

Letter of Findings: 04-20150407R; 04-20150408R; 04-20150409.LOF
Gross Retail and Use Tax
For the Years 2010, 2012, and 2013

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Manufacturer was entitled in part to a sales tax exemption on equipment and supplies directly used or consumed in the direct production of the Manufacturer's plastics and films; Manufacturer was entitled to an exemption on the purchase of equipment necessary for its employees to safely work within the production process or to comply with federal environmental regulations.

ISSUES

I. Gross Retail and Use Tax - Equipment Directly Used in Direct Production.

Authority: IC § 6-2.5-1-2; 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 § 6-2.5-4-1(b); IC § 6-2.5-5-2(a); IC § 6-2.5-5-3; IC § 6-2.5-5-3(b); IC § 6-2.5-5-40; IC § 6-8.1-5-1(c); Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Conklin v. Town of Cambridge City, 58 Ind. 130 (1877); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); 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); General Motors Corp. v. Indiana Dept. of State Revenue, 578 N.E.2d 399 (Ind. Tax Ct. 1991); Indiana Dept. of State Rev. v. Kimball Int'l Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988); 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](#); [45 IAC 2.2-5-8\(a\)](#); [45 IAC 2.2-5-8\(c\)](#); [45 IAC 2.2-5-8\(c\)\(2\)\(F\)](#); [45 IAC 2.2-5-8\(d\)](#); [45 IAC 2.2-5-8\(g\)](#); [45 IAC 2.2-5-8\(h\)\(2\)](#); [45 IAC 2.2-5-8\(h\)](#); [45 IAC 2.2-5-8\(k\)](#); [45 IAC 2.2-5-10\(g\)](#).

Taxpayer argues that it is not subject to sales or use tax on equipment or materials directly used in the direct production of Taxpayer's plastics and films.

II. Gross Retail and Use Tax - Consumed in Direct Production.

Authority: IC § 6-2.5-5-5.1(b); Alloy Custom Products, Inc. v. Indiana Dept. of State Revenue, 26 N.E.3d 1078 (Ind. Tax Ct. 2015); [45 IAC 2.2-5-12](#).

Taxpayer maintains it was not subject to sales or use tax on supplies purchased and consumed in the direct production of Taxpayer's plastics and films.

III. Gross Retail and Use Tax - Environmental Regulations.

Authority: IC § 6-2.5-1-1 et seq.; IC § 6-2.5-5-30; Mynsberge v. Dep't of State Revenue, 716 N.E.2d 629 (Ind. Tax Ct. 1999); Tri-States Double Cola Bottling Co. v. Dep't of State Revenue, 706 N.E.2d 282 (Ind. Tax Ct. 1999); [45 IAC 2.2-5-70\(a\)](#).

Taxpayer states that it was not required to pay sales tax or self-assess use tax on the purchase of equipment mandated by federal, state, or local environmental regulations.

IV. Gross Retail and Use Tax - Services.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1(a); IC § 6-2.5-4-1(a); IC § 6-2.5-4-1(b).

Taxpayer claims that it was not required to pay sales tax or self-assess use tax on payment for services.

STATEMENT OF FACTS

Three Indiana companies ("Taxpayers") are in the business of manufacturing plastic and film products. The companies filed claims for refund of sales or use tax. The Indiana Department of Revenue ("Department") reviewed the companies' refund claims denying the claims in part and granting the claims in part. In addition, the Department issued an assessment of additional sales/use tax. The tax was assessed on items considered during the refund review for which the Department determined the companies should have paid sales tax at the time the purchases were made or should have subsequently self-assessed use tax.

For simplicity sake, the three companies are hereinafter referred to as "Taxpayer."

Taxpayer manufactures plastic products including "[Trade Names] resins and films for use in the plastics manufacturing industry." Taxpayer sells its plastic and film products to companies in the automobile, electronic, information technology, consumer, industrial, and health care businesses.

Taxpayer disagreed with that portion of the Department's decision denying it any amount of the requested refund; Taxpayer also disagreed with the assessment of additional tax. Taxpayer 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. Gross Retail and Use Tax - Equipment Directly Used in Direct Production.

DISCUSSION

Taxpayer argues it should not have been required to pay sales tax or self-assess use tax on the purchase of equipment, supplies, or materials directly used to produce Taxpayer's plastics and films.

As a threshold issue, it is the Taxpayer's responsibility to establish that any 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." *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Thus, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Poorly developed and non-cogent arguments are subject to waiver. *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480, 486, fn. 9 (Ind. Tax Ct. 2012). Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing . . . [courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014). Thus, interpretations of Indiana tax law contained within this decision, as well as the preceding audit investigation, are entitled to deference.

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 *Rhoads 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 (particularly out-of-state retail transactions) that escape sales tax liability are nevertheless taxed. *Id.* at 1048; *USAir, Inc. v. Indiana Dep't of State Revenue*, 623 N.E.2d 466, 469 (Ind. Tax Ct. 1993). The use tax ensures that, after such goods arrive in Indiana, the retail purchasers of the goods bear their fair share of the tax burden. To trigger imposition of Indiana's use tax, tangible personal property must (as a threshold matter) be acquired in a retail transaction. IC §

6-2.5-5-2(a). A taxable retail transaction occurs when; (1) a party acquires tangible personal property as part of its ordinary business for the purpose of reselling the property; (2) that property is then exchanged between parties for consideration; and (3) the property is used in Indiana. See IC § 6-2.5-1-2; IC § 6-2.5-4-1(b), IC § 6-2.5-3-2(a).

