

Letter of Findings Number: 07-0639
Sales and Use Tax
For the Tax Years 2004-2006

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ISSUES

I. Sales Tax – Imposition.

Authority: IC § 6-8.1-5-1(b); IC § 6-2.5-2-1(a); IC § 6-8.1-5-4; IC § 6-2.5-6-7.

The Taxpayer protests the imposition of sales tax.

II. Use Tax – Imposition.

Authority: IC § 6-2.5-3-2(a); IC § 6-2.5-4-1.

The Taxpayer protests the assessment of use tax.

III. Tax Administration – Negligence Penalty.

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

The Taxpayer protests the imposition of the negligence penalty.

STATEMENT OF FACTS

The Taxpayer is a non-store retailer who sells products such as cosmetics, vitamins, and cleaners. She is also a real estate agent. The Indiana Department of Revenue (Department) audited the Taxpayer for the tax years 2004-2006. The audit resulted in an assessment of sales tax, use tax, interest, and penalty. The Taxpayer protested the assessments. A hearing was held and this Letter of Findings results.

ISSUES

I. Sales Tax – Imposition.

DISCUSSION

During the audit period, the Taxpayer, a registered retail merchant, reported and remitted sales taxes to the state. The Taxpayer did not maintain adequate sales records for the Department to validate reported sales tax amounts. Therefore, the Department estimated the Taxpayer's taxable sales and sales tax owing to the state. The Department first determined that thirty-five percent is a standard commission for the sale of items such as vitamins and cosmetics from a home. The Department considered the Taxpayer's non-employee compensation as the Taxpayer's commission for retail sales from the home. The Department extrapolated the Taxpayer's total retail sales from the commission. The Department subtracted the gross sales on which the Taxpayer remitted sales tax from the total determined in the audit. This resulted in the Taxpayer's gross retail sales that were subject to the sales tax and on which sales tax had not been paid. The Department assessed sales tax on this figure for each of the years of the audit pursuant to IC § 6-2.5-2-1(a). The Taxpayer protested this assessment.

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.* Taxpayers have the duty to maintain books and records and present those to the Department for review upon the Department's request. IC § 6-8.1-5-4(a).

IC § 6-2.5-2-1(a) imposes sales tax on retail transactions made in Indiana. The sales tax a retail merchant must remit to the state is calculated by multiplying the merchant's gross retail income by the sales tax rate. IC § 6-2.5-6-7.

The Taxpayer protested the assessment of sales tax stating that she purchased the product and sold it to family and friends at wholesale so that everyone could enjoy the benefits of purchasing at wholesale. Therefore, she did not make a profit. Whether or not the Taxpayer made a profit on the sales is immaterial because the sales tax is based on the gross retail price of the product rather than the retail merchant's profit. IC § 6-2.5-6-7.

The Department used a reasonable method to estimate the Taxpayer's gross retail sales. The Taxpayer did not offer and substantiate a calculus to determine the proper amount of sales tax owing to the state that was different than the method used by the Department. Therefore, the Taxpayer did not sustain her burden of proving that the Department's assessment of sales tax was incorrect.

FINDING

The Taxpayer's protest to the assessment of additional sales taxes is denied.

II. Use Tax – Imposition.

DISCUSSION

Indiana imposes a 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. IC § 6-2.5-3-2(a). The Department assessed use tax on several of the Taxpayer's purchases. The Taxpayer protested these assessments.

The Department assessed use tax on "Dues and Subscriptions" in a taxable amount of \$648. The Taxpayer protested this assessment, arguing that this payment was actually for membership fees in the local board for real

estate agents. The Taxpayer produced invoices and copies of cancelled checks indicating that the Taxpayer had paid these amounts to the local real estate board for membership fees and services. Since they are not retail sales of tangible personal property, memberships and fees for services are not tangible personal property subject to the sales and use tax. Therefore, the Taxpayer sustained her burden of proving that the \$648 is not subject to the use tax.

The Taxpayer also protested the assessment of use tax on materials. She argued that she had already paid sales tax on these items. In support of this contention, the Taxpayer submitted credit card statements. The statements merely indicate a total price paid. There is no indication on the statements whether or not the Taxpayer paid sales tax on the purchases. Therefore, the Taxpayer did not sustain her burden of proving that she had already paid sales tax on these purchases and therefore use tax was improperly assessed.

The Taxpayer also protested the assessment of use tax on checks at a gross retail price of \$27. The Taxpayer presented an invoice dated September 8, 2004 for the checks. There is no indication that she paid sales tax on the checks. Therefore, the use tax properly applies.

The Taxpayer protested the assessment on the total price of the lab equipment purchased from Canada on August 30, 2004. The Taxpayer argued that the payment was actually for the nontaxable service of shipping the lab equipment. The invoice shows that \$7,577 was for the equipment and \$595 for shipping and handling. After March 17, 2004, the title to tangible personal property is transferred at the time of delivery of the goods to the purchaser. IC § 6-2.5-4-1. The charge for any service such as delivery that is provided by the seller prior to the transfer is considered part of the gross retail price subject to the imposition of sales and use tax. *Id.* Therefore, the Department properly imposed the use tax on the total sales price of the lab equipment.

Finally, the Taxpayer protested the assessment of use tax on equipment listed on page 10 of the audit for \$364. The Taxpayer argued that this cost was actually freight charges to move the equipment from one city to another. The Taxpayer did not provide any documentary evidence substantiating this contention. Therefore, she did not sustain her burden of proving that the \$364 for equipment was improperly subjected to the use tax.

FINDING

The Taxpayer's protest to the imposition of use tax on the \$368 for dues and subscriptions is sustained. The remainder of the Taxpayer's protest to the imposition of use tax are respectfully denied.

III. Tax Administration - Ten Percent Negligence Penalty.

DISCUSSION

The Taxpayer protests the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1. Indiana Regulation [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. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

The Taxpayer provided substantial documentation to indicate that its failure to pay the assessed sales and use tax was due to reasonable cause rather than negligence.

FINDING

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

CONCLUSION

The Taxpayer's protest to the assessment of sales tax is denied.

The Taxpayer's protest to the assessment of use tax on "Dues and Subscriptions" is sustained.

The Taxpayer's protest to the assessment of use tax on materials is denied.

The Taxpayer's protest to the assessment of use tax on checks is denied.

The Taxpayer's protest to the assessment of use tax on lab equipment is denied.

The Taxpayer's protest to the assessment of use tax on equipment is denied.

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