

DEPARTMENT OF STATE REVENUE

**Memorandum of Decision: 04-20191434R; 04-20191441R; 04-20191442R;
04-20191443R; 04-20191445R; 04-20191446R; 04-20191447R
Gross Retail Tax
For the Years 2016, 2017, and 2018**

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 Companies provided adequate information purporting to establish that they were the entities entitled to claim refunds of sales tax paid on the purchase of exempt telecommunication equipment; the Department did not agree that Telecommunications Companies established that there were sufficient grounds to warrant similar reconsideration of certain invoices which appeared to represent sales tax charged at a rate more than seven percent.

ISSUES

I. Gross Retail Tax - Exempt Telecommunication Company Purchases.

Authority: IC § 6-2.5-2-1; IC §§ 6-2.5-5 et seq.; IC § 6-2.5-5-13; 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); *Tri-States Double Cola Bottling Co. v. Dep't of State Revenue*, 706 N.E.2d 282 (Ind. Tax Ct. 1999); *General Motors Corp. v. Indiana Dept. of State Revenue*, 578 N.E.2d 399 (Ind. Tax Ct. 1991); *Indiana Dep't of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454 (Ind. Ct. App. 1988); *Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96 (Ind. Ct. App. 1974); [45 IAC 2.2-3-13](#).

Taxpayers argue that they are the business entities entitled to claim additional refunds of sales tax paid on the purchase of exempt telecommunications equipment and services.

II. Gross Retail Tax - Indiana's Sales Tax Rate and Taxpayers' Refund Claims.

Authority: IC § 6-2.5-1-5(a)(4); IC § 6-2.5-2-1; IC § 6-2.5-2-2(a); IC § 6-2.5-5-13; Sales Tax Information Bulletin 92 (December 2019).

Taxpayers argue that the Department erroneously denied refunds where the tax amounts represented on individual vendor invoices did not plainly represent Indiana sales tax.

STATEMENT OF FACTS

Taxpayers are seven companies in the business of providing cell phone and other telecommunication services. Taxpayers purchased equipment, supplies, and services from various vendors for which they paid sales tax.

Taxpayers' representative filed a series of seven GA-110L claims for refund on behalf of the seven named Taxpayers. Taxpayers claimed the refunds on the ground that they purchased "items and services" on which they paid sales tax "in error." The Indiana Department of Revenue ("Department") reviewed six of the seven claims denying a portion of each of the six refunds and granting a portion of the six refunds. In the remaining single instance, the Department denied that one claim in its entirety.

In letters written to each Taxpayer, the Department offered two reasons for the denial. In each of the seven letters, the Department stated:

Due to bill name on invoices provided do not match the [T]axpayer's name. Some invoices do not appear to be Indiana sales tax.

In the first instance, the individual Taxpayer's business name did not match the invoice for which sales tax had

been paid. (E.g. "Acme Phone Company was claiming a refund of sales tax paid on an invoice sent to and paid by Apex Equipment Company.")

In the second instance, the Department denied refunds where the tax rate did not correspond to Indiana's sales tax rate. (E.g. "Acme Phone Company was claiming a refund of 7.5 percent sales tax paid on the purchase of exempt equipment.") In other words, the Department denied the refund because the tax amount indicated on the invoices did not clearly represent *Indiana* sales tax.

Taxpayers disagreed with the Department's decisions denying the refunds and filed individual protests challenging the denials. Since the companies are related, because the companies share the same representative, because the refunds are based on the same grounds, because the Department's reasons for denying the refunds are identical, and because Taxpayers' reasons for protesting the denials are identical, this Memorandum of Decision addresses the Taxpayers' collective protest issues.

I. Gross Retail Tax - Exempt Telecommunication Company Purchases.

DISCUSSION

The issue is whether Taxpayers have provided adequate information substantiating that they are the entities entitled to claim refunds of sales tax paid on the purchase of exempt telecommunication equipment.

Indiana sales tax is imposed pursuant to IC § 6-2.5-2-1, which states in relevant part:

- (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.

As a general rule, all purchases of tangible personal property - including equipment bought by telephone companies - are subject to sales or use tax unless specifically exempted by statutes or regulations. Various tax exemptions are outlined in IC §§ 6-2.5-5 et seq. which are applicable to both sales tax and use tax. [45 IAC 2.2-3-13](#).

