

DEPARTMENT OF STATE REVENUE

04-20181400R.SODR; 04-20181397R.SODR
04-20181395R.SODR; 04-20181398R.SODR
04-20181396R.SODR; 04-20181399R.SODR

**Supplemental Final Order Denying Refund: 04-20181400R; 04-20181397R;
04-20181395R; 04-20181398R; 04-20181396R; 04-20181399R
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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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 Supplemental Final Order Denying Refund.

HOLDING

On rehearing, Company could not show that tangible personal property shipped to Indiana customers did not constitute an Indiana retail transactions. Therefore the Department correctly denied Company's refund claim.

ISSUE

I. Sales Tax-Refund.

Authority: IC § 6-2.5-2-1; IC § 6-8.1-5-1; IC § 6-2.5-3-1; IC § 6-2.5-4-1; IC § 6-8.1-5-4; IC § 6-2.5-9-3; IC § 6-2.5-13-1; *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 no proof that sales tax was paid at the time of the transaction.

Taxpayer submitted a protest and an administrative phone hearing was held. A Memorandum of Decision ("MOD") was issued. Taxpayer requested a rehearing for the denied portion of their refund. A rehearing was held and this Supplemental Final Order Denying Refund 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. IC § 6-8.1-5-1(c). 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.

In the previous Memorandum of Decision the Department sustained Taxpayer on 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, FH-059880, and FH-058469. Taxpayer requested a rehearing on denied order numbers, FH-059235, FH-058469; FM-057473, FH-060965, FH-056537, FT-061053, FM-059913, FH-057578, FT-061054, and FH-060061, claiming that it is not a retail merchant engaged in business in Indiana and has no obligation to act as an agent of the state and collect and remit sales tax on the denied orders.

Taxpayer cites to IC § 6-2.5-3-1 highlighting subsection (c):

"A retail merchant engaged in business in Indiana" includes any retail merchant who makes retail transactions in which a person acquires personal property or services for use, storage, or consumption in Indiana and who:

- (1) maintains an office, place of distribution, sales location, sample location, warehouse, storage place, or other place of business which is located in Indiana . . .

During the rehearing Taxpayer also cited to the Department's Sales Tax Information Bulletin 37, (May 2016), 20160629 Ind. Reg. 045160254NRA; (see also, 20070620 Ind. Reg. 045070337NRA). Taxpayer specifically pointed out that it did not meet any activity listed under "Engaged in Business in Indiana" nor the "Not Engaged in Business in Indiana." Taxpayer stated that its business operation is not located in Indiana, it does not have any warehouse or sales locations in Indiana, does not deliver goods to Indiana by its own shipping trucks, and does not "do business" in Indiana.

As discussed in the Memorandum of Decision already issued, Taxpayer is in fact located outside Indiana, but does come to Indiana for installing tangible personal property ("TPP"), conducting services in Indiana, and also ships TPP to Indiana customers.

IC § 6-2.5-3-1 states in full:

- (a) "Use" means the exercise of any right or power of ownership over tangible personal property.
- (b) "Storage" means the keeping or retention of tangible personal property in Indiana for any purpose except temporary storage.
- (c) "A retail merchant engaged in business in Indiana" includes any retail merchant who makes retail transactions in which a person acquires personal property or services for use, storage, or consumption in Indiana and who:
 - (1) maintains an office, place of distribution, sales location, sample location, warehouse, storage place, or other place of business which is located in Indiana and which the retail merchant maintains, occupies, or uses, either permanently or temporarily, either directly or indirectly, and either by the retail merchant or through a representative, agent, or subsidiary;**
 - (2) maintains a representative, agent, salesman, canvasser, or solicitor who, while operating in Indiana under the authority of and on behalf of the retail merchant or a subsidiary of the retail merchant, sells, delivers, installs, repairs, assembles, sets up, accepts returns of, bills, invoices, or takes orders for sales of tangible personal property or services to be used, stored, or consumed in Indiana;**
- (3) is otherwise required to register as a retail merchant under [IC 6-2.5-8-1](#); or
- (4) may be required by the state to collect tax under this article to the extent allowed under the Constitution of the United States and federal law.
- (d) "Temporary storage" means the keeping or retention of tangible personal property in Indiana for a period of not more than one hundred eighty (180) days and only for the purpose of the subsequent use of that property solely outside Indiana.
- (e) Notwithstanding any other provision of this section, tangible or intangible property that is:
 - (1) owned or leased by a person that has contracted with a commercial printer for printing; and
 - (2) located at the premises of the commercial printer;shall not be considered to be, or to create, an office, a place of distribution, a sales location, a sample location, a warehouse, a storage place, or other place of business maintained, occupied, or used in any way by the person. A commercial printer with which a person has contracted for printing shall not be considered to be in any way a representative, an agent, a salesman, a canvasser, or a solicitor for the person.

