THE BOARD OF TAX APPEALS
STATE OF WASHINGTON

LIMELIGHT NETWORKS, INC., Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF REVENUE, Respondent.	Docket No. 20-129 RE: Excise Tax Appeal REVISED FINAL DECISION

This matter came before the Board of Tax Appeals (Board), on June 21, 2023, Rosann Fitzpatrick, Vice Chair, presiding, with Board Chair Claire Hesselholt and Member Matthew Randazzo participating on the panel. Aaron Johnson and Brett Durbin, of Lane Powell PC, represented the Appellant, Limelight Networks, Inc. (Limelight). Charles Zalesky, Assistant Attorney General, represented the Respondent, State of Washington, Department of Revenue (Department).

Testifying on behalf of Limelight was James Kelsall, Vice President of Operations, Edgio, Inc. (formerly Limelight Networks, Inc.). Testifying on behalf of the Department was Teri Sommer, Revenue Auditor.

Limelight presented 3 hearing exhibits (A1 to A3). The Department presented 13 hearing exhibits (R1 to R13). The Board admitted all hearing exhibits without objection.

The Board heard the testimony, reviewed the evidence, and considered the arguments made on behalf of both parties. The Board issued a decision on December 30, 2024. The Department timely filed a motion for reconsideration, requesting that the Board revise Finding of Fact 31. Limelight filed a response objecting to the motion.

The Board grants the Department's motion and issues this revised decision. The Board also takes this opportunity to correct a citation error.

NATURE OF THE APPEAL

This is an appeal from the Department's assessment of retail sales taxes, penalties, and interest on Limelight's gross receipts from providing content delivery network (CDN) services for the 2011 through 2015 tax years. The Department determined that Limelight's CDN services are "digital automated services" subject to retailing B&O tax and retail sales taxes. Limelight contends its gross receipts from providing CDN services in Washington are subject to B&O tax under the "service or other" tax classification, but not retail sales tax.

This appeal presents a dispute over the meaning and scope of two statutory exclusions to the general definition of "digital automated services." According to Limelight, the central dispositive fact is that its content delivery network is a "backbone" component of the internet that its customers use to transmit their content to end users. Limelight contends that this fact places its content delivery services squarely within the exclusion for "the internet and internet access" under RCW 82.04.192(3)(b)(vii). In the alternative, Limelight argues that its content delivery service qualifies as "the mere storage of digital products," including "providing space on a server for web hosting" under RCW 82.04.192(3)(b)(xiv). Limelight further argues that even if its CDN services are digital automated services, the Department incorrectly sourced its receipts from those services to Washington.

The Board finds that the exclusion for "the internet and internet access" under RCW 82.04.192(3)(b)(vii) applies only to services the State is prohibited from taxing under the Internet Tax Freedom Act (ITFA) and the Supremacy Clause. Because Limelight has not demonstrated that its content delivery services fall within the narrow range of services subject to ITFA's state tax moratorium, the exclusion does not apply.

The Board further finds that Limelight's core content delivery network service, which enables customers to upload their digital content to Limelight's CDN and make it accessible via the internet, qualifies as a "web hosting" service excluded from the definition of digital automated service under RCW 82.04.172(3)(B)(xiv). But the amounts Limelight charged for services that enabled customers to modify or enhance their digital content, including Limelight's Mobility and Monetization Service (MMS) and Video Publishing Service (VPS), are not excluded.

Finally, the Board finds that Limelight has not met its burden of proving that the Department improperly sourced its non-excluded retailing revenues to Washington.

ISSUES

1. Are Limelight's content delivery network (CDN) services excluded from the statutory definition of "digital automated services" under either of the following exclusions:
    a. "The internet and internet access as those terms are defined in RCW 82.04.297." RCW 82.04.192(3)(b)(vii); or
    b. "The mere storage of digital products, digital codes, computer software, or master copies of software. This exclusion from the definition of digital automated services includes providing space on a server for web hosting or the backing up of data or other information." RCW 82.04.192(3)(b)(xiv).

2. If not, has Limelight met its burden of demonstrating that the Department improperly sourced its receipts from CDN services to Washington?

FINDINGS OF FACT

A. Credibility Findings

1. The Board finds that both witnesses called at the hearing testified credibly. The Board finds no reason to believe that any of the witnesses were untruthful in their testimony.

B. Facts and Procedural History

2. During the audit period, Limelight was a leading global provider of content delivery network (aka "CDN") services, with its primary business being content delivery.[1] A CDN is a geographically dispersed group of servers that work together to expedite the delivery of internet content.[2] CDNs were developed in the 1990s as a solution to the problem of internet bottlenecks that limited the volume and speed of content delivery across the worldwide web.[3]

3. The invention of CDNs allowed the replication and delivery of content over a large network of distributed servers.[4] CDNs free up web congestion and allow faster more reliable and secure delivery of content over the internet using algorithms to replicate and store

[1] R3-12; Testimony of James Kelsall.
[2] R3-4.
[3] *Akamai Techs., Inc. v. Cable & Wireless Internet Servs., Inc*., 344 F.3d 1186, 1189 (Fed. Cir. 2003).
[4] *Id*; R3-4.

the content at multiple locations. This caching (or storage) of content decreases the time and network bandwidth it takes to deliver the content to end users.[5]

4. Limelight's CDN is a private network with more than 80 points of presence (PoPs) consisting of hundreds of servers and routers that connect to other network providers as part of the internet.[6] Limelight's customers include over a thousand internet content providers operating in media, entertainment, gaming, software, enterprise, and other sectors.[7]

5. Limelight's customers use Limelight's content delivery service to deliver their digital content to customers across the internet.[8] Limelight provides this service by replicating and "caching" (storing) its customers' content on servers distributed throughout the world, and then delivering the content from the server in closest geographic proximity to the end-user. Limelight uses proprietary algorithms to anticipate demand and to balance the load of content across its servers in order to optimize the delivery of its customers' content to end-users.[9]

6. Limelight's content delivery service does not provide "last mile" internet connectivity to end-users.[10] Limelight's customers need to establish an internet connection through their own server or a third-party Internet Service Provider (ISP) to use Limelight's content delivery service.[11] Limelight's customers then either upload their content to Limelight's servers or provide access to their content on the internet so Limelight can retrieve it.[12]

7. When an end-user requests content from one of Limelight's customer's websites, the request is routed to the CDN server that is geographically closest to the end-user, and the requested content is then delivered to the end-user's ISP network, which delivers the content to the end user.[13] Limelight has relationships with over 800 broadband ISPs globally, allowing Limelight to deliver its customers' content directly to the end user's ISP.[14]

8. In its contracts with customers, Limelight warrants the reliability of its content delivery service, which it defines as "the ability to redirect and deliver the requested Customer

[5] R2-3.
[6] R1-7; R3-10
[7] R1-3.
[8] R1-8.
[9] R3-7; Kelsall Testimony.
[10] R8-2.
[11] R8-3.
[12] R12-17.
[13] R9-2. *See also* R8-2 ("When an end user clicks on their website, Limelight provides the content from Limelight's servers to the end user's internet service provider ("ISP").
[14] R9-2, R8-2, R12-17.