An exemption to the tax is found at IC § 6-2.5-5-13 which provides:

Transactions involving tangible personal property are exempt from the state gross retail tax, if:

- (1) the property is:
 - (A) classified as central office equipment, station equipment or apparatus, station connection, wiring, or large private branch exchanges according to the uniform system of accounts which was adopted and prescribed for the utility by the Indiana utility regulatory commission;
 - (B) mobile telecommunications switching office equipment, radio or microwave transmitting or receiving equipment, including, without limitation, towers, antennae, and property that perform a function similar to the function performed by any of the property described in clause (A); or
 - (C) a part of a national, regional, or local headend or similar facility operated by a person furnishing video services, cable radio services, satellite television or radio services, or Internet access services; and
- (2) the person acquiring the property:
 - (A) furnishes or sells intrastate telecommunication service in a retail transaction described in [IC 6-2.5-4-6](#); or
 - (B) uses the property to furnish:
 - (i) video services or Internet access services; or
 - (ii) VOIP services.

An exemption statute such as IC § 6-2.5-5-13 is strictly construed against the taxpayer. *Tri-States Double Cola Bottling Co. v. Dep't of State Revenue*, 706 N.E.2d 282, 283 (Ind. Tax Ct. 1999); *Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." *Id.* at 101 (internal citations omitted). In applying any tax exemption, the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." *Indiana Dep't of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988).

Nevertheless, the Department is well aware of the countervailing rule that a "statute must not be construed so narrowly that it does not give effect to legislative intent because the intent of the legislature embodied in a statute constitutes the law." *General Motors Corp. v. Indiana Dept. of State Revenue*, 578 N.E.2d 399, 404 (Ind. Tax Ct. 1991).

In sum, Indiana requires retail merchants - the absence of an exemption certificate - to collect sales tax on sales of tangible personal property including telecommunication equipment. As a business conducting retail transactions and engaging in substantial retail transactions, Taxpayers are 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 Taxpayers, 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 initial decisions denying portions of the refund request, are entitled to deference.

Taxpayers maintain that they can now establish that they are entitled to claim the refunds under their various "doing business as" names. To that end, Taxpayers' presented letters signed by their parent companies' Vice President of Taxes, explaining and attesting to the relationship between the various Taxpayer/Claimants and the vendors who originally collected the tax. For example, one of the letters stated that:

[Representative] on behalf of [Taxpayer One] (d/b/a [Parent]), filed a claim for refund on April 30, 2019 for sales tax paid on purchases of various nontaxable items and services. During the years at issue, the invoices related to these purchases list [Parent] as the "bill to name." However [Taxpayer One] is the company (also reflected in our books and records) that purchased and utilized the equipment and services. I have reviewed the attached listing of transactions and am confirming that these purchases were made by [Taxpayer One].

In support of its protest, Taxpayers' representative has provided documentation intended to define its relationships with the various entities whose names are on the invoices in questions. The Department's Audit Division is requested to review Taxpayers' "books and records" and to specifically corroborate the representation that "[Taxpayer One] is the company that purchased and utilized the equipment services."

To the extent that Taxpayer has documented that it is entitled to a refund of sales tax billed to and paid on behalf of the Taxpayer - as attested by its parent company's vice-president and verified by the Department's Audit Division - Taxpayers' protest is sustained.

FINDING

To the extent specified in Part I of this Memorandum of Decision, Taxpayers' protest is sustained.

II. Gross Retail Tax - Indiana's Sales Tax Rate and Taxpayers' Refund Claims.

DISCUSSION

The issue is whether Taxpayers have sufficiently established that they are entitled to claim refunds of sales tax paid on invoices in which it appears - on the face of the original refund requests and invoices - the tax amount charged by the vendor does not appear to represent Indiana's seven-percent sales tax. For example, Taxpayers claim refunds in instances in which an invoice lists a tax amount which is either less than or greater than seven percent.

A. Invoices Which Appear to Represent a Sales Tax Rate Greater than Seven Percent.

Taxpayers explain that "certain invoices appear to have a tax rate greater than the 7.0[percent] Indiana sales tax rate due to the tax charged on freight charges." Taxpayers explain that the original refund requested did not include sales tax charged on "freight" or delivery charges and their corrected request now includes those charges.

Indiana's sales tax rate is indeed seven percent. IC § 6-2.5-2-2(a). The tax is imposed on the sale of tangible personal property, but Indiana law allows a specific exemption for telecommunication equipment sold to a telecommunications provider. IC § 6-2.5-2-1; IC § 6-2.5-5-13. However, Indiana law subjects "delivery charges" to sales tax. IC § 6-2.5-1-5(a)(4). In instances in which the otherwise taxable delivery and installation charges are attributable to the purchase of exempt tangible personal property, current Sales Tax Information Bulletin 92 (December 2019), explains the procedure:

If the item being sold is not subject to sales tax, the delivery charges related to that item also are not subject to sales tax. If some of the items being delivered are exempt and some of the items are subject to sales tax, the delivery charge attributable to the taxable items is subject to tax. (See *former* Commissioner's Directive 23 (September 2013)).

In tangible support of its argument, Taxpayer cites to the following three transactions.

