Prewritten Computer Software and Software as an Exempt Service.

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 § 6-2.5-4-17; 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); *State Bd. of Tax Comm'rs v. Jewell Grain Co.*, 556 N.E.2d 920 (Ind.1990); *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); *Mynsberge v. Department of State Revenue*, 716 N.E.2d 629 (Ind. Tax Ct. 1999); *Tri-States Double Cola Bottling Co. v. Department of State Revenue*, 706 N.E.2d 282 (Ind. Tax Ct. 1999); [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).

Taxpayer argues that it is entitled to a refund of Indiana sales tax paid on transactions for the acquisition or use of prewritten computer software.

STATEMENT OF FACTS

Taxpayer is a company doing business in Indiana. Taxpayer designs, collects, and analyzes customer surveys and advises organizations to improve their performance and customer service.

Taxpayer submitted a claim for refund, Form GA-110L, for sales and/or use tax paid on transactions with vendors for the acquisition or use of pre-written computer software.

The Indiana Department of Revenue ("Department") reviewed the request and granted a partial refund of sales tax paid on purchases of software completed after July 1, 2018. However, the Department did not agree that Taxpayer's purchases of prewritten software made before July 1, 2018, were exempt from tax. As a result, the Department denied a portion of the original refund request attributable to those pre-July 1, 2018 transactions. The Department explained in a letter dated June 8, 2021.

As of July 1, 2018, prewritten computer software sold, rented, leased, or licensed for consideration that is remotely accessed over the internet, over private or public networks, or through wireless media, is considered an electronic transfer of computer software and is not considered a retail transaction.

....

All invoices provided to support the refund requested for SaaS [software as a service], dated prior to July 1, 2018 are considered taxable. Therefore, tax is due on all invoices regarding SaaS in this review prior to July 1, 2018 and exempt after this date.

Taxpayer protested the partial refund denial. An administrative hearing was conducted during which Taxpayer's representatives explained the basis for its protest. This Memorandum of Decision results.

I. Gross Retail and Use Tax - Prewritten Computer Software and Software as an Exempt Service.

DISCUSSION

Taxpayer filed a claim for refund of sales and/or use tax paid between January 1, 2017 and June 30, 2018 on transactions involving software. The Department denied the claim and Taxpayer filed a protest of that denial.

The issue is whether Taxpayer has provided sufficient information establishing that it is entitled to a refund of sales tax paid on software purchases executed prior to July 1, 2018.

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).

A. 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).

B. 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).

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). As to any of Taxpayer's vendor agreement to supply software maintenance or software updates, 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.

C. Presumption For and Against Imposition of the Tax.

As a general rule, all purchases of tangible personal property - including pre-written 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\(2\)](#).

In considering Taxpayer's argument that the purchase of software services is not subject to sales tax, the Department bears in mind that IC § 6-2.5-2-1 is a tax imposition statutory provision and therefore, is strictly construed against the imposition of tax. *Mynsberge v. Department of State Revenue*, 716 N.E.2d 629, 633 (Ind. Tax Ct. 1999). See also *State Bd. of Tax Comm'rs v. Jewell Grain Co.*, 556 N.E.2d 920, 921 (Ind.1990); *Tri-States Double Cola Bottling Co. v. Department of State Revenue*, 706 N.E.2d 282, 285 n. 9 (Ind. Tax Ct. 1999).

D. Taxpayer's Agreements with Software Vendors.

Taxpayer protested the audit findings concerning the following vendors and provided documentation to support its argument. In certain instances, Taxpayer provided copies of the underlying contract, written agreement, invoices, or terms of use.

1. Adaptive Insights, Inc.

The invoice (Number 0649599) is labeled as bill for "Planning & Analytics" and "integration." The signed agreement, in relevant part, states the Planning & Analytics package includes "software to adopt an active planning process, such as budgeting, forecasting, management and ad hoc reporting and analytics, variance analysis, process management, and transaction management." Taxpayer further provided a copy of signed "Master Subscription Agreement" and "Adaptive Suite Product Descriptions and Definitions." The invoice shows that the vendor collected seven percent tax on the transaction.

2. Aptris

The invoice (Number 274012) is labeled as bill for 160 "Service Management Suite - Fulfiller License" and 1150 "Discovery-Per Device; Per Year." Taxpayer provided one-page quote for the 1150 Nodes of ServiceNow Discovery, but it did not provide the underlying contract, written agreement, or terms of use. Seven percent of tax was collected on the transactions.

3. Apttus Corporation

The invoices (Numbers IN17971 and IN21875) are labeled as bills for "Ultimate CLM." Taxpayer provided a standardized Master Services Agreement which it obtained "PRIOR TO DOWNLOADING AND/OR USING THE SUBSCRIPTION SERVICES." The Agreement however does not reference any purchase of Ultimate CLM. The invoices show that the vendor collected seven percent of tax on the transactions.

