

DEPARTMENT OF STATE REVENUE

04-20231183.MOD; 04-20231184.MOD;
04-20231185.MOD; 04-20231186.MOD**Memorandum of Decision: 04-20231183; 04-20231184; 04-20231185; 04-20231186**
Sales Tax
For Tax Years 2021 & 2022

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

Businesses were able to provide sufficient analysis to show that the four locations at issue qualified for the predominant use exemption.

ISSUE**I. Sales Tax—Refund.**

Authority: [IC 6-2.5-2-1](#); [IC 6-2.5-5-5.1](#); [IC 6-8.1-9-1](#); *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); Black's Law Dictionary (11th ed. 2019); [45 IAC 2.2-4-13](#).

Taxpayers protest the partial denial of their claims for refund.

STATEMENT OF FACTS

Taxpayers are four related restaurants operating in Indiana. Each restaurant filed a claim for refund of sales tax paid on utilities consumed at its Indiana locations during the 2021 and 2022 tax years. Taxpayers claimed the manufacturing exemption on the purchase of utilities. The Indiana Department of Revenue ("Department") partially denied Taxpayers' exemption claims for all four restaurants. Taxpayers protested all four of the partial denials, maintaining that each location did qualify for the predominant use exemption and that each location had a higher exemption rate than the rate determined by the Department. An administrative hearing was held and this Memorandum of Decision result. Further facts will be supplied as required.

I. Sales Tax—Refund.**DISCUSSION**

Taxpayers protest the partial denial of their sales tax refund claims for the 2021 and 2022 tax years. The Department partially approved the claimed refunds but denied the rest on the grounds that Taxpayers did not predominantly use the utilities at issue in an exempt manner. Taxpayers protest that their utility usage was predominantly used in an exempt manner and that they are therefore entitled to the full amount of refunds as originally claimed.

As a threshold issue, "when [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, all interpretations of Indiana tax law contained within this decision are entitled to deference.

Sales tax is imposed by [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.

Next, [IC 6-2.5-5-5.1](#) states:

- (a) As used in this section, "tangible personal property" includes electrical energy, natural or artificial gas,

water, steam, and steam heat.

(b) Transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for direct consumption as a material to be consumed in the direct production of other tangible personal property in the person's business of manufacturing, processing, refining, repairing, mining, agriculture, horticulture, floriculture, or arboriculture. This exemption includes transactions involving acquisitions of tangible personal property used in commercial printing.

Also, [IC 6-8.1-9-1\(a\)](#) provides:

If a person has paid more tax than the person determines is legally due for a particular taxable period, the person may file a claim for a refund with the department. Except as provided in subsections (j) and (k), in order to obtain the refund, the person must file the claim with the department within three (3) years after the later of the following:

- (1) The due date of the return.
- (2) The date of payment.

For purposes of this section, the due date for a return filed for the state gross retail or use tax, the gasoline tax, the special fuel tax, the motor carrier fuel tax, the oil inspection fee, or the petroleum severance tax is the end of the calendar year which contains the taxable period for which the return is filed. The claim must set forth the amount of the refund to which the person is entitled and the reasons that the person is entitled to the refund.

Taxpayer's refund claim states that they were entitled to the predominant use exemption found at [45 IAC 2.2-4-13](#), which states:

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

(b) The gross receipt of every person engaged as a power subsidiary or a public utility derived from selling electrical energy, gas, water, or steam to consumers for direct use in direct manufacturing, mining, production, refining, oil or mineral extraction, irrigation, agriculture, horticulture, or another public utility or power subsidiary described in [IC 6-2.5-4-5](#) shall not constitute gross retail income of a retail merchant received from a retail transaction. Electrical energy, gas, water, or steam will only be considered directly used in direct production, manufacturing, mining, refining, oil or mineral extraction, irrigation, agriculture, or horticulture if the utilities would be exempt under [IC 6-2.5-5-5.1](#).

