DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 99-0292
Use Tax
For Years 1994 - 1996

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ISSUE

I. Use Tax – Liability of taxpayer for use tax on purchases of advertising services.

Authority: Ind. Code § 6-2.5-1-1;
Ind. Admin. Code tit. 45, r. 2.2-1-1;
Ind. Admin. Code tit. 45, r. 2.2-4-2.

The taxpayer protests the assessment of use tax on purchases of advertising services.

STATEMENT OF FACTS

The taxpayer is an Indiana company and its principal business is the retail sale and installation of floor coverings. The retail business was sold during the audit period and no retail transactions were made after October 1, 1996. A sales and use tax audit for the period 1994 through 1996 was completed on July 18, 1997.

I. Use Tax – Liability of taxpayer for use tax on purchases of advertising services.

DISCUSSION

The taxpayer was assessed use tax on the full amount paid for advertising materials and services performed by an out-of-state advertising agency. The agency was paid to create, print, and mail promotional materials to prospective customers in Indiana. No sales tax was charged by the agency for either materials or services. The taxpayer concedes that use tax is due on the materials that were purchased, but argues that it should not be assessed use tax on the services performed by the advertising agency. The taxpayer cites Ind. Admin. Code tit. 45, r. 2.2-4-2, which states that, generally, professional services are

not subject to the gross retail tax but when tangible personal property is transferred along with the services, it is selling at retail and subject to the tax unless four conditions are met:

> (1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property;
> (2) The tangible personal property purchased is used or consumed as a necessary incident to the service;
> (3) The price charged for tangible personal property is inconsequential (not to exceed 10%) compared with the service charge; and
> (4) The serviceman pays gross retail tax or use tax upon the tangible personal property at the time of acquisition.

Ind. Admin. Code tit. 45, r. 2.2-4-2(a).

This regulation does not, however, apply to the present circumstances. With the work it did for the taxpayer, the advertising agency was not primarily furnishing and selling services. The advertising agency produced tangible personal property, in the form of promotional materials, and sold those materials to the taxpayer.

Of the thirty-one advertising agency invoices submitted by the taxpayer, two of them show separate charges for postage, a service. Those are invoices #21082 and #21084, both dated July 26, 1994. The remaining invoices indicate that charges for property and services were combined. The taxpayer has submitted worksheets where the charges for the materials and the charges for services provided are separated. The worksheets, however, were completed by the taxpayer after receiving the invoices from the advertising agency and do not affect the nature of the transaction.

"'[U]nitary transaction' includes all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated." Ind. Code § 6-2.5-1-1(a).

> 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.

Ind. Admin. Code tit. 45, r. 2.2-1-1(a).

The advertising agency invoices clearly show that the taxpayer's purchases were unitary transactions, and, thus, the entire charge on the invoices is subject to use tax. The amounts charged for postage on invoices #21082 and #21084 were not assessed use tax in

the audit since those were separately stated charges for services. The remaining amount charged on each of those invoices is subject to use tax.

FINDING

The taxpayer's protest is denied.

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