

FILED
Court of Appeals
Division II
State of Washington
8/30/2018 10:08 AM
No. 51637-3-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

GARTNER, INC.,

Appellant

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. John C. Skinder)

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ASSIGNMENT OF ERROR AND STATEMENT OF ISSUE	3
III. STATEMENT OF THE CASE.....	3
A. Undisputed Facts.....	3
B. Procedural History	11
IV. ARGUMENT	12
A. Standard of Review.....	12
B. Gartner Research Is A Professional Service Subject To The Service B&O Tax Classification, Not A Digital Product Subject To The Retailing B&O Tax Classification.....	13
1. The True Object Of Gartner Research Is Professional Services, Not Online Access To Reports	14
2. Gartner Research Is Not A “Digital Product” Because It Involves Primarily Human Effort.....	19
3. Gartner Research Is Not A Digital Automated Service.....	22
C. Classification Of Gartner Research As A “Digital Product” Would Violate The Internet Tax Freedom Act.....	27
D. In The Alternative, If Gartner Research Is Classified As A “Digital Product,” Then It Is A “Digital Good”	29
V. CONCLUSION.....	31

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Estate of Ackerley v. Dep't of Revenue</i> , 187 Wn.2d 906, 389 P.3d 583 (2017).....	12, 13
<i>Grant v. Spellman</i> , 99 Wn.2d 815, 664 P.2d 1227 (1983).....	29
<i>Green River Community College, Dist. No. 10 v. Higher Ed. Personnel Bd.</i> , 95 Wn.2d 108, 622 P.2d 826 (1980)	15
<i>Inlandboatmen's Union of the Pac. v. Dep't of Transp.</i> , 119 Wn.2d 697, 836 P.2d 823 (1992).....	29
<i>Irwin Naturals v. Dep't of Revenue</i> , 195 Wn. App. 788, 382 P.3d 689 (2016)	12
<i>Lamtec Corp. v. Dep't of Revenue</i> , 170 Wn.2d 838, 246 P.3d 788 (2011).....	13
<i>Performance Marketing v. Hamer</i> , 998 N.E.2d 54 (Ill. 2013)	28
<i>Qualcomm, Inc. v. Dep't of Revenue</i> , 171 Wn.2d 125, 249 P.3d 167 (2011).....	14, 18
<i>Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County</i> , 135 Wn.2d 542, 958 P.2d 962 (1998).....	15
<i>Steven Klein, Inc. v. Dep't of Revenue</i> , 183 Wn.2d 889, 897, 357 P.3d 59 (2015).....	13
<i>Tesoro Ref. & Mktg. Co. v. Dep't of Revenue</i> , 164 Wn.2d 310, 190 P.3d 28 (2008).....	24

STATUTES AND RULES

47 U.S.C. § 151.....	27, 28
RCW 82.04.050(3).....	13

RCW 82.04.192	<i>passim</i>
RCW 82.04.220	13
RCW 82.04.257	13, 14
RCW 82.04.290(2)(a)	13
RCW 82.08.020(1)(b)	13
RCW 82.08.02087	30
RCW 82.32.180	12
WAC 458-20-224.....	13
WAC 458-20-15503.....	<i>passim</i>
CR 56(c).....	12

OTHER AUTHORITIES

Det. No. 14-0276, 35 WTD 97 (March 31, 2016)	24
Det. No. 15-0093, 36 WTD 080 (February 28, 2017)	24
Laws of 2009, Ch. 535, § 101	14, 19
Pub.L. 105–277, Div. C, Title XI, §§ 1100–1104	28
Pub. L. No. 114-125, § 992(a)	28

I. INTRODUCTION

Gartner, Inc. is the IT world's preeminent professional research and advisory firm. Gartner provides insight, analysis, and hands-on assistance to help clients utilize technology in a way that helps them grow and thrive in the face of rapid technological developments. It employs hundreds of research analysts and specialized service delivery professionals who provide cutting-edge analysis, insight, advice, consultations, presentations, and research to Gartner's clients through a variety of means—in-person meetings, inquiries, teleconferences, peer networking, seminars, briefings, webinars, emails, and research reports.

The primary issue on appeal in this tax refund case is whether Gartner's research business, inclusive of its research analysts, client partners, and service delivery teams ("Gartner Research"), is properly characterized as a "professional service" subject only to service B&O tax, or a "digital automated service" subject to retailing B&O tax and sales tax.

In 2009, the Washington legislature enacted a law designed to promote tax "neutrality" so that taxpayers engaging in e-commerce would not escape retailing B&O tax simply because they sold or delivered their goods or services over the Internet rather than by traditional means. The law requires, among other things, that "digital products" be "transferred electronically." DOR erroneously took the position (and the trial court

agreed on summary judgment) that Gartner Research must be classified as a “digital automated service” simply because Gartner’s clients can access some of Gartner’s research services—namely, its research reports—on Gartner’s website, while ignoring both the law and the undisputed facts demonstrating the fundamental character of Gartner Research’s services.

The judgment below must be reversed. For decades, when Gartner sent its reports to clients by mail, DOR did not question whether Gartner Research was properly characterized as a professional service and taxed under the service B&O tax classification. After all, in addition to the analysis and information clients received through their personal interaction with Gartner, Gartner’s Research reports themselves reflected the acumen and insight of hundreds of Gartner’s professionals. Gartner’s clients paid for the timely analysis they received, not because Gartner delivered its analysis by mail, phone or meeting.

