

DEPARTMENT OF STATE REVENUE

**Memoranda of Decision: 04-20181469R; 04-20181470R; 04-20181471R; 04-20181472R;
04-20181473R; 04-20181474R; 04-20181475R; 04-20181476R; 04-20181477R;
04-20181478R; 04-20181479R; 04-20181480R; 04-20181481R; 04-20181482R;
04-20181483R; 04-20181484R; 04-20181485R; 04-20181486R; 04-20181487R;
04-20181488R; 04-20181489R; 04-20181490R; 04-20181491R; 04-20181492R;
04-20181493R; 04-20181494R; 04-20181495R; 04-20181496R; 04-20181497R;
04-20181498R; 04-20181499R; 04-20181500R; 04-20181501R; 04-20181502R;
04-20181503R; 04-20181504R; 04-20181505R; 04-20181506R; 04-20181508R;
04-20181509R; 04-20181510R; 04-20181511R; 04-20181512R; 04-20181513R;
04-20181514R; 04-20181515R; 04-20181516R; 04-20181517R; 04-20181518R;
04-20181519R; 04-20181520R; 04-20181521R; 04-20181522R; 04-20181523R;
04-20181524R; 04-20181525R; 04-20181526R; 04-20181527R; 04-20181528R;
04-20181529R; 04-20181530R; 04-20181531R; 04-20181532R; 04-20181533R;
04-20181534R; 04-20181535R
Sales Tax
For Tax Year 2014**

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.

HOLDING

Businesses were able to provide sufficient analysis to show that some of the sixty-six locations at issue did qualify for the predominant use exemption. All locations qualify for some level of exemption. The Department will therefore issue refunds reflecting the appropriate level of exemption for each location.

ISSUE**I. Sales Tax–Refund.**

Authority: IC § 6-2.5-2-1; IC § 6-2.5-5-5.1; IC § 6-8.1-9-1; *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); [45 IAC 2.2-4-13](#).

Taxpayers protest the partial denial of their claims for refund.

STATEMENT OF FACTS

Taxpayers are related restaurants operating in Indiana. In 2018, Taxpayers each filed its own claim for refund of sales tax paid on utilities it consumed at its individual Indiana location during the tax year 2014. Taxpayers claimed the manufacturing exemption on the purchase of the utilities. Because all sixty-six locations are related and use identical equipment, Taxpayers stated, they filed their refund claims using the same utility study. After review, the Indiana Department of Revenue ("Department") approved the claim for the predominant use exemption at three locations and denied Taxpayers' claim for predominant use of electricity at all other locations. The Department approved exemption at various rates of less than fifty percent for the non-predominant use locations. Taxpayers protested the determinations regarding the predominant use exemption for most locations, maintaining that most locations did qualify for the predominant use exemption and that all locations had a higher exemption rate than the rate determined by the Department. Because of the relationship of Taxpayers and the identical nature of the refund claims and protests and for administrative ease, this document will address all sixty-six refund denial protests. An administrative hearing was held and these Memoranda of Decision result. Further facts will be supplied as required.

I. Sales Tax–Refund.**DISCUSSION**

Taxpayers protest the partial denial of their claims for refund of sales tax paid in the year 2014. The Department partially denied the claims on the basis that it determined that Taxpayers' utility study counted some equipment as

exempt when it was not exempt, and also included some exempt equipment twice. The Department's review of Taxpayers' utility study resulted in some level of exemption for all locations, but only allowed the predominant use exemption for three of the sixty-six locations at issue.

As an initial point, the Department notes that, "[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 initial refund determination, shall be entitled to deference.

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.

Next, IC § 6-2.5-5-1 states:

- (a) As used in this section, "tangible personal property" includes electrical energy, natural or artificial gas, water, steam, and steam heat.
- (b) 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.

Also, IC § 6-8.1-9-1(a) provides:

If a person has paid more tax than the person determines is legally due for a particular taxable period, the person may file a claim for a refund with the department. Except as provided in subsections (f) and (g), in order to obtain the refund, the person must file the claim with the department within three (3) years after the latter of the following:

- (1) The due date of the return.
- (2) The date of payment.

For purposes of this section, the due date for a return filed for the state gross retail or use tax, the gasoline tax, the special fuel tax, the motor carrier fuel tax, the oil inspection fee, or the petroleum severance tax is the end of the calendar year which contains the taxable period for which the return is filed. The claim must set forth the amount of the refund to which the person is entitled and the reasons that the person is entitled to the refund.