Content in Limelight-approved formats for delivery to the Internet from the Limelight Network."[15] Limelight bills its customers based on either the customer's bandwidth utilization or the total amount of data transferred in Gigabytes.[16]

9. In addition to its core content delivery service, Limelight offers a number of ancillary services, including cloud storage, reporting, data analytics, and access to software applications to modify and "monetize" digital content.[17]

10. The Department's Audit Division audited Limelight's excise tax returns for the 2011 through 2015 tax years.[18] Audit determined that Limelight had correctly reported the gross income it received from cloud storage and professional services under the "service or other" B&O tax classification. But it found that Limelight's content delivery service and related services are "digital automated services" subject to retail sales tax and retailing B&O tax.

11. At the conclusion of the audit, the Department issued a tax assessment asserting a tax deficiency of $704,148 for the 2011 through 2015 audit period.[19] The assessment includes $904,640 in unremitted retail sales tax, $44,780 in retailing B&O tax, less a credit of $245,272 in overpaid service and other B&O tax.

12. Limelight sought administrative review of the assessment from the Department's Administrative Review and Hearings Division (ARHD).[20]

13. ARHD first rejected Limelight's argument that its service is part of the internet, explaining that Limelight's content delivery service "does not 'enable users to connect to the internet' and therefore [the "internet and internet access" exclusion in RCW 82.04.192(3)(b)(vii)] is not applicable to the service at issue."[21]

14. ARHD also concluded that Limelight's service did not fall within the "mere storage" exclusion because Limelight's service "includes features beyond 'mere storage,' such as its selection of the location and quantity of content to cache in specific locations, its routing of content requests to specific locations, and its purging of cached content. These additional components go beyond simply providing space on a server."[22]

---

[15] A3-6.
[16] R9-2; Kelsall Testimony.
[17] R1-3.
[18] R7-2.
[19] R7-1.
[20] R10.
[21] R10-6.
[22] R10-5.

15. ARHD also denied Limelight's petition for reconsideration, explaining that Audit had properly determined the location where Limelight's sales occurred, based on the "traffic reports" Limelight provided during the audit.[23]

16. Limelight filed a timely appeal to the Board, which the Department converted to a formal appeal.

C. Analysis

Board's Jurisdiction. The Board has jurisdiction to decide appeals from the Department's final decision on a taxpayer's petition for the correction of a tax assessment.[24] In formal appeals, the Board conducts a de novo hearing using the adjudicative procedures established by the Administrative Procedure Act, chapter 34.05 RCW.

Tax assessments are presumed correct, and the Taxpayer has the burden to prove otherwise.[25]

Retail Sales Tax and B&O Tax. Washington imposes a retail sales tax on the selling price of every retail sale in the state.[26] Washington also imposes a B&O tax on companies for the privilege of engaging in business activities in the State.[27] Different rates apply to different types of business activities.[28] The "service and other" B&O Tax rate is a catchall provision that applies to activities not falling within a specific tax classification.[29] The retailing B&O tax rate applies to the retail seller's gross sale proceeds.[30]

For both the retail sales tax and retailing B&O tax, a "retail sale" includes sales to consumers of digital automated services.[31] *Digital automated service* is broadly defined as "any service transferred electronically that uses one or more software applications."[32] It includes any

---

[23] R11-5.
[24] RCW 82.03.130(1)(a); RCW 82.03.190.
[25] "Taxes are presumed to be just and legal, and the burden is on the taxpayer to prove that the tax is incorrect." *AOL, LLC v. Dep't of Revenue*, 149 Wn. App. 533, 554, 205 P.3d 159 (2009). *See also Gartner, Inc. v. Dep't of Revenue*, 11 Wn. App. 2d 765, 778, 455 P.3d 1179 (2020*)* (the taxpayer "has the burden of proving it is factually exempt from the tax at issue.")
[26] RCW 82.08.020(1).
[27] RCW 82.04.220(1).
[28] *Steven Klein, Inc. v. Dep't of Revenue*, 183 Wn.2d 889, 896-97, 357 P.3d 59 (2015).
[29] RCW 82.04.290(2)(a).
[30] RCW 82.04.250(1).
[31] RCW 82.04.050(8)(a); RCW 82.08.020(1)(b).
[32] RCW 82.04.192(3)(a).

services provided by the seller exclusively in connection with the digital automated services, whether or not a separate charge is made for such services.[33]

The legislature has provided numerous exceptions to the retail sales tax for digital automated services (DAS), including one for "[t]he internet and internet access as those terms are defined in RCW 82.04.297."[34] That statute incorporates by reference the definitions of "the internet" and "internet access" set forth in the federal Internet Tax Freedom Act (ITFA), Title 47 U.S.C. § 151 note, as existing on July 1, 2009. ITFA prohibits the states from imposing sales or use taxes on "Internet access."[35] It more broadly prohibits "multiple or discriminatory taxation of electronic commerce."[36] The moratorium on state taxation of internet access does not apply to Washington's B&O tax, only its sales and use taxes.[37]

Another exception to the retail sales tax for DAS is for the "mere storage" of digital products, including providing space on a server for "web hosting" or "the backing up" of data.[38]

Taxing statutes are to be strictly construed, either in favor of the taxpayer, if tax-imposing, or in favor of the taxing authority, if providing an exemption or deduction. The parties dispute which principle applies here. Limelight strenuously argues that the exclusions are part of a tax-imposing statute, which must be strictly construed in its favor. The Department argues they are exceptions to a generally applicable tax that must be narrowly construed in favor of taxation.

