DEPARTMENT OF STATE REVENUE

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Letter of Findings Number: 09-0618
Sales and Use Tax
For Tax Years 2006-07

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ISSUES

I. Sales and Use Tax–Imposition.

Authority: IC § 6-2.5-1-1; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-7; IC § 6-2.5-4-4; IC § 6-2.5-5-8; IC § 6-8.1-5-1; 45 IAC 2.2-3-4; 45 IAC 2.2-4-8; Sales Tax Information Bulletin 28S (May 2007).

Taxpayer protests the imposition of sales and use tax on some items included as taxable in the audit.

II. Tax Administration–Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2.

Taxpayer protests the imposition of a ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is a recreational vehicle ("RV") retailer in Indiana. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not collected and remitted the proper amount of sales tax in its capacity as a retail merchant and had not remitted the proper amount of use tax for the tax years 2006 and 2007. The Department therefore issued proposed assessments for sales and use tax, ten percent negligence penalties, and interest for those years. Taxpayer states that it did collect and remit the proper amount of sales tax in its capacity as a retail merchant, as well as several items upon which the Department imposed use tax, and that the proposed assessments are incorrect. Taxpayer therefore protests the imposition of sales tax, a portion of the use tax, and the ten percent negligence penalties. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Sales and Use Tax–Imposition.

DISCUSSION

Taxpayer protests the imposition of sales tax on sales of RVs and the imposition of use tax on some items it purchased during the tax years 2006-07. Taxpayer states that the RV sales in question were not Indiana taxable transactions for various reasons. Taxpayer also states that several items included in the Department's use tax calculations were either incorrectly included or entered twice. 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 sales tax is imposed by 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. (Emphasis added.)

Next, IC § 6-2.5-3-7 states:

(a) 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. However, the person or the retail merchant can produce evidence to rebut that presumption.

(b) A retail merchant is not required to produce evidence of nontaxability under subsection (a) if the retail merchant receives from the person who acquired the property an exemption certificate which certifies, in the form prescribed by the department, that the acquisition is exempt from the use tax.

(c) A retail merchant that sells tangible personal property to a person that purchases the tangible personal property for use or consumption in providing public transportation under IC 6-2.5-5-27 may verify the exemption by obtaining the person's:

(1) name;

(2) address; and

(3) motor carrier number, United States Department of Transportation number, or any other identifying number authorized by the department.

The person engaged in public transportation shall provide a signature to affirm under penalties of perjury that the information provided to the retail merchant is correct and that the tangible personal property is being purchased for an exempt purpose.

(Emphasis added).

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

(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.

Also, 45 IAC 2.2-3-4 provides:

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.

In its audit report, the Department determined that Taxpayer sold RVs to certain out-of-state purchasers without collecting sales tax. Also, pursuant to IC § 6-2.5-5-39(c), the Department explained that Indiana entered into reciprocal agreements with forty-two states providing that customers from those states, who completed an affidavit which stated that the RV would be registered in the other state, were able to purchase RVs exempt from sales tax in Indiana. However, citizens of the other eight states and any other country which did not have reciprocal agreements were not exempt from Indiana sales tax and were required to pay sales tax on the purchase of an RV. The Department reviewed the sales documents and found that several of the RVs were sold to citizens of the non-reciprocal states and/or Canada. The Department therefore imposed sales tax on Taxpayer as the retail merchant of those sales.

Sales Tax Information Bulletin 28S (May 2007) stated, in relevant part:

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 the 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.

While Sales Tax Information Bulletin 28S (May 2007) was not issued until the second of the two tax years at issue (and has since been updated twice), the above-referenced provision is relevant for the entire two tax years. Taxpayer physically delivered the RVs to a delivery point outside Indiana, either itself or by third-party carrier hired by Taxpayer. The terms and method of delivery were indicated on the sales invoices and Taxpayer kept copies of such terms of delivery. As provided by Sales Tax Information Bulletin 28S (May 2007), this constitutes delivery in interstate commerce. The distinction is that Taxpayer, as the merchant, arranged delivery to the out-of-state address, which constituted a sale in interstate commerce. Had Taxpayer's customer arranged delivery, then the transaction would have constituted an Indiana sale and would have been subject to Indiana sales tax. Therefore, while the purchasers in question were indeed residents of the eight non-reciprocal states as originally determined by the Department, the sales were nonetheless exempt due to the fact that they took place in interstate commerce. Regarding the collection of sales tax on these RV sales, Taxpayer has met the burden imposed by IC § 6-8.1-5-1(c).

