

Letter of Findings: 04-20110432
Use Tax
For the Tax Years 2008, 2009, and 2010

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ISSUE

I. Use Tax – Manufacturing Exemption.

Authority: IC § 6-8.1-5-1; IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-5-3; [45 IAC 2.2-5-8](#); [45 IAC 2.2-5-9](#); [45 IAC 2.2-5-10](#); [45 IAC 2.2-4-26](#); Energy Supply, Inc. v. Indiana Dep't of State Revenue, 549 N.E.2d 1110 (Ind. Tax Ct. 1990); Indiana Dep't of State Revenue v. Cave Stone, Inc., 457 N.E.2d 520 (Ind. 1983); Indiana Dep't of State Revenue v. Amax, Inc., 513 N.E.2d 1260 (Ind. Ct. App. 1987); Rotation Products Corp. v. Dep't of State Revenue, 690 N.E.2d 795 (Ind. Tax Ct. 1998); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); See Rhoades v. Indiana Dep't of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); USAir, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466 (Ind. Tax Ct. 1993); Indiana Dep't. of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974).

Taxpayer protests the imposition of use tax on construction equipment, repairs, and parts.

STATEMENT OF FACTS

Taxpayer is an Indiana company. Pursuant to an audit, the Indiana Department of Revenue ("Department") determined that tax should have been paid on the purchase of concrete pumping equipment, repairs, and service parts for the 2008, 2009, and 2010 tax years. The Department assessed use tax and interest to the Taxpayer. The Taxpayer protested the imposition of use tax and interest, arguing that the concrete pumping equipment, and repairs and service parts for the equipment, qualify for the manufacturing exemption. An administrative hearing was held and this Letter of Findings results. Additional facts will be provided as necessary.

I. Use Tax – Manufacturing Exemption.

DISCUSSION

Taxpayer is protesting the imposition of use tax on the purchase of a concrete pumping truck, line pump, as well as repairs and service parts for the truck and pump for the 2008, 2009, and 2010 tax years.

According to Taxpayer, it is hired by customers to pump concrete for use in mining infrastructure, other construction, and preset molds. Taxpayer's pump truck is kept in one location so that it is easily accessible to ready-mix concrete trucks. The ready-mix concrete trucks, hired by Taxpayer, pour concrete into Taxpayer's line pump, which pumps concrete through a pipeline to a specific destination. Taxpayer supplies both the concrete and the pumping equipment for the customer and charges the customer for both labor and materials.

All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A person who acquires property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). Indiana also imposes a complementary excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). "Use" means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a). The use tax is functionally equivalent to the sales tax. See Rhoades v. Indiana Dep't of State Revenue, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002).

By complementing the sales tax, the use tax ensures that non-exempt retail transactions that escape sales tax liability are nevertheless taxed. Id.; USAir, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466, 468–69 (Ind. Tax Ct. 1993). To trigger imposition of Indiana's use tax, tangible personal property must (as a threshold matter) be acquired in a retail transaction. Id.

An exemption from use tax is granted for transactions where the sales tax was paid at the time of purchase pursuant to IC § 6-2.5-3-4. There are also additional exemptions from sales tax and use tax some of which are collectively known as the industrial production exemptions. Rotation Products Corp. v. Dep't of State Revenue, 690 N.E.2d 795, 798 (Ind. Tax Ct. 1998).

A taxpayer claiming exemption has the burden of showing the terms of the exemption statute are met. General Motors Corp. v. Indiana Dept. of State Revenue, 578 N.E.2d 399, 404 (Ind. Tax Ct. 1991) aff'd 599 N.E.2d 588 (Ind. 1992) (Internal citations omitted). A statute which provides a tax exemption is strictly construed against the taxpayer. Indiana Dep't. of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here such an exemption is claimed, the party claiming the same must show a case, by

sufficient evidence, which is clearly within the exact letter of the law." Id. at 100-01. Additionally "[e]xemption statutes are strictly construed because an exemption releases property from the obligation of bearing its fair share of the cost of government." General Motors, 578 N.E.2d at 404.

Taxpayer argues that use tax should not be imposed because they qualify for the manufacturing exemption. IC § 6-2.5-3(b) states:

Except as provided in subsection (c), transactions involving manufacturing machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property.

In other words, to meet the requirements of this exemption, Taxpayer must have acquired the equipment for direct use in manufacturing, processing, or mining.

[45 IAC 2.2-5-8](#) elaborates on the manufacturing exemption:

(a) In general, all purchases of tangible personal property by persons engaged in the direct production, manufacture, fabrication, assembly, or finishing of tangible personal property are taxable. The exemption provided in this regulation [\[45 IAC 2.2\]](#) extends only to manufacturing machinery, tools, and equipment directly used by the purchaser in direct production. It does not apply to material consumed in production or to materials incorporated into tangible personal property produced.

(b) The state gross retail tax does not apply to sales of manufacturing machinery, tools, and equipment to be directly used by the purchaser in the direct production, manufacture, fabrication, assembly, or finishing of tangible personal property.

(c) The state gross retail tax does not apply to purchases of manufacturing machinery, tools, and equipment to be directly used by the purchaser in the production process provided that such machinery, tools, and equipment are directly used in the production process; i.e., they have an immediate effect on the article being produced. Property has an immediate effect on the article being produced if it is an essential and integral part of an integrated process which produces tangible personal property.

(Emphasis added).

