

Letter of Findings: 09-0797
Gross Retail Tax
For the Years 2006 through 2008

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ISSUES

I. Extended Warranty Contracts – Gross Retail Tax.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2(a); IC § 6-2.5-4-1; IC § 6-2.5-4-1(e); IC § 6-8.1-5-1(c); Sales Tax Information Bulletin 2 (December 2006).

Taxpayer argues that it is not required to collect sales tax from its customers when it sells extended warranties.

II. Computer Based Information Technologies – Gross Retail Tax.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-2(a); IC § 6-8.1-5-1(c); Sales Tax Information Bulletin 8 (May 2002); [45 IAC 2.2-4-1](#).

Taxpayer argues that purchases of certain information related technologies were not subject to sales tax.

STATEMENT OF FACTS

Taxpayer is an Indiana car dealership. Taxpayer's facilities include a retail showroom, sales offices, parts facility, and service shop. The Department conducted an audit review of Taxpayer's business and tax records concluding that Taxpayer owed additional tax. Taxpayer disagreed with a portion of the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representative explained the basis for the protest. This Letter of Findings results.

I. Extended Warranty Contracts – Gross Retail Tax.

DISCUSSION

Taxpayer sold optional extended warranty contracts to customers for new and used vehicles. Under the terms of these contracts, parts and service would be provided in the event the vehicle malfunctioned. The contracts were billed on a "lump-sum" basis; the customer paid one price for the service, labor, and parts provided under the warranty contract. Taxpayer did not charge or collect sales tax.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "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."

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-3-2(a). IC § 6-2.5-4-1 defines "retail transactions" stating in part as follows:

- (a) A person is a retail merchant making a retail transaction when he engages in selling at retail.
- (b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business he:
 - (1) acquires tangible personal property for the purpose of resale; and
 - (2) transfer that property to another for consideration.
- (c) For purposes of determining what constitutes selling at retail, it does not matter whether:
 - (1) the property is transferred in the same form as when it was acquired;
 - (2) the property is transferred alone or in conjunction with other property or services; or
 - (3) the property is transferred conditionally or otherwise.

Here, Taxpayer is purportedly the "retail merchant" selling "tangible personal property" in conjunction with "other property or services."

The Department has previously addressed the issue of optional maintenance agreements in Sales Tax Information Bulletin 2 (December 2006) which states in part as follows:

Optional warranties and maintenance agreements that contain the right to have property supplied in the event it is needed are subject to sales tax if there is a reasonable expectation that tangible personal property will be provided. Any parts or tangible personal property supplied pursuant to this type of agreement are not subject to sales or use tax. The supplier of the parts or property is not liable for the use tax on the parts or property because the supplier is using the material to fulfill the service called for by the terms of the warranty or maintenance agreement. A merchant that maintains an inventory of parts for resale and uses some of the parts in fulfilling the terms of the warranty or maintenance agreement is not required to self assess use tax on any parts so used. (Emphasis added).

A sample of Taxpayer's extended warranties states that, "[The warranty] provides for the repair or

replacement of the vehicles tires and wheels which, during the term of this agreement, become **Unserviceable** due to a **Road Hazard** covered under this limited warranty." (**Emphasis in original**) This particular warranty also provides that, "You will be reimbursed for the repair or replacement of wheels rendered **Unserviceable** due to a **Road Hazard** covered under this warranty." (**Emphasis in original**) In addition, the warranty provides that, "You [the insured] will be reimbursed for the reasonable costs you incur to replace a tire...."

Based on the terms of the above warranty, there is a "reasonable expectation" that the purchaser of the warranty will have tangible personal property supplied. The purchaser of the warranty reasonably expects that its tire or wheels will be replaced and Taxpayer either expects – or should expect – that it will at some point be required to provide replacement tires and/or wheels.

In the second sample agreement supplied by Taxpayer, the agreement states that, "You [the insured] will be reimbursed for the reasonable costs You incur to replace a tire rendered **Unserviceable** due to a **Road Hazard** covered under this membership." (**Emphasis in original**) Although this second agreement leans more heavily toward the benefits of "roadside assistance" and the purely service benefits available to the purchaser, there is also a "reasonable expectation" on the part of the parties that the purchaser will receive tangible personal property in the form of replacement tires.

