

Letter of Findings Number: 10-0394
Use Tax
For the Years 2007-2009

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Use Tax—Contractors.

Authority: IC § 6-2.5-3-2; [45 IAC 2.2-3-12](#).

Taxpayer protests the Department's assessment of use tax with respect to welding gases.

STATEMENT OF FACTS

Taxpayer is a limited liability company doing business in Indiana. Taxpayer works as a contractor, generally working on tax-exempt projects such as hospitals or university facilities. The Indiana Department of Revenue ("Department") audited Taxpayer and determined that Taxpayer owed additional use tax on various purchases. Taxpayer protested the portion of the assessment relating to welding gases, the Department conducted an administrative hearing, and this Letter of Findings results.

I. Use Tax—Contractors.

DISCUSSION

Taxpayer protests the assessment of use tax with respect to welding gases. One gas, nitrogen, is used to purge medical gas systems of impurities during the welding and brazing process. Another set of gases, oxygen and acetylene, is used to melt welding rods during the welding process. Yet another gas, argon, is used as a shield in TIG (tungsten and inert gas) welding. The issue is whether the gases are become part of the structures on which Taxpayer works as a contractor.

IC § 6-2.5-3-2(c) states:

The use tax is imposed on the addition of tangible personal property to a structure or facility, if, after its addition, the property becomes part of the real estate on which the structure or facility is located. However, the use tax does not apply to additions of tangible personal property described in this subsection, if:

- (1) the state gross retail or use tax has been previously imposed on the sale or use of that property; or
- (2) the ultimate purchaser or recipient of that property would have been exempt from the state gross retail and use taxes if that purchaser or recipient had directly purchased the property from the supplier for addition to the structure or facility.

Further, [45 IAC 2.2-3-12](#) states in relevant part:

- (a) Tangible personal property purchased to become a part of an improvement to real estate under a contract with an organization entitled to exemption is eligible for exemption when purchased by the contractor.
- (b) In order to be exempt on such purchases, the contractor must be registered as a retail merchant, must obtain an exemption certificate from the exempt organization, and must issue an exemption certificate to his supplier.
- (c) Utilities, machinery, tools, forms, supplies, equipment, or any other items used or consumed by the contractor and which do not become a part of the improvement to real estate are not exempt regardless of the exempt status of the person for whom the contract is performed.

In Taxpayer's operations, the brazing, welding rods, and tungsten were found to be exempt. In each case, the materials became part of the final structure. Because the structures were built for hospitals and universities that qualified for sales tax exemption, Taxpayer's materials that became part of the structures qualified for tax exemption under [45 IAC 2.2-3-12](#).

In Taxpayer's processes, the nitrogen serves to eliminate gases and materials in medical gas systems. However, the nitrogen does not become part of the medical gas systems. Instead, the nitrogen is consumed as part of the construction process and does not qualify for tax exemption.

In oxyacetylene welding, the oxygen and acetylene only serve to increase the temperature of the brazing compound and welding rods; they do not create a new chemical compound or otherwise become incorporated into the structure itself. Instead, the oxygen and acetylene are consumed and do not qualify for tax exemption.

In TIG welding, the argon gas serves as a shield for the tungsten. However, the argon does not become a part of the structure or otherwise act with the materials to become a new chemical compound. Instead, the argon is consumed as part of the construction process and does not qualify for tax exemption.

In summary, while Taxpayer's welding gases play a crucial role in its welding operations, the gases do not become part of the structure. The materials melted or shielded by the gases do become part of the structure and thus qualify for tax exemption under [45 IAC 2.2-3-12\(a\)](#). Because the gases do not become part of the structure, either directly or indirectly by chemical reactions, the gases are considered to be "consumed" under [45 IAC 2.2-3-](#)

[12](#)(c) and are thus not exempt from taxation even if the structure is otherwise being built for a tax-exempt organization.

FINDING

Taxpayer's protest is denied.

Posted: 11/24/2010 by Legislative Services Agency
An [html](#) version of this document.