

DEPARTMENT OF STATE REVENUE

Memoranda of Decision:

04-20190221R; 04-20190222R; 04-20190223R; 04-20190224R; 04-20190225R;
04-20190226R; 04-20190227R; 04-20190228R; 04-20190229R; 04-20190230R;
04-20190231R; 04-20190232R; 04-20190233R; 04-20190234R; 04-20190235R;
04-20190236R; 04-20190237R; 04-20190239R; 04-20190240R; 04-20190241R;
04-20190242R; 04-20190243R; 04-20190244R; 04-20190245R; 04-20190253R;
04-20190254R; 04-20190255R; 04-20190256R; 04-20190257R; 04-20190258R;
04-20190259R; 04-20190260R; 04-20190261R; 04-20190262R; 04-20190263R;
04-20190266R; 04-20190267R; 04-20190268R; 04-20190272R; 04-20190273R;
04-20190274R; 04-20190276R; 04-20190277R; 04-20190278R; 04-20190280R;
04-20190284R; 04-20190285R; 04-20190286R; 04-20190287R; 04-20190289R;
04-20190291R; 04-20190292R; 04-20190293R; 04-20190294R; 04-20190295R;
04-20190296R; 04-20190320R; 04-20190321R; 04-20190329R; 04-20190331R;
04-20190346R; 04-20190347R

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.

HOLDING

Businesses were able to provide sufficient analysis to show that some of the sixty-two locations at issue qualified 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 § 6-2.5-5-1; 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](#); Black's Law Dictionary 1122, (11th ed. 2019).

Taxpayers protest the partial denial of their claims for refund.

STATEMENT OF FACTS

Taxpayers are related restaurants operating in Indiana. Each restaurant filed a claim for refund of sales tax paid on utilities consumed at its Indiana location during the 2015 and 2016 tax years. Taxpayers claimed the manufacturing exemption on the purchase of utilities. Because all sixty-seven locations are related and use identical equipment, Taxpayers stated, they filed their refund claims using the same utility study. This utility study was used in a successful appeal of this same issue for the 2014 tax year. Nonetheless, the Indiana Department of Revenue ("Department") denied Taxpayers' exemption claims on all but two of the restaurant locations. For the other stores, the Department approved exemptions at various rates for the non-predominant use of electricity in production. Taxpayers protested sixty-two of these partial denials, maintaining that most locations did qualify for the predominant use exemption and that all of these 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-two 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 sales tax refund claims for the 2015 and 2016 tax years. The Department partially denied these claims due to a disagreement in methodology.

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 (j) and (k), 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' refund claims state 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.)

The utility study in this case, which analyzes the Taxpayers' exempt and non-exempt uses of electricity, originated in a separate protest from the 2014 tax year. As part of that protest process, Taxpayers provided a utility study which suggested that all sixty-two restaurants currently at issue qualified for the predominant use exemption. The Department reviewed the study and attempted to verify its contents by visiting one of the restaurant locations. From this review process, the Department found several problems with the Taxpayers' study, including an overstated number of operational fryers in each restaurant, overstated number of hours each restaurant is open, and incorrect classification of some nonexempt equipment as exempt. Based on its review of the Taxpayers' study, the Department recalculated the percentages of exempt electrical use for each location. The recalculations found that none of the sixty-two stores qualified for the predominant use exemption. The Department therefore allowed varying percentages for exempt electrical use and agreed to refund each location's sales tax on utilities at these recalculated percentages.

Taxpayers only challenged the Department's recalculations to the utility study on one issue: they disagreed with the Department's load factor for calculating the amount of electricity used by grills and fryer in the Taxpayers' stores. Those items use a substantial percentage of the overall electricity used by the stores, and Taxpayers and the Department agree that this electricity is exempt. Thus, calculating the actual amount of electricity used by these items is pivotal to determining the percentage of electricity that is exempt.

A load factor is "the ratio of a utility customer's usage levels during a given period compared to the customer's demand during peak periods." Black's Law Dictionary 1122 (11th ed. 2019). In this application, the peak demand of a fryer or grill is the maximum amount of electricity it can use. Thus, load factor expresses the amount of electricity an appliance *actually uses* in a set period of time as a percentage of this maximum.

Taxpayers explained that their load factors were determined by an engineer who observed the different levels of grill and fryer usage throughout the day. This helped the engineer determine the amount of electricity used by the items when they were most and least heavily used. Next, the engineer discussed the run and cycle times of these items with the store manager. That discussion, along with sales data from each store, provided the approximate frequency and length of busy and slow hours. With this information, Taxpayers were able to recalculate the estimated average daily electricity usage for the grills and fryer in each store, which the utility study expressed as load factors. This analysis showed higher loads than those 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 higher than the Department's revised calculations. As a result, of the sixty-two locations under protest, fifty-one qualified for the predominant use exemption. Those locations will receive refunds in the entire amount claimed. The remaining eleven 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 with their protest.

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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An [html](#) version of this document.