

DEPARTMENT OF STATE REVENUE

Revenue Ruling #2020-13ST
January 8, 2021

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ISSUES

I. Sales and Use Tax - Sourcing of Transactions to Out-of-State Purchasers

Authority: [IC 6-2.5-1-5](#); [IC 6-2.5-1-14.7](#); [IC 6-2.5-1-27](#); [IC 6-2.5-2-1](#); [IC 6-2.5-3-2](#); [IC 6-2.5-4-1](#); [IC 6-2.5-8-8](#); [IC 6-2.5-8-9](#); *National Bellas Hess v. Department of Revenue of Illinois*, 386 U.S. 753 (1967); *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904 (1992); *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 201 L. Ed. 2d 403 (2018).

A taxpayer ("Company") is seeking a ruling as to whether certain of its transactions to out-of-state dealers would be sourced to Indiana or another jurisdiction for purposes of determining whether it should count those transactions as Indiana sales following the issuance of *South Dakota v. Wayfair, Inc.*, 585 U.S. _ (2018).

II. Adjusted Gross Income Tax - Sourcing of Transactions to Out-of-State Purchasers

Authority: [IC 6-3-2-2](#); [IC 6-3-2-2.2](#); [45 IAC 3.1-1-55](#).

Company is seeking a ruling regarding whether transactions to out-of-state dealers would be sourced to Indiana or another jurisdiction for purposes of determining whether it should count those transactions as Indiana sales for purposes of the Indiana adjusted gross income tax.

STATEMENT OF FACTS

Company is an Indiana manufacturer that fabricates and sells fiberglass pools, which are ultimately installed for in-ground use. The pools are sold by Company to dealers, both in Indiana and in other states. These dealers subsequently sell the pools to their customers, after which the dealers install the pools. A dealer will either pick up the pool at the Company's Indiana location, or Company will deliver the pool to the dealer by a private carrier (which is owned by the owners of the Company) or by common carrier. When the pools are delivered, it is often to the dealer's business location, but in some cases it could be sent to another location, such as to the dealer's customer. Under the contract for the sale of the pools by Company to the dealers, title passes where the dealer takes possession (upon delivery when delivered by truck; e.g., freight on board (or f.o.b.) destination).

DISCUSSION

Based on the foregoing facts, Company requests a determination regarding under what circumstances a sale to an out-of-state dealer would not be considered an Indiana transaction for purposes of both Indiana gross retail tax (or "sales tax") and the Indiana adjusted gross income tax.

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. [IC 6-2.5-2-1\(a\)](#). Indiana also imposes a complementary excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." [IC 6-2.5-3-2\(a\)](#).

[IC 6-2.5-4-1\(a\)](#) provides that "[a] person is a retail merchant making a retail transaction when he engages in selling at retail." 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. "Tangible personal property" is defined at [IC 6-2.5-1-27](#) to mean personal property that can be seen, weighed, measured, felt, or touched, or is in any other manner perceptible to the senses. "Construction material" is a type of tangible personal property which is then converted into real property. [IC 6-2.5-1-14.7](#). As such, the prefabricated pools would be considered construction materials, and therefore would also be considered tangible personal property.

As an initial matter, it is important to discuss Indiana's prior stance on the registration requirements for out-of-state retail merchants operating in Indiana, which is similar to how other states treated remote sellers that made transactions into their respective states. Prior to 2018, Indiana and other states with a sales tax followed standards as set out by the United States Supreme Court cases *National Bellas Hess v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), and then *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904 (1992), concerning a retail merchant's physical presence or contacts with the state in order to impose a requirement on the retail merchant to collect and remit sales tax. .

Recently, however, the United States Supreme Court in the matter of *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 201 L. Ed. 2d 403 (2018) considered the constitutionality of a law which required a seller without a physical presence in South Dakota (a "remote seller") to obtain a registered retail merchant's certificate and to collect and remit applicable sales tax, if the seller met certain economic thresholds, thus creating "economic nexus" within the state. The United States Supreme Court issued their opinion in June of 2018, upholding the statute's constitutionality, and furthermore overturned the court's prior decision in *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904 (1992), such that physical presence in a state is no longer required for sellers to be obligated by that state to collect and remit their sales tax.

Indiana and many other states now impose an economic nexus test on retail merchants instead of merely determining whether a merchant has a physical presence in Indiana for purposes of sales tax. Many other states impose the same or very similar economic nexus tests as well. As some of Company's sales are to dealers located outside of the state of Indiana, Company wishes to know which of these sales would be considered Indiana transactions and which would not, as the sales that are not Indiana transactions may count towards another state's economic nexus thresholds.

As mentioned previously, [IC 6-2.5-4-1\(b\)](#) provides that a retail transaction occurs when a person is engaged in selling at retail when the person (1) acquires tangible personal property for the purpose of resale, and (2) transfers that property to another person for consideration in the ordinary course of the person's regularly conducted trade or business. [IC 6-2.5-4-1\(c\)](#) provides that, for purposes of determining what constitutes selling at retail, it does not matter whether the property is transferred conditionally or otherwise.