Taxpayer is in the business of manufacturing plastics and films. 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 - such as Taxpayer's plastics and films - are taxable. [45 IAC 2.2-5-8\(a\)](#).

However, as authority for its conclusion that certain of its equipment is exempt, Taxpayer cites to the Indiana statute, IC § 6-2.5-5-3, which states in part:

(b) 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.

(c) The exemption provided in subsection (b) does not apply to transactions involving distribution equipment or transmission equipment acquired by a public utility engaged in generating electricity.

The Department's regulation, [45 IAC 2.2-5-8](#), explains that a taxpayer is entitled to purchase machinery, tools, and equipment without payment of the gross retail tax when the equipment is used in the direct production of tangible personal property. [45 IAC 2.2-5-8\(a\)](#) emphasizes that the exemption is limited to that equipment "directly used by the purchaser in direct production." [45 IAC 2.2-5-8\(c\)](#) specifies that "directly used" means that the equipment has "an immediate effect on the article being produced." Refining the definition further, the regulation states that "[p]roperty 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." Id. See IC § 6-2.5-5-3(b). However, it should also be noted that "[t]he fact that particular property may be considered essential to the conduct of the business of manufacturing because its use is required . . . by practical necessity does not mean that the property 'has an immediate effect upon the article being produced.'" [45 IAC 2.2-5-8\(g\)](#).

Finally, [45 IAC 2.2-5-8\(k\)](#) specifies that, in order to qualify for the exemption, the articles being produced have undergone a "substantial change."

"Direct production, manufacture, fabrication, assembly, or finishing of tangible personal property" is performance as a business of an integrated 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.

Proper application of this particular exemption requires determining at what point "production" begins and at what point "production" ends. In part [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.

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

In addition, Taxpayer has the burden of establishing that it is entitled to the sought after exemption. In applying any tax exemption, the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." Indiana Dept. of State Rev. v. Kimball Int'l Inc., 520 N.E.2d 454, 456 (Ind. Ct. App. 1988). 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 (citing Conklin v. Town of Cambridge City, 58 Ind. 130, 133 (1877)).

Nevertheless, 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).

The issue is whether the specific items of Taxpayer's equipment, supplies, or materials are exempt because these items are "directly used in the production process because they have an immediate effect on the article being produced." [45 IAC 2.2-5-8\(g\)](#).

1. Self-Contained Breathing Apparatus

Taxpayer's plastic and film production facilities include various enclosed areas which contain toxic gases. On occasion, Taxpayer's employees are required to enter these enclosed areas. In doing so, Taxpayer explains that its employees are required to wear the self-contained breathing equipment. Taxpayer estimates that 42 percent of the equipment is used for emergency rescue purposes and 58 percent is routinely used by employees to safely enter areas in which toxic gas is present.

Taxpayer relies on [45 IAC 2.2-5-8\(c\)\(2\)\(F\)](#) as authority for its position that the equipment is exempt from sales and use tax. The regulation provides in part as follows:

The following types of equipment constitute essential and integral parts of the integrated production process and are, therefore, exempt. The fact that such equipment may not touch the work-in-process or, by itself, cause a change in the product, is not determinative . . . Safety clothing or equipment which is required to allow a worker to participate in the production process without injury or to prevent contamination of the product during production.

The audit report disagreed with Taxpayer's position because the apparatus was a "precautionary measure" and that "toxic gases very rarely escape the piping systems" The Department does not agree with this analysis. Used frequently or rarely is not the benchmark test. Instead, the question is whether apparatus is necessary for Taxpayer's employees to work within these potentially hazardous areas.

Taxpayer has produced sufficient documentation that permits a conclusion that the breathing apparatus (called "escape masks" in that documentation) is partially exempt pursuant to [45 IAC 2.2-5-8\(c\)\(2\)\(F\)](#) because the breathing apparatus "is required to allow a worker to participate in the production process without injury" Of the 94 units purchased during the period under review, 55 were assigned to manufacturing areas and required for the workers to participate in the production process.

2. Conveyors and Automatic Guided Vehicles

As mentioned above, Taxpayer is in the business of manufacturing plastics and films. Simultaneous with the plastic and film production, Taxpayer prepares and assembles cardboard containers called "octabins." "Octabins" are reinforced, eight-sided, pallet sized containers used for storage and shipment of bulk quantities. The containers consist of corrugated cardboard, plastic liners, pallets, glue, and staples. The assembly and preparation of the containers occurs simultaneously with but separate from the production of Taxpayer's plastics and films. The containers are eventually used to store and transport Taxpayer's plastic products to Taxpayer's customers.

The conveyors and automatic guide vehicles are used within the process of assembling the containers, and Taxpayer maintains that these devices are not subject to sales or use tax. Taxpayer explains as follows:

Because [Taxpayer] is in the business of manufacturing, and purchases the [container] raw materials to manufacture\assemble into a distinctly different end product, it causes the required substantial change to qualify as a manufacturing process. Further, the finished [] container is a component of the final product sold to a third party. As such, the process constitutes an integrated manufacturing process, and the equipment used [to assemble] the [container] components as work-in-process or semi-finished goods within the production process is exempt under. [45 IAC 2.2-5-8\(f\)\(3\)](#).

