

Final Order Denying Refund: 04-20231163
Sales and Use Tax
For The Tax Year 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 Final Order Denying Refund.

HOLDING

Business was not entitled to a refund of use tax.

ISSUE

I. Sales and Use Tax - Refund.

Authority: [IC 6-2.5-1-2](#); [IC 6-2.5-2-1](#); [IC 6-2.5-3-1](#); [IC 6-2.5-3-2](#); [IC 6-2.5-3-4](#); [IC 6-2.5-4-1](#); [IC 6-2.5-4-6](#); [IC 6-2.5-5-13](#); [IC 6-8.1-9-1](#); *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Indiana Dept. of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454 (Ind. Ct. App. 1988); *Beasley v. Kwatnez*, 445 N.E.2d 1028 (Ind. Ct. App. 1983); *Indiana Dept. of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96 (Ind. Ct. App. 1974); *Rhoads v. Indiana Dept. of State Revenue*, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); *USAir, Inc. v. Indiana Dept. of State Revenue*, 623 N.E.2d 466 (Ind. Tax Ct. 1993); [45 IAC 2.2-2-1](#); [45 IAC 2.2-3-4](#).

Taxpayer protests the refund denial of previously paid use tax.

STATEMENT OF FACTS

Taxpayer is an out-of-state communications company that sells telephone services to customers via new contracts. Taxpayer also offers warranty contracts to customers and provides replacement phones as needed under the warranty terms.

In December 2021, Taxpayer filed a claim for refund of sales/use tax paid on cell phone purchases made during tax year 2018. The Department of Revenue ("Department") reviewed Taxpayer's claim and denied the refund. The Department concluded that "free phones" provided as part of a new service contract as well as "replacement phones" provided under optional warranty contracts were subject to use tax.

Taxpayer disagreed and submitted a protest. An administrative hearing was held in which Taxpayer's representatives explained the basis for the protest. This Final Order Denying Refund results. Additional facts will be provided as necessary.

I. Sales and Use Tax - Refund.

DISCUSSION

Taxpayer protests the Department's denial of a claim for refund of use tax paid on purchased cell phones. The Department determined that "free phones" Taxpayer provided to customers at the beginning of a service contract were taxable as tangible personal property of a retail transaction pursuant to [45 IAC 2.2-3-4](#). The Department also concluded that "replacement phones" Taxpayer provided to customers under an optional warranty contract were subject to tax because Taxpayer was required to pay sales or use tax on "all taxable items used under the contract." Taxpayer argued that its phone purchases were exempt from tax under [IC 6-2.5-5-13](#). The Department stated that it was unable to determine whether any phones were exempt under this statute because it could not determine whether Taxpayer was the "end consumer" of the phones.

As a threshold issue, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. "[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).

[IC 6-8.1-9-1](#)(a) affords a taxpayer a statutory right to file a claim for refund. This statute provides, in part:

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 refund with the department.

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); [45 IAC 2.2-2-1](#). A person who acquires property in a retail transaction is liable for the sales tax on the transaction. [IC 6-2.5-2-1](#)(b). Indiana also imposes a complementary excise tax called a "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). "Use" means the "exercise of any right or power of ownership over tangible personal property." [IC 6-2.5-3-1](#)(a). The use tax is a functional equivalent to the sales tax. See *Rhoades v. Indiana Dept. of State Revenue*, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002).

The complementary relationship between sales and use tax ensures non-exempt retail transactions that escape sales tax liability remain taxed. *Id.*; *USAir, Inc. v. Indiana Dept. of State Revenue*, 623 N.E.2d 466, 468 (Ind. Tax Ct. 1993). If sales tax is paid at the time of the transaction, an exemption from use tax is granted under [IC 6-2.5-3-4](#). A statute which provides a tax exemption is strictly construed against the taxpayer. *Indiana Dept. of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96, 97 (Ind. Ct. App. 1974).

To trigger the imposition of Indiana's use tax, tangible personal property must be acquired in a retail transaction. A taxable retail transaction occurs when (1) a party acquires tangible personal property as part of its ordinary business for the purpose of reselling the property; (2) that property is then exchanged between parties for consideration; and (3) the property is used in Indiana. See [IC 6-2.5-1-2](#); [IC 6-2.5-4-1](#)(b) and (c); [IC 6-2.5-3-2](#)(a).

Under Indiana law, certain items or transactions may be exempt from tax if certain conditions are met. In applying any tax exemption, the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." *Indiana Dept. of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988). The party seeking the exemption must present sufficient evidence showing the exemption is within the exact letter of the law. *RCA Corp.*, at 101.

[IC 6-2.5-5-13](#) states, in relevant part,

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);

(C) ...**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](#)...

(Emphasis added.)

[IC 6-2.5-4-6](#)(a) provides,

(a) A person is a retail merchant making a retail transaction when the person:

(1) furnishes or sells an intrastate telecommunication service; and

(2) receives gross retail income from billings or statements rendered to customers.

Taxpayer argues that its purchases of cell phones, regardless of whether the phones are provided to customers under service or warranty contract, are exempt under [IC 6-2.5-5-13](#)(1)(B). In support, Taxpayer's representatives provided an explanation and information/diagrams of how cell phones operate.

As previously noted, *Kimball* requires the Department to narrowly construe exemptions against a taxpayer, and the taxpayer has the burden of establishing qualification under the strict terms of the exemption. *Id.* at 456. Additionally, exemption statutes are strictly construed in favor of taxation and against exemption, contrary to the

general rule that tax laws are construed against the state. *Beasley v. Kwatnez*, 445 N.E.2d 1028, 1030 (Ind. Ct. App. 1983) (internal citations omitted). "Ambiguities in any exemption statute are construed against the party claiming the exemption." *Id.* Thus, a narrow reading of [IC 6-2.5-5-13](#) is required.

[IC 6-2.5-5-13](#) provides an exemption to a specific list of equipment used in providing telecommunication services. The exemption includes "radio or microwave transmitting or receiving equipment," and cell phones are that type of equipment. However, the use of the phones as radio or microwave transmitting or receiving equipment is performed by Taxpayer's customers and not by Taxpayer itself. Taxpayer's "use" of the phones is to provide the phones to customers via new contracts or replacement warranties while the exemption provided under [IC 6-2.5-5-13](#) is applicable to equipment used in providing telecommunication services. Taxpayer does not operate the cell phones as radio or microwave transmitting or receiving equipment; rather Taxpayer's customers use the phones in that manner. Further, the cell phones do not perform a function similar to the function performed by any of the property described in [IC 6-2.5-5-13](#)(1)(A) as plainly required by [IC 6-2.5-5-13](#)(1)(B). Ultimately, Taxpayer's reliance on [IC 6-2.5-5-13](#) is misplaced and this statute does not apply to Taxpayer's purchase and disposition of the cell phones under protest.

FINDING

Taxpayer's protest is denied.

December 6, 2023

Replaces Finding Document at: New

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