DEPARTMENT OF STATE REVENUE

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Letter of Findings: 04-20120467
Gross Retail Tax
For the Years 2009 and 2010

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ISSUE

I. Coal Processing Equipment – Gross Retail Tax.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-2-1(a); IC § 6-2.5-2-1(b); IC § 6-2.5-3-1(a); IC § 6-2.5-3-2(a); IC § 6-2.5-5-3; IC § 6-2.5-5-3(b); IC § 6-2.5-5-4; IC § 6-8.1-5-1(c); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Rhoade v. Ind. Dep't of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); General Motors Corp. v. Indiana Dept. of State Revenue, 578 N.E.2d 399 (Ind. Tax Ct. 1991); Tri-States Double Cola Bottling Co. v. Dep't of State Revenue, 706 N.E.2d 2845 (Ind. Tax Ct. 1999); Mynsberge v. Dep't of State Revenue, 716 N.E.2d 629 (Ind. Tax Ct. 1999); Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974); 45 IAC 2.2-5-8(a); 45 IAC 2.2-5-8(c); 45 IAC 2.2-5-8(d); 45 IAC 2.2-5-8(f)(3); 45 IAC 2.2-5-8(k); 45 IAC 2.2-5-10; 45 IAC 2.2-5-10(g).

Taxpayer argues that certain equipment is exempt from sales and use tax on the ground that the equipment is directly used to process coal.

II. Vehicle Rentals – Gross Retail Tax.

Authority: IC § 6-2.5-1-21; IC § 6-2.5-1-21(a)(3); IC § 6-8.1-5-4(a); 45 IAC 2.2-4-27.

Taxpayer maintains it is not required to pay sales tax on the price it paid to rent vehicles.

III. Computer Software – Gross Retail Tax.

Authority: IC § 6-2.5-1-27; IC § 6-2.5-4-1(b); IC § 6-8.1-5-1(c); 45 IAC 2.2-5-8(c)(5); Sales Tax Information Bulletin 8 (November 2011).

Taxpayer states that it was not required to pay sales tax on the purchase of computer software on the ground that the software controls and monitors its coal processing facility and because the computer software was custom designed for that purpose.

STATEMENT OF FACTS

Taxpayer is an Indiana business which processes coal. The Department of Revenue ("Department") conducted an audit of Taxpayer's business records. The audit resulted in the assessment of additional sales/use tax. Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representatives explained the basis for the protest. This Letter of Findings results.

I. Coal Processing Equipment – Gross Retail Tax.

DISCUSSION

Taxpayer is in the business of processing coal. Taxpayer does not own the coal it processes. Taxpayer has one customer for its processed coal; at all times, this particular customer owns the coal.

A. Department's Audit:

The audit report explains that coal is delivered to Taxpayer by rail car. The coal is dumped into a 60 foot deep "dumper house" and passes through a device for screening the coal. The screening device consists of a row of iron or steel bars and is called a "grizzly." The audit report notes that the "grizzly helps break the coal up as it falls into the dumper house."

From the dumper house, the coal is transported by means of a conveyor belt to the "stacker." Based on certain specific qualities, the coal is then sorted and separated into six piles; each of the six piles contains coal of a specific type and quality. As needed, the coal is then moved back onto a conveyor belt to the "crusher house." At the crusher house, the coal is blended and crushed while on "conveyor belt four."

The audit concluded that conveyor belt four "is the only belt where any type of processing or refining is taking place."

According to the audit report, once the coal has been blended and crushed, it is transferred by means of another belt "where it is sprayed with dust [and] fire suppression so it doesn't freeze or blow away." From there, the coal "travels through several other conveyor belts for storage or back to the customer."

The audit report concluded that "[T]axpayer's exemption only applies to their blending and crushing process, which happens on conveyor belt [four]."

