DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 05-0172
Sales and Use Tax
For the Years 2001-2003

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ISSUE

I. Sales and Use Tax-Imposition

Authority: IC 6-8.1-5-1(b), IC 6-2.5-2-1(a), IC 6-2.5-1-2, IC 6-2.5-4-1.

The taxpayer protests the imposition of sales tax.

II. Tax Administration- Ten Percent (10%) Negligence Penalty

Authority: IC 6-8.1-10-2.1, 45 IAC 15-11-2(b), 45 IAC 15-11-2(c).

The taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

The taxpayer sells personal property from its facility, through vending machines and from other locations. After an audit, the Indiana Department of Revenue (hereinafter referred to as the "department") assessed additional sales and use tax, interest and penalty. The taxpayer protested the imposition of sales tax and penalty. A hearing was scheduled for January 12, 2006. The taxpayer failed to appear for the hearing. Therefore, this Letter of Findings is based on the documentation in the file.

I. Sales and Use Tax-Imposition

DISCUSSION

The taxpayer sells personal property through vending machines and commissaries in county jails. Prior to April, 2001, the taxpayer provided lists of what was available in the commissary to the detainees who filled out order sheets. The taxpayer sorted the items and packed them in individual bags for each detainee. The bags were delivered to the Sheriffs who delivered them to the detainees. The taxpayer billed the sheriff on a monthly basis for the personal items ordered by the detainees. The county jail then issued a check to the taxpayer from the jail's commissary fund to pay the

invoice. Essentially, the taxpayer sold the goods to the sheriff who then resold the goods to the detainees. Those sales were not subject to the Indiana sales tax.

In April 2001 the taxpayer began the changeover to a new debit card system. First, the taxpayer changed to the new debit card system for the vending machines. Then, in December 2002 it changed to the debit card system for the commissary. With this debit card system, the taxpayer sells debit cards to the detainees and their families. The debit cards are identified and coded for specific detainees. The sheriff stores the debit cards at all times except when the detainee is actually using the card. The detainees or their families apply money to the debit cards. The detainees use these cards to purchase items from the taxpayer's vending machines or the commissary. The taxpayer is required to maintain trust account records for each detainee and account for all vending machine and commissary charges made by each detainee. The audit assessed sales tax on the sales made after the changes to the debit card system. The taxpayer protested this assessment.

All tax assessments are presumed to be accurate. The taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1(b).

I.C. 6-2.5-2-1(a) imposes sales tax on retail transactions made in Indiana. A retail transaction is one that constitutes selling at retail. IC 6-2.5-1-2. "Selling at retail" is defined at IC 6-2.5-4-1 in pertinent part as follows:

> (b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:
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> (1) acquires tangible personal property for the purpose of resale: and
> (2) transfers that property to another person for consideration.

As part of its regular course of business, the taxpayer acquires goods for resale and delivers ownership of those goods to the detainees in exchange for money. Under the debit card system, the detainees pay the taxpayer directly for the goods they purchase. The detainees purchase the goods from the taxpayer. These transactions constitute retail sales subject to the Indiana sales tax.

FINDING

The taxpayer's protest is denied.

II. Tax Administration- Ten Percent Negligence Penalty

DISCUSSION

The taxpayer protests the imposition of the ten percent negligence penalty pursuant to IC 6-8.1-10-2.1. 45 IAC 15-11-2(b) clarifies the standard for the imposition of the negligence penalty as follows:

> Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at 45 IAC 15-11-2(c) as follows:

> The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. 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 under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:
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> (1) the nature of the tax involved;
> (2) judicial precedents set by Indiana courts;
> (3) judicial precedents established in jurisdictions outside Indiana;
> (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc;
> (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.
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> Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

The taxpayer provided substantial documentation to indicate that its failure to pay the assessed use tax was due to reasonable cause rather than negligence.

FINDING

The taxpayer's protest to the imposition of penalty is sustained.

KMA/DK/06/17/01