**DEPARTMENT OF STATE REVENUE**

04-20090398.LOF

**Letter of Findings: 09-0398**
**Indiana Gross Retail Tax**
**For the Year 2007**

**NOTICE:** Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

**ISSUE**

**I. Gross Retail Tax–Watercraft.**

**Authority**: IC § 6-2.5-1-1 et seq.; IC § 6-2.5-3-2; IC § 6-2.5-3-7; IC § 6-8.1-5-1; IC § 9-31-3-1; IC § 9-31-3-2; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Rhoade v. Ind. Dep't of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); 45 IAC 15-5-3.

Taxpayer argues that the Department of Revenue erred when it assessed Gross Retail (use) Tax on the purchase price of a watercraft.

**STATEMENT OF FACTS**

Taxpayer is an Indiana resident who purchased a watercraft in Kentucky on August 17, 2007. Taxpayer instructed the dealer that he was exempt from paying Kentucky sales tax because the boat was being delivered to Indiana. The Kentucky dealer and Taxpayer completed an "Out-of-State Delivery Exemption Certificate." This "Out-of-State Delivery Exemption Certificate," includes a section that was signed by Taxpayer as buyer, which provides:

> I hereby certify under penalty of perjury that the tangible personal property described below is purchased exempt from Kentucky sales tax and will be delivered by the seller or his agent immediately to the State of Indiana and the information contained herein is true and correct. I further understand that the tangible personal property described herein is not to be returned to [Kentucky] for use.

The "Out-of-State Delivery Exemption Certificate" also includes an affidavit, signed by the Kentucky dealer, providing that "[the Kentucky dealer] being sworn according to law, depose and say that I have personally delivered the... boat... to [Taxpayer's home address in Indiana]." Thereafter, the Kentucky Department of Revenue contacted the Indiana Department of Revenue (Department) with the information indicating that this transaction ended with the boat being delivered to Indiana for use in Indiana. The "U.S. Coast Guard's Certificate of Documentation," specified the boat's "hailing port" was in Indiana. As a result of a desk audit, the Department determined this was an Indiana retail transaction and assessed gross retail tax (use tax), interest, and penalty on the boat purchase. Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer was provided an opportunity to explain its position on the disputed issue, and this Letter of Findings results.

**I. Gross Retail Tax–Watercraft.**

**DISCUSSION**

As with any administrative tax protest, it should be noted as a threshold issue that it is the taxpayer who bears the burden of proof. "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." 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). The Indiana Administrative Code states "[t]he burden of proving that a proposed assessment is incorrect rests with the taxpayer...." 45 IAC 15-5-3(b)(8).

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. 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." IC § 6-2.5-3-2. The use tax is the functional equivalent of sales tax on the acquisition of certain non-exempt tangible personal property that escapes sales tax, usually because the property was acquired in a transaction that occurred outside Indiana. Rhoade v. Ind. Dep't of State Revenue, 774 N.E.2d 1044, 1047-48 (Ind. Tax Ct. 2002).

Relevant to the issue raised by Taxpayer is the use tax provision found at IC § 6-2.5-3-2(b) which states that, "The use tax is imposed on the storage, use, or consumption of a vehicle, an aircraft, or a watercraft, if the vehicle, aircraft, or watercraft... is required to be titled, licensed, or registered by this state for use in Indiana." (Emphasis added). However, Taxpayer argues that it was not necessary to register his watercraft in Indiana and, thus, no sales or use tax is due on its purchase of the watercraft. Even though the law states that, "[E]very motorboat principally used on the waters of Indiana must be registered [with the Bureau of Motor Vehicles] and numbered" under IC § 9-31-3-1, Taxpayer claims it is entitled to an exemption from registering the boat in Indiana. Taxpayer alleges an exemption offering any and all of the following reasons for exemption: his boat was not used for more than 60 days on the waters of Indiana, the primary use of the boat occurred in several states, and/or the

boat is of a class that is federally numbered and is exempt from state registration. See IC § 9-31-3-2.

Essentially, Taxpayer's argument is that since the watercraft is not primarily used in Indiana, that it is not required to register the boat in Indiana, and, therefore, no use tax is due because no taxable Indiana "use" occurred.

However, accepting Taxpayer's conclusion requires accepting Taxpayer's position that the watercraft does not have to be registered in Indiana, or any other state. Taxpayer, without registering the boat anywhere, paying sales or use tax to any state, or showing that the boat was transported out of Indiana, merely asserts that the watercraft was used in Indiana less than 60 consecutive days and was not required to be registered in Indiana. Taxpayer then also asserts that the boat is used in "numerous other states" including Kentucky, Illinois, and Alabama for undisclosed amounts of time. Thus, Taxpayer concludes that the watercraft did not need to ever be registered in any state, no sales or use tax was ever owed to any state, and Taxpayer acquired a tax free, "nowhere" boat.

