

Supplemental Letter of Findings: 08-0413
Sales and Use Tax
For the Tax Years 2003-2005

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ISSUES

I. Sales and Use Tax—Software.

Authority: IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-13-1; IC § 6-2.5-13-2 (repealed effective Jan. 1, 2008); IC § 6-8.1-5-1.

Taxpayer protests the imposition of use tax on certain of its software purchases.

II. Sales and Use Tax—"Maintenance Agreements."

Authority: IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-8.1-5-1.

Taxpayer protests the imposition of use tax on its purchase of certain "maintenance agreements."

III. Sales and Use Tax—Hardware.

Authority: IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-8.1-5-1.

Taxpayer protests the imposition of use tax on its purchase of hardware.

STATEMENT OF FACTS

Taxpayer is a manufacturer with two plants in Indiana. After an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer owed additional use tax and assessed a negligence penalty for the tax years 2003, 2004, and 2005. The Department found that Taxpayer had made a variety of purchases on which sales tax was not paid at the time of purchase nor was use tax remitted to the Department. Taxpayer protested this imposition of the tax and penalties. A hearing was held and a Letter of Findings issued on January 29, 2009. The Taxpayer requested a rehearing to present additional documentation. The Taxpayer's request was granted, the documentation was reviewed, and this Supplemental Letter of Findings results.

I. Sales and Use Tax—Software.

DISCUSSION

Pursuant to IC § 6-8.1-5-1(c), all tax assessments are presumed accurate, and the taxpayer bears the burden of proving that an assessment is incorrect.

The Department found that Taxpayer had purchased software/licenses without paying sales tax at the time of purchase, and assessed use tax on the purchases.

IC § 6-2.5-3-2(a) provides, "An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." An exemption from the use tax is granted for transactions where the gross retail tax ("sales tax") was paid at the time of purchase pursuant to IC § 6-2.5-3-4.

A. Multiple Points of Use.

Taxpayer asserts that certain of its software purchases, where only one copy of the software/license was purchased, qualify for a partial use exemption based upon an apportionment method as found in the "multiple points of use ("MPU")" exemption in IC § 6-2.5-13-2. Taxpayer maintains that the software is located on one server and has multiple users in several jurisdictions.

IC § 6-2.5-13-2 (repealed effective Jan. 1, 2008), provided in relevant part, as follows:

(a) Notwithstanding section 1 of this chapter, a business purchaser that

(1) is not a holder of a direct pay permit; and

(2) **knows at the time of purchase** of a digital good, computer software delivered electronically, or a service that the digital good, computer software delivered electronically, or service **will be concurrently available for use in more than one (1) jurisdiction; shall deliver to the seller in conjunction with its purchase a form disclosing** this fact ("multiple points of use" or "MPU" exemption form.)

(b) Upon receipt of the MPU exemption form, the seller is relieved of all obligation to collect, pay, or remit the applicable tax and the **purchaser shall be obligated to collect, pay, or remit the applicable tax** on a direct pay basis.

(c) **A purchaser delivering the MPU exemption form** may use any reasonable, but consistent and uniform method of apportionment that is supported by the purchaser's business records as they exist at the time of the consummation of the sale.

...

(Emphasis added).

Accordingly, purchasers, which present the "MPU exemption form" to the seller at the time of purchase are

granted the exemption, may use the apportionment method, and are obligated to pay the applicable tax on a direct pay basis.

However, during the course of the protest, Taxpayer stated that it did not 1) hold a direct pay permit, 2) present any "MPU exemption forms" to the sellers at the time of purchase of the software, 3) present any evidence that, at the time of purchase, Taxpayer disclosed its written intention to the seller to use the software at specific multiple locations, or 4) pay any use tax, allocated or otherwise, to other jurisdictions based upon a written intention for use that was disclosed at the time of purchase. Since Taxpayer neither presented any "MPU exemption forms" to the sellers at the time of the purchases nor presented any evidence of a written intention for multiple use to the seller at the time of the purchases, Taxpayer cannot claim the exemption under IC § 6-2.5-13-2(c).

