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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

SAP AMERICA, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 20-1249-II**
	)	
DAVID GERREGANO,	)	
Commissioner of Revenue,	)	
State of Tennessee,	)	
	)	
Defendant.	)	

FINAL MEMORANDUM AND ORDER

This matter arises from a dispute over a business tax assessment issued for tax years 2014 through 2018. On July 14, 2023, the Court heard cross motions for summary judgment filed by both Plaintiff SAP America, Inc. ("SAP") and Defendant David Gerregano, Commissioner of Revenue, State of Tennessee (the "State" or the "Department"). In both motions, it is asserted that there are no disputed material facts and each party asserts entitlement to a judgment as a matter of law.

The primary issue is whether the State properly assessed SAP during the relevant years under the Business Tax Act, Tenn. Code Ann. § 67-4-701, *et seq.* Both parties provided extensive briefing and other materials to support their positions. The Court has reviewed the entire record, as well as the applicable caselaw, and is ready to rule.

UNDISPUTED MATERIAL FACTS

SAP's Business

SAP is incorporated under the laws of the State of Delaware and is primarily engaged in the business of selling/licensing enterprise software developed by SAP or SAP affiliates for its business customers to use as a tool in their organizations for financial, human resources,

procurement, expense payment, and other tasks. SAP's customers include the oil and gas industry, the retail industry, the airline industry, and others. SAP licenses software to its customers using two primary "models" or methods: "On-Premise Software" and "Remotely Accessed Software." The difference between On-Premise Software and Remotely Accessed Software is simply the manner in which SAP's customers choose to access SAP's software. Under either, SAP's customers are purchasing the right (or license) to use software.

Under the On-Premise Software model, an SAP customer purchases a license for a particular enterprise software application from SAP, and SAP provides a direct download link for the software, which the customer uses to download the software directly onto its computer or server. Each of SAP's On-Premise Software customers purchases the right to use SAP's software, and it obtains that software by downloading it from SAP's servers and installing it on the customer's own computer or server. None of SAP's On-Premise Software customers download software from any server located in Tennessee. SAP's internal records identify receipts from SAP's customers attributable to the licensing of On-Premise Software using Tax Codes OA and OB.

Under the Remotely Accessed Software model, an SAP customer purchases a license or right to use via remote access SAP software located on SAP's servers using the Internet. SAP has Remotely Accessed Software customers all across the world, including some located in Tennessee, who pay to access SAP's software located on SAP's servers, all of which are located outside the state. SAP's internal records identify receipts from SAP's customers attributable to the licensing of Remotely Accessed Software using Tax Code OM.

On occasion, customers of SAP will request to license software with functionalities that fall outside SAP's current software offerings, and SAP will sometimes develop software to meet

that customer's need and license the software to its customers ("Customer-Specific On-Premise Software"). In all instances, SAP maintains ownership of the Customer-Specific On-Premise Software it develops, which can (and often is) licensed to other customers seeking the same functionality. Customer-Specific On-Premise Software is, for all practical purposes, simply a type of On-Premise Software, and these customers are simply licensing software from SAP—just like the customers licensing On-Premise Software and Remotely Accessed Software. In SAP's internal records, receipts from SAP's customers attributable to Customer-Specific On-Premise Software are identified with Tax Code S2—though this Tax Code is also used to identify receipts from other sales made by SAP as well.

For a customer who elects to receive the software's functionality through the cloud, SAP employees may travel to the customer's location to assist with training, troubleshooting, and software configuration. This service is optional, and the charges for such training and consulting work are separate from the charges for SAP's software. Moreover, the only training at issue in this matter is the optional Online Training offered by SAP, all of which is provided from locations outside Tennessee. Likewise, the only configuration and consulting at issue in this case are the optional Ancillary Services and optional Cloud Consulting Services provided by SAP remotely from SAP's own locations outside Tennessee.

SAP also offers its On-Premise Software customers the option to purchase on-going access to software updates, patches, and other fixes to ensure that the software continues to perform as expected. The updates and patches consist of computer code and are, themselves, computer software—just like the underlying programs to which they correspond. SAP's customers download the updates, patches, and other fixes from SAP's servers outside Tennessee. In SAP's internal

records, receipts from SAP's customers purchasing on-going access to software updates, patches, and other fixes for On-Premise Software are identified with Tax Codes OF and OL.

