DEPARTMENT OF STATE REVENUE

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Letter of Findings: 09-0411
Sales and Use Tax
For the Years 2006, 2007, and 2008

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ISSUES

I. Sales and Use Tax – Imposition.

Authority: IC § 6-2.5-1-1 et seq.; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-8.1-5-1(c); 45 IAC 2.2-4-2; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Sales Tax Information Bulletin 8 (May 2002); Revenue Ruling ST-97-08 (Jan. 2, 1998).

Taxpayer protests the assessment of use tax on purchases of credit reports.

II. Tax Administration – 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 wholesale distributor of specialty electronic and audio equipment. Pursuant to an audit, the Indiana Department of Revenue ("Department") concluded that Taxpayer purchased credit reports without paying sales tax at the time of the transactions or self-assessing and remitting to the Department the use tax due. The Department thus assessed Taxpayer use tax, interest, and penalty. Taxpayer protests the assessments. A hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales and Use Tax – Imposition.

DISCUSSION

The Department assessed Taxpayer use tax on the purchase of the credit reports because Taxpayer did not pay sales tax at the time of the purchase. Taxpayer claimed that it "receive[d] no tangible personal property," i.e., data or media, and further argued that there was no transfer of tangible personal property at the retail transaction. Thus, Taxpayer believes that it subscribed to a service and, therefore, as a service it is not subject to sales and/or use tax.

As a threshold issue, 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 and a complementary use tax on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-1-1 et seq.

IC § 6-2.5-2-1 provides:

(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.

(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

IC § 6-2.5-3-2 provides:

(a) 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.

Accordingly, all sales of tangible personal property are taxable. An exemption from use tax is granted for a transaction where the gross retail tax ("sales tax") was paid at the time of purchase pursuant to IC § 6-2.5-3-4.

To support its protest, Taxpayer submitted a copy of the master agreement between Taxpayer and its vendor, a copy of a November 2006 invoice, and a three-page sample printout of the credit report itself. The contents of the credit report consist of (1) Business summary, (2) Commercial credit score (including credit score class, credit score percentile, commercial credit score, incidence of delinquent payment among [companies/firms], average high credit, highest credit, trade experiences), (3) Commercial credit analysis, (4) Payment details (payment history), and (5) Special events. All the contents of the credit report were compiled and furnished by the vendor, a repository of consumer credit data.

Taxpayer stated that each year it subscribes and pays a flat fee for unlimited access to use the vendor's credit report database. With this flat fee package deal, Taxpayer is permitted to search and print unlimited copies of credit reports. The vendor has provided Taxpayer with a user-name and password which allow Taxpayer to log into the vendor's website and to access to the vendor's database. Upon entering the vendor's database, Taxpayer can search and retrieve the credit report it wants by using the customer's name, city, state, and/or phone number. Occasionally, if Taxpayer's customer has the vendor's identification number designated by the vendor, Taxpayer

could also retrieve the credit report concerning the customer by entering the identification number into the vendor's database. Additionally, Taxpayer can print out the reports without incurring additional costs. The vendor's website also allows Taxpayer to archive Taxpayer's search results and provides a web-link to "My Report Archive."

Sales Tax Information Bulletin 8 (May 2002), in relevant part, states:

F. Sale of Miscellaneous Data:

The sale of statistical reports, graphs, diagrams or any other information produced or complied [sic] by a computer and sold or reproduced for sale in substantially the same form as it is so produced is considered to be the sale of tangible personal property unless the information from which such reports was compiled was furnished by the same person to whom the finished report is sold.

The charge for reports compiled by a computer exclusively from data furnished by the same person for whom the data is prepared is considered to be for a service and is not subject to sales or use tax unless it is part of a unitary transaction which is subject to sales or use tax.

Here, the vendor compiles and produces the credit reports and sells them "in substantially the same form as [they are] so produced." Taxpayer is limited to search, retrieve, and print out what is produced and offered by the vendor. The vendor, on its website, also designates a web-link, "My Report Archive," for its customers, such as Taxpayer, to organize the purchases of credit reports. Thus, Taxpayer paid the vendor a flat fee in exchange for unlimited copies of the credit reports and the vendor electronically transferred the credit reports to Taxpayer upon Taxpayer's demand, i.e. entering the search terms, retrieving, and printing out or archiving the credit reports. Taxpayer possessed the copies of the credit report, either in printouts or by electronically storing and archiving in "My Report Archive" at the vendor's web server, or simply by viewing the generated reports.