Moreover, at least two of the software/licenses, for which Taxpayer is claiming an exemption, are actually used by the Taxpayer and would not have multiple users. Taxpayer uses this software as a sales and marketing tool on its website. The software is located on its website where it is accessible to customers to assist the customers in making their purchasing decisions. Taxpayer does not resell or lease the software to its customers. Taxpayer is claiming an exemption based upon the percentage of its sales made to customers that were located outside of Indiana. However, in this instance, it is Taxpayer's use of the software that matters, and Taxpayer uses the software in Indiana. Any tangible personal property used by Taxpayer in the State of Indiana in the provision of its sales or services is subject to sales/use tax to be paid by Taxpayer pursuant to IC § 6-2.5-3-2.

Alternatively, Taxpayer asks for credits for sales or use tax paid in error maintaining that at the time of the software/license purchase it paid sales or use tax to the sellers who wrongfully remitted the tax to Indiana. Taxpayer asserts that since the invoices came from sellers with out-of-state locations listed on the invoices, the sellers wrongfully collected Indiana sales or use tax on the purchases. However, the sellers, which collected the tax at the time of purchase, were registered as Indiana retail merchants to collect Indiana sales and use tax due on the purchases. Under IC § 6-2.5-13-1, which provides the general sourcing rules of sellers, the sellers are obligated to pay, collect, or remit the tax to the place where the purchaser first takes possession or makes first use, whichever comes first. For all the software, in question, the Taxpayer designated for the property to be delivered to Indiana, i.e. Taxpayer designated to take first possession in Indiana. Therefore, the seller did rightfully remit the tax to Indiana under IC § 6-2.5-13-1.

B. Temporarily Stored in Indiana for use outside of Indiana.

Taxpayer asserts that certain of its software/license purchases, where multiple copies of the software/license were purchased, are not all subject to Indiana use tax because its use does not meet the definition of taxable storage or use under IC § 6-2.5-3-1 or IC § 6-2.5-3-2. Taxpayer maintains that its temporary storage of the software/licenses in Indiana did not give rise to a taxable use because Taxpayer purchased, from out-of-state vendors, software that was temporarily retained in Indiana for use outside of Indiana.

During the course of the protest, Taxpayer submitted numerous invoices for the software/license purchases, a chart showing the number of users of each software/license in the various states, and other documentation. While a few of the invoices show the purchase of multiple copies of software/licenses, many of the invoices revealed the purchase of only one software/license. Therefore, Taxpayer's protest is denied for purchases where only one software/license was purchased.

Moreover, for the few invoices that show multiple copy purchases, the numbers of copies purchased as shown on the Taxpayer's chart are not the same number of copies purchased on the invoices. Thus, since not all the copies purchased have been properly reconciled or accounted, the information provided by Taxpayer failed to fully account for the use of all the copies. Therefore, Taxpayer's protest is denied, to the extent that the information provided by Taxpayer did not account for all the use of the software/licenses.

However, while the information provided by Taxpayer was insufficient to demonstrate the full extent of Taxpayer's assertion, the information provided by Taxpayer did show that certain of the software/licenses purchases were not subject to Indiana use tax. Therefore, Taxpayer has provided sufficient documentation to demonstrate that the following purchases (listed below) are not subject to Indiana use tax:

Microsoft software/licenses purchases on invoice numbers 9652152985 and 9653041048 that exceed the 430 copies of each type of software/license used in Indiana;

UGS Corp. software/licenses purchases on document number 306089 that exceed the 11 copies of each type of software/license used in Indiana.

Therefore, Taxpayer's protest, as it pertains to the above listed purchases to the extent that tax was assessed, is sustained subject to the findings of a supplemental audit; Taxpayer's protest, as it pertains to any other purchases not included in the above list, is denied.

FINDING

Taxpayer's protests as addressed in subparts A and B are sustained in part and denied in part.

II. Sales and Use Tax—"Maintenance Agreements."

DISCUSSION

Pursuant to IC § 6-8.1-5-1(c), all tax assessments are presumed accurate, and the taxpayer bears the burden of proving that an assessment is incorrect.

