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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)

REPLY BRIEF

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I. INTRODUCTION

DOR relies on the fallacy that "online access" to Gartner Research is a separate "product." But Gartner's clients pay for only one product: a professional IT analyst service. And, as was the case before creation of the Internet or passage of the digital products law, clients receive that service both through interaction with Gartner's analysts and research reports. Clients used to get the reports through the mail; now they can get them online. While the method of delivery has expanded, the service is the same as it was before—and so should its tax treatment. Because the true object of Gartner Research is a professional service, not some automated Internet functionality, the digital products law does not apply. Any other result creates impermissible conflict between DOR's assessment and ITFA.

II. ARGUMENT

A. The True Object Of Gartner Research Is Professional Analyst Services, Not Mere Online Access To Research Reports; The Bundled Transaction Statute Does Not Bring Gartner's Services Within The Scope Of The Digital Products Law.

The true object test dictates that Gartner Research remain subject to service B&O tax because clients contract with Gartner to obtain expert IT analysis from hundreds of professional analysts, not so they can access research reports over the Internet. Op. Br. at 14-19. DOR mischaracterizes what Gartner sells as mere "online access" to "canned" research reports,

which it claims is a "digital product" subject to retailing B&O tax and retail sales tax. DOR concedes that everything else Gartner does for its clients is a service subject to service B&O tax—but, DOR claims, because those services are not sold separately, the "bundled transaction" statute requires it all to be taxed as a digital product. DOR is wrong. The bundled transaction statute does not apply because Gartner Research is a single product, not two; and, even if the statute applied, no component of Gartner Research, even "online access," triggers the digital products law.

To begin with, this Court can easily dismiss DOR's suggestion that the "bundled transaction" statute somehow supersedes the "true object" test. The bundled transaction statute was enacted in 2007. Laws of 2007, ch. 6, § 1401. Yet, more than four years later, in *Qualcomm, Inc. v. Dep't of Revenue*, 171 Wn.2d 125, 136, 249 P.3d 167 (2011), the Supreme Court applied the true object test without mentioning the bundled transaction statute. Indeed, the true object test and bundled transaction statute comfortably co-exist, because they apply in different situations.

The true object test applies where only one product is sold, and its tax treatment turns on whether it is "classified as a retail sale or a service." *Id.* at 136. The "test focuses on the real object of the transaction . . . not just the transaction's different parts." *Id.* at 137. The bundled transaction statute, on the other hand, applies where two "distinct and identifiable"

products are sold, albeit in one transaction. RCW 82.08.190(1)(a). In that case, retail sales tax applies if any of the component products would be subject to retail sales tax if sold separately. RCW 82.08.195(1). Thus, even where there is a bundled transaction, the true object test can also apply to determine the proper tax treatment for each component part.[1]

The bundled transaction statute does not help DOR here for two, related reasons. *First*, Gartner Research is a single product, not some amalgamation of "distinct and identifiable" products. Gartner's clients pay for one, and only one, thing: a professional service—specifically, timely and actionable professional IT analysis, information and advice generated by hundreds of Gartner analysts. That is precisely why, before enactment of the digital products law, but ***after*** enactment of the bundled transaction statute, DOR taxed Gartner Research entirely and exclusively under the service B&O tax classification, without applying the retailing B&O tax or

[1] DOR concedes that because the "bundled transaction" statute addresses only whether the taxpayer is responsible for collecting retail sales tax, the true object test "might" be used to determine which B&O tax rate should apply. DOR Br. at 29-30. DOR discounts this concession, arguing that determination of which B&O tax rate applies is not "material" because the B&O rate for digital products is less than for services. *Id.* DOR's suggestion that Gartner paid less tax under the digital products law than it would have under the services B&O tax classification is wrong and deliberately misleading. Because it erroneously classified Gartner Research as a "digital automated service," DOR assessed Gartner retail sales tax on all sales; it was the retail sales tax, not the difference in B&O tax rate, that constitutes the overwhelming bulk of DOR's assessment.

retail sales tax to any aspect of the sales. CP 70 (Velez Decl., ¶ 3). And, even now, DOR does not seriously dispute that when Gartner Research is properly treated as a single product, *i.e.*, an IT analyst service, the true object test easily removes it from the digital products law.