Gartner’s clients pay for the same professional services today, only now they can receive some of that analysis and insight through the Internet. But opening a link on a website is no different than opening an envelope, and it doesn’t change the character of Gartner’s business. The digital products law does not apply here, both as a function of the “true object” test and the statute’s plain and unambiguous language. The ability to access research reports online is not the true object of the parties’

relationship; it is Gartner’s analysis and insight that Gartner’s clients want and receive. And that analysis and insight are entirely the product of the human effort of Gartner’s analysts and client service delivery teams—not some automated Internet functionality. Indeed, if the digital products law were construed to apply to Gartner here, application of the tax would be preempted by the federal Internet Tax Freedom Act.

II. ASSIGNMENT OF ERROR AND STATEMENT OF ISSUE

The trial court erred when it denied Gartner’s motion for summary judgment and granted DOR’s cross-motion in this tax refund case. CP 829-31. The primary issue on appeal is whether Gartner Research provides a “professional service” subject to the service B&O tax classification or a “digital product” subject to the retailing B&O tax classification.

III. STATEMENT OF THE CASE

A. Undisputed Facts

Overview of Gartner. Gartner is the world’s leading professional research and advisory firm in the IT industry. CP 130 (Black Decl., ¶ 2). Gartner provides insight, analysis, and hands-on assistance to help clients utilize technology in the face of rapid technological developments. *Id.* Clients turn to Gartner to “maximize the value of their IT investments” in light of the “strategic and critical nature of technology decision-making and spending.” CP 137-43 (Form 10-K). Gartner’s clients include a wide

variety of organizations, from nonprofit corporations and public agencies (including the State of Washington), to Fortune 500 businesses. CP 130-31 (Black Decl., ¶ 2). Gartner also provides sector-specific guidance and service for clients in a wide variety of industries, such as aerospace, automotive, retail and high-tech manufacturing, among many others. *Id.*

Gartner primarily works with members of its clients' leadership teams to research, analyze, interpret, and forecast IT and technology developments in a way that is tailored to each individual's role within the organization. CP 131 (Black Decl., ¶ 3). Gartner delivers these services in three lines of business: "Research," "Consulting," and "Events." *Id.* (¶ 4). Gartner Research is the foundation of all Gartner services. It employs hundreds of research analysts world-wide, who continuously examine current technology developments and emerging trends, provide cutting-edge analysis and predictions, and take positions on technology issues affecting client industries. *Id.* Gartner also employs hundreds of client service delivery professionals to assist clients in understanding the research. *Id.* (¶ 10); CP 257. Clients rightly compare Gartner Research analysts to Wall Street analysts in that they provide timely and actionable information for decision-making purposes. CP 742 (Supp. Black. Decl., ¶ 7). In 2011, Gartner employed more than 800 research analysts; today, it employs more than 1900. CP 131 (Black Decl., ¶ 4).

Gartner Research. Gartner Research offers various services to its clients, depending on each client’s needs. CP 131 (Black Decl., ¶ 6). The pricing varies depending on a variety of factors, such as which category of Research the client seeks (e.g., Market and Competitive, Intelligence, or Product Management and Marketing), the specific industry covered by Research, the number of licensed users who will be granted access to the Research, and the level of personal interaction between Gartner’s service delivery teams and the client. CP 131-32 (¶ 7). More than 95% of Gartner Research clients enter into contracts that involve human interaction, such as on-site meetings, phone calls, advisory services, and customized analyst briefings. CP 131 (¶ 6). The average engagement exceeds \$30,000 per client per year. Some clients pay more than \$1 million per year for Gartner Research. CP 132 (¶ 9).

Once a client signs a Service Agreement with Gartner Research, Gartner assigns the client a service delivery team. CP 132 (Black Decl., ¶ 10); CP 741-42 (Supp. Black Decl., ¶¶ 2-4). Professionals on this client service delivery team are internally referred to as “Client Partners.” These service delivery teams serve as the primary point of contact between Gartner and the client. They work closely with clients to understand what the client seeks from Gartner Research, to identify client’s key issues, and to determine how to effectively engage and assist the client. *Id.* Gartner

communicates its Research insights to clients through a variety of methods, including in-person meetings, phone calls, and Research reports. CP 132 (Black Decl., ¶ 11). In general, the greater amount of personal interaction provided by client service delivery teams, the higher the price for Gartner Research. CP 741 (Supp. Black Decl., ¶ 10).

Gartner's Client Partners and service delivery teams are tailored to specific organizational roles, such as Gartner Executive Programs, Gartner for IT Leaders, Gartner for Business Leaders, Gartner Industry Advisory Services, Gartner Invest, Gartner for Technology Professionals, and Gartner for Supply Chain Leaders. CP 132 (Black Decl. ¶8); CP 257; CP 274. For example, Gartner's service delivery teams provide members of its Executive Programs customized access to insight and resources in ways that are specific to a CIO's needs. This service provides CIOs with the combined value of role-specific insights from Gartner analysts, practical advice from an exclusive community of peers, and expert coaching from a leadership partner. CP 257. Approximately 4,100 CIOs and senior IT executives are members of Gartner Executive Programs. *Id.*

The role of Gartner's Client Partners and service delivery teams is to ensure clients are personally supported during their contract. At this engagement level, Client Partners aim to interact with their clients at least once per month, but more typically every two weeks. CP 742 (Supp. Black

