

DEPARTMENT OF STATE REVENUE

Revenue Ruling #2019-04ST
November 8, 2019

NOTICE: Under [IC 4-22-7-7](#), this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

Sales and Use Tax - Requirement to Register as a Retail Merchant

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 6-2.5-4-1](#); [IC 6-2.5-5-8](#); [IC 6-2.5-5-17](#); [IC 6-2.5-13-1](#); [IC 6-2.5-13-3](#); *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); Sales Tax Information Bulletin #89 (June 2019).

A taxpayer ("Company") is seeking an opinion as to whether it would have an obligation to collect and remit sales tax on transactions sourced to Indiana. Specifically, Company asks the following:

1. Is Company required to register in Indiana for sales tax related to the production and sale of catalogs at the commercial printer ("Printer")?
2. What impact, if any, does the U.S. Supreme Court decision in *South Dakota v. Wayfair, Inc.*, have on [IC 6-2.5-3-1\(e\)](#) if Company sells in excess of \$100,000 in catalogs to a retail entity ("Retail")?
3. Is Company required to collect Indiana sales tax from Retail for the sale and transfer of title to the catalogs in Indiana?
4. Does the answer to Issue 3 change if Company does not sell the catalogs to Retail in Indiana but arranges for the Printer to ship the catalogs to Retail locations outside the State of Indiana and title to the catalogs passes to Retail while in transit?

STATEMENT OF FACTS

Company is based and domiciled in Europe. Company provides the following relevant, factual context regarding its business operations, reproduced exactly as submitted in its request for a ruling with certain details redacted:

[Company] is engaged in the business of designing and producing print and digital catalogs and buyer's guides for [Retail].

[Company] purchases cover paper for the catalogs from a paper vendor located outside the United States. The paper vendor is responsible for importation and shipping of the cover paper to a processor located in Kentucky. After processing, the processor ships the completed covers to a [Printer] located in Indiana. [Company] purchases body paper for the catalogs from vendors located in New York and Wisconsin and the vendors ship the body paper to the Printer located in Indiana. The Printer prints the catalog body and produces the final product (catalog/brochure). The Printer invoices [Company] for the printing and binding services required to produce the final product (catalog/brochure).

[Company] sells the final product to Retail while the product is still located at the Printer. Retail is responsible for the costs of distributing the final product to its retail locations and customers throughout the United States and to Retail's Canadian distribution hub located outside the United States for distribution to Canadian locations.

DISCUSSION

Based on the foregoing facts, Company requests a determination as to whether it has a requirement to register in Indiana as a retail merchant and to collect Indiana sales 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.

As an initial matter, and of relevance to the first and second issue, it is important to discuss Indiana's prior stance on the registration requirements for out-of-state retail merchants operating in Indiana. Prior to 2018, Indiana followed standards as set out by *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 Indiana sales tax. However, the Indiana General Assembly passed an amendment to [IC 6-2.5-2-1](#) in 2017 which requires a seller without a physical presence in Indiana (a "remote seller") to obtain a registered retail merchant's certificate and to collect and remit applicable sales tax, if the seller meets certain economic thresholds. [IC 6-2.5-2-1](#)(c) now provides the following:

(c) A retail merchant that does not have a physical presence in Indiana shall, as an agent for the state, collect the gross retail tax on a retail transaction made in Indiana, remit the gross retail tax as provided in this article, and comply with all applicable procedures and requirements of this article as if the retail merchant has a physical presence in Indiana, if the retail merchant meets either of the following conditions for the calendar year in which the retail transaction is made or for the calendar year preceding the calendar year in which the retail transaction is made:

- (1) The retail merchant's gross revenue from any combination of:
 - (A) the sale of tangible personal property that is delivered into Indiana;
 - (B) a product transferred electronically into Indiana; or
 - (C) a service delivered in Indiana;exceeds one hundred thousand dollars (\$100,000).
- (2) The retail merchant sells any combination of:
 - (A) tangible personal property that is delivered into Indiana;
 - (B) a product transferred electronically into Indiana; or
 - (C) a service delivered in Indiana;in two hundred (200) or more separate transactions.

Although the law was effective July 1, 2017, the department began enforcing this statute effective October 1, 2018. Prior to October 1, the department was enjoined from enforcing [IC 6-2.5-2-1](#)(c), in part because the United States Supreme Court was considering the constitutionality of a nearly identical law in the matter of *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 201 L. Ed. 2d 403 (2018). The opinion was finally issued in June of 2018. The state statute in that case also required sellers without a physical presence in South Dakota (i.e., "remote sellers") to collect sales tax because they met certain thresholds of having an "economic nexus" in the state, despite having no physical presence in the state. The United States Supreme Court upheld 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 is no longer required for sellers to be obligated to collect and remit sales taxes.