The distinction DOR draws between Gartner's sales of "access to its online library of research reports" and "analyst inquiry service," *see* DOR Br. at 11, is entirely artificial. Gartner sells only professional analyst services, and it sells them for a single fee to each client. CP 131 (Black Decl., ¶¶ 6-8). Gartner does not separately sell "online access" to its research reports. Rather, clients choose among service packages that offer a range of content and analyst interaction based on industry type and topic, organizational roles, and number of licensed users. *Id.* The fact that a very small percentage of Gartner's clients (less than 5%) choose to receive Gartner Research without direct interaction with analysts does not mean they purchased a separate product; it simply means they've chosen a more limited means of receiving Gartner's service than other clients.

Second, if Gartner Research could be carved-up into separate components, such that "online access" to reports were treated as a "distinct and identifiable" product, *see* DOR Br. at 28, the sales still fall outside the digital products law. All Gartner's clients can access reports online (although many do not), but that is not the true object of their purchase.

Clients contract with Gartner to receive, among other things, the IT analysis reflected in Gartner Research reports, and that is exclusively a product of Gartner's analysts, not the limited functionality provided by Gartner's website. Thus, when Gartner's clients received reports by mail, DOR recognized that Gartner's services were the object of the transaction; the fact that clients can now access reports online does not change that object. Indeed, as explained below, for the same reasons, Gartner Research easily satisfies the digital product law's "human effort" exclusion.

Lastly, and in all events, even if online access to Gartner Research reports were a "distinct and identifiable" product, ***and*** the digital products law applied to that component, application of the bundled transaction statute still requires DOR to refund the retail sales tax. For the reasons explained in the opening brief and below, in the event this Court concludes that online access to research reports qualifies as a digital product, then it is a "digital good," not a "digital automated service." Op. Br. at 29-31 & n. 5. As DOR recognizes, no retail sales tax is collected on the sale of "digital goods" to businesses for "business purposes." DOR Br. at 16; RCW 82.08.02087(1). Here, again, the bundled transaction statute would not subject Gartner Research to retail sales tax when no component product of the sale is subject to the tax. RCW 82.08.195(1).

B. The Digital Products Law Does Not Apply By Its Own Terms; Gartner Research Is Exclusively The Product Of Human Effort, Not Any Automated Website Functionality.

In addition to the true object test, the plain language of the digital products law confirms that Gartner Research must be classified as a professional service subject only to service B&O tax. As explained in the opening brief, whether properly viewed as a single product, or improperly viewed as a combination of products, no aspect of Gartner Research qualifies as a "digital automated service" for two reasons. *First*, Gartner Research falls within the law's express exclusion for a product "that primarily involves the application of human effort." Op. Br. at 19-22. *Second*, Gartner Research's website does not use software to provide the user with automated functionality beyond basic search capability. *Id.* at 22-26. None of DOR's arguments to the contrary have merit.

1. Gartner Research Primarily Involves Human Effort.

Prior to the digital products law, Gartner Research was subject to service B&O tax, even though a significant aspect of Gartner's services included research reports. CP 70 (Velez Decl., ¶ 3). DOR classified Gartner Research this way because it recognized that Gartner's clients did not pay Gartner tens or hundreds of thousands of dollars annually simply to receive "canned" research reports, but rather for the massive amount of work Gartner's analysts put into researching, drafting, reviewing, editing

and publishing those reports, and equally so for the work that the analysts and Gartner's other professionals put into communicating with clients to ensure they can understand and best use the information, insight and advice contained in the reports. CP 132-33 (Black Decl., ¶¶ 10-11, 14, 16-18); CP 741-42 (Supp. Black Decl., ¶¶ 2-6). All this remains true today.

