DEPARTMENT OF STATE REVENUE

04-20080405P.LOF
04-20080406P.LOF

Letters of Finding: 08-0405P; 08-0406P
Gross Retail Tax
For the Years 2004, 2005, 2006, and 2007

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Rental Exemption – Gross Retail Tax.

Authority: IC § 6-2.5-5-1 to -40; IC § 6-2.5-2-1; IC § 6-2.5-5-8; 45 IAC 2.2-5-15; 45 IAC 2.2-5-15(b)(2); 45 IAC 2.2-4-27(c).

Taxpayer argues that it was not subject to sales/use tax on equipment purchased and installed on a truck on the ground that the truck is rented to its customers.

II. Taxable Transaction – Gross Retail Tax.

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

Taxpayer states that a payment made to a related entity was not subject to tax because the payment constituted a loan.

III. Storage Tanks – Gross Retail Tax.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-4-1(b); IC § 6-2.5-6 et seq.; 45 IAC 2.2-2-2.

Taxpayer maintains that the sale of storage tanks to one of its customers was not subject to sales tax because the customer paid use tax on materials used to build the tanks.

IV. Diesel Fuel – Gross Retail Tax.

Authority: IC § 6-8.1-5-1(b); IC § 6-8.1-5-1(c).

Taxpayer argues that it was not subject to sales tax on the purchase of diesel fuel because the tax was paid at the fuel pump.

V. 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 asks that the Department exercise its authority to abate the ten-percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana business which provides various services to sanitary landfill operations both within the state and outside the state. The Department of Revenue (Department) conducted an audit of taxpayer's records. The audit resulted in the assessment of additional Gross Retail (sales) Tax. Taxpayer disagreed with portions of the assessment 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. Rental Exemption – Gross Retail Tax.

DISCUSSION

Taxpayer states that a payment it made for the purchase and installation of an item of equipment was not subject to sales or use tax because the equipment was installed on a truck which it rents to its customers.

Indiana imposes a sales tax on retail transactions in Indiana. IC § 6-2.5-2-1. The legislature has provided a number of exemptions to the imposition of that tax. See IC § 6-2.5-5-1 to -40. One of those exemptions is provided at IC § 6-2.5-5-8 which states that, "Transactions involving tangible personal property... are exempt from the state gross retail tax if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of his business without changing the form of the property."

The rental exemption set out in IC § 6-2.5-5-8 is further explained in 45 IAC 2.2-5-15, which states:

(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, renting or leasing are exempt from 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.

Therefore, if taxpayer bought the vehicle for the purpose of leasing it to others, taxpayer was not required to pay sales tax on the initial purchase price because taxpayer bought the truck for "an exempt purpose." However,

taxpayer does not argue that the truck is exempt. Taxpayer argues that equipment installed on the truck is exempt because the truck is exempt under IC § 6-2.5-5-8. Assuming for the moment that any equipment installed in an exempt vehicle is itself exempt, taxpayer has failed to meet its burden of demonstrating that the vehicle is itself exempt. Taxpayer states that it charges its customers for the use of the truck when it transports equipment on behalf of its customers. The Department does not dispute taxpayer's claim that the customers pay for the cost of the truck but it does dispute whether or not taxpayer has established that it rents the truck to its customers. There is no evidence that taxpayer "is occupationally engaged in reselling, renting or leasing such property in the regular course of his business...." 45 IAC 2.2-5-15(b)(2). In addition, if taxpayer is engaged in renting the truck to its customers, then taxpayer necessarily collects, reports, and forwards sales tax on the stream of rental income as required under IC § 6-2.5-2-1. As explained in 45 IAC 2.2-4-27(c), "In general, the gross receipts from renting or leasing tangible personal property are subject to tax."

While taxpayer charges its customers for the cost of using and operating the truck. There is nothing to indicate that taxpayer is "occupationally engaged" in the business of renting the truck to its customers.

FINDING

Taxpayer's protest is respectfully denied.

II. Taxable Transaction – Gross Retail Tax.

DISCUSSION

Taxpayer argues that a $25,000 check paid to a related entity was not evidence of a retail transaction subject to sales/use tax.

As noted above, 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."

Under IC § 6-8.1-5-1(c), taxpayer has met its burden of demonstrating that the $25,000 check was payment made pursuant to a loan agreement entered into between taxpayer and a related entity. Because there was no transfer of "tangible personal property," taxpayer was not engaged in a "retail transaction." The payment is not subject to sales or use tax.

FINDING

Taxpayer's protest is sustained.