Taxpayer disagrees with the audit's conclusion arguing that its purchases of "capital assets, supplies, materials, machinery, tools, and equipment" are exempt from tax pursuant to IC § 6-2.5-5-3 and 45 IAC 2.2-5-10.

B. Indiana Sales & Use Tax:

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).

In effect and practice, the use tax is functionally equivalent to the sales tax. See Rhoade v. Ind. Dep't of State Revenue, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002).

The general rule is that all purchases of tangible personal property by persons engaged in the direct production, manufacture, fabrication, assembly or finishing of tangible personal property are taxable. 45 IAC 2.2-5-8(a).

C. Exemption:

As authority for its conclusion that "capital assets, supplies, materials, machinery, tools, and equipment" are exempt, Taxpayer cites to the Department's regulation, 45 IAC 2.2-5-10, which states:

> (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:
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> (1) acquires tangible personal property owned by another person;
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> (2) provides industrial processing or servicing, including enameling or plating, on the property; and
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> (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.
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> (b) The state gross retail tax will not apply to sales of manufacturing machinery, tools, and equipment which are to be directly used by the purchaser in processing or refining tangible personal property.
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> (c) Purchases of manufacturing machinery, tools, and equipment to be directly used by the purchaser in processing or refining 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 tangible personal property being processed or refined. The property has an immediate effect on the article being produced if it is an essential and integral part of an integrated process which processes or refines tangible personal property. (Emphasis added) See IC § 6-2.5-5-4.

The exemption which Taxpayer claims is found at IC § 6-2.5-5-4 and only applies to machinery, tools, and equipment directly used by the purchaser in direct production. Id. The regulation provides that the "manufacturing exemptions" apply with equal weight to "industrial processors." Machinery, tools, and equipment are directly used in the production process if they have an immediate effect on the article being produced. 45 IAC 2.2-5-8(c). A machine, tool, or equipment has an immediate effect on the product being produced if it is an essential and integral part of an integrated process that produces the product. 45 IAC 2.2-5-8(c). An integrated process is one where the total production process is comprised of activities or steps that are functionally interrelated and where there is a flow of "work-in-process." 45 IAC 2.2-5-8(c), example (1).

To summarize, machinery, tools, and equipment purchased for direct use in the production of goods are subject to use tax unless the property used has an immediate effect on the goods produced and is essential to an integrated process used to produce marketable goods.

In reviewing Taxpayer's objection, it is important to note that the question of whether or not Taxpayer is or is not an "industrial processor" is not at issue; the audit found – and the Taxpayer produced substantial, detailed evidence at hearing – that the customer's coal has been substantially changed in form, quality, and composition and that Taxpayer falls squarely within the definition of an "industrial processor."

D. Application of Exemption:

Proper application of the exemption requires determining at what point "production" begins and at what point "production" ends. 45 IAC 2.2-5-8(d) states:

> Pre-production and post-production activities. "Direct use in the production process" begins at the point of the first operation or activity constituting part of the integrated production process and ends at the point that the production has altered the item to its completed form, including packaging, if required.
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> Under IC § 6-2.5-5-3(b):
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> 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 addition, 45 IAC 2.2-5-8(c) states:
>
> 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.

Finally, 45 IAC 2.2-5-8(k) states:

"Direct production, manufacture, fabrication, assembly, or finishing of tangible personal property" is performance of a series of operations which places tangible personal property in a form, composition, or character different from that in which it was acquired. The change in form, composition, or character must be a substantial change, and it must result in a transformation of property into a different product having a distinctive name, character, and use. Operations such as compounding, fabricating, or assembling are illustrative of the types of operations which may qualify under this definition.

The issue is whether the specific items of equipment are exempt because these items of equipment are "directly used in the production process because they have an immediate effect on the article being produced." IC § 6-2.5-5-3(b). The determining factor is when Taxpayer's production process is deemed to be end; in this particular case, the question is when does the coal reach its final, marketable form.

E. Taxpayer's Burden of Proof:

In addressing Taxpayer's protest and as a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012).