Next, Taxpayer protests the Department's determination that sales tax should have been collected on the sale of an RV referred to as "Unit 0360A", from Taxpayer to an RV dealer in another state. Taxpayer states that, not only was the sale exempt as a wholesale transaction, it also has a completed exemption certificate for this sale from the out-of-state dealer. As stated above, IC § 6-2.5-3-7 provides that a retail merchant is not required to produce evidence of nontaxability under subsection (b) if the retail merchant receives from the person who acquired the property an exemption certificate which certifies, in the form prescribed by the department, that the acquisition is exempt from the use tax. Since Taxpayer has an exemption certificate, in the form prescribed by the Department, Taxpayer is not required to produce any other evidence of nontaxability as provided by IC § 6-2.5-3-7(b).

Next, Taxpayer protests the Department's determination that Taxpayer should have collected sales tax on the sale of an optional equipment "add-on" for one customer. The Department included the entire $3,820 charged for this add-on in its assessment of tax. Taxpayer protests that the $3,820 included the amounts charged for labor, parts, and sales tax charged on the parts. IC § 6-2.5-1-1 states:

(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.

Taxpayer provided a copy of the invoice for the add-on. Upon review, the add-on was not a unitary transaction, as defined by IC § 6-2.5-1-1(a). The invoice also shows that sales tax was collected on the sale of parts. Therefore, Taxpayer did collect the proper amount of sales tax on the add-on, and has met the burden

imposed by IC § 6-8.1-5-1(c).

Next, Taxpayer protests that some sales included in the Department's calculations on page thirteen (13) of the audit report were overstated due to Taxpayer's erroneous double entry of sales to a particular customer on its September 2007 general ledger. A review of the ledger establishes that $64,090 was entered twice for a single sale. The Department's calculations on page thirteen of the audit report will be recalculated after removal of the $64,090 which represents the second erroneous entry of the sale in question.

Next, Taxpayer protests the imposition of use tax on rental of booth spaces. The Department determined that Taxpayer had rented booth spaces at RV shows, but had not paid sales tax on those rentals. In its audit report, the Department referred to 45 IAC 2.2-4-8, which states:

(a) For the purpose of the state gross retail tax and use tax: Every person engaged in the business of renting or furnishing for periods of less than thirty (30) days any accommodation including booths, display spaces and banquet facilities, in any place where accommodations are regularly furnished for a consideration is a retail merchant making retail transactions in respect thereto and the gross income received therefrom shall constitute gross retail income from retail unitary transactions.

(b) In general, the gross receipts from renting or furnishing accommodations are taxable. An accommodation which is rented for a period of thirty (30) days or more is not subject to the gross retail tax.

(c) There is no exemption for purchases made by persons who are engaged in renting or furnishing accommodations. Such persons are deemed to purchase or otherwise acquire tangible personal property for use or consumption in the regular course of their business.

(d) The renting or furnishing of an accommodation for less than thirty (30) days constitutes a retail merchant making a retail transaction. Every person so engaged must collect the gross retail tax on the gross receipts from such transactions. The tax is borne by the person or organization who uses the accommodation.

(e) The tax is imposed on the gross receipts from "furnishing" an accommodation. The gross receipts subject to tax include the amount which represents consideration for the rendition of those services which are essential to the furnishing of the accommodation, and those services which are regularly provided in furnishing the accommodation. Such amounts are subject to tax even when they are separately itemized on the statement or invoice.

(f) The tax is imposed on the gross receipts from accommodations which are furnished for periods of less than thirty (30) days.

Taxpayer protests that the spaces were rented from promoters who in turn rented the facilities which were operated by political subdivisions or capital improvement boards and, as such, were exempt from sales tax under IC § 6-2.5-4-4, which states:

(a) A person is a retail merchant making a retail transaction when the person rents or furnishes rooms, lodgings, or other accommodations, such as booths, display spaces, banquet facilities, and cubicles or spaces used for adult relaxation, massage, modeling, dancing, or other entertainment to another person:

(1) if those rooms, lodgings, or accommodations are rented or furnished for periods of less than thirty (30) days; and

(2) if the rooms, lodgings, and accommodations are located in a hotel, motel, inn, tourist camp, tourist cabin, gymnasium, hall, coliseum, or other place, where rooms, lodgings, or accommodations are regularly furnished for consideration.

