

Letter of Findings Number: 05-0238
Sales/Use Tax
For Tax Years 2001 and 2003

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I. Tax Imposition—Burden of Proof

Authority: [IC 6-8.1-5-1\(b\)](#); [45 IAC 15-5-3\(b\)](#); [IC 6-2.5-2-1](#); [IC 6-2.5-4-1](#); [IC 6-8.1-9-2](#)

Taxpayer protests the imposition of sales/use taxes.

II. Tax Administration—Negligence Penalty and Interest

Authority: [IC 6-8.1-10-1](#); [45 IAC 15-11-2](#)

Taxpayer protests the imposition of a ten percent negligence penalty and interest.

STATEMENT OF FACTS

Taxpayer rents various gaming equipment (video games, pool tables, etc.) to Company X. The Department conducted an investigation of the taxpayer, and as a result of that investigation the taxpayer was billed for proposed sales/use tax assessments. The taxpayer has protested those proposed assessments. Additionally, it should be noted that due to taxpayer's initial Tax Amnesty installment payment, the taxpayer is precluded by the Tax Amnesty regulation (28 Indiana Register 3585) from protesting the following years: 1998, 1999, 2000, and 2002. More facts will be provided as needed below.

I. Tax Imposition—Burden of Proof

DISCUSSION

Before examining the taxpayer's protest, it should be noted that the *taxpayer* bears the burden of proof. [IC 6-8.1-5-1\(b\)](#) states in pertinent part:

The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.

The Indiana Administrative Code also states "[t]he burden of proving that a proposed assessment is incorrect rests with the taxpayer. . . ." [45 IAC 15-5-3\(b\)](#).

The investigation report notes:

[Taxpayer] was receiving rents for video arcade games, juke boxes, pool tables, and other gaming equipment leased to [Company X] and he was not registered to do so.

The report also states, "No sales tax was collected or remitted on the rental of the aforementioned equipment."

The taxpayer describes the protest as follows:

Taxpayer owns real and personal property that [taxpayer and his wife] lease to [Company X], a corporation owned by Taxpayer. Taxpayer did not register as a retail merchant in their capacity as lessors, but Taxpayer paid sales tax at the time of acquiring the personal property that Taxpayer leased to [Company X].

And further:

The Department rejected Taxpayer's lease with [Company X] as a basis for reducing the assessment, instead the Department assessed sales tax on the entire lease payment from [Company X], without any allowance for the real property that Taxpayer leased to [Company X]. Additionally, the Department did not give credit for tax paid by Taxpayer on the purchase of the amusement equipment that Taxpayer leased to [Company X].

Thus the taxpayer summarizes the protest as being about two issues:

1. Sales or use tax assessed on real property lease.
2. Credit for sales tax paid on items purchased for resale.

Regarding the real property, the taxpayer states:

Indiana sales and use taxes apply to retail transactions under [IC 6-2.5-2-1](#). Indiana law defines a retail transaction as transfers of tangible personal property at [IC 6-2.5-4-1](#). Taxpayer has obtained an appraisal from a local realtor as to what price Taxpayer could charge on the lease of its building and parking lot to a third party. Taxpayer believes that the Department should reduce the assessment of tax on the lease by reducing the lease amount subject to tax by \$1,200 per month.

[IC 6-2.5-4-1](#) states in pertinent part (*Emphasis added*):

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

The taxpayer is arguing that the leasing between the taxpayer and Company X contained both taxable tangible personal property (See [IC 6-2.5-4-1](#)) and nontaxable real property, and that an "allowance for the real property" should be made. As noted at the outset of this Letter of Finding, the burden of proving the assessment wrong rests with the taxpayer, as provided in [IC 6-8.1-5-1\(b\)](#). Taxpayer has not met this burden regarding the issue of "real property," and instead asks the Department, *ex post facto*, to impute a real property lease agreement and dollar amount (recall that the taxpayer stated, "Taxpayer has obtained an appraisal from a local realtor as to what price Taxpayer could charge on the lease of its building and parking lot to a third party").

Turning to the credit for sales tax paid on items purchased for resale, the taxpayer states:

Taxpayer paid sales tax at the time of acquisition for some of the personal property Taxpayer leased to [Company X]. Taxpayer has included copies of invoices showing sales tax paid totaling \$8,063 on amusement equipment that Taxpayer leases to [Company X]. Under [IC 6-8.1-9-2](#), the Department must credit any overpayments of tax made by the Taxpayer, regardless of whether those payments are eligible for refund.

[IC 6-8.1-9-2\(a\)](#) states:

(a) If the department finds that a person has paid more tax for a taxable year than is legally due, the department shall apply the amount of the excess against any amount of that same tax that is assessed and is currently due. The department may then apply any remaining excess against any of the listed taxes that have been assessed against the person and that are currently due. If any excess remains after the department has applied the overpayment against the person's tax liabilities, the department shall either refund the amount to the person or, at the person's request, credit the amount to the person's future tax liabilities.

The taxpayer is sustained on the credit for the sales tax paid for the years 2001 and 2003, subject to the Department's verification of the provided documentation.

FINDING

The taxpayer's protest regarding the real property is denied; the taxpayer is sustained on the credit for the sales tax paid for the years 2001 and 2003, subject to the Department's verification of the provided documentation.

II. Tax Administration—Negligence Penalty and Interest

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty and interest for the tax years in question. With regard to interest, the Department refers to [IC 6-8.1-10-1](#), which states in relevant part (*Emphasis added*):

(a) If a person fails to file a return for any of the listed taxes, fails to pay the full amount of tax shown on his return by the due date for the return or the payment, or incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment.

...
(e) Except as provided by [IC 6-8.1-3-17\(c\)](#) and [IC 6-8.1-5-2](#), the department *may not* waive the interest imposed under this section.

With regard to the penalty, the Department refers to [45 IAC 15-11-2\(b\)](#), which 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.

[45 IAC 15-11-2\(c\)](#) provides in pertinent part:

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.

Taxpayer has not affirmatively established that its failure to pay the deficiency was due to reasonable cause and not due to negligence, as required by [45 IAC 15-11-2\(c\)](#).

FINDING

Taxpayer's protest is denied.

Posted: 08/30/2006 by Legislative Services Agency
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