DEPARTMENT OF STATE REVENUE

04-20090074.LOF

Letter of Findings: 09-0074
Gross Retail Tax
For the Years 2005, 2006, and 2007

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and 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 It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register.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. 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Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1(a); IC § 6-2.5-4-1(a); IC § 6-2.5-4-1(b); IC § 6-2.5-5-15 (Repealed July 1, 2004); IC § 6-8.1-5-1(c); Commissioner's Directive 25 (July 2004); Sales Tax Information Bulletin 28 (July 2004); Sales Tax Information Bulletin 28S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).

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

II. Computational Changes – Gross Retail Tax.

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

Taxpayer argues that it can present evidence sufficient to warrant making several corrections to information contained within the audit report.

STATEMENT OF FACTS

Taxpayer is an Indiana corporation which sells used cars. Taxpayer sells cars to Indiana customers and to customers throughout the country by means of the Internet. The Indiana Department of Revenue (Department) conducted an audit review of taxpayer's business records and tax returns. That review 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 explained the basis for its 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) originally 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. See also Sales Tax Information Bulletin 28S (February 2008).

Taxpayer objects to the Department's decision requiring it to pay sales tax on the sale of vehicles to out-of-state customers. Taxpayer maintains that the Department failed to notify it of the change in law regarding "drive-out" sales and that it cannot now be held liable for the uncollected sales tax.

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."

Assuming for the moment that the Department was under a good-faith obligation to alert automobile dealers of the change in law, there is evidence that the Department did just that by contacting automobile trade associations, publishing a notice on the Department's website, communicating with Indiana businesses holding a Registered Retail Merchant's Certificate, and issuing a press release.

Taxpayer has presented no legal authority supporting its position that the Department was required to notify taxpayer individually of the change in law and that – in the face of the Department's alleged failure to provide sufficient notice – the Department is now required to abate the assessed tax amounts. As a non insubstantial business, taxpayer is under an obligation to understand and comply with Indiana tax requirements. As explained in 45 IAC 15-11-2(b), "Ignorance of the listed tax laws, rules and/or regulations is treated as negligence."

FINDING

Taxpayer's protest is respectfully denied.

II. Computational Changes – Gross Retail Tax.

DISCUSSION

Taxpayer states that the audit made certain determinations in preparing the proposed assessment and asks that those determinations should be updated and corrected. As noted above, all tax assessments are presumed to be accurate, and the taxpayer bears the burden of p roving that any assessment is incorrect. IC § 6-8.1-5-1(c) (Emphasis added).

Taxpayer maintains that it collected and remitted tax on the sales of a number of vehicles. Taxpayer has provided information relevant to the sale of the following five vehicles.

2000 Lincoln Town Car sold for $9,000 and listed on page 11 of the audit report

1996 Ford Taurus sold for $2,495 and listed by VIN number on 11 of the audit report

1992 Honda Civic sold for $3,000 and listed by VIN number of page 11 of the audit report

1995 Chevrolet Pickup sold for $3,495 and listed by VIN number on page 13 of the audit report.

1993 GM Suburban sold for $500 and listed by VIN number on page 9 of the audit report.

For the above five vehicles, the information provided by taxpayer is sufficient under IC § 6-8.1-5-1(c) to establish that the vehicles were sold, the sales tax collected from the customers, and that the tax amounts were forwarded to the Department.

Taxpayer argues that it sold a 2000 GMC Safari Van to a commercial customer and that the customer was not required to pay sales tax on the purchase. To that end, taxpayer has provided a copy of Indiana form ST-108E on which the customer certified that the van was purchased for an exempt purpose. Under IC § 6-8.1-5-1(c), taxpayer has presented sufficient information to establish that it was not required to collect sales tax on this particular transaction.

Taxpayer argues that it was not required to collect or pay sales tax on the sale of a 2000 Jaguar – listed on page 9 of the audit report – because the customer returned the vehicle for service shortly after it was purchased, taxpayer was unable to complete repairs to the customer's satisfaction, and that taxpayer refunded the purchase price and tax to the disaffected customer some six months after the original transaction.

Indiana sales tax is imposed on the "retail transactions made in Indiana." IC § 6-2.5-2-1(a). The taxpayer is required to "collect the tax as agent for the state." IC § 6-2.5-2-1(b). When taxpayer sold the Jaguar, taxpayer was obligated to collect and forward the sales tax to the state. Thereafter, taxpayer felt an obligation to accept the return of the Jaguar and refund its customer the amount originally paid. However, the tax was imposed on the transaction and not the Jaguar. That transaction was completed on the date of the original sale and taxpayer no longer had control over or responsibility for the sales tax initially collected. Taxpayer is not entitled to a refund or credit for the amount of sales tax collected on the sale of the Jaguar.

FINDING

Taxpayer is sustained in part and denied in part.

SUMMARY

Taxpayer's challenge to the imposition of tax on the sale of vehicles to out-of-state customers is denied. The audit report should be corrected to remove sales tax on the six vehicles stipulated in Part II of this Letter of Findings. Taxpayer is not entitled to a credit or a refund of the tax collected on the sale of the 2000 Jaguar.

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