- Taxpayers provided a specific example with an October 2016 invoice from a vendor called Vertiv Energy Systems. The invoice originally appeared to represent sales tax charged at the rate of 7.315 percent. Taxpayers explained that including the freight charge in the total refund request, results in a "true sales tax rate" of 7 percent.
- Taxpayers provided an additional example with an August 2017 invoice from a vendor called Wright Line LLC. The invoice originally appeared to represent sales tax charged at the rate of 14.795 percent. Taxpayers explained that including the freight charge in the total refund request, results in a "true sales tax rate" of 7 percent.
- Taxpayers provided yet a third example with an invoice dated December 2017 from a vendor called Teoco. The invoice originally appeared to represent sales tax charged at the rate of 7.5 percent. Taxpayers explained that it "reached out to this vendor prior to filing the [refund] claim to verify it was [Indiana] sales tax charged and they confirmed they charged an incorrect rate."

Of the "greater than 7 percent" invoices, Taxpayers claim that - by factoring in the delivery charges - they were able to reconcile the tax rates for all but one of the invoices. That one case is represented by the third example cited above. Except for the one invoice which remains unreconciled on its face, the Department is prepared to agree that Taxpayers have presented information sufficient to justify revisiting the "greater than 7 percent" invoices in question and to grant any additional refunds warranted.

B. Invoices Which Appear to Represent a Sales Tax Rate Less than Seven Percent.

Taxpayers explain that certain invoices apparently represent transactions in which sales tax less than Indiana's seven percent sales tax was charged. In these instances, Taxpayers state that "the tax charged on these invoices relates just to the equipment portion of the charge, which results in the tax rate charged appearing to be lower than 7[percent] for the voucher." Alternatively, Taxpayers explain:

"Certain invoices include multiple line items . . . [h]owever the vendor did not charge sales tax on all line items. Therefore, the sales tax refund per line item on the appeal schedule will be lower than the actual tax charged by the vendor for the item."

In tangible support of its argument, Taxpayer cites to the following three transaction.

- Taxpayers provided a specific example with a July 2016 invoice from a vendor called General Datatech. The invoice originally appeared to represent sales tax charged at the rate of 4.513 percent. Taxpayers explain that Datatech sold and installed exempt telecommunications equipment. According to Taxpayers, Datatech "charged sales tax on the equipment component but not the installation charge." However, Datatech failed to "break out the labor and equipment into separate lines on the invoice."
- Taxpayers provided a second example with a July 2016 invoice from a vendor called AGF Maintenance Service, Inc. The invoice originally appeared to represent sales tax charged at the rate of 6.56 percent. Taxpayers explain that AGF sold and installed an exempt antenna. According to Taxpayers, AGF "charged

sales tax on the equipment component of the transaction but not the labor." However, AGF failed to "break out the labor and equipment into separate lines on the invoice."

- Taxpayers provided a third example with a July 2016 invoice from a vendor called Bluestream Professional Services. The invoice originally appeared to represent sales tax charged at the rate of 3.861 percent. Taxpayers explain that Bluestream entered into an agreement for the sale and installation of exempt data equipment. According to Taxpayers, Bluestream "charged sales tax on the equipment component of the transaction but not the labor." However, Bluestream failed to "break out the labor and equipment into separate lines on the invoice."

Taxpayers argue that in the instances in which the vendors appear to charge sales tax at a rate less than 7 percent, they are entitled to a refund of that 4.513, 6.56, or 3.861 percent amount. Taxpayers maintain that their explanation in these instances sufficiently justifies granting the refund. The Department is unable to agree because, based on the information provided, there is nothing to establish that the amount charged was indeed *Indiana* sales tax. It is possible that Taxpayers are correct in their assumptions but the Department will not grant refunds based on an assumption when the documentation underlying that assumption is less than crystal-clear.

As noted above, Taxpayers have provided information sufficient to warrant revisiting the refund request attributable to certain invoices which - on their face - appear to charge a sales rate greater than seven percent. The Department does not agree that Taxpayers have provided that same level of assurance that would justify reconsidering the invoices which indicate sales tax imposed at a rate less than seven percent.

FINDING

Taxpayers' protest is denied in part and sustained in part.

SUMMARY

Sufficient to warrant reconsideration by the Department's Audit Division, the Department agrees that Taxpayers provided information purporting to establish that they may be entitled to a refund of sales tax billed to and paid on behalf of the Taxpayers. The Department also agrees that they have provided, with one exception, an explanation and documentation sufficient to warrant reconsideration of the Department's initial decision denying a refund of sales tax for transactions in which the vendor appeared to charge sales tax at a rate greater than seven percent. The Department does not agree that a refund of sales tax, charged at a rate less than seven percent, is warranted.

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