

IN THE MICHIGAN COURT OF APPEALS
Appeal from the Michigan Court of Claims
Judge Clinton Canady III

THOMSON REUTERS (TAX &
ACCOUNTING) INC.,

Court of Appeals No. 313825

Court of Claims No. 11-91-MT

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,
STATE OF MICHIGAN,

Defendant-Appellee.

**SOFTWARE & INFORMATION INDUSTRY ASSOCIATION'S MOTION FOR LEAVE
TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT
THOMSON REUTERS (TAX & ACCOUNTING) INC.**

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Dated: July 10, 2013

Software & Information Industry Association (“SIIA”), through its attorneys Schiff Hardin LLP, states the following in support of its Motion for Leave to File an Amicus Curiae Brief in Support of Plaintiff-Appellant Thomson Reuters (Tax & Accounting) Inc., filed pursuant to MCR 7.211 and 7.212(H):

1. SIIA is the principal, largest and oldest trade association in the United States representing software, digital content and online service companies.

2. SIIA is the leading voice for the software and digital content industries across a wide-range of issues, including intellectual property protection, privacy and data security, e-government and information policy, taxation of electronic commerce, security, education technology and workforce development.

3. A component of SIIA’s principal mission is to serve as a resource on trends, technologies, policies and related issues that affect member companies and demonstrate the contribution of the industry to the broader economy.

4. SIIA is vitally interested in cases that affect online services such as this one.

5. SIIA has approximately 700 member companies that are providers of, among other things:

- software publishing, graphics, and photo editing tools;
- corporate database and data processing software;
- financial trading and investing services, news, and commodities exchanges;
- online legal information and legal research services;
- textbooks, reference works and research periodicals;
- protection against software viruses and other threats;
- education software and online education services; and

- open source software.

6. Members of SIIA employ a significant number of Michigan residents, own significant property in Michigan, and conduct substantial business in Michigan.

7. SIIA has an interest in providing education regarding the fundamental physical and conceptual distinctions between the various operations of member companies selling software, providing online services, or providing digital content. Law impacting online services should be developed with a full understanding of how the Internet functions as a platform for selling products and for providing services, and should be interpreted in a way that is uniform, consistent and constitutional.

8. The views of SIIA in this case are informed by the real-world experience of those members that are “sellers of online services” and/or “subscribers to online services” in various kinds of market transactions that SIIA urges should not be subject to Michigan sales or use tax under the plain language of Michigan’s Sales and Use Tax Acts (MCL 205.51 *et seq.* and MCL 205.91 *et seq.*)

9. In this case, the Michigan Court of Claims’ decision granting the Department of Treasury summary disposition was based on a fundamental misunderstanding of what an online information service is. Technical knowledge about online services coupled with experience speaking on behalf of the software and digital content industries gives SIIA unique insight into the issues involved in this case.

10. SIIA respectfully requests that the Court of Appeals accept SIIA’s Amicus Curiae Brief in support of Plaintiff-Appellant’s Claim of Appeal, attached as **Appendix A**.

WHEREFORE, Software & Information Industry Association respectfully requests that the Court of Appeals grant leave for SIIA to file an Amicus Curiae Brief in Support of Plaintiff-Appellant Thomson Reuters (Tax & Accounting) Inc., and accept for filing and consideration SIIA's Amicus Curiae Brief, attached as **Appendix A**.

Respectfully submitted,

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Appendix A

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1. Brief Type (select one): APPELLANT(S) APPELLEE(S) REPLY
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 OTHER [identify]:
2. This brief is filed by or on behalf of [insert party name(s)]:
3. This brief is in response to a brief filed on by .
4. ORAL ARGUMENT: REQUESTED NOT REQUESTED
5. THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.
 [See MCR 7.212(C)(1) to determine if this applies.]
6. As required by MCR 7.212(C), this brief contains, in the following order: [check applicable boxes to verify]
- Table of Contents [MCR 7.212(C)(2)]
Index of Authorities [MCR 7.212(C)(3)]
Jurisdictional Statement [MCR 7.212(C)(4)]
Statement of Questions [MCR 7.212(C)(5)]
Statement of Facts (with citation to the record) [MCR 7.212(C)(6)]
Arguments (with applicable standard of review) [MCR 7.212(C)(7)]
Relief Requested [MCR 7.212(C)(9)]
Signature [MCR 7.212(C)(9)]
7. This brief is signed by [type name]: /s/
 Signing Attorney's Bar No. [if any]:

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I. STATEMENT OF JURISDICTION AND QUESTIONS PRESENTED FOR REVIEW

Amicus curiae adopts Plaintiff-Appellant's Statement of Jurisdiction and Statement of Questions Presented.