The digital product law's "human effort" provision unambiguously reflects the legislature's intent that services previously subject to the service B&O tax classification remain subject to that classification; the mere fact that some aspect of that service happens to be "transferred electronically," RCW 82.04.192(3)(a) & (6)(a), is not enough to bring it within the law, much less subject what is otherwise a professional service to retail sales tax. Thus, regardless of whether the service is delivered or communicated through the Internet, the law specifically excludes 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).

DOR's argument that Gartner Research fails the "human effort" test turns entirely on the fallacy that Gartner Research is "two distinct services," *e.g.*, "analyst inquiries" and other "professional services," on one hand, and "online access" to "canned" research reports, on the other. DOR Br. at 22-23. Notably, DOR never explains which side of the line the

massive “human effort” undertaken by Gartner’s analysts to create the reports falls. No matter. The digital products law (or bundled transaction statute) did not change the nature of Gartner Research, nor did it create two products where there once was one. As explained above, Gartner has only ever sold a single “product”: professional analyst services. While it offers that service at various levels and at different prices based on client need, it does not sell “online access” as a discrete product.

DOR does not dispute that, when treated as a single service, as it must, Gartner Research satisfies the digital product law’s “human effort” test because Gartner’s very-human analysts and professionals are *entirely* (not just primarily) responsible for the analysis, insight and advice that Gartner’s clients purchase—and that is true regardless of whether that information is conveyed via a report or personal interaction, “online” or through traditional means. Op. Br. at 15-18, 20-21. Nor does DOR dispute that, under the quantitative formula set forth in its own rule, *see* WAC 458-20-15503(303)(a), Gartner spends far more than fifty percent of its time and costs on the human effort involved to create and communicate its services. Op. Br. at 7, 21. Relatively speaking, Gartner spends almost no

time or money on its website, CP 132-33 (Black Decl., ¶¶ 12-13); CP 145—which, as discussed below, provides no automated services.[2]

Not only is Gartner Research a product of "human effort," but it also originates "after the customer requested the service." DOR claims only an "individualized" service created for a "specific client" will suffice. DOR Br. at 21, 24. But the statute does not require either thing. It requires only that a service be performed "after" a client requests it. As Gartner explained, and DOR ignores, all meetings, calls, emails, and interactions between clients and Gartner come "after" clients sign up for Gartner Research, ***and*** the vast majority of reports that clients read are likewise created "after" they sign up for the service. CP 133-34 (¶¶ 19, 20). Indeed, Gartner creates its reports, in large part, based on requests, questions, and trends that it learns through its dynamic interaction with clients. CP 131-33 (Black Decl., ¶¶ 5, 15); CP 744 (Supp. Black Decl., ¶ 12). The service

[2] DOR's argument still fails even if this Court were to ignore the human effort that goes into creating research reports *and* working with clients to use the information contained in them. Put simply, Gartner's clients know and want to access the reports "online" only because of their high-touch engagement with Gartner's analysts and professionals. DOR admits that clients access reports on Gartner's website more than one-third of the time after clicking on links in emails sent by Gartner professionals. CP 134 (Black Decl., ¶ 21). That interaction, in turn, results in clients clicking on links embedded in those reports to access an equal number of additional reports. *Id.* Only a minority of reports (30%) are accessed "without any human effort on the part of Gartner employees," DOR Br. at 20, when clients find them on Gartner's website. *Id.* Thus, even access alone is "primarily" the result of Gartner's human effort.

Gartner sells is the antithesis of an existing, canned, product; nor is it an aggregation of content from other sources. Gartner continuously creates and delivers content for its clients through the human labor of its analysts.

2. Gartner Research Is Not A Digital Automated Service.

In addition to "primarily involv[ing] the application of human effort," Gartner Research also fails to satisfy the definition of a "digital automated service." *See* Op. Br. at 22-26. This Court must reject DOR's improper citation to facts outside the record regarding Gartner.com's supposed functionality. The record shows that Gartner's website provided only basic content search capability, which—under DOR's own rule—is not enough to qualify as a digital automated service.

a. This Court Cannot Consider DOR's Improper References To Unsupported Materials Outside Of The Summary Judgment Record.