The regulation on which Taxpayer relies states:

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.

Taxpayer maintains that the conveyors and automatic guided vehicles are exempt because they directly affect the

"octabins" assembled at Taxpayer's facilities. The Department respectfully disagrees; Taxpayer is in the business of manufacturing plastics and films and is not in the business of manufacturing and selling these containers. Although the octabins may very well be exempt as "non-returnable" packaging ([45 IAC 2.2-5-16](#)), the Department does not agree that equipment which assembles the packaging is also exempt. Taxpayer's assembly of the packaging - along with the equipment involved - is separate and distinct from Taxpayer's production of plastics and films and is not used within the integrated process which produces those plastics and films.

3. Piping

During the audit, Taxpayer conducted a survey of the piping used at its facilities and determined that seven percent of the piping was subject to sales or use tax because seven percent of the piping was not directly used in production. Taxpayer states that the Department's audit agreed to this percentage allocation.

Taxpayer presented invoices and purchase orders related to the purchase of certain pipes which - Taxpayer maintains - were not accounted for during the audit. Taxpayer asks that the Department tax the amounts listed on the invoices at the "agreed-to taxable percentage established under the audit."

The Department's Enforcement Division is requested to review the supplemental information provided and, based on that information, make whatever adjustment is consistent with the Department's previous conclusion on this issue.

4. Extruder Line Extraction Hood

Among its other products, Taxpayer produces "pelletized resin." Taxpayer explains this production process:

Within the manufacturing process, plastic strands, run through a water bath, and move on through the process to be cut into pellets. The extruder line extraction hood is positioned about the die head where the plastic strands are extracted. This highly integrated equipment removes vapors which include steam and trace elements of related plastic and chemicals.

During the audit period the extruder line equipment was replaced at both the [redacted] and the [redacted] locations. Because this equipment is so highly integrated in this water bath process, it is essential and integral to Taxpayer's manufacturing process and is exempt under [45 IAC 2.2-5-8\(c\)](#) and [45 IAC 2.2-5-8\(h\)](#).

The regulation on which Taxpayer relies provide in part as follows:

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.

...

(h) Maintenance and replacement equipment.

(1) Machinery, tools, and equipment used in the normal repair and maintenance of machinery used in the production process which are predominantly used to maintain production machinery are subject to tax.

(2) Replacement parts, used to replace worn, broken, inoperative, or missing parts or accessories on exempt machinery and equipment, are exempt from tax. [45 IAC 2.2-5-8\(h\)](#).

The Department's audit review found that the hood was not exempt. As described in that report:

[Taxpayer] purchased and installed exhaust hoods above extruders and in the compounding area to extract vapor, smoke, and fumes from the plant. The hoods capture particles before moving up to roof vents where it is released into the outside air.

One of the touchstones of the manufacturing exemption is that the equipment at issue must have "an immediate effect on the article being produced." [45 IAC 2.2-5-8\(c\)](#). In the case of Taxpayer's ventilation equipment, the hoods do not directly affect Taxpayer's plastics and films. Instead the hoods are essentially "post-production" equipment outside the purview of the exemption. The Taxpayer's own description of the hoods is that the hoods are likely "necessary" but that is not the exemption benchmark. See [45 IAC 2.2-5-8\(g\)](#).

5. Extruder Spray Nozzle

Taxpayer argues the purchase of these nozzles is exempt on the ground that the nozzles "are manufacturing equipment that has an immediate effect on the article being produced."

Taxpayer explains, "The plastic water spray nozzles are installed in the [] (underwater pelletizing system)" "The nozzles provide spray cooling to the strands as they advance down the slide tray prior to pelletizing. This information was still in review and not available at the time the auditor closed the audit."

Taxpayer relies on [45 IAC 2.2-5-8](#) for its position that the audit results should be adjusted to reflect the exemption. In part, the regulation provides:

- (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.

Based on Taxpayer's description of its manufacturing process and the manner in which the nozzles are deployed at Taxpayer's facility along with the documentation supplied during the hearing, the Department is prepared to agree that the nozzles used by Taxpayer are entitled to the exemption.

6. Chemical Manufacturing Equipment

Taxpayer manufactures an "industry specific chemical [Chemical] that is further used within the manufacture of its final product." Hot nitrogen is used in the manufacturing of the Chemical. The hot nitrogen is used to "remov[e] sulfur dioxide by regenerating the activated carbon [filters] within the [Chemical] production process" As described by Taxpayer, the inert hot nitrogen is used to "flush" waste sulfur dioxide from Taxpayer's activated charcoal filters. Taxpayer asserts that the flushing of the waste sulfur dioxide regenerates the filters.

Taxpayer explains:

The above described process explains how [Taxpayer's] [Chemical] production process requires the use of hot nitrogen. The process equipment consists of a series of "beds." These beds contain activated carbon. The stream of carbon monoxide flows through the beds of activated carbon, until the process requires the introduction of hot nitrogen to regenerate the activated carbon. [Taxpayer] refers to this process [as] online and offline. This reference does not mean that the machinery is shut down during the introduction of the hot nitrogen. Rather, the process is a cyclical process and the equipment is continually functioning, simply with a different chemical stream running through the beds. [45 IAC 2.2-5-10\(g\)](#).