Washington courts have characterized the DAS exclusions as "exceptions," which generally must be narrowly construed, while also observing that ambiguous tax statutes are construed in favor of the taxpayer.[39] The question is largely academic because Washington courts typically resolve purported ambiguities in tax statutes, whether tax-imposing or tax-exempting, through a robust plain meaning analysis that tests the reasonableness of competing

---

[33] RCW 82.04.050(8)(b).
[34] RCW 82.04.192(3)(b)(vii).
[35] ITFA, § 1101(a)(1), 47 U.S.C. § 151 (note).
[36] *Id.* at 1101(a)(2). *See, generally*, Walter Hellerstein and Andrew Appleby, "The Internet Tax Freedom Act at 25," State Tax Notes, Vol. 107, January 2, 2023, at 8, available at https://ssrn.com/abstract=4346851.
[37] The B&O tax is not a "tax on internet access" under ITFA. *See* ITFA, § 1105(1)(C)(i) (excluding state gross receipts taxes from ITFA moratorium on state taxation of internet access); ETA 2029.08.245 (June 24, 2008) (discussing 2007 amendments to ITFA and their impact on Washington's taxation of telecommunications services and internet services).
[38] RCW 82.04.192(3)(b)(xiv); WAC 458-20-15503(303)(n).
[39] *See Landis+GYR Midwest, Inc. v. Dep't of Revenue,* 26 Wn. App.2d 249, 258, 526 P.3d 867 (2023); *Gartner,* 11 Wn. App.2d at 772 (characterizing the "human effort" exclusion as an "exception to the definition of digital automated services").

interpretations in light of "all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question," the statutory scheme as a whole, consideration of all relevant canons of construction, and the consequences of adopting one interpretation over another.[40]

In *Landis*, the court of appeals concluded that the Department's interpretation of the exclusion for "data processing" was unreasonably narrow. In *Gartner*, the court concluded the Taxpayer's interpretation of the "human effort" exclusion was unreasonably broad.[41] Both decisions were based on the court's plain meaning analysis of the statutory text.

The structure of the DAS imposition statute shows legislative intent to broadly tax digital automated services absent an applicable statutory exception.[42] The 2009 digital products legislation marks a departure from the historical approach of applying sales tax only to services specifically defined as retail sales. The legislature opted instead to adopt a general imposition tax on all "digital automated services" not specifically excluded from tax, similar to the traditional approach of taxing all sales of tangible personal property absent a specific statutory exemption or exclusion. The legislature defined "digital automated services" very broadly, to include "any service transferred electronically that uses one or more software applications," with 16 enumerated exclusions.[43]

There is no dispute that Limelight's content delivery network services satisfy the general definition of a digital automated service. Thus, Limelight has the burden of proving that some or all of its services come within the clear scope of an applicable statutory exclusion.

The exclusion for "the internet and internet access" applies to internet access services that the State is prohibited from taxing as retail sales under ITFA and the Supremacy Clause

Limelight frames the central issue in this case as whether its CDN meets the statutory definition of "the Internet" under Washington law. According to Limelight, its CDN services fit squarely within the exclusion for "the internet and internet access" because its CDN is "a

[40] *TracFone Wireless, Inc. v. Dep't of Revenue*, 170 Wn.2d 273, 281, 242 P.3d 810 (2010).
[41] *Landis,* 26 Wn. App.2d 249; *Gartner*, 11 Wn. App.2d 765.
[42] *Cf. Sprint Int'l Communications Corp. v. Dep't of Revenue,* 154 Wn. App. 926, 935, 226 P.3d 253 (2010) (finding that the similarly structured imposition statute for "network telephone service" shows legislative intent to tax services not specifically excluded).
[43] RCW 82.04.192(3)(a).

component of the Internet" as that term is defined in ITFA. The Department does not dispute that Limelight's CDN is "part" of the internet. But the Department argues that the exclusion cannot reasonably be interpreted as applying to services that are "part" of the internet or "related" to the internet because doing so would swallow the rule that digital automated services are retail sales.

The statutory text requires "and" to be given its conjunctive, joint meaning

Limelight reads the exclusion as applying to either "the Internet" or "Internet access" services. But when the exclusion for "the internet and internet access" is read as a whole and in its statutory context, it is clear the legislature used "and" to convey a conjunctive and joint meaning. The ITFA definitions of "the Internet" and "Internet access" work together to create a single exclusion for internet services that ITFA prohibits the state from taxing as retail sales.

"'And' conveys a conjunctive meaning; otherwise, the legislature would have used the word 'or' to convey a disjunctive meaning." *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 856, 827 P.2d 1000 (1992); *Ahten v. Barnes*, 158 Wn. App. 343, 242 P.3d 35 (2010).

The conjunctive "and" may be read as "or" when it is clear from the plain language of the statute that it is appropriate to do so. "[A]uthorities agree that *and* has a distributive (or several) sense as well as a joint sense."[44] For example, a law that criminalizes "theft and battery" is naturally read as applying to either theft or battery. The word "and" is used conjunctively and severally. Thus, a crime occurs when a person commits a theft, a battery, or both. But a law that criminalizes "drinking and driving" is naturally understood as describing a single crime. The word "and" is used in the joint sense. There is no crime unless both drinking and driving occur.

Limelight's broad interpretation of the exclusion hinges on a disjunctive reading. It is clear from the statutory text and context, however, that the legislature intended "and" to be read in a conjunctive, joint sense when it created the exclusion for "the internet [and] internet access as those terms are defined in RCW 82.04.297."

[44] *State v. Hodgins*, 190 Wn. App. 437, 444, 360 P.3d 850 (2015) (quoting *Bryan A. Garner, Garner's Dictionary of Legal Usage* 639 (3 ed. 2011)). "And" is used in the "several" sense when it denotes A and B, jointly or severally; it is used in the "joint" sense when it denotes A and B jointly, but not severally. *Weinberg v. Waystar, Inc.*, 294 A.3d 1039, 1045-46 (Del. 2024) (comprehensive discussion of the "two avenues" used to correctly interpret "and," – the "conjunctive or disjunctive" path and the "joint or several" path).