As explained in Gartner's opening brief and below, there is no evidence that Gartner's website offered the functionality required of a digital automated service. DOR knows this, and therefore asks this Court to consider materials outside the summary judgment record to infer that the website offered something more. Specifically, DOR repeatedly claims that Gartner's website allowed users to "search for content, save and organize search results, identify specific areas of interest from a drop-down menu, and create and manage 'alerts,' among other functions." DOR

Br. at pp. 7, 19 & 20; *id.* at 33-34 (describing website as having "search and customization capabilities"). For this proposition, DOR cites (1) an internet link to an online video currently available on Gartner.com, and (2) characterizations from its own ALJ's administrative ruling in this case, CP 696 & 701. Neither thing, however, is evidence this Court can consider.[3]

DOR's citation to the video on Gartner's website is improper on multiple fronts. To begin with, DOR did not cite to the link in any of its summary judgment pleadings below. *See* CP 431-522; CP 708-25; CP 771-97. Because it was not "called to the attention of the trial court," it is not part of the record for review. *See* RAP 9.12. "The purpose of this limitation is to effectuate the rule that the appellate court engages in the same inquiry as the trial court." *Wash. Fed'n of State Employees v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 157, 849 P.2d 1201 (1993).

Moreover, DOR does not and cannot ask the Court to take notice of the video. Judicial notice is proper only if the fact is "(1) generally

[3] Equally improper is DOR's citation to Gartner's generic online "IT Glossary" to infer that Gartner's website is a "portal" that offers the functionality described in the glossary's definition. DOR Br. at 6-7 & n.2. There is no evidence to support such an inference. Gartner's designee testified unequivocally that "portal" was simply the term Gartner used to describe which version of the website clients could access based on the service they purchased; it has nothing to do with functionality. CP 605-06 ("Again, it's a little bit of parlance from 2011. I think there were websites. There were, I think at the time, six or seven variants of the website for the different products we sold . . . so they focused on different portal segments to target information most relevant to those roles.").

known … or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." ER 201(b). No case "recognizes an Internet web page to be a source whose accuracy cannot reasonably be questioned." *Spokane County v. East. Wash. Growth Mgmt. Hearings Bd.*, 2015 WL 1609138, *19 (Wn. App. Apr. 09, 2015). This is especially so here. The audit period at issue is 2007 through 2011. Whatever the video purports to show about Gartner.com's functionality in 2018, it does not show what functionality the website had over a decade ago, nor is that fact capable of determination from the video or any other source in the record. The video is both inadmissible and irrelevant.[4]

That leaves DOR's citation to its own ALJ's ruling against Gartner in this case. *See* CP 696 & 701. Here, again, DOR did not cite to the ruling as "evidence" of Gartner.com's functionality in its summary judgment papers below—meaning it is off limits under RAP 9.12. DOR properly cited its prior ruling only by way of procedural background—for good reason. Gartner filed suit under RCW 82.32.180. The statute mandates a

[4] Even if the link to the video passed muster under ER 201(b), which it does not, DOR would have to satisfy RAP 9.11 before this Court could consider it. *See King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 549 n. 6, 14 P.3d 133 (2000) ("Even though ER 201 states that certain facts may be judicially noticed at any stage of a proceeding, RAP 9.11 restricts appellate consideration of additional evidence on review."). DOR makes no effort to satisfy this standard either—and could not do so even if it tried. *See* RAP 9.11(a)(3) (additional evidence on appeal permissible only if "it is equitable to excuse a party's failure to present the evidence to the trial court").

"de novo" trial, in which both parties must "produce evidence that is competent, relevant, and material to determine the correct amount of the tax that should be paid by the taxpayer." RCW 82.32.180. To be sure, the ALJ's underlying ruling is not itself "evidence that is competent, relevant, and material" in a subsequent de novo trial. It is not "evidence" at all.

