

**Memorandum of Decision: 04-20231602**  
**Indiana Gross Retail Tax**  
**For the March 1, 2021, to September 30, 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

Construction Manager established that it was entitled to a refund of sales tax Manager paid to vendors because Manager purchased the materials pursuant to a time and materials contract between Manager and exempt utility company.

### ISSUE

#### **I. Gross Retail Tax - Purchases of Construction Materials.**

**Authority:** [IC 6-2.5-2-1](#); [IC 6-2.5-3-2](#); *Conklin v. Town of Cambridge City*, 58 Ind. 130 (1877); *Tri-States Double Cola Bottling Co. v. Dep't of State Revenue*, 706 N.E.2d 282 (Ind. Tax Ct. 1999); *Mynsberge v. Dep't of State Revenue*, 716 N.E.2d 629 (Ind. Tax Ct. 1999); *General Motors Corp. v. Indiana Dept. of State Revenue*, 578 N.E.2d 399 (Ind. Tax Ct. 1991); *Indiana Dept. of State Rev. 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); Sales Tax Information Bulletin 60 (March 2023); Sales Tax Information Bulletin 60 (July 2021).

Taxpayer argues it is entitled to a refund of sales tax paid to construction material vendors because the materials were used to complete construction of an exempt customer's facility.

### STATEMENT OF FACTS

Taxpayer is an out-of-state company in the business of providing construction services including "design-build" projects.

Taxpayer undertook a project on behalf of a utility company. The project was completed over a period of approximately one year and completed on the basis of a "time and material contract" between Taxpayer and utility company.

The utility company provided Taxpayer with an Indiana "General Sales Tax Exemption Certificate" (ST-105). In claiming the exemption, the utility relied on Indiana law exempting the purchase of tangible personal property purchased by a utility company furnishing electricity, steam, or steam heat.

Taxpayer proceeded to purchase construction materials and then resold those materials to the utility company. According to Taxpayer, it collected sales tax from the utility company and remitted those amounts to the Indiana Department of Revenue ("Department").

Taxpayer concluded it was entitled to a refund of the tax and submitted a "Claim for Refund" (GA-110L) seeking a refund of approximately \$350,000. The GA-110L explained the refund was requested for "[t]angible property and expenses related to power production." According to Taxpayer, its claim was limited to "materials that were incorporated into [the utility's] real property."

Accompanying Taxpayer's GA-110L, was a copy of the utility company's ST-105 ("General Sales Tax Exemption Certificate").

The Department reviewed Taxpayer's refund request and - in a letter dated December 2022 - informed Taxpayer the \$350,000 refund was being denied. The letter explained why the refund was denied.

The [T]axpayer is not occupationally engaged in energy production and cannot directly claim an exemption for purchases under [IC 6-2.5-5-10](#). Furthermore, the [T]axpayer received a full reimbursement from the

Indiana utility company for sales tax incurred and provided no evidence a refund was issued to the Indiana utility company for the sales tax paid.

Taxpayer disagreed with the Department's decision and submitted a protest to that effect. An administrative hearing was conducted by telephone during which Taxpayer's representative explained the basis for the protest. This Memorandum of Decision results.

## **I. Gross Retail Tax - Purchases of Construction Materials.**

### **DISCUSSION**

The issue is whether Taxpayer has established it was entitled to a refund of sales tax it paid on its purchase of construction materials used to construct a utility company's facility.

What follows is a streamlined/simplified explanation of what took place during a series of transactions between vendors, Taxpayer, and utility company.

The agreement between Taxpayer and the utility company called for the construction of the utility company's facility on a "time and materials" basis.

To complete the facility, Taxpayer purchased construction materials from various vendors. For example,

- Taxpayer purchases \$100 in bricks from vendor, pays the vendor \$100 and pays \$7 in sales tax to vendor.
- Taxpayer resells the bricks to its customer, which is an exempt utility.
- Utility receives a bill from Taxpayer for \$115.56 which represents the cost of the bricks, sales tax, and a fixed transaction fee. ( $100 + 7 + 8.56$ ).
- Utility writes a check to Taxpayer \$115.56.
- Taxpayer wants a refund of the \$7 tax that it remitted to vendor.

As noted, pursuant to the "time and materials" contract, Taxpayer billed utility company \$115.56. The utility company reimbursed Taxpayer \$115.56. That reimbursement included the cost of tangible personal property, separately stated Indiana sales tax, and a transaction fee.