Regarding the issue of whether Company is required to register with the department in order to collect sales tax because of the production and sale of catalogs at the Printer, Company asserts that it does not meet the definition of "a retail merchant engaged in business in Indiana" under [IC 6-2.5-3-1](#)(c). This subsection provides that a retail merchant engaged in business in Indiana:

. . . includes any retail merchant who makes retail transactions in which a person acquires personal property or services for use, storage, or consumption in Indiana and who:

- (1) maintains an office, place of distribution, sales location, sample location, warehouse, storage place, or other place of business which is located in Indiana and which the retail merchant maintains, occupies, or uses, either permanently or temporarily, either directly or indirectly, and either by the retail merchant or through a representative, agent, or subsidiary;
- (2) maintains a representative, agent, salesman, canvasser, or solicitor who, while operating in Indiana under the authority of and on behalf of the retail merchant or a subsidiary of the retail merchant, sells, delivers, installs, repairs, assembles, sets up, accepts returns of, bills, invoices, or takes orders for sales of tangible personal property or services to be used, stored, or consumed in Indiana;
- (3) is otherwise required to register as a retail merchant under [IC 6-2.5-8-1](#); or
- (4) may be required by the state to collect tax under this article to the extent allowed under the Constitution of the United States and federal law.

Company also cites to [IC 6-2.5-3-1\(e\)](#), which provides the following:

- (e) Notwithstanding any other provision of this section, tangible or intangible property that is:
 - (1) owned or leased by a person that has contracted with a commercial printer for printing; and
 - (2) located at the premises of the commercial printer;
- shall not be considered to be, or to create, an office, a place of distribution, a sales location, a sample location, a warehouse, a storage place, or other place of business maintained, occupied, or used in any way by the person. A commercial printer with which a person has contracted for printing shall not be considered to be in any way a representative, an agent, a salesman, a canvasser, or a solicitor for the person.

Company concludes that under [IC 6-2.5-3-1\(e\)](#), it would not be considered a "retail merchant engaged in business in Indiana" solely by the presence of tangible personal property owned by the Company at the location of Printer in Indiana. Based upon [IC 6-2.5-3-1\(e\)](#), Company also concludes that it does not appear that Company would be required to register for Indiana sales and use tax, assuming no activity by Company other than the presence of tangible personal property at the Printer.

Chapter 3 of Title 6, Article 2.5 of the Indiana Code pertains to "use tax." [IC 6-2.5-3-1](#) expressly states that the definitions found within that statute are for the purpose of [IC 6-2.5-3](#) only, and do not apply to the remainder of Title 6, Article 2.5 of the Indiana Code. While it is correct to say that Company would not be considered a "retail merchant engaged in business in Indiana" for purposes of [IC 6-2.5-3-1](#), this conclusion is limited to Company's requirement to register with the department and collect use tax. Because Indiana now imposes 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 or whether a retail merchant is a "retail merchant engaged in business in Indiana" for purposes of the use tax, it still must be determined whether Company would meet either of the thresholds in [IC 6-2.5-2-1\(c\)](#) so that Company would be required to collect Indiana sales tax.

With regard to the first and third issues, it has already been discussed that the department is currently enforcing the provisions of [IC 6-2.5-2-1\(c\)](#) now that the United States Supreme Court has rendered its decision in the *Wayfair* matter. Prior to this decision, the provisions of [IC 6-2.5-3-1](#) allowed Indiana to enforce a use tax collection responsibility on remote sellers if they met certain physical presence standards in the time between the *Bella Hess/Quill* decisions and the *Wayfair* decision. Now that the economic nexus provisions of [IC 6-2.5-2-1\(c\)](#) may be deemed to have been affirmed by the United States Supreme Court in *Wayfair*, the department is permitted to require a sales tax collection responsibility from remote sellers, even if they do not have a physical presence, as long as the remote sellers meet either or both of the economic thresholds in [IC 6-2.5-2-1\(c\)](#).

Company states that it sells in excess of \$100,000 in catalogs to Retail. Company has engaged the Printer to manufacture the catalogs, but Company sells the catalogs to Retail prior to the catalogs being mailed. The catalogs are in Indiana with Printer at the time of the sale, but the catalogs are not received by Retail, as Retail never takes possession of the catalogs. Instead, they are shipped by Retail from Printer to customers throughout the United States and to Retail's distribution hub in Canada. Under these facts, Company asserts that title to the catalogs passes to Retail while at the printer in Indiana.