Indeed, the ALJ's characterization of Gartner's website is plainly inadmissible hearsay; it is an out-of-court statement offered (for the first time on appeal) to prove the truth of the matter asserted. ER 801(c); ER 802. And it is the worst kind of hearsay because it bears no indicia of reliability; DOR's ruling was the product of an "informal administrative review" by its own attorneys, not an independent fact-finder. It was not conducted under oath, and it was not subject to the rules of evidence. *See* WAC 458-20-100(5). Notably, the ALJ did not identify any underlying evidence to support her observations about Gartner's website, or whether they pertained to the then-current version of the site or the one Gartner maintained during the audit period. *See* CP 696 & 701. In any event, whatever the ALJ relied upon, DOR failed to present it to the trial court.

b. Gartner Research Does Not Use Software To Provide Automated Functionality.

DOR does not dispute that to qualify as a "digital automated service," the service must be "transferred electronically" ***and*** it must use

"software applications" to provide integrated online functionality beyond mere Internet access. DOR Br. at 17-19. This is so because the transferred electronically requirement applies to both "digital goods" and "digital automated services," *see* RCW 82.04.192(3)(a) & (6)(a), meaning that the statute's reference to "software applications" refers to functionality beyond online access or delivery. *See* Op. Br. at 22-23. When one buys a digital good, he or she receives sounds, images, data, facts or information online; when one purchases a digital automated service, he or she receives the means to use or manipulate those sounds, images, data, facts or information online. WAC 458-20-15503(202) & (203)(a).

DOR can cite to no evidence in the summary judgment record to show that Gartner's website provided such functionality. The only *admissible* evidence DOR offered on the issue came from of a single deposition question regarding search functionality on Gartner's website:

> Q. And also this says the least common method of accessing Gartner reports is by searching Gartner's website. But there are clients that will go onto the website and self-navigate or self-search?
>
> A. Yeah. I think most people would explore. The search is topical based, so unless you know - - I would say more index like than, say, Google, which is what most people would understand by "search." If you put in "Cloud computing" as a term, it would work. If you put in "network of disconnected computers," it wouldn't understand anything your saying.

> So if you know the term you're looking for, it would give more of an index, I would say, [than] a search, as most people would regard it today.

CP 349-50; *also* CP 625-26. DOR references testimony that Gartner used Lotus Notes to "manage the content" on its website, DOR Br. at 7 & 18 (citing CP 624 & 634)—but, critically, it is undisputed that this software provided Gartner's own IT employees a back-end tool to post information to the site and track usage; it did not provide Gartner's clients with front-end functionality. *See* CP 809-10. DOR does not argue otherwise.

In the end, then, the undisputed record shows that the ***only*** functionality offered by Gartner's website (beyond Internet access) was a limited, topical search capability, which allowed clients to locate Gartner's own reports. CP 349-50. As Gartner explained in its opening brief, DOR's own interpretive rule unambiguously (and properly) states that a "software based search function that is integrated into [a taxpayer's] web site," that clients can use in "order to locate specific digital . . . files" does not qualify as a "digital automated service." WAC 458-20-15503(203)(a), Example 4. Although not binding, DOR's rule is entitled to "great weight" in interpreting our tax laws. *First Student, Inc. v. Dep't of Revenue*, 4 Wn. App.2d 857, 871-72, 423 P.3d 857 (2018); *also Cashmere Valley Bank v. Dep't of Revenue*, 181 Wn.2d 622, 635-36, 334 P.3d 1100 (2014).

DOR argues that Example 4 is not "germane" because the hypothetical company sold only digital music, but its "website's search capability was not part of the sale." DOR Br. at 33. DOR's argument is baseless. The example recognizes that a website containing digital content—whether video, music or research—is worthless to customers unless they can locate the desired content. The fact that customers use a search function to locate that content, however, does not change the nature of the product they purchase; they are purchasing the content, not search functionality. If, as DOR repeatedly argues, the only relevant component of Gartner Research is "online access" to "canned" research reports, then Gartner's limited search capability is no different than the example.