The statutory reference is to the B&O tax statute that classifies "internet access service" as a service activity. To define "internet access service," the legislature incorporated by reference the ITFA definitions of "the Internet" and "Internet Access," which provide as follows:

> **Internet** -- The term "internet" means collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected world-wide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio.[45]
>
> **Internet access** -- The term "internet access" –
>
> (A) means a service that enables users to connect to the Internet to access content, information, or other services offered over the Internet;
>
> (B) includes the purchase, use, or sale of telecommunications by a provider of a service described in subparagraph (A) to the extent such telecommunications are purchased, used or sold—
>
> (i) To provide such service; or
>
> (ii) To otherwise enable users to access content, information or other services offered over the Internet;
>
> (C) includes services that are incidental to the provision of the service described in subparagraph (A) when furnished to users as part of such service, such as a home page, electronic mail and instant messaging (including voice-and-video capable electronic mail and instant messaging), video clips, and personal electronic storage capacity;
>
> (D) does not include voice, audio or video programming, or other products or services (except services described in subparagraph (A), (B), (C), or (E) that utilize Internet protocol or any successor protocol and for which there is a charge, regardless of whether such charge is separately stated or aggregated with the charge for services described in subparagraph (A), (B), (C), or (E); and
>
> (E) includes a homepage, electronic mail and instant messaging (including voice- and video-capable electronic mail and instant messaging), video clips, and personal electronic storage capacity, that are provided independently or not packaged with Internet access.[46]

[45] ITFA, § 1105(4), 47 U.S.C. § 151 (note).
[46] ITFA, § 1105(5), 47 U.S.C. § 151 (note).

As Limelight correctly observes, ITFA's definition of "the Internet" is exceedingly broad. It encompasses the entire infrastructure of the world wide web. Virtually all services provided over the internet would qualify as excluded "internet services" if the word "and" were replaced by "or." It is not reasonable to infer the legislature inserted a vague and unbounded exception for "internet" services in a list of otherwise specifically tailored exclusions.

The exclusion for "the internet and internet access as those terms are defined in RCW 82.04.297" only makes sense when "the internet" is read in conjunction with the definition of "internet access," just as in RCW 82.04.297 and Section 1105 of ITFA (defining "Internet access" by reference to "the Internet," separately defined). The definition of "the internet" is used to give meaning to "internet access."

The obvious legislative intent of the exclusion for "the internet and internet access as those terms are defined in RCW 82.04.297" is to comply with ITFA's ban on state taxation of internet access services, using statutory language that applies uniformly to multiple types of taxable transactions and activities.

Related statutory provisions confirm this reading of the exclusion. The legislature enacted substantially the same exclusion for "telecommunication services," "digital goods," and "digital automated services." In each case, the legislature incorporated the ITFA definitions of "the internet" and "internet access" by reference to RCW 82.04.297, which addresses the state's B&O tax. The legislature also used substantially the same statutory language in restricting local taxation of "internet access providers," under RCW 35.21.717.[47] That statute allows cities to impose B&O tax on internet access providers, but not retail sales tax.

Unlike the exclusions of "the internet and internet access" in the digital products statute, the exclusion of "internet access services" from "telecommunications service," under RCW 82.04.065(27)(f), does not specifically reference RCW 82.04.297.[48] The latter statute, however, explicitly states that its definitional provisions apply throughout chapter 82.04 RCW, unless the

[47] *See* RCW 35.21.717 ("A city or town may tax internet access providers under generally applicable business taxes or fees….For the purpose of this section, 'internet access' has the same meaning as in RCW 82.04.297.").
[48] RCW 82.04.065(27) "Telecommunications service" means the electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points. "Telecommunications service" includes such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission, conveyance, or routing without regard to whether such service is referred to as voice over internet protocol services or is classified by the federal communications commission as enhanced or value added. "Telecommunications service" does not include…(f) Internet access service[.]"

context clearly requires otherwise.[49] This shows that the legislative purpose was to create a uniform exclusion for services affected by ITFA's state tax moratorium.

The legislature tied the sales tax exclusions to the B&O tax statute addressing internet-related services as part of the same comprehensive piece of legislation. Before 2009, the B&O tax statute applied more broadly to "internet *services*," defined as "a service that includes computer processing applications, provides the user with additional or restructured information, or permits the user to interact with stored information through the internet or a proprietary subscriber network." Laws of 1997, ch. 304, § 4. As part of the 2009 digital products legislation, the legislature narrowed the scope of internet services subject to service B&O under RCW 82.04.297 tax by replacing "internet service" with "internet access" service, as that term was defined under ITFA as of July 2, 2009.[50] The legislature simultaneously amended RCW 82.04.065 to exclude "internet access service" from the definition of "telecommunications service."[51]

The 2009 legislation narrowed the scope of "internet services" subject to service B&O tax to align with the new tax imposition statute. This statutory change implements a recommendation made by the committee the legislature commissioned to study and make recommendations regarding the taxation of digital products. The committee advised the legislature: "If the current definition of Internet services is retained, it could result in a definition of digital products or digital services that is narrower than contemplated."[52]

---

[49] RCW 82.04.297(3) ("Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.").

[50] In 2010, however, the legislature amended RCW 82.04.297 again to exclude certain telecommunications services from the definition of "internet access" for B&O tax purposes. The overall purpose of the 2010 bill was to address "ambiguities and unintended consequences" which, "if not corrected, will unsettle expectations," in the wake of the 2009 enactment of the digital products legislation. Laws of 2010, ch.. 111, § 101. The related fiscal note explains that the purpose of the amendment was to clarify that telecommunications services exempt from the retail sales tax as a result of ITFA, nevertheless are taxable under the retailing B&O tax rate rather than the higher service rate. *See* Fiscal Note for H.B. 2620, 61st Leg., 2010 Reg. Sess., ch. 111, Laws of 2010, at 2 ("The definition of "Internet access" in RCW 82.04.297 is amended to exclude a telecommunications service purchased, used, or sold by internet service providers, where the telecommunications service is used to provide access to the internet. This will ensure that these services remain taxed under the 'retailing' B&O tax classification.").

[51] Laws of 2007, ch. 6, §§ 1002, 1003. Formerly defined as "network telephone service." Laws of 1983, 2d Ex. Sess. ch. 3, § 24. In 2007, the legislature amended RCW 82.04.065 to replace "network telephone service" with "telecommunications service," to conform with the definitions set forth in the Streamlined Sales and Use Tax Agreement (SSUTA). From 1997 to 2007, the definition of "network telephone service" in RCW 82.04.065 included the provision of "transmission to and from the site of an internet provider" via an electronic transmission system but excluded "the provision of internet service." Laws of 1997, ch. 304, § 5.

[52] *Study of the Taxation of Electronically Delivered Products, Final Report*, December 5, 2008, prepared pursuant to chapter 522, Laws of 2007 (SHB 1128), at 13.

As a result of the 2009 legislation, internet services formerly subject to service B&O tax under RCW 82.04.297 became taxable as retail sales of either digital products or telecommunications services, absent an applicable statutory exclusion or exemption.[53]

When the statute is read in the context of the 2009 legislation and the statutory scheme as a whole, the plain meaning of the statutory exclusion for "the internet and internet access as those terms are defined in RCW 82.04.297" is that internet services the State is prohibited from taxing as retail sales under ITFA are subject to service B&O tax under RCW 82.04.297, but exempt from retail sales tax under RCW 82.04.192(3)(b)(vii) ("digital automated service").

