STATE OF WISCONSIN

TAX APPEALS COMMISSION

MICROSOFT CORPORATION, DOCKET NO. 13-I-042

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DECISION AND ORDER

LORNA HEMP BOLL, CHAIR:

This case comes before the Commission for decision following a trial held on June 27-29 and July 7, 2016, in Madison, Wisconsin. The Petitioner, Microsoft Corporation ("Microsoft"), was represented at trial by Attorneys Daniel H. Schlueter and Jeffrey A. Friedman, of Eversheds Sutherland (US) LLP (formerly Sutherland, Asbill & Brennan, LLP), Washington, D.C., and by Attorney Timothy G. Schally, of Michael, Best & Friedrich, LLP, Milwaukee, Wisconsin. The Respondent, the Wisconsin Department of Revenue ("the Department"), was represented by Attorneys Mark S. Zimmer and Kelly A. Altschul.

The central issue in this case concerns the proper legal measure of Microsoft's Wisconsin sales for income and franchise tax apportionment purposes. The parties have agreed to the specific dollar amounts attributable to Wisconsin depending

upon the Commission's decision on the applicable law. Pursuant to the Commission's post-trial briefing schedule, both parties have filed post-trial submissions.

FINDINGS OF FACT

Jurisdictional Facts

1. Microsoft is a corporation, organized and existing under the laws of the State of Washington, with its headquarters in the State of Washington. (Pre-trial Stipulations filed June 27, 2016 ("Stip."), ¶ 1.)

2. For the tax years June 30, 2006 through June 30, 2009 ("years at issue"), Microsoft filed timely Wisconsin Corporate Franchise Tax Returns. (Stip. ¶ 2.)

3. On April 1, 2011, the Department issued a Notice of Field Audit Action ("Assessment"), which assessed additional corporate franchise tax for the years at issue with interest in an aggregate amount of more than $9 million. (Stip. ¶ 3; R. Ex. 1.)

4. In the Assessment, the Department made several adjustments to Microsoft's as-filed tax returns, including an adjustment to the sales factor of Microsoft's Wisconsin apportionment formula. The adjustment addressed certain of Microsoft's receipts from original equipment manufacturers ("OEMs"). (Stip. ¶ 5.)

5. On May 27, 2011, Microsoft timely filed a Petition for Redetermination, protesting numerous adjustments including the OEM adjustment. (Stip. ¶ 6; R. Ex. 2.)

6. On December 18, 2012, the Department issued a Notice of Action granting in part and denying in part Microsoft's Petition for Redetermination and

reducing the assessment to $2,882,359.42, comprised of $1,513,738.42 of additional tax and $1,368,621 of interest. (Stip. ¶ 7; R. Ex. 3.)

7. On February 15, 2012, Microsoft timely filed a Petition for Review with the Wisconsin Tax Appeals Commission, contesting the revised OEM adjustment. (Stip. ¶ 8; R. Ex. 4.)

8. On or about February 26, 2013, Microsoft deposited the entire amount of the deficiency asserted in the December 18, 2012 Notice of Action, plus interest, with the Department. (Stip. ¶ 9.)

9. The case was tried on June 27-29 and July 7, 2016, before Chair Lorna Hemp Boll of the Wisconsin Tax Appeals Commission.

Material Facts

10. During the years at issue, Microsoft was engaged in the business of developing, licensing, manufacturing, and distributing computer software and providing computer software-related services.

11. During the years at issue, Microsoft entered into licensing agreements with original equipment manufacturers (OEMs).

12. OEMs are companies which assemble computers and computer systems for sales to retailers and/or to end-users. (Prime examples are Dell or Hewlett Packard, both of which are significant customers of Microsoft.) The OEMs acquire computer equipment or components from various vendors and combine them with software (e.g., Microsoft Office) into a single product, such as a desktop or laptop computer (generically "computer" or "laptop").

13. OEMs determine how they want their computer configured, including what software to include, based on the market segment that the OEM is targeting. OEMs typically sell their computers with a variety of hardware and pre-loaded software from different vendors.