Decl., ¶ 4). Based on continuous client input and dialogue throughout the contract period, Gartner's Client Partners will direct the client toward Gartner Research's insights and reports that address the client's particular needs and interests. *Id.*; CP 132 (Black Decl., ¶ 10). There are times when clients desire to talk directly to a Research analyst (referred to as an "Analyst Inquiry") to gain a better understanding of a specific issue or to have an in-depth discussion of a particular Research report. CP 742 (Supp. Black Decl., ¶¶ 5-6). Most frequently, clients initiate an Analyst Inquiry through a discussion of their needs with a Client Partner. *Id.*

Gartner Research is primarily created by human effort, whether measured by cost or time. CP 132 (Black Decl., ¶ 12). Thus, in 2011, compensation paid to Gartner Research personnel (including analysts, Client Partners and service delivery teams) comprised more than 95% of its direct costs. *Id.*; CP 145. Indeed, travel costs for Gartner Research analysts alone is higher than all of Gartner's firm-wide IT costs. CP 132 (Black Decl., ¶ 12). In terms of time, nearly 100% of Gartner's time providing Research in 2011 was spent on analysts performing services for Gartner's clients. CP 132-33 (¶ 13). For Research analysts, approximately 60% of that time was spent on drafting Gartner Research reports, with the other 40% directly interacting with clients and others in the technology and other sector-specific industries. *Id.*

Each Service Agreement incorporates a “Service Description” that provides a detailed description of the services Gartner must deliver to the client. CP 149-54; CP 277-81. Depending on the service package, these deliverables can include teleconferences, webinars and podcasts, in-person strategy meetings and workshops, telephone or in-person Analyst Inquiry, briefings, an assigned service delivery team, symposiums and retreats, e-mailed and online access to Research reports. CP 277-81; CP 748-65. Neither the Service Agreements, the Service Descriptions, nor the invoices Gartner submits to the client separately itemizes the prices of the component services provided with each package. Rather, the contracts and invoices identify a single Research Fee. CP 149-54; CP 277-81; CP 305; CP 422; CP 748-65.

Gartner Research Reports. Gartner creates its Research reports through a vigorous process involving various stages of research, drafting, peer and management review, external review, editing, revising, and publishing. CP 133 (Black Decl., ¶¶ 14, 16-18). All research is internally commissioned by an agenda manager who requests 20 to 30 documents from Research analysts on any particular topic. *Id.* (¶ 15). The topics are driven by client requests, needs, opportunities and challenges, as well as important trends and issues in the IT industry. *Id.*; CP 131 (Black Decl., ¶ 5). Analysts stay in regular contact with their clients, technology users

and developers to identify the topics most relevant to Gartner's clients. CP 131 (Black Decl., ¶ 5).

Client challenges expressed via questions and problems are at the heart of the Research report commissioning process. CP 744 (Supp. Black Decl., ¶ 12). Even just a few clients asking similar questions will result in a Research report addressing those issues. *Id.* Gartner Research is very responsive to client trends, and only a very small amount of research is pre-planned during the year; the IT world changes quickly, and client needs change quickly as well. *Id.* Even in a quarterly content plan for a client team, it is not uncommon for 50% of the planned output to change over the quarter as priorities change. *Id.* Gartner Research is the product of a creative process targeting client challenges, needs and solutions; and it always results in original work, not an aggregation of others' materials. CP 744-45 (¶ 13). Client access to the reports is strictly limited because the content of those reports is so valuable. CP 742-43 (¶ 8).

Gartner Research reports must be very timely in order to provide value to Gartner's clients. In the dynamic and complex IT industry, technology insight becomes outdated quickly. CP 133 (Black Decl., ¶ 19). Thus, Gartner clients primarily access Research reports that are created after the clients begin their contracts. *Id.* Readership of Gartner Research is highly concentrated in the first 30 days after publication; readership

drops by roughly 67% in the second month after publication, and by 75% after the third month. CP 133-34 (¶ 20); CP 147. Client readership of Research reports is so short-lived because the lifespan of any IT development is typically 12 months or less—rendering the majority of Research reports obsolete within 18 months. CP 134 (Black Decl., ¶ 20).

Access to Gartner Research Reports. As noted, Research reports are only one form of information and insight clients receive from Gartner Research. “The majority of the activity is in one-to-one calls with clients.” CP 325 (Black Depo at 13). Most of the time, clients obtain information and insight through their engagement with the service delivery teams and/or the Client Partners; more than 60% of Gartner client representatives never access a single report. CP 742 (Supp. Black Decl., ¶ 4). Those who access reports can do so in various ways. Most commonly, clients identify reports that interest them as a result of a personal recommendation from the client services team or Client Partner, either verbally or via email (with a link to the recommended report). CP 743 (¶ 9).

Navigating Gartner.com is the least common method clients use to access Research reports. CP 743 (Supp. Black Decl., ¶ 9). During the audit period, clients primarily accessed Research reports through emails sent by Client Partners (around 35% of total readership) or by using links in reports clients already reviewed (also 35% of readership). CP 134 (Black

Decl., ¶ 21). Only around 30% of Gartner Research reports are read as the result of a client locating the report on the Gartner website. *Id.* Even then, Gartner’s website allows topical-based searches, not true content search functionality (like Google or Bing). CP 349-50 (Black Depo at 58-59).