[45 IAC 2.2-5-10](#) explains that the manufacturing exemption extends to industrial processors:

(a) In general, all purchases of tangible personal property by persons engaged in the processing or refining of tangible personal property are taxable. The exemption provided in this regulation [\[45 IAC 2.2\]](#) extends only to manufacturing machinery, tools, and equipment used in direct production. It does not apply to materials consumed in production or to materials incorporated into the tangible personal property produced.

Additionally, the exemption provided in this regulation [\[45 IAC 2.2\]](#) extends to industrial processors. An industrial processor, as defined in [IC 6-2.5-4-2](#), is one who:

- (1) acquires tangible personal property owned by another person;
- (2) provides industrial processing or servicing, including enameling or plating, on the property; and
- (3) transfers the property back to the owner to be sold by that owner either in the same form or as a part of other tangible personal property produced by that owner in his business of manufacturing, assembling, constructing, refining, or processing.

(Emphasis added).

[45 IAC 2.2-5-9](#) further describes the mining exemption:

(a) In general, all purchases of tangible personal property by persons engaged in extraction or mining are taxable. The exemption provided in this regulation [\[45 IAC 2.2\]](#) extends only to manufacturing machinery, tools, and equipment directly used in mining or extraction. It does not apply to materials consumed in mining or extraction.

(b) The state gross retail tax shall not apply to sales of manufacturing machinery, tools, and equipment which are to be directly used by the purchaser in extraction or mining.

(c) Manufacturing machinery, tools, and equipment to be directly used by the purchaser in the extraction or mining process are exempt from tax provided that such machinery, tools and equipment are directly used in the production process; i.e., they have an immediate effect on the item being produced by mining or extraction. Property has an immediate effect on the article being produced if it is an essential and integral part of an integrated process which produces tangible personal property.

(Emphasis added).

Taxpayer argues that these exemptions should apply to it and cites four cases in support of its argument.

First, Taxpayer argues in its protest letter that "trucks not to be licensed for highway use and to be directly used in direct production of manufacturing, mining, refining or harvesting of agricultural commodities are specifically exempt from the imposition of the sales tax." Energy Supply, Inc. v. Indiana Dept. Of State Revenue, 549 N.E.2d 1110 (Ind. Tax Ct. 1990). However, Energy Supply does not discuss truck licensing. Instead, the case focuses on the distance trucks must travel from Energy Supply's two mines to the processing plant to determine if the trucks have an immediate link to the manufacturing process. Taxpayer has not explained beyond the quote above how Energy Supply relates to the present issue. Taxpayer does not begin work until Taxpayer has arrived at customer's location. Therefore, the distance the truck must travel is irrelevant to the determination of this issue.

Next, Taxpayer argues that because it performs some jobs at mines (where it is contracted to pour concrete for various mine infrastructure projects), its activities are part of a continuous mining operation and therefore the equipment it uses should be exempt. Taxpayer generally refers to Cave Stone and Amax presumably for this proposition. Indiana Dept. of Revenue v. Cave Stone, Inc., 457 N.E.2d 520 (Ind. 1983) and Indiana Dept. of Revenue v. Amax, Inc., 513 N.E.2d 1260 (Ind. Ct. App. 1987). Taxpayer however is incorrect. Taxpayer is not the mining company whose mining operations qualify for the exemption. Taxpayer's activities at the mines are not even part of the actual mining operation. Taxpayer is contracted to build part of the infrastructure of the mining operation, but is not involved in the actual mining process. In Cave Stone, for example, the taxpayer mined the stone, and then transported the mined stone to its stone crushing operation. The Tax Court found Cave Stone's trucks to be exempt because they were used within the mining operation.

Finally, Taxpayer argues in its protest letter that "a taxpayer's qualification for this industrial exemption to sales and use taxes is not based on whether the activity is to be called manufacturing or processing or any other of the listed terms, but rather whether the activity was directly involved in creation of a product." Rotation Products. However, the issue in Rotation Products is whether the remanufacture of roller bearings is included in the manufacturing exemption. The court in Rotation Products, held that the repair and remanufacturing activity in this case was so extensive that it transformed the tangible personal property into a new product and thus constituted manufacturing. Taxpayer's brief explanation, quoted above, does not explain how its activities fit into the context of Rotation Products. Taxpayer does not itself mix the concrete and does not itself alter the concrete to create tangible personal property. Instead, Taxpayer purchases pre-mixed concrete which is poured into its concrete pump line by a third party and which Taxpayer then pumps into a designated location or item belonging to a customer.

Some of the language of Taxpayer's protest suggests that Taxpayer is relating itself to an industrial processor. However, Taxpayer does not fit the description of an industrial processor. Taxpayer buys pre-mixed concrete from a third party concrete producer, but Taxpayer does not return the concrete to the third party concrete producer. Instead, Taxpayer sells the concrete purchased from the third party concrete producer to the customer who hired Taxpayer to pump the concrete.

Taxpayer enters into contracts to pump concrete. Some contracts require Taxpayer to pump concrete into the infrastructure of mines and others require Taxpayer to pump concrete into preset molds. The customers may themselves be manufacturers and miners, but Taxpayer is a contractor.

[45 IAC 2.2-4-26](#) states:

(a) A person making a contract for the improvement to real estate whereby the material becoming a part of the improvement and the labor are quoted as one price is liable for the payment of sales tax on the purchase price of all material so used.

[...]

(e) Utilities, machinery, tools, forms, supplies, equipment or any other items used by 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.

(Emphasis Added).

Taxpayer is a contractor and is not exempt from tax in this instance. Taxpayer did not meet the burden to show exemption set in IC § 6-8.1-5-1(c). The imposition of use tax on Taxpayer's equipment, repairs, and service parts was proper.

FINDING

Taxpayer's protest is denied.

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