DEPARTMENT OF STATE REVENUE

04-20060273.LOF

Letter of Findings: 06-0273
Gross Retail Tax
For 2003 and 2004

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 It shall remain in effect until it is superseded or deleted by the publication of a new document in the Indiana Register.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. Delivery Charges – Gross Retail Tax.

Authority: IC 6-8.1-5-1(b); 45 IAC 2.2-4-3(a).

Taxpayer argues that it was not subject to sales tax on certain delivery charges.

II. Automobile Sales to Out-of-State Customers – Gross Retail Tax.

Authority: 45 IAC 2.2-3-5(c); 45 IAC 15-11-2(b).

Taxpayer argues that it was not required to charge sales tax to out-of-state customers who purchased automobiles.

III. Ten Percent Negligence Penalty.

Authority: IC § 6-8.1-5-1(b); IC § 6-8.1-10-2.1(a)(3); IC § 6-8.1-10-2.1(a)(4); IC § 6-8.1-10-2.1(d); 45 IAC 15-11-2(b); 45 IAC 15-11-2(c); 45 IAC 15-11-2(d).

Taxpayer seeks abatement of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana business which sells automobiles. Taxpayer is an S-Corporation with one shareholder. The Department of Revenue (Department) conducted an audit review of taxpayer's records and assessed taxpayer additional gross retail tax. Taxpayer disagreed with a portion of the assessment and submitted a protest to that effect. Taxpayer's protest was assigned to the Hearing Officer, a hearing was scheduled, notice of the hearing was provided, but taxpayer's representative failed to participate. This Letter of Findings results.

I. Delivery Charges – Gross Retail Tax.

DISCUSSION

Taxpayer sells automobiles and charges its customers for delivery and handling costs. The Department's audit found that taxpayer failed to collect sales tax on certain delivery costs. Taxpayer admits that, "Under Indiana law sales tax needs to be assessed on delivery charges if the delivery is part of the 'retail sale.'" However, taxpayer argues that, "The delivery charges identified by the auditor however do not represent this type of delivery charge." Taxpayer concludes that the delivery charges "need to be removed from the audit findings."

45 IAC 2.2-4-3(a) states that "Separately stated delivery charges are considered part of selling at retail and subject to sales and use tax if the delivery is made by or on behalf of the seller of property not owned by the buyer."

It is taxpayer's responsibility to explain why the proposed assessment is incorrect. IC 6-8.1-5-1(b) states that, "The amount of the 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 person against whom the proposed assessment is made."

Taxpayer explains that the delivery charges cited by the audit report "represent so called 'bird-dog' fees paid to individuals that drive the cars either purchased or sold on a wholesale basis at the local auctions...." From this explanation, it appears that the disputed delivery charges represent the costs taxpayer incurs when it arranges for someone to drive a car from the place the car was acquired to taxpayer's own location. From the audit's explanation, these costs were charged to the ultimate customer as an itemized expense on the final invoice. Taxpayer's explanation is unclear as to why these itemized "bird dog" fees do not fall squarely within 45 IAC 2.2-4-3(a) because – at the time the expense was incurred – the vehicle belonged to the seller of the car.

Taxpayer was the seller of the car, the delivery charges were incurred on behalf of taxpayer, and those charges are subject to sales or use tax pursuant to 45 IAC 2.2-4-3(a). Taxpayer has not met its burden of demonstrating that – as requested – the delivery charges "need to be removed from the audit findings."

FINDING

Taxpayer's protest is respectfully denied.

II. Automobile Sales to Out-of-State Customers – Gross Retail Tax.

DISCUSSION

The audit found that taxpayer failed to charge sales tax on the sale of certain cars. Taxpayer explains that these cars were sold to Illinois customers.

45 IAC 2.2-3-5(c) states that, "If [a] vehicle is purchased from a registered Indiana motor vehicle, the dealer must collect the tax and provide the purchaser a completed form ST-108 showing that the tax has been paid to him; or if the purchasers claims exemption and no tax is collected by the dealer, the certificate at the bottom of the

ST-108 must be completed and signed by the purchaser."

However, taxpayer claims that he had no notice of the requirement but apparently assumed that Illinois residents were not required to pay Indiana sales tax. Taxpayer states that this information "was never mailed to the taxpayer when he applied for either his retail merchant's certificate or dealer's license." Taxpayer asserts that, "He was not knowledgeable of the specifics of the Indiana law and any material he was given by the Indiana Department of Revenue did not explain this part of the law." Taxpayer concludes that the tax attributable to the sales of vehicles to Illinois residents should be abated because taxpayer was unaware of his responsibility to collect the tax and because – presumably – the Department bears a certain degree of fault for failing to individually notify taxpayer of taxpayer's collection responsibility.

The Department is unable to agree that an Indiana taxpayer cannot be held responsible for collecting sales tax on the ground that it was unaware of its requirement to comply with the law. As explained in 45 IAC 15-11-2(b), "Ignorance of the listed tax laws, rules and/or regulations is treated as negligence." The state holds taxpayer to the same requirement that it does any other Indiana individual or business; taxpayer is required to understand its responsibility or to accept the fact that it may incur liability for failure to do so.

FINDING

Taxpayer's protest is respectfully denied.

III. Ten Percent Negligence Penalty.

DISCUSSION

Taxpayer believes that it is entitled to abatement of the ten percent negligence penalty.

IC § 6-8.1-10-2.1(a)(3) requires that a ten percent penalty be imposed if the tax deficiency results from the taxpayer's negligence. IC § 6-8.1-10-2.1(a)(4) requires a ten percent penalty if the taxpayer "fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment."

IC § 6-8.1-10-2.1(d) states that, "If a person subject to the penalty imposed under this section can show that the failure to... pay the full amount of tax shown on the person's return... or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall wave the penalty."

Departmental regulation 45 IAC 15-11-2(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." Id.

IC § 6-8.1-10-2.1(d) allows the Department to waive the penalty upon a showing that the failure to pay the deficiency was based on "reasonable cause and not due to willful neglect." Departmental regulation 45 IAC 15-11-2(c) requires that 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 IC § 6-8.1-5-1(b), "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." An assessment – including the negligence penalty – is presumptively valid.

Pursuant to IC§ 6-8.1-5-1(b), taxpayer has failed to meet its burden of demonstrating that it is entitled to abatement of the penalty. Taxpayer has provided nothing which would establish that it "exercised ordinary business care and prudence..."

FINDING

Taxpayer's protest is respectfully denied.

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