DEPARTMENT OF STATE REVENUE

Revenue Ruling #2019-03ST
October 8, 2019

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ISSUES

Sales and Use Tax -Taxability of Fees for Electric Vehicle Charging

Authority: IC 6-2.5-1-1; IC 6-2.5-1-27; IC 6-2.5-2-1; IC 6-2.5-2-2; IC 6-2.5-4-1; IC 6-2.5-4-15; IC 6-2.5-5-8; 45 IAC 2.2-1-1; 45 IAC 2.2-4-2; *Cowden & Sons Trucking, Inc. v. Indiana Dep't of State Revenue*, 575 N.E.2d 718 (Ind. T.C. 1991); Sales Tax Information Bulletin #55 (May 2012).

A taxpayer ("Company") is seeking a determination as to whether fees for the charging of electric vehicles are subject to Indiana sales or use tax depending on if they are based on charging time or if they are assessed on per kilowatt hour (kWh).

STATEMENT OF FACTS

Company owns and operates electric vehicle charging stations. Customers pay for charging time, plus a $1.00 session fee. If the customer leaves the vehicle connected to the charger after the charge is complete (not including a 10-minute grace period), there are additional charges for "idling."

Currently, Company does not charge for the service based on kWh but may if granted approval by any utility regulatory agency. Further, no resale exemptions are being taken by the Company on the purchase of electricity from the utility company.

DISCUSSION

Company requests that the Department determine whether its fee for charging a vehicle is subject to Indiana sales tax whether it is based on the amount of time charged or based on the kWh.

Pursuant to IC 6-2.5-2-1(a) and IC 6-2.5-2-2(a), sales tax is imposed on retail transactions made in Indiana. A person who acquires 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 transaction is defined in IC 6-2.5-4-1(b) as the transfer, in the ordinary course of business, of tangible personal property for consideration. IC 6-2.5-4-1(c) goes on to provide in pertinent part:

> For purposes of determining what constitutes selling at retail, it does not matter whether:
> . . .
> (2) the property is transferred alone or in conjunction with other property or services . . .

"Tangible personal property" is defined in IC 6-2.5-1-27 as:

> . . . personal property that:
> (1) can be seen, weighed, measured, felt, or touched; or
> (2) is in any other manner perceptible to the senses.
> The term includes **electricity**, water, gas, steam, and prewritten computer software. ("**Emphasis added**").

IC 6-2.5-4-5(b) provides that a power subsidiary or a person engaged as a public utility is a retail merchant making a retail transaction when they furnish or sell electrical energy, natural or artificial gas, water, steam, or steam heating service to a person for commercial or domestic consumption. IC 6-2.5-4-5(a) defines a "power subsidiary" to mean a corporation which is owned or controlled by one or more public utilities that furnish or sell electrical energy, natural or artificial gas, water, steam, or steam heat and which produces power exclusively for the use of those public utilities.

Prior to the definition of "tangible personal property" being added to the Indiana Code (effective January 1, 2004),

IC 6-2.5-4-1 provided the requirement for retail transactions in general, while IC 6-2.5-4-5 provided a specific requirement for public utilities (and later subsidiaries of public utilities) selling utilities. Before the addition of the definition of tangible personal property, it would be reasonable to assume that the specificity of IC 6-2.5-4-5, coupled with the Indiana Code not stating specifically that utilities were considered tangible personal property, meant that any other transaction involving utilities sold by other types of merchants was not considered a taxable retail transaction under IC 6-2.5-4-1. However, now that tangible personal property is statutorily defined and includes utilities, the issue is whether the general provisions of IC 6-2.5-4-1 applies, in that Company is a retail merchant selling tangible personal property for consideration, or whether the statutory intent is that electricity and the other enumerated utilities are only subject to sales tax when sold by a public utility or power subsidiary under IC 6-2.5-4-5.