The Indiana Code does not define what constitutes a "transfer" in Title 6, Article 2.5, but Company states that title transfers between Company and the dealers upon delivery when the pools are delivered by Company. Further, as far as where the transaction should be sourced for purposes of imposing Indiana's sales tax, [IC 6-2.5-13-1](#) provides the sourcing rules for most transactions involving tangible personal property in Indiana. This statute states in relevant part the following:

- (a) As used in this section, the terms "receive" and "receipt" mean:
 - (1) taking possession of tangible personal property;
 - (2) making first use of services; or
 - (3) taking possession or making first use of digital goods;whichever comes first. The terms "receive" and "receipt" do not include possession by a shipping company on behalf of the purchaser.
- (b) This section:
 - (1) applies regardless of the characterization of a product as tangible personal property, a digital good, or a service;
 - (2) applies only to the determination of a seller's obligation to pay or collect and remit a sales or use tax with respect to the seller's retail sale of a product; and
 - (3) does not affect the obligation of a purchaser or lessee to remit tax on the use of the product to the taxing jurisdictions of that use.
- (d) The retail sale, excluding lease or rental, of a product shall be sourced as follows:
 - (1) When the product is received by the purchaser at a business location of the seller, the sale is sourced to that business location.
 - (2) When the product is not received by the purchaser at a business location of the seller, the sale is sourced to the location where receipt by the purchaser (or the purchaser's donee, designated as such by the purchaser) occurs, including the location indicated by instructions for delivery to the purchaser (or donee), known to the seller.
 - (3) When subdivisions (1) and (2) do not apply, the sale is sourced to the location indicated by an address for the purchaser that is available from the business records of the seller that are maintained in the ordinary course of the seller's business when use of this address does not constitute bad faith.

Pursuant to these rules, a sale by Company at Company's Indiana location (e.g., the customer picks up the pool in Indiana) is considered the sale of tangible personal property sourced to Indiana as an Indiana sale for Indiana sales tax purposes. [IC 6-2.5-13-I\(d\)\(1\)](#). Conversely, sales by Company in which Company delivers the pool (whether they use their own vehicles or they hire a related company or third party to transport the pool using the other company's vehicles) to the dealer by truck will be sourced to the state in which the pool is delivered for Indiana sales tax purposes, whether to the dealer's location or the dealer's customer's location. As such, those sales where the pools are delivered outside Indiana will not be considered Indiana sales. [IC 6-2.5-13-I\(d\)\(2\)](#). Further, sales where a customer hires or arranges for a delivery company to pick up the pool in Indiana to be delivered outside Indiana will be sourced to the state of delivery, as [IC 6-2.5-13-1\(a\)](#) makes clear that "receipt" does not mean "possession by a shipping company on behalf of the purchaser," meaning the purchaser receives the pool at the delivery location pursuant to [IC 6-2.5-13-I\(d\)\(2\)](#). This is true regardless of whether the f.o.b. designations state that title transfers in Indiana when the shipping company picks up the pool.

Additionally, for sales which are considered Indiana sales, any delivery charges (e.g., trucking transportation charges) on an invoice, bill of sale, or similar document issued by Company to its customer, whether those charges are separately stated or not, are subject to Indiana sales tax. Conversely, any delivery charges invoiced directly to the customer by a transportation company (whether the transportation company with common ownership with Company as described above, or any other transportation company) are not subject to Indiana sales tax. See [IC 6-2.5-1-5\(a\)](#).

For any of these sales, if a dealer provides Company with a fully completed Indiana General Sales Tax Exemption Certificate (Form ST-105), a fully completed Streamlined Sales and Use Tax Agreement Certificate of Exemption (SSTGB Form F0003), or an Indiana direct pay permit, Company may rely on that certificate or permit and not collect or remit Indiana sales tax for that transaction. [IC 6-2.5-8-8\(a\)](#); [IC 6-2.5-8-9\(b\)](#).

As for the Indiana adjusted gross income tax implications for Company of the sales to out-of-state dealers, [IC 6-3-2-2\(a\)](#) defines adjusted gross income from sources within Indiana for corporations and nonresident persons to include:

- (1) income from real or tangible personal property located in this state;
- (2) income from doing business in this state;
- (3) income from a trade or profession conducted in this state;
- (4) compensation for labor or services rendered within this state; and
- (5) income from stocks, bonds, notes, bank deposits, patents, copyrights, secret processes and formulas, good will, trademarks, trade brands, franchises, and other intangible personal property to the extent that the income is apportioned to Indiana under this section or if the income is allocated to Indiana or considered to be derived from sources within Indiana under this section.