B. Procedural History

DOR audited Gartner for the period January 1, 2007 through December 31, 2011. CP 70 (Velez Decl., ¶ 2). DOR classified Gartner Research under the service B&O tax classification prior to the effective date of the digital products law in mid-2009, but reclassified Gartner Research to the retailing B&O tax classification for the balance of the audit period on the theory that it was a “digital automated service.” *Id.* (¶ 3). Pursuant to an Excise Tax Advisory (“ETA”) dated November 2, 2010, however, DOR informed Gartner that sales tax would not be imposed prior to January 1, 2011 because DOR previously had considered “online searchable databases” to be “digital goods,” not “digital automated services.” *Id.* (¶ 4); CP 79; CP 801 (ETA).

After DOR denied Gartner’s administrative appeal, Gartner paid the assessment in full. CP 71 (¶ 10). On September 23, 2016, Gartner filed its de novo complaint under RCW 82.32.180, seeking a refund in the amount of \$1,246,091. CP 1-4. Gartner and DOR filed cross-motions for summary judgment. CP 5-8. The trial court heard oral argument on March

2, 2018, after which it ruled in favor of DOR, stating that it had adopted DOR's analysis. VRP (3/2/2018) at 27-29. The court thereafter entered a written order granting DOR's motion for summary judgment, and denying Gartner's. CP 829-31. Gartner timely appealed. CP 832-38.

IV. ARGUMENT

A. Standard of Review

Gartner has the burden of showing that DOR incorrectly assessed the tax and that it is entitled to a refund. RCW 82.32.180. The trial court upheld DOR's assessment on summary judgment. This Court reviews summary judgment orders de novo, engaging in the same inquiry as the trial court. *Irwin Naturals v. Dep't of Revenue*, 195 Wn. App. 788, 793, 382 P.3d 689 (2016). Summary judgment is proper only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; CR 56(c).

The meaning of a statute is also a question of law that this Court reviews de novo. *Estate of Ackerley v. Dep't of Revenue*, 187 Wn.2d 906, 909, 389 P.3d 583 (2017). The goal is to determine the legislature's intent by giving effect to the plain meaning of the statute, gleaned both from the words of that statute and those in related statutes. *Id.* at 910. Courts must consider the ordinary meaning of the words, any statutory definitions provided, the context of the statute, related provisions, and the statutory

scheme as a whole. *Id.* “When its meaning is in doubt, a tax statute must be construed most strongly against the taxing power and in favor of the taxpayer.” *Lamtec Corp. v. Dep’t of Revenue*, 170 Wn.2d 838, 842-43, 246 P.3d 788 (2011) (internal quotation marks and citation omitted).

B. Gartner Research Is A Professional Service Subject To The Service B&O Tax Classification, Not A Digital Product Subject To The Retailing B&O Tax Classification.

B&O tax is imposed on the privilege of engaging in business activities in Washington, and measured by the gross receipts from those activities. RCW 82.04.220. The tax rate depends on the activity involved. *Steven Klein, Inc. v. Dep’t of Revenue*, 183 Wn.2d 889, 897, 357 P.3d 59 (2015). Taxpayers selling “professional services” are subject to the service B&O tax classification and are not required to collect sales tax on the sale of those services. WAC 458-20-224; RCW 82.04.290(2)(a); RCW 82.04.050(3). Effective July 26, 2009, however, taxpayers selling “digital products”—which include both “digital automated services” and “digital goods”—are subject to the retailing B&O tax and, unless an exception applies, sales tax. RCW 82.04.257(1); RCW 82.08.020(1)(b).

Prior to the effective date of the digital products law, DOR properly recognized that Gartner Research was a “professional service,” subject only to service B&O tax. CP 70 (Velez Decl., ¶ 3). The primary issue on appeal is whether, after the effective date of the statute, those

same professional services must be reclassified and taxed as “digital products.” They should not. The “true object” of Gartner’s activities, the statute’s plain and unambiguous meaning, DOR’s own interpretive rules, and the undisputed evidence all show that Gartner Research has been, and remains, a professional service—not a “digital product.”

1. The True Object Of Gartner Research Is Professional Services, Not Online Access To Reports.

When a particular activity could be subject to either the service B&O tax classification or the retailing classification, Washington courts apply a “true object” test to examine the “real object of the transaction sought by the taxpayer’s customers.” *Qualcomm, Inc. v. Dep’t of Revenue*, 171 Wn.2d 125, 136-37, 249 P.3d 167 (2011). This test focuses on the buyer, not the taxpayer, and “seeks the essential reason the buyer enters the transaction[.]” *Id.* (citation omitted).

The goal of the digital products law is to promote tax “neutrality” with respect to “electronically delivered products.” Laws of 2009, ch. 535, § 101. And it seeks to do so by ensuring that taxpayers do not escape retailing B&O tax merely by virtue of the fact that they deliver “digital products” over the Internet rather than by traditional means. RCW 82.04.257. Thus, the core requirement of the statute is that digital products must be “transferred electronically.” RCW 82.04.192(3)(a) & (6)(a).