The regulation which Taxpayer cites provides in part as follows:

Machinery, tools, and equipment used during processing or refining which have an immediate effect upon the tangible personal property being processed or refined are exempt from tax. Component parts of an exempt unit of machinery and equipment, which unit has an immediate effect on the article being produced, are exempt if such components are an integral part of the manufacturing unit. [45 IAC 2.2-5-10\(g\)](#).

Taxpayer further explains:

The use of hot nitrogen to regenerate the activated carbon in this process is essential and integral to the integration production of not only [Chemical], but [Taxpayer's] final products. Not only is the hot nitrogen essential and integral to the integrated process, it actually has an immediate effect on the exempt production equipment as exempted in [\[45 IAC 2.2-5-12\(e\)\]](#).

The cited regulation provides:

Purchases of materials to be consumed during the production or mining process are exempt from tax, if the

consumption of such materials has an immediate effect upon the article being produced and mined, or upon machinery, tools, or equipment which are both used in the direct production or mining process and are exempt from tax under these regulations [\[45 IAC 2.2\]](#).

Taxpayer concludes that "equipment that heats and moves the hot nitrogen throughout the above described process is exempt under [45 IAC 2.2-5-8\(c\)](#)" because the equipment is "an essential and integral part of an integrated process which produces tangible personal property."

The Department does not agree that the equipment used to introduce the nitrogen into its production process is exempt. While the equipment may be used within the integrated process, it does not have a direct effect on the plastic productions. The Department finds the description set out in the initial audit report instructive:

The auditor's position is that [plastic] production stops, then purging occurs, and then production starts again.

Taxpayer's position is this stop-and-start purging of the filters occurs frequently. ("[T]he process is a cyclical process and the equipment is continually functioning, simply with a different chemical stream running through the beds") Bearing in mind that "exemptions are strictly construed in favor of taxation and against the exemption," The Department concludes that the nitrogen purging equipment is one-step removed from the actual production of Taxpayer's manufacturing process.

7. Safety Clothing

Taxpayer leases "flame retardant and ordinary work clothing." Taxpayer explains, "Personnel in certain areas of the plant are required to wear the flame retardant uniforms to perform their production jobs."

Taxpayer explains that forty percent of the clothing it rented during the audit period consisted of "required flame retardant for specific personnel." Taxpayer states the lease of these uniforms was exempt pursuant to [45 IAC 2.2-5-8\(c\)\(2\)\(F\)](#). The regulation provides:

The following types of equipment constitute essential and integral parts of the integrated production process and are, therefore, exempt. The fact that such equipment may not touch the work-in-process or, by itself, cause a change in the product, is not determinative Safety clothing or equipment which is required to allow a worker to participate in the production process without injury or to prevent contamination of the product during production.

Taxpayer has not provided information sufficient to allow for a conclusion that it is entitled to the exemption on the purchase of this clothing.

8. Cyclone Dust Collectors

Taxpayer purchased "cyclones" and dust collectors which Taxpayer maintains were not subject to either sales or use tax. Taxpayer explains:

The cyclones & dust collectors work together to enable efficient air-transfer of product to the bagging hopper []. The cyclone does the bulk of the separation of the powder from air and the dust collector does the final separation to minimize powder loss and enable air to be vented to the outside environment. The powder separated by the cyclone and dust collector then proceeds through the bagging hopper where it is packaged into super sacks [] for final resale to end customers.

Taxpayer asserts that the devices are exempt because the "machinery is directly affecting the article being produced it is essential and integral to the integrated manufacturing process and is exempt under [45 IAC 2.2-5-8\(c\)](#)."

The regulation on which Taxpayer relies provides:

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. [45 IAC 2.2-5-8\(c\)](#).

Taxpayer explains that dust residue is sold to its customers and that the dust collectors have an "immediate effect" on the "article being produced." See IC § 6-2.5-5-3(b). The Department does not agree that the dust collectors are exempt from tax because Taxpayer has provided nothing which establishes that the dust residue is a manufactured product sold to its customers.

9. "Chemical" Knockout Vessel

The knockout vessel is a glass lined container. The container is employed in Taxpayer's production of its Chemical. Taxpayer maintains that this container is exempt from sales and use tax and explains as follows:

Process gases resulting from the production of [Chemical] are routed to this vessel. Any [Chemical] that enters the EDS Knockout Pot gets neutralized with sodium hydroxide in the EDS Scrubber to prevent it from being released to the environment.

Taxpayer states that the audit reviewed its Chemical production and scrubber process and "exempted all scrubber equipment transactions within the review pull list." Taxpayer states that the knockout vessel is exempt pursuant to [45 IAC 2.2-5-8\(c\)](#) because it has "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."

Based on Taxpayer's own description of the container, the Department concludes that this container is not entitled to the exemption. The container is employed after the production of Taxpayer's product but is intended to render safe its Chemical which would otherwise escape into the environment. As such, the container is "post-production" equipment outside the purview of the exemption.

10. Optiva Core Software

Taxpayer bought computer software which it maintains is not subject to sales or use tax. Taxpayer explains the software "is used to manage the processes and data associated with our [plastics] formulations, from new formula creation, product and decommission."

Taxpayer cites to [45 IAC 2.2-5-8](#) and IC § 6-2.5-5-40 as authority for its position that the Optiva software is exempt.

[45 IAC 2.2-5-8\(c\)](#) provides:

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.

