

Letter of Findings Number: 07-0483
Sales and Use Tax
For Tax Years 2004-05

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ISSUES

I. Sales and Use Tax—Imposition.

Authority: IC § 6-2.5-1-1 et seq.; IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-5-27; IC § 6-8.1-5-1; *Indiana Dep't of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454 (Ind. Ct. App. 1988).

Taxpayer protests the assessment of use tax on a variety of purchases.

II. Tax Administration—Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of a ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana corporation providing excavation services and operating as a lump sum contractor. Taxpayer provides services to both tax-exempt and taxable customers. After an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer owed additional sales and use tax and assessed a negligence penalty for the tax years 2004 and 2005. The Department found that Taxpayer had made a variety of purchases on which the Indiana sales tax was not paid at the time of purchase nor was use tax remitted to the Department. Taxpayer protests the imposition of use tax on its purchases of certain "pipes," "dump truck beds," and "fuel" and the imposition of the negligence penalty. An administrative hearing was held, and this letter of findings results. Further facts will be supplied as required.

I. Sales and Use Tax—Imposition.

DISCUSSION

Pursuant to IC § 6-8.1-5-1(c), all tax assessments are presumed to be accurate, and the taxpayer bears the burden of proving that an assessment is incorrect.

IC § 6-2.5-2-1 provides:

(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.

(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

IC § 6-2.5-3-2(a) provides:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Accordingly, Indiana imposes a sales tax on retail transactions and a complementary use tax on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-1-1 et seq. An exemption from the use tax is granted for transactions where the gross retail tax ("sales tax") was paid at the time of purchase pursuant to IC § 6-2.5-3-4. Since Taxpayer failed to pay sales tax at the time of purchase, the Department found that the purchases were subject to use tax.

A. "Pipes."

The Department found that use tax was due on purchases of "pipes" that Taxpayer had bought without paying sales tax at the time of purchase.

Taxpayer maintains that Taxpayer did not pay sales tax on the "pipes" at the time of purchased, because Taxpayer thought the "pipes" were to be used for a tax-exempt customer. Taxpayer later discovered that the customer was not a tax-exempt customer. Taxpayer asserts that the "pipes" were not used for this taxable customer and have remained in Taxpayer's possession. Thus, Taxpayer maintains that since the "pipes" have remained in Taxpayer's possession, the "pipes" are not subject to use tax. Further, Taxpayer asserts that since the majority of its customers are tax-exempt, Taxpayer next use of the "pipes" will most likely be in an exempt manner.

However, by storing the "pipes," Taxpayer has "used" the "pipes" in Indiana within the statutory meaning. IC § 6-2.5-3-1(a). Thus, the pipes are subject to use tax at this time. Moreover, the Department declines Taxpayer's invitation to assume that Taxpayer would use the "pipes" in an exempt manner in the future. The proper course of action when new facts have occurred would be for Taxpayer, after the new facts have occurred, to submit a request for refund based upon the new facts.

Therefore, Taxpayer's protest is respectfully denied.

B. "Dump Truck Beds."

The Department found that use tax was due on purchase of two "dump truck beds" that Taxpayer had bought without paying sales tax at the time of purchase.

Taxpayer maintains that the purchase of the "dump truck beds" was exempt under the public transportation exemption found at IC § 6-2.5-5-27.

IC § 6-2.5-5-27 provides:

Transactions involving tangible personal property and services are exempt from the state gross retail tax, if the person acquiring the property or service directly uses or consumes it in providing public transportation for persons or property.

In applying any tax exemption, the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." *Indiana Dep't of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988).

Taxpayer asserts that a bookkeeping error occurred and the "dump truck beds" were paid for by Taxpayer instead of Taxpayer's sister corporation, which is in the transportation business. Taxpayer further asserts that the "dump truck beds" were always intended for and were only used by the sister corporation.

However, Taxpayer has failed to provide sufficient documentation to demonstrate that it did not "use" the "dump truck beds" or that a bookkeeping error occurred for the purchase. In fact, Taxpayer submitted income tax returns that show that Taxpayer depreciated the "dump truck beds" as a business asset in service for Taxpayer for the years in question. Further, by giving or allowing its sister corporation to use the "dump truck beds," Taxpayer exercised a right or power of ownership—i.e., used the "dump truck beds" in Indiana within the statutory meaning. IC § 6-2.5-3-1(a).

Thus, regardless of whether the "dump truck beds," if purchased and/or used by Taxpayer's sister corporation, would qualify for the public transportation exemption for Taxpayer's sister corporation, Taxpayer purchased and "used" the "dump truck beds," does not provide public transportation, and does not qualify for the exemption.

Therefore, Taxpayer's protest is respectfully denied.

C. "Fuel."

The Department found that use tax was due on purchases of "fuel" that Taxpayer had bought without paying sales tax at the time of purchase.

Taxpayer maintains that the purchases of the "fuel" were exempt under the public transportation exemption found at IC § 6-2.5-5-27.

IC § 6-2.5-5-27 provides:

Transactions involving tangible personal property and services are exempt from the state gross retail tax, if the person acquiring the property or service directly uses or consumes it in providing public transportation for persons or property.

In applying any tax exemption, the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." *Indiana Dep't of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988).

Taxpayer asserts that bookkeeping errors occurred and the "fuel" was paid for by Taxpayer instead of Taxpayer's sister corporation, which is in the transportation business. Taxpayer further asserts that the "fuel" was always intended for and was only used by its sister corporation.

However, Taxpayer has failed to provide sufficient documentation to demonstrate that it did not "use" the fuel or that bookkeeping errors occurred for the purchases. Moreover, Taxpayer records show that Taxpayer had rented equipment and trailers, which would use fuel. Furthermore, by giving or allowing its sister corporation to use the "fuel," Taxpayer exercised a right or power of ownership—i.e., used the fuel in Indiana within the statutory meaning. IC § 6-2.5-3-1(a).

Thus, regardless of whether the "fuel," if purchased and/or used by Taxpayer's sister corporation, would qualify for the public transportation exemption for Taxpayer's sister corporation, Taxpayer purchased and "used" the "fuel," does not provide public transportation, and does not qualify for the exemption.

Therefore, Taxpayer's protest is respectfully denied.

FINDING

In summary, Taxpayer's protest of subparts A, B, and C are respectfully denied.

II. Tax Administration—Negligence Penalty.

DISCUSSION

Taxpayer protests the imposition of the ten percent negligence penalty for the tax years in question. The Department refers to IC § 6-8.1-10-2.1(a)(3), which provides, "if a person... incurs, upon examination by the department, a deficiency that is due to negligence... the person is subject to a penalty."

[45 IAC 15-11-2](#)(b) clarifies the standard for the imposition of the negligence penalty as follows:

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.

The standard for waiving the negligence penalty is given at [45 IAC 15-11-2\(c\)](#) as follows:

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 provided sufficient information to establish that its failure to pay the deficiency was not due to Taxpayer's negligence, but was due to reasonable cause as required by [45 IAC 15-11-2\(c\)](#).

FINDING

Taxpayer's protest to the imposition of penalty is sustained.

CONCLUSION

In summary, Taxpayer's protests in issue I subparts A, B, and C are respectfully denied, and Taxpayer's protest of the imposition of the penalty in issue II is sustained.

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