Taxpayer argues that only a portion of the extended warranty cost is subject to sales tax and relies on IC § 6-2.5-4-1(e) which states, "The gross retail income received from selling at retail is only taxable... to the extent that the income represents: (1) the price of the property transferred without the rendition of any service..." Taxpayer is correct and – in a perfect world – Taxpayer's customers would pay sales tax on the cost of the wheel rim, tire, windshield, or whatever tangible personal property was acquired under the warranty. However, being in the nature of a warranty, it is not possible and Taxpayer did not attempt to separate the cost of the services from the cost of the tangible personal property furnished under the warranty. The Department's decision imposing sales tax on the optional warranties is neither unreasonable nor outside its statutory authority.

Under IC § 6-8.1-5-1(c), Taxpayer has failed to demonstrate that the proposed assessment of sales tax on the sale of optional maintenance warranties was wrong.

FINDING

Taxpayer's protest is respectfully denied.

II. Computer Based Information Technologies – Gross Retail Tax.

DISCUSSION

During the course of the audit, the Department found that Taxpayer had purchased "online database subscriptions" and "credit reports" without paying sales tax or self-assessing use tax. The Department proceeded to impose use tax on those items. Taxpayer disagreed arguing that neither the subscriptions nor credit reports are subject to neither sales nor use tax. Nonetheless, the audit determined that it was appropriate to "assess use tax on the database subscriptions and credit reports under [45 IAC 2.2-4-1](#)."

As noted in Part I above, it is the Taxpayer's responsibility to establish that the proposed tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "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."

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-3-2(a). A complementary 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. IC § 6-2.5-3-2.

Specifically, IC § 6-2.5-2-1 provides as follows:

(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(a) provides for the complementary use tax:

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.

In this case, the audit found that Taxpayer had made purchases which were subject to sales tax but failed to pay that tax. Therefore, the audit assessed the complementary use tax.

A. Carfax:

Taxpayer entered into an agreement with Carfax to obtain "vehicle history reports." The agreement provided by Taxpayer states that "The CARFAX AutoReports program is a service that provides a fast, simple way to run the CARFAX Reports needed to certify vehicles through [Taxpayer's] Certified Pre-Owned program." The agreement provides that Carfax "will run reports on your certified vehicles [and] will post these reports to [Taxpayer's] online inventory in you[r] Inventory Managers, where you can print them and share them with your customers." As to the cost of the reports, the agreement states that, "All reports run by CARFAX will be billed to

the dealer at previously agreed to pricing [and that] No additional charges will be applied."

In addition, Taxpayer provided a "CARFAX Subscriber Application" which further explains the pricing structure. Under that portion of the agreement, Carfax charges "SUBSCRIPTION FEES" PRICES AT "\$50.00 PER MONTH PER LOCATION for which [Taxpayer] may order any combination or number of reports up to a value of \$50.00 per location or the cost of the reports [Taxpayer has] run." Reports obtained over-and-above the number of report provided under the basic \$50 subscription fee incur additional costs as follows:

Standard report prices currently are \$10.99 per Vehicle History Report, \$2.99 per Consumer Info Pack sold only with Vehicle History Report purchase, or \$5.00 per Branded Title Check.

The Subscriber Application offers additional details on the pricing including providing a price incentive on queries directed toward Taxpayer's "GM Certified Used Vehicle[s]."

Along with the underlying agreements with Carfax, Taxpayer also supplied a sample Carfax invoice. The price Taxpayer paid is based on the quantity of reports received and the individual cost for that particular type of report. For example, Taxpayer paid for 26 "Vehicle History Report[s]" at a cost of \$12.99 for each report. The other reports are priced differently; some cost more than \$12.99 and some cost less.

Taxpayer's basic \$50 subscription fee paid to access the information on the Carfax's database meets the situation contemplated under the imposition statutes cited above. The "transfer" element of IC § 6-2.5-4-1 is satisfied. In addition, because access is restricted to those who have paid for a subscription and because access is conditioned upon payment of a subscription, the "for consideration" element of IC§ 6-2.5-4-1 is satisfied. Therefore, the purchase of the reports is subject to sales tax as addressed in Sales Tax Information Bulletin 8 (May 2002) which states as follows:

The sale of statistical reports, graphs, diagrams or any other information produced or compiled 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.

Taxpayer purchases "tangible personal property" in the form of various reports obtained from Carfax. Those reports are obtained pursuant to the basic \$50 monthly fee or by means of a per-unit cost billed to Taxpayer each month. The Department correctly determined that the purchase of the vehicle reports from Carfax was subject to sales tax.