IC § 6-2.5-5-40 exempts equipment used in research and development. The statute provides in part:

- (b) As used in this section, "research and development equipment" means tangible personal property that:
 - (1) consists of or is a combination of:
 - (A) laboratory equipment;
 - (B) computers;
 - (C) computer software;
 - (D) telecommunications equipment; or
 - (E) testing equipment;
 - (2) has not previously been used in Indiana for any purpose; and
 - (3) is acquired by the purchaser for the purpose of research and development activities devoted directly to experimental or laboratory research and development for:
 - (A) new products;
 - (B) new uses of existing products; or
 - (C) improving or testing existing products.
- (c) As used in this section, "research and development property" means tangible personal property that:
 - (1) has not previously been used in Indiana for any purpose; and
 - (2) is acquired by the purchaser for the purpose of research and development activities devoted to experimental or laboratory research and development for:

- (A) new products;
- (B) new uses of existing products; or
- (C) improving or testing existing products.

The Department's audit did not agree that the purchase of computer software was exempt. As explained in the audit's written report:

Taxpayer purchased SAP software and maintenance agreements that included license fees and updates. This software is used for accounting purposes. They also purchase[d] Optiva Core software for use in tracking information[] for various products. Both of these software packages are taxable because the use is for administrative purposes and not [an] integral and essential part of the production process.

The vendor's website describes the software's "product details" as follows:

A best-of-breed product lifecycle management solution created specifically for process manufacturers, Infor Optiva helps companies accelerate their product development, minimize their cost of production, and ensure 100[percent] regulatory compliance. Infor, <http://www.infor.com/product-summary/plm/optiva/> (last visited January 12, 2016).

The Department disagrees with Taxpayer's reliance on [45 IAC 2.2-5-8\(c\)](#) because there is no indication that the Optiva in any way has "an immediate effect" on Taxpayer's plastic products.

Similarly, the Department also disagrees with Taxpayer's reliance on IC § 6-2.5-5-40. Although this vendor's description of its software makes reference to "product development," there is little to establish that - as required in the statute - the software was "acquired by the purchaser for the purpose of research and development activities devoted directly to experimental or laboratory research and development." (Emphasis added). Based on the audit's description of how the software was used and the vendor's own description of the production, the software is best described as a management/compliance tool rather than software devoted directly and wholly to development of new products.

11. Ring Shear Tester

Taxpayer bought a "ring shear tester" which it maintains is not subject to sales or use tax. Taxpayer explains the device "is an analyzer used in the [Trade Name] area lab to verify process running conditions are correct for the product tested analyzed (i.e., [Trade Name] powder). Equipment used in the labs at [Taxpayer's location] was determined to be 80[percent] exempt during the field audit."

Taxpayer argues that the audit should be adjusted to reflect its position that this device is laboratory equipment entitled to the agreed-upon 80 percent exemption.

Based on Taxpayer's description of this device, the vendor's documentation describing its function, and the manner in which the device is used at Taxpayer's facility along with the documentation supplied during the hearing, the Department is prepared to agree that the "ring shear tester" is entitled to exemption. The Department's Audit Division is requested to review the supplemental information provided and, based on that information and the previous determination that 80 percent of Taxpayer's laboratory equipment was exempt, make whatever adjustment is consistent with the Department's previous conclusion on this issue.

12. Piping Insulation

Taxpayer operates two separate production facilities. The two facilities are physically close to each other. One of the facilities produces a second industry specific chemical with a very high freezing points; the second facility uses his second chemical. This second chemical is transferred by pipe to the second facility which uses the second chemical to make Taxpayer's plastics and films.

Taxpayer explains that the second chemical has a "high freezing point" and the transfer pipe must be insulated. However, the audit determined that the transfer pipe and its insulation were not exempt because the pipe was transferring "finished goods" between one of Taxpayer's facilities to another of Taxpayer's facilities.

Taxpayer disagrees stating that the audit drew "an artificial and arbitrary boundary based on the first marketable product to emerge rather than drawing the more logical line based on the actual end product produced."

Taxpayer points to the Tax Court's decision in *General Motors Corp. v. Indiana Dep't of State Revenue*, 578 N.E.2d 399, 401 (Ind. Tax Ct. 1991). In that decision case, General Motors had several plants which made components which were assembled at another General Motors plant. The court determined that General Motors' integrated production process began at the various General Motors individual plants and ended upon the completion of the actual end product marketed, which in General Motors' case was a finished vehicle, at another General Motors plant. Id. at 402

In *General Motors*, the automobile manufacturer shipped component automobile parts to its plants and claimed an exemption for the purchase of items employed in the interdivisional transfer of those component parts. The court held that the automobile manufacturer's packing materials were part of the integral process whereby the manufacturer produced its finished product. Therefore, the automobile manufacturer's packing materials were exempt under IC § 6-2.5-5-3. The court reached that decision after finding the automobile manufacturer's widely separated production facilities formed a cohesive, singular production unit in which the claimant's "manufacture of finished marketable automobiles [was] accomplished by one continuous integrated production process within which the transport of parts from component plants to assembly plants [was] an essential and integral part." *General Motors*, 578 N.E.2d at 404.

In finding that the automobile manufacturer's production process encompassed manufacturing activities performed at multiple sites, the court identified a number of significant facts. Specifically, the court found that "[t]he facts in the case as well as previous judicial findings indicate GM's production process is by nature highly integrated. The court's sole concern, however, is whether GM's manufacturer of finished automobiles qualifies as one continuous integrated production process for the purpose of exemption from sales/use tax." Id. at 402.