Taxpayer first compared the purchase of a credit report to the purchase of a Certificate of Existence from Access Indiana, the Indiana Secretary of State's website for a business. Taxpayer argued that the Indiana Secretary of State does not collect sales and/or use tax when Taxpayer paid a fee to obtain a Certificate of Existence from Access Indiana. Thus, Taxpayer maintained that, like the purchases of Certificates of Existence, the purchases of credit reports are not subject to sales and/or use tax.

Taxpayer is mistaken. The Indiana Secretary of State is an agency of the Indiana state government and is not a retail merchant as outlined in the Indiana statutes. Additionally, the purpose of issuing the Certificate of Existence is to certify the facts that a company is registered to do business in Indiana and the company is in compliance with the Indiana laws, and nothing more. Unlike the information in the credit reports compiled by the vendor, the Certificate of Existence issued by the Indiana Secretary of State does not contain "statistical reports, graphs, diagrams or any other information produced or complied [sic] by a computer" as stated in the Sales Tax Information Bulletin 8 (May 2002).

Taxpayer also maintained that it "receive[d] no tangible personal property" and, thus, it subscribed to a service which is not subject to sales and/or use tax. To support its argument, Taxpayer relied on 45 IAC 2.2-4-2 and the Revenue Ruling ST-97-08 (Jan. 2, 1998).

45 IAC 2.2-4-2, in relevant part, 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.

Notably, only when the four requirements mentioned above are fulfilled, is a taxpayer entitled to the exemption pursuant to 45 IAC 2.2-4-2. Here, the vendor is a commercial credit data repository that compiled credit information and packaged the credit information into report formats for sale through its website and electronically transferred the data/reports to Taxpayer. Taxpayer did not contract with the vendor to perform and provide a service, i.e. collecting specific and customized information. Instead, Taxpayer purchased the completed products, i.e., credit reports, after the vendor already compiled and furnished the information in the report formats.

The Revenue Ruling ST-97-08 responded to a question submitted by a taxpayer, a nonprofit trade association, whose members included commercial television and radio broadcasters located throughout Indiana. The taxpayer's members regularly entered into agreements with market analysts for surveys of viewers or listeners in their respective viewing or listening markets. The market analysts then interpreted and collated the surveys to furnish the reports to the taxpayer's members. The Revenue Ruling ST-97-08 concluded that:

Here, there is a transfer of tangible personal property (market surveys and reports themselves) for

consideration (retail transaction) between the taxpayer's members and the market analysts, hence, pursuant to [IC § 6-2.5-2-1 and IC § 6-2.5-3-2] the transaction is subject to sales and/or use tax to be collected by the market analysts. The charge for this retail transaction (sale or license to use) is only an insignificant part, however, of the total charge made by the market analysts. The largest part of the charge is made for the compilation, interpretation and collation of the data used for the market surveys and reports (a provision of a service).

Unlike the market analysts in the Revenue Ruling ST-97-08 who were obligated to (1) gather statistical information by surveying selected samples of households within their customers' viewing or listening areas, (2) compile, interpret, and collate the information, and (3) present the results of the survey to the customers in the form of a written report, here, Taxpayer did not obligate the vendor to perform the tasks mentioned in the Revenue Ruling ST-97-08. Taxpayer's documentation showed that it purchased the credit reports consisting of data already compiled by the vendor in the format which the vendor produced.

Accordingly, the vendor sells the credit reports it compiled through its website and electronically transfers the reports "in substantially the same form as [they are] so produced" to whoever is interested in purchasing or subscribing, such as Taxpayer. Although Taxpayer paid a flat fee for the purchases of the unlimited copies of the credit reports, Taxpayer purchased the credit reports at the retail transaction. Thus, the use tax is properly imposed because Taxpayer failed to pay sales tax at the time of the transactions.

FINDING

Taxpayer's protest on the assessment of use tax is respectfully denied.

II. Tax Administration – Penalty.

DISCUSSION

Taxpayer also protests the imposition 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 has provided sufficient documentation establishing that its failure to timely remit tax was due to reasonable cause and not due to negligence.

FINDING

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

SUMMARY

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

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