

Letter of Findings Number: 09-0540
Sales and Use Tax
For the Years 2006-2008

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ISSUES

I. Sales and Use Tax—Rental Equipment.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-8.1-5-1; [45 IAC 2.2-4-27](#).

Taxpayer protests the imposition of sales and use tax on rental equipment.

II. Tax Administration—Negligence Penalty and Interest.

Authority: IC § 6-8.1-10-1; IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the ten percent negligence penalty and interest.

STATEMENT OF FACTS

Taxpayer is a vision care facility in Indiana. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not paid all sales and use tax due for the tax years 2006, 2007, and 2008. The Department therefore issued proposed assessments for use tax, ten percent negligence penalties and interest for those years. Taxpayer protests that one piece of equipment it rented from a third party was not subject to sales tax. Taxpayer therefore protests the imposition of use tax on that piece of equipment as well as all negligence penalties and interest. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Sales and Use Tax—Rental Equipment.

DISCUSSION

Taxpayer protests the imposition of use tax on a piece of equipment which it believes is not subject to sales and use tax. The Department determined that the equipment in question was rented for use by Taxpayer in the course of providing its vision care services. Taxpayer protests that the equipment was rented with an operator and was therefore not subject to sales and 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 first relevant statute is IC § 6-2.5-2-1, which states:

- (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.

Also, Indiana imposes a complementary use tax 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.

Next, [45 IAC 2.2-4-27](#)(3) states:

- (A) The renting or leasing of tangible personal property, together with the services of an operator shall be subject to the tax when control of the property is exercised by the lessee. Control is exercised when the lessee has exclusive use of the property, and the lessee has the right to direct the manner of the use of the property. If these conditions are present, control is deemed to be exercised even though it is not actually exercised.
- (B) The rental of tangible personal property together with an operator as part of a contract to perform a specific job in a manner to be determined by the owner of the property or the operator shall be considered the performance of a service rather than a rental or lease provided the lessee cannot exercise control over such property and operator.
- (C) When tangible personal property is rented or leased together with the service of an operator, the gross retail tax or use tax is imposed on the property rentals. The tax is not imposed upon the charges for the operator's services, provided such charges are separately stated on the invoice rendered by the lessor to the lessee.
- (D) Notwithstanding any other provision of this regulation [[45 IAC 2.2](#)] any lessee leasing or renting a vehicle(s) from any lessor, including an individual lessor, with or without operators, driver(s), or even if the operator (driver) himself is the lessor, regardless of control exercised, shall not be subject to the gross retail tax or use tax, if the leased or rented vehicle(s) are directly used in the rendering of public transportation. (Emphasis added).

In the course of the protest process, Taxpayer provided documentation and video evidence which establishes that the equipment was rented together with an operator as part of a contract to perform a specific job in a manner to be determined by the owner of the property or the operator. This qualifies as a service under [45 IAC 2.2-4-27\(d\)\(3\)\(B\)](#), and is not subject to sales or use tax. Taxpayer has met the burden imposed by IC § 6-8.1-5-1(c). The piece of equipment in question is not subject to use tax.

FINDING

Taxpayer's protest is sustained.

II. Tax Administration–Negligence Penalty and Interest.

DISCUSSION

Taxpayer protests the imposition of ten percent negligence penalty and interest. Taxpayer states that it did what was reasonable in its actions and that it was aware of and self-assessed and remitted sales and use taxes. Taxpayer believes that these circumstances are sufficient to warrant waiver of penalty and interest. The Department notes that, under IC § 6-8.1-10-1(e), it may not waive interest.

Next, the Department refers to IC § 6-8.1-10-2.1(a), which states in relevant part:

If a person:

...

(3) incurs, upon examination by the department, a deficiency that is due to negligence;

...

the person is subject to a penalty.

The Department refers to [45 IAC 15-11-2\(b\)](#), which 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.

(Emphasis added.)

[45 IAC 15-11-2\(c\)](#) provides in pertinent part:

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.

In this case, Taxpayer has been sustained on the imposition of use tax on the piece of equipment discussed in Issue I above, but has additional use tax assessments which remain as assessed. While the amount of penalty will be recalculated after the adjustment discussed in Issue I, the penalty is properly imposed on the remaining amount. As provided by IC § 6-8.1-10-1(e), the Department may not waive interest.

FINDING

Taxpayer's protest is denied.

CONCLUSION

Taxpayer is sustained on Issue I regarding the imposition of use tax on the lease of equipment with an operator. Taxpayer is denied on Issue II regarding the imposition of penalty and interest.

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