Thus, Limelight's content delivery services are not excluded merely because its content delivery network is "part" of the internet or provides services "related to" internet access. To fit within the exclusion of "the internet and internet access," Limelight must show that ITFA prohibits the State from imposing sales and use taxes on its content delivery network services.

Limelight's has not demonstrated that its content delivery services are "the internet and internet access" services within the meaning of the DAS exclusion

Limelight argues its content delivery services fall within the plain meaning of "internet access" services because its customers purchase Limelight's content delivery services "so that end users can access content" on the internet.[54] The Department argues that Limelight's content delivery services are not "internet access" services because they do not enable the customer "to connect" to the internet.[55]

"Internet access" means a service that allows an end user "to connect" to the Internet

Limelight presents no relevant case law authority supporting its broad interpretation of "internet access" services. Instead, it relies on authorities addressing a different federal law, involving a different statutory definition of "internet access service provider," where courts have interpreted that term broadly for the purpose of enforcing consumer protection legislation.[56]

---

[53] *See* WAC 458-20-15503(203)(b) (noting that the sale of a digital automated service to consumers was not a retail sale before July 26, 2009, and that income from such sales generally was subject to service B&O tax).
[54] App's Resp. Br. at 5.
[55] Resp's Br. at 4.
[56] *Ferguson v. Quinstreet, Inc.,* 2008 WL 3166307 (W.D. Wash. Aug. 5, 2008) (addressing CAN-SPAM act, 15 U.S.C. § 7701, which is designed to protect consumers from "unwanted mobile service commercial messages.");

When the legislature incorporates by reference a federal law, court decisions that have interpreted that federal law can offer persuasive insight and guidance.[57] The decisions Limelight relies on are not persuasive or helpful because they do not address the meaning of "internet access" for purposes of ITFA.

Because ITFA operates to preempt state taxation, it is narrowly construed by courts and state taxing authorities.[58] The prohibition on state taxation of "internet access" is generally understood as applying to amounts an Internet Service Provider (ISP) charges residential or business customers for so-called "last mile" or "end-user" internet access services.[59] It also applies to "middle mile" data transmission services purchased, used, or sold by an ISP to provide such access.[60] But it does not apply to internet services provided to customers who already have access to the internet through an ISP or their own server.[61]

The core definition of *internet access* under ITFA is a service that "enables users to connect to the Internet."[62] State courts and taxing authorities have interpreted this language as describing the "last mile" internet service that provides a connection between the end-user and a server that is connected to the internet. Thus, internet services that are accessible only once the consumer has established online access through an ISP or via its own server are not "internet access" services within the meaning of ITFA.[63]

MySpace, Inc. v. The Globe.com, Inc., 2007 WL 1686966 (C.D. Cal. Feb. 27, 2007) (holding that the operator of an online social networking service provided an "internet access service" for purposes of the CAN-SPAM act).

[57] *See, e.g., State v. Reader's Digest Ass'n, Inc.* v. 81 Wn.2d 259, 274-75, 501 P.2d 290 (1972) (interpreting the phrase "unfair methods of competition" in Washington's Consumer Protection Act in light of the "well settled" meaning established by federal court decisions addressing the federal law after which the CPA is modeled).

[58] "There is a strong presumption against finding preemption, and the burden of proof is on the party claiming preemption." *Gartner*, 11 Wn. App.2d at 789 (finding that ITFA does not preempt Washington's retail sales tax access to an online research library because it was not sufficiently similar to research delivered by hard copy to constitute multiple or discriminatory taxation of electronic commerce).

[59] U.S. Government Accountability Office, Internet Access Tax Moratorium: Revenue Impacts will Vary by State, GAO-07-897T, Jan. 2006 (analyzing revenue impacts of ITFA's moratorium on internet access charges).

[60] *See Level 3 Communications LLC v. Pennsylvania*, 125 A.3d 832 (Pa Commw. 2015) (finding that internet infrastructure services sold to AOL for use in providing internet access to consumers was exempt).

[61] *See J2Global Communications, Inc. v. City of Los Angeles*, 218 Cal.App.4th 328, 159 Cal. Rptr. 3d 742 (2013); Virginia Dep't of Taxation, Ruling of the Tax Comm'r, Pub. Doc. No. 16-195 (2016).

[62] ITFA, § 1105(5)(A).

[63] *See* ATB 2019-202., Mass. Ruling ("according to appellant's own standard terms and conditions, customers are responsible for providing their own internet and email service, which negates any contention that the efax service involves the purchase and resale of internet access"); Virginia Dep't of Taxation, Ruling of the Tax Comm'r, Pub. Doc. No. 16-195 (2016) (picture-messaging service offered by provider of cellphone service was not an "internet access" service because customers must already have access to the internet through their ISPs to use the service);

For example, in *J2 Global Communications, Inc. v. City of Los Angeles,*[64] the California Court of Appeals held that providing an online e-fax service that allowed customers to receive faxes or voice mail by email did not qualify as "internet access" service under ITFA. The court rejected the company's argument that its e-fax service was an exempt "incidental" service under section 1105(5)(C) of ITFA. The court noted that the critical words in the statutory definition of "internet access" is "a service that enables users to connect to the Internet," under section 1105(5)(A). Because the undisputed evidence showed that J2's customers obtained services from a third-party to enable them to connect to the internet, the court concluded that J2 cannot establish that its eFax service qualified as internet access under section 1105(5)(A) or (C*).* The Department published a tax determination expressing its agreement with the *J2 Global* decision.[65]

The court of appeals applied similar reasoning in *Vonage America, Inc. v. City of Seattle*,[66] addressing whether Washington's moratorium on local taxation of "internet service," then defined as including "access to the internet for information retrieval," prohibited the City of Seattle from imposing tax on revenues from Voice over Internet Protocol (VoIP) services. The court found that, because customers had to establish a broadband internet connection to access VoIP services, the service provider was not providing internet access services within the meaning of former RCW 35.21.717 (prohibiting local taxation of "internet services" as defined in former RCW 82.04.297).[67] *See also Community Telecable of Seattle, Inc. v. City of Seattle*, 164 Wn.2d 35, 186 P.3d 1032 (2008) (the State internet tax moratorium prohibited Seattle from imposing a telephone utility tax on high-speed cable internet services that were provided by an ISP). In both *Verizon* and *Community Telecable*, the courts understood the State's moratorium on local taxation of internet services as applying to providers of "last mile" internet access services.