14. OEMs decide how much to charge for their computers. The total price charged by the OEM includes whatever amount the OEM determines is appropriate for the entire computer, including any preinstalled software. Microsoft does not participate in OEM pricing for the assembled product.

15. During the years at issue, Microsoft Licensing, GP, a general partnership of which Microsoft was the general partner, entered into license agreements with hundreds of OEMs, including such large companies as Dell and Hewlett-Packard. Microsoft also had license agreements with a handful of OEMs that were located in Wisconsin, but most OEMs were located in other states, particularly the larger OEMs which were responsible for the vast majority of Microsoft's OEM revenues.

16. The OEM License Agreement generally granted an OEM three specific intellectual property rights with respect to Microsoft's software: (1) the right to make a copy of Microsoft software to preinstall it on its computer; (2) the right to make a copy of Microsoft software to create recovery media for backup purposes; and (3) the right to distribute the Microsoft software that has been preinstalled on the computers to its customers under the terms of the End User License Agreement or EULA. The licensing agreement did not include the right to make derivative works, the right to modify the software, or the general right to copy at will.

17. Under the licensing agreements, the OEM acquired the right to replicate and install Microsoft software into its products by one of two methods. With the first method, Microsoft supplied the OEM with a physical "Golden Disk" which the OEM used to copy the proprietary software onto the hard drives of the products the OEM assembled. With the second method, a third-party provided "back-up disks" which were bundled with the OEMs' products.

18. Under the licensing agreements, Microsoft received royalty payments from the OEMs. Such payments were calculated either on a per system or per copy basis.

19. Under the per system basis, the OEM would designate a specific computer model to include particular Microsoft software, such as Microsoft Windows and/or Microsoft Office. Royalty payments to Microsoft were calculated as a function of the number of computers of that particular model the OEM assembled/manufactured, regardless of whether the Microsoft software was ever actually loaded on the computer or whether any or all of that model of computer were ever actually sold.

20. Under the per copy basis, the OEM paid Microsoft royalties for the number of copies it made of the software for its computers, regardless of whether those computers were ever actually sold.

21. Some versions of the OEM License Agreements required the OEM to pay a "Minimum Commitment" royalty in exchange for discounted pricing. The OEM was responsible for the Minimum Commitment royalty regardless of how many copies the OEM installed.

22. Royalties due to Microsoft from the OEMs under the license agreements were not tied in any way to the price for which the OEM sold the PC.

23. Once the computers were assembled with the Microsoft software installed, the OEMs sold them either directly to end-users or to retailers, such as Best Buy, who in turn sold them to end-users.

24. The OEMs were responsible for servicing the computers they assembled and sold. If the customer of an OEM contacted Microsoft regarding product support, Microsoft would direct the OEM's customer to contact the OEM for product support. The OEMs were responsible for warrantying the computers they sold, including the software contained on them.

25. In order to access the software on the computer, the end-user needed to agree to the terms of an End User License Agreement ("EULA").

26. The EULA was drafted by Microsoft, providing uniformity across all uses of its software. The OEMs did not participate in the drafting of the EULA and could not alter it.

27. Microsoft was not, however, a party to the EULA. By its terms, the EULA was an agreement between the OEM and the end-user of the software.

28. During the years at issue, Microsoft's OEM business was run primarily out of two locations - Redmond, Washington and Reno, Nevada. Microsoft's corporate sales, marketing, policy, legal and engineering teams that support its OEM business were located in Redmond, Washington. Microsoft's OEM operations departments, including the teams that managed the OEM license agreements, handled

OEM invoicing, coordinated with OEMs regarding product launches, and provided technical support to the OEMs, were located in Reno, Nevada.

29. During the years at issue, the vast majority of Microsoft's research and development ("R&D") employees who engaged in activities necessary to the creation of Microsoft's copyrighted software were located in the State of Washington.

30. During the years at issue, Microsoft employed approximately 24,000 people in the United States.

31. During the years at issue, Microsoft did not have a significant physical presence in the State of Wisconsin. There were no Microsoft employees who worked in Microsoft's OEM business located in Wisconsin, and there were no R&D employees located in Wisconsin who worked in any capacity related to the OEM business.