By the same token, Gartner's website was nothing like the rule's example of a "digital automated service." WAC 458-20-15503(203)(a), Example 3. In the example, the hypothetical company's website does not simply allow customers to search the site for the company's own content, but rather allows customers to search for "news and information" from other sources, and then manipulate, customize or otherwise use that news or information using things like "[r]esearch history, natural and boolean searching, industry chat forums, chart creation, document and word flagging, and information organizing folders." *Id.* Gartner does not argue, as DOR's falsely posits, that a website must offer all the "*same functions*

listed in Example 3" to qualify as a digital automated service." DOR Br. at 31-32. But it must offer at least ***some functions*** beyond the ability to search the seller's own digital content. Here, there is no evidence that Gartner's website offered ***any functions*** beyond internal searchability.

Finally, there is no merit to DOR's characterization of Gartner's website as an "online searchable database" like Westlaw or Lexis. There is no evidence that Gartner's website functioned like a database. Gartner creates its own content; its website simply gave users another means to access that content. That limited capability is not remotely like the robust functionality offered by Westlaw or Lexis. Not only do those services aggregate vast amounts of third-party content from myriad public sources, their websites allow customers to search, organize, reproduce, and further use that information. In short, the true object of Westlaw and Lexis is the ability to find, manipulate and use aggregated content, not simply obtain access to content. Gartner's website offered no similar functionality.

C. The Digital Products Law Cannot Be Applied To Gartner Research Without Violating ITFA.

Application of the digital products law to Gartner conflicts with ITFA and violates the Supremacy Clause. *See* Op. Br. at 27-29. Thus, the Court's choices are clear. "[T]o avoid constitutional doubt," *see Utter v. Bldg. Indus. Ass'n of Wash.*, 182 Wn.2d 398, 434-35, 341 P.3d 953

(2015), the Court should conclude that Gartner's professional services do not fall within the intended scope or plain language of the digital products law. And, if it cannot do that, then the Court must conclude that ITFA preempts the digital products law "as applied" to Gartner. *See City of Redmond v. Moore*, 151 Wn.2d 664, 668-69, 91 P.3d 875 (2004) ("as applied" challenge does not invalidate statute, but finds its application unconstitutional "in the specific context of the party's actions").

DOR concedes ITFA prohibits states from imposing a "non-uniform," *i.e.*, discriminatory, tax rate on goods or services "delivered electronically" rather than "through traditional means," like mail. DOR Br. at 34. DOR claims that it does not discriminate against Gartner because it applies the digital products law to all "substantially similar businesses." DOR Br. at 35. In fact, DOR claims it is impossible for it to discriminate against Gartner because "[p]roviding access to an online searchable database is not an activity that can be accomplished through non-electronic means," and, thus, "there is no 'offline' equivalent to the business activity engaged in by Gartner or its competitors." *Id.* at 35-36.

DOR's argument is specious. The whole point of ITFA is to compare taxes imposed on "online" and "offline" transactions involving delivery of "similar property, goods, services, or information." 47 U.S.C. § 151, note § 1105(2)(A). So the issue is not whether DOR applies the

same tax rate to businesses, like Gartner, that also deliver their goods or services "online." That is an apples-to-apples comparison. The issue is whether DOR applies a different rate to businesses that deliver "similar" goods and services "offline." *Performance Mktg. v. Hamer*, 998 N.E.2d 54 (Ill. 2013) (striking down tax that did not require retailers who enter into "marketing contracts for 'offline' print or broadcast advertising . . . to collect Illinois use tax," when "retailers who enter into such contracts . . . for . . . online marketing . . . are required to collect Illinois use tax").