SAP also provides "Cloud Hosting" to its customers who have purchased software from SAP and wish to access the software through the cloud. With its Cloud Hosting offering, SAP provides customers access to SAP's servers or hardware infrastructure—all of which is located outside of Tennessee—so that the customers can deploy, manage, and run SAP's software on SAP's hardware, or gain access to processing, storage, or networking solutions using SAP's platform. SAP's Cloud Hosting customers are relieved from having to purchase and maintain their own data center, including computer infrastructure or software platforms, by instead purchasing usage of such infrastructure or platforms located outside of Tennessee from SAP. SAP's Cloud Hosting customers are, in substance, purchasing the ability to use SAP's hardware or computer server equipment on a subscription basis. In SAP's internal records, receipts from SAP's customers purchasing Cloud Hosting are identified with Tax Code O2.

SAP provides a variety of services to its customers remotely using cloud technology or otherwise in a "remote" manner ("Cloud-Based Services"). SAP's Cloud-Based Services include "Premium Cloud Subscription Support," "Ancillary Services" for Remotely Accessed Software, "Online Training," and "Cloud Consulting Services." With its Premium Cloud Subscription Support offering, SAP provides some of its customers optional ongoing software support. Premium Cloud Subscription Support can include software patches and fixes developed by SAP (which are not services), but it also includes support services, such as enhanced account support. In SAP's internal records, receipts from SAP's customers purchasing Premium Cloud Subscription Support are identified with Tax Code OE.

SAP also provides optional Ancillary Services to some customers who license Remotely Accessed Software, which include software configuration and other similar services. SAP provides all Ancillary Services from locations outside Tennessee, unless customers elect to obtain assistance with training, troubleshooting, configuration, and the like. In SAP's internal records, receipts from SAP's customers purchasing Ancillary Services are identified with Tax Code O5.

SAP also provides optional Online Training to some customers, consisting of training sessions that are accessed by SAP's customers through the Internet. SAP provides all Online Training from locations outside Tennessee, and none of SAP's employees provides any Online Training from within the state. In SAP's internal records, receipts from SAP's customers purchasing Online Training are identified with Tax Code T7.

SAP's Cloud Consulting Services consist of software configuration, data conversion and migration, and related services provided remotely to customers from SAP's own locations outside Tennessee, unless customers require onsite training, troubleshooting, configuration and the like. In SAP's internal records, receipts from SAP's customers purchasing Cloud Consulting Service are identified with Tax Codes OC, OZ, S1, S2, S4, S5, S6, S7, and S9— though these Tax Codes may also include receipts related to certain non-cloud services, some of which may be provided using, in part, individuals travelling to customer locations in Tennessee. All of SAP's Cloud-Based Services are optional, and no customer licensing software from SAP is required to purchase any Cloud-Based Service.

SAP maintains no physical business location in Tennessee. None of SAP's servers are located inside Tennessee. Its customers are located across the world, and some customers have locations or operations in Tennessee. Even when SAP's customers have locations or operations in Tennessee, those customers very often have locations and operations outside Tennessee. When a

customer places an order with SAP, it provides SAP with a "ship to" address, but despite the use of the "ship to" phrase, SAP does not ship anything to its customers.

The Audit and Assessment

The Department commenced a Business Tax audit of SAP for the period January 1, 2014, through December 31, 2018, and by Notice of Proposed Assessment, dated January 31, 2020 (the "Assessment"), proposed an assessment of $485,061 in tax, including $43,155 for Cloud-Based Services beginning January 1, 2016, plus $121,265.25 in interest, and $121,754.26 in penalties. Prior to the issuance of the Department's Business Tax Manual in March 2021, the Department published no guidance taking the position that Business Tax applied to gross receipts from the licensing of software. The Department based its calculation of Tennessee Business Tax it claims SAP owes on the "ship to" addresses provided by SAP's customers.