32. In 2006 and 2007, Microsoft had no R&D employees in Wisconsin. In 2008, Microsoft had 20 R&D employees in Wisconsin, none of whom worked in any capacity related to the OEM business. In 2009, Microsoft had 60 R&D employees in Wisconsin, none of whom worked in any capacity related to the OEM business.

33. With respect to Microsoft's OEM receipts, DOR's assessment is based upon a premise that the royalties from the OEMs should be sourced to Wisconsin to the extent an OEM (wherever located) sold a computer to a customer located in Wisconsin. Because Microsoft did not know the location of the OEMs' customers, the

Department estimated the Wisconsin sales by OEMs to their customers using a population percentage computation.[1]

34. During the years at issue, Microsoft operated as a single unitary business for the purposes of tax reporting in Wisconsin.[2] The aspect of apportionment at issue is the amount of sales attributable to Wisconsin during the years at issue. The remaining pieces of the equation are agreed to by the parties and are not at issue in the case before the Commission.

35. Microsoft concedes that it had some licensing agreements with OEMs in Wisconsin, such as Milwaukee PC. The parties have agreed to the amount of receipts attributable to the licensing agreements with Wisconsin OEMs.

36. The vast majority of the Microsoft receipts at issue in this case come from licensing agreements with OEMs who have no presence in Wisconsin. The transactions between Microsoft and those out-of-state OEMs did not occur in Wisconsin.

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[1] The Department initially assigned a percentage of Microsoft's world-wide sales to Wisconsin. That percentage was subsequently adjusted to reflect Wisconsin sales as a percentage of U.S. sales as measured by population.

[2] During the years at issue, Wisconsin employed varying forms of the standard apportionment formula for allocation of income to determine the corporation's net income derived from or attributable to sources within Wisconsin. The forms varied as Wisconsin changed the weightings of the three factors over the years at issue as it migrated from a three-factor apportionment formula to a single sales factor. Regardless of the weightings of the various factors, the parties only disagree on the composition of the numerator of the sales factor.

ISSUE

The issue in this case is whether the royalties paid by OEMs located outside of Wisconsin to Microsoft are treated as Wisconsin sales for purposes of Microsoft's Wisconsin sales factor pursuant to Wis. Stat. § 71.25(9).[3]

The Department's Position

The Department takes the position that Wis. Stat. § 71.25(9)(df) applies and that the royalties Microsoft received should be sourced to Wisconsin as gross receipts from the use of computer software. The Department reasons that, although the OEMs in question do not have a presence in Wisconsin, a significant percentage of the end-users to whom they sell the software licenses, as part of the sale of computers, are located in Wisconsin.

> [The] end user pays the OEM for the hardware and the right to use Microsoft software. The OEM passes on a royalty for that right of use to Microsoft. The royalties received by Microsoft from the OEMs are for the rights of the end user to use the software. Accordingly, those royalties are "gross receipts from the use of computer software," and if end users use that software in Wisconsin, the royalties attributed to those users should be apportioned to Wisconsin in accordance with the plain language of the statute.

(Dep't Pre-Trial Memo.)

Petitioner's Position

The Petitioner takes the position that Wis. Stat. § 71.25(9)(df) does not apply because Microsoft's gross receipts are not from the use of computer software in Wisconsin

[3] Although there are some includable royalties for smaller OEMs located in Wisconsin, the dispute in this case concerns the larger out-of-state OEMs with whom Microsoft has no income-producing activity in Wisconsin.

as those terms are used in the statute. Instead, Petitioner believes that Wis. Stat. § 71.25(9)(d), which addresses the sale of intangibles, applies to the royalty payments Microsoft receives from the OEMs. Because the income-producing activity of Microsoft which generates these royalties from the out-of-state OEMs is not performed in this state, Petitioner argues that the royalties are not includable in the numerator of the sales factor.

