

DEPARTMENT OF STATE REVENUE

04-20171003R.MOD; 04-20171008R.MOD

04-20171009R.MOD; 04-20171223R.MOD

04-20171233R.MOD; 04-20171256R.MOD

**Memorandum of Decision: 04-20171003R; 04-20171008R;
04-20171009R; 04-20171223R; 04-20171233R; 04-20171256R
Sales Tax**

For Tax Periods February, April, May, June, August, and September 2016

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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

HOLDING

Out-of-state Company provided sufficient documentation to establish that it was entitled to some if its refund request, but was denied for the remaining refund claim.

ISSUE

I. Sales Tax-Refund.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-8.1-5-4; IC § 6-2.5-9-3; IC § 6-2.5-13-1; [45 IAC 2.2-4-2](#); *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014).

Taxpayer protests the denial of its refund claim.

STATEMENT OF FACTS

Taxpayer is a retail merchant in the business of constructing and maintaining large towers and structures. Taxpayer is based out-of-state but does work in Indiana. Taxpayer did not collect sales tax on transactions with its customers but did remit sales tax from its own funds on transactions it thought were subject to Indiana sales tax; however, upon inspection it determined that twenty-seven of those transactions were not Indiana transactions after all. Taxpayer subsequently requested a refund of sales tax on twenty-six transactions on six separate GA-110L forms. The Department denied each claim, stating they were unitary transactions and/or there was not proof sales tax was paid at the time of the transaction. Taxpayer submitted a protest and an administrative phone hearing was held. This Memorandum of Decision ensues. Additional facts will be provided as necessary.

I. Sales Tax-Refund.

DISCUSSION

A taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. 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, all interpretations of Indiana tax law contained within this decision, as well as the preceding refund denial, shall be entitled to deference.

Taxpayer protests the Department's refund denial. Taxpayer submitted a refund request for sales tax on twenty-six transactions. The Department denied each transaction collectively claiming that, "1) A review of the invoices indicates unitary transactions. . . . 2) The submitted invoices do not document that tax was ever charged or paid." Sales tax is imposed by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

Selling at retail occurs when a person "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration." IC § 6-2.5-4-1(b). A person who acquires tangible person property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). A retail merchant, such as Taxpayer, is required to "collect the tax as agent for the state." IC § 6-2.5-2-1(a). The retail merchant "must keep books and records so that the department can determine the amount, if any, of the [retail merchant's] liability for tax by reviewing those books and records." IC § 6-8.1-5-4(a). Additionally, the retail merchant "holds those taxes in trust for the state and is personally liable for the payment of those taxes" IC § 6-2.5-9-3.

Taxpayer protested and provided proof, in the form of INtax confirmations, that sales tax was remitted to Indiana for all the transactions upon which refund was claimed. Thus, Taxpayer has overcome the Department's second stated reason for denial. Taxpayer, in addition, protests that the transactions at issue were either not Indiana transactions or were service only transactions. The remaining protested transactions will be reviewed as follows: A) Whether the transaction was an out-of-state transaction; B) whether Taxpayer fabricated tangible personal property and delivered via common carrier; and C) whether the transaction is considered a service only contract.

A. Whether the transaction was an exempt out-of-state transaction or fabrication delivered via common carrier by Taxpayer.

The Indiana retail merchant is not responsible for collecting Indiana's sales tax if the retail transactions, i.e., sales, are considered non-Indiana sales. That is, sales are not subject to Indiana sales tax when the tangible personal property sold, are delivered by Taxpayer, to a place outside of Indiana. The Indiana Code dictates how a retail sale should be sourced.

IC § 6-2.5-13-1(d) states:

- (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 purchaser (or donee), known to the seller.
- (3) When subdivisions (1) and (2) do not apply, the sale is sourced to the location indicated by an address for the purchaser that is available from the business records of the seller that are maintained in the ordinary course of the seller's business when use of this address does not constitute bad faith.
- (4) When subdivisions (1), (2), and (3) do not apply, the sale is sourced to the location indicated by an address for the purchaser obtained during the consummation of the sale, including the address of a purchaser's payment instrument, if no other address is available, when use of this address does not constitute bad faith.
- (5) When none of the previous rules of subdivision (1), (2), (3), or (4) apply, including the circumstance in which the seller is without sufficient information to apply the previous rules, then the location will be determined by the address from which tangible personal property was shipped, from which the digital good or the computer software delivered electronically was first available for transmission by the seller, or from which the service was provided (disregarding for these purposes any location that merely provided the digital transfer of the product sold).