II. STATEMENT OF INTEREST OF AMICUS CURIAE

The Software & Information Industry Association ("SIIA") is the principal, largest and oldest trade association in the United States representing software, digital content and online service companies. SIIA is the leading voice for the software and digital content industries across a wide-range of issues, including intellectual property protection, privacy and data security, e-government and information policy, taxation of electronic commerce, security, education technology and workforce development. A component of SIIA's principal mission is to serve as a resource on trends, technologies, policies and related issues that affect member companies and demonstrate the contribution of the industry to the broader economy.

SIIA has approximately 700 member companies that are providers of, among other things:

- software publishing, graphics, and photo editing tools;
- corporate database and data processing software;
- financial trading and investing services, news, and commodities exchanges;
- online legal information and legal research services;
- textbooks, reference works and research periodicals;
- protection against software viruses and other threats;
- education software and online education services; and
- open source software.

Members of SIIA employ a significant number of Michigan residents, own significant property in Michigan, and conduct substantial business in Michigan.

SIIA has an interest in providing education regarding the fundamental physical and conceptual distinctions between the various operations of member companies selling software, providing online services, or providing digital content. Law impacting online services should be developed with a full understanding of how the Internet functions as a platform for selling products, and for providing services, and should be interpreted in a way that is uniform, consistent and constitutional. The views of SIIA in this case are informed by the real-world experience of those members that are “sellers of online services” and/or “subscribers to online services” in various transactions that do not involve a sale or delivery of tangible personal property and therefore should not be subject to Michigan sales or use tax.

In this case, the Michigan Court of Claims’ decision granting the Department of Treasury (“the Department”) summary disposition was based on a misunderstanding of the nature of a subscription to an online information service. The Court of Claims erroneously believed that a subscription to an online information service was a sale of prewritten software. Technical knowledge about online services coupled with experience speaking on behalf of the software and digital content industries gives SIIA critical insight in this case and a unique ability to assist with the navigation of the factual and legal issues involved.

III. INTRODUCTION

This case concerns whether a service, accessed online via the Internet, is subject to Michigan use tax. Thomson Reuters (Tax & Accounting), Inc. (“Thomson Reuters” or “Plaintiff-Appellant”) provides an online information service, Checkpoint® (“Checkpoint”), through which a subscriber may access and search an immeasurable amount of information, including case law, statutes, and articles. Online services, such as Checkpoint, are dynamic, constantly updating and contrast sharply with the finite nature of a tangible book or CD-ROM. For example, a researcher can purchase a book of Michigan statutes, a monthly periodical with legal articles and case summaries on a particular topic, or a CD-ROM containing Michigan appellate court cases. The information contained within these books and CD-ROMs would be limited, finite and possibly outdated or obsolete by the date published and do not provide in and of themselves what the researcher wants or needs. (See discussion, *infra*, p. 10)

In contrast, Checkpoint not only provides information from multiple sources that would fill up the walls of a library but, more importantly, Checkpoint serves the function of compiling information relevant to a particular topic and providing connectivity and live links between helpful sources. (See discussion, *infra*, pp. 9) Without Checkpoint, a researcher could spend hours or days reading books and reviewing information on a CD-ROM, verifying that the information is up-to-date and relevant, and compiling that information on a particular topic. With Checkpoint, this service is provided to a wide range of subscribers around the world who pay an annual fee to access the service because it saves hours or days of research time.

As the largest trade association in the United States representing software, digital content and online service providers, SIIA has a vital interest in seeing this case correctly decided based upon a complete understanding of online services. The Court of Claims’ decision disregards the

plain language of the Michigan Use Tax Act (MCL 205.91 *et seq*, “the Act”), and an appellate decision affirming it would open the door to the assessment of numerous Michigan businesses and consumers using online services. Such a result would be an unfair burden on Michigan businesses and would effectively create a new tax on Michigan businesses. SIIA strongly believes that online services should not be subject to Michigan use tax as they do not meet the Act’s definition of “tangible personal property” and do not involve a delivery of prewritten computer software.

