

Letter of Findings Number: 09-0056
Use Tax
For Tax Years 2005-07

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ISSUE

I. Use Tax–Telephone Directories.

Authority: Ameritech Publishing, Inc. v. Indiana Dep't of State Revenue, No. 49T10-0305-TA-26 (Ind. Tax Ct. Oct. 19, 2006); IC § 6-2.5-1-1; IC § 6-2.5-1-2; IC § 6-2.5-1-5; IC § 6-2.5-3-2; [45 IAC 2.2-3-4](#); [45 IAC 2.2-4-1](#); Indiana Tax Ct. R. 17.

Taxpayer protests the imposition of use tax on its purchase of telephone directories.

STATEMENT OF FACTS

Taxpayer is a corporation located in Indiana. Taxpayer filed a claim for refund of sales tax it paid when it purchased telephone directories in 2004, 2005, and 2006. The Indiana Department of Revenue ("Department") conducted an investigation of the claim for refund and also conducted an audit for tax years 2005, 2006, and 2007. As a result of the investigation and audit, the Department denied the claim for refund of sales tax in its entirety and issued proposed assessments for use tax for 2005, 2006, and 2007. Taxpayer protests both the denial of its claim for refund and the proposed assessments. An administrative hearing was held and this Letter of Findings results, which addresses the protest of the proposed assessments. A separate Order Denying Refund addresses the protest of the denial of the claim for refund. Further facts will be supplied as required.

I. Use Tax–Telephone Directories.

DISCUSSION

Taxpayer protests the imposition of use tax for the tax years in question. Taxpayer claims that its purchase of telephone directories was exempt from sales tax since it purchased them from an out-of-state vendor. Taxpayer cited an Indiana Tax Court case in support of this position. The Department conducted an investigation of the sales tax refund claim and also conducted an audit for the following years for sales and use taxes. As a result of the investigation and audit, the Department determined that the claim for refund was not valid and that Taxpayer owed additional use taxes for purchases of directories. Taxpayer protests the proposed assessments for use tax. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

The use tax is imposed under IC § 6-2.5-3-2(a), which states:

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.

Also, [45 IAC 2.2-3-4](#) states:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Therefore, if a taxpayer purchases tangible personal property and stores, uses, or consumes it in Indiana, but does not pay sales tax at the time of purchase, then use tax is due.

Taxpayer's claim for refund of sales taxes, as filed with the Department, states that the sales taxes paid were not properly due and therefore should be refunded. Taxpayer cites Ameritech Publishing, Inc. v. Indiana Dep't of State Revenue, No. 49T10-0305-TA-26 (Ind. Tax Ct. Oct. 19, 2006) in support of its claim. Taxpayer also applies this argument to this protest of use tax. In its denial of the claim for refund and in its audit report, the Department determined that there were facts which distinguished Ameritech Publishing from the instant case. A review of that case shows that it was not designated "For Publication" pursuant to Indiana Tax Court Rule 17, which states:

All judgments shall be incorporated in written memorandum decisions by the court. Unless specifically designated "For Publication," such written memorandum decisions shall not be published and shall not be regarded as precedent nor cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case. Judgment shall be subject to review as prescribed by relevant Indiana rules and statutes.

(Emphasis added).

Therefore, since Ameritech Publishing was not for publication, it shall not be regarded as precedent as provided by Tax Ct. R. 17. This means that the decision in Ameritech Publishing applies only to the two parties involved in that specific case. While the Department did discuss Ameritech Publishing in the investigation report and in the audit report, there was no need to do so. Since it is not precedent under Tax Ct. R. 17, and since

Taxpayer was not one of the two parties involved in that case, Ameritech Publishing provides no support for Taxpayer's refund claim and protest and shall not be discussed further.

Taxpayer also argues that it only purchased printing services from its vendor. Taxpayer points out that it retains ownership of the information which is printed on the pages of the directories. The relevant regulation is [45 IAC 2.2-4-1](#), which states:

(a) Professional services, personal services, and services in respect to property not owned by the person rendering such services are not "transactions of a retail merchant constituting selling at retail", and are not subject to gross retail tax. **Where, in conjunction with rendering professional services, personal services, or other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail unless:**

- (1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property;
- (2) The tangible personal property purchased is used or consumed as a necessary incident to the service;
- (3) The price charged for tangible personal property is inconsequential (not to exceed 10 [percent]) compared with the service charge; **and**
- (4) The serviceman pays gross retail tax or use tax upon the tangible personal property at the time of acquisition.

(b) Services performed or work done in respect to property and performed prior to delivery to be sold by a retail merchant must however, be included in taxable gross receipts of the retail merchant.