The audit package was prepared by auditor Ross Davis, who has since passed away. In the audit package, the Department classified SAP's software sales as sales of services. The Department determined that SAP was in the business of selling computer software, cloud services, software consulting services, software programming services, configuration services, and training classes. The Department concluded that these services fell under Class 3 of Tenn. Code Ann. § 67-4-708. In determining classifications for business tax purposes, the Department consults the Standard Industrial Classification (SIC) Index which, it submits, classifies computer software, whether prepackaged or custom, as business services. The SIC has been replaced by NAICS (North American Industry Classification System). The Department also consults the NAICS, particularly for industries that have evolved since the 1980s and crosschecks the NAICS code with the SIC code. The Department's new computer system does not allow its auditors to enter SIC codes and

instead requires them to enter the applicable NAICS code. Consequently, in the audit package, the Department classified SAP under NAICS code 541511, Custom Computer Programming Services.

SAP requested an informal taxpayer conference to dispute the proposed assessment. In the informal conference decision upholding the proposed assessment, the Department's hearing officer concluded, inter alia, that SAP's computer programming services were classified as business services by the SIC, and she cited the following SIC codes: 7371, Computer Programming Services; 7372, Prepackaged Software; and 7373, Computer Integrated Systems Design. It is that decision from which this matter was initiated.

CONCLUSIONS OF LAW

Summary Judgment Standard

Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Tenn. R. Civ. P. 56.04. However, "[i]f there is any uncertainty concerning a material fact, then summary judgment is not the appropriate disposition." *Liput v. Grinder*, 405 S.W.3d 664, 669 (Tenn. Ct. App. 2013). The Tennessee Supreme Court has explained:

> The summary judgment procedure was designed to provide a quick, inexpensive means of concluding cases, in whole or in part, upon issues as to which there is no dispute regarding the material facts. Where there does exist a dispute as to facts which are deemed material by the trial court, however, or where there is uncertainty as to whether there may be such a dispute, the duty of the trial court is clear. He [or she] is to overrule any motion for summary judgment in such cases, because summary judgment proceedings are not in any sense to be viewed as a substitute for a trial of disputed factual issues.

Shacklett v. Rose, No. M2017-01650-COA-R3-CV, 2018 WL 2074102, at *2–3 (Tenn. Ct. App. May 2, 2018) (quoting *EVCO Corp. v. Ross*, 528 S.W.2d 20, 25 (Tenn. 1975)).

Taxing Statute

This case requires the Court to interpret certain provisions in the Business Tax Act, codified at Tenn. Code Ann. § 67-4-701 *et seq*., and construe them properly according to Tennessee law. Issues involving the interpretation of statutes are questions of law. *In re Est. of Tanner*, 295 S.W.3d 610, 613 (Tenn. 2009) (citing *Gleaves v. Checker Cab Transit Corp.*, 15 S.W.3d 799, 802 (Tenn. 2000); *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 924 (Tenn. 1998)). In conducting such an analysis, the Court utilizes longstanding principles of statutory construction:

> When dealing with statutory interpretation, well-defined precepts apply. Our primary objective is to carry out legislative intent without broadening or restricting the statute beyond its intended scope. *Houghton v. Aramark Educ. Res., Inc.*, 90 S.W.3d 676, 678 (Tenn. 2002). In construing legislative enactments, we presume that every word in a statute has meaning and purpose and should be given full effect if the obvious intention of the General Assembly is not violated by so doing. *In re C.K.G.*, 173 S.W.3d 714, 722 (Tenn. 2005). When a statute is clear, we apply the plain meaning without complicating the task. *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004). Our obligation is simply to enforce the written language. *Abels ex rel. Hunt v. Genie Indus., Inc.*, 202 S.W.3d 99, 102 (Tenn. 2006). It is only when a statute is ambiguous that we may reference the broader statutory scheme, the history of the legislation, or other sources. *Parks v. Tenn. Mun. League Risk Mgmt. Pool*, 974 S.W.2d 677, 679 (Tenn. 1998). Further, the language of a statute cannot be considered in a vacuum, but "should be construed, if practicable, so that its component parts are consistent and reasonable." *Marsh v. Henderson*, 221 Tenn. 42, 424 S.W.2d 193, 196 (1968). Any interpretation of the statute that "would render one section of the act repugnant to another" should be avoided. *Tenn. Elec. Power Co. v. City of Chattanooga*, 172 Tenn. 505, 114 S.W.2d 441, 444 (1937). We also must presume that the General Assembly was aware of any prior enactments at the time the legislation passed. *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995).

