

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS: 09-0822P
Sales and Use Tax
For the Year 2006

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 It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register.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 the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales & Use Tax – Unitary Transaction.

Authority: IC § 6-2.5-1-1 et seq.; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-8.1-5-1; 45 IAC 2.2-1-1; 45 IAC 2.2-4-1; *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the assessment of tax on purchases of tangible personal property.

II. Tax Administration – Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2.

Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer, an Indiana corporation, specializes in contract product design, development, and manufacture of minimally invasive surgical products, hand-held devices, and catheter-based technologies. Pursuant to an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer failed to pay sales tax or to self-assess and remit use tax to the Department on its purchases of tangible personal property. The Department's audit assessed use tax, interest, and penalty. Taxpayer protested the assessments.

Taxpayer was afforded an additional twenty (20) days to request an administrative hearing or submit more documentation to support its protest. Taxpayer did not request a hearing nor did it provide additional information. Thus, this Letter of Findings was written based on the information within Taxpayer's protest file. Additional facts will be provided as necessary.

I. Sales & Use Tax – Unitary Transaction.

DISCUSSION

The Department's audit, referring to 45 IAC 2.2-1-1, determined that Taxpayer's purchase of a "CCTV/Access/Security" for a building was a unitary transaction and, thus, the charge was subject to sales and/or use tax. Since Taxpayer did not pay sales tax at the time of its purchase, nor did Taxpayer remit to the Department the use tax due, the Department's audit assessed Taxpayer use tax as a result.

Taxpayer asserted that, after the audit, it obtained a break-down on the charges of materials and labor from its vendor concerning the purchase of the "CCTV/Access/Security." Therefore, Taxpayer maintained that only the purchase of the materials was subject to sales/use tax.

As a threshold issue, all tax assessments are *prima facie* evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes a sales tax on retail transactions and a complementary use tax on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-1-1 *et seq.*

IC § 6-2.5-2-1 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.

IC § 6-2.5-3-2(a) provides:

An excise tax, known as the use tax, is imposed 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.

An exemption from use tax is granted for transactions where the gross retail tax ("sales tax") was paid at the time of purchase pursuant to IC § 6-2.5-3-4.

45 IAC 2.2-1-1(a) defines "unitary transaction," as follows:

For purposes of the state gross retail tax and use tax, such taxes shall apply and be computed in respect to each retail unitary transaction. A unitary transaction shall include all items of property and/or services for which a total combined charge or

selling price is computed for payment irrespective of the fact that services which would not otherwise be taxable are included in the charge or selling price.

Taxpayer asserted that the vendor had provided a break-down of the charges for labor and materials. Taxpayer claimed that labor was not subject to sales and/or use tax because it was a service. To support its protest, Taxpayer submitted a copy of an excerpt from an e-mail stating that “[t]he labor for this project was \$12,464.00 and material was \$49,389.00.” In the absence of other reliable documentation to substantiate its claim, however, the Department is not able to agree with Taxpayer that it has met its burden demonstrating that the Department’s proposed assessment is not correct.

Even if, for the purpose of argument, Taxpayer purchased the “CCTV/Access/Security,” which included labor and materials, and the vendor listed the charges separately, the transaction was still subject to sales and/or use tax pursuant to 45 IAC 2.2-4-1. 45 IAC 2.2-4-1 explains:

(a) Where ownership of tangible personal property is transferred for a consideration, it will be considered a transaction of a retail merchant constituting selling at retail unless the seller is not acting as a “retail merchant”.

(b) All elements of consideration are included in gross retail income subject to tax. Elements of consideration include, but are not limited to:

(1) The price arrived at between purchaser and seller.

(2) Any additional bona fide charges added to or included in such price for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other services performed in respect to or labor charges for work done with respect to such property prior to transfer.

(3) No deduction from gross receipts is permitted for services performed or work done on behalf of the seller prior to transfer of such property at retail.

In this instance, the labor charge for work done with respect to the CCTV and accessories was prior to transfer of the property and, therefore, was subject to sales and/or use tax pursuant to 45 IAC 2.2-4-1.

Given the totality of the circumstances, for the reasons stated above, the Department is not able to agree that Taxpayer has met its burden demonstrating that the proposed assessment is not correct. Since Taxpayer did not pay sales tax at the time of the purchase, use tax is properly imposed.

FINDING

Taxpayer’s protest is respectfully denied.

II. Tax Administration – Negligence Penalty.

DISCUSSION

Taxpayer also protests the imposition of the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1, the Department may assess a ten (10) percent negligence penalty if the taxpayer:

- (1) fails to file a tax return;
- (2) fails to pay the full amount of tax shown on the tax return;
- (3) fails to remit in a timely manner the tax held in trust for Indiana (e.g., a sales tax); or
- (4) fails to pay a tax deficiency determined by the Department to be owed by a taxpayer.

45 IAC 15-11-2(b) further states:

“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 Department may waive a negligence penalty as provided in 45 IAC 15-11-2(c), in part, 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:

- (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.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer has provided sufficient documentation establishing that its failure to pay tax was due to reasonable cause and not due to negligence.

FINDING

Taxpayer's protest on the imposition of the negligence penalty is sustained.

SUMMARY

For the reasons discussed above, Taxpayer's protest on the purchase of "CCTV/Access/Security" is respectfully denied. Taxpayer's protest on the imposition of the negligence penalty is sustained.