RELEVANT STATUTES[4]

Wis. Stat. § 71.25(9)(d):

> Except as provided in pars. (df) [relating to software, see below] and (dh) [relating to services, not relevant here], sales, other than sales of tangible personal property, are in this state if the income-producing activity is performed in this state. If the income-producing activity is performed both in and outside this state the sales shall be divided between those states having jurisdiction to tax such business in proportion to the direct costs of performance incurred in each such state in rendering this service.

Wis. Stat. § 71.25(9)(df):

1. Gross receipts from the use of computer software are in this state if the purchaser or licensee uses the computer software at a location in this state.
2. Computer software is used at a location in this state if the purchaser or licensee uses the computer software in the regular course of business operations in this state, for personal use in this state, or if the purchaser or licensee is an individual whose domicile is in this state. If the purchaser or licensee uses the computer software in more than one state, the gross receipts shall be divided among those states having jurisdiction to impose an income tax on the taxpayer in proportion to the use of the computer software in those states. To determine computer software use in this state, the department may consider the number of users in each state where the computer software is used, the number of site licenses or workstations in this state,

[4] References are to the 2007-08 statutes.

and any other factors that reflect the use of computer software in this state.

3. If the taxpayer is not subject to income tax in the state in which the gross receipts are considered received under this paragraph, but the taxpayer's commercial domicile is in this state, 50 percent of those gross receipts shall be included in the numerator of the sales factor.

ANALYSIS

In matters before the Commission, the Petitioner carries the burden to prove that the Department's determination is incorrect. "Assessments made by the Department are presumed to be correct, and the burden is upon the Petitioner to prove by clear and satisfactory evidence in what respects the Department erred in its determination." *Puissant v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984). We find that the Department's application of Wis. Stat. § 71.25(9)(df) to these facts is incorrect and therefore grant the Petitioner's Petition.

Section 71.25 of the Wisconsin Statutes addresses situs of income and how to allocate and apportion that income for the purpose of Wisconsin income and franchise taxation. During the years at issue, for companies doing business in more than one state, including Wisconsin, Wisconsin's apportionment method included three factors; Wisconsin's current method consists only of a sales factor. Regardless of the method, old or new, the parties' dispute concerns the sales factor only. The sales factor is a fraction, the numerator of which is the taxpayer's sales sourced to Wisconsin and the denominator of which is the taxpayer's sales everywhere.[5] The parties strongly disagree on the

[5] See footnote 1.

sourcing of Microsoft's receipts from the licensing of software to OEMs located outside of Wisconsin and, therefore, the measure of sales properly included in the numerator of Microsoft's Wisconsin sales factor.

This is a case of statutory interpretation, so we begin with the language of the statutes in question. Statutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110. When interpreting a statute, we assume that the legislature's intent is expressed in the statutory language. *Id.*

The sales factor is outlined in subsection 71.25(9). The parties agree that the sales in question are not of tangible property. Specifically, Wis. Stat. § 71.25(9)(d), addresses sales of "other than tangible property." Subsection (d), which describes intangible sales in this state, begins with the language, "except as provided in pars. (df) and (dh)."[6] Thus, the first question is, does subsection (df) apply? We find that it does not.

> Wis. Stat. § 71.25(9)(df):
>
> 1. Gross receipts from the use of computer software are in this state if the purchaser or licensee uses the computer software at a location in this state.
> 2. Computer software is used at a location in this state if the purchaser or licensee uses the computer software in the regular course of business operations in this state, for personal use in this state, or if the purchaser or licensee is an individual whose domicile is in this state . . . .

[6] Subsection (dh) concerns services and therefore is not relevant to this discussion.

Receipts are included in the numerator of the sales factor if they are "gross receipts from the use of computer software" in Wisconsin. The receipts in question in this case are received from the OEMs, who purchase the software licenses from Microsoft. The parties stipulated, and we agree, that those OEMs do not "use" the software, as anyone would understand the "use" of software. The OEMs are not creating documents or running spreadsheets.

In simple terms, Microsoft sells licenses to software which allow the OEMs (e.g., Dell, HP, or smaller computer builders like Milwaukee PC) to replicate Microsoft software onto some but not necessarily all of the computers they build. The OEMs in turn may or may not sell the computers to end-users, and they may or may not sell them to retail customers (e.g., computer stores such as Best Buy) who may or may not place the computers on the market for sale to that re-seller's own customers.