Bearing Distributors, Inc. v. Gerregano, No. M2020-01075-COA-R3-CV, 2022 WL 40008, at *5 (Tenn. Ct. App. Jan. 5, 2022) (citing *In re Estate of Tanner*, 295 S.W.3d 610, 613-14 (Tenn. 2009)).

Specifically concerning tax statutes, the Tennessee Supreme Court has stated:

> In addition to general principles of statutory construction, we must also consider the rules of construction specifically applicable to tax statutes. Statutes imposing a tax are to be construed strictly against the taxing authority. *See Covington Pike Toyota, Inc. v. Cardwell*, 829 S.W.2d 132, 135 (Tenn. 1992). However, statutes

> granting exemptions from taxation are construed strictly against the taxpayer. *Tibbals Flooring Co. v. Huddleston*, 891 S.W.2d 196, 198 (Tenn. 1994); *Covington Pike Toyota*, 829 S.W.2d at 135.

Id. (citing *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004)).

Classification of SAP's Transactions

The State assessed SAP business tax on the gross receipts from its licensing of software, sales of Cloud Hosting, and sales of Cloud-Based Services. The State contends that these constitute services that are taxable under the Business Tax Act, while SAP argues that these constitute intangible property, and not tangible personal property or a service that is subject to the Business Tax. SAP also argues that the State's assessment of Business Tax upon the gross receipts from Cloud Hosting ignores the "true object" or "primary purpose" of these transactions, which is a customer's purchase of the ability to use SAP-owned hardware and computer server equipment, or intangible software platforms, located outside of Tennessee, which is tantamount to a lease and not subject to the Business Tax. To the extent the Court determines that the sales of computer software, Cloud Hosting, and Cloud-Based Services are "services" that are taxable under the Business Tax Act, SAP argues that the Business Tax would still not apply because the software is not "delivered" into Tennessee.[1]

When the Business Tax Act was enacted, "the legislature undertook to create a system of . . . taxation upon the privilege of engaging in certain types of business activities." *Worrall v. Kroger Co.*, 545 S.W.2d 736, 738 (Tenn. 1977). Specifically, the Act provides that "the making of sales by engaging in any vocation, occupation, business, or business activity enumerated, described, or referred to in § 67-4-708(1)-(5) is declared to be a privilege upon which a state tax

[1] Beginning January 1, 2016, when the Department started assessing business taxes on SAP's sales of cloud-related services, the business tax applied to the "sale of a service that is delivered to a location in this state." Tenn. Code Ann. § 67-4-717(a)(1)(B).

is levied." Tenn. Code Ann. § 67-4-704(a). Tenn. Code Ann. § 67-4-708 sets forth various classifications for businesses that are taxable, and under the taxation scheme, a business is classified according to its dominant business activity, which determines the rate and due date of the tax owed. The "dominant business activity" of a business is defined as "the business activity that is the major and principal source of taxable gross sales of the business." Tenn. Code Ann. § 67-4-702(a)(5).

Here, the State assessed SAP for taxes on its gross receipts pursuant to Tenn. Code Ann. § 67-4-708(3)(C), classifying the business under Class 3 and finding that the taxpayer is "in the business of selling computer software, cloud services, software consulting services, software programming services, configuration services and training classes." (Ex. B to Complaint). Tenn. Code Ann. § 67-4-708(3)(C) declares generally that "making sales of services or engaging in the business of furnishing or rendering services" is a taxable privilege, and then lists sixteen service categories that are exempt from taxation. Tenn. Code Ann. § 67-4-708(3)(C)(i)–(xvi). To further describe the services exempt from taxation, that particular subsection states that "[i]t is the legislative intent that the exceptions . . . shall include the sales of services by those businesses or establishments so described in the Standard Industrial Classification Index of 1972, including all supplements and amendments prepared by the bureau of the budget of the federal government." Tenn. Code Ann. § 67-4-708(3)(C). The Act defines the term "services" as

> . . . every activity, function or work engaged in by a person for profit or monetary gain, except as otherwise provided in this part. Services for profit or monetary gain does not include services rendered by a person for an affiliated business entity; provided, that the services are accounted for as allocations of cost incurred in providing the service without any markup whatsoever. "Services" does not include sales of tangible personal property;

Tenn. Code Ann. § 67-4-702(a)(21).

