

DEPARTMENT OF STATE REVENUE

04-20170008R.MOD

Memorandum of Decision: 04-20170008R
Sales/Use Tax
For the Tax Years 2013 through 2015

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 This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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 Memorandum of Decision.

HOLDING

Company provided sufficient documentation to show that some items were exempt from sales tax. Company however could not show that the remaining items were exempt.

ISSUE**I. Sales/Use Tax - Telecommunication Equipment Exemption.**

Authority: IC § 6-2.5-1-2; IC § 6-2.5-1-27; IC § 6-2.5-1-27.5; IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-2.5-4-6; IC § 6-2.5-5-8; IC § 6-2.5-5-13; IC § 6-2.5-3-2; IC § 6-2.5-3-1(a); *Rhoades v. Indiana Dep't of State Revenue*, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); *Indiana Dept. of State Revenue v. Cave Stone, Inc.*, 457 N.E.2d 520 (Ind. 1983); *Indiana Dept. of Revenue v. Kimball International, Inc.*, 520 N.E.2d 454 (Ind. Ct. App. 1988); *Tri-States Double Cola Bottling Co. v. Dep't of State Revenue*, 706 N.E.2d 282 (Ind. Tax Ct. 1999); [45 IAC 2.2-5-15](#); Sales Tax Information Bulletin 17 (August 2009).

Taxpayer argues that the Department erred in denying a refund of the sales tax it paid on its purchases of certain equipment used to furnish telecommunication services, Internet access services, VOIP (voice over Internet protocol) services.

STATEMENT OF FACTS

Taxpayer is a company that provides telecommunication services to customers throughout Indiana. It is registered with the Indiana Utility Regulatory Commission as a CLEC (Competitive Local Exchange Carrier). Taxpayer purchased equipment that it used to provide telecommunication services in Indiana. Taxpayer filed a claim for refund of the sales taxes it paid during the tax years 2013 through 2015, stating that it purchased exempt equipment and erroneously paid sales tax on the purchases. Taxpayer's refund claim included a list of protested items along with invoice numbers and brief descriptions of the purpose of the items. The Indiana Department of Revenue ("Department") conducted a review of Taxpayer's claim for refund. Taxpayer's claim for refund was granted in part and denied in part. In denying part of Taxpayer's claim for refund, the Department provided an explanation of adjustments. Taxpayer protested the partial refund denial. An administrative hearing was held, and Memorandum of Decision results. Further facts will be supplied as necessary.

I. Sales/Use Tax - Telecommunication Equipment Exemption.**DISCUSSION**

Taxpayer protests the partial denial of its refund claim for the sales tax it paid on its purchases of the Equipment at Issue. Taxpayer argues that the items were for resale and therefore are exempt from sales tax. In the alternative, Taxpayer argues that the Equipment at Issue is "central office equipment" used to furnish intrastate telecommunication services, and therefore eligible for the "telecommunication equipment exemption" found in IC § 6-2.5-5-13.

Indiana imposes a sales tax on retail transactions made in Indiana. IC § 6-2.5-2-1(a). The sales and use taxes apply to retail transactions. A retail transaction is a transaction made by a retail merchant that constitutes "selling at retail." IC § 6-2.5-1-2. Selling at retail means a retail merchant "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration" in the ordinary course of the merchant's business. IC § 6-2.5-4-1. Tangible personal property is personal property that "can be seen, weighed,

measured, felt, or touched" IC § 6-2.5-1-27.

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

Indiana legislature provided some exemptions from the sales and use taxes, including the "telecommunications equipment exemption" outlined in IC § 6-2.5-5-13. Exemption statutes are strictly construed in favor of taxation. *Indiana Dept. of State Revenue v. Cave Stone, Inc.*, 457 N.E.2d 520, 524 (Ind. 1983). Whether a taxpayer qualifies for an exemption from tax is "highly fact sensitive," and it is the taxpayer's burden to prove the exemption criteria has been met. *Indiana Dept. of Revenue v. Kimball International, Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988).