The Indiana Supreme Court dealt with a similar matter of statutory construction involving the definition of tangible personal property in *Indiana Dep't of Revenue v. Kitchin Hospitality, LLC*., 907 N.E.2d 997 (Ind. 2009). The Indiana Supreme Court ruled in favor of the Department on the issue of whether a hotel-operator was entitled to an exemption for sales and use tax paid on utility consumption pursuant to IC 6-2.5-5-35. The exemption applies to the consumption of certain tangible personal property by persons engaged in the furnishing of accommodations. The relevant language in the statute provides as follows:

> Transactions involving tangible personal property are exempt from the state gross retail tax if:
> . . .
> (2) the:
> (A) person acquiring the property is engaged in the business of renting or furnishing rooms, lodgings, or accommodations in a commercial hotel, motel, inn, tourist camp, or tourist cabin; and
> (B) property acquired is:
> (i) used up, removed, or otherwise consumed during the occupation of the rooms, lodgings, or accommodations by a guest; or
> (ii) rendered nonreusable by the property's first use by a guest during the occupation of the rooms, lodgings, or accommodations.

When the Indiana General Assembly adopted IC 6-2.5-5-35, the definition of "tangible personal property" found at IC 6-2.5-1-27 did not exist. After the definition was adopted, the language in IC 6-2.5-5-35 remained unchanged until after the matter in *Kitchin Hospitality* was brought forward, at which point IC 6-2.5-5-35 was amended by the General Assembly to provide that utilities consumed were specifically not exempt.

However, during the years at issue before the statute was updated, the taxpayer in *Kitchin* maintained that utilities were tangible personal property according to the plain language of IC 6-2.5-1-27. The Department's position was that the reference to utilities in the definition of tangible personal property did not apply to IC 6-2.5-5-35 and that, in any event, utilities do not fall under the language of IC 6-2.5-5-35 because hotels, and not their guests, are the ones that consume utilities.

The Indiana Supreme Court analyzed the exemption in IC 6-2.5-5-35 as follows:

> We believe that the using up or consumption of the tangible personal property in question must meet two tests in order for the property to be exempt from tax: first, the property must be used up or otherwise consumed "during occupation of the rooms." Second, the property must be used up or otherwise consumed "by a guest."
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> We reach this conclusion for several reasons. First, the Tax Court's interpretation would extend the Section 35 Exemption to property far beyond that which we believe the Legislature intended it to reach. If the property does not have to be used up or consumed by a guest, as the Tax Court held, but only used up or consumed during the occupation of a room by a guest, the exemption would extend to products the hotel used to clean a room or wash the linens during a guest's stay–or even to office supplies used during a guest's stay.
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> Second, the other two parts of the Section 35 Exemption make it clear that what the Legislature attempted to exempt from tax was property that guests themselves used–subdivision (1) covering paper napkins, pre-packaged condiments, and other property used by food service guests; and subdivision (2) covering property "rendered nonreusable by the property's first use by a guest." It seems far more consistent with the statutory scheme that subdivision (2) would operate in the same way.

Id. at 1001-02.

The Indiana Supreme Court concluded:

> Kitchin purchased water, electricity, and gas from utility companies in order to supply its lodging operations for the tax years at issue. Each hotel had a single electric meter, water meter, and gas meter for the entire facility. The guest rooms did not have separate utility meters or thermostats; Kitchin did not monitor each guest's use of utilities. Most importantly for the statutory scheme, water, electricity, and gas is used up or otherwise consumed in guest rooms whether the rooms are occupied or vacant–they are used up or otherwise consumed by a hotel, not "by a guest."

Id. at 1003.

Unlike in *Kitchin*, Company's customers are (1) consuming the electricity and (2) the charging stations can track the amount of electricity being consumed. The purpose of the charging stations is to allow Company's customers to consume electricity, and to the extent that Company is also consuming electricity in maintaining the charging stations, both while in use and not, the difference between Company and the hotel in *Kitchin* is that there are not extraneous operations where Company would consume electricity in addition to the charging stations like laundry rooms, front desk space, and so on that the customers don't use, and that Company is monitoring how much electricity is being consumed by its customers (whether by time spent at the station or by actual consumption in kWh).

