

**Letter of Findings Number 05-0433
Use Tax Audit Deficiencies for the
Reporting Periods Covering
Calendar Years 2002-04**

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ISSUE

**I. Use Tax—Credits—Credit for Gross Retail (Sales) or Use Tax Paid to Another United States Jurisdiction
Tax Procedure—Protests—Burden of Proof**

Authority: [IC 6-2.5-3-5\(a\)](#) (1998); [IC 6-2.5-3-5](#), 6-8.1-5-1(a) (2004); *State v. Huffman*, 643 N.E.2d 899, 900 (Ind. 1994); *Peabody Coal Co. v. Ralston*, 578 N.E.2d 751, 754 (Ind. Ct. App. 1991); *Porter Mem'l Hosp. v. Malak*, 484 N.E.2d 54, 58 (Ind. Ct. App. 1985); *Galligan v. Ind. Dep't of State Rev.*, 825 N.E.2d 467, 478-80 (Ind. Tax Ct.), review denied 841 N.E.2d 180 (Ind. 2005)(table); *Canal Sq. Ltd. P'ship v. State Bd. of Tax Comm'rs*, 694 N.E.2d 801, 804 (Ind. Tax Ct. 1998); *Longmire v. Ind. Dep't of State Rev.*, 638 N.E.2d 894, 898 (Ind. Tax Ct. 1994); *Bullock v. Foley Bros. Dry Goods Corp.*, 802 S.W.2d 835, 839 (Tex. App. 1990); [45 IAC 2.2-3-16](#) (2001)(2004); Black's Law Dictionary 190 (7th ed. 1999) ("burden of proof")

The taxpayer argues that it is entitled to credit against the proposed assessments for gross retail (sales) and use taxes paid to another jurisdiction.

STATEMENT OF FACTS

The taxpayer is a bank and trust company chartered and with its commercial domicile in another state, but which during the years in issue had authority from the Indiana Secretary of State to do business here as a foreign corporation. During that time the taxpayer had several Indiana branches.

The Department audited the taxpayer's use tax liabilities for calendar years 2002-04 (hereinafter "the audit period") for those branches. The field auditor adjusted those liabilities, and the Audit Division issued notices of proposed assessment that included, transactions on which the field auditor noted in the audit Summary that the taxpayer had paid sales or use tax to the state of its legal and commercial domicile. Additional facts will be provided as needed.

**I. Use Tax—Credits—Credit for Gross Retail (Sales) or Use Tax Paid to Another United States Jurisdiction
Tax Procedure—Protests—Burden of Proof**

DISCUSSION

A. Taxpayer's Argument

The taxpayer argues that it is entitled to credits against the proposed assessments in the amount of the sales and use taxes it paid to its home state. In support of its argument the taxpayer cites [IC 6-2.5-3-5\(a\)](#) (1998) (current version at [IC 6-2.5-3-5](#) (2004)) as interpreted in *Galligan v. Indiana Department of State Revenue*, 825 N.E.2d 467, 478-80 (Ind. Tax Ct.), review denied 841 N.E.2d 180 (Ind. 2005)(table). In its protest letter the taxpayer states it has reviewed the invoices that were audited and states the total amount of credits to which it believes itself to be entitled. However, the taxpayer has not provided the Department with any documentation to substantiate that figure. Additional facts will be provided as needed.