In addition to sales of services, the Act imposes taxes on sales of "tangible personal property," which is defined as:

> personal property that may be seen, weighed, measured, felt or touched, or is in any other manner perceptible to the senses. "Tangible personal property" does not include stocks, bonds, notes, insurance or other obligations or securities, nor does it include any materials, substances or other items of any nature inserted or affixed to the human body by duly licensed physicians or dentists or otherwise dispensed by them in the treatment of patients;

Tenn. Code Ann. § 67-4-702(a)(23). While the sales of certain types of tangible personal property and certain services are listed as taxable activities as set forth in Tenn. Code Ann. § 67-4-708, the statute does not specifically list or include the sale or licensing of intangible property as a taxable business activity; thus, the Business Tax is imposed on businesses making sales of either tangible personal property or services in Tennessee, and not sales of intangible personal property. Further, the Department acknowledges that under the definition of "services" in the Business Tax Act, "any activity or work engaged in for monetary gain will constitute a service, unless it involves the sale of tangible or intangible personal property or unless it is excepted under subsection 708(C)(3)." (State's Resp. to Pl.'s Mot. for Summ. J., p. 4). Thus, according to the Department, the sale of intangible personal property is not the sale of a service. This conclusion is supported by the Department's guidance from 2018 that the Business Tax does not apply to "[a] person who, as part of the normal business operations, buys and sells intangible personal property." (Tenn. Dep't of Rev., Tennessee Business Tax Guide, p. 24 (Sept. 2018)).[2] Thus, the question becomes whether the software SAP licenses to its customers is intangible property, and, therefore, not subject to taxation under the Business Tax Act.

[2] Attached as Ex. 6 to Susan Sagash's deposition, a tax auditor for the Department who reviews the published guides, in support of Plaintiff's Motion for Summary Judgment.

The State argues that SAP's sales of its software platform meets the definition of "services," as SAP sells licenses to its software platform, as well as subscriptions to access the software platform using cloud-hosting services, and provides reconfiguration, training, consulting, and other customer-support services in connection with the software sales. The State contends that the Act defines "services" very broadly and is intended to encompass any activity engaged in for profit or monetary gain, unless otherwise provided "in this part." Tenn. Code Ann. § 67-4-702(a)(21). Further, that the Act's reference to the SIC Index, which classifies software as a service, supports the State's conclusion that software is considered a service under the Act. *See* Tenn. Code Ann. § 67-4-708(3)(C). Moreover, the State argues it correctly imposed the tax on sales of software obtained using Cloud-Based Services beginning January 1, 2016, because these services were delivered to SAP's customers in Tennessee and because the true object of the sales was the sale of software and not the leasing of computer equipment or platforms. In addition, that there is nothing in the Act to suggest that software should be classified as intangible personal property, especially considering that the Act does not expressly exclude "software" in its definition of "tangible personal property," and that the exclusion of "stocks, bonds, notes, insurance or other obligations or securities" does not resemble the software that is sold by SAP as it is not merely the representation or evidence of value. It relies on *State v. Sanders*, 923 S.W.2d 540, 542 (Tenn. 1996) for this position.

In contrast, SAP contends that its sales of software were sales of intangible personal property and not subject to the Business Tax, relying on the Tennessee Supreme Court case *Commerce Union Bank v. Tidwell*, which held that "the sale of computer software does not constitute the sale of tangible personal property for the purposes of T.C.A. ss 67—3001 *et seq*. [the sales and use tax section of the Code]." *Com. Union Bank v. Tidwell*, 538 S.W.2d 405, 408

(Tenn. 1976). The software at issue in *Commerce Union* included software "designed to perform specific functions, such as preparation of the employee payroll, preparation of a loan amortization schedule, or any other specific job which the computer is capable of performing," much like the software licensed by SAP to its customers. *Id*. at 406. Further, some of the software programs at issue in Commerce Union could "be modified to fit the peculiar application of the individual user, while others are unique." *Id*. Finally, the "information contained in these programs may be introduced into the user's computer by several different methods," including being "programmed manually . . . at the location of the user's computer," "programmed by a remote programming terminal located miles from the user's computer, with the input information transmitted by telephone," or "more commonly, the computer could be programmed by punch cards, magnetic tapes or discs, containing the program developed by the vendor." *Id*. at 406-407. The Supreme Court agreed with the taxpayer and specifically held, in the context of the sales and use tax, that the sale of computer software is the sale of intangible personal property.

