Cases and Rulings in the News States A-M, Indiana Department of Revenue, IN—Revenue Ruling No. 2012-05ST, Indiana, (Oct. 4, 2016)

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DEPARTMENT OF STATE REVENUE

Revenue Ruling #2012-05ST

October 4, 2016

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ISSUES

Sales and Use Tax - Cloud Computing and Related Services

Authority: *IC 6-2.5-1-24; IC 6-2.5-1-26.5; IC 6-2.5-1-27; IC 6-2.5-1-27.5; IC 6-2.5-1-28.5; IC 6-2.5-2-1; IC 6-2.5-2-2; IC 6-2.5-4-1; IC 6-2.5-4-6; IC 6-2.5-4-16.4; 45 IAC 2.2-1-1; 45 IAC 2.2-4-2;* Sales Tax Information Bulletin #8 (November 2011); Streamlined Sales and Use Tax Agreement (May 16, 2016)

A taxpayer (“Company”) is seeking an opinion as to whether Company's products are services that are not subject to the Indiana sales and use tax when sold to clients located in Indiana. Specifically, Company seeks a ruling regarding the following:

1. Based on the description below, is Company's Cloud Computing service with Open Source Instances subject to Indiana gross retail tax?
2. Based on the description below, is Company's Cloud Computing service with Third Party Instances subject to Indiana gross retail tax?
3. Based on the description below, is Company's Remote Storage service subject to Indiana gross retail tax?
4. Based on the description below, is Company's Data Transfer Fee subject to Indiana gross retail tax?

STATEMENT OF FACTS

Company is an out of state corporation that sells a variety of products over the internet. Company provides the following facts regarding its request for a revenue ruling:

A. Background

Company offers a variety of web services that support Internet infrastructure for businesses. Company's customers can access computing resources and storage capacity through the Internet without a significant capital outlay. The subjects of this request are Company's Cloud Computing service and Remote Storage service (“Services”) along with a certain fee that may be charged with such Services.

Company's headquarters and offices are all located outside of Indiana. The Services described below are provided through servers located at data centers and point of presence sites (“PoP sites”). Data centers are large collections of servers that support the majority of Company's Services. PoP sites are small clusters of servers that support a minority of Company's Services. Company does not own or operate any data centers or PoP sites. The data centers and PoP sites that Company utilizes to provide services (“Company's Network”) are owned and operated by affiliated entities. While none of the data centers are

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located in Indiana, one PoP site is located in the state. However, none of the Services discussed below utilize the PoP site located in Indiana.

B. Cloud Computing Service

1. Overview

While Customers cannot download any third-party software from Company to use its Cloud Computing Service, they provide scalable computing capacity for customers to execute applications - commonly referred to in the industry as cloud computing. Cloud computing is a paradigm of computing in which dynamically scalable and often virtualized computing resources are provided as a service over the Internet -it encompasses infrastructure, a platform, and software. Customers can access Company's computing resources to perform a variety of activities, including, but not limited to, sending electronic communications, monitoring computers and computer usage, running applications, and hosting web domains.

In order to use Company's Cloud Computing Service, customers create a virtual server to run specific services and applications. Customers select a configuration of memory, CPU, and instance storage that is optimal for their demands. Company provides these services in units called instances, which constitute a specific configuration of computing resources and software. Customers access content through means of an account. Accounts are assigned encryption keys, which customers use to access their content. Customers retain all intellectual property rights to all data and content that they upload.

2. Software

Company also makes available to customers a variety of free software, data, and other content as necessary for use of Company's Cloud Computing service. While Customers cannot download any third-party software from Company to use its Cloud Computing Service, they must use some operating system software and/or applications to use the Cloud Computing service. Thus, customers have three options- they may: (1) use their own software; (2) utilize Company's open-source operating system software (“Open Source Instance”); or (3) utilize designated third-party operating system software that Company has licensed (“Third Party Instance”). Open Source Instances consist of software that is free to access by anyone, including Company, via the Internet. In an Open Source Instance, the software will be accessed for free by Company and offered to customers for no charge. With respect to Third Party Instances, Company will license software from a third party software provider which Company will use to provide its Cloud Computing service to customers. Company is the user of the software. Company is not sublicensing the software to its customers and does not have the right to sublicense the software to its customers. Company's licensing agreements with third party software providers explicitly state that Company's customers cannot download the operating system software and Company may not transfer the software to its customers. Company does not charge customers separately for any operating system software that Company uses to provide its Cloud Computing service with Third Party Instances.