B. Analysis

The inclusion in the notices of proposed assessments of use tax on the transactions on which the auditor noted the taxpayer had already paid sales or use tax to its state of legal and commercial domicile was erroneous. [IC 6-2.5-3-5\(a\)](#) (1998) and [IC 6-2.5-3-5](#) (2004), governing calendar years 2002-03 and 2004, respectively, both explicitly grant a credit against Indiana's use tax in the amount of any sales, purchase or use tax paid to another United States jurisdiction. The implementing regulation, [45 IAC 2.2-3-16](#) (2001)(2004), which remained unchanged throughout the audit period, is to the same effect. *Galligan* held in relevant part that the fact that the taxpayer has the items purchased in the taxing jurisdiction shipped into Indiana, rather than bringing them in itself, does not deprive the taxpayer of entitlement to the credit. The credit is applicable either way. 825 N.E.2d at 478-80. The present taxpayer is therefore entitled to credit under [IC 6-2.5-3-5\(a\)](#) (1998), [IC 6-2.5-3-5](#) (2004) and [45 IAC 2.2-3-16](#) (2001)(2004) in the amount of the sales or use tax paid to its home state on the transactions the auditor included in the Summary and on which he noted that the taxpayer had paid such tax.

However, it does not follow that the taxpayer is entitled to credit for the full amount it requested in its protest letter. By statute, a taxpayer has the burden of proof in a protest. [IC 6-8.1-5-1\(a\)](#) states that "[t]he burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Id.* See also Black's Law Dictionary 190 (7th ed. 1999) (defining "burden of proof" as a "party's duty to prove a disputed assertion or charge"). The burden of proof is two-fold, consisting of both the burden of persuasion and the burden of production. *Porter Mem'l Hosp. v. Malak*, 484 N.E.2d 54, 58 (Ind. Ct. App. 1985)

(noting that "burden of proof" is not a precise term, as it can mean both the burdens of persuasion and production).

The terms "burden of production" and "burden of persuasion" have two distinct meanings. See *State v. Huffman*, 643 N.E.2d 899, 900 (Ind. 1994) (stating that there are "two senses" of the term "burden of proof," the burdens of persuasion and production). The burden of persuasion is the taxpayer's "duty to convince the fact-finder to view the facts in a way that favors that party." Black's Law Dictionary 190 (7th ed. 1999) (defining "burden of proof"). The same definition indicates that the term "burden of persuasion" is "loosely termed *burden of proof*." *Id.* (emphasis in original). Some cases have referenced this dual meaning. See, e.g., *Peabody Coal Co. v. Ralston*, 578 N.E.2d 751, 754 (Ind. Ct. App. 1991) (observing that in criminal cases, the "State carries the ultimate burden of proof, or burden of persuasion").

In contrast to the burden of persuasion component of the burden of proof, the burden of production also referred to as the burden of going forward, is the taxpayer's "duty to introduce enough evidence on an issue to have the issue decided by the fact-finder." *Id.* In other words, a taxpayer must submit evidence sufficient to establish a prima facie case, i.e., evidence sufficient to establish a given fact and which if not contradicted will remain sufficient to establish that fact. See *Longmire v. Ind. Dep't of State Rev.*, 638 N.E.2d 894, 898 (Ind. Tax Ct. 1994); *Canal Sq. Ltd. P'ship v. State Bd. of Tax Comm'rs*, 694 N.E.2d 801, 804 (Ind. Tax Ct. 1998). Cf. *Bullock v. Foley Bros. Dry Goods Corp.*, 802 S.W.2d 835, 839 (Tex. App. 1990) (observing, in challenge to state's sales and use tax audit, that comptroller's deficiency determination is prima facie correct and that taxpayer must disprove it with documentation).

The present taxpayer has sustained its burden of persuasion, but not its burden of production. As noted above under Subpart A, the taxpayer has not provided the Department with any documentation to substantiate the proposed sum of the credits to which it believes itself to be entitled. Given this absence of evidence, the Department can only give credit for the sales or use taxes paid to its state of legal and commercial domicile on the transactions in the Summary on which the auditor noted the taxpayer made such payments.

FINDING

The taxpayer's protest is sustained in part and denied in part. The protest is sustained, and credit against the proposed assessments is granted, in the amount of the sales or use taxes paid to its home state on the transactions in the Summary on which the auditor noted the taxpayer made such payments. The protest and credit are denied as to any amount of such taxes greater than the Summary documents.

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