In general, services are not subject to Michigan sales and use tax. [MCL 205.52(1) and MCL 205.93(1); see also *Catalina Marketing Sales Corp v Dep’t of Treasury*, 470 Mich 13, 20-21; 678 NW2d 619 (2004)]¹ There is no distinction between a service performed online and a service performed in person. The fact that an online information service is powered by software owned by the service provider does not change the nature of an online information service. Furthermore, the Michigan Supreme Court has already determined that “computer and informational services” are “nontaxable.” [*Catalina Marketing Sales Corp, supra*, p. 20-21]

When a subscriber accesses Checkpoint online, no tangible personal property, including prewritten computer software, is delivered to the subscriber. Even if the Court determined that there was a transfer of tangible personal property or prewritten computer software to the subscriber, it would be incidental to the online information services. Just as a service is not subject to Michigan use tax, a mixed transaction of tangible personal property and services when the property is incidental to the services is also not subject to Michigan use tax. (*Catalina Marketing Sales Corp, supra*)

¹ The few services subject to Michigan use tax, identified under MCL 205.93a and MCL 205.93b, are not at issue in this case.

SIIA respectfully requests that the Court of Appeals reverse the Court of Claims' order granting the Department summary disposition and remand to the Court of Claims for entry of an order granting Thomson Reuters summary disposition pursuant to MCR 2.116(I)(2), or in the alternative remand for a trial.

IV. STATEMENT OF FACTS

Amicus curiae adopts Plaintiff-Appellant's Statement of Facts.

V. A SUBSCRIPTION TO AN ONLINE INFORMATION SERVICE IS A SERVICE AND NOT A TAXABLE DELIVERY OF PREWRITTEN COMPUTER SOFTWARE.

Use tax is only imposed on “*tangible* personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses and includes electricity, water, gas, steam, and prewritten computer software.” [MCL 205.92(k)] In order for prewritten computer software to be subject to use tax, it must be “delivered” to the user. [MCL 205.92b(o)]

To impose Michigan use tax on a subscription to an online service, a Court must find that prewritten computer software is “delivered” to the subscriber in a manner that the subscriber can exercise “a right or power over tangible personal property incident to the *ownership* of that property including transfer of the property in a transaction where possession is given.” [MCL 205.92(b) and MCL 205.92b(o)] The Court of Claims' decision that a subscription to Checkpoint is subject to Michigan use tax fails to comply with the statutory mandate of MCL 205.92(b) and MCL 205.92b(o):

- 1) The Court erroneously determined that intangible information was tangible personal property. (See Transcript to Summary Disposition hearing, held November 26, 2012 (“Tr.”), pp. 25, 26, 27)

- 2) The Court failed to make a determination that computer software was “delivered” to the subscriber. (Tr., pp. 22-29)
 - 3) The Court determined that the mechanism of how Checkpoint is powered remotely by hardware and software located in Minnesota and how information from Checkpoint is accessed by subscribers is “not relevant.” (Tr., pp. 27-28)
- A. The Department Concedes that Information is Not Subject to Michigan Use Tax.**

Intangible property, such as “information,” is not subject to Michigan sales and use tax. [MCL 205.52(1) and MCL 205.93(1); see also *Macabees Mutual Life Insurance Co v Dep’t of Treasury*, 122 Mich App 660; 332 NW2d 561 (1983)] The Department concedes that “‘information’ by itself is not taxable as tangible personal property.” (See Department’s Brief on Appeal, p. 13)² Information and services are often intertwined and should both be treated as not taxable. (*Catalina Marketing Sales Corp v Dep’t of Treasury* 470 Mich at 25-26) Neither services nor intangible products “assume the taxable character of a tangible medium.” (*Catalina Marketing Sales Corp v Dep’t of Treasury*, 470 Mich at 26)

Twenty years ago, the Court of Appeals considered whether customized computer software delivered to a customer was tangible or intangible property. [*Maccabees Mutual Life Insurance Co, supra*; *Detroit Automobile Inter-Insurance Exchange v Dep’t of Treasury*, 138 Mich App 696; 361 NW2d 373 (1984)] Taking into consideration that canned or prewritten software delivered to a customer, such as “TV games, albums, and cassette tapes” was taxable as tangible personal property, the Court determined that software, such as customized software, that is “dynamic and changing” is “intangible personal property.” (*Id.*) Canned software programs are “end products in themselves” while the end product from a sale of customized computer

² The Department’s concession in this case that “‘information’ by itself is not taxable as tangible personal property” is consistent with the Department’s Letter Ruling No. LR 90-6 which states that “information is not tangible personal property and is not, therefore, subject to Michigan sales or use tax.” (See Appellant’s Brief, p. 20 and Exhibit 20.) Accordingly, there is no issue in this case that information is not taxable.

software is the “intangible personal property” and the personalized services. (*Id.*) “The medium used in transferring the information was of insignificant value and that it was for the intangible information stored on the medium that the purchaser paid the seller.” [*Maccabees Mutual Life Insurance Co v Dep’t of Treasury*, Court of Claims Case No. 6673 (1982) (affirmed by 122 Mich App 660), citing *District of Columbia v Universal Computer Associates, Inc*, 151 US App DC 30; 465 F2d 615 (1962), attached hereto as **Appendix 1**]

The Court of Claims’ finding that intangible information is “tangible” and subject to Michigan use tax is contrary to Michigan’s Use Tax Act, relevant case law, the Department’s published position and the Department’s concession on the issue in this case. The Court of Claims’ decision that information is tangible personal property must be reversed.