Gartner Research reports can be “transferred electronically.” But for purposes of the “true object” test, the Court must ask whether “the essential reason” clients contract with Gartner is to obtain timely facts, data, information and insights from Gartner’s hundreds of research analysts and client service delivery teams or, as DOR contends, simply to gain online access to its Research reports. The undisputed facts show that it is the former, not the latter; the means by which Gartner delivers its services is incidental to the services themselves. Indeed, not only are Gartner Research reports merely one way by which Gartner provides its services and communicates its expertise to clients, it is not even the most common way. In fact, online searches of Gartner’s website for reports is the *least common method* clients use to obtain the reports.¹

¹ DOR recognized that the true object test applies to distinguish professional services from “digital products.” In its *Study of the Taxation of Electronically Delivered Products* (“Study”) that led to the digital products law, see CP 361-82, DOR noted: “The key to determining whether a digital product is merely the representation of a professional service depends on whether the *true object* of the transaction is the sale of professional services or of a digital product.” CP 372 (emphasis added). This Court can consider the study probative of legislative intent. See, e.g., *Green River Community College, Dist. No. 10 v. Higher Ed. Personnel Bd.*, 95 Wn.2d 108, 116 n. 3, 622 P.2d 826 (1980) (legislative history includes report commissioned to study issue and recommend legislation); see also *Skagit Surveyors & Eng’rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 561-64, 958 P.2d 962 (1998) (same).

The “true object” of Gartner Research always has been providing high-touch professional analyst services to its clients, not the sale of static research reports (whether online or through other means of delivery)—and that is no less true after enactment of the digital products law. Gartner employs hundreds of professional research analysts and client engagement professionals whose sole job it is to continuously examine IT and technology developments and to provide that insight to Gartner’s clients. CP 131 (Black Decl., ¶ 4). Gartner’s clients pay tens of thousands of dollars (and often far more) for that insight and, in particular, for the hands-on interaction from a devoted client service delivery team that ensures the insight and advice they receive is timely and actionable for making business-critical decisions. This IT-related insight from analysts and client service delivery teams contributes considerably to clients’ service and overhead savings. This is the main reason approximately 82% of Gartner clients renew their service engagement contract each year. CP 132 (Black Decl., ¶ 9); CP 742 (Supp. Black. Decl., ¶ 7).

Thus, clients enter into “Service Agreements”—not subscription agreements—that describe the services Gartner provides during the contract term. CP 132 (Black Decl., ¶ 10); CP 741-42 (Supp. Black Decl., ¶¶ 2-3). Gartner then works continuously with clients to learn what information they need and how best to provide it. (Supp. Black Decl., ¶ 4);

CP 132 (Black Decl., ¶¶ 11, 10). Gartner provides information and insight by various means, including emails, telephone calls, workshops, in-person Analyst Inquiries, Research reports, and client service presentations, briefings, consultations. *Id.*; CP 277-81; CP 748-65. Critically, and contrary to DOR’s theory that the clients’ “true object” is online access to a library of reports, more than 95% of Gartner Research clients enter into Service Agreements that require human interaction, and more than 60% of client representatives never access even a single report—online or otherwise. CP 131 (Black Decl., ¶ 6); CP 742 (Supp. Black Decl., ¶¶ 4-6).

The low frequency with which clients access Gartner Research reports by navigating Gartner’s website further shows the insignificance of online access in the context of Gartner’s services as a whole. Most clients obtain Gartner’s information and insight through direct interaction with Client Partners and service delivery team. CP 742 (Supp. Black Decl., ¶ 4). Those clients that do actually review Gartner Research reports most commonly do so after they are directed to a specific report in an email sent by a Client Partner or service delivery team member. CP 743 (¶ 9). The next most common method is when clients click on a link in one report to open another. CP 134 (Black Decl., ¶ 21). Critically, searching through Gartner.com is the least common method clients use to view reports—at around only 30% of total readership. *Id.*; CP 743 (Supp. Black Decl., ¶ 9).

Finally, even when Gartner conveys its insights to clients via Research reports (online or otherwise), the reports themselves reflect the interactive nature of Gartner's services. The topics are driven by client requests, needs, and opportunities, as well as by client issues and challenges that Gartner's Client Partners, client service delivery teams, and analysts glean from their ongoing client relationships. CP 131 (Black Decl., ¶ 5); CP 744-45 (Supp. Black Decl., ¶¶ 12 & 13). Clients, in turn, demand that the reports reflect Gartner's immediate insight so they can be used to quickly address business needs. Only a small amount of research is pre-planned, and more often than not, that research is scrapped in the face of changing client priorities. CP 744 (Supp. Black Decl., ¶ 12). As a result, almost all reads of Gartner's Research reports occur within three months of publication. CP 133-34 (Black Decl., ¶ 20); CP 147.

In sum, Gartner's clients contract with Gartner to obtain real-time and responsive IT insight and advice from Gartner's analysts and service delivery teams, and clients receive that professional analysis in myriad ways. But it is Gartner's analysis and high-touch services, not how the analysis and services are conveyed, that is the true object of the relationship. *See Qualcomm*, 171 Wn.2d at 142-44 (true object of data transmission service was information itself, not how information was conveyed). Indeed, even if the messenger mattered as much as the

message, online access to Gartner Research reports—and, in particular, searching for reports on Gartner’s website—plays only a minor role. Not only do these undisputed facts foreclose application of digital products law under the true object test, for the reasons explained below, they are fatal to DOR’s position under the plain language of the law itself.

2. Gartner Research Is Not A “Digital Product” Because It Involves Primarily Human Effort.

Even if the true object of Gartner Research did not remove it from the scope of the digital products law, the statutes and rules do not apply by their terms. As noted, in enacting the law, the legislature intended to promote neutral tax treatment regardless of how goods and services were delivered. Laws of 2009, ch. 535, § 101(2). It did not intend to abrogate the traditional B&O tax for professional services just because a service could be “transferred electronically.” Accordingly, the statute specifically exempts from the definition of “digital goods” and “digital automated services” any “service that primarily involves the application of human effort by the seller” where the “human effort originated after the customer requested the service.” RCW 82.04.192(3)(a), (6)(b)(iv)(A) & (6)(b)(v).

