

**Memorandum of Decision: 04-20221572**  
**Sales Tax Penalty and Interest**  
**For the Years 2019, 2020, and 2021**

**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**

Indiana Restaurant was entitled to a refund of penalties assessed when Indiana Restaurant underpaid sales tax due on its utility consumption; however, the Department had no authority to abate or refund Indiana Restaurant interest charges.

**ISSUE**

**I. Sales Tax - Exempt Utility Consumption.**

**Authority:** [IC 6-2.5-2-1](#); [IC 6-2.5-4-5](#); [IC 6-2.5-5-5.1](#); [IC 6-3-4-8](#); [IC 6-8.1-10-1](#); [IC 6-8.1-10-2.1](#); *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 15-11-2](#).

Taxpayer protests the denial of a refund requesting the return of a penalties and interest charges.

**STATEMENT OF FACTS**

Taxpayer is an Indiana company which consumes utility services. A portion of the utilities are consumed in conducting exempt activities. The remainder is not consumed in exempt activities.

On the basis that it had correctly evaluated its exempt and non-exempt utility consumption, Taxpayer proceeded to pay sales tax on approximately 10 percent of those utility charges.

The Indiana Department of Revenue ("Department") reviewed Taxpayer's returns concluding that Taxpayer overestimated the exempt usage stated on its returns. Instead, the Department determined that Taxpayer was entitled to an approximately 40 percent exemption on the purchase of natural gas and an approximately 30 percent exempt on the purchase of electricity.

As a result of that decision, the Department issued sales tax assessments for the years 2019, 2020, and 2021. The assessments totaled approximately \$5,700. In addition, the Department also assessed additional penalty and interest assessments. Taxpayer paid all three assessments in full and then sought a refund of the penalties and interest.

The Department denied the refund requests. Taxpayer disagreed with the Department's decision and submitted a protest to that effect. The protest asked for and was granted a "[f]inal determination without a hearing."

**I. Sales Tax - Exempt Utility Consumption.**

**DISCUSSION**

The issue is whether Taxpayer has met its burden of establishing that it is entitled to a refund of penalties and interest.

**A. Indiana Sales Tax and Public Utilities.**

Taxpayer is required to pay sales tax on its purchases of natural gas and electric utilities under [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.

The tax is not imposed on all transactions but only those which constitute "retail transactions." Sales of utilities are specifically designated as "retail transactions." [IC 6-2.5-4-5\(b\)](#) states that, "A power subsidiary or a person engaged as a public utility is a retail merchant making a retail transaction when the subsidiary or person furnishes or sells electrical energy, natural or artificial gas, water, steam, or steam heating service to a person for commercial or domestic consumption."

#### **B. Sales Tax Exemption - Direct Production.**

An exemption from sales and use tax is provided for tangible personal property purchased for use in direct production of other tangible personal property. This exemption is found in [IC 6-2.5-5-1](#), which states:

(a) As used in this section, "**tangible personal property**" includes electrical energy, natural or artificial gas, water, steam, and steam heat. (**Emphasis added**).

As noted above, Taxpayer consumes these utilities in both an exempt and nonexempt manner. However, the Department determined that Taxpayer miscalculated the exemption and assessed tax based on the corrected calculation. In addition, the Department assessed penalties and interest as called for in Indiana law.

#### **C. Assessing Taxpayer a Penalty.**

[IC 6-8.1-10-2.1\(a\)\(3\)](#) requires that a ten-percent penalty be imposed if the tax deficiency results from the taxpayer's negligence. [IC 6-8.1-10-2.1\(a\)\(2\)](#) requires a ten-percent penalty if the taxpayer "fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment."

#### **D. Authority to Abate Penalty and Interest.**

Nonetheless [IC 6-8.1-10-2.1\(d\)](#) states that, "If a person subject to the penalty imposed under this section can show that the failure to . . . pay the full amount of tax shown on the person's return . . . or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty."

Departmental regulation [45 IAC 15-11-2\(b\)](#) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." *Id.*

Departmental regulation [45 IAC 15-11-2\(c\)](#) requires that in order to establish "reasonable cause," the taxpayer must demonstrate that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed . . . ."

As noted above, [IC 6-8.1-5-1\(c\)](#) requires that Taxpayer establish that the penalty was unwarranted. In this case, the Department agrees that Taxpayer erred in determining its sales and use tax liability. However, there is insufficient information to establish that Taxpayer's position was so egregious as to constitute "willful neglect." Based on a "case-by-case" analysis and after reviewing "the facts and circumstances of each taxpayer" the Department agrees that the penalty should be abated and refunded Taxpayer.

Taxpayer's request for a refund of the interest charges will not be directly addressed here because the request is moot. Under [IC 6-8.1-10-1\(e\)](#), the Department has no authority to abate properly assessed interest charges.

### **FINDING**

Taxpayer's protest is sustained in part and denied in part. Taxpayer is entitled to a refund of approximately \$500 in penalty charges; the Department has no authority to refund the approximately \$300 interest charges.

December 29, 2022

*Posted: 06/21/2023 by Legislative Services Agency*