Taxpayers' initial refund claims stated that not only was the electricity used in an exempt manner, but that they were entitled to the predominant use exemption found at [45 IAC 2.2-4-13](#), which states:

- (a) *In general, the furnishing of electricity, gas, water, steam, or steam heating services by public utilities to consumers is subject to tax.*
- (b) The gross receipt of every person engaged as a power subsidiary or a public utility derived from selling electrical energy, gas, water, or steam to consumers for direct use in direct manufacturing, mining, production, refining, oil or mineral extraction, irrigation, agriculture, horticulture, or another public utility or power subsidiary described in [IC 6-2.5-4-5](#) shall not constitute gross retail income of a retail merchant received from a retail transaction. *Electrical energy, gas, water, or steam will only be considered directly used in direct production, manufacturing, mining, refining, oil or mineral extraction, irrigation, agriculture, or horticulture if the utilities would be exempt under [IC 6-2.5-5-1](#).*
- (c) Sales of public utility services or commodities to consumers engaged in manufacturing, mining, production, refining, oil or mineral extraction, irrigation, agriculture, horticulture, or another public utility or power subsidiary described in [IC 6-2.5-4-5](#), based on a single meter charge, flat rate charge, or other charge, are excepted if such services are separately metered or billed and will be used predominantly for the excepted purposes.
- (d) Sales of public utility services and commodities to consumers engaged in manufacturing, mining, production, refining, oil or mineral extraction, irrigation, agriculture, or horticulture, based on a single meter charge, flat rate charge, or other charge, which will be used for both excepted and nonexcepted purposes are

taxable unless such services and commodities are used predominantly for excepted purposes.

(e) Where public utility services are sold from a single meter and the services or commodities are utilized for both exempt and nonexempt uses, the entire gross receipts will be subject to tax unless the services or commodities are used predominantly for excepted purposes. Predominant use shall mean that more than fifty percent (50[percent]) of the utility services and commodities are consumed for excepted uses. (Emphasis added.)

As part of the protest process, Taxpayers provided the initial utility study which they stated applied to all locations equally. That equal application resulted in all sixty-six Taxpayers claiming to qualify for the predominant use exemption. As part of the Department's review of the refund claims, it specifically reviewed the utility study. After a visit to one of the locations, the Department determined that Taxpayers' utility study overstated the percentage of exempt electric usage at the locations. Specifically, the Department determined that some equipment classified as exempt in the utility study did not qualify as exempt under IC § 6-2.5-5-5.1(b). The Department also determined that the utility study listed two fryers using a set amount of electricity in an exempt manner, while only one fryer was observed in the restaurant. Also, the Department noted that the refund claims were based on twenty-four hour a day operations, but that several of the locations were not open twenty-four hours a day.

The Department reclassified the equipment listed in Taxpayers' utility study to match its determinations and recalculated the percentages of exempt electrical use for each location. The results of these recalculations were that the Department agreed that three locations did qualify for the predominant use exemption and therefore agreed with those three refund claims in whole. For the remaining sixty-three locations, the Department's recalculations resulted in varying percentages of exempt electrical use. The Department therefore agreed to refund each location's sales tax on utilities at its recalculated percentage.

Taxpayers disagreed with the results of the Department's reclassification of items and amounts of exempt electrical usage for the sixty-three locations which did not receive predominant use status. Taxpayers provided additional explanation and analysis of the utility study to further define the usage of the three pieces of production equipment which used the largest amount of electricity. The analysis showed higher load factors for the three largest pieces of exempt equipment than the load factors used by the Department in its calculations. By providing this additional analysis, Taxpayers were able to show that the percentage of exempt electrical usage was lower than the initial utility study, but higher than the Department's revised calculations. As a result, of the sixty-six locations under protest, fifty-two qualified for the predominant use exemption. Those fifty-two locations will receive refunds in the entire amount claimed for those locations. The remaining fourteen locations had varying exempt percentages of electrical usage and will receive refunds based on those exempt use percentages as provided by Taxpayers to the Department on December 18, 2018.

Finally, the Department takes this opportunity to note that refund claims are initiated by taxpayers and that there is not necessarily the same amount of information available as if the Department had conducted an audit and issued a written audit report. In the event of an audit, the Department would perform its own review of utility usage independent of any utility study provided by a taxpayer. In that case, the percentages of taxable and exempt utility usage could potentially change from what a taxpayer had previously reported. Therefore, statutorily required record-keeping and availability along with diligent and accurate calculations of utility use is strongly recommended for all taxpayers.

FINDING

Taxpayers' protests are sustained to the extent described above.

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