For all the reasons explained above, and precisely because it “primarily involves human effort” by Gartner’s professionals, Gartner Research is neither a “digital good” nor a “digital automated service.”

DOR properly noted that the role of “human effort” in the service “often turns on the amount of interactivity between the client and the professional.” CP 372 (*Study*, p. 12). DOR’s rules further provide:

In this context, “primarily” means greater than fifty percent of the effort to perform the service involved human labor. . . . The time factor is determined by dividing the time spent to perform the human effort portion for customers by the total time spent performing the service. The cost factor is determined by dividing the direct costs incurred to perform the human effort portion for customers by the total direct costs incurred to perform the service. Direct costs of the human effort component include salaries, employee benefits and similar direct costs. Direct costs of the automated component include the cost of software, computers, hosting services and other similar direct costs. ***If the average of the time and cost factors is greater than fifty percent then the service requires primarily human effort and is not a digital [product]***

WAC 458-20-15503(303)(a). If the service “requires primarily human effort,” then it “will generally be subject to the service . . . B&O tax.” *Id.*

Here, too, Gartner Research is properly excluded from the digital products law. There can be no dispute that Gartner Research “primarily involves the application of human effort.” As discussed more below, there is nothing automated about the service Gartner provides its clients. The core of Gartner Research is the analysis, insight and advice Gartner provides its clients exclusively through the very human efforts of more than a thousand professional analysts, Client Partners and service delivery teams. CP 131 (Black Decl., ¶ 4). Indeed, Gartner Research offers clients

little else but the product of “human effort.” That effort manifests itself not only through timely and actionable reports, but also through Gartner’s continuous high-touch personal interaction with clients—by phone, email, meetings, conferences, Analyst Inquiries, client delivery service presentations, consultations, discussions and more. CP 131-32 (¶¶ 5, 6, 11, 12); CP 742 (Supp. Black Decl., ¶¶ 4-6).

This is also true in quantitative terms. Almost 100% of Gartner’s time is spent on research analysts performing professional services for Gartner Research’s clients—comprised of drafting reports and directly interacting with clients and others in the IT industry and other markets. CP 132-33 (Black Decl., ¶ 13). In terms of expense, more than 95% of Gartner’s direct costs in providing Gartner Research to clients is comprised of compensation paid to Gartner personnel, including analysts, Client Partners and service delivery teams; by contrast, Gartner spends relatively little on its own IT, which would include maintaining the Gartner.com website. *Id.* (¶ 12); CP 145. In short, even under DOR’s own rule, it is clear that Gartner Research “primarily involves . . . human effort” because the “average of the time and cost factors is greater than fifty percent.” WAC 458-20-15503(303)(a).

That leaves the requirement that human effort “originate[] after the customer requested the service.” DOR claimed that Gartner cannot make

such a showing because it does not create Research reports for specific clients. But the statute contains a temporal element, not a causal one—and Gartner easily satisfies it. To be sure, all phone calls, emails, meetings and other interactions between Gartner and its clients come “after” clients sign up for Gartner’s service. It is equally undisputed that due to the pace of the IT industry, Gartner Research reports are overwhelmingly read within the first three months of publication—and, thus, Gartner’s clients primarily view reports created “after” they begin their contracts. CP 133-34 (¶¶ 19, 20). By its plain terms, the statute requires nothing more.

3. Gartner Research Is Not A Digital Automated Service.

There is another reason why DOR’s reclassification of Gartner Research as a “digital automated service” was erroneous. As noted, the statute defines both “digital goods” and “digital automated services” as “digital products” subject to retailing B&O tax. As between the two, DOR claims that (at least after January 1, 2011) Gartner Research is a “digital automated service.” CP 79; 425. That’s wrong not only because Gartner Research is entirely a product of “human effort,” but also because no “software applications” automate Gartner’s services; the insight contained in Gartner’s reports are created by analysts, not by software.

For an activity to be a “digital automated service,” it must be a service that is “transferred electronically” *and* “that uses one or more

software applications.” RCW 82.04.192(3)(a). Reference to “software applications,” however, does not include the software the buyer must use to merely access the online content—for that is encompassed in the “transferred electronically” requirement and is an element of both “digital goods” and “digital automated services.” RCW 82.04.192(3)(a) & (6)(a); *also* WAC 458-20-15503(102) (“this means the product is transferred using the public internet, a private network, or some combination”).

Rather, the requirement that a service use “software applications” means that it must utilize integrated software to provide some additional functionality to the user beyond mere online access. Otherwise, nothing would distinguish “digital automated services” from “digital goods,” which focus on electronic content alone (*see below*). *See* WAC 458-20-15503(203)(a)(i) (“A digital good is not a service involving one or more software applications.”). To qualify as a “digital automated service,” the integrated software must collect, analyze, manipulate or manage data or content (typically through algorithms, applications or software tools) in some way so as to automate the service for the user. *Id.*, Example 1 (“software based service facilitates and automates various administrative

functions”); *id.*, Example 2 (the “software facilitates the gathering, identifying and categorizing of information acquired from the internet”).²

Critically, however, functionality that allows the buyer to merely search for and retrieve content from the seller’s website is not, without more, a “digital automated service” that “uses . . . software applications.” This is so because in the absence of some additional functionality, the user’s only object is to purchase the seller’s online content (*i.e.*, “digital goods”), not some automated service. WAC 458-20-15503(203)(a) (“online information service may contain data, facts, or information the use of which is facilitated by one or more software applications that provide search capabilities ***and other functionality***”); CP 801 (DOR *Special Notice* (June 29, 2010): “online legal research services are [automated services] because . . . they also provide ***additional functions***, such as search, retrieve, and storage capabilities) (emphasis added).

