

BOARD OF TAX APPEALS
STATE OF LOUISIANA
LOCAL TAX DIVISION

APPLE INC.,
Petitioner
versus

DOCKET NO. L01283

ROMY S. SAMUEL, IN HER CAPACITY
AS COLLECTOR OF REVENUE OF THE
CITY OF NEW ORLEANS, DEPARTMENT
OF FINANCE, AND THE CITY OF NEW
ORLEANS, DEPARTMENT OF FINANCE,
IN ITS CAPACITY AS ORLEANS PARISH
TAX COLLECTOR,
Respondents

JUDGMENT
ON UNOPPOSED MOTION FOR PARTIAL SUMMARY JUDGMENT
WITH REASONS

On November 3, 2022, this matter came before the Board for hearing on the Motion for Partial Summary Judgment filed by Apple, Inc. ("Apple"). Presiding at the hearing was Local Tax Judge Cade R. Cole. Present before the Board were William M. Eackstrom, Jr. and Mark E. Nebergall¹ attorneys for Apple. Prior to the hearing, counsel for Romy S. Samuel, in her Capacity as Collector of Revenue of the City of New Orleans, Department of Finance, and the City of New Orleans, Department of Finance, in its Capacity as Orleans Parish Tax Collector ("Collector") notified the Board that it would not oppose, nor consent to, Apple's Motion for Partial Summary Judgment. Counsel for the Collector did not appear at the hearing. At the conclusion of the hearing, the Board took the matter under advisement. The Board now issues this Judgment in accordance with the attached written reasons:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Apple's Motion for Partial Summary Judgment is HEREBY GRANTED. For the Sales Tax periods January 1, 2016, through October 31, 2018, Apple's iCloud personal electronic storage capacity services are not subject to the City's French Quarter Economic

¹ Appearing *Pro Hac Vice*.

Development District sales/use tax. The Assessment appealed from, dated September 20, 2021, shall be reduced by \$135,580.00, being the undisputed amount of tax attributable to subscription fees Apple charged customers in the New Orleans for iCloud storage, and penalties interest shall be reduced accordingly as provided for by law.

This is not a final Judgment and does not constitute an appealable Judgment as contemplated by La. R.S. 47:1410 and La. R.S. 47:1434.

**Judgment Rendered and Signed at Baton Rouge, Louisiana on this
12th day of January, 2023.**

FOR THE BOARD:



LOCAL TAX JUDGE CADE R. COLE

BOARD OF TAX APPEALS
STATE OF LOUISIANA
LOCAL TAX DIVISION

APPLE INC.,
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CITY OF NEW ORLEANS, DEPARTMENT
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REASONS FOR JUDGMENT
ON UNOPPOSED MOTION FOR PARTIAL SUMMARY JUDGMENT

On November 3, 2022, this matter came before the Board for hearing on the Motion for Partial Summary Judgment filed by Apple, Inc. (“Apple”). Presiding at the hearing was Local Tax Judge Cade R. Cole. Present before the Board were William M. Eackstrom, Jr. and Mark E. Nebergall² attorneys for Apple. Prior to the hearing, counsel for Romy S. Samuel, in her Capacity as Collector of Revenue of the City of New Orleans, Department of Finance, and the City of New Orleans, Department of Finance, in its Capacity as Orleans Parish Tax Collector (“Collector”) notified the Board that it would not oppose, nor consent to, Apple’s Motion for Partial Summary Judgment. Counsel for the Collector did not appear at the hearing. At the conclusion of the hearing, the Board took the matter under advisement. The Board now issues Judgment for the following reasons:

Background:

For purposes of this Motion for Partial Summary Judgment, the following facts asserted by Taxpayer are undisputed. Apple is a California company that designs, manufactures, and markets consumer electronics, software and personal computers. Apple was established in 1977, and its most popular consumer electronics products

² Appearing *Pro Hac Vice*.

include the Mac line of computers, the iPad tablet computer and the iPhone smartphone (collectively, the "Apple devices"). Apple sells its products worldwide through its online stores, its retail stores, its direct sales force and third-party wholesalers, resellers and value-added resellers. Apple also operates certain online storefronts including the iTunes Store, App Store, Mac App Store, TV App Store, Book Store and Apple Music. Apple's customers include individual consumers. During the Sales Tax periods January 1, 2016 through October 31, 2018 (the "Audit Periods"), Apple had customers in the City of New Orleans/Orleans Parish (the "City").