Footnote three gives an indication of the evidence which the court relied in arriving at a conclusion that GM's production was both "continuous" and "integrated." Specifically, the court found that "GM's component plant personnel collaborate with the assembly plant personnel (1) to develop new product concepts, (2) to individually design, engineer, and test the performance of new parts and packing materials, (3) to plan the layout and production processes for new parts, (4) to coordinate production schedules because delays at one plant would have an immediate effect on the other plants, and (5) to solve problems and ensure quality control." Id. at n.3. In addition, the court noted that a "continuity of production exists between GM's different plants [which is] demonstrated by the standard practice of shifting certain production operations back and forth between component and assembly plants when necessary for more efficient operation." Id.

In applying any tax exemption, the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." *Kimball Int'l Inc.*, 520 N.E.2d at 456.

As provided above and bearing in mind the requirement that all exemptions are "strictly construed," it was in the specific context of particularized facts and findings that the court held that GM's manufacture of automobiles represented one "continuous integrated production process." Id. at 404. It was in the context of those particularized facts and findings that the Tax Court held that GM's assembled automobiles, and not the automobile's component parts, constituted GM's most marketable product and that the production of that "most marketable product" constituted the conclusion of GM's integrated but physically discontinuous manufacturing process.

However, based on the information provided, the Department is not prepared to agree that the "second chemical insulation" is entitled to the exemption because although the three companies may have some thread of common ownership, they are essentially three different business entities performing interrelated production tasks. The production of Taxpayer's plastics and films may well be coordinated between the different facilities, but because that production occurs among and between distinct legal entities, the production of the products is not a "continuous integrated process" *General Motors*, 578 N.E.2d at 404.

13. Replacement Manufacturing Equipment

Taxpayer cites to certain equipment which it maintains was a "replacement of manufacturing equipment that was replaced due to damage [incurred] during demolition."

Other than a passing reference to replacement "manufacturing equipment," Taxpayer has provided nothing which would justify granting a sales exemption to the purchase of the equipment.

14. EVS Pack Equipment

Taxpayer bought EVS Pack Equipment from a vendor called "Industrial Contractors." To "perform the packing and inspecting of the [Chemical] EVS equipment. "Taxpayer explains that this Pack Equipment is the "scrubber" system employed in its Chemical production process. Taxpayer states the audit reviewed the "scrubber system was reviewed by the field auditor and fully exempted as essential and integral to the manufacturing process and federally regulated emissions control process."

Taxpayer states that the "de minimis amount of materials incorporated during the installation of this equipment is exempt under [45 IAC 2.2-5-8\(c\)](#) and [45 IAC 2.2-5-8\(h\)\(2\)](#)."

Taxpayer references an agreement with Industrial Contractors to "furnish labor, materials, and equipment and supervision to perform the [Chemical] . . . inspection and Packing work . . ." The contract further provides that Taxpayer would pay for "[t]ime and material - not to exceed without written authorization [= \$200,000]."

The Department is unable to agree that its earlier conclusion regarding this particular transaction should be changed. The information provided by Taxpayer - although certainly relevant - is insufficient to establish Taxpayer's premise that the transaction with Industrial Contractors was substantively for the provision of exempt services.

15. Hazardous Chemical Air Monitors

Taxpayer explains that it has implemented a "global policy requirement to monitor [Chemical] gases in [its] production area in order to prevent personnel injury and allow personnel to safely perform their jobs on the production line."

Taxpayer argues that the air monitors are exempt pursuant to [45 IAC 2.2-5-8\(c\)\(2\)\(F\)](#) which provides:

The following types of equipment constitute essential and integral parts of the integrated production process and are, therefore, exempt. The fact that such equipment may not touch the work-in-process or, by itself, cause a change in the product, is not determinative . . . Safety clothing or equipment which is required to allow a worker to participate in the production process without injury or to prevent contamination of the product during production.

Although commonly used for industrial purposes, the Chemical was used as a chemical weapon during World War I and World War II and is described as an "insidious poison." Publicly available references such as Wikipedia and the Center for Disease Control refer to potential human poisoning by this Chemical dependent upon the amount of the Chemical "to which a person is exposed, the route of exposure, and the length of time that a person is exposed."

Given the hazardous nature of Taxpayer's Chemical product, the Department agrees that the air monitors are entitled to the exemption set out at [45 IAC 2.2-5-8\(c\)\(2\)\(F\)](#) because without the air monitors, the employees could not be assured of working safely in the production process.

FINDING

As described above in Part I, Taxpayer's protest is denied in part and sustained in part subject to review by the Department's Enforcement Division.

II. Gross Retail and Use Tax - Consumed in Direct Production.

DISCUSSION

Taxpayer maintains it was not required to pay sales tax or self-assess use tax on the purchase of materials which are consumed in the direct production of its plastics and films.

Taxpayer relies on the exemption set out in IC § 6-2.5-5-5.1(b) which provides as follow:

Transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for direct consumption as a material to be consumed in the direct production of other tangible personal property in the person's business of manufacturing, processing, refining, repairing, mining, agriculture, horticulture, floriculture, or arboriculture. This exemption includes transactions involving acquisitions of tangible personal property used in commercial printing.

