

Memorandum of Decision: 04-20191119R
Gross Retail Tax
For the Years 2014, 2015, and 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

Telecommunications Company established it was entitled to a refund of sales tax billed to and paid by certain newly acquired and "doing business as" companies.

ISSUE

I. Gross Retail Tax - Exempt Utility Services.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-4-5(c); IC § 6-2.5-4-6(b); IC § 6-8.1-5-4(a); *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480 (Ind. Tax Ct. 2012); *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138 (Ind. Tax Ct. 2010); [45 IAC 2.2-4-13\(a\)](#).

Taxpayer argues that it is entitled to an additional refund of sales tax paid on the purchase of exempt electric utilities.

STATEMENT OF FACTS

Taxpayer is an out-of-state company in the business of providing cell phone and other telecommunication services. Taxpayer purchased electricity and paid sales tax at the time of payment.

Taxpayer submitted a GA-110L Claim for Refund requesting the return of approximately \$1.2 million dollars of sales tax previously remitted to Indiana. The Indiana Department of Revenue ("Department") reviewed the claim and supporting documentation granting the refund in part and denying it in part. The Department granted approximately \$560,000 of the refund and denied the remaining amount.

In a letter dated May 2019, the Department explained the reason for denying the remainder of Taxpayer's request.

In reviewing the utility portion of the claim it was discovered the utilities are in multiple different company names. These bills should be in the name of the company requesting the refund. The addresses . . . do not match the utility bills in some instances The invoices have different names and Federal Identification numbers listed on them [that] do not reflect the customer. The tax on the invoices does not match 7[percent] One invoice has Texas tax listed. Taxpayer did not provide the additional information requested in a reasonable timeframe.

Taxpayer disagreed with the Department's analysis explaining that "the electricity purchases at issue in this refund claim were made by [Taxpayer] regardless of what entity was printed on the invoice." Taxpayer submitted a protest, and an administrative hearing was conducted during which Taxpayer's representatives explained the basis for the protest. This Memorandum of Decision results.

I. Gross Retail Tax - Exempt Utility Services.

DISCUSSION

The issue is whether Taxpayer has provided adequate information substantiating its assertion that it paid sales tax on exempt utility services, that it is entitled to claim taxes billed to and paid by related companies, and is now entitled to an additional, specific refund of Indiana sales tax.

Indiana sales tax is imposed pursuant to 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.

In the case of electrical usage, [45 IAC 2.2-4-13](#)(a) explains:

In general, the furnishing of electricity, gas, water, steam, or steam heating services by public utilities to consumer is subject to tax.

An exemption is found in IC § 6-2.5-4-5(c), which states in part:

Notwithstanding subsection (b), 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:

- (1) The power subsidiary or person provides, installs, constructs, services, or removes tangible personal property which is used in connection with the furnishing of the services or commodities listed in subsection (b).
- (2) The power subsidiary or person sells the services or commodities listed in subsection (b) to another public utility or power subsidiary described in this section or a person described in section 6 of this chapter.

IC § 6-2.5-4-6(b) in turn provides:

Notwithstanding subsection (a), a person is not a retail merchant making a retail transaction when:

- (1) the person furnishes or sells telecommunication services to another person described in this section or in section 5 of this chapter;
- (2) the person furnishes telecommunications services to another person who is providing prepaid calling services or prepaid wireless calling services in a retail transaction to customers who access the services described in section 13 of this chapter;
- (3) the person furnishes intrastate mobile telecommunications service (as defined in [IC 6-8.1-15-7](#)) to a customer with a place of primary use that is not located in Indiana (as determined under [IC 6-8.1-15](#)); or
- (4) the person furnishes or sells value added nonvoice data services in a retail transaction to a customer.

In sum, Indiana requires retail merchants to collect sales tax on sales of tangible personal property; electricity is "tangible personal property;" electric utility providers are not retail merchants when they sell electricity to telecommunication providers such as Taxpayer.

As a business conducting retail transactions and engaging in substantial retail transactions, Taxpayer is required to maintain accurate financial records. "Every person subject to a listed tax must keep books and records so that the [D]epartment can determine the amount, if any, of the person's liability for that tax by reviewing those books and records." IC § 6-8.1-5-4(a). In bringing a matter to protest such as that raised here by Taxpayer, the petitioner is required to provide documentation explaining and supporting its challenge that the Department's position is wrong. Poorly developed and non-cogent arguments are subject to waiver. *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012).

In interpreting the facts and law in this protest 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, interpretations of Indiana tax law contained within this decision, as well as the preceding audit decision, are entitled to deference.

Taxpayer's executive vice-president explained the discrepancy in writing.

[Accounting Firm], on behalf of [Taxpayer], filed a claim for refund on 12/22/2017 that included purchases of electricity by [Taxpayer] on the grounds that such purchases are excluded from the imposition of Indiana tax. The utilities purchased by [Taxpayer] for the provision of electricity utilized in the wireless network do not always reflect [Taxpayer] as the "bill to" name. However, [Taxpayer] is the company that is purchasing (also reflected in our books and records) and using the electricity. This can happen for a number of reasons such

as entity acquisitions or dba's. I have reviewed the attached listing of "bill to" company names and they are reflective of purchases of electricity used by [Taxpayer].

In support of its protest, Taxpayer has provided substantial documentation establishing its relationships with the various entities whose names and identifying numbers appear on the utility bills at issue. To the extent that Taxpayer has documented that it is entitled to a refund of sales tax billed to and paid on behalf of associated companies, Taxpayer's protest is sustained.

A tangential issue stemming from the purchase of exempt telecommunications equipment is not addressed here.

The Department's Audit Division is requested to review the revised refund documentation and take steps to issue Taxpayer the refund amount to which it is entitled.

FINDING

To the extent specified in this Memorandum of Decision, Taxpayer's protest is sustained.

December 4, 2019

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