Taxpayer has the responsibility of establishing that it is entitled to the exemption because the presumption in Indiana is that all retail sales are subject to sales tax unless expressly exempted by statute. IC § 6-2.5-2-1 ("An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana... except as otherwise provided in this chapter...."). IC § 6-2.5-5-4 like all tax exemption provisions, is strictly construed against exemption from the tax. Tri-States Double Cola Bottling Co. v. Dep't of State Revenue, 706 N.E.2d 282, 283 (Ind. Tax Ct. 1999); Mynsberge v. Dep't of State Revenue, 716 N.E.2d 629, 636 (Ind. Tax Ct. 1999). A statute which provides a tax exemption, however 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 101.

Despite the presumption that all sales are subject to tax and that Taxpayer bears the burden of demonstrating that the audit's conclusion was incorrect, the Department is well aware of the countervailing rule that a "statute must not be construed so narrowly that it does not give effect to legislative intent because the intent of the legislature embodied in a statute constitutes the law." General Motors Corp. v. Indiana Dept. of State Revenue, 578 N.E.2d 399, 404 (Ind. Tax Ct. 1991).

F. Taxpayer's Coal Processing:

Taxpayer provides an explanation of the steps involved in coal processing as follows:

- Seven different "special types of coal" are delivered by railcar;
- While still in the railcar, the coal is treated with a chemical spray;
- The coal filled railcar "run[s] over gas-fired thaw pits;"
- Taxpayer tests the coal "for its composition and other characteristics to determine its suitability... and the specific blending and crushing process;"
- Coal filled railcars enter the Dumper House where the railcars are sprayed with a dust suppressant and connected to a "rotary dumper;"
- The rotary dumper turns the railcar over allowing the coal to fall into a 100 foot deep pit;
- According to Taxpayer, the previous chemical and heat treatment allow the coal to fall freely into a 100 foot deep pit;
- At a depth of 20 feet, the pit contains a "grizzly" deck which consists of a 20 by 60 foot metal grid with 12-inch openings;
- According to taxpayer, the grizzly "breaks enormous lumps of coal... into smaller pieces that can be transported [and] blended with other coals. According to Taxpayer, "[T]he grizzly acts as a filter, catching plant and animal life... and other foreign debris...."
- After falling through the grizzly, the coal falls another 80 feet to the bottom of the pit. A backhoe further breaks up the coal. The backhoe "feeds the coal onto Conveyor Belt [One] after it is treated with a chemical spray;
- Conveyor Belt One transports the coal underneath magnets which remove foreign metals;
- Conveyor Belt One transports the coal to Transfer Tower One;
- From Transfer Tower One, the coal is transported by Conveyor Belt Two to the Traveling Stacker;
- The Traveling Stacker "moves up and down" Conveyor Belt Two and sorts the coal into seven different piles

each pile containing a specific grade or type of coal;
• From each coals piles one through six, Conveyor Belt Three (containing "sub conveyors") removes coal from the bottom of each pile in "sequence and quantity determined by the type of coal being processed" and is fed onto Conveyor Belt Four. According to Taxpayer, "Precision in the blend of coals on [Conveyor Belt Four] is crucial;"
• Taxpayer also maintains a "seventh pile of coal" which is not accessed by Conveyor Belt Three. According to Taxpayer, coal is drawn from the seventh pile of coal as needed and is transferred to Conveyor Belt Four by means of a wheel loader;
• Conveyor Belt Four transports the blended coal to transfer chutes containing various screens, crushers, and magnets before being dropped onto a vibrating screen to "separate remaining debris;"
• The vibrating screen separates coal by size allowing only coal fragments smaller than two inches to pass through the screen;
• The sorted and sized coal is transferred to the Crusher House;
• From the Crusher House, the coal is loaded onto Conveyor Belt Five;
• While being transported on Conveyor Belt Five, the coal is treated with "chemical foam or water suppressant" before being fed into Transfer Tower Two;
• From Transfer Tower Two, the coal is transferred by means of Conveyor Belt Nine for temporary storage in a 3,000 ton silo;
• From the 3,000 ton silo, the coal is released "through a vibrating feeder" to Conveyor Belt Ten which returns the coal back to Transfer Tower Two. The "vibrating feeder" assures that the different grades and types of coal are thoroughly blended into a "homogenous mix;"
• From Transfer Tower Two, the coal passes through a chute and onto Conveyor Belt Six on which it is transported to Transfer Tower Four;
• According to Taxpayer, the coal is "manipulated, turned, and passed through another transfer chute and onto" Conveyor Belt Seven and directed to Transfer Tower Three;
• In Transfer Tower Three, the coal is mixed and transferred onto Conveyor Belt Eight which transports the coal to its customer's East and West silos.
• According to Taxpayer, "Only a homogenous mix of coal, blended to [Customer's] specifications and of the correct size and moisture content is delivered to the [East and West] silos.

