

Letter of Findings: 09-0190
Gross Retail Tax
For the Year 2006

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ISSUES

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

Authority: IC § 6-2.5-2-1; IC § 6-2.5-5-15 (Repealed July 1, 2004); IC § 6-8.1-5-1(c); [45 IAC 15-3-2](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); 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 protests the imposition of the Gross Retail (sales) Tax on sales of vehicles to out-of-state customers.

II. Tax Administration – Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana sole proprietor who started his used car business on a cash basis by means of the Internet in 2006. Pursuant to an audit, the Department of Revenue ("Department") determined that Taxpayer failed to collect and remit the gross retail tax ("sales tax") on several vehicles which Taxpayer sold to out-of-state customers in 2006. The Department's audit assessed sales tax, interest, and penalty. Taxpayer protested the assessments. A hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

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

DISCUSSION

After an audit, the Department assessed Taxpayer sales tax on his sales to out-of-state customers during 2006. Taxpayer, to the contrary, argued that he cannot be held responsible for collecting sales tax on the sales to out-of-state customers.

All tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes a sales tax on retail transactions. IC § 6-2.5-2-1 states:

(a) The person who acquires tangible personal property in a retail transaction is liable for the tax on the transaction and shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction.

(b) The retail merchant shall collect the tax as agent for the state.

Taxpayer, a used car dealer, is a retail merchant and, therefore, is responsible for collecting and remitting the sales tax.

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 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 claimed that he contacted the Indiana Bureau of Motor Vehicles (BMV) for assistance to ensure his compliance when he started the business in 2006. Taxpayer claimed that, per the BMV employee's instruction, he completed and sent to the Department the ST-137 forms, Certificate of Exemption for Out-of-State Delivery of Motor Vehicle. Thus, Taxpayer argued that he cannot be held responsible for the additional sales tax because he relied on the BMV representations.

To support his protest, Taxpayer submitted copies of the ST-137 forms which he completed and allegedly submitted to the Department. Taxpayer maintained that the Department failed to notify him of the change in law regarding sales to out-of-state customers after he sent the ST-137 forms in 2006 and that he cannot now be held liable for the uncollected sales tax. However, Taxpayer did not provide any documentation showing that he delivered the cars in question to the out-of-state customers. Additionally, upon examining Taxpayer's documentation, some of the out-of-state purchasers did not sign the ST-137 forms. Moreover, Taxpayer did not provide any documentation showing that he sent, and the Department received, the ST-137 forms. The Department, conducting a post-hearing search, also did not find any record regarding Taxpayer's submission of the ST-137 forms during 2006.

[45 IAC 15-3-2](#)(e) states:

Oral opinions or advice will not be binding upon the department. However, taxpayers may inquire as to whether or not the department will make a ruling or determination based on the facts presented by the taxpayer. If the taxpayer wishes a ruling by the department, the formal request must be in writing. A taxpayer may also orally receive technical assistance from the department in preparation of returns. However this advice is advisory only and is not binding in the latter examination of returns.

Here, Taxpayer did not contact the Department and request an official advisory letter (which was his prerogative). Taxpayer's reliance on the BMV employee's representation, while understandable, was misplaced. In the absence of other documentation to substantiate Taxpayer's contention, the Department is not able to agree with Taxpayer.

FINDING

Taxpayer's protest is respectfully denied.

II. Tax Administration – Negligence Penalty.

DISCUSSION

Taxpayer also protests the assessment of the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1, the Department may assess a ten (10) percent negligence penalty if the taxpayer:

- (1) fails to file a tax return;
- (2) fails to pay the full amount of tax shown on the tax return;
- (3) fails to remit in a timely manner the tax held in trust for Indiana (e.g., a sales tax); or
- (4) fails to pay a tax deficiency determined by the Department to be owed by a taxpayer.

[45 IAC 15-11-2](#)(b) further states:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty as provided in [45 IAC 15-11-2](#)(c), in part, as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. 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 this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;

(5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer did not provide sufficient documentation establishing that his failure to timely remit tax held in trust was due to reasonable cause and not due to negligence.

FINDING

Taxpayer's protest on the imposition of the negligence penalty is respectfully denied.

SUMMARY

For the reasons discussed above, Taxpayer's protest on the imposition of sales tax is denied. Taxpayer's protest on negligence penalty is also respectfully denied.

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An [html](#) version of this document.