The OEMs are Microsoft's customers; that is, they are *the* purchasers/licensees of software from Microsoft. All agree the OEMs do not use the software; thus, they do not use the software in Wisconsin or anywhere. The OEMs construct computers on which they load the Microsoft software.[7] At some later point, if and when those computers are sold, the computers and the software they contain may be used by the OEMs' customers (end-users) or perhaps by the OEMs' customers' customers (e.g., in the case in which the computer is sold by a retailer to the retailer's customers).

[7] For simplicity, the term "software" is used to encompass Microsoft Office products as well as the operating systems.

These end-users do not purchase software and software licenses from, and are not the customers of, Microsoft.

Ignoring the source of the gross receipts, the Department shifts the focus to the statutory requirement that the receipts be from the use of the computer software and argues that it need not be the OEMs who use the software. Instead, the Department argues for us to look past the OEMs to the sub-licensees, i.e., the end-users of the software. Thus, there was extensive testimony about the practicality of tracing the computer software to the end-users of the software. Even if the obvious logistic difficulties could be overcome, we note that Microsoft's gross receipts were not a function of use by actual end-users. The trial testimony indicated that OEMs paid Microsoft either 1) based on the number of copies the OEMs loaded onto laptops, or 2) per system (laptop model) on which they were authorized to load the software. Under the first scenario, the OEM owed the payment even if it did not sell the laptop to anyone. Under the latter payment method, the OEM owed the payment even if it did not even load the software onto all the laptops in that particular system, nor did it matter whether they necessarily sold the laptops. Thus, the payments were due regardless of whether the software was ever used by an end-user.[8]

The Department offers a further argument, asserting that subsection 71.25(9)(df) was created to carve all computer software out of the general language

[8] For the reasons set forth in *Sketchers USA, Inc. II v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-978 (WTAC 2015), discussed below, we further decline to look to the ultimate end-user of the software after the computers have traveled through the supply chain.

referring to sales of intangibles. We do not find the statutory sections to be ambiguous; therefore, it is not our role to attempt to divine the unwritten intentions of the legislature. The *Kalal* court was clear on this point: "We have stated time and again that courts must presume that the legislature says in a statute what it means and means in a statute what it says there." *Kalal* at ¶ 39.

For the reasons discussed above, we find that Wis. Stat. § 71.25(9)(df) does not apply. Instead, we find that Microsoft's receipts from sales to OEMs under copyright license agreements are sales "other than sales of tangible personal property" to which Wis. Stat. § 71.25(9)(d) applies. Microsoft's OEM customers buy a bundle of rights which includes the ability to copy and sublicense the software; these rights are intangibles for which Microsoft's OEM customers pay what can be classified as royalties.

Subsection (9)(d) directs that Microsoft's gross receipts from sales of Microsoft software to OEMs be sourced to Wisconsin only if income producing-activity occurs in this state.

The Department's arguments on this point are similar to those set forth in *Sketchers USA, Inc. II v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ ¶401-978, (WTAC 2015). In *Sketchers*, the taxpayer ("SKII") owned and engaged in the sale of licensed intellectual property ("IP") in the form of Skechers' branding. SKII sold the licensing rights to the Sketchers shoe manufacturer. Sketchers then incorporated the branding into the footwear products it sold. The issue was whether the taxpayer had income-producing activity in Wisconsin. This Commission analyzed the situation and concluded as follows:

> The Department's own long-standing rule at the time stated that "income-producing activity" means "the act or acts directly engaged in *by the taxpayer* for the ultimate purpose of obtaining gains or profit." Wis. Admin. Code § Tax 2.39(6) (emphasis supplied). The activity directly engaged in by SKII during the Period was the licensing of the Domestic IP. SKII did not sell shoes – Skechers did. The purchasers of Skecher's shoes are customers of Skechers, not SKII. The sale of shoes by Skechers in Wisconsin and elsewhere during the Period, while providing the measure of the royalties payable to SKII, is simply not an activity directly engaged in by SKII. To the extent the design, development, and marketing activities of SKII may have aided in Skechers' sales, those activities took place outside the state. Consequently, we conclude that SKII engaged in no income-producing activities in Wisconsin during the Period and that its Wisconsin sales factor is therefore zero.