III. Storage Tanks – Gross Retail Tax.

DISCUSSION

Taxpayer states that it is not required to collect or pay sales tax on the sale of tanks to its Ohio customer because the Ohio customer paid use tax on the cost of the materials. In support of its argument, taxpayer supplied a verification letter from its Ohio customer indicating that the Ohio customer paid use tax on the "materials used on this project" and forwarded that tax to "the State of Indiana on a monthly basis for the months of August, September, October, and November 2005." A review of the Department's record indeed verifies that this particular Ohio customer paid amounts of sales/use tax to Indiana during 2005.

It is taxpayer's contention that the Ohio purchaser paid use tax on the materials used in the tanks and that taxpayer is therefore not responsible for now paying sales tax. Taxpayer's argument is not well founded.

Pursuant to IC § 6-2.5-2-1, the state Gross Retail (sales) Tax is imposed on retail transactions made in Indiana unless a valid exemption is applicable. The imposition of Gross Retail Tax is triggered by the occurrence of a retail transaction in which a person, in the ordinary course of his business, acquires tangible personal property for the purpose of resale and transfers that property to another person for consideration. IC § 6-2.5-4-1(b). In other words, it is the transaction which triggers the sales tax liability. The audit report correctly noted that taxpayer failed to collect the sales tax at the time the taxable transactions occurred. Under 45 IAC 2.2-2-2, the state Gross Retail Tax is paid by the customer but the retail merchant acts as an agent for the state of Indiana and is responsible for collecting the sales tax. Acting as the state's agent, the seller is not only responsible for collecting but must hold the tax and pay it over to the state periodically. See IC § 6-2.5-6 et seq. As the retail merchant making the transaction, taxpayer was required to collect the sales tax but failed to do so. Whether or not the purchaser is now being assessed use tax is irrelevant insofar as taxpayer failed to collect sales tax at the time the transaction occurred.

The Department does not doubt taxpayer's veracity or good intentions but the requirement to collect sales tax on non-exempt transactions remains. In addition, taxpayer's implication – that the Department match un-documented sales to customers who made undocumented payments of use tax – presents insurmountable compliance issues.

FINDING

Taxpayer's protest is respectfully denied.

IV. Diesel Fuel – Gross Retail Tax.

Taxpayer maintains that the Department's audit erred in assessing sales tax on the purchase of diesel fuel

because the tax was paid at the time of each initial purchase.

Taxpayer made numerous small dollar purchases of diesel fuel from local gas stations. Taxpayer contended that the Department unreasonably required it to prove that it paid sales tax. The audit report noted as follows: "The taxpayer purchased diesel fuel from several gas stations, which had exempt and taxable diesel pumps. The taxpayer could not verify if the diesel purchased was pumped from a taxable or exempt pump. The taxpayer and the audit agreed that 50 [percent] of the diesel fuel purchased from gas stations would be considered taxable."

However, taxpayer now argues that many of the small dollar purchases it made – in the range of approximately twenty to forty dollars – were made at local vendors which did not have an exempt pump and even though the invoice did not specify that sales tax was purchased, taxpayer is unable to establish that the tax was paid. Further, taxpayer suggests that it is unreasonable to expect that it prove that tax was paid.

IC § 6-8.1-5-1(b) provides that "If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department." As noted above, the audit determined that taxpayer had made diesel purchases from vendors which offered exempt and non-exempt fuel. Therefore, the audit did not overreach by concluding that taxpayer's invoices represented sales which may or may not have included the sales tax. The statute continues stating that, "The notice of proposed assessment is prima facie 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." IC § 6-8.1-5-1(c).

In the absence of specific documentation establishing which diesel invoices were taxable and which were exempt, the audit sensibly concluded that "50 [percent] of the diesel fuel was purchased from gas stations [and] would be considered taxable." The taxpayer's argument is not entirely unreasonable, but the audit's approach to the issue is also not unreasonable. The audit's determination must stand because the taxpayer has failed to meet its burden "of proving that the proposed assessment is wrong...." Id. (Emphasis added).

FINDING

Taxpayer's protest is respectfully denied.

V. Ten-Percent Negligence Penalty.

DISCUSSION

Taxpayer believes that it is entitled to abatement of the ten-percent negligence penalty because the "Corporation was unclear on many of the issues raised by the audit." According to the "Audit Progress Report," the penalty was imposed because the "Taxpayer had no use tax self-assessment policy in place prior to [the] audit" and because "Taxpayer failed to remit use tax on all taxable purchases, where sales tax was not paid to the vendor."

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(b), "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.

Given the number of items for which taxpayer failed to self-assess use tax, and the fact that the taxpayer had no established internal procedure by which to self-assess use tax, the Department is unable to agree that the taxpayer exercised ordinary business care in determining its use tax liabilities.

FINDING

Taxpayer's protest respectfully denied.

Posted: 04/29/2009 by Legislative Services Agency
An html version of this document.