

Letter of Findings Number: 07-0651
Sales Tax
For Tax Years 2004-2006

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ISSUES

I. Sales Tax—Imposition.

Authority: IC § 6-2.2-5-1; IC § 6-2.5-3-7; IC § 6-2.5-8-8; IC § 6-2.5-9-3; IC § 6-8.1-5-1.

Taxpayer protests the assessment of sales tax.

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 sells used vehicles in Indiana. After an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer owed sales and use tax and assessed a negligence penalty for the tax years 2004, 2005, and 2006. Taxpayer protested a portion of these tax assessments and the negligence penalty. Taxpayer declined its administrative hearing, and requested for the Department to write and issue the Letter of Findings based on the materials in the file. Further facts will be provided as required.

I. Sales 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, as follows:

(a) An excise tax, known as the state gross retail tax ("sales 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 by law, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant is required to collect the tax as agent for the state.

Additionally, IC § 6-2.5-9-3(2) in relevant part, provides that a retail merchant:

[H]as a duty to remit Indiana gross retail ("sales") or use taxes (as described in [IC 6-2.5-3-2](#)) to the department; hold those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

Accordingly, Taxpayer, as a retail merchant, has a duty to collect and remit sales tax on its vehicle sales.

Thus, Taxpayer, as a retail merchant, "has a duty to remit state gross retail or use taxes... holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state." IC § 6-2.5-9-3.

A. "Exemption Certificates."

Taxpayer's first point of protest is the imposition of sales tax on sales to its customers which provided Taxpayer with "exemption certificates." Taxpayer did not charge sales tax on sales to those customers. The Department determined that Taxpayer should have charged sales tax on sales to those customers, since those customers did not provide valid Indiana exemption certificates. The Department refers to IC § 6-2.5-3-7(b), which states:

A retail merchant is not required to produce evidence of nontaxability under subsection (a) if the retail merchant receives from the person who acquired the property an exemption certificate which certifies, *in the form prescribed by the department*, that the acquisition is exempt from the use tax. (*Emphasis added.*)

The Department also refers to IC § 6-2.5-8-8, which states:

(a) A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax.

The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.

(b) The following are the only persons authorized to issue exemption certificates:

(1) retail merchants, wholesalers, and manufacturers, who are registered with the department under this chapter;

(2) organizations which are exempt from the state gross retail tax under [IC 6-2.5-5-21](#), [IC 6-2.5-5-25](#), or [IC 6-2.5-5-26](#) and which are registered with the department under this chapter; and

- (3) other persons who are exempt from the state gross retail tax with respect to any part of their purchases.
- (c) The department may also allow a person to issue a blanket exemption certificate to cover exempt purchases over a stated period of time. The department may impose conditions on the use of the blanket exemption certificate and restrictions on the kind or category of purchases that are exempt.
- (Emphasis added.)*

During the course of the protest, Taxpayer submitted five non-Indiana "exemption certificates" and one Indiana exemption certificate, form ST-105 for the six sales in question. Form ST-105 is the Department's standard Indiana exemption certificate, and is the form prescribed by the Department for compliance with IC § 6-2.5-3-7(b) and IC § 6-2.5-8-8. The Indiana form ST-105 is the necessary form to comply with IC § 6-2.5-3-7(b) and IC § 6-2.5-8-8. There are no provisions for accepting other exemption certificates.

Accordingly, a seller is required to receive an Indiana exemption certificate when not collecting sales tax from a customer. IC § 6-2.5-3-7(b) and IC § 6-2.5-8-8 both require that an exemption certificate be on forms prescribed by the Department. The non-Indiana "exemption certificates" received by Taxpayer were not a form prescribed by the Department. Since Taxpayer has not produced such forms for the other five customers, Taxpayer has not met the burden imposed by IC § 6-8.1-5-1(c).

Therefore, Taxpayer's protest is sustained in part for its sale of a 1994 Chevy Motorama for \$3,600, listed on page 14 of the audit report, to a customer with a completed Indiana form ST-105, and Taxpayer's protest is denied in part for its sale of the five vehicles to customers without receiving Indiana form ST-105s.

B. "Consignment Sales."

Taxpayer's second point of protest is the imposition of sales tax on five vehicles it claims were received on "consignment" and were returned to the "owners" after the vehicles did not sell. During the course of the protest, Taxpayer provided incomplete "consignments" documents to demonstrate that the vehicles were received on "consignment."

However, the fact that the vehicles were received on "consignment" does not of itself demonstrate that Taxpayer returned the vehicles to the "owners" and did not sell the vehicles. Accordingly, since the documentation submitted was insufficient to establish that Taxpayer received the vehicles on "consignment," and returned them to the "owners" after the vehicles did not sell, Taxpayer has failed to meet its burden under IC § 6-8.1-5-1(c).

Therefore, Taxpayer protest is denied.

FINDING

In summary, Taxpayer's protest of subpart A, for its sales to customers providing exemption certificates, is sustained in part, for its sale of a 1994 Chevy Motorama for \$3,600, listed on page 14 of the audit report, but denied in part for the five other sales. Taxpayer's protest of subpart B is denied.

II. Tax Administration—Negligence Penalty.

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty for the tax year in question. Taxpayer protests the imposition of penalty. The Department refers to IC § 6-8.1-10-2.1(a)(3), which provides, "[I]f 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.

In this case, taxpayer incurred a deficiency which the Department determined was due to negligence under [45 IAC 15-11-2](#)(b), and so was subject to a penalty under IC § 6-8.1-10-2.1(a). While Taxpayer has established that it does not owe some of the proposed assessments discussed in Issue I subpart A, Taxpayer has not affirmatively established that its failure to pay the remaining deficiencies was due to reasonable cause and not due to negligence, as required by [45 IAC 15-11-2](#)(c).

FINDING

Taxpayer's protest is denied.

CONCLUSION

In summary, Taxpayer's protest of the sales tax assessment for sales to customers providing exemption

certificates is sustained in part, for its sale of a 1994 Chevy Motorama for \$3,600, listed on page 14 of the audit report, but denied in part, for all the other sales. Taxpayer's protests of the consignment sales and negligence penalties are denied.

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