A. Items for Resale

IC § 6-2.5-5-8(b) provides an exemption for transactions in which tangible personal property is purchased for resale:

Transactions involving tangible personal property . . . are exempt from state gross retail tax if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of the person's business without changing the form of the property.

[45 IAC 2.2-5-15](#) further explains:

(a) The state gross retail tax shall not apply to sales of any tangible personal property to a purchaser who purchases the same for the purpose of reselling, renting or leasing, in the regular course of the purchaser's business, such tangible personal property in the form in which it is sold to such purchaser.

(b) General rule. Sales of tangible personal property for resale, rental or leasing are exempt from tax **if all of the following conditions are satisfied:**

- (1) The tangible personal property is sold to a purchaser who purchases this property to resell, rent or lease it;**
- (2) The purchaser is occupationally engaged in reselling, renting or leasing such property in the regular course of his business; and**
- (3) The property is resold, rented or leased in the same form in which it was purchased.**

(c) Application of general rule.

(1) The tangible personal property must be sold to a purchaser who makes the purchase with the intention of reselling, renting or leasing the property. **This exemption does not apply to purchasers who intend to consume or use the property or add value to the property through the rendition of services or performance of work with respect to such property.**

(2) The purchaser must be **occupationally engaged in reselling**, renting or leasing such property in the regular course of his business. **Occasional sales and sales by servicemen in the course of rendering services shall be conclusive evidence that the purchaser is not occupationally engaged in reselling the purchased property in the regular course of his business.**

(3) The property must be resold, rented or leased in the same form in which it was purchased.

(Emphasis added).

Thus, to claim the exemption, a taxpayer must demonstrate (1) that he or she purchases the items with an intention to resell, rent, or lease the items; (2) that he or she is occupationally engaged in reselling, renting or leasing the items in the regular course of his business; and (3) that the items purchased are resold, rented, or leased in the same form in which they were purchased.

In this instance, Taxpayer provided a list of equipment it claims as exempt, an equipment rental fee sheet, customer terms and conditions for Taxpayer's services, detailed billing of nine customer accounts. Upon review of

the provided documents the following items are part of either customer's billing or specifically listed on the equipment rental sheet: modem, Multimedia Terminal Adapter, Cable Card, Set Top Box, Remote, Remote DTA, and Remote for Top Box/DVRs. For the remaining listed items such as cords and cables Taxpayer did not demonstrate that they are part of the Cable or Internet Terms of Services or the equipment rental sheet. Thus, sales tax was properly paid for the remaining items.

As stated above, Taxpayer provided sufficient documentation to show that modem, Multimedia Terminal Adapter, Cable Card, Set Top Box, Remote, Remote DTA, and Remote for Top Box/DVRs are exempt from sales tax. These items are rented by Taxpayer's customers and are therefore exempt under IC § 6-2.5-5-8(b). The remaining protested items are denied.

B. Central Office Equipment

Taxpayer argued, in the alternative, that the listed items are also exempt because they are used for "furnishing or selling intrastate telecommunication services, video services, internet access services, or VOIP services in a retail transaction." As stated above, the Indiana legislature provided some exemptions from the sales and use taxes, including the "telecommunications equipment exemption" outlined in IC § 6-2.5-5-13. Exemption statutes are strictly construed in favor of taxation. *Indiana Dept. of State Revenue v. Cave Stone, Inc.*, 457 N.E.2d 520, 524 (Ind. 1983). Whether a taxpayer qualifies for an exemption from tax is "highly fact sensitive," and it is the taxpayer's burden to prove the exemption criteria has been met. *Indiana Dept. of Revenue v. Kimball International, Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988). Like all such tax exemption provisions, IC § 6-2.5-5-13 is strictly construed against exemption from the tax. *Id.*; *Tri-States Double Cola Bottling Co. v. Dep't of State Revenue*, 706 N.E.2d 282, 283 (Ind. Tax Ct. 1999).

