

Letter of Findings Number: 09-0736
Sales and Use Tax
For Tax Years 2006-2008

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ISSUES

I. Sales and Use Tax—Bowling Shoes.

Authority: IC § 6-2.5-1-5; IC § 6-2.5-1-21; IC § 6-2.5-2-1; IC § 6-2.5-4-10; IC § 6-8.1-5-1.

Taxpayer protests the assessment of sales tax on receipts from bowling shoe rentals.

II. Tax Administration—Negligence Penalty and Interest.

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

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

STATEMENT OF FACTS

Taxpayer operates a bowling alley in Indiana. After an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer owed additional sales and use tax for the tax years 2006, 2007, and 2008 and assessed tax, interest, and penalty. Taxpayer protested the imposition of interest, penalty, and sales tax on the receipts it received from bowling shoe rentals. An administrative hearing was held, and this Letter of Findings results.

I. Sales and Use Tax—Bowling Shoes.

DISCUSSION

All tax assessments are presumed to be accurate; the taxpayer bears the burden of proving that an assessment is incorrect. IC § 6-8.1-5-1(c).

The Department found that Taxpayer was renting bowling shoes without collecting sales tax. Indiana imposes "[a]n excise tax, known as the state gross retail tax ["sales tax"]... on retail transactions made in Indiana." IC § 6-2.5-2-1(a). Pursuant to IC § 6-2.5-4-10(a) "a person, other than a public utility, is a retail merchant making a retail transaction when he rents or leases tangible personal property to another person."

Further, [45 IAC 2.2-4-27](#)(c)-(d), in relevant part, provides:

(c) In general, the gross receipts from renting or leasing tangible personal property are subject to tax. The rental or leasing of tangible personal property constitutes a retail transaction, and every lessor is a retail merchant with respect to such transactions. The lessor must collect and remit the [sales tax] or use tax on the amount of actual receipts as agent for the state of Indiana.

...

(d) The rental or leasing of tangible personal property, by whatever means effected and irrespective of the terms employed by the parties to describe such transaction, is taxable.

...

IC § 6-2.5-1-21(a) defines "rental" as "any transfer of possession or control of tangible personal property for a fixed or indeterminate term for consideration."

Accordingly, when a person transfers any type of control or possession over tangible personal property in exchange for consideration, sales tax is due on the transfer of the property.

Taxpayer asserts that the transactions where its customers are paying for the use of bowling shoes that Taxpayer has provided do not meet the definition of "rental" provided in IC § 6-2.5-1-21. Taxpayer maintains that since Taxpayer requires its customers to give Taxpayer a personal shoe while the customer uses its bowling shoes, Taxpayer does not transfer possession or control of the bowling shoes to the customers. Taxpayer reasons that since these transactions are not "rentals," sales tax is not due.

However, Taxpayer is mistaken. The statute does not require the person renting the property to gain complete control or possession over the property. As long as the person renting the property receives any type of control or possession of the property, sales tax is due on the transfer of the property. For example, when a person rents a set of golf clubs for use on a golf course and the golf course limits the use of the clubs to its course, sales tax is due on the transfer. While Taxpayer's customers have obtained possession and control of the bowling shoes that has been limited by Taxpayer, the customers are still receiving some form of possession or control. Therefore, the transfer of the bowling shoes for consideration qualifies as a "rental" that is subject to sales tax.

Additionally, Taxpayer asserts that the amounts that the Department subjected to sales tax for the bowling shoes rentals are overstated because the amounts include discount tickets/coupons that were provided for free shoes rentals. During the course of the hearing, Taxpayer provided some examples of the discount coupons it hands out to its birthday customers, to school groups, and to charities for events that entitle the customer to a free shoe rental.

Pursuant to IC § 6-2.5-1-5(b)(3), "'Gross retail income' does not include that part of the gross receipts attributable to discounts, including cash, terms, or coupons that are not reimbursed by a third party that are allowed by a seller and taken by a purchaser on a sale." While Taxpayer submitted some coupons that on their face included free shoe rental, Taxpayer did not provide evidence of transactions where these discount coupon amounts were recorded in its shoe rentals revenue account that is being subjected to tax. Therefore, Taxpayer has failed to meet its burden of proof under IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is respectfully denied.

II. Tax Administration—Negligence Penalty and Interest.

DISCUSSION

The Department issued proposed assessments, ten percent negligence penalties, and interest for the tax years in question. Taxpayer protests the imposition of penalties and interest. The Department is prohibited from waiving interest as provided by IC § 6-8.1-10-1(e). The Department also refers to IC § 6-8.1-10-2.1(a)(3), which provides, "[i]f a person... 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.

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

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). Taxpayer has provided sufficient information to establish that its failure to pay the deficiency in this instance was not due to Taxpayer's negligence, but was due to reasonable cause as required by [45 IAC 15-11-2\(c\)](#). While Taxpayer's current circumstances show that Taxpayer acted with reasonable cause, Taxpayer should be on notice that should these circumstances arise again in the future penalty waiver would not be warranted. In addition, the Department may not waive interest. Therefore, the penalties will be waived and interest will remain.

FINDING

Taxpayer's protest is partially sustained and partially denied.

CONCLUSION

Taxpayer's protest is denied regarding Issue I and the imposition of sales tax on the receipts received from bowling shoe rentals. Taxpayer's protest is sustained regarding the imposition of penalties and denied regarding the imposition of interest.

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