For either Open Source Instances or Third Party Instances, Company will provide its service using the operating system software running on a virtual server. The software runs only on the virtual server while Company provides its Cloud Computing services. Customers have no control over the software and the software does not run outside the cloud computing environment. Customers cannot download the software; the software runs only on the virtual server. Customers only enter into a service agreement with Company. Customers do not enter into an end-user software license agreement with Company. As a result, Company does not separately sell or distribute any software with its Cloud Computing services. Company does not transfer any software to its customers.

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Customers may also download free application tools or kits that are used to access and configure their Cloud Computing instance. The free tools may be supplied by Company, a third party, or developed by customers themselves.

3. Pricing

Company charges customers for Cloud Computing based on hourly rates for the computing resources they consume, and Company generally does not charge based upon any fixed fees. Customers may use Cloud Computing services at any time, for any length of time. Alternatively, customers may reserve instance capacity by paying an up-front fee for an instance and receive a discount on the hourly rate. Company does not separately charge its customers for use of any software or applications. Company charges solely for providing computing resources.

There are also different rates for instances depending upon which operating system the instance utilizes- Open Source Instance or Third Party Instance. Third Party Instances that include third party operating system software that Company has licensed for its use may be charged at a higher rate. However, Open Source Instances that include other operating system software that Company accesses for free may be charged at a lower hourly rate. Finally, the configuration of an instance (computing resources such as memory, CPU, and instance storage) as selected by the customer generally impacts the hourly rate for Cloud Computing services.

In addition, Company also charges its customers a data transfer fee (“Data Transfer Fee”) for uploading data, downloading data, or moving data within the Company's Network as part of the customer's usage of Cloud Computing services. A Data Transfer Fee is only charged in connection with a customer's use of the Cloud Computing service. Customers may not separately purchase “data transfer” services. Lastly, the Data Transfer Fee is separately stated on the customer's invoice.

C. Remote Storage Service

1. Overview

Company's Remote Storage service allows customers to store, retrieve, and maintain content, data, applications, and software on servers. Customers can store and retrieve large amounts of data at any time and from any location through the Internet. Customers can do this by setting up an account through the Internet that enables them to upload their content to, and download their content from, servers located in data centers outside of Indiana. A unique electronic key is assigned to each account which allows customers to access stored data. The Remote Storage service is also scalable - customers can increase storage space, speed, throughput, and robustness to adapt the service to their evolving storage needs.

The Remote Storage service is typically used by companies and individual developers. Companies may use it to backup data or store large amounts of data for which they do not have the memory capacity. Web development companies often use it to store temporary data used in setting up a website. Individual developers also utilize the Remote Storage services to backup and store data.

Customers that utilize Company's Remote Storage service retain ownership of their content. Company does not have the authority to use, sell, or license customer content on its servers. Company merely provides the infrastructure for customers to store digital content. Customers are able to freely access and use their content with only some restrictions on the content that may be stored, including size restrictions.

2. Software

Customers are not required to download any software or use any applications to use the Remote Storage service. Customers upload and download data through various Internet programming languages, which are all freely available (i.e., not provided by Company).

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3. Pricing

Company charges customers for the Remote Storage service based on the amount of storage capacity they use within a given month. Company charges customers for the amount of data that is stored during a month, and also for the volume of data uploaded or downloaded to/from the server. Remote Storage service prices are on a sliding scale per gigabyte basis with the price decreasing the more a customer stores or transfers data. Company does not charge customers for use of any software.

Customers may use the Remote Storage service without also purchasing and using Company's Cloud Computing service as described above. In addition, as noted above, Company also charges its customers a Data Transfer Fee for uploading data, downloading data, or moving data within the Company's Network as part of the customer's usage of the Remote Storage service. Data Transfer Fees are only charged in connection with a customer's use of the Remote Storage service. Customers may not separately purchase "data transfer" services. Lastly, the Data Transfer Fee is separately stated on the customer invoice.

DISCUSSION

Based on the foregoing facts, Company requests a ruling as to whether three of its products are exempt from sales and use tax as services.

Pursuant to *IC 6-2.5-2-1*(a) and *IC 6-2.5-2-2*(a), sales tax is imposed on retail transactions made in Indiana. A retail transaction is defined in *IC 6-2.5-4-1*(b) as the transfer, in the ordinary course of business, of tangible personal property for consideration. *IC 6-2.5-4-1*(c) goes on to provide in pertinent part:

> For purposes of determining what constitutes selling at retail, it does not matter whether:
>
> …
>
> (2) the property is transferred alone or in conjunction with other property or services …

"Tangible personal property" is defined in *IC 6-2.5-1-27* as:

> …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.