Currently, Company's charging fee is based on the amount of time that a vehicle is charging, and not on the actual consumption in kWh. Regardless of how the fee is structured, the purpose of the transaction is to acquire electricity in order for the customer's electric vehicle to operate as discussed above. There appears to be no other reason to use the charging station. Whether it was an intended consequence of the definition of tangible personal property including electricity and other utilities in IC 6-2.5-1-27, Company is selling electricity to its customers and under the plain terms of IC 6-2.5-4-1, and therefore this would be considered a taxable retail transaction.

Even if it could be argued that the fee represents a service of providing a customer with the ability to charge their vehicle, the service would still be sold in conjunction with electricity. As such, it would be necessary to analyze whether this would fall under the definition of "bundled transaction" in IC 6-2.5-1-11.5, which is defined in pertinent part as follows:

> (b) "Bundled transaction" means a retail sale of two (2) or more products, except real property and services to real property, that are:
> (1) distinct;
> (2) identifiable; and
> (3) sold for one (1) nonitemized price.
> (c) The term does not include a retail sale in which the sales price of a product varies, or is negotiable, based on other products that the purchaser selects for inclusion in the transaction.
> (d) The term does not include a retail sale that:
> (1) is comprised of:
> (A) a service that is the true object of the transaction; and
> (B) tangible personal property that:
> (i) is essential to the use of the service; and
> (ii) is provided exclusively in connection with the service;
> . . .

The requirements for determining the "true object" of a transaction are not defined in statute. In *Cowden & Sons Trucking, Inc. v. Indiana Dep't of State Revenue*, 575 N.E.2d 718 (Ind. T.C. 1991), the Indiana Tax Court held that the determination of whether a sale was a retail transaction hinged on whether the "true object" of the transaction was service or property. In *Cowden*, the taxpayer was a hauler who only on occasion sold stone at cost to his customers as a convenience, and therefore the Court concluded that the "true object" of the transaction was the provision of service and not the sale of stone.

Under IC 6-2.5-1-11.5(d)(1), there is no percentage test to determine whether the cost of the tangible personal property needs to be at a certain percentage relative to the cost of the service in order to qualify as a bundled transaction. Instead, in order to not qualify as a bundled transaction, the transaction would have to be comprised of a service that is the true object of the transaction as well as tangible personal property that is essential to the use of the service and which is provided exclusively in connection with the service. In this case, the electricity would be the true object of the transaction, because, as discussed, there is no other primary reason for a customer to charge the vehicle except to obtain electricity in order for their vehicle to continue to operate. As this

would therefore be considered a bundled transaction, IC 6-2.5-4-15 provides that "[a] person is a retail merchant making a retail transaction when the person sells tangible personal property as part of a bundled transaction," which means that the transaction would still be subject to sales tax.

As it is therefore evident that Company is selling electricity to its customers, which makes it a taxable retail transaction under the plain terms of IC 6-2.5-4-1 or, if one could argue that a service is also provided in conjunction with electricity, as a taxable bundled transaction under IC 6-2.5-14.5-1, Company should collect sales tax on the charging fee (whether based on the amount of time for charging the vehicle, or on the actual consumption in kWh). Regarding the session fee, it is ostensibly a charge for the right to access the station's features in order to charge a vehicle. Applying the bundled transaction analysis to this charge, it is evident that the true object would still be for electricity, and therefore this fee should be subject to Indiana sales tax as well. The same holds true for the "idling fee," as the fee represents the continuing consumption of electricity (in addition to being a form of penalty for doing so).

Additionally, because Company is selling electricity, the "sale for resale" exemption at IC 6-2.5-5-8 should apply to the transactions between Company and its utility provider (or providers) for the electricity it purchases and subsequently resells to its customers. Subsection (b) of this statute provides in relevant part that "transactions involving tangible personal property" - which includes electricity - "are exempt from the state gross retail tax if the person acquiring the property acquires it for resale . . . in the ordinary course of the person's business without changing the form of the property." There is no exception in this statute to utilities or to electricity in particular.