In 2003, Apple began offering digital content with its release of the iTunes Store, which allowed users to purchase and download songs. In 2008 and coinciding with the launch of Apple's first iPhone, Apple opened the iPhone App Store to expand its downloadable content to include apps. In 2010, Apple announced the launch of the iBookstore, which allows users to purchase and download eBooks. Apple Music launched on June 30, 2015, and is Apple's first subscription based service, which, among other features, allows for the streaming of audio content to an Apple device.

During the Audit Periods, Petitioner also offered a remote personal electronic storage capacity service called "iCloud." iCloud software and functionality were preloaded on every Apple device sold during the Audit Periods. iCloud allows a user, via an internet connection, to upload their personal digital content, such as photos, videos and music, to Apple's remote servers and access their personal digital content from any of their Apple devices or other devices connected to the internet.

Apple imposes no charge for the use of iCloud; however, if the subscriber wants to store more than 5 gigabytes of personal digital content, the subscriber must pay a monthly subscription fee for a storage plan ranging from 99 cents per month for up to 50 gigabytes of storage to \$9.99 per month for up to two terabytes of storage. No additional software is provided to a subscriber when the subscriber executes a subscription for increased storage on iCloud.

Respondent conducted an audit of Apple's Sales Tax returns for the Audit Periods. As a result of the Audit, on September 20, 2021, the Collector issued a Notice of Assessment to Apple for a total amount of \$419,313.00 of City Sales Tax and French Quarter Economic Development District ("FQEDD") sales/use tax (the "Assessment"). According to the Assessment, the Collector generally seeks to impose Sales Tax on subscription fees received by Apple for iCloud storage subscriptions. Of the total amount allegedly due, \$135,580.00, exclusive of interest and penalties, is attributable to City Sales Tax on subscription fees Apple charged customers in the City for iCloud storage during the Audit Periods.

Summary Judgment Standard:

A motion for summary judgment will 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 material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B); *Beteta v. City of New Orleans*, 06-0972 (La. App. 4 Cir. 1110/07), 950 So.2d 862, 865. A party is permitted move for a summary judgment on a part of the relief prayed for. La. C.C.P. art. 966(A)(1). Partial summary judgment may be granted as to a particular issue, theory of recovery, cause of action, defense, or party, even though the grant of partial summary judgment does not dispose of the entire case as to that party or parties. La. C.C.P. art. 966(E). Furthermore, partial summary judgment may be rendered only with respect to the issues presented in the motion under consideration at that time. La. C.C.P. art. 966(F).

The party moving for summary judgment bears the burden of proving that no genuine issue of material fact exists. La. C.C.P. art. 966(D)(1). A material fact is one that ensures or precludes recovery, bears on a party's ultimate success, or is determinative of the legal dispute. *Hines v. Garrett*, 04-0803, p. 1 (La. 6/25/04), 876 So.2d 764, 765. A genuine issue is one upon which reasonable persons could disagree. *Larson v. XYZ Ins. Co.*, 16-0745, pp. 6-7 (La. 5/3/ 17), 226 So.3d 412, 416.