(Emphasis added)

Furthermore IC § 6-2.5-4-1 defines "Selling at retail" as:

- (a) A person is a retail merchant making a retail transaction when the person engages in selling at retail.
- (b) A person is engaged in selling at retail when, in the ordinary course of the person's regularly conducted trade or business, the person:
 - (1) acquires tangible personal property for the purpose of resale; and
 - (2) transfers that property to another person for consideration.
- (c) For purposes of determining what constitutes selling at retail, it does not matter whether:
 - (1) the property is transferred in the same form as when it was acquired;

- (2) the property is transferred alone or in conjunction with other property or services; or
- (3) the property is transferred conditionally or otherwise.

The previous MOD determined that several protested invoices were exempt from sales tax because Taxpayer was only conducting services in Indiana. The MOD stated:

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 [sales tax exemption] 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.

Based on the information provided Taxpayer comes into Indiana to perform services that are part of its business. Therefore, based on the exemption and facts provided by Taxpayer it is in fact engaging in business in Indiana. A company cannot be engaging in business in Indiana for one transaction and not engaging in business in Indiana for other transactions. Thus, Taxpayer is considered doing business in Indiana regardless of the fact it was exempt from sales tax on the referenced invoices from the MOD. Thus, Taxpayer's argument that it is not engaged in business in Indiana is denied.

In regards to the specific transactions that are protested, IC § 6-2.5-13-1:

(b) This section:

- (1) applies regardless of the characterization of a product as tangible personal property, a digital good, or a service;
- (2) applies only to the determination of a seller's obligation to pay or collect and remit a sales or use tax with respect to the seller's retail sale of a product; and**
- (3) does not affect the obligation of a purchaser or lessee to remit tax on the use of the product to the taxing jurisdictions of that use. (Emphasis added).**

Taxpayer protests the refund denial 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. Taxpayer stated that these were fabrication jobs in which the product was shipped via common carrier and are therefore not Indiana transactions. FH-058469 is listed on both Taxpayer's May and June refund claims. 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.

The Department notes that Taxpayer sold TPP to Indiana customers. Thus, based on IC § 6-2.5-4-1 Taxpayer sold at retail. The issue is whether these transactions are sourced to Indiana. IC § 6-2.5-13-1 applies to sourcing of TPP for purposes of sales tax regardless of whether the purchaser has an obligation to remit use tax to the appropriate taxing jurisdiction. To determine the sourcing of TPP the Department looks to IC § 6-2.5-13-1(d):

- (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). (**Emphasis added**).

According to the statutes above, the Department must source Taxpayer's TPP to the customers located in Indiana. Taxpayer was selling at retail as stated in IC § 6-2.5-4-1, and those sales are sourced to Indiana pursuant to IC § 6-2.5-13-1(d)(2). Taxpayer was therefore required to collect and remit Indiana sales tax. 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. Thus, the Department was correct in denying Taxpayer's refund claim on 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.

FINDING

Taxpayer's protest is denied.

September 21, 2018

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