Except for certain enumerated services, sales of services generally are not retail transactions and are not subject to sales or use tax. *45 IAC 2.2-4-2* clarifies the taxability of services as follows:

> (a) 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%) 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.

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(b) Services performed or work done in respect to property and performed prior to delivery to be sold by a retail merchant must however, be included in taxable gross receipts of the retail merchant.

(c) Persons engaging in repair services are servicemen with respect to the services which they render and retail merchants at retail with respect to repair or replacement parts sold.

(d) A serviceman occupationally engaged in rendering professional, personal or other services will be presumed to be a retail merchant selling at retail with respect to any tangible personal property sold by him, whether or not the tangible personal property is sold in the course of rendering such services. If, however, the transaction satisfies the four (4) requirements set forth in [subsection (a)], the gross retail tax shall not apply to such transaction.

A unitary transaction is clarified in *45 IAC 2.2-1-1*(a) as follows:

Unitary Transaction. For purposes of the state gross retail tax and use tax, such taxes shall apply and be computed in respect to each retail unitary transaction. A unitary transaction shall include all items of property and/or services for which a total combined charge or selling price is computed for payment irrespective of the fact that services which would not otherwise be taxable are included in the charge or selling price.

Sales of specified digital products are also included in the definition of retail transactions. *IC 6-2.5-4-16.4*(b) provides that a person engages in making a retail transaction when the person (1) electronically transfers specified digital products to an end user; and (2) grants to the end user the right of permanent use of the specified digital products that is not conditioned upon continued payment by the purchaser. “Specified digital products,” as currently defined by *IC 6-2.5-1-26.5*, include only digital audio works (e.g., songs, spoken word recordings, ringtones), digital audiovisual works (e.g., movies), and digital books. Products “transferred electronically” are defined at *IC 6-2.5-1-28.5* to mean products that are “obtained by a purchaser by means other than tangible storage media.”

Pursuant to Section 333 (“Use of Specified Digital Products,” effective Jan. 1, 2010) of the Streamlined Sales and Use Tax Agreement (“SSUTA,” effective May 16, 2016), of which Indiana is a signatory, “A member state shall not include any product transferred electronically in its definition of ‘tangible personal property.’” Pursuant to the same section of the SSUTA, “ancillary services,” “computer software,” and “telecommunication services” are excluded from the term “products transferred electronically.”

In order to stay in conformity with the SSUTA, Indiana may not impose sales tax on a product transferred electronically by basing the product's taxability on inclusion of the product in the definition of tangible personal property. It is important to note that “ancillary services,” “computer software,” and “telecommunication services” are not restricted by the phrase “product transferred electronically.” However, *IC 6-2.5-1-27.5*(c)(8) explicitly excludes ancillary services from the definition of telecommunication services, which are taxable under *IC 6-2.5-4-*6. Accordingly, ancillary services are not subject to sales tax in Indiana.

Based on the foregoing, Indiana may impose sales tax on products transferred electronically only if the products meet the definition of specified digital products, pre-written computer software, or telecommunication services. “Prewritten computer software” is defined in *IC 6-2.5-1-24* as follows:

Subject to the following provisions, “prewritten computer software” means computer software, including prewritten upgrades, that is not designed and developed by the author or other creator to the specifications of a specific purchaser:

(1) The combining of two (2) or more prewritten computer software programs or prewritten parts of the programs does not cause the combination to be other than prewritten computer software.

(2) Prewritten computer software includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than the purchaser.

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(3) If a person modifies or enhances computer software of which the person is not the author or creator, the person is considered to be the author or creator only of the person's modifications or enhancements.

(4) Prewritten computer software or a prewritten part of the software that is modified or enhanced to any degree, where the modification or enhancement is designed and developed to the specifications of a specific purchaser, remains prewritten computer software. However, where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for such a modification or enhancement, the modification or enhancement is not prewritten computer software.

With regard to the taxability of remotely accessed software, the Department in Sales Tax Information Bulletin #8 (November 2011) provides the following guidance:

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.

"Telecommunication services" is defined in *IC 6-2.5-1-27.5* as follows:

(a) "Telecommunication services" means electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points.

(b) The term includes a transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission, conveyance, or routing regardless of whether the service:

(1) is referred to as voice over Internet protocol services; or

(2) is classified by the Federal Communications Commission as enhanced or value added.

(c) The term does not include the following:

(1) Data processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a purchaser whose primary purpose for the underlying transaction is the processed data or information.

