DEPARTMENT OF STATE REVENUE

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Letter of Findings: 08-0478
Gross Retail Tax
For the Years 2005, 2006, and 2007

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ISSUES

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

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1(a); IC § 6-2.5-4-1(a); IC § 6-2.5-4-1(b); IC § 6-2.5-5-15 (Repealed July 1, 2004); IC § 6-8.1-5-1(c); 45 IAC 2.2-2-2; 45 IAC 2.2-5-54; Commissioner's Directive 25 (July 2004); Sales Tax Information Bulletin 28 (July 2004); Sales Tax Information Bulletin 28S (May 2007); Sales Tax Information Bulletin 28S (February 2008); Black's Law Dictionary (7th ed. 1999).

Taxpayer challenges the Department of Revenue's decision requiring it to collect Gross Retail (sales) tax on the sale of specialized vehicles to out-of-state customers.

II. Ten-Percent Negligence Penalty.

Authority: IC § 6-8.1-5-1(c); 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).

Taxpayer argues that its failure to collect sales tax was not due to negligence or intentional disregard of tax law and asks that the Department of Revenue abate the ten-percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana equipment dealer. It sells new and used specialized equipment such as bucket trucks, digger derricks, pressure diggers, aerial platforms, augers, and service trucks. The Department of Revenue (Department) conducted a sales and use tax audit finding that taxpayer should have collected tax on the sale of equipment to out-of-state purchasers when the purchaser arranged for a third party to transport the equipment from Indiana to the purchaser's out-of-state location. The audit exempted sales when taxpayer – and not the out-of-state customer – transported the equipment to the out-of-state location.

Taxpayer objected to the imposition of additional sales tax and submitted a protest to that effect. An administrative hearing was conducted during which taxpayer's representative explained the basis for the protest. This Letter of Findings results.

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

DISCUSSION

IC § 6-2.5-2-1(a) imposes sales tax on retail transactions made in Indiana. IC § 6-2.5-1-2 defines a retail transaction as "a transaction of a retail merchant that constitutes selling at retail as described in IC § 6-2.5-4-1... or that is described in any other section of IC § 6-2.5-4." IC § 6-2.5-4-1(a) provides that "[a] person is a retail merchant making a retail transaction when he engages in selling at retail." IC § 6-2.5-4-1(b) further explains that a person sells at retail when he "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration."

IC § 6-2.5-5-15 (Repealed July 1, 2004) exempted sales of vehicles to out-of-state customers. The Department issued Commissioner's Directive 25 (July 2004) and Sales Tax Information Bulletin 28 (July 2004) to address the change in law. Commissioner's Directive 25 stated that the repeal of IC § 6-2.5-5-15 "only affect[ed] situations where the purchaser [took] possession of the vehicle prior to taking the vehicle out-of-state." The Directive stated that;

> [The] repeal does not affect out of state sales by dealers. For a sale of a vehicle to be considered out of state, the purchaser must take possession via delivery outside of Indiana. No exemption certificate is required when making an out of state sale. However, the sales contract must specify that the vehicle is to be delivered out of state and the dealer must maintain shipping documentation to verify that the vehicle was delivered to the purchaser at a specific out of state location.

Sales Tax Information Bulletin 28 provided that the dealer was required to collect the tax and provide forms ST-108 to the purchaser to show that the tax had been paid in Indiana. If the purchaser claimed an exemption, form ST-108E was to be completed and signed by the purchaser with a copy of the retained by the dealer.

Sales Tax Information Bulletin 28 was updated in May of 2007 becoming Sales Tax Information Bulletin 28S (May 2007). The language from the previous bulletin was removed and the following added.