When a corporation derives business income from sources both within and without Indiana, the business income derived from sources within Indiana is determined by an apportionment formula. [IC 6-3-2-2\(b\)](#). Subsection (e) of [IC 6-3-2-2](#) provides the following:

(e) The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the taxable year, and the denominator of which is the total sales of the taxpayer everywhere during the taxable year. . . . Regardless of the f.o.b. point or other conditions of the sale, sales of tangible personal property are in this state if:

- (1) the property is delivered or shipped to a purchaser that is within Indiana, other than the United States government; or
- (2) the property is shipped from an office, a store, a warehouse, a factory, or other place of storage in this state and the purchaser is the United States government.

Gross receipts derived from commercial printing as described in [IC 6-2.5-1-10](#) and from the sale of computer software shall be treated as sales of tangible personal property for purposes of this chapter.

The department's regulation at [45 IAC 3.1-1-53](#) clarifies what is meant by sales of tangible personal property in Indiana, providing as follows:

When Sales of Tangible Personal Property Are in This State. Gross receipts from the sales of tangible personal property . . . are in this state: (a) if the property is delivered or shipped to a purchaser within this state regardless of the F.O.B. point or other conditions of sales; or (b) if the property is shipped from an office, store, factory, or other place of storage in this state, and the taxpayer is not taxable in the state of the purchaser. See Regulation 6-3-2-2(n)(010) [[45 IAC 3.1-1-64](#)].

Examples:

(1) Property shall be deemed to be delivered or shipped to a purchaser within this state if the recipient is located in this state, even though the property is ordered from outside this state. Example: The taxpayer, with inventory in State A sold \$100,000 of its products to a purchaser having branch stores in several states including this state. The order for the purchase was placed by the purchaser's central purchasing department located in State B. \$25,000 of the purchase order was shipped directly to the purchaser's branch store in this state. The branch store in this state is the "purchaser within this state" with respect to \$25,000 of the taxpayer's sales.

(2) Property is delivered or shipped to a purchaser within this state if the shipment terminates in this state, even though the property is subsequently transferred by the purchaser to another state. Example: The taxpayer makes a sale to a purchaser who maintains a central warehouse in this state at which all merchandise purchases are received. The purchaser reships the goods to its branch offices in other states for sale. All of taxpayer's products shipped to the purchaser's warehouse in this state is property "delivered or shipped to a purchaser within this state."

(3) The term "purchaser within this state" shall include the ultimate recipient of the property if the taxpayer in this state, at the designation of the purchaser, delivers to or has the property shipped to the ultimate recipient within this state. Example: A taxpayer in Indiana sold merchandise to a purchaser in State A. The taxpayer directed the manufacturer or supplier of the merchandise in State B to ship the merchandise to the purchaser's customer in Indiana pursuant to the purchaser's instructions. The sale by the taxpayer is "in this state."

(4) When the property being shipped by a seller from the state of origin to a consignee in another state is diverted while enroute to a purchaser in this state, the sales are in this state. Example: The taxpayer, a produce grower in State A, begins shipment of perishable produce to the purchaser's place of business in State B. While enroute the produce is diverted to the purchaser's place of business in Indiana in which state the taxpayer is subject to tax. The sale by the taxpayer is attributed to Indiana.

Accordingly, a sale by Company at Company's Indiana location (e.g., the customer picks up the pool in Indiana) is considered the sale of tangible personal property sourced to Indiana as an Indiana sale for purposes of the Indiana adjusted gross income tax, as are deliveries to dealers or customers within Indiana. [IC 6-3-2-2\(e\)](#). However, sales by Company in which Company delivers the pool to the dealer or the dealer's customer at a location outside of Indiana by a company owned truck are not considered Indiana sales. Further, sales delivered to a location outside of Indiana by a related party or a third party hired by the Company are not considered to be Indiana sales. Sales are also not sourced to Indiana when a purchaser arranges for a common carrier to pick them up in Indiana and deliver them out of state. Id.

RULING

Based on the information provided, Company's sales at its Indiana location (e.g., where a customer picks up a pool in Indiana) or which are delivered to an Indiana location are considered the sale of tangible personal property and will be sourced to Indiana as an Indiana sale for both Indiana sales tax purposes and Indiana adjusted gross income tax. However, Company's sales in which Company delivers a pool to the dealer at the dealer's out-of-state location (or their customer's out-of-state location) by a company owned truck or by a related party or a third party hired by the Company will be sourced to the state in which the pool is delivered for both Indiana sales tax and Indiana adjusted gross income tax purposes, as would sales in which customers hire a common carrier to transport the pool to a location outside Indiana.

Delivery or transportation fees on any invoice for the pools, whether separately stated or not, are subject to sales tax for transactions considered Indiana sales. These fees are not subject to sales tax when the pool is delivered to an out-of-state location, as the transaction is not subject to Indiana sales tax.

For any of the sales to out-of-state dealers, if a dealer provides Company with a fully completed Indiana General Sales Tax Exemption Certificate (Form ST-105), a fully completed Streamlined Sales and Use Tax Agreement Certificate of Exemption (SSTGB Form F0003), or an Indiana direct pay permit, Company may rely on that certificate or permit and not collect or remit Indiana sales tax for that transaction.

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.

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