Limelight's CDN services are not "internet access" services under ITFA.

[64] 218 Cal.App.4th 328, 159 Cal. Rptr.3d 742 (2d Dist. 2013).
[65] *See* Det. No. 14-0307R, 38 WTD 29 (2019) (cloud-based e-fax services do not qualify as an exempt internet access service where customers had to have internet connectivity to use the service).
[66] 152 Wn. App. 12, 216 P.3d 1029 (2009).
[67] *Id.* at 25 (discussing former RCW 35.21.717 (2004)).

17. Limelight's basic content delivery service is not a service enabling its customers to connect to the internet. Limelight's customers connect to the internet through their own equipment, or via an ISP.[68] Limelight delivers content to the servers or gateway of the ISP that actually provide internet access to the end-user.[69] Limelight contracts with ISPs around the globe for permission to deliver content to the ISP's gateway.[70]

18. Limelight's network is "connected to multiple Internet backbone and broadband Internet service provider (ISP) networks," but Limelight does not, itself, provide "last mile" internet connectivity services.[71] "Although in most cases we are not our customer's Internet service provider, which is often referred to as the 'Last Mile' of the Internet, we are instead what is considered the 'Middle Mile.' We provide our customers with Internet infrastructure services that are faster and more reliable than they would experience without using our services. Our customers pay us to speed the delivery of their content over the Internet."[72] "Limelight's CDN service merely delivers our customers' content across the Internet to their customers for a fee based on the amount of gigabytes delivered."[73]

19. In order to use Limelight's services, the customer must configure its own server to "point" to Limelight's network.[74] Limelight only provides the CDN services once the customer has done so. "When ABC Company signs up with Limelight, they are not provided any software, hardware, or access to Limelight's network. ABC Company has absolutely no access or access point to Limelight's network whatsoever."[75]

20. Limelight acquires content from its customers, replicates and stores the content on its servers, and provides the content to the end user's ISP.[76] Limelight's proprietary software "enables Limelight to perform the service of delivering media objects more efficiently by caching objects in certain geographic locations based on popularity (i.e. the amount of end user requests for the object)."[77] When an end user clicks on the website, Limelight provides the

[68] R8-3 ("Upon request by an end user, Limelight provides the content to the end-users ISP.").
[69] *Id.*
[70] R9-2.
[71] R1-7 ("All of our delivery locations are interconnected via our global network and also connected to multiple Internet backbone and broadband Internet service provider (ISP) networks.").
[72] R9-3.
[73] R9-4.
[74] R9-2.
[75] R9-7.
[76] R8-3.
[77] R9-8.

content from the Limelight server closest to the end-user's ISP, and the ISP delivers the content to the end user.

21. Limelight's customers and end users must have internet access to use Limelight's services. Limelight's content delivery service enables customers to more efficiently, quickly, and reliably transmit their content to end-users usings Limelight's private network. These services do not fall within the exclusion for the "internet and internet access as those terms are defined in RCW 82.04.297."

22. The Board finds that the amounts Limelight charged its customers for content delivery network services are not exempt under the "internet and internet access" exclusion in RCW 82.04.192(3)(b)(vii) because those services do not enable the customers "to connect" to the internet, which is the critical element of the ITFA definition.[78]

Limelight's core CDN service is an excluded storage and web hosting service

23. Approximately 80 percent of Limelight's revenues are from charges for its content delivery service, which is booked to a general ledger account labeled "Content Delivery Network." Limelight argues that its content delivery service is fundamentally a "data storage solution" that qualifies for the "mere storage" exclusion. The Department does not dispute that a significant portion of Limelight's revenues are from excluded storage services. But it contends that Limelight's content delivery network services provide much more than "mere storage."

24. "Digital automated service" does not include: "The mere storage of digital products, digital codes, computer software, or master copies of software. This exclusion from the definition of digital automated services includes providing space on a server for web hosting or the backing up of data or other information."[79] The Department's rule addressing the exclusion provides the following example:

> **Example 19.** Company charges Rowe a fee for 25 terabytes of storage space under its "basic storage service" offering. Company also charges Rowe an additional and optional fee for its "premium service" package offering, which involves services beyond mere storage. The "basic storage" services are mere storage services and excluded from the definition of digital automated services.

[78] Limelight offers the service of acting as the customer's ISP for customers with origin servers located in a Limelight data center. R6-3 (description of amounts booked to Limelight's general ledger account for "Transit": "Limelight acts as an ISP for customers who are collocated in a Limelight PoP."). But the Department did not assess taxes on those services. *See* R7-16 ("not material").
[79] RCW 82.04.192(3)(b)(xiv).

> These services would generally be subject to service and other activities B&O tax. However, the charges for the optional premium services are more than mere storage or hosting services. As such, the premium services are not excluded from the definition of digital automated services and would generally be subject to retail sales tax and retailing B&O tax.[80]

25. Limelight offers multiple services that allow customers to upload content to Limelight's CDN and have it available for delivery throughout the network. The Department did not reclassify amounts Limelight booked to its general ledger account for "Storage."[81] But the Department determined the amounts booked to general ledger accounts for "Content Delivery Network" and related services were "premium services" outside the exclusion for "mere storage," as in Example 19 of WAC 458-20-15503.

26. In the only published tax determination addressing the "mere storage" exclusion, Det. No. 18-0109, 38 WTD 189 (2019), the Department ruled that a data center provided more than "mere storage" by giving its customers use of the "CPU capacity and random access memory" necessary to access the digital content stored on its servers. The Department argues that Limelight's content delivery service similarly goes beyond "mere storage" because its software applications allow customers to "optimize the quality and speed of content accessed by viewers."

27. The Department's interpretation of the exclusion is unreasonably narrow. It fails to recognize that the legislature specifically excluded "providing space on a server for web hosting," which requires both hardware and software components working together.

28. The term "web hosting" is not defined by the statute or administrative rule addressing digital products. Unlike "mere," which commonly means "nothing more than,"[82] "web hosting" is a technical term. When technical terms are used, courts give effect to their technical meaning.[83] To shed light on the technical meaning of web hosting, Limelight relies heavily on a federal court decision addressing a patent infringement claim involving one of its competitors.