DOR's application of the digital products law to Gartner fails this apples-to-oranges comparison. DOR's only basis for applying the law is Gartner's delivery of research reports "online." It is undisputed that if Gartner delivered the same reports "offline," DOR would apply the service B&O tax rate—which is what DOR did when Gartner mailed reports to its clients. CP 743 (Supp. Black Decl., ¶ 9). And, unlike the services in *Community Telecable of Seattle, Inc. v. City of Seattle*, 136 Wn. App. 169, 149 P.3d 380 (2006), application of the digital products law would not result in a uniform tax rate—but a higher rate. *Id.* at 189 (no ITFA violation where "utility tax applies uniformly to all companies engaged in telephone business," regardless of delivery method). Simply put, the law discriminates against Gartner because it imposes a higher tax rate on the same services delivered "online" rather than "offline."

Recognizing that application of the digital products law to Gartner violates ITFA, DOR incredibly claims that ITFA itself is unconstitutional —an argument it did not raise below and cannot raise for the first time now. RAP 9.12. The argument can be rejected out-of-hand in any event. No court has ever found ITFA unconstitutional, or even questioned its validity. "The Supreme Court has long made clear that when Congress properly exercises its enumerated powers, it may lawfully abridge the states' ability to tax." *City of Spokane v. Federal Nat. Mortg. Ass'n*, 775 F.3d 1113, 117-18 (9th Cir. 2014). Because Congress' power to regulate interstate commerce is plenary, it can "prohibit States from imposing taxes that interfere with interstate commerce." *Nat. Private Truck Council, Inc. v. Comm'r of Revenue*, 688 N.E.2d 936, 940 (Mass. 1997).

When a federal statute prohibits a state tax, courts must determine whether Congress had a "rational basis for finding the . . . tax interfered with interstate commerce." *Ariz. Pub. Serv. Co. v. Snead*, 441 U.S. 141, 150 (1979). There is no dispute that there is a rational basis for ITFA. Its legislative history reveals Congress' intent to "establish a national policy against State and local government interference with interstate commerce on the Internet . . . by establishing a [prohibition] on . . . exactions that would interfere with the free flow of commerce via the Internet." *See* H.R. 4105 – Internet Tax Freedom Act, https://www.congress.gov/bill/105th-

congress/house-bill/4105/all-actions; S.442 – Internet Tax Freedom Act, https://www.congress.gov/ bill/105th-congress/senate-bill/442/actions.[5]

The Tenth Amendment does not further limit Congress's power to prohibit state taxes under its commerce power. *See Montgomery Co. Comm'n v. Fed. Housing Fin. Agency*, 776 F.3d 1247, 1261 (11th Cir. 2015) (Tenth Amendment "does not set forth a different standard for legislation enacted under the Commerce Clause, including . . . the state taxes here at issue."); *Nat. Private Truck*, 688 N.E.2d at 940 ("limiting the States' power to tax is not sufficient encroachment upon the States' sovereign authority to warrant invalidating a Federal statute under the Tenth Amendment."); *S.E. Pa. Transp. Auth. v. Pa. Pub. Utility Comm'n*, 826 F. Supp. 1506, 1520 (E.D. Pa. 1993), *aff'd*, 27 F.3d 558 (3d Cir. 1994) ("that pre-emptive federal legislation may impinge on a state revenue-raising scheme has no special Tenth Amendment implications").

The United States Supreme Court's recent decision in *Murphy v. N.C.A.A.*, 138 S.Ct. 1461 (2018), did nothing to change this settled rule. *Murphy* did not involve limits on state taxes, and nothing in its reasoning

[5] *See* K. Houghton & W. Hellerstein, *State Taxation of Electronic Commerce: Perspectives On Proposals For Change And Their Constitutionality*, 2000 B.Y.U. L. Rev. 9, 20-21 (2000) ("philosophy informing the congressional legislative initiative was rooted in the federal government's power to restrain, under Congress's power to regulate interstate commerce under the Commerce Clause, the power of state and local governments to tax electronic commerce.").

remotely questions Congress's authority to regulate commerce through uniform state tax laws. *Murphy* involved the Professional and Amateur Sports Protection Act (PASPA), which made it unlawful for a State to "authorize" sports gambling. After New Jersey passed a law repealing a ban on sports gambling, the NCAA successfully sued to enjoin the law. *Id.* at 1468-72. The Supreme Court reversed, holding that PASPA's effect of prohibiting a State from repealing its own laws on gambling violated the Tenth Amendment's "anticommandeering" principle. *Id.* at 1478.