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 the fact that title transfers between Company and Retail while the catalogs are in Indiana would indicate that this is an Indiana transaction. Further, as far as where the transaction should be sourced for purposes of imposing Indiana's sales tax, [IC 6-2.5-13-3](#) provides the sourcing rules for "advertising and promotional direct mail." This term is defined in [IC 6-2.5-1-10.7](#) as follows:

"Advertising and promotional direct mail" means printed material that is direct mail, the primary purpose of which is to attract public attention to a product, person, business, or organization, or to attempt to sell, popularize, or secure financial support for a product, person, business, or organization. As used in this section, "product" means tangible personal property, a product transferred electronically, or a service.

"Direct mail" is defined in [IC 6-2.5-1-16.5](#) as follows:

(a) "Direct mail" means printed material delivered by United States mail or another delivery service to:

- (1) a mass audience; or
- (2) addresses on a mailing list:
 - (A) provided by a purchaser; or
 - (B) specified at the direction of a purchaser;

if the cost of the item is not billed directly to the recipient.

(b) The term includes tangible personal property that the purchaser supplies directly or indirectly to the direct mail seller for inclusion in the package containing the printed material.

(c) The term does not include multiple items of printed material delivered to a single address.

Catalogs and brochures produced by Printer for Company would be considered advertising and promotional direct mail because: the catalogs and brochures are printed material delivered to a mass audience without being billed to those recipients; Company supplying tangible personal property to the Printer is still a qualifying factor within the definition of "direct mail;" and the catalogs and brochures are intended to attract the public to products that Retail sells. Turning back to the sourcing rules for "advertising and promotional direct mail," [IC 6-2.5-13-3](#) provides in pertinent part the following:

(a) Notwithstanding section 1 of this chapter, a purchaser of advertising and promotional direct mail that is not a holder of a direct pay permit may provide to the seller in conjunction with the purchase:

- (1) a direct mail form;
- (2) a certificate of exemption claiming "direct mail" (or another written statement approved, authorized, or accepted by the department); or
- (3) information to show the jurisdictions to which the advertising and promotional direct mail is delivered to recipients.

(b) If the purchaser provides the direct mail form referred to in subsection (a)(1), or a certificate or statement referred to in subsection (a)(2), in the absence of bad faith, the seller is relieved of all obligations to collect, pay, or remit the applicable tax on any transaction involving advertising and promotional direct mail to which the direct mail form, certificate, or statement applies. The purchaser shall source the sale to the jurisdictions to which the advertising and promotional direct mail is to be delivered to the recipients and is obligated to pay or remit the applicable tax on a direct pay basis.

(c) If the purchaser provides the information referred to in subsection (a)(3) showing the jurisdictions to which the advertising and promotional direct mail is delivered to recipients, the seller shall source the sale to the jurisdictions to which the advertising and promotional direct mail is to be delivered and collect the tax according to the delivery information provided by the purchaser. In the absence of bad faith, the seller is relieved of any further obligation to collect tax on any transaction where the seller has sourced the sale and collected tax under the delivery information provided by the purchaser.

(d) If the purchaser of advertising and promotional direct mail does not have a direct pay permit and does not provide the seller with either a direct mail form referred to in subsection (a)(1), a certificate or statement referred to in subsection (a)(2), or delivery information referred to in subsection (a)(3), the sale shall be sourced and the seller shall collect the tax according to section 1(d)(5) of this chapter. Nothing in this subsection limits a purchaser's obligation for sales or use tax to any state to which the advertising and promotional direct mail is delivered. The state to which the advertising and promotional direct mail is delivered may disallow a credit for tax paid to this state on sales sourced under this subsection.

(Emphasis added).

Company makes no mention of Retail using a direct pay permit (and it should be noted that only a registered retail merchant may be issued a direct pay permit by the department) or any of the other methods listed in subsection (a) in its transactions with Retail. As such, pursuant to subsection (d) immediately above, [IC 6-2.5-13-1\(d\)\(5\)](#) would apply, which provides in pertinent part the following:

(d) The retail sale, excluding lease or rental, of a product shall be sourced as follows:

- ...
- (5) . . . the location will be determined by the address from which tangible personal property was shipped, from which the digital good or the computer software delivered electronically was first available for transmission by the seller, or from which the service was provided (disregarding for these purposes any location that merely provided the digital transfer of the product sold).

Under the facts presented by Company, the Printer is still in possession of the catalogs when title to the catalogs has passed to Retail, who will arrange for the Printer or a common carrier to ship the catalogs from the location of

the Printer to locations inside and outside Indiana. Therefore, under [IC 6-2.5-13-1\(d\)\(5\)](#), because the catalogs are shipped from the Printer, the sale of the catalogs from Company to Retail are sourced to Indiana.