Taxpayer billed the utility company because it expected to be compensated for the brick purchase. According to Taxpayer, it billed the utility company for the bricks (\$100), collected \$7.00 in Indiana sales tax from the utility, and charged a fixed transaction fee agreed upon in the time and materials contract. In effect, Taxpayer explains it acted as a "retail merchant" collecting Indiana's seven percent sales tax on behalf of and acting as an agent for Indiana.

Taxpayer wants the Department to refund Taxpayer the \$7.00 it paid to the vendor.

The agreement between Taxpayer and the utility was structured as a "time and materials" contract which is a "a contract in which the cost of construction material and the cost of labor or other charges are stated separately." Sales Tax Information Bulletin 60 (March 2023). See also Sales Tax Information Bulletin 60 (July 2021).

The presumption in Indiana is that all retail sales are subject to sales tax unless expressly exempted by statute. [IC 6-2.5-2-1](#) ("An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana . . .").

Taxpayer bases its claim on a sales tax exemption provided under Indiana law. The general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." *Indiana Dept. of State Rev. v. Kimball Int'l Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988). A statute which provides a tax exemption, however, is strictly construed against the taxpayer. *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 (citing *Conklin v. Town of Cambridge City*, 58 Ind. 130, 133 (1877)).

[IC 6-2.5-3-2](#), like all tax exemption provisions, is strictly construed against exemption from the tax. *Tri-States Double Cola Bottling Co. v. Dep't of State Revenue*, 706 N.E.2d 282, 283 (Ind. Tax Ct. 1999); *Mynsberge v. Dep't of State Revenue*, 716 N.E.2d 629, 636 (Ind. Tax Ct. 1999). 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*

[IC 6-2.5-3-2](#)(c) provides the following:

The use tax is imposed on a contractor's conversion of construction material into real property if that construction material was purchased by the contractor. However, the use tax does not apply to conversions of construction material described in this subsection, if:

- (1) the state gross retail or use tax has been previously imposed on the contractor's acquisition or use of that construction material;
- (2) the person for whom the construction material is being converted *could have purchased the material exempt* from the state gross retail and use taxes, as evidenced by a properly issued exemption certificate, if that person had directly purchased the construction material from a retail merchant in a retail transaction; or
- (3) the conversion of the construction material into real property is governed by a time and material contract as described in [IC 6-2.5-4-9](#)(b). (*emphasis added*).

This Memorandum of Decision considers only the transactions between Taxpayer and the vendors to whom it paid sales tax. This decision *does not* address the transactions between Taxpayer and the utility. Although those secondary transactions are indirectly related to the issues raised by Taxpayer, they are not immediately related to the transactions between Taxpayer and the vendors.

The issue here is whether Taxpayer was required to pay Indiana sales when it purchased the construction materials. To the extent that Taxpayer purchased construction materials, resold the materials to the utility, and the materials were incorporated into the utility's exempt construction project, Taxpayer is correct.

The transactions between Taxpayer and the vendor were exempt under [IC 6-2.5-3-2](#) because Taxpayer (the contractor) purchased materials governed by a time and materials contract, the utility "could have purchased the material exempt from the state gross retail and use taxes," and because the utility provided Taxpayer with a "properly issued exemption certificate."

On the single question of whether Taxpayer is entitled to a refund of sales tax paid to the vendors, Taxpayer's protest is sustained. However, Taxpayer may well be required to establish that the materials were sold to and incorporated into the utility's exempt project. Taxpayer has not established that it is entitled to purchase materials, equipment, or supplies consumed or used by Taxpayer in the process of completing the project. Those items might well be necessary but are not necessarily exempt.

Finally, the Department requires that Taxpayer account for the sales tax charged and collected by Taxpayer when it sold the materials to the utility. If, as Taxpayer maintains, it was acting as a "retailer merchant" in selling the materials to the utility, it holds those taxes as "an agent for the state." [IC 6-2.5-2-1](#)(b). There is nothing under Indiana law - or simple common sense - that permits a retailer to retain any of the sales tax collected from a customer. If Taxpayer collected sales tax from the utility and remitted that tax to the state, any refund claim on those amounts becomes a matter between the utility and the Department.

## FINDING

Taxpayer's protest is sustained.

November 15, 2023

*Finding Replaces: New*

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