(b) Each rental or furnishing by a retail merchant under subsection (a) is a separate unitary transaction regardless of whether consideration is paid to an independent contractor or directly to the retail merchant.

(c) For purposes of this section, "consideration" includes a membership fee charged to a customer.

(d) Notwithstanding subsection (a), a person is not a retail merchant making a retail transaction if:

(1) the person is a promoter that rents a booth or display space to an exhibitor; and

(2) the booth or display space is located in a facility that:

(A) is described in subsection (a)(2); and

(B) is operated by a political subdivision (including a capital improvement board established under IC 36-10-8 or IC 36-10-9) or the state fair commission.

This subsection does not exempt from the state gross retail tax the renting of accommodations by a political subdivision or the state fair commission to a promoter or an exhibitor.

(Emphasis added).

Also, IC § 6-2.5-5-8(d) states:

The rental or leasing of accommodations to a promoter by a political subdivision (including a capital improvement board) or the state fair commission is not exempt from the state gross retail tax, if the rental or leasing of the property by the promoter is exempt under IC 6-2.5-4-4.

Read together, IC § 6-2.5-4-4(d) and IC § 6-2.5-5-8(d) provide that when a promoter rents space from a political subdivision or capital improvement board, that promoter is subject to sales tax on the rental. Those statutes also provide that the promoter is not a retail merchant involved in a retail transaction. Since the promoter is not a retail merchant involved in a retail transaction, the promoter's customers, such as Taxpayer, are not involved in retail transactions. Since the customers are not involved in retail transactions, there are no sales or

use tax due on these rentals.

Next, Taxpayer protests the imposition of use tax on purchases for which the Department could find no invoices during the audit. Taxpayer states that the purchases in question, listed in Exhibit F of Taxpayer's protest documents and at the bottom of page twenty-one and the top of page twenty-two of the audit report, were for prescription drugs. Taxpayer explains that the prescriptions were paid by credit card, and that an employee used a company credit card instead of a private credit card. Taxpayer states that the purchases were not business purchases and should not be included in its use tax calculations. A review of the documentation establishes that the purchases were prescription drugs. Since the consumer of prescription drugs was Taxpayer's employee and not Taxpayer itself, Taxpayer did not store, use, or consume the tangible personal property in question, and use tax is not due on these purchases, as provided by IC § 6-2.5-3-2(a).

In conclusion, the sales of the RVs in question were in interstate commerce and were therefore not subject to Indiana sales tax. The sale of Unit 0360A was an exempt sale and sales tax was not due on that transaction. The optional equipment "add-on" charge in question was for labor only, since Taxpayer had separately stated the costs of materials and had charged sales tax on that amount. The double entry of the sale of one RV will be corrected as a single entry for the Department's calculations as described on page thirteen of the audit report. The rental of booths or display spaces by promoters to Taxpayer in facilities operated by political subdivisions or capital improvement boards were not subject to sales or use tax since IC § 6-2.5-4-4(d) provides that such rentals are not retail transactions. The charges for prescription drugs are not subject to use tax since Taxpayer did not store, use, or consume the drugs.

FINDING

Taxpayer's protest is sustained.

II. Tax Administration–Negligence Penalty.

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty for the tax years in question. Taxpayer protests the imposition of penalty. 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.

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 incurred a deficiency which the Department determined was due to negligence under 45 IAC 15-11-2(b), and so was subject to a penalty under IC § 6-8.1-10-2.1(a). While Taxpayer was sustained on its protest in Issue I, some use tax liabilities remain. Taxpayer has not affirmatively established that its failure to pay the remaining deficiency was due to reasonable cause and not due to negligence, as required by 45 IAC 15-11-2(c). The amount of penalty will be recalculated after making the adjustments resulting from the outcome of Taxpayer's protest in Issue I.

FINDING

Taxpayer's protest is denied.

CONCLUSION

Taxpayer's protest is sustained on Issue I regarding imposition of sales and use tax, as described in Issue I. Taxpayer's protest is denied on Issue II regarding imposition of negligence penalties.

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