The Court made clear, however, that the Tenth Amendment is not implicated where Congress regulates the conduct of private actors, not a State's legislative process—even if it does so by enacting a federal statute that purports to prohibit a State's authority to enforce state laws relating to that conduct. *Id.* at 1480 (quoting, as a permissible example, the Airline Deregulation Act of 1978: "no State . . . shall enact or enforce any law, rule, regulation, standard . . ."). The Court noted that such "language might appear to operate directly on the States, but it is a mistake to be confused by the way in which a preemption provision is phrased." *Id.* At bottom, the issue is not whether a preemptive statute purports to prohibit state law, but whether it "confers on private entities . . . a federal right to engage in certain conduct subject only to certain (federal) constraints." *Id.*

The problem with PASPA was that it directly instructed a State legislature on what bills it could or could not enact, but did not do so as a means of regulating the conduct of private actors; PASPA "certainly does not confer any federal rights on private actors interested in conducting sports gambling operations." *Id.* at 1481. This problem does not exist with ITFA because ITFA ***does*** confer federal rights on private actors: persons engaged in "electronic commerce"—"transaction[s] conducted over the Internet or through Internet access"—shall not be subjected to "multiple or discriminatory" taxes. 47 U.S.C. § 151, note §§ 1101(a)(2); 1105(3). DOR simply makes the "mistake" of confusing "the way in which [ITFA's] preemptive provision is phrased," 138 S.Ct. at 1480, with what the Act actually does. ITFA does not violate the Tenth Amendment.

D. If The Digital Products Law Applies, Then Gartner Research Is A Digital Good Not Subject To Retail Sales Tax.

To be clear, the Court does not have to reach this issue. The digital products law does not apply because the "true object" of what clients want from Gartner Research is professional analyst services, not merely reports "transferred electronically." RCW 82.04.192(3)(a) & (6)(a). Gartner's services are excluded from the law in any event because they "primarily involve[] the application of human labor." *Id.*, (3)(b)(i) & (6)(b)(v). Any other interpretation runs afoul of ITFA. Only if the Court concludes

otherwise must it determine whether DOR properly classified Gartner Research as a "digital automated service" rather than a "digital good."

It did not. Both kinds of "digital products" require the taxpayer to transfer content "electronically." RCW 82.04.192(3)(a) & (6)(a). And, for both, the taxpayer's website can provide search functionality. WAC 458-20-15503(203)(a) (digital automated service: "search capabilities and other functionality); *id.*, (203)(a)(i), Example 3 (digital good: "software based search function). As explained above, what distinguishes a "digital automated service" from a "digital good" is that, in the former, the website uses integrated software to provide customers with additional, automated functionality to facilitate use of the content, whereas, in the latter, customers get nothing more than the content itself. *Id.* & Example 4.

For the same reasons Gartner Research is not a "digital automated service" explained above, if it must be pigeon-holed as a digital product at all, then it is a "digital good." DOR cannot have its cake and eat it too. In arguing that Gartner Research is a "bundled transaction" rather than a professional service, DOR asks this Court to ignore all the professional services that go into the analysis, insight, and advice that Gartner's clients receive from Gartner's analysts—and, instead, focus only on what clients receive from Gartner's website. So be it. The undisputed record shows that customers receive no automated functionality from Gartner's website. All

they can do is search for and access Gartner's digital files, *i.e.*, Gartner Research reports. That is a digital good, not a digital automated service. RCW 82.04.192(6)(a); WAC 458-20-15503(202)(a) & (b), (203)(a)(i).

III. CONCLUSION

The judgment must be reversed, and the trial court directed to enter summary judgment in favor of Gartner on its claim for a tax refund.

RESPECTFULLY SUBMITTED this 21st day of December, 2018.

LANE POWELL PC

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 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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DATED: December 21, 2018

s/Kathryn Savaria
Kathryn Savaria

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