The exemption for direct consumption in production is further explained at [45 IAC 2.2-5-12](#), in part, as follows:

- (a) The state gross retail tax shall not apply to sales of any tangible personal property consumed in direct production by the purchaser in the business of producing tangible personal property by manufacturing, processing, refining, or mining.
- (b) The exemption provided by this regulation [\[45 IAC 2.2\]](#) applies only to tangible personal property to be directly consumed in direct production by manufacturing, processing, refining, or mining. It does not apply to machinery, tools, and equipment used in direct production or to materials incorporated into the tangible personal property produced.
- (c) The state gross retail tax does not apply to purchases of materials to be directly consumed in the production process or in mining, provided that such materials are directly used in the production process; i.e., they have an immediate effect on the article being produced. The 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.

. . .

- (f) Other taxable transactions. Purchases of materials consumed in manufacturing, processing, refining, or mining activities beyond the scope of those described in subsection B above [subsection (e) of this section] are taxable. Such activities include postproduction activities; storage step) [sic.]; maintenance, testing and inspection (except where in direct production); (except where essential and integral to the process system); management and administration; sales; research and development; exhibition of products; safety or fire prevention; space heating; ventilation and cooling equipment for general temperature control; illumination; shipping and loading.

As noted above in Part I above, Taxpayer has the burden of establishing that it is entitled to an exemption from sales or use tax. ("[Taxpayer's] burden of demonstrating that it is entitled to the exemption precedes the Department's burden of demonstrating that [Taxpayer] is not entitled to the exemption." Alloy Custom Products, Inc. v. Indiana Dept. of State Revenue, 26 N.E.3d 1078, 1082 n.4 (Ind. Tax Ct. 2015).

1. Hot Nitrogen

Taxpayer buys nitrogen gas. As explained in Part I.6. above, Taxpayer uses nitrogen in its Chemical production process. Taxpayer heats the nitrogen and introduces it into the production process intermittently to "regenerate" or "flush" activated charcoal filters. The heated nitrogen scrubs accumulates sulfur dioxide from the filters. The sulfur dioxide is removed from the Chemical production stream and "flared off into the environment."

Taxpayer explains:

The use of hot nitrogen to regenerate the activated carbon in this process is essential and integral to the integration production of not only [Chemical], but [Taxpayer's] final products. Not only is the hot nitrogen essential and integral to the integrated process, it actually has an immediate effect on the exempt production equipment as exempted in the following regulation.

Taxpayer cites to [45 IAC 2.2-5-12\(e\)](#) for its position that the purchase of the nitrogen was exempt because the nitrogen is consumed in the production of Taxpayer's plastics and films. In part the regulation provides:

Purchases of materials to be consumed during the production or mining process are exempt from tax, if the consumption of such materials has an immediate effect upon the article being produced and mined, or upon machinery, tools, or equipment which are both used in the direct production or mining process and are exempt from tax under these regulations [\[45 IAC 2.2\]](#).

Taxpayer's use of the nitrogen to purge activated charcoal filters employed during the manufacture of the Chemical was described in Part I.6. above. For the same reasons that Taxpayer is being denied the exemption for equipment that "heats and moves the hot nitrogen . . ." Taxpayer is denied the exemption for the nitrogen consumed in the purging of the sulfur dioxide from the filters. The nitrogen is used to flush sulfur dioxide from the filters. The nitrogen enables the production to continue but the does not directly affect the Chemical.

2. Oxygen

Taxpayer buys oxygen from its vendors. Taxpayer maintains that the purchase of the oxygen was exempt because the oxygen is used in the manufacture of carbon monoxide from coke and carbon dioxide. Taxpayer explains:

The oxygen is incorporated into the carbon monoxide molecule. Carbon monoxide is then used to produce [Chemical]. [Chemical] is then used in the polymerization process to make polycarbonate, the final product. Salt and water are by-products of the polymerization process.

Because the oxygen is directly incorporated into the Chemical, Taxpayer is entitled to the exemption on the purchase of the oxygen.

FINDING

Taxpayer's protest is sustained in part and denied in part; Taxpayer is entitled to the exemption on the purchase of oxygen but is not entitled to the exemption on the purchase of nitrogen.

III. Gross Retail and Use Tax - Environmental Regulations.

DISCUSSION

Taxpayer states that it was not required to pay sales tax or self-assess use tax on the purchase of equipment purchased for the purpose of complying with federal, state, or local environmental regulations.

Indiana imposes a sales tax on retail transactions and a complimentary use tax on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-1-1 et seq. However, Indiana law allows manufacturers an exemption for items which are purchased for the purpose of complying with environmental quality standards.

The exemption is set out in IC § 6-2.5-5-30 which states in part that, "Sales of tangible personal property are exempt from the state gross retail tax if . . . the property constitutes, is incorporated into, or is consumed in the operation of, a device, facility, or structure predominately used and acquired for the purpose of complying with any state, local, or federal environmental quality statutes, regulations, or standards" The Department's regulation restates the exemption as follows:

The state gross retail tax does not apply to sales of tangible personal property which constitutes, is incorporated into, or is consumed in the operation of, a device, facility, or structure predominately used and acquired for the purpose of complying with any state, local or federal environment [quality] statutes, regulations or standards; and the person acquiring the property is engaged in the business of manufacturing, processing, refining, mining, or agriculture.