DOR’s rule makes this distinction clear. *Tesoro Ref. & Mktg. Co. v. Dep’t of Revenue*, 164 Wn.2d 310, 322, 190 P.3d 28 (2008) (“rules of statutory construction apply to agency regulations” and “unambiguous

² See also Det. No. 14-0276, 35 WTD 97 (March 31, 2016) (service “included an analysis of . . . data by [Computer Program] algorithms in order to automatically evaluate the creditworthiness of potential borrowers”); Det. No. 15-0093, 36 WTD 080 (February 28, 2017) (service was “comprehensive investor communications system that manages and facilitates every aspect of the proxy voting process”).

regulation is given its plain and ordinary meaning unless legislative intent indicates to the contrary.”). The rule provides two examples to distinguish “digital goods” from “digital automated services.” In the first, an online research service (e.g., Westlaw or Lexis) qualifies as a digital automated service because it “uses software applications to facilitate the use of news and information” *from the Internet or third-party databases*, including “features such as: Research history, natural and boolean searching, industry chat forums, chart creation, document and word flagging, and information organizing folders.” WAC 458-20-15503(203)(a), Example 3. Gartner’s website provides no such functionality; it simply provides users the ability to retrieve *Gartner’s own content*.

That such capability is not a digital automated service is clear from the rule’s second example. In that example, the seller’s internet software enables a user to access and search the seller’s content to purchase music (e.g., iTunes), but the buyer receives no added functionality or online service in the process—and, thus, there is no “digital automated service”:

Company sells digital music files (i.e., digital goods) on its web site. In order to locate specific digital music files customers may use a free software based search function that is integrated into Company’s web site. Customers may also find the digital music file they are seeking by clicking on a series of links to get to the desired music file. *Company’s software based search function associated with the sale of the digital music does not transform the sale of the digital music file into a digital automated service.*

WAC 458-20-15503(203)(a), Example 4 (emphasis added). Like Gartner Research, the seller does not provide a digital automated service because the only functionality provided by its website is the ability to sift through its own content, not search, analyze or use third-party content. The result is the same whether the website’s search function is used to download content or merely to access it (*i.e.*, stream or view). *Id.* (102); RCW 82.04.192(7) (“So long as the purchaser may access the product, it will be considered to have been electronically transferred”).

Under the plain and unambiguous language of the digital products statutes and DOR’s own rule, Gartner Research is not a “digital automated service” because neither online access nor Gartner.com’s internal content search feature satisfies the statute’s requirement that the service “uses . . . software applications” to perform some automated function. Just as important, Gartner does not provide any other or additional online functionality to Gartner Research clients. Below, DOR pointed to the fact that Gartner uses Lotus Notes as a database tool to manage the content on the Gartner.com website—but, critically, DOR presented no evidence that Notes or other software performs any automated service or functionality for Gartner’s clients. CP 358 & 770 (Black Depo at 67, 69). The trial court’s judgment must be reversed for this reason as well.

C. Classification Of Gartner Research As A “Digital Product” Would Violate The Internet Tax Freedom Act.

Before the digital products law, DOR recognized Gartner Research as a professional service, taxable under the service B&O tax classification. CP 70 (Velez Decl., ¶ 3). Even though Gartner’s services did not change, nor its delivery method, after the law was enacted in 2009, DOR claimed that Gartner Research must be taxed as a “digital product” because clients can (even if relatively few do) access reports on Gartner’s website, *i.e.*, the reports are “electronically transferred.” RCW 82.04.192(3)(a) & (6)(a). There is no dispute that if Gartner still sent Research reports to clients by mail or CD, as it once did, *see* CP 743 (Supp. Black Decl., ¶ 9), Gartner Research would remain subject to the service B&O tax. RCW 82.04.192(8) (“transferred electronically” means goods or services must be obtained “by means other than tangible storage media”).

In short, because—and only because—some of Gartner’s services can be accessed on the Internet, DOR has applied the digital products law to impose a higher tax rate. The Internet Tax Freedom Act (“ITFA”) prohibits states from imposing just this kind of discriminatory tax. ITFA provides that “[n]o State . . . may impose . . . discriminatory taxes on electronic commerce.” 47 U.S.C. § 151, note § 1101. A tax discriminates against electronic commerce if it “imposes an obligation to collect or pay

the tax on a different person or entity than in the case of transactions involving similar property, goods, services, or information accomplished through other means.” *Id.*, § 1105(2)(A)(iii).³ In other words, states cannot tax those providing goods or services through the Internet differently than those who sell the same goods or services by other means.