B. Services are Not Subject to Michigan Use Tax.

In general, services are not subject to Michigan use tax.³ [MCL 205.52 and MCL 205.93; see also *Catalina Marketing Sales Corp, supra*] In October 2007, the Michigan Legislature temporarily expanded Michigan’s Use Tax Act to include the taxation of some services. (2007 PA 93, adding MCL 205.93d, attached hereto as **Appendix 2**) For example, Michigan’s temporary use tax applied to “travel and reservation services” [MCL 205.93d(1)(j)], “genealogical investigation services” [MCL 205.93d(1)(i)(xvii)], “landscaping services” [MCL 205.93d(1)(g)], “dating services” [MCL 205.93d(1)(i)(xiii)], and “fortune-telling services” [MCL 205.93d(1)(i)(xvi)]. (*Id.*) 2007 PA 93 did not distinguish between whether these services were performed in person on the Internet.

With opposition from consumers and the burden of formulating a new system for collecting use tax on intangible services, the use tax on services was repealed in December 2007,

³ The few services subject to Michigan use tax, identified under MCL 205.93a and MCL 205.93b, are not at issue in this case.

two months after it was enacted. (2007 PA 145) Absent another action by the Legislature, services are not subject to Michigan use tax.

“Travel and reservation services” are not taxable. Online travel and reservation services should also not be taxable. “Genealogical investigation services” are not taxable. Online genealogical investigation services should also not be taxable. “Landscaping services” are not taxable. Online landscaping services that provide remote landscaping consultation and services should also not be taxable. “Dating services” are not taxable. Online dating and matchmaking services should also not be taxable. “Fortune-telling services” are not taxable. Online fortune-telling services should also not be taxable. Legal informational services are not taxable. Online informational services, such as Checkpoint, should also not be taxable. Online services should be treated like any other in-person service not subject to Michigan use tax.

Although the Michigan Supreme Court has already recognized that “computer and informational services” are not subject to Michigan use tax in *Catalina*, the Department is trying to extend the imposition of use tax to online services by mischaracterizing them as including a delivery of prewritten computer software. (470 Mich at 20-21) By imposing use tax on services provided online, the Department will be improperly imposing use tax on Michigan businesses for online services when services in general are not taxable in Michigan.

In this case, the medium used to provide information – the software located in Minnesota powering Checkpoint’s services via the Internet – is insignificant to the information and research services being provided. Over 90% of Thomson Reuters’ budget for Checkpoint in 2012 was for the content of the information service, including editorial and operations costs, while less than 10% was for platform maintenance and development. (See Plaintiff-Appellant’s Brief on Appeal

(“Appellant’s Brief”), p. 4 and Exhibit 4, ¶ 14)⁴ This ratio emphasizes that Checkpoint is a service powered and facilitated by software.

The services nature of Checkpoint is demonstrated by the multiple services performed by Thomson Reuters’ editorial and production representatives that facilitate the availability of the topical, relevant and up-to-date information Checkpoint subscribers’ need, including but not limited to the following:

- Producing, creating, and writing content information (Appellant’s Brief, Ex. 5, p. 9; Ex. 6, p. 14; Ex. 6, p. 26);
- Acquiring content information (Appellant’s Brief, Ex. 5, p. 9);
- Arranging content into a proprietary format (Appellant’s Brief, Ex. 5, p. 9);
- Researching and studying the needs of customers (Appellant’s Brief, Ex. 5, p. 13);
- Following legal developments (Appellant’s Brief, Ex.6, p. 19);
- Determining how to share information about breaking legal developments with clients (such as “major legislation at a federal/state/local or international level”) (Appellant’s Brief, Ex. 6, p. 19); and
- Customizing the services offered online to the particular needs of the subscriber (for example, for a subscriber that focuses on estate planning, a sales representative of Thomson Reuters will focus the subscriber’s access to Checkpoint on estate planning information and products) (Appellant’s Brief, Ex. 6, p. 29)