(1) Consumed as used in this regulation . . . means the dissipation or expenditure by combustion, use or application and does not mean or include the obsolescence, discarding, disuse, depreciation, damage, wear or breakage of tools, machinery, devices or furnishings.

(2) Incorporated as used in this regulation . . . means the material must be physically combined into and become a component of the environmental quality device, facility, or structure. The material must constitute a material or integral part of the finished product. [45 IAC 2.2-5-70\(a\)](#).

As noted previously, IC § 6-2.5-5-30, 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).

Taxpayer bought air monitors from a company called DOD Technologies. Taxpayer explains that the monitors are used in its Chemical scrubbers to detect air borne emissions. Taxpayer explains that the monitors are requested according to "National Emission Standards for Hazardous Air Pollutants for Source Categories: Generic Maximum Achievable Control Technology Standards." Taxpayer states that the air monitors are required pursuant to federal regulation found at 40 C.F.R. § 63.1100 pt. YY.

A review of the federal regulation establishes that the production of this product requires use of the air monitoring equipment. Taxpayer has met its burden of establishing that the purchase of the equipment is entitled to the

FINDING

Taxpayer's protest is sustained.

IV. Gross Retail and Use Tax - Services.

DISCUSSION

Taxpayer argues it was not required to pay sales tax or self-assess use tax on transactions in which Taxpayer did not obtain tangible personal property because the transaction was one for which Taxpayer obtained the vendor's intangible services.

IC § 6-2.5-2-1(a) imposes sales tax on retail transactions made in Indiana. IC § 6-2.5-1-2 defines a retail transaction as "a transaction of a retail merchant that constitutes selling at retail as described in IC § 6-2.5-4-1 . . . or that is described in any other section of IC § 6-2.5-4." IC § 6-2.5-4-1(a) provides that "[a] person is a retail merchant making a retail transaction when he engages in selling at retail." IC § 6-2.5-4-1(b) further explains that a person sells at retail when he "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration."

1. Roof Inspection Service

Taxpayer engaged a company called Tremco. According to Taxpayer, it paid Tremco to inspect its facilities various roofs. Taxpayer states that the price it paid to Tremco was for services only and exempt from sales and use tax.

Taxpayer explains:

There is no reasonable expectation that tangible personal property is certain to be provided at the time of purchase of the contract. Further, during the inspection, repairs are found to be needed, Tremco separately invoices for the specific repairs. Because the vendor is a service provider, any use tax due on the minor transfers of tangible personal property for a unitary price under the service person rules would be the responsibility of the provider.

Based on information provided, the Department agrees that the contract with Tremco calls exclusively for the provision of "services" and that no tangible personal property was provided Taxpayer pursuant to that contract.

2. Voicemail Provider

Taxpayer states that it entered into a "service contract" with a company called Octel. Taxpayer entered into the agreement by means of a third-party vendor called "Technology."

Taxpayer states that this contract was for voice mail support services only and the agreement did not call for the provision of tangible personal property. Taxpayer concludes that the price it paid for the contract was not subject to sales or use tax.

Other than an invoice and a passing reference to the agreement in an email, Taxpayer has provided scant information regarding the nature of the agreement it had with Octel. The Department does not agree that Taxpayer has established it is entitled to the exemption.

3. Analytical Lab Equipment Agreement

Taxpayer entered into a "service agreement" with a company called "Analytical" for the period January 2013 through January 2014. Taxpayer states that the agreement allowed for "preventative maintenance visits," up to two "emergency visits," and "rental coverage for analytical equipment used in [Taxpayer's] lab."

Taxpayer states that there was no "reasonable expectation that parts [would] be provided under the contract" and concludes that the "purchase is exempt from sales tax"

As additional authority for its position, Taxpayer cites to Sales Tax Information Bulletin 2 (November 2011),

Maintenance contracts generally meet the definition of bundled transactions under [IC 6-2.5-1-11.5](#) and are subject to sales tax on that basis. The determination as to whether a contract is a maintenance contract is not necessarily based on the particular title of or language used in the contract. Instead, the determination is based on the substantive provisions contained in the contract. An explicit guarantee that tangible personal property will be provided under the contract is not required. What is important is that both the customer and the service provider are aware at the time the contract is executed that consumable items will be provided under the contract. However, the amount of tangible personal property supplied under the contract must be more than a de minimis amount. As a rule, the seller's purchase price or the sales price of the taxable items provided under the contracts must exceed 10[percent] of the total purchase price or the total sales price of the bundled products.

Taxpayer makes a secondary argument; according to Taxpayer, the Department determined that 80 percent of its lab equipment was exempt according to "the field auditor's review." Taxpayer concludes that "this purchase should also fall under the determination of 80[percent] exemption."

The Department does not agree that Taxpayer has provided sufficient information to establish that the parties to the Analytical agreement were "aware at the time the contract [was] executed that consumable items [would] be provided under the contract" Similarly, Taxpayer has not provided sufficient information to establish how - or why - the price it paid for the contract should be apportioned based on the audit's conclusions concerning the lab equipment.

FINDING

Taxpayer's protest is respectfully denied.

SUMMARY

Taxpayer's protest is denied in part and sustained in part; equipment employed in the direct production of Taxpayer's product and supplies consumed in the production of the product are exempt from sales tax. Equipment and supplies necessary for Taxpayer's employees to safely participate in the production process or to comply with environmental regulations of the products are exempt.

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