Taxpayer states that order numbers, IN-058100, FH-053204, LA-059576, and FH-059880, were delivered to customers by common carrier located outside Indiana. Taxpayer provided invoices, contracts, and public information about customers to show that these customers were in fact located outside Indiana. Based on the information provided, Taxpayer has proven that it is entitled to its claimed refund of the listed order numbers.

B. Whether the transaction was a fabrication order delivered via common carrier by Taxpayer.

Taxpayer also protests that other transactions were not Indiana transactions because they were fabrication jobs shipped via common carrier from Taxpayer's business located out-of-state to Indiana. Taxpayer stated that order numbers, FH-059235, FH-058469; FM-057473, FM-057473, FH-060965, FH-056537, FT-061053, FM-059913, FH-057578, FT-061054, and FH-060061 are fabrication jobs in which the product was shipped via common carrier and are therefore out-of-state transactions. FH-058469 is listed on both Taxpayer's May and June refund claim. In regards to Taxpayer's May refund, the invoice was for billing of fabricated parts shipped via common carrier. The June refund claim is for a refund of sales tax paid on the shipping cost. Taxpayer provided contracts,

invoices, and freight bills that show the referenced invoices were fabrication jobs and shipped via common carrier. All customers of the referenced orders are located in Indiana.

Based on IC § 6-2.5-13-1(d)(2), a transaction is sourced to the customer's location, which in this case is located in Indiana. Thus, sales tax was properly remitted to Indiana for order numbers, FH-059235, FH-058469; FM-057473, FH-060965, FH-056537, FT-061053, FM-059913, FH-057578, FT-061054, and FH-060061. Therefore, Taxpayer's protest regarding these order numbers is denied.

Taxpayer also protests the refund denial on transactions in which customers drove to Taxpayer's out-of-state location to buy and pick up scrap metal from Taxpayer's "scrap bin." Taxpayer argues that these transactions are not Indiana transactions. Taxpayer provided statements from its director, invoices, and copy of a check to show that customers pick up scrap at Taxpayer's location. Based on IC § 6-2.5-13-1(d)(1), the information provided by Taxpayer is sufficient to show that the transactions that involve scrap are out of state transactions, and not Indiana transactions. Taxpayer is therefore entitled to refunds regarding "scrap bin" orders.

As stated above, order numbers IN-058100, FH-053204, LA-059576, and FH-059880 are not Indiana transactions and Taxpayer is sustained on these order numbers and the scrap bin orders. However, based on IC § 6-2.5-13-1(d)(2), Taxpayer is denied on order numbers FH-059235, FH-058469; FM-057473, FH-060965, FH-056537, FT-061053, FM-059913, FH-057578, FT-061054, and FH-060061 because they are considered Indiana transactions.

C. Whether the transaction is considered a service only contract.

Taxpayer claims that order numbers ER-049415, IN-057545, DE-056649, IN-059214, IN-057478, AN-046067, MA-057321, MA-059758, ER-058834, and ER-060093 are exempt from sales tax because they were for services only. [45 IAC 2.2-4-2\(a\)](#) states that:

Professional services, personal services, and services in respect to property not owned by the person rendering such services are not "transactions of a retail merchant constituting selling at retail," and are not subject to gross retail tax. Where, in conjunction with rendering professional services, personal services, or other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail unless:

- (1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property;
- (2) The tangible personal property purchased is used or consumed as a necessary incident to the service;
- (3) The price charged for tangible personal property is inconsequential (not to exceed 10[percent]) compared with the service charge; and
- (4) The serviceman pays gross retail tax or use tax upon the tangible personal property at the time of acquisition.

In this instance, Taxpayer provided "Job Cost Reports," contracts, and purchase orders. The documentation shows that Taxpayer was hired to dismantle a structure, inspect a structure, or reinforce a structure. The provided documentation show that the referenced order numbers meet all four prongs of the service person analysis. Thus, Taxpayer is sustained on order numbers, ER-049415, IN-057545, DE-056649, IN-059214, IN-057478, AN-046067, MA-057321, MA-059758, ER-058834, and ER-060093

FINDING

Taxpayer's protest is sustained for order numbers, ER-049415, IN-057545, DE-056649, IN-059214, IN-057478, AN-046067, MA-057321, MA-059758, ER-058834, ER-060093, scrap bins, IN-058100, FH-053204, LA-059576, and FH-059880. FH-058469 June 2016 protest is sustained in part because the delivery charges are not subject to sales tax. Taxpayer's protest is denied for order numbers, FH-059235, FH-058469; FM-057473, FM-057473, FH-060965, FH-056537, FT-061053, FM-059913, FH-057578, FT-061054, and FH-060061.

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