29. In *Akamai Technologies, Inc. v. Cable & Wireless Internet Services, Inc.*, 344 F.3d 1186 (Fed. Cir. 2003), the court provides a detailed description of the evolution of the

[80] WAC 458-20-15503(303)(n).
[81] R7-16 (Workpaper A).
[82] See www.merriam-webster.com/dictionary/mere (last viewed 11/27/2024).
[83] *Tingey v. Haisch*, 159 Wn.2d 652, 658, 152 P.3d 1020 (2007).

internet and web browsing technology. A host server is a server that stores digital content and is responsible for responding to requests for the stored content.[84] In the early days of the internet, an entire web page was typically stored and delivered from a single origin host server, which stymied the growth of the internet. The technology of content delivery networks evolved to alleviate internet congestion by replicating and storing digital content on geographically dispersed servers so that the digital content can be distributed more efficiently to end users.[85] Essentially, a content delivery network is a platform that enables a scalable and highly redundant form of web hosting.

30. The Board finds that Limelight's basic content delivery network service is an excluded web hosting service under the applicable statute and administrative rule. Customers pay Limelight to replicate and store their digital content on its geographically distributed servers so their content can be delivered to end users more quickly and cost-effectively. The use of multiple, interconnected servers rather than a single host server does not change the basic nature of the service.

31. The Department concluded that Limelight's content delivery service includes features beyond "mere storage," including the application of proprietary algorithms to retrieve, copy, store, route, and purge the customer's digital content. The Board disagrees. The legislature's use of the word "mere" limits the exclusion to services that only provide access to server resources for the storing or hosting of digital content. Limelight's basic content delivery service merely provides the infrastructure, including the hardware and software required by the server to upload digital content and make it accessible. The features the Department deems disqualifying are inseparable components of Limelight's web hosting service. They are not distinct or premium services.

32. In addition to its basic content delivery service, Limelight's site performance service provides customers access to a dedicated portion of its content delivery network for use in storing and delivering digital content to end users.[86] Like its basic content delivery service, Limelight's site service improves website performance by offloading digital content from the customer's origin servers to Limelight's edge servers, enabling faster delivery to end users. The

[84] *Akamai Techs.,* 344 F.3d at 1189.
[85] *Id.;* Kelsall Testimony.
[86] R12-27.

Site service is not a premium service. It is a hybrid form of Limelight's excluded storage and web hosting services.

33. Limelight also provides services that go beyond excluded data storage or web hosting. Limelight's mobility and monetization service (MMS) optimizes the delivery of content to mobile devices and allows the insertion of advertising through the content delivery network.[87] A typical customer uses the service to deliver video content to mobile devices with advertising. Customers provide an original copy of their content to Limelight, and Limelight transforms the content into a mobile format and injects advertising into the content stream using multiple software applications.[88] The Department correctly determined that the MMS service is not an excluded storage or hosting service.

34. Limelight's Video Publishing Service (VPS) provides customers with a self-service portal where they can access software applications to manage, analyze, and "monetize" video content through the insertion of advertising before delivering it to end users.[89] The Department correctly determined that the VPS service is not an excluded storage or hosting service.

Limelight has not demonstrated that the Department improperly sourced its retailing receipts

35. Limelight argues that the Department improperly sourced its sales of content delivery services to Washington based on the location of its customers' content on Limelight's Washington server. Limelight argues that if its CDN services are retail services, they should be sourced using its customer's address. The issue is moot with respect to Limelight's receipts from its excluded content delivery services, including amounts booked to GL 42001 (Content Delivery Network) and GL 42002 (Site), which are subject to service B&O tax.[90] And there is no dispute about the apportionment method Limelight used in reporting its service B&O taxable income. But the sourcing of Limelight's retailing receipts from non-excluded digital automated services remains at issue.

[87] R12-19, R2-5, R6-2.
[88] R2-6; R12-19, 22.
[89] R12-24.
[90] R6-3, R7-3.

36. Washington law requires the sourcing of digital automated services using a series of cascading rules. "Sourcing" generally refers to the location where a sale is deemed to occur for sales tax purposes. For most retail transactions, RCW 82.32.730 requires sellers to source their retail sales based on the location where the purchaser "received" the taxable goods or services. The term "receipt" or "received" means "making first use of digital automated services."[91]

37. First, if the service is received by the purchaser at a business location of the seller, the service is sourced to that business location.[92] Second, if the service is not received by the purchaser at a business location of the seller, the service is sourced to where "receipt by the purchaser" occurs, including "the location indicated by instructions for delivery" known to the seller.[93] Third, if neither of the first two sourcing rules apply, then the service is sourced to the customer's address "obtained during the consummation of the sale."[94]

38. If the first three sourcing rules do not apply, the sale is sourced to the location indicated by an address for the buyer obtained during the sale transaction, such as a credit card billing address.[95] If the seller lacks sufficient information to apply any of the preceding rules, the seller must source the sale to the location "from which the digital automated service was provided."[96]

39. The Department sourced Limelight's content delivery services using the second sourcing rule.[97] The Department determined that Limelight's customers first used the content delivery services "at the point where the CDN's server closest to the user is located."[98] The Department used "traffic reports" supplied by Limelight showing the volume of "CDN traffic" delivered to end-users from Limelight's Seattle location. The Department developed an attribution percentage based on the ratio of CDN traffic delivered from Limelight's Seattle server to the total CDN traffic delivered to end users.[99] The Department recognizes that some of the content delivered from Limelight's Washington server was destined for servers located in

[91] RCW 82.32.730(9)(f).
[92] RCW 82.32.730(1)(a); WAC 458-20-15503(402)(a).
[93] RCW 82.32.730(1)(b); WAC 458-20-15503(402)(b).
[94] RCW 82.32.730(1)(c); WAC 458-20-15503(402)(c).
[95] RCW 82.32.730(1)(d); WAC 458-20-15503(403)(d).
[96] RCW 82.32.730(1)(e); WAC 458-20-15503(403)(e).
[97] R7-10.
[98] *Id*.
[99] R7-10; Testimony of Teri Sommers.

Oregon, Idaho, or Montana. But the Department assumed this would be offset by content delivered to servers in Washington from outside the state.[100]

40. Limelight contends that its content delivery services should be sourced based on its customers' addresses under the third sourcing rule. Limelight agrees that the first sourcing rule does not apply. It also agrees that its customers "receive" its services "wherever end users access content from Limelight's CDN."[101] But Limelight argues that the second sourcing rule does not apply because "there is no defined location" where customers take receipt. Rather, Limelight delivers the content to end users' network providers, whenever and wherever it is requested."