Id.

Similarly, the activity directly engaged in by Microsoft during the years at issue was the licensing to OEMs of the rights to copy, install, and sublicense the software. That software was incorporated into computers assembled and sold by the OEMs. Microsoft does not sell the computers in question – the OEMs do. The purchasers of the OEMs' computers are customers of the OEMs or customers of the OEMs' customers; they are not customers of Microsoft. The sales by the OEMs of computers containing Microsoft software to end-users or to retailers in Wisconsin and elsewhere are not even an accurate measure of the royalties payable to Microsoft by the OEMs as were the royalties in *Sketchers*, since the royalties were owed regardless of sales activity. Although the sales of these computers assembled by the OEMs included a sublicense to allow the end-user to use the Microsoft software, the sale of the computers is simply not an activity directly engaged in by Microsoft. To the extent the Microsoft software may have aided in the

OEMs' sales, those activities took place outside this state. Consequently, we conclude that, with respect to the sales and licensing of Microsoft software to OEMs located outside of Wisconsin, Microsoft engaged in no income-producing activities in Wisconsin. Thus, no portion of the receipts from those sales is includable in the numerator of Microsoft's Wisconsin sales factor.

We find instead that Microsoft's gross receipts consist of inflows from its own sales to its OEM customers.[9] While Microsoft has smaller Wisconsin-based OEM customers, the Commission has been asked to rule regarding the receipts from the larger OEMs with no Wisconsin presence or activity.[10] Because Wis. Stat. § 71.25(9)(d) is the proper statutory section and because Microsoft had no income-producing activity in Wisconsin with respect to the out-of-state OEMs in question, the royalties from those OEMs are not included in the sales factor of the apportionment formula.

The Department offers several additional arguments. At one point, it argues that the right the OEMs buy to install the software is worthless without the accompanying right for the end-user to use the software. The Department focuses on the end use as the only important aspect of the bundle of rights purchased by the OEM. This is untrue. One could similarly argue the reverse – that, if the OEMs did not have the right

[9] It is telling that the language of the statute refers to "the" customer rather than "a" or any customer. In light of this wording and the reasoning in *Sketchers*, we are comfortable reading "the" customer as referencing the particular customers from whom the receipts are received.

[10] Specific OEM nexus determinations are not for this Commission as the parties have sufficiently stipulated to the income-producing activity and associated specific dollar amounts attributable to Wisconsin depending upon the Commission's legal conclusions.

to install the software, the end-user's sublicense would be worthless since there would be nothing for them to use.

The Department continues to focus on the end-user's use of the software. We also reject any inference that the term "use" as employed in Wis. Stat. § 71.25(9)(df) extends to a third party's use of the software somewhere down the supply chain. The statute refers to the licensee or purchaser; the language does not encompass sublicensees or subsequent purchasers.

The Department also argues that we must look through the OEMs to the end-users based on an agency theory. The Department maintains that the OEMs sublicense the software to end-users on Microsoft's behalf, arguing, "The OEMs have no independent right to grant such a license to Microsoft's software without Microsoft's authorization." This is patently untrue; Microsoft has no say in whether or to whom an OEM sells a computer and its accompanying software licenses. There was considerable testimony concerning the sublicense language in the EULA to which the end-user must agree in order to use the software. We accept that the agreements were drafted by Microsoft; however, witnesses testified for the need and desire for uniformity, which is understandable for software used the world over. We also note that the EULA itself states Microsoft is not a party. The OEMs decide what components to incorporate into their computer products, they choose the relevant market, and they determine pricing and other aspects of sale. The OEMs are not agents of Microsoft and/or the suppliers of the many other the components which are incorporated into their computers.