These services facilitate Thomson Reuters’ ability to offer more information and services to subscribers than what was even possible through a CD-ROM product, such as OnPoint. “Checkpoint has far more content than OnPoint ever did – both editorial content, as well as primary source material.” (Appellant’s Brief, Ex. 6, p. 30) Checkpoint offers “opportunities that the CD-ROM product couldn’t.” (Appellant’s Brief, Ex. 6, p. 32) There are many more

⁴ “In general, there would have been a similar ratio during the Period at Issue.” (See Appellant’s Brief, p. 4 and Exhibit 4, ¶ 14)

“research features” available on Checkpoint. (Appellant’s Brief, Ex. 6, p.31) For example, for subscriber’s conducting state and local tax research, Checkpoint provides a service of offering “state-by-state comparisons”:

“[O]ne of the things we did was that we reorganized all of our state and local material so that it’s all arranged in the same sequence in every state, which means that, if you’re looking up an issue in one state, with one click, you can move to the same discussion about the same issue, even though the state may have a different name for it, you can move the same discussion, same issue in another state. . . We also did that so you could, with one click, go from the federal treatment to the state treatment. . . [W]e took that further and said, well, what if you’d like to see what that treatment would look like in chart form. You could actually extract that content, this happens dynamically, and then you’d see in chart form the way it looked. So . . . these are all part of the research process that people are doing, and we just made it a bit easier.” (Appellant’s Brief, Ex. 6, pp. 31-32)

The nature of Checkpoint as an information service is clear. There is no basis to impose use tax on a subscription to an online information service.

C. No Computer Software is “Delivered” to Subscribers Using Thomson Reuters’ Online Information Service.

Tangible personal property “can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses and includes electricity, water, gas, steam, and prewritten computer software.” [MCL 205.92(k)] Computer software is a “set of coded instructions designed to cause a computer or automatic data processing equipment to perform a task. [MCL 205.92b(c)] Computer software is only “prewritten computer software” (and therefore “tangible personal property”) if it is “delivered.” [MCL 205.92b(o)]

The Michigan Court of Appeals considered whether a traveler’s use of a hotel bed was subject to tax given the requirement of a transfer of tangible property: “Under no stretch of the imagination, or the language, can the use of a bed in a motel be defined as a transfer of ownership in a tangible property.” [*Bailey v Muskegon County Board of Commissioners*, 122 Mich App 808, 819; 333 NW2d 144 (1983)] The Court of Claims’ decision failed to find that

tangible personal property was delivered or transferred to the subscriber. Accordingly, the Court's conclusion that a subscription to an online information service is subject to Michigan use tax cannot be upheld.

There is no dispute that Thomson Reuters' servers, physically located in Minnesota, power Checkpoint. (See Appellant's Brief, pp. 7-8) Indeed, the Court of Claims determined that Thomson Reuters' "offsite server" contains prewritten computer software. (Tr., p. 24) The Court failed to follow up this factual determination – that there is prewritten computer software on Thomson Reuters' servers located in Minnesota – with the necessary determination that prewritten computer software was "delivered" to the subscriber in Michigan. The Court instead determined that only intangible "information was delivered" to Michigan. [See Tr., pp. 25, 26, 27]

Like other online services powered by software, subscribers never have "ownership" over the computer software that is powering the online service. [MCL 205.92b(o)] Because subscribers do not have "ownership" over the software that is powering the online service, a subscription to an online service is not a taxable "use." [MCL 205.92b(o) and MCL 205.92(b)] MCL 205.92(b) requires that only a "use" that is "the exercise of a right or power over tangible personal property incident to the *ownership* of that property including transfer of the property in a transaction where possession is given" is taxable. The availability of the service and information online does not equate to the service provider's prewritten computer software being "delivered." [MCL 205.92b(o)]

D. JavaScript is a “Red Herring”: JavaScript has No Relevance to the Court’s Determination of Whether Prewritten Computer Software is Delivered to a Subscriber when Accessing an Online Service.⁵

The Court of Claims was correct about JavaScript language: it is a “red herring.” (Tr., p. 24) JavaScript bears no relevance whatsoever to the determination of whether online services are subject to Michigan use tax. However, SIIA is compelled to address the issue of JavaScript herein, given the Department’s reference to JavaScript in its Brief on Appeal. The utilization of client-side JavaScript to interpret information from Checkpoint does not give the subscriber “ownership” rights over Checkpoint or the software in Minnesota used to power Checkpoint.