(2) Installation or maintenance of wiring or equipment on a customer's premises.

(3) Tangible personal property.

(4) Advertising, including but not limited to directory advertising.

(5) Billing and collection services provided to third parties.

(6) Internet access service.

(7) Radio and television audio and video programming services, regardless of the medium, including the furnishing of transmission, conveyance, and routing of the services by the programming service provider. Radio and television audio and video programming services include cable service as defined in 47 U.S.C. 522(6) and audio and video programming services delivered by commercial mobile radio service providers, as defined in 47 CFR 20.3.

(8) Ancillary services.

(9) Digital products delivered electronically, including the following:

(A) Software.

(B) Music.

(C) Video.

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(D) Reading materials.

(E) Ring tones.

1. Cloud Computing

Company's Cloud Computing service product, which provides computing resources to its customers, is available to use with different configurations. Company provided the following explanation of their product:

> …customers create a virtual server to run specific services and applications. Customers select a configuration of memory, CPU, and instance storage that is optimal for their demands. Company provides these services in units called instances, which constitute a specific configuration of computing resources and software. Customers access content through means of an account. Accounts are assigned encryption keys, which customers use to access their content.

Customers have to use some operating system software and/or applications to use the Cloud Computing product. If they don't have their own operating system software or other applications, it can use either “open source instances” product or “third party instances.” Company questions whether the product is subject to Indiana sales or use tax when using “open source instances” or with “third party instances.”

Regarding the first issue, the question is whether Company's product with “open source instances” is a service that includes a transfer of prewritten computer software, specified digital products, or other tangible personal property. With the “open source instances” option, Customers utilize Company's open-source operating system software, which is available for free, if they don't have their own operating software or applications. However, the customers do not download the software. It remains on the virtual servers as part of Company's “instances.” The software is never transferred to their customers, and customers never possess, control, or hold title in the software. The software is instead downloaded and used by Company to perform functions for creating a virtual server that allows customers to test their own services and applications.

While a customer may use their own operating system software or applications to access Company's computing resources on the third-party servers (none of which are in Indiana), Company does not transfer any such software for consideration or as a part of the “Cloud Computing service with Open Source Instances.” It is only if a customer does not have a means of accessing the product that they would choose the “Open Source Instances” option, and in that case, the software is free for Company to download and use on their customer's behalf.

With the “Open Source Instances” option, the Department would agree that Company does not transfer any “prewritten computer software.” Regarding the Department's policy to tax remotely accessed software per Sales Tax Information Bulletin #8, customers do not access the software. Instead, customers access computing resources, and Company uses the software to facilitate those resources. Company also does not transfer any “specified digital products” or other type of “tangible personal property” as a part of the “Cloud Computing service with Open Source Instances.”

Furthermore, the serviceperson test found at *45 IAC 2.2-4-2* applies in this case. The software is available to Company and utilized incident to the service provided, which is providing computing resources. Neither Company nor their customers retains ownership of the software, and customers do not agree to any software licensing agreements. Company satisfies all of the requirements of *45 IAC 2.2-4-2*(a) for finding that the services provided by Company are non-taxable. First, Company is primarily in the business of providing data storage and computing capacity, and not selling tangible personal property. *45 IAC 2.2-4-2*(a)(1). Second, the software is for the purpose of enabling Company's customers to test their own applications incident to Company's computing resource service. *45 IAC 2.2-4-2*(a)(2). Third, Company does not charge for the software, so it would be considered is inconsequential compared to the overall service fee. *45 IAC 2.2-4-2*(a)(3). Fourth, the software was free for Company to use, and thus Company did not have to pay sales tax when it was downloaded. *45 IAC 2.2-4-2*(a)(4).

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Company's “Cloud Computing service with Open Source Instances” appears to be a service under *45 IAC 2.2-4-2*. It would not meet the definition of a “telecommunication service,” as it would be excluded under *IC 6-2.5-1-27.5*(c)(1). Company's service is providing dynamically scalable and virtualized computing resources for its customers.

Customers pay a fee based upon the hourly rates for the computing resources they consume, or they may pay an up-front fee for an instance and receive a discount on the hourly rate. Company does not charge their customers for software. There are no separately stated charges for use of any software or applications. Company appears to charge solely for providing computing resources.

Based on the information provided, the “Cloud Computing service with Open Source Instances” is not subject to Indiana sales or use tax, as it is a service and does not constitute or include sales of tangible personal property, specified digital products, prewritten computer software, or telecommunication services.