In *Performance Marketing v. Hamer*, 998 N.E.2d 54 (Ill. 2013), the Illinois Supreme Court struck down state statutes as preempted by ITFA because they treated taxpayers differently depending on whether their services involved electronic commerce. The law required out-of-state retailers to collect use tax if they entered into online marketing agreements with Illinois companies, but did not impose the same requirement on out-of-state retailers entering into “offline” marketing agreements (such as print or broadcasting). *Id.* at 59. The court concluded that the statutes “impose a discriminatory tax on electronic commerce within the meaning of ITFA . . . by singling out retailers with Internet performance marketing arrangements for use tax collection. *Id.* at 58-59.

DOR’s classification of Gartner Research as a “digital product” results in the same discriminatory “singling out” of taxpayers who provide

³ ITFA was enacted as a temporary measure in 1998. *See* Pub.L. 105–277, Div. C, Title XI, §§ 1100–1104. It was extended several times, and made permanent in 2016. *See* Pub. L. No. 114-125, § 992(a).

professional services (even in part) via the Internet. To avoid this conflict, this Court should reject DOR's construction of the digital products law and its application to Gartner Research. *Grant v. Spellman*, 99 Wn.2d 815, 819, 664 P.2d 1227 (1983). Not only is a harmonious result compelled for all the reasons discussed above, it also furthers legislative intent. As noted above, the digital products law was intended to level the playing field between traditional commerce and e-commerce by ensuring that taxpayers selling the same goods and services pay the same tax rate, regardless of the means of distribution. It was never intended to subject taxpayers that provide a professional service to a *higher* tax rate if they provide some of their services online, rather than exclusively by meeting, phone, or mail.⁴

D. In The Alternative, If Gartner Research Is Classified As A “Digital Product,” Then It Is A “Digital Good.”

Gartner Research is not a “digital product,” and certainly not a “digital automated service,” because its clients’ true object is the timely receipt of facts, data, information and insights from Gartner’s (entirely human) analysts, Client Partners, and service delivery teams, not online

⁴ If the Court cannot interpret the digital products law to avoid conflict with ITFA here, then it will have no choice but to conclude that its application is preempted. *Inlandboatmen’s Union of the Pac. v. Dep’t of Transp.*, 119 Wn.2d 697, 702, 836 P.2d 823 (1992) (conflict preemption arises when “compliance with both [state and federal law] is physically impossible” or “a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”).

(non-automated) access to Research reports. In the alternative, however, if this Court were to conclude that online access to Gartner Research reports is enough to bring Gartner Research within the scope of the digital products law in a way that does not conflict with ITFA, then this activity must be classified as a sale of “digital goods,” not “digital automated services.”⁵

Again, both digital goods and digital automated services must be “transferred electronically.” RCW 82.04.192(3)(a) & (6)(a). But unlike the transfer of a “digital automated service”—which uses software to provide some automated functionality—the transfer of a “digital good” involves the mere electronic transfer of digital content. Digital goods are defined as “sounds, images, data, facts, or information, or any combination thereof,” and includes downloaded, streamed or online viewing of things like digital books and magazines, digital audio works (music, ringtones), and digital

⁵ The distinction between “digital goods” and “digital automated services” is important because, although retailing B&O tax applies to both, no retail sales tax is collected on sales of “digital goods” to businesses for “business purposes.” This exemption does not apply to sales of “digital automated services.” RCW 82.08.02087; WAC 458-20-15503(505)(a). The overwhelming majority of Gartner’s clients access Gartner Research reports for business use. CP 741-45 (Supp. Black Decl., ¶¶ 2, 10, 13). During the audit and administrative process, Gartner offered to submit business use exemption certificates, but DOR refused to accept them on the grounds that Gartner Research did not qualify as a “digital good.” CP 802 (Supp. Velez Decl., ¶ 2); CP 422.

audio visual works (movies, videos). RCW 82.04.192(6)(a); WAC 458-20-15503(202)(a) & (b). Moreover, as discussed above, an online search function that enables the buyer to locate the seller's content "*does not transform* the sale of the digital [good] into a digital automated service." WAC 458-20-15503(203)(a)(i), Example 4 (emphasis added).

If, as DOR (wrongly) contends, the "true object" of Gartner Research is not professional services, and the "primarily . . . human effort" of its analysts is irrelevant, then Gartner Research's only possible tether to the digital products law is the fact that clients can access Research Reports via the Internet. Because integrated search functionality does not qualify as an "automated service," this online access to reports constitutes nothing more than a mere electronic transfer of "data, facts or information" by Gartner, *i.e.*, a "digital good." RCW 82.04.192(6)(a). Indeed, if Gartner Research is a "digital product," then it must be treated the same way as a subscription to an online periodical. *See* WAC 458-20-15503(202)(b)(iv) (digital goods include "[d]igital periodicals or magazines transferred electronically"). Put simply, DOR cannot have it both ways.

V. CONCLUSION

The digital products law does not apply and, indeed, cannot apply without violating ITFA. Gartner Research is a professional service subject to the service B&O tax classification. In the alternative, if this Court were

to conclude that Gartner Research did fall within the ambit of the digital products law, then it must be characterized as a “digital good,” not a “digital automated service.” The trial court’s judgment must be reversed, and the trial court directed to enter summary judgment in favor of Gartner.

RESPECTFULLY SUBMITTED this 30th day of August, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2018, I caused to be served a copy of the foregoing document to be delivered in the manner indicated below to the following person at the following address:

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August 30, 2018 - 10:08 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51637-3
Appellate Court Case Title: Gartner, Inc., Appellant v. WA State Dept. of Revenue, Respondent
Superior Court Case Number: 16-2-03888-1

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