

DEPARTMENT OF STATE REVENUE

04-20160602R.ODR

Final Order Denying Refund: 04-20160602R
Sales Tax
For Tax Years 2015 & 2016

NOTICE: IC § 4-22-7-7 permits the publication of this document in the Indiana Register. The publication of this document provides the general public with information about the Indiana Department of Revenue's official position concerning a specific set of facts and issues. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Memorandum of Decision or Final Order Denying Refund.

HOLDING

Indiana Manufacturer was not entitled to refund of sales tax paid on promotional materials shipped to out-of-state customers because the temporary storage exemption did not apply to sales tax paid to promotional materials vendor.

ISSUE**I. Sales Tax—Temporary Storage.**

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-8.1-5-1; IC § 6-2.5-13-1; Dep't of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Miles, Inc. v. Indiana Dep't of Revenue, 659 N.E.2d 1158 (Ind. Tax Ct. 1995); Indiana Dep't 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, 97 (Ind. Ct. App. 1974); Conklin v. Town of Cambridge City, 58 Ind. 130 (1877); [45 IAC 2.2-3-4](#).

Taxpayer protests the denial of refund of sales tax paid on promotional materials temporarily stored in Indiana and shipped out of state.

STATEMENT OF FACTS

Taxpayer is an Indiana corporation doing business in Indiana and across the country. Taxpayer distributes its products to dealers, who then sell the products to end-users. Taxpayer states that 93.6 percent of its sales are to dealers outside the state of Indiana. Taxpayer provides, free of charge, promotional literature, brochures, and product price books to its dealers and independent sales representatives. The promotional materials are ordered from an out-of-state vendor that does business in Indiana, and Taxpayer paid Indiana sales tax on these purchases. The promotional materials are sent directly to and are temporarily stored at a local service provider's location in Indiana where they are received, unbundled, repackaged, labeled, and sent out to Taxpayer's customers as requested.

Taxpayer filed a GA-110L form requesting a refund of sales tax paid to the promotional materials vendor during tax years 2015 and 2016. The Indiana Department of Revenue ("Department") denied Taxpayer's request for refund of sales tax, stating that the transactions indicated were not exempt and the sales tax was properly remitted to the Department. Taxpayer protested the refund denial. An administrative hearing was held and this Order Denying Refund results. Further facts will be supplied as necessary.

I. Sales Tax—Temporary Storage.**DISCUSSION**

Taxpayer protests the denial of refund of sales tax paid on promotional items that it ultimately shipped to dealers in other states outside of Indiana. Taxpayer does not protest the tax paid on promotional materials that were sent to Indiana locations. Taxpayer argues that the promotional materials sent to out-of-state locations are non-taxable because they were temporarily stored in Indiana for subsequent use outside of Indiana.

As a threshold issue, it is the taxpayer's responsibility to establish that the existing tax assessment is incorrect, as provided in IC § 6-8.1-5-1(c). In addition, "[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.'" Dep't of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579, 583 (Ind.

2014). Thus, all interpretations of Indiana tax law contained within this decision shall be entitled to deference.

As an additional matter, 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 Dep't 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 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)).

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).

When an out-of-state vendor sells tangible personal property to a purchaser in Indiana, the Indiana sourcing statutes determine whether the transaction is a "retail transaction" subject to Indiana sales tax. IC § 6-2.5-13-1 provides, in relevant part:

(d) The retail sale, excluding lease or rental, of a product shall be sourced as follows:

(1) When the product is received by the purchaser at a business location of the seller, the sale is sourced to that business location.

(2) When the product is not received by the purchaser at a business location of the seller, the sale is sourced to the location where receipt by the purchaser (or the purchaser's donee, designated as such by the purchaser) occurs, including the location indicated by instructions for delivery to the purchaser (or donee), known to the seller. (Emphasis added).

Indiana also imposes a complementary, but separate, 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) **(emphasis added)**. Storage means "the keeping or retention of tangible personal property in Indiana for any purpose **except temporary storage**." IC § 6-2.5-3-1(b). "Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, **unless the Indiana state gross retail tax has been collected at the point of purchase.**" [45 IAC 2.2-3-4](#) **(emphasis added)**. Thus, Indiana provides an exemption from use tax for purchases temporarily stored in Indiana and subsequently used out of state.

Taxpayer argues that the temporary storage exemption applicable to use tax should also be applied to the sales tax it paid on the purchases of the promotional materials at issue. Taxpayer refers to the Indiana Tax Court case *Miles, Inc. v. Indiana Dep't of Revenue*, 659 N.E.2d 1158 (Ind. Tax Ct. 1995), which states:

Miles argues that its promotional materials are excepted from use tax under the definition of "storage." "Storage" is defined as "the keeping or retention of tangible personal property in Indiana for any purpose **except the subsequent use of that property solely outside Indiana.**" **(Emphasis added).**

The Department argues that the promotional materials are taxable under the definition of "use." "Use" is defined as "the exercise of any right or power of ownership over tangible personal property." Specifically, the Department contends that "Miles is liable for use tax because its storage of the promotional items in, and withdrawal of them from, its Indiana warehouses constitute the exercise of a right or power of ownership over them."

...

Miles is correct. This Court has previously held that the storage exception limits and qualifies the meaning of "use." *USAir, Inc. v. Indiana Dep't of State Revenue* (1993), Ind.Tax, 623 N.E.2d 466, 470. If property is stored in Indiana for subsequent use outside Indiana, then the activities of storing, handling, and transporting the property cannot be taxed as "uses." *Id.* To hold otherwise would subsume "storage" within "use," and nullify the exception for subsequent use outside Indiana. *Id.* at 1164 (internal citations omitted).

While Indiana statutes and case law provide for an exemption for use tax on items temporarily stored in Indiana and ultimately shipped out of state, including promotional materials, there is no corresponding exemption applicable to sales tax found under Indiana law. In this instance, Taxpayer paid Indiana sales tax in a retail transaction pursuant to IC § 6-2.5-2-1, and the promotional materials vendor is registered as a retail merchant with the state of Indiana. Because tax exemptions are strictly construed in favor of taxation, the Department cannot apply the temporary storage use tax exemption to sales tax.

FINDING

Taxpayer's protest is respectfully denied.

Posted: 03/29/2017 by Legislative Services Agency
An [html](#) version of this document.