“JavaScript is a general-purpose programming language, and its use is not restricted to web browsers.”⁶ When a webpage is accessed, whether access to it is free or requires a subscription, a “language” within the user’s computer may be utilized in order for the webpage content to be visible and understandable to the user. In some cases, the language utilized by the user’s computer to interpret content is JavaScript:

JavaScript is most commonly used in web browsers, and, in that context, the general-purpose core is extended with objects that allow scripts to interact with the user, control the web browser, and alter the document content that appears within the web browser window. This embedded version of JavaScript runs scripts embedded within HTML web pages. It is commonly called *client-side* JavaScript to emphasize that scripts are run by the client computer rather than the web server.⁷

⁵ The Department’s auditor did not consider JavaScript when issuing the use tax assessment at issue. In defending the assessment through litigation, the Department should be limited to the auditor’s basis for the assessment. [*Montgomery Ward & Co v Dep’t of Treasury*, 191 Mich App 674, 682-84; 478 NW2d 745 (1991) and *Michiana Metronet, Inc v Dep’t of Treasury*, unpublished opinion per curiam of the Court of Appeals, Docket No. 306219 (November 8, 2012), attached hereto as **Appendix 3**] Accordingly, the Court of Appeals, like the Court of Claims, should disregard any discussion by the Department regarding the implication of client-side JavaScript language as a basis for the use tax assessment.

⁶ *JavaScript: The Definitive Guide*, Fifth Ed., Chapter 1, p. 9, David Flanagan.

⁷ *Id.*, Chapter 1, p. 1.

JavaScript is free to download and is used by many websites, applications and formats:

There are lots of applications and websites that will not work unless you have Java installed, and more are created every day. Java is fast, secure, and reliable. From laptops to datacenters, game consoles to scientific supercomputers, cell phones to the Internet, Java is everywhere!⁸

It functions as any other language interpreting remote information and content for the local user. JavaScript assists in client-side access to content from a webpage through “windows, menus, pop-ups, dialog boxes, text areas, anchors, frames, history, cookies, and input/output.”⁹ “The [JavaScript] language has stabilized and has been standardized by the European Computer Manufacturer’s Association, or ECMA. [The standard is ECMA-262, version 3 (available at <http://www.ecma-international.org/publications/files/ecma-st/ECMA-262.pdf>)].”¹⁰ JavaScript (also referred to as “ECMAScript”) language is never referred to as software in either the ECMA-262 Standard or Flanagan’s *JavaScript: The Definitive Guide, 5th Edition*.¹¹

Looking to other states, only New Jersey has considered whether client-side JavaScript language can give rise to “delivery” of software accessed online. Like Michigan, New Jersey requires that “computer software” be “delivered” in order to be subject to use tax. [N.J.S.A. 54:32B-2(g)] New Jersey determined that a user’s access to an online service through the utilization of client-side JavaScript was not a delivery of software to the user and was therefore not subject to use tax:

Taxpayer has developed an online tool intended for non-commercial, educational or entertainment purposes that enables users to create puzzles (such as “word

⁸ http://www.java.com/en/download/faq/whatis_java.xml.

⁹ ECMA-262 Standard, version 3, Section 4.1 (available at <http://www.ecma-international.org/publications/files/ecma-st/ECMA-262.pdf>).

¹⁰ *Id.*, Chapter 1, p. 3.

¹¹ *Id.*, Chapter 1, p. 3.

search” puzzles). The user provides input for the puzzles (including, for instance, which words should be included in the puzzles), and Taxpayer’s service transforms the user’s input into puzzles on Taxpayer’s servers, and then provides the finished puzzles back to the user as one or more downloadable PDF files.

From a technical perspective, the tool Taxpayer has developed contains portions of code that are executed on Taxpayer’s server, and portions that are executed on the client’s computer through the web browser (e.g., via HTML and JavaScript).

As the Division understands it, software as a service typically consist of the following:

- The seller fully owns and operates the software applications.
- The seller owns, operates and maintains the server that hosts the software.
- Customers access the software via the Internet. The software is not transferred to the customer, and the customer does not have the right to download, copy, or modify the software.

Web-hosted services where software is only accessed by the user, but not delivered or transferred to the user, are not subject to sales and use tax.