Although Company has not mentioned Retail using a direct pay permit or any of the other methods listed in [IC 6-2.5-13-3\(a\)](#) (a direct mail form; an exemption certificate claiming "direct mail"; or information that shows the jurisdictions to which the advertising and promotional direct mail is delivered to recipients) in its transactions with Retail, if Retail were to use any of those methods, the sourcing of tax would be different. Pursuant to [IC 6-2.5-13-3\(b\)](#), if Retail provides a direct mail form or an exemption certificate claiming "direct mail," Retail would source the sale to the jurisdictions to which the advertising and promotional direct mail is to be delivered to the recipients. Retail would then be required to remit to the department any applicable Indiana sales tax on the advertising and promotional direct mail delivered to Indiana recipients. This procedure would also be applicable if a direct pay permit were provided. On the other hand, if Retail provides information to show the jurisdictions to which the advertising and promotional direct mail is delivered to recipients, then pursuant to [IC 6-2.5-13-3\(c\)](#), Company would source the sale to the jurisdictions to which the advertising and promotional direct mail is to be delivered and collect sales tax according to the delivery information provided by Retail.

Even though the amount of tax owed Indiana would be reduced if these procedures were to be followed, the transaction between Company and Retail would still be considered an Indiana transaction. As [IC 6-2.5-13-1\(b\)\(2\)](#) provides, the statute "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." That a sale is sourced to Indiana pursuant to [IC 6-2.5-13-1](#) or 3 does not necessarily mean that the actual transaction occurred in Indiana. If a merchant in another state with the same sourcing rules as Indiana sells tangible personal property to an Indiana resident and the tangible personal property will be delivered to Indiana, the tax would not be sourced to that state (as [IC 6-2.5-13-1\(d\)\(2\)](#) would similarly provide). This does not mean that the transaction actually occurred in Indiana, only that the tax is not owed to that other state. Particularly with [IC 6-2.5-13-3](#), the purpose of the statute is to allow sales of advertising and promotional direct mail to be apportioned between various states where the mail is delivered. It would not be possible for a single transaction to occur in each state where advertising and promotional direct mail was delivered. Instead, it would be correct to say that the transaction occurred in Indiana pursuant to [IC 6-2.5-4-1](#), but the taxes owed would be sourced to various states pursuant to [IC 6-2.5-13-3](#).

Therefore, regardless of whether the documentation is provided by Retail pursuant to [IC 6-2.5-13-3\(a\)](#), the transaction remains an Indiana transaction, and because the amount of the gross revenue Company receives in transactions with Retail exceeds \$100,000, Company would be required to register with the department and collect sales tax, either on the entire amount if Retail provides no documentation, or on the amount that represents catalogs delivered to Indiana recipients if documentation is provided.

Finally, regarding the fourth issue, Company states that it could contract with the Printer for both the production and mailing of the catalogs. Company would then invoice Retail for the catalogs and costs of mailing after the catalogs have been mailed. [IC 6-2.5-5-17\(a\)\(2\)](#) provides an exemption from Indiana sales tax for transactions involving commercial printing that results in printed materials that are shipped, mailed, or delivered outside Indiana. As long as Company provides an exemption certificate, direct pay permit, or some other information showing where the catalogs are to be delivered, Printer would exempt the sales tax on the catalogs shipped to addresses outside Indiana. The remaining catalogs sold to Company would then be exempt from sales tax as a "sale for resale" under [IC 6-2.5-5-8](#). As to the transaction between Company and Retail, depending on the information Retail provides, either Company or Retail would then be responsible for remitting any sales or use tax on the catalogs shipped to its customers in Indiana.

RULINGS

In consideration of the facts as presented to the department, Company is required to register with the Indiana Department of Revenue as an Indiana Retail Merchant for gross retail tax and use tax pursuant to [IC 6-2.5-1-2\(c\)](#), as it has over \$100,000 in sales. Depending on the information provided by Retail, either Company would be responsible for collecting sales tax on the transaction (Indiana sales tax on the entire transaction, or the portion delivered to Indiana recipients), or Retail would be responsible for remitting use tax only on the portion that represents gross retail income from catalogs that will be shipped to Indiana customers. If, however, Company pays Printer to print and ship the catalogs, the transaction between Company and Printer will be completely exempt pursuant to [IC 6-2.5-5-17\(a\)\(2\)](#) and [IC 6-2.5-5-8](#), and, depending on the information Retail provides, either Company or Retail would be responsible for remitting tax on the catalogs shipped to Retail's customers in Indiana.

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.

Posted: 02/26/2020 by Legislative Services Agency
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