For the second issue involving the “Cloud Computing service with Third Party Instances,” the question is again whether the product is a service that includes a transfer of prewritten computer software, specified digital products, or other tangible personal property. As Company described the third party instance, it constitutes designated third-party operating system software that Company has licensed, which Company uses to provide its Cloud Computing service to customers. Company further explained:

> Company is not sublicensing the software to its customers and does not have the right to sublicense the software to its customers. Company's licensing agreements with third party software providers explicitly state that Company's customers cannot download the operating system software and Company may not transfer the software to its customers. Company does not charge customers separately for any operating system software that Company uses to provide its Cloud Computing service with Third Party Instances.

As with the “Cloud Computing service with Open Source Instances,” the third-party software is never transferred to Company's customers, and the customers never possess, control, or hold title in the software. The third-party software remains on the virtual servers as part of Company's “instances,” and is also used to perform functions that allows customers to test their own services and applications.

The Company does not transfer any “specified digital products,” “prewritten computer software,” or other type of “tangible personal property” as a part of the “Cloud Computing service with Third Party Instances.” Similarly, the serviceperson test found at *45 IAC 2.2-4-2* applies in this case in the same manner described above. Company's “Cloud Computing service with Third Party Instances” appears to be a service under *45 IAC 2.2-4-2*. It would not meet the definition of a “telecommunication service,” as it would be excluded under *IC 6-2.5-1-27.5*(c)(1). Company's service is providing dynamically scalable and virtualized computing resources for its customers.

The fee structure for this product is the same as with “Cloud Computing service with Open Source Instances,” except that Customers may pay a higher fee based upon the hourly rates for the computing resources they consume. Company does not charge their customers for software under the “Cloud Computing service with Third Party Instances.” There are no separately charges for use of any software or applications. Company appears to charge solely for providing computing resources.

Based on the information provided, the “Cloud Computing service with Third Party Instances” is not subject to Indiana sales or use tax, either.

2. Remote Storage

With regard to the third issue, the question is again whether Company's “Remote Storage” product is a service that includes a transfer of prewritten computer software, tangible personal property, or specified digital products. As mentioned above, data from the customer is uploaded to, and downloaded from, servers located in data centers outside of Indiana. Customers are not required to download any computer software in order to use the “Remote Storage” product. Instead, customers use programming language which Company has no ownership in or title to.

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The Company does not transfer any “specified digital products” or other type of “tangible personal property” either as a part of the “Remote Storage” product, either. While a customer may upload their own digital audio works, digital audiovisual works, digital books, or other tangible personal property into Company's servers, Company does not transfer any such items as a part of the “Remote Storage” product. Further, Company does not retain any ownership of the items uploaded.

Company's “Remote Storage” product appears to be a service under *45 IAC 2.2-4-2*. It would not meet the definition of a “telecommunication service,” as it would be excluded under *IC 6-2.5-1-27.5*(c)(1). Company's service for its customers is the remote storage of digital data, applications, and information.

The customers pay a fee based upon the amount of storage capacity used within a given month, based on the amount of data stored and the volume of data uploaded and download to and from the server. Company does not charge their customers for software, as customers can download software from third-party sites if they choose.

Based on the information provided, the “Remote Storage” product is not subject to sales or use tax.

3. Data Transfer Fee

The final issue is whether Company's fee to transfer data (either by uploading, downloading, or moving the data) within the Company's Network as part of the customer's usage of Cloud Computing services are subject to sales or use tax when separately stated on customer invoices. According to Company:

> Company also charges its customers a Data Transfer Fee for uploading data, downloading data, or moving data within the Company's Network as part of the customer's usage of the Remote Storage service. Data Transfer Fees are only charged in connection with a customer's use of the Remote Storage service. Customers may not separately purchase “data transfer” services. Lastly, the Data Transfer Fee is separately stated on the customer invoice.

Neither of the services subject to review in this Revenue Ruling are transferred in conjunction with tangible personal property. Therefore, Company's fee to transfer data is not subject to Indiana sales or use tax, as it relates only to professional or personal services under *45 IAC 2.2-4-2*.

RULING

Company's “Cloud Computing service with Open Source Instances,” “Cloud Computing service with Third Party Instances,” and “Remote Storage” product are all services as enumerated in *45 IAC 2.2-4-2* and are therefore not subject to Indiana sales and use tax. The Data Transfer Fee is likewise not subject to Indiana sales and use tax.

CAVEAT

This ruling is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances as stated herein are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. However, other taxpayers with substantially identical factual situations may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material respect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this ruling a change in statute, regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection.

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