Taxpayer argues that the Department wrongly concluded that industrial processing begins while the coal is on Conveyor Belt Four and ends at the Crusher House. Taxpayer maintains that processing begins before the coal arrives at Conveyor Belt Four and that processing continues after the coal leaves the Crusher House.

Taxpayer has provided original documentation, charts, diagrams, photographs, and detailed explanations by persons closely associated with its coal processing operation. Taxpayer maintains that the coal processing begins "immediately after the coal arrives at the facility" and that its "integrated process ends when the coal is delivered to the East and West Silos."

G. Conclusion:

Taxpayer is correct in part; equipment and devices involved in the coal processing preparatory steps are not entitled to the exemption because these items do not have an immediate effect on the processed coal. As explained in 45 IAC 2.2-5-10(g), "The fact that particular property may be considered essential to the conduct of the business of manufacturing because its use is required either by law or by practical necessity does not, of itself, mean that the property "acts upon and has an immediate and direct effect on the tangible personal property being processed or refined." As coal first arrives at Taxpayer's facility, it is treated with chemicals, heated, sprayed with dust suppressant, and conveyed by means of a "rotary dumper." However, the Department is unable to agree with Taxpayer's contention that its "integrated production process" has yet to begin when these particular steps are undertaken.

Nonetheless, the Department is prepared to agree that the "integrated production process" begins at the point where the coal is initially sized, manipulated, and sorted at its "grizzly" because the "grizzly" has an immediate effect on the coal itself; coal which arrives at the grizzly substantially changed from coal which leaves the "grizzly." It is at this point where Taxpayer's "integrated production process" begins because the "grizzly" causes a "substantial change" in the "form, composition [and] character" of the coal itself. 45 IAC 2.2-5-8(c).

The equipment and devices which follow continue within that integrated process and are also entitled to the exemption.

However, the Department is unable to agree with Taxpayer's contention that its coal processing continues until the coal is delivered by means of Conveyor Belt eight to its customer's East and West Silos; in reality, Transfer Tower Three marks the final point at which the coal undergoes any "substantial change" having been "mixed and turned" while within that tower. Equipment and devices subsequent to Transfer Tower Three are not entitled to the exemption because the "integrated production process" has concluded and the coal has been altered "to its completed form...." 45 IAC 2.2-5-8(d).

Taxpayer operates an integrated coal processing operation; the processing of the coal begins at the "grizzly" and continues up to and including Transfer Tower Three. Specifically included within that "integrated operation"

are a Komatsu Crawler bulldozer ("used to maintain the six piles of coal formed by the Traveling Stacker....") and a Komatsu Wheel Loader (used to push "work-in-process coal back to the middle of the six piles" and used to "transport work-in-process coal in [the] seventh pile to the coal feedunits."). See 45 IAC 2.2-5-8(f)(3). ("Transportation equipment used to transport work-in-process or semi-finished materials to or from storage is not subject to tax if the transportation is within the production process.")