After the *Commerce Union* decision, the General Assembly amended the sales and use tax statutes to treat sales of computer software as sales of "tangible personal property." *See* Tenn. Code Ann. § 67-6-102(97)(A); *see also Creasy Sys. Consultants, Inc. v. Olsen*, 716 S.W.2d 35, 36 (Tenn. 1986) (noting that "[t]he definition of computer software as tangible personal property was the response of the General Assembly to the holding of this court in *Commerce Union Bank v. Tidwell*, 538 S.W.2d 405 (Tenn. 1976) that a sale of computer software was not a sale of tangible personal property"). The State acknowledges, however, that the General Assembly has not addressed this issue in the context of the Business Tax.

Specifically, the Retailers' Sales Tax Act (i.e., sales and use tax section of the Code), Tenn. Code Ann. § 67-6-101, *et seq.*, has been amended several times since *Commerce Union Bank* to

legislate that computer software is tangible property subject to taxation as technology has progressed. Recently, in 2015, the General Assembly amended the Retailers' Sales Tax Act at section 231 to apply specifically to remotely accessed software, providing that certain software is subject to taxation regardless of whether it is delivered electronically, by use of tangible storage media, loaded into a computer, created on the premises of the consumer, or otherwise. Tenn. Code Ann. § 67-6-231. It specifies that computer software is to be subject to sales and use tax on the sale or purchase price of the software equal to the tax rate for tangible personal property set out elsewhere in that section. *Id*. Notably, the Business Tax Act does *not* contain such a provision. Moreover, the case of *Commerce Union Bank* is instructive on this point. That decision, issued regarding the Retailers' Sales Tax Act over forty years ago, prior to the enactment of Tenn. Code Ann. § 67-6-231 and prior to the advent of cloud computing and involving the obsolete technology of punch cards and magnetic tapes, held that "[w]hat is created and sold here is information, and the magnetic tapes which contain this information are only a method of transmitting these intellectual creations from the originator to the user." *Com. Union Bank*, 538 S.W.2d at 407. The Court found that even pre-cloud computing software was not tangible property. The General Assembly stepped in and amended the Retailers' Sales Tax Act thereafter to legislate that computer software is tangible property subject to taxation therein. No such amendments were made to the Business Tax Act.

In addition, the Court does not find the State's reliance on *State v. Sanders*, 923 S.W.2d 540 (Tenn. 1996), to be persuasive. The State argues that the Supreme Court adopted a narrower definition of intangible property for sales tax purposes and that "SAP's software does not fit within this definition." (State's Resp. to Plt.'s M. for Summ. J., p.4, n.1). In that case, the taxpayer at issue sold actual bars of silver and gold and silver bullion coins. He argued that these were not sales of

tangible goods because he was purchasing Federal Reserve notes, i.e. dollars. The Court disagreed, finding gold and silver bullion and coins to be tangible property with "intrinsic value" rather than "their representative value as a medium of exchange." *Sanders*, 923 S.W.2d at 542-43. Value, for instance, was determined by weight, not the value assigned by the issuing government. *Id.* at 543. This case is not analogous to the current case, certainly in comparison to *Commerce Union Bank*, which specifically addresses computer software.

While the State argues that the SIC Index classification is conclusive that the sales of software are considered a service under the Business Tax Act, SAP responds that the Act only mentions SIC classifications for one purpose: determining whether the *exemptions* set forth in Tenn. Code Ann. 67-4-708(3)(C) apply, which forecloses the State's attempt to use the SIC for other purposes. The Court of Appeals has noted that the Business Tax Act references the SIC "in the context of determining exceptions under Classification 3(C)." *Auto Glass Co. of Memphis Inc. v. Gerregano*, 596 S.W.3d 257, 264, n.5 (Tenn. Ct. App. 2019). In that case, at issue was whether an auto glass company had been properly considered under the Business Tax Act. The Department attempted to argue that the auto glass company should be classified under Classification 3(C) as a seller of services in part "because, under the Standard Industrial Classification Index, it would be considered an 'automotive glass replacement shop,' which is classified thereunder as a service," as the SIC "provides that the sale of glass is considered incidental to its replacement." *Id*. The Court noted that the statute wherein Classification 3(C) is codified provides: "It is the legislative intent that the exceptions in subdivisions 3(C)(i)-(xvi) shall include the sales of services by those businesses or establishments so described in the Standard Industrial Classification Index," and noted that the SIC, pursuant to the plain language of the statute, is referenced in determining

exemptions under that subsection. *Id*. (citing Tenn. Code Ann. § 67-4-708(3)(C)). Accordingly, the Court finds this argument without merit.