Company mentions that it has not been providing its utilities with an exemption certificate in order to purchase the electricity exempt pursuant to the "sale for resale" exemption. The Department's policy regarding the General Sales Tax Exemption Certificate (Form ST-105) is that it can be used for various exemptions, including for "sale for resale" transactions made by retailers, wholesalers, or manufacturers. However, it specifically states at the top of the form that the form cannot be used for transactions involving utilities. Instead, the Department requires a purchaser to use the Indiana Utility/Commission Sales Tax Exemption Certificate (Form ST-109) for exempt utility transactions; however, the ST-109 is primarily utilized for utility transactions where the utility is predominately used in manufacturing or production pursuant to IC 6-2.5-4-5. This statute provides in pertinent part the following:

> (c) [A] power subsidiary or a person engaged as a public utility is not a retail merchant making a retail transaction in any of the following transactions:
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> . . .
>
> (3) The power subsidiary or person sells the services or commodities listed in subsection (b) to a person for use in manufacturing, mining, production, processing (after December 31, 2012), repairing (after December 31, 2012), refining, recycling (as defined in IC 6-2.5-5-45.8), oil extraction, mineral extraction, irrigation, agriculture, floriculture (after December 31, 2012), arboriculture (after December 31, 2012), or horticulture. However, this exclusion for sales of the services and commodities only applies if the services are consumed as an essential and integral part of an integrated process that produces tangible personal property and those sales are separately metered for the excepted uses listed in this subdivision, or if those sales are not separately metered but are predominately used by the purchaser for the excepted uses listed in this subdivision.

The process for obtaining an ST-109 is described in more detail in Sales Tax Information Bulletin #55 (May 2012). It provides that in order to receive the exemption, there is an application process with the Department, stating the following:

> The exclusion from sales tax applies only if nontaxable utilities are separately metered and are predominately used by the purchaser for the excepted uses. "Predominately used" means more than 50% of the utilities are consumed for the exempted use. Each meter is considered separately to determine whether the utility measured is exempt. If a user has multiple meters, they will not be aggregated together for a determination of predominate use, but each will be considered separately.
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> . . .
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> To receive an exclusion, the taxpayer must complete Form ST-200. The form will be reviewed by the Department and, if the meter qualifies for the exemption, a validated ST-109 will be sent to the taxpayer to be forwarded to the utility company. The ST-109 is the only exemption form that can be accepted by a utility to exempt the utility from collecting the Indiana sales tax. Applications for exemptions (ST-200) are available from the Department of Revenue's website at www.in.gov/dor/3504.htm.

Because the electricity will not be used in manufacturing or production, this process would not be appropriate for Company. It would therefore fall back on the ST-105, which, as mentioned, cannot be used for utilities according to the Department's own policies. As such, Company must continue to pay sales tax on the transactions with its utility for the electricity. However, if Company filed a properly completed Claim for Refund (Form GA-110L), Company would be able to receive a refund for the sales tax paid on the electricity purchased and subsequently resold to its customers. The Department would request that Company file a GA-110L for these transactions no more frequently than once a month. Company may file one GA-110L for all electricity purchases in a month, even if it purchased electricity from more than one utility company.

RULING

Company's fees for its charging station, whether based on the customer's time using the station or based on the kWh, as well as the session fee and idling fee, are retail transactions subject to Indiana sales tax. Because there is no mechanism for Company to claim a "sale for resale" exemption on the purchase of electricity from its utility companies, Company must pay sales tax on those transactions. However, it may file a claim for refund with the Department no more frequently than on a monthly basis in order to recover the sales taxes paid to its utility companies for electricity that it subsequently resold to its customers.

CAVEAT

This ruling is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances as stated herein are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. However, other taxpayers with substantially identical factual situations may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material respect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this ruling a change in statute, regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection.

Posted: 11/27/2019 by Legislative Services Agency
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