(See **Appendix 4**, New Jersey Letter Ruling 2012-4-SUT, 6/22/2012)

The widespread utilization of JavaScript by websites dispels a characterization that JavaScript language is connected exclusively to Checkpoint or any other online service.¹² JavaScript is even required for subscribers to access information on a website familiar to federal court practitioners and litigants, the Public Access to Court Electronic Records (“PACER”), available at www.pacer.gov.¹³

¹² JavaScript is such a widely utilized language that the Court could take judicial notice of its wide-spread use to access information from many websites. The Court of Appeals has taken judicial notice of information publicly available on a website. [See, for example, *In re Application of Indiana Michigan Power Co*, 275 Mich App 369, 371, fn 2; 738 NW2d 289 (2007)]

¹³ If a user does not have client-side JavaScript, instead of accessing information from PACER when the user logs on, the user will receive a message “This site requires JavaScript. Turn it on then refresh the page.” If the user has client-side JavaScript, the user will be able to access the information available at www.pacer.gov. (See **Appendix 5**)

PACER is an electronic public access service that allows users to obtain case and docket information from federal appellate, district and bankruptcy courts, and the PACER Case Locator via the Internet. PACER is provided by the federal Judiciary in keeping with its commitment to providing public access to court information via a centralized service.¹⁴

Information regarding federal court cases on PACER is available to anyone who registers for an account.¹⁵ The cost to access information on PACER is generally \$0.10 per page.¹⁶ In order to access information on PACER, the user must have JavaScript.¹⁷

Applying the Department's position to PACER, the Department would assert that because client-side JavaScript facilitates a Michigan resident's access to information and research services on PACER that the Federal Judiciary is *delivering its computer software* that is powering PACER to the Michigan resident. This example demonstrates the fallacy of the Department's argument that Thomson Reuters is delivering its computer software to Michigan residents because of client-side JavaScript. Furthermore, a decision finding that computer software is delivered through JavaScript would be onerous and burdensome to the residents of Michigan who would then be responsible for remitting use tax on their access to all online services that require a fee, including PACER.

The Department's emphasis on JavaScript is a weak attempt to infuse confusion into how online information services function. There is no "delivery" of computer software when a subscriber accesses information online through Checkpoint. If anything is delivered, it is intangible information and intangible services which are not subject to Michigan sales and use

¹⁴ See www.pacer.gov.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See footnote 13, *supra*.

tax. (MCL 205.52(1) and MCL 205.93(1); see also *Catalina Marketing Sales Corp*, 470 Mich at 20-21) In the absence of any evidence of a “delivery” of tangible personal property, the Court should reverse and remand to the Court of Claims for entry of an Order granting Thomson Reuters summary disposition under MCR 2.116(I)(2).

VI. ALTERNATIVELY, IF A SMALL COMPONENT OF A SUBSCRIPTION TO AN ONLINE INFORMATION SERVICE IS PREWRITTEN COMPUTER SOFTWARE DELIVERED TO SUBSCRIBERS IN MICHIGAN, THE SOFTWARE IS INCIDENTAL TO THE SERVICE PROVIDED, AND THE SUBSCRIPTION IS NOT SUBJECT TO MICHIGAN USE TAX.

For the reasons described above, access to an online service by a user in Michigan does not qualify as a delivery of prewritten computer software into Michigan. However, if the Court somehow determines that access to Checkpoint online involves a mixture of tangible personal property and intangible information and services, the Court should still find that the overall transaction is not taxable under the test described in *Catalina, supra*.

A. The Facts Involved in *Catalina* are Similar to the Facts in this Case.

In *Catalina*, the issue was whether the plaintiff’s Checkout Coupon TM program, which involved both the transfer of a tangible paper receipt and a provision of services, was a retail sale subject to sales tax under MCL 205.52. (*Catalina Marketing*, 470 Mich at 14) In *Catalina*, its “sophisticated targeted marketing distribution service” was powered by software. *Catalina* maintained ownership of the software powering the services related to the printing of the coupons. (*Catalina*, 470 Mich at 16) Interestingly, *Catalina*’s grocery store customers had physical possession of some of *Catalina*’s software that was used to power the services. (*Id.*) *Catalina*’s software physically located in the consumers’ stores served as a liaison between the consumers’ checkout registers and *Catalina*’s remote databases located in California – collecting

information locally to be analyzed remotely. [*Catalina*, 470 Mich at 15-16; see also *Catalina Marketing Corp v Dep't of Treasury*, MTT Docket No. 231398 (August 9, 1999)]

The Supreme Court determined that the transaction was a mixture of a sale of tangible personal property (the receipt) and “nontaxable computer and informational services.” (*Catalina*, 470 Mich at 20-21) The Court adopted the incidental to services test for determining whether tangible personal property is incidental to a nontaxable “intangible product” and/or a “nontaxable computer and information service”:

For purposes of determining whether a transaction falls within a sales tax statute, the court considers **whether the tangible personal property serves exclusively as the medium of transmission for an intangible product or service**; if the intangible component is the true object of the sale, the intangible object does not assume the taxable character of a tangible medium.