When dealing with statutory interpretation, the Court's primary objective is to carry out legislative intent without broadening or restricting the statute beyond its intended scope. *See Bearing Distributors, Inc.*, 2022 WL 40008, at *5 (citing *Houghton v. Aramark Educ. Res., Inc.*, 90 S.W.3d 676, 678 (Tenn. 2002). While the sales and use taxation scheme has been amended to clearly include the sale of software as the sale of tangible personal property subject to taxation therein, the Business Tax Act has not been so amended. Based on the holding in *Commerce Union*, the Court finds that software is intangible property that is not subject to taxation under the Business Tax Act. The State has admitted in its briefing, as mentioned above, that under the definition of "services" in the Business Tax Act, "any activity or work engaged in for monetary gain will constitute a service, unless it involves the sale of tangible or intangible personal property or unless it is excepted under subsection 708(C)(3)," which is also supported by the Department's published guidance that the Business Tax does not apply to one who buys and sells intangible personal property. (State's Resp. to Pl.'s Mot. for Summ. J., p. 4). Since the sale of software is the sale of an intangible, SAP's sales of software, Cloud-Based Services, and Cloud Hosting at issue in this case is not subject to taxation under the Business Tax Act, and, accordingly, the Court need not address SAP's remaining arguments.

CONCLUSION

For the foregoing reasons, the Court hereby GRANTS SAP's motion for summary judgment and respectfully DENIES the Department's motion for summary judgment in its entirety. Accordingly, the Court awards judgment as a matter of law to SAP and against David Gerregano,

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Commissioner of Revenue, State of Tennessee, and hereby abates in full the business tax assessment challenged in SAP's Complaint, plus all interest and penalties.

The Court determines SAP to be the prevailing party pursuant to Tenn. Code Ann. § 67-1-1803(d) for purposes of awarding attorneys' fees and expenses. The Court finds, however, that determination of the amount of such fees and expenses to which SAP is entitled should await the outcome of any possible appeals in this case.

The Court finds that there is no just reason for delay in entering a final, appealable judgment as to all matters other than the amount to be awarded to SAP for attorneys' fees and expenses. The Court, pursuant to Tenn. R. Civ. P. 54.02, therefore expressly directs that a final, appealable judgment is hereby entered as stated above, granting SAP's motion for summary judgment, denying the Department's motion for summary judgment, and abating in full the business tax assessment challenged in SAP's complaint, plus all interests and penalties.

The Court reserves determination of the amount of attorneys' fees and expenses of litigation to be awarded pursuant to Tenn. Code Ann. § 67-1-1803(d) in this case until all appeals are concluded. Within sixty (60) days after the entry of this Final Judgment, SAP may file an application for an award of fees and expenses, unless a timely notice of appeal is filed. If the decision of this Court is appealed, the prevailing party may file an application for an award of fees and expenses within sixty (60) days after issuance of the mandate concluding proceedings in the appellate courts.

All costs of this case are taxed against the Department.

It is so ORDERED.

s/Anne C. Martin

ANNE C. MARTIN
CHANCELLOR, PART II

cc: G. Michael Yopp, Esq.
Christopher A. Wilson, Esq.
Michael Cottone, Esq.
Holland & Knight LLP
Nashville City Center
511 Union Street, Suite 2700
Nashville, TN 37219
mike.yopp@hklaw.com
chris.wilson@hklaw.com
michael.cottone@hklaw.com

Mary Ellen Knack, Senior Counsel
Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202-0207
maryellen.knack@ag.tn.gov

RULE 58 CERTIFICATION

A copy of this Order has been served by U.S. Mail upon all parties or their counsel named above.

s/Megan Broadnax
Deputy Clerk & Master

8-9-23
Date