IC § 6-2.5-5-13 provides an exemption to telecommunication services providers that use the property to provide "telecommunication services" as described in IC § 6-2.5-4-6. See IC § 6-2.5-5-13. IC § 6-2.5-1-27.5(a) defines "telecommunication services," as the "electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points." The term includes "a transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission, conveyance, or routing regardless of whether the service . . . is referred to as voice over Internet protocol services" IC § 6-2.5-1-27.5(b)(1). However, IC § 6-2.5-1-27.5(c) specifically excludes, among other things, "(1) Data processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a purchaser whose primary purpose for the underlying transaction is the processed data or information," "(2) Installation or maintenance of wiring or equipment on a customer's premises," "(6) Internet access service," and "(8) Ancillary services."

IC § 6-2.5-5-13 reads:

Transactions involving tangible personal property are exempt from the state gross retail tax, if:

(1) the property is:

- (A) classified as central office equipment, station equipment or apparatus, station connection, wiring, or large private branch exchanges according to the uniform system of accounts which was adopted and prescribed for the utility by the Indiana utility regulatory commission;
 - (B) mobile telecommunications switching office equipment, radio or microwave transmitting or receiving equipment, including, without limitation, towers, antennae, and property that perform a function similar to the function performed by any of the property described in clause (A); or
 - (C) a part of a national, regional, or local headend or similar facility operated by a person furnishing video services, cable radio services, satellite television or radio services, or Internet access services;
- and

(2) the person acquiring the property:

- (A) furnishes or sells intrastate telecommunication service in a retail transaction described in [IC 6-2.5-4-6](#); or
- (B) uses the property to furnish:
 - (i) video services or Internet access services; or
 - (ii) VOIP services.

The legislature added subsection (1)(C), which provides an exemption for certain equipment that is "a part of a national, regional, or local headend or similar facility operated by a person furnishing video services, cable radio services, satellite television or radio services, or Internet access services." IC § 6-2.5-5-13(1)(C). Thus, "radio and television audio and video programming service" providers and Internet service providers became entitled to the

exemption for telecommunication equipment used in their "national, regional, or local headend or similar facilit[ies]." Id. "A headend facility is a master facility for receiving signals for processing and distribution over a cable television system. The facility is normally surrounded by some type of security fencing and is typically a building housing electronic equipment used to receive and transmit video or local cable infrastructure." Sales Tax Information Bulletin 17 (August 2009), 20090826 Ind. Reg. 045090668NRA.

Upon review, Taxpayer is not eligible for the "telecommunications equipment exemption" outlined in IC § 6-2.5-5-13. The equipment protested appears to be used for installation or maintenance at a customer's premises which would not fit within the requirements of (1)(C) which requires property to be "a part of a national, regional, or local headend or similar facility" Id. Therefore, Taxpayer has not demonstrated that the Equipment at Issue meets the requirements of IC § 6-2.5-5-13(1)(C).

Since Taxpayer has not shown that the Equipment at Issue meets the requirements of IC § 6-2.5-5-13, it is not telecommunication equipment that qualifies for exemption from tax.

C. Calculation Error

Taxpayer also argues that the Department erred in its calculation of use tax on Invoice or Reference Number 20397331. Taxpayer states that the taxable amount on the invoice is \$6,774.90 but that the Department entered the taxable amount as \$9,774.90, thus resulting in a use tax variance of \$209.99. Taxpayer was able to provide the corresponding invoice showing that the taxable amount is \$6,774.90. The Department shall adjust the tax accordingly.

The Department denies the remaining equipment under both subsection **A.** and **B.** Thus, the Department sustains Taxpayer for the items specifically modem, Multimedia Terminal Adapter, Cable Card, Set Top Box, Remote, Remote DTA, and Remote for Top Box/DVRs and invoice number 20397331.

FINDING

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

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