FINDING

Taxpayer's protest is denied in part and sustained in part.

II. Vehicle Rentals – Gross Retail Tax.

DISCUSSION

According to a sample invoice provided by Taxpayer, it paid for "semi truck rental" from a third party vendor. The audit report characterized the equipment as "lowboys." According to the audit report, "The vendor did not charge sales tax on the equipment rentals during 2009 through 2010." The audit assessed tax and cited 45 IAC 2.2-4-27 as authority for doing so. In part, the regulation states:

> (a) In general, the gross receipts from renting or leasing tangible personal property are taxable. This regulation [45IAC 2.2] only exempts from tax those transactions which would have been exempt in an equivalent sales transaction.
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> (b) Every person engaged in the business of the rental or leasing of tangible personal property, other than a public utility, shall be deemed to be a retail merchant in respect thereto and such rental or leasing transaction shall constitute a retail transaction subject to the state gross retail tax on the amount of the actual receipts from such rental or leasing.
>
> (c) In general, the gross receipts from renting or leasing tangible personal property are subject to tax. The rental or leasing of tangible personal property constitutes a retail transaction, and every lessor is a retail merchant with respect to such transactions. The lessor must collect and remit the gross retail tax or use tax on the amount of actual receipts as agent for the state of Indiana. The tax is borne by the lessee, except when the lessee is otherwise exempt from taxation.
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> (d) The rental or leasing of tangible personal property, by whatever means effected and irrespective of the terms employed by the parties to describe such transaction, is taxable.

However, Taxpayer disagrees on the ground that the price it paid to rent the trucks included the simultaneous services of an equipment operator which renders the rental transactions exempt. In support of its position, Taxpayer cites to IC § 6-2.5-1-21 which states in part:

> (a) "Lease" or "rental" means any transfer of possession or control of tangible personal property for a fixed or indeterminate term for consideration and may include future options to purchase or extend. "Lease" or "rental" does not include....
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> (3) providing tangible personal property along with an operator for a fixed or indeterminate period, if:
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> (A) the operator is necessary for the equipment to perform as designed; and
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> (B) the operator does more than maintain, inspect, or set up the tangible personal property. (Emphasis added).

Taxpayer provided an invoice along with "copies of slip tickets" which purportedly support the invoice charges. Taxpayer explains that, "[Taxpayer] and the equipment operator use these tickets to sign off and approve the description of equipment used, the time for which it was used, and the applicable rate." Taxpayer believes that the documentation establishes that the vendor's operator maintains control and possession of the vehicles, that the operator is "necessary" for the operation of the vehicles, and that Taxpayer "never operates any gear lever, wheel, or other control on the equipment." In addition, Taxpayer has provided an affidavit from the vice-president of a company which purportedly supplied Taxpayer's coal processing facility with "hauling and trucking services." The affidavit indicates that the equipment supplied by vendor "required special licenses and training to operate," that vendor "always provided an operator with the equipment," and that the vendor's employees "were the only individuals to operate the equipment."

Taxpayer is reminded that IC § 6-8.1-5-4(a) requires, "Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks." The difficulty in arriving at a decision on this matter is compounded by the fact that there was almost no source documentation which establishes the relationship and obligations between Taxpayer and the transportation vendor. Especially in the case of related parties, there is a heightened requirement that the affected taxpayer establish that the parties are not engaged in self-dealing. Nonetheless – based upon the supplemental information provided at and subsequent to the hearing – the Department is prepared to agree that there is sufficient documentation to establish that the transactions at issue involved the rental of equipment along with an associated operator and that the transactions fall within the exemption set out at IC § 6-2.5-1-21(a)(3).

FINDING

Taxpayer's protest is sustained.

III. Computer Software – Gross Retail Tax.

DISCUSSION

The audit included as taxable an item designated as "Software with Upgrades" purchased from an automation services company. Taxpayer disagrees with this portion of the assessment on two separate grounds.