Discussion:

Apple argues that sales of iCloud subscriptions are sales of “Internet Access” as defined in the Internet Tax Freedom Act (“ITFA”). The ITFA generally imposes a moratorium on states and their political subdivisions from taxing Internet Access. ITFA §1101. Effective November 1, 2007, Congress expanded the ITFA’s definition of Internet Access to include: “a homepage, electronic mail and instant messaging (including voice- and video-capable electronic mail and instant messaging), video clips, and personal electronic storage capacity, that are provided independently or not packaged with Internet access.” ITFA §1105(5)(E). Apple contends that its iCloud service meets the definition of Internet Access under the ITFA because it provides storage plan subscribers with “personal electronic storage capacity.” The Collector has not filed an opposition to Apple’s Motion for Partial Summary Judgment.

The language at issue has been considered only in passing in the decisions of other states. In *J2 Cloud Servs., Inc. (f/k/a J2 Glob., Inc. & J2 Glob. Commc’ns, Inc.) v. Comm’r of Revenue*, Docket No. C325426, 2019 WL 1102964, at *7 (Mass. App. Tax. Bd. Feb. 27, 2019), the Massachusetts Appellate Tax Board rejected an argument based on that language as applied to an eFax service. However, the tribunal bypassed any discussion of the definition of this language by holding that any purported personal electronic storage capacity services were “not provided independently and certainly not accounted for independently, but rather packaged as an additional feature to the eFax service.” *Id.* at *17.

The Board interprets the law in accordance with the plain meaning of the text of the statute at issue. *Niz-Chavez v. Garland*, 209 L.Ed.2d 453; 141 S.Ct. 1474, 1480 (2021); *David v. Our Lady of the Lake Hosp., Inc.*, 2002-2675, p. 11 (La. 7/2/03), 849 So.2d 38. Dictionaries inform the plain meaning of language and are a valuable source for determining the “common and approved usage” of words not otherwise defined in statute. *United States v. Radley*, 632 F.3d 177, 182 (5th Cir. 2011); *Gregor v. Argenot Great Cent. Ins. Co.*, 02-1138, p. 7 (La.5/20/03), 851 So.2d 959, 964.

Merriam Webster's Dictionary defines the language at issue in relevant part as follows: personal means "of, relating to, or affecting a particular person," or "of, relating to, or constituting personal property"³; electronic means "implemented on or by means of a computer," and "involving a computer" or "of, relating to, or being a medium (such as television) by which information is transmitted electronically"⁴; storage means a "space or a place for storing"⁵; capacity means "the potential or suitability for holding, storing, or accommodating."⁶

The transactions at issue fit within the ordinary meaning of the language employed. iCloud is provided to individual customers for their personal use in storing and retrieving their data. Data is accessed on a computer or other electronic device through the internet. iCloud provides a space for the data to be stored. iCloud has a capacity for holding and storing data. There is nothing in the plain text of statute that is irreconcilable with iCloud as it is described in the undisputed facts of this case. Apple's prayer for partial summary judgment based on the ITFA is supported by the uncontested facts and the plain language of the statute. Therefore, Apple is entitled to partial summary judgment as prayed for.

The Board notes the following additional grounds for granting Apple's Motion for Partial Summary Judgment. In this case, the City did not oppose the affidavit defining the iCloud storage as a service. Services are generally not taxable under Louisiana law, except for the specifically enumerated taxable services in La. R.S. 47:301(14). Personal electronic storage services are not one of the listed taxable services. Thus, under the uncontested facts as presented in this case, personal electronic storage services would be considered non-taxable services.

³ <https://www.merriam-webster.com/dictionary/personal>.
⁴ <https://www.merriam-webster.com/dictionary/electronic>.
⁵ <https://www.merriam-webster.com/dictionary/storage>.
⁶ <https://www.merriam-webster.com/dictionary/capacity>.

Judgment Rendered and Signed at Baton Rouge, Louisiana on this
12th day of January, 2023.

FOR THE BOARD:

A handwritten signature in blue ink, appearing to read "Cade R. Cole", written over a horizontal line.

LOCAL TAX JUDGE CADE R. COLE