

**Letter of Findings Number: 07-0379
Sales and Use Tax
For the Tax Years 2004-2006**

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ISSUE

I. Sales and Use Tax - Imposition.

Authority: [IC 6-8.1-5-1](#)(c); IC § 6-2.5-2-1(a); IC § 6-2.5-10; IC § 6-2.5-3-2(a); IC § 6-2.5-5-8(b); IC § 6-2.5-6-14.1; [45 IAC 2.2-5-15](#).

The Taxpayer protests the imposition of use tax.

STATEMENT OF FACTS

The Taxpayer is a corporation engaged in construction services. The Taxpayer purchased a crane in 2004 and another crane in 2005. The Taxpayer did not pay sales tax on the purchases of the cranes. The Taxpayer charged its customers for the use of the cranes as a separate line item on its invoices. The Taxpayer collected and remitted sales taxes on these transactions.

The Indiana Department of Revenue (Department) audited the Taxpayer for the tax years 2004-2006. The audit resulted in an assessment of additional use tax, interest, and penalty. The Taxpayer protested the assessment of use tax on cranes. Alternatively, the Taxpayer requested a use tax credit equal to the amount of sales tax the Taxpayer collected from its customers and remitted to the Department on the cranes. A hearing was held and this Letter of Findings results.

I. Sales and Use Tax - Imposition.

DISCUSSION

The Taxpayer purchased cranes without paying sales tax. The Department assessed use tax on these cranes because the Taxpayer used them in its construction business. The Taxpayer protested this assessment. The Taxpayer argued that it had considered the purchase of the cranes exempt from sales tax because the cranes were rented to the Taxpayer's customers and the Taxpayer accordingly collected and remitted sales tax on these rental transactions. Alternatively, the Taxpayer requested a credit against its use tax liability in the amount of the sales tax it collected and remitted on the cranes.

All tax assessments are presumed to be valid. IC § 6-8.1-5-1(b). The Taxpayer bears the burden of proving that any assessment is incorrect. *Id*

IC § 6-2.5-2-1(a) imposes sales tax on retail transactions made in Indiana. IC § 6-2.5-3-2(a) imposes a complementary use tax on the storage, use or consumption of tangible personal property in Indiana, if the property was acquired in a retail transaction as defined for sales tax purposes and sales tax was not paid at the time of purchase. IC § 6-2.5-4-10 defines rental transactions as retail sales for sales and use tax purposes. IC § 6-2.5-5-8(b) provides for an exemption from the sales tax for tangible personal property purchased to be resold in the Taxpayer's ordinary course of business.

[45 IAC 2.2-5-15](#) clarifies the purchase for resale exemption as follows:

- (a) The state gross retail tax shall not apply to sales of any tangible personal property to a purchaser who purchases the same for the purpose of reselling, renting or leasing, in the regular course of the purchaser's business, such tangible personal property in the form in which it is sold to such purchaser.
- (b) General rule. Sales of tangible personal property for resale, rental or leasing are exempt from the tax if all of the following conditions are satisfied:
 - (1) the tangible personal property is sold to a purchaser who purchases this property to resell, rent or lease it;
 - (2) *The purchaser is occupationally engaged in reselling, renting or leasing such property in the regular course of his business;* and
 - (3) The property is resold, rented or leased in the same form in which it was purchased.
- (c) Application of General rule.
 - (1) The tangible personal property must be sold to a purchaser who makes the purchase with the intention of reselling, renting or leasing the property. *This exemption does not apply to purchasers who intend to consume or use the property or add value to the property through the rendering of services or performance of work with respect to the property.*
 - (2) The purchaser must be occupationally engaged in reselling, renting or leasing such property in the regular course of his business. *Occasional sales and sales by servicemen in the course of rendering services shall be conclusive evidence that the purchaser is not occupationally engaged in reselling the purchased property in the regular course of his business.*

The property must be resold, rented or leased in the same form in which it was purchased. (*Emphasis added.*)

The Taxpayer's primary occupation was providing construction services. The Taxpayer used the cranes as tools in the provision of construction services. The Taxpayer's employees operated the cranes. The Taxpayer was not in the business of buying and renting cranes. Since the Taxpayer was not occupationally engaged in the purchase and renting of tangible personal property and the cranes were used in the performance of the Taxpayer's service, the cranes did not qualify for exemption from the sales and use taxes pursuant to IC § 6-2.5-5-8(b).

Alternatively, the Taxpayer requested a credit against its use tax liability for the sales taxes it incorrectly collected and remitted to the state. In order to credit the sales taxes to the Taxpayer's use tax liability, the Department would have to first refund the sales taxes to the Taxpayer and then apply the refunded taxes to the current use tax liability.

The law concerning the refund of sales taxes to a merchant is found at IC § 6-2.5-6-14.1 as follows:

Notwithstanding the refund provisions of this article as incorporated from the gross income tax law ([IC 6-2.1](#), repealed), a retail merchant is not entitled to a refund of state gross retail or use taxes unless the retail merchant refunds those taxes to the person from whom they were collected.

The Taxpayer asks to use the sales tax refund as a credit against its use tax rather than distributing it to the persons who actually paid the sales tax. Refunds of sales taxes to merchants are prohibited under these circumstances.

FINDING

The Taxpayer's protest is respectfully denied.

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