> A vehicle or trailer sold in interstate commerce is not subject to the Indiana sales tax. To qualify as being "sold in interstate commerce" the vehicle or trailer must be physically delivered, by the selling dealer, to a delivery point outside Indiana. The delivery may be made by the dealer or the dealer may hire a third party carrier. Terms and method of delivery must be indicated on the sales invoice. The dealer must document terms of delivery and must keep a copy of such terms of delivery to substantiate the interstate sale. The

exemption does not apply to sales to out-of-state buyers in which the buyer takes physical possession of a vehicle or trailer in Indiana, nor is the exemption valid if the buyer, and not the seller, hires a third party carrier to transport the vehicle or trailer outside Indiana. If the buyer hires the carrier, the carrier is acting as an agent for the buyer, and thus the buyer takes physical possession within Indiana. Possession taken within the state does not qualify as an interstate sale.

Taxpayer objects to the Department's decision requiring it to pay sales tax on multiple grounds. As a threshold issue, it is the taxpayer's responsibility to establish that the existing sales tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

A. F.O.B. Sales

IC § 6-2.5-2-1(a) states that, "An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana." 45 IAC 2.2-2-2 requires that a retail seller, "[A]cting as an agent for the state of Indiana, must collect the tax." However, taxpayer states that the proposed assessments were not "made in Indiana." Taxpayer states that the vehicles were "sold and delivered f.o.b. destination, where the destination was outside of Indiana.... In those instances, title and risk of loss did not pass until the vehicles reached the destination and hence there was no retail transaction... within Indiana on which Indiana sales tax may be imposed."

Taxpayer's argument is based on the premise that the sales to the out-of-state customers were designated as "f.o.b. destination." This particular designation represents, "A mercantile term denoting that the seller is required to pay the freight charges as far as the buyer's named destination." Black's Law Dictionary 676 (7th ed. 1999). The abbreviation "f.o.b." stands for "free on board" and means that the "seller is responsible for delivering goods on board a ship or other conveyance for carriage to the consignee at a specified location [and that] the seller must deliver the goods to the vessel named and has the risk of loss until the goods reach that location." Id.

The Department is unable to agree that the parties' own agreement or stipulation as to the terms of the sale takes precedence in determining whether or not the transaction is subject to Indiana's sales tax. In each of the transactions at issue, the out-of-state purchaser engaged a third-party carrier to take physical possession of the vehicle at taxpayer's Indiana location. The Department has determined that in order to qualify as "sold in interstate commerce" – and consequently exempt from sales tax – the "vehicle or trailer must be physically delivered, by the selling dealer, to a delivery point outside Indiana." The exemption does not apply to out-of-state sales " if the buyer, and not the seller, hires a third party carrier to transport the vehicle or trailer outside Indiana. If the buyer hires the carrier, the carrier is acting as an agent for the buyer, and thus the buyer takes physical possession within Indiana." Sales Tax Information Bulletin 28S (February 2008). See also Sales Tax Information Bulletin 28S (May 2007) (Emphasis added).

B. Double Taxation.

Taxpayer argues that the Department's imposition of sales tax would subject each of the transactions to double taxation "since the destination state would only have granted a credit upon registration in the destination state if tax had been properly payable to Indiana, which it was not." See 45 IAC 2.2-5-54 (Precluding Indiana from imposing its sales tax on "sales in interstate commerce" and to the extent prohibited by the United States Constitution).

The Department is unable to agree that taxpayer's analysis is correct since – as noted above – each of the sales transaction was properly subject to Indiana sales tax when the customers' transportation agents took possession of the vehicle at taxpayer's Indiana location. In addition, the "double taxation" issue is not taxpayer's argument to make. The sales tax is collected by the seller from the buyer and held in trust by seller. If Indiana and another state both imposed sales tax on the transactions here at issue, the objection is one for the individual or business which paid both taxes to raise.

FINDING

Taxpayer's protest is respectfully denied.

II. 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(c), "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.

The Department is not prepared to agree that taxpayer "exercised ordinary business care and prudence" in failing to collect substantial amount of sales tax or that the failure warrants abatement of the penalty.

FINDING

Taxpayer's protest is respectfully denied.

SUMMARY

Taxpayer's protest is denied as to the imposition of sales tax as described in Part I of this Letter of Findings. The Department does not agree that the ten-percent negligence penalty should be abated.

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