(c) Persons engaging in repair services are servicemen with respect to the services which they render and retail merchants at retail with respect to repair or replacement parts sold.

(d) A serviceman occupationally engaged in rendering professional, personal or other services will be presumed to be a retail merchant selling at retail with respect to any tangible personal property sold by him, whether or not the tangible personal property is sold in the course of rendering such services. If, however, the transaction satisfies the four (4) requirements set forth in 6-2.5-4-1(c)(010), paragraph (1) [subsection (a) of this section], the gross retail tax shall not apply to such transaction.

(Emphasis added).

A review of the agreement between Taxpayer and its vendor shows that the vendor supplied the paper, ink, and binding materials as part of the purchase of the directories. In order to be considered a serviceman providing only services, and therefore not be considered a retail merchant making a retail transaction under [45 IAC 2.2-4-1](#), all four conditions must be met. In the instant case, the only condition met is number two, which requires that the tangible personal property purchased be used or consumed as a necessary incident to the service. Conditions one, three, and four have not been met. The transactions at issue do not meet the requirements of [45 IAC 2.2-4-1](#). Taxpayer's retention of ownership of the information on the pages is not determinative.

Next, the invoices supplied as part of this protest show charges for copies of the directories. There is not a separate charge for service and a separate charge for materials. As provided by IC § 6-2.5-1-1:

(a) Except as provided in subsection (b), "unitary transaction" includes all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated.

(b) "Unitary transaction" as it applies to the furnishing of public utility commodities or services means the public utility commodities and services which are invoiced in a single bill or statement for payment by the consumer.

(Emphasis added).

Also, IC § 6-2.5-1-2 states:

(a) "Retail transaction" means a transaction of a retail merchant that constitutes selling at retail as described in [IC 6-2.5-4-1](#), that constitutes making a wholesale sale as described in [IC 6-2.5-4-2](#), or that is described in any other section of [IC 6-2.5-4](#).

(b) "Retail unitary transaction" means a unitary transaction that is also a retail transaction.

(Emphasis added).

Finally, IC § 6-2.5-1-5 states in relevant part:

(a) Except as provided in subsection (b), "gross retail income" means the total gross receipts, of any kind or character, received in a retail transaction, including cash, credit, property, and services, for which tangible personal property is sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for:

- (1) the seller's cost of the property sold;
- (2) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller;
- (3) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges;
- (4) delivery charges; or

(5) the value of exempt personal property given to the purchaser where taxable and exempt personal property have been bundled together and sold by the seller as a single product or piece of merchandise. For purposes of subdivision (4), delivery charges are charges by the seller for preparation and delivery of the property to a location designated by the purchaser of property, including but not limited to transportation, shipping, postage, handling, crating, and packing.

(b) "Gross retail income" does not include that part of the gross receipts attributable to:

- (1) the value of any tangible personal property received in a like kind exchange in the retail transaction, if the value of the property given in exchange is separately stated on the invoice, bill of sale, or similar document given to the purchaser;
- (2) the receipts received in a retail transaction which constitute interest, finance charges, or insurance premiums on either a promissory note or an installment sales contract;
- (3) discounts, including cash, terms, or coupons that are not reimbursed by a third party that are allowed by a seller and taken by a purchaser on a sale;
- (4) interest, financing, and carrying charges from credit extended on the sale of personal property if the amount is separately stated on the invoice, bill of sale, or similar document given to the purchaser;
- (5) any taxes legally imposed directly on the consumer that are separately stated on the invoice, bill of sale, or similar document given to the purchaser; or
- (6) installation charges that are separately stated on the invoice, bill of sale, or similar document given to the purchaser.

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Therefore, as provided by IC § 6-2.5-1-1, IC § 6-2.5-1-2, and IC § 6-2.5-1-5, and as listed on the invoices for the sales, these were unitary transactions for the purchase of telephone directories, which are wholly subject to sales tax.

In conclusion, Taxpayer's reliance on a not for publication tax court case is misplaced. Tax Court Rule 17 states that cases which are not for publication shall not be considered precedent. The transactions at issue do not meet the requirements of [45 IAC 2.2-4-1](#) and are therefore considered retail transactions made by retail merchants, not the provision of services. The transactions were unitary transactions as provided by IC § 6-2.5-1-1 and IC § 6-2.5-1-2. The entire cost of the directories is subject to use tax as provided by IC § 6-2.5-1-5. Taxpayer has not met the burden imposed by IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is denied.

Posted: 08/26/2009 by Legislative Services Agency
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