B. Reynolds & Reynolds:

The Department determined that amounts paid to Reynolds & Reynolds were subject to sales tax. Taxpayer furnished a copy of an invoice prepared by Reynolds & Reynolds. The invoice states that, "[T]hese goods were produced in compliance with all applicable requirements of sections 6, 7 and 12 of the Fair Labor Standards Act..." The detailed invoice lists charges for individual credit reports. The cost of the reports varies from \$3.05 per report to approximately \$4.15 per report.

The information provided on the Reynolds & Reynolds documents is somewhat ambiguous but the charges are apparently for compilations of credit information obtained in turn from the three major credit reporting agencies. However, the detailed Reynolds & Reynolds invoice is clear that Taxpayer is purchasing reports (or "goods") based on a per-unit cost. Therefore, for the reasons outlined above in Part A, the reports – although delivered electronically – are nonetheless subject to the Indiana sales tax.

C. First Advantage Credco:

Taxpayer paid for what the audit report indicates was an "Online database subscription-employment verification." Taxpayer provided a copy of the "CREDCO sign-up documents." These documents state that "CREDCO" provides a "credit report service." In addition, Taxpayer supplied an "Addendum to Agreement for Service for Screening Services and Buyrider Index." This document states that First Advantage Credco offers "Screening Services that screen against databases that contain name and other limited identifying information on individuals and entities... supplied by a government agency or other organization." Taxpayer also supplied a copy of First Advantage's pricing structure. The pricing structure is "based on the number of bureaus (Experian, Equifax, Transunion)" provides to Taxpayer. According to First Advantage, its combined credit service "generates a credit report that is comprehensive, streamlined and easy-to-read." For example, a First Advantage report which combines information from all three credit agencies costs \$10.85; a report which combines information from two of the three agencies costs \$7.25 or \$8.10 depending on which of three agencies are combined. The pricing also allows for additional "Add-on Products" such as bankruptcy scores, identify verification, and "compliance solutions," which are priced at a per-unit cost such as \$.20, \$.50, or \$.60. The sample invoice provided by Taxpayer indicates that Taxpayer is paying for the compilation credit reports on a per-unit basis. Therefore, for the same reasons as set out in Part A above, the purchase of the compilation credit reports is subject to Indiana's sales tax.

D. DealerTrack:

The audit found that amounts paid to DealerTrack were subject to sales tax. The audit report states that Taxpayer was paying DealerTrack for "Online monthly subscriptions." Taxpayer evidently subscribes to one of DealerTrack's ancillary services called "DealWatch." Taxpayer pays a monthly fee "for loading, storing and accessing electronic copies of documentation data in the electronic storage facility provided." For the DealWatch

price paid, Taxpayer becomes entitled to "200 megabytes of data per month." For the price paid, Taxpayer becomes entitled to "loading, storing and accessing electronic copies of documentation data in the electronic storage facility provided." However, the sample invoices provided by Taxpayer indicate that Taxpayer is also paying for a monthly subscription to "NADA" which is in apparent reference to the National Automobile Dealers Association. That subscription cost \$49 per month. In addition, DealerTrack bills a monthly subscription cost for the "Black Book" which costs \$79 each month. The "DealWatch" monthly subscription is \$289 which is in apparent reference to the subscription for data storage described above.

The information is somewhat ambiguous, but the Department is prepared to agree with Taxpayer that charges for the monthly "DealWatch" portion of the DealerTrack invoices is exempt from sales tax because DealWatch appears to be in the nature of an electronic storage service cost. A subscription to the DealWatch service enables Taxpayer to load, store, and access up to 200 megabytes of electronic storage capacity. However, the remaining separately stated charges are for monthly reports delivered electronically and are properly subject to use tax.

Because the exempt DealWatch costs are separately stated on the invoices, the audit division is requested to remove those items from the amount of costs subject to sales tax.

E. Vauto/American Express:

The audit found that charges made by Vauto/American Express were subject to sales tax. Taxpayer provided an email exchange along with a separate line item in which it was stated that the price paid Vauto Inc. was for "an extended payment option." The information available is insufficient to establish that the Vauto/American Express charges are exempt from sales tax. IC § 6-8.1-5-1(c) requires that Taxpayer bear the burden of "proving" that the assessment on this particular assessment was incorrect and Taxpayer has not met that burden.

FINDING

Taxpayer's protest is sustained in part and denied in part. Costs attributable to "DealerWatch" and separately stated on invoices received from "DealerTrack" are not subject to sales tax.

SUMMARY

Except for the specific "DealerWatch" charges described in Part II D above, Taxpayer's protest is denied.

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