The Department found that Taxpayer had purchased "maintenance agreements" without paying sales tax at the time of purchase, and assessed use tax on the purchases.

IC § 6-2.5-3-2(a) provides, "An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." An exemption from the use tax is granted for transactions where the gross retail tax ("sales tax") was paid at the time of purchase pursuant to IC § 6-2.5-3-4.

Pursuant to IC § 6-8.1-5-1(c), Taxpayer has met its burden of demonstrating that the following "maintenance agreements" are not subject to sales and use tax:

Frontrange Solutions, "Frontrange Maintenance and Support" agreement;

GPC America, "Maintenance" agreement date 2003;

SAP America, Inc., "Maintenance" agreements dates 11/25/1998 and 8/31/1996.

Therefore, Taxpayer's protest, as it pertains to the above listed "maintenance agreement," to the extent that tax was assessed, is sustained subject to the findings of a supplemental audit.

However, the documentation Taxpayer submitted was insufficient to prove that Taxpayer's other purchases of "maintenance agreements," which were not included in the above list, were not subject to use tax.

Alternatively, Taxpayer asserts that if the "maintenance agreements" are subject to use tax, the "maintenance agreements" are only subject to use in the same percentage/number as the software to which the "maintenance agreements" relate are subject to use tax (as discussed in Issue I). Taxpayer has provided sufficient documentation to demonstrate that the following purchases (listed below) are not subject to Indiana use tax:

UGS Corp. "maintenance agreements" purchases on document numbers 382785 and 306089 that exceed the 11 copies of each type of "maintenance agreements" used in Indiana.

Therefore, Taxpayer's protest, as it pertains to the above listed purchase to the extent that tax was assessed, is sustained subject to the findings of a supplemental audit; Taxpayer's protest, as it pertains to any other purchases not included in the above list, is denied.

Pursuant to IC § 6-8.1-5-1(c), all tax assessments are presumed accurate, and the taxpayer bears the burden of proving that an assessment is incorrect. Since Taxpayer failed to demonstrate that the Department's assessment was incorrect for any of the other purchases that were not included in the two above lists, Taxpayer has failed to meet its burden to prove. Therefore, Taxpayer's protest, as it relates to these other purchases, is denied.

FINDING

Taxpayer's protest is denied in part and sustained in part subject to the findings of a supplemental audit.

III. Sales and Use Tax—Hardware.

DISCUSSION

Pursuant to IC § 6-8.1-5-1(c), all tax assessments are presumed accurate, and the taxpayer bears the burden of proving that an assessment is incorrect.

The Department found that Taxpayer had purchased computer hardware without paying sales tax at the time of purchase, and assessed use tax on the purchases.

IC § 6-2.5-3-2(a) provides, "An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." "Use" is defined at IC § 6-2.5-3-1(a) as "the exercise of any right or power of ownership over tangible personal property." "Storage" is defined at IC § 6-2.5-3-1(b) as "the keeping or retention of tangible personal property in Indiana for any purpose except the subsequent use of that property solely outside Indiana."

Taxpayer asserts that its purchase of computer hardware (listed on invoice number 97523 in the amount of \$187,500) is not subject to Indiana use tax because its use of the hardware did not meet the definition of taxable storage or use under IC § 6-2.5-3-1 or IC § 6-2.5-3-2. Taxpayer maintains that its temporary storage of the hardware in Indiana did not give rise to a taxable use because Taxpayer purchased, from an out-of-state vendor, hardware that was temporarily retained in Indiana for use outside of Indiana and was immediately shipped to Virginia.

During the course of the protest Taxpayer provided a Virginia tax return, the purchasing invoice, and other documentation to support its assertion. Taxpayer has provided sufficient information to establish that its use of the hardware is not subject to Indiana use tax. Pursuant to IC § 6-8.1-5-1(c), taxpayer has met its burden of proof.

FINDING

Taxpayer's protest is sustained.

CONCLUSION

In summary, Taxpayer's protest of Issues I and II are denied in part and sustained in part subject to the findings of a supplemental audit. Taxpayer's protest of Issue III is sustained.