41. The sourcing rules are intended to source receipts to the location where taxable services are used by the consumer, as opposed to the place from which they were ordered or delivered, or where the seller's property or personnel are located. The sourcing rules require the seller to source retail sales using the best available information about the place of "first use." Limelight's "traffic reports" were used for billing purposes and provide a reasonably reliable way to source its content delivery services under the second sourcing rule.

42. Limelight argues that sourcing its receipts based on the customers' address would be consistent with the sourcing of most telecommunications services, which similarly involve an operating network spanning different states.[102] Limelight has not presented evidence to show what portion of its CDN revenues is from sales to customers with an out-of-state billing address. Limelight's large customers include a number of Washington businesses, including Amazon, Microsoft, and Nintendo.[103] Thus, even if the Board were to conclude that the third sourcing rule applies, the evidence in the record is insufficient for the Board to find that the correct amount of Limelight's tax liability is less than the amount assessed.

CONCLUSIONS OF LAW

1. The Board has jurisdiction to hear this formal appeal under RCW 82.03.130(1)(a).

[100] Testimony of Teri Sommers.
[101] App's Trial Br. at 13.
[102] App's Resp. Br. at 18-19. *See* RCW 82.08.066 (sourcing mobile phone service to the customer's "place of primary use," regardless of where the services originate, terminate, or pass through).
[103] R1-8 (2014 Form 10-K describing customer base).

2. As Taxpayer, Limelight has the burden of proving the contested tax assessment is incorrect, in whole or in part, and the correct amount of its tax liability.[104]

3. By enacting a tax imposition statute that defines "digital automated service" in all-encompassing terms, with specific exclusions and exemptions, the legislature manifested its intent to tax all digital automated services not specifically excluded or exempted.[105]

4. Limelight's content delivery network services fall within the general definition of "digital automated services," under RCW 82.04.192(3)(a), because they are services transferred electronically that use one or more software applications.

5. To avoid retail sales tax liability on its sales of content delivery services, Limelight has the burden of proving that its services fall within the clear scope of an applicable statutory exception (exclusion, exemption, or deduction) to the general definition of "digital automated services."[106]

Internet and Internet Access Exclusion

6. The word "and" in the exclusion for "the internet and internet access as those terms are defined in RCW 82.04.297" has a conjunctive and joint meaning. Thus, the exclusion applies only to services that satisfy both definitions of "the internet" and "internet access" in the referenced statute.

7. RCW 82.04.297 incorporates by reference the definitions of "the Internet" and "Internet access" in ITFA as of 2009.

8. The critical element of an "Internet access" service under ITFA is a service that "enables users to connect to the Internet."[107] This applies to what is commonly referred to as "last mile" internet service that provides a connection between the end-user and a server that is connected to the internet.

---

[104] "Taxes are presumed to be just and legal, and the burden is on the taxpayer to prove that the tax is incorrect." *AOL*, 149 Wn. App. at 554. *See also Gartner*, 11 Wn. App. 2d at 778 (the taxpayer "has the burden of proving it is factually exempt from the tax at issue.").

[105] *Swinomish Indian Tribal Community v. Dep't of Ecology*, 178 Wn.2d 571, 582, 311 P.3d 6 (2013); *Tracfone,* 170 Wn.2d at 283 ("Use of the word all shows legislative intent that each and every radio access line (telephone number) be taxed…without implied exceptions.").

[106] *Tracfone*, 170 Wn.2d at 296-97 ("where there is an exception, the intention to make one should be expressed in unambiguous terms").

[107] ITFA, § 1105(5), 47 U.S.C. § 151 (note).

9. Internet services that are only accessible to customers with internet connectivity are not "Internet access" services for purposes of ITFA.[108]

10. Limelight's content delivery service and related services do not enable its customers, or its customers' customers, "to connect" to the internet to access services as that term is defined in ITFA.

11. Limelight has not met its burden of proving that the amounts it charged its customers for content delivery network services were for excluded "internet and internet access" services under RCW 82.04.192(3)(b)(vii).

Web Hosting and Online Data Storage Exclusion

12. The exclusion for the "mere storage" of digital products, under RCW 82.04.192(3)(b)(xiv), applies to the service of "providing space on a server for web hosting or the backing up" of digital content.

13. Example 19 in the Department's interpretive rule addressing the "mere storage" exclusion distinguishes "basic storage services" from "optional premium services."

14. The amounts Limelight booked to its general ledger revenue accounts, for "Content Delivery Network" and "Site," were for the "basic" excluded service of "providing space on a server for web hosting" under RCW 82.04.192(3)(b)(xiv) and WAC 458-20-15503(303), Ex. 19.

15. Limelight has met its burden of proving that the Department erroneously assessed retailing B&O tax and retail sales tax on its gross receipts from Content Delivery Network and Site services.

16. Limelight has not met its burden of proving that the Department erroneously assessed retailing B&O tax or retail sales tax on any other excluded web hosting or data storage services.

Sourcing

17. The Department reasonably relied on Limelight's "traffic reports" in sourcing Limelight's sales of digital automated services to Washington based on the location where the

[108] *Accord*, *j2 Global,* 218 Cal. App. 4th at 334 (taxpayer providing an online "eFax" service allowing users to send faxes over the internet was not immune from local tax under the ITFA prohibition on taxing internet access because its service did not allow customers to connect to the internet); Det. No. 14-0307R, 38 WTD 29 (2019).

digital content is retrieved by end-users. Limelight offered no exhibits or testimony to rebut the Department's determination.

18. Limelight has not offered evidence establishing the location of its sales under any of the steps set out in the sourcing statute. Thus, even if Limelight is correct that the location of the server where content is retrieved cannot be used to source it sales, it has failed to establish the correct amount of tax it owes under a "purchaser's address" or "address from which the service was provided" steps in RCW 82.32.730(1)(c) – (1)(e).

19. Limelight has met its burden of proving that the Department erroneously assessed retail sales taxes and retailing B&O taxes on the amounts it booked to GL 42001 (Content Delivery Network) and GL 42002 (Site). The reclassification of Limelight's revenues from these services should be reversed, and the assessment adjusted accordingly.

20. Any Finding of Fact that should be deemed a Conclusion of Law is hereby adopted as such.

DECISION

For the forgoing reasons, the Board reverses Tax Determination Nos. 19-0285 and 19-0285R, and remands to the Department to revise the assessment in accordance with this decision.

ISSUED January 8, 2025.

BOARD OF TAX APPEALS

CLAIRE HESSELHOLT, Chair

ROSANN FITZPATRICK, Vice Chair

MATTHEW RANDAZZO, Member