(c) Sales of public utility services or commodities to consumers engaged in manufacturing, mining, production, refining, oil or mineral extraction, irrigation, agriculture, horticulture, or another public utility or power subsidiary described in [IC 6-2.5-4-5](#), based on a single meter charge, flat rate charge, or other charge, are excepted if such services are separately metered or billed and will be used predominantly for the excepted purposes.

(d) Sales of public utility services and commodities to consumers engaged in manufacturing, mining, production, refining, oil or mineral extraction, irrigation, agriculture, or horticulture, based on a single meter charge, flat rate charge, or other charge, which will be used for both excepted and nonexcepted purposes are taxable unless such services and commodities are used predominantly for excepted purposes.

(e) Where public utility services are sold from a single meter and the services or commodities are utilized for both exempt and nonexempt uses, the entire gross receipts will be subject to tax unless the services or commodities are used predominantly for excepted purposes. Predominant use shall mean that more than fifty percent (50[percent]) of the utility services and commodities are consumed for excepted uses. (Emphasis added).

Based on the Department's review of the Taxpayers' study, the Department recalculated the percentages of exempt electrical use. The recalculations found that Taxpayers did not qualify for the predominant use exemption. The Department therefore allowed varying percentages for exempt electrical use and agreed to refund Taxpayers sales tax on utilities at the recalculated percentage. Taxpayers challenged the Department's recalculations of each restaurant's exempt electrical usage, ranging from 40 percent to 49 percent, arguing instead that the exempt electrical usage of each restaurant is between 70 percent and 85 percent.

Taxpayers state that the Department made its adjustment using the wrong store hours for one restaurant. The

Department calculated its adjustment on the premise that the restaurant is open 17 hours a day, while Taxpayers provided confirmation that the restaurant is open 24 hours a day.

Further, Taxpayers disagree with the Department's electric rating used to calculate the amount of electricity used by the two platen, electric clamshell grills. The Department used the rating of 13.03 kilowatts. Taxpayers provided documentation from the grill's manual which states that the rating is 21.7 kilowatts.

Taxpayers argue that the Department understated the load factor or "utilization factor" for multiple items in its utility study.

A load factor is "the ratio of a utility customer's usage levels during a given period compared to the customer's demand during peak periods." Black's Law Dictionary (11th ed. 2019). In this application, the peak demand of a fryer or grill is the maximum amount of electricity it can use. Thus, load factor expresses the amount of electricity an appliance actually uses in a set period of time as a percentage of this maximum.

Taxpayers further state:

The [Department] has its own written guidelines listing major restaurant equipment and the Utilization factor expressed as a range stating the low side and a high side allowing for individual variances in different locations. . . For lack of evidence of the actual [Utilization factor], it is recommended that the midpoint be used.

In the 4 worksheets prepared by the [Department], a variety of [Utilization factors] for grills were used, namely 20[percent], 30[percent], and 40[percent]. The [Department's] recommended guideline . . . was never used.

Additionally, Taxpayers argue that the Department omitted an ice cream machine from two stores along with exhaust hood fans from all four stores. Taxpayers state that each restaurant has two exhaust hood fans over the grills and fryers to remove the smoke generated while cooking and are both "necessary and integral to the operation of the cooking equipment." Taxpayers maintain that the ice cream machines and the fans were improperly omitted in the Department's calculation. However, Taxpayers noted that the Department included an ice cream machine in one restaurant that does not have an ice cream machine, which Taxpayers request be excluded from the Department's calculation.

After review of Taxpayers' documentation and analysis provided in the course of the protest process, the Department agrees that Taxpayers had additional exempt usage of utilities at all four restaurants. By providing this additional documentation and analysis, Taxpayers established that the percentage of exempt electrical usage was higher than the Department's revised calculations. As a result, Taxpayers qualified for the predominant use exemption for all four restaurants and will receive refunds in the entire amount claimed as provided by [45 IAC 2.2-4-13\(e\)](#).

FINDING

Taxpayer's protest is sustained.

June 5, 2023

Posted: 08/30/2023 by Legislative Services Agency
An [html](#) version of this document.