4. CA Technologies

The invoice (Number 90391629) and a signed Order Form are labeled as a bill for renewing "CA Agile Central Unlimited Edition SAAS" purchase. To support its protest, Taxpayer referenced an "End User Agreement." Taxpayer however did not provide that End User Agreement. Seven percent of tax was collected on the transaction.

5. Microsoft Corporation

The invoices (Numbers 9825561620, 9825565583, 9825565584, 9876710427, and 9876711762) and Volume Licensing Quote (Number 0403872.009) show that Taxpayer purchased various Microsoft Enterprise software products, such as Office 365 and corresponding servers, which were delivered electronically. The vendor collected seven percent of tax on the transactions.

6. Oracle America, Inc.

The invoices (Numbers 43866596 and 8129311) and the Oracle Cloud Services Agreement show that Taxpayer purchased various Oracle software products, including "E-Commerce Interactions Cloud Service" and "Enterprise Edition Cloud Service." The vendor collected seven percent of tax on the transactions.

7. Planview Delaware LLC

The invoice (Number LLC20171997) and the Order Form show that Taxpayer purchased various products, such as "Predictive Portfolio Analysis [] projects and [] Resources" and "100 Innotas Portfolio Manager License." Taxpayer however did not provide any agreement or contract to support the terms and conditions concerning its purchase. Seven percent tax was collected on the transaction.

8. Qualtrics LLC

The invoices (Numbers 115142 and 116052) show that Taxpayer purchased "Employee Experience." Seven percent tax was collected on the transactions.

Referencing an unspecified agreement, Taxpayer stated, in part:

a. Contract Language

Page 1, Section 1.1 License.

...

i. Page 1, Section 1.2 Restrictions

...

ii. Section 4 OWNERSHIP OF INTELLECTUAL PROPERTY.

(Emphasis in original).

Taxpayer however did not provide a signed copy of that agreement in question. Its supporting documents only contain the Second Amendment to MASTER SERVICES AGREEMENT, which does not support Taxpayer's statement.

9. Salesforce.com, Inc.

The invoice (Number 11726892) and MASTER SUBSCRIPTION AGREEMENT show that Taxpayer purchased "CPQ+; Lightning Sales Cloud; Salesforce Inbox; Shield; Sandbox." The invoice further stated that "Access to Salesforce.com CRM subscription services is through a remote Internet browser. This on-demand CRM service does not include the transfer of any software." The vendor collected seven percent of tax on the transactions.

E. Analysis and Conclusions.

Software transactions which occurred prior to July 1, 2018, are governed by the Department's information bulletins which represented the Department's review and analysis at the time of the transaction.

Sales Tax Information Bulletin 8 (July 1, 2018) is clear on the relevance and 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.

As such, the vendor transactions which occurred during and after December 2016 are governed by Sales Tax Information Bulletin 8 (December 2016), 20170125 Ind. Reg. 045170026NRA. Information Bulletin 8 provides guidelines for distinguishing transactions in which a customer is purchasing taxable, pre-written software or the customer is paying for access to and use of software the customer does not own. As explained in Sales Tax 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.

In deciding whether or not the buyer has acquired "an ownership interest" in the software, the 2016 Bulletin further provides:

In order to determine whether a purchaser obtains a possessory or ownership interest in pre-written software, the following factors that indicate a possessory or ownership interest should be considered:

- Whether the Indiana customer obtains or is granted the right to access or download copies of the software to the customer's own computers, servers, or network;
- Whether the Indiana customer gains or is granted the right to modify or customize the pre-written software;
- Whether the Indiana customer gains or is granted the right to make copies of the pre-written software for the customer's own use;
- Whether the Indiana customer is required to pay additional amounts for enhancements, modifications, or updates to the software;
- Whether the provider has a policy of providing a duplicate copy of the software at minimal or no charge if the customer loses or damages the software;
- Whether the Indiana customer gains or obtains the right to use, deploy, or access the software for an

unlimited or indeterminate period of time;

- Whether the software must be returned or destroyed at the end of a specifically limited license period;
- The relative price paid for accessing or using the software compared to the price charged for obtaining a possessory or ownership interest in that same, similar, or comparable software.

Based on the documentation provided, the Department is prepared to agree that transactions with Adaptive Insights, Inc., Microsoft Corporation, Oracle America, Inc., and Salesforce.com, Inc. were not subject to Indiana's sales tax pursuant to the above-mentioned 2016 Bulletin because the transactions called for the provision of software services and granted Taxpayer no possessory interest in the underlying pre-written software during or after the subscription term.

In the absence of verifiable supporting documentation, the Department is unable agree that Taxpayer is entitled to a refund of transactions with Apris, Apttus Corporation, CA Technologies, Planview Delaware LLC, and Qualtrics LLC because the information provided is ambiguous or the nature of the transaction (what Taxpayer is buying and what the vendor is selling) is unclear.

FINDING

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

June 6, 2022

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