Again, we reject the Department's contention that the royalties received by Microsoft from the OEMs are for the rights of the end-user to use the software. There is no such direct relationship. Microsoft's receipts are in exchange for the rights to copy, install, and perhaps sublicense the software, should the computer at some point be sold to an end-user. We do not look through to some other sale; Microsoft's receipts are not measured by the sales of its customers or its customer's customers. Moreover, we do not view the OEMs as agents of Microsoft but as actors in their own right.

CONCLUSIONS OF LAW

1. The OEMs are the purchasers or licensees of Microsoft's software; they do not use the computer software in question as described under 71.25(9)(df).

2. Microsoft's gross receipts from OEMs from sales of the rights to copy, install, and sublicense software under copyright license agreements are not "gross receipts from the use of computer software" as that language is used in Wis. Stat. § 71.25(9)(df).

3. Wisconsin Statute § 71.25(9)(df) does not apply to the apportionment of Microsoft's receipts from the sale of the intangible rights to copy, install, and sublicense the software.

4. Wisconsin Statute § 71.25(9)(d) does apply to the apportionment of the receipts from the sale of these intangible rights.

5. Pursuant to Wis. Stat. § 71.25(9)(d), only receipts from sales to OEM customers which involve income-producing activities in this state on the part of the taxpayer are to be included in the sales factor. Microsoft did not have any income-

producing activities or direct costs of performance in Wisconsin related to the royalties Microsoft received from non-Wisconsin-based OEMs.

ORDER

Based upon the foregoing, the Commission grants the Petitioner's Petition, ruling as a matter of law that the sales factor in this case does not include receipts from sales to OEM customers where no-income producing activity on the part of Microsoft occurs in this state.

Dated at Madison, Wisconsin, this 10th day of August, 2017.

WISCONSIN TAX APPEALS COMMISSION

Lorna Hemp Boll, Chair

David D. Wilmoth, Commissioner

David L. Coon, Commissioner

ATTACHMENT: **NOTICE OF APPEAL INFORMATION**

WISCONSIN TAX APPEALS COMMISSION
5005 University Avenue - Suite 110
Madison, Wisconsin - 53705

NOTICE OF APPEAL INFORMATION

NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE TIMES ALLOWED FOR EACH, AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS RESPONDENT

A taxpayer has two options after receiving a Commission final decision:

Option 1: PETITION FOR REHEARING BEFORE THE COMMISSION

The taxpayer has a right to petition for a rehearing of a final decision within 20 days of the service of this decision, as provided in Wis. Stat. § 227.49. The 20-day period commences the day after personal service on the taxpayer or on the date the Commission issued its original decision to the taxpayer. The petition for rehearing should be filed with the Tax Appeals Commission and served upon the other party (which usually is the Department of Revenue). The Petition for Rehearing can be served either in-person, by USPS, or by courier; however, the filing must arrive at the Commission within the 20-day timeframe of the order to be accepted. Alternatively, the taxpayer can appeal this decision directly to circuit court through the filing of a petition for judicial review. It is not necessary to petition for a rehearing first.

AND/OR

Option 2: PETITION FOR JUDICIAL REVIEW

Wis. Stat. § 227.53 provides for judicial review of a final decision. Several points about starting a case:

1. **The petition must be filed in the appropriate county circuit court and served upon the Tax Appeals Commission either in-person, by certified mail, or by courier, and served upon the other party (which usually is the Department of Revenue)** within 30 days of this decision if there has been no petition for rehearing, or within 30 days of service of the order that decides a timely petition for rehearing.

2. If a party files a late petition for rehearing, the 30-day period for judicial review starts on the date the Commission issued its original decision to the taxpayer.

3. The 30-day period starts the day after personal service or the day we mail the decision.

4. **The petition for judicial review should name the other party (which is usually the Department of Revenue) as the Respondent, but not the Commission, which is not a party.**

For more information about the other requirements for commencing an appeal to the circuit court, you may wish to contact the clerk of the appropriate circuit court or the Wisconsin Statutes. The website for the courts is *http://wicourts.gov*.

This notice is part of the decision and incorporated therein.