At the time Taxpayer purchased the boat in Kentucky, he claimed an exemption from Kentucky sales tax on the ground that the watercraft was never to be returned to Kentucky for use in Kentucky and that the watercraft was "personally delivered" to Indiana from Kentucky by the seller. These facts were certified by both Taxpayer and the seller. In addition, the watercraft's Coast Guard Certificate of Documentation specifies that the watercraft's "hailing port" is in Indiana.

Not only are watercraft specifically subject to tax under the circumstances in IC § 6-2.5-3-2(b), but the law presumes that any item of tangible personal property – including a watercraft – acquired for delivery within Indiana is subject to tax under IC § 6-2.5-3-7. "A person who acquires tangible personal property from a retail merchant for delivery in Indiana is presumed to have acquired the property for storage, use, or consumption in Indiana, unless the person or the retail merchant can produce evidence to rebut that presumption." IC § 6-2.5-3-7(a). The Department is unable to agree that Taxpayer has rebutted the presumption set out in IC § 6-2.5-3-7(a) or that Taxpayer has met his burden of demonstrating that the proposed assessment of use tax is incorrect pursuant to IC § 6-8.1-5-1(c). Taxpayer did not provide documentation establishing any use in any other state. Although the Department agrees that an Indiana resident can acquire a watercraft which is not primarily used within the resident's own home state, the Department is not prepared to agree that an Indiana resident can acquire a watercraft and never use that watercraft anywhere.

Taxpayer avoided paying Kentucky sales tax by declaring, under the penalties of perjury, that the watercraft was to be delivered to Indiana and certifying that the watercraft will never be returned for use in Kentucky on a document upon which the seller also provides, by sworn and duly signed testimony, that the boat was "personally delivered" to Taxpayer's home address in Indiana. Perhaps Taxpayer's plans changed after the transaction took place, but it would seem intuitive that the watercraft must have been "used" somewhere; thus, use tax would be paid somewhere and the boat would be registered somewhere. Moreover, Taxpayer argues and attempts to show that if use tax is due to a state it should not be paid to Indiana, but should be paid to Kentucky because Taxpayer has a mooring agreement in Kentucky. However, Taxpayer's Kentucky mooring agreement lists a different boat and has been in place since January of 2007, which was many months prior to this boat's purchase in August of 2007. Moreover, Taxpayer signed an affidavit certifying it would never use the boat in question in Kentucky, but wants the Department to "presume" that tax would be due in Kentucky where Taxpayer said it would never use the boat and where Taxpayer has not subsequently paid any sales or use tax.

Alternatively, Taxpayer claims to have "mistakenly signed" this document for an out-of-state delivery exemption, and further asserts that the seller did not actually deliver this boat to Indiana. Taxpayer maintains that because of its size this boat cannot operate in the waterways near his home address in Indiana and that Taxpayer would have the boat delivered to his home address because it would require specially equipment for the boat to be moved from its home address to a body of water. However, it seems unlikely that Taxpayer, an attorney, would "mistakenly sign" a document that required certification under the penalties of perjury or that the dealer would sign an affidavit that it personally delivered the boat to the Taxpayer's Indiana home address if the dealer did not. In fact, upon hearing this assertion during the course of the hearing, the Department asked Taxpayer to provide documentation from the dealer that the dealer's initial certification about the personal delivery to Indiana was not factual. However, Taxpayer did not provide any such documentation.

Lastly, Taxpayer also cites to IC § 6-2.5-3-2(e)(3), in isolation, for the proposition that use tax is generally not due on the exercising of any right or power of the property when the property is later transported outside the state for use solely outside of Indiana. Notwithstanding that if, as Taxpayer claims, the boat was only delivered into Indiana to be transported outside of Indiana and special equipment is required to transport the boat, Taxpayer did not present any documentation demonstrating that the boat was transported outside of Indiana–using special equipment or otherwise. IC § 6-2.5-3-2(e) has three specific requirements, and Taxpayer's situation also fails to meet the other requirements. See IC § 6-2.5-3-2(e)(2) (requiring that the property be brought into Indiana for the "sole purpose of being processed, printed, fabricated, or manufactured into, attached to, or incorporated into other tangible personal property.")

**FINDING**

Taxpayer's protest is denied.

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