Taxpayer states that the software purchased is exempt because the software is "used to monitor and control various aspects of the production process" pursuant to 45 IAC 2.2-5-8(c) Example 5.

> 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....
>
> (5) A computer is used to control and monitor various aspects of the plating and surface-treatment operations in Example (1). The computer is located in a separate room in a different part of the plant from the plating and surface-treatment operations but is connected to the equipment comprising those operations by means of electrical devices. The computer equipment, including related terminals, printer, and memory, data storage, and input/output devices, is exempt because its use in this manner is an integral and essential part of the integrated production process.

Taxpayer makes a secondary argument claiming that the software purchased "is customer software designed for [Taxpayer] for use in its coal handling plant and developed only for [Taxpayer] unavailable on the general market." Taxpayer points out that IC § 6-2.5-4-1(b) imposes tax on the sale of "tangible personal" property and that IC § 6-2.5-1-27 defines "tangible personal property" as including "prewritten computer software." However, Taxpayer asserts that the software is custom designed software and falls outside the definition of "prewritten computer software."

The Department's Sales Tax Information Bulletin 8 (November 2011), 20111228 Ind. Reg. 045110765NRA, sets out the relevant issue:

> The term "prewritten computer software" means computer software, including prewritten upgrades, that [are] not designed and developed by the author or other creator to the specifications of a specific purchaser.
>
> Please note the following: The combining of two or more prewritten computer software programs or prewritten parts of the programs does not cause the combination to be other than prewritten computer software. Prewritten computer software includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than the purchaser. If a person modifies or enhances computer software of which the person is not the author or creator, the person is considered to be the author or creator only of the person's modifications or enhancements. Prewritten computer software or a prewritten part of the software that is modified or enhanced to any degree, where the modification or enhancement is designed and developed to the specifications of a specific purchaser, remains prewritten computer software. However, where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for such a modification or enhancement, the modification or enhancement is considered a non-taxable service and not prewritten computer software.

The Department is unable to agree that Taxpayer paid the "automation services company" to write custom-designed software. Although the software may have been configured and adapted to Taxpayer's unique requirements, based upon the documentation provided, Taxpayer acquired software consisting of an amalgamation of pre-written, relatively common, and commercially available computer software which the developer specifically designed, altered, and assembled in such a way as be useful within Taxpayer's coal processing facility. However, the software is not entitled to the sought-after exemption on the ground that it is custom-designed software not subject to tax pursuant to IC § 6-2.5-1-27.

Taxpayer has provided additional information explaining the function and purpose of the computer software. Taxpayer explains that the software is the control room operator's only available interface for the execution of any of the following; "controlling all large scale automated production; configuring all coal handling, crushing, blending, delivery rates, and proportions as well as all automated processes; real time, fault and historical monitoring of every step of all automated coal handling processes; the starting and shutting down of production equipment and machinery with the exception of various E-stop buttons provided in the control room as well as throughout the plant."

A review of the documentation provided and a review of commonly available information describing the function, use, and purpose of the software is sufficient to establish that the computer software functions in such a way as to have an "immediate effect on the article being produced...." The computer software at issue – "Intouch Runtime," "Wonderware Development Studio," and various patches - constitutes an essential and integral part of the integrated process by which Taxpayer processes coal.

Although Taxpayer has not established that the computer software is custom designed, Taxpayer has met its burden under IC § 6-8.1-5-1(c) of establishing that the software components here at issue functions as "an integral and essential part of the integrated production process" by which Taxpayer controls and operates it coal processing facility. 45 IAC 2.2-5-8(c)(5).

FINDING

Taxpayer's protest is sustained.

SUMMARY

The Audit Division is requested to review the original audit assessment and to make any necessary adjustment as described in Part I above; Taxpayer has met its burden of establishing that the computer software and the vehicle rentals are exempt from sales/use tax.

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An html version of this document.