(*Catalina*, 470 Mich at 25-26, citing 68 A. Jur. 2d, Sales and Use Taxes, Sec. 52 pp. 51-52, emphasis added)

Although the Department did not make the argument in *Catalina* that Catalina’s customers were making a taxable use of Catalina’s computer software that was powering the services, the Supreme Court’s determination that any tangible personal property delivered was incidental to the services powered by Catalina’s software is directly on point to this case. Thomson Reuters, like Catalina, retained ownership of the hardware and software powering the online services. Thomson Reuters, like Catalina, used its own software to perform “nontaxable computer and informational services” to deliver a nontaxable “intangible product” – information. Thomson Reuters’ service, like Catalina’s, should not be subject to Michigan use tax.

B. Applying *Catalina*'s Incidental To Service Test, Thomson Reuters' Online Service is Not Subject to Michigan Use Tax.¹⁸

Under the *Catalina* “incidental to service” test, if the provision of nontaxable services is the object of the transaction, Michigan use tax does not apply, even if there is an incidental exchange of tangible personal property. The test looks objectively at the entire transaction to determine whether the transaction is primarily a transfer of tangible personal property or, alternatively, the provision of nontaxable services.

SIIA agrees with Thomson Reuters' discussion regarding how the application of the *Catalina* “incidental to service” test demonstrates that access to online services should not be subject to Michigan use tax. However, SIIA is uniquely able to speak from the viewpoint of its membership as “sellers of online services” and “subscribers to online services” as to whether the object of an online service is to deliver computer software or to perform a service, the first prong of the *Catalina* test.

As the Internet has developed into a ubiquitous part of modern life, many services that were previously performed by individuals in face-to-face or telephone meetings are now performed or facilitated by Internet websites. Travel agencies have largely been replaced by online travel and reservation services. Investigators assisting with family tree research have been replaced to a large extent by online genealogical investigation services. Matchmakers have been replaced to a large extent by online dating services. And legal research and analysis services that once were performed by attorneys, paralegals and librarians are increasingly performed by online legal research services like Checkpoint and its competitors.

¹⁸ The *Catalina* “incidental to service” test applies to both Michigan’s Sales Tax Act and Use Tax Act. [*HOV Services, Inc v Dep’t of Treasury*, unpublished opinion per curiam of the Michigan Court of Appeals, Docket No. 309575 (March 21, 2013), attached hereto as **Appendix 6**]

All of these online service providers, by definition, use software to power their websites. But that does not change the fundamental nature of the transaction: in each case, subscribers are seeking the service. The traveler is seeking travel and reservation services. Family members interested in learning about their family tree are seeking genealogical investigation services. Singles are seeking matchmaking services. Tax practitioners are seeking information and research services that once were performed in libraries and in books by paralegals and librarians when accessing Checkpoint. As demonstrated by affidavits submitted by Thomson Reuters, users of online services are not seeking software.¹⁹ They are seeking information and services. Under *Catalina*, access to online services should not be subject to Michigan use tax.

¹⁹ Affidavits containing facts relevant to the *Catalina* incidental to services are taken into consideration when analyzing the *Catalina* factors. In *Catalina*, the Michigan Supreme Court remanded the case to the Michigan Tax Tribunal to apply the incidental to services test to the facts in the record. On remand, the Tax Tribunal found that the Stipulation of Facts, which included the affidavits of the plaintiff's Treasurer and President/CEO, to be determinative in interpreting the six-factor test of *Catalina*. [MTT Docket No. 231397 (July 29, 2004)] The Tax Tribunal's decision was affirmed by the Michigan Supreme Court. (471 Mich 1209) [See also *HOV Services, Inc v Dep't of Treasury*, unpublished opinion per curiam of the Michigan Court of Appeals, Docket No. 309575 (March 21, 2013), attached hereto as **Appendix 6**]

VII. CONCLUSION

For the reasons stated herein, and for the reasons stated in Plaintiff-Appellant's Brief on Appeal, amicus curiae Software & Information Industry Association respectfully requests that the Court of Appeals reverse the Court of Claims' order granting the Department summary disposition and remand to the Court of Claims for entry of an order granting Plaintiff-Appellant summary disposition pursuant to MCR 2.116(I)(2), or in the alternative remand for a trial.

Respectfully submitted,

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