DEPARTMENT OF STATE REVENUE

04-20090688.LOF

Letter of Findings: 09-0688
Sales and Use Tax
For 2006 and 2007

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ISSUES

I. Installation Charges – Sales and Use Tax.

Authority: IC § 6-2.5-1-5; IC § 6-2.5-1-5(a)(4); IC § 6-2.5-1-5(b)(6); Cowden & Sons v. Dept. of State Revenue, 575 N.E.2d 718 (Ind. Tax Ct. 1991); Commissioner's Directive 23 (April 2004).

Taxpayer argues that it was not required to collect sales tax on business furniture installation charges and that the Department of Revenue erred in assessing use tax on those charges.

II. Administration – Ten-Percent Negligence Penalty.

Authority: IC § 6-8.1-5-1(c); IC § 6-8.1-10-2.1(a)(3); IC § 6-8.1-10-2.1(a)(4); IC § 6-8.1-10-2.1(d); 45 IAC 15-11-2(b); 45 IAC 15-11-2(c).

Taxpayer asks that the Department of Revenue exercise its discretion to abate the Ten-Percent Negligence Penalty on the ground that it exercised "ordinary care and prudence."

STATEMENT OF FACTS

Taxpayer is an Indiana business which sells office furniture to Indiana customers and to customers outside the state. On occasion, Taxpayer provides delivery, assembly, or installation services. The Department of Revenue (Department) conducted an audit review of Taxpayer's records and concluded that Taxpayer owed additional sales or use tax. Taxpayer disagreed and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representatives explained the basis for the protest. This Letter of Findings results.

I. Installation Charges – Sales and Use Tax.

DISCUSSION

Taxpayer sells business furniture to its customers. Taxpayer also stores, delivers, and installs business furniture. When Taxpayer billed its customers, it typically included a cost for delivery and installation but frequently labeled that cost simply as "delivery" or as "delivery charges." Taxpayer did not list a separate line-item charge for delivery and for installation. For example, taxpayer might charge a customer $750 for "Delivery & Installation" or it might charge a customer $300 for "delivery and install[ation] of workstations."

The Department's audit concluded that Taxpayer should have collected sales tax on the amount charged for "delivery and installation." In the two examples provided above, the Department would have assessed Taxpayer sales tax on the entire $750 and on the entire $300.

Taxpayer disagrees and states that it "protests the assessment on the installation charges that are separable by Taxpayer." How does Taxpayer separate the cost of the installation from the cost of the delivery? Taxpayer references internal documentation entitled "Estimating Report – With Line Details." These documents list the cost of the furniture and the "Delivery Fee."

In the first example cited above, Taxpayer provided its customer with an invoice charging $750 for "Delivery & Installation." For that particular customer, Taxpayer provides a corresponding "Estimating Report – With Line Details" which indicates that the delivery cost for that particular customer was $100. Taxpayer therefore invites the Department to conclude that the $750 charge – in reality – consisted of a $100 delivery charge and a $650 installation charge. Taxpayer concludes that the Department's assessment should be adjusted to remove sales tax assessed against the $650.

The relevant statute is IC § 6-2.5-1-5 which states:

(a) Except as provided in subsection (b), "gross retail income" means the total amount of consideration, including cash, credit, property, and services, for which tangible personal property is sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for:

(1) the seller's cost of the property sold;

(2) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller;

(3) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges;

(4) delivery charges; or

(5) consideration received by the seller from a third party if:

(A) the seller actually receives consideration from a party other than the purchaser and the consideration is directly related to a price reduction or discount on the sale;

(B) the seller has an obligation to pass the price reduction or discount through to the purchaser;
(C) the amount of the consideration attributable to the sale is fixed and determinable by the seller at the time of the sale of the item to the purchaser; and
(D) the price reduction or discount is identified as a third party price reduction or discount on the invoice received by the purchaser or on a coupon, certificate, or other documentation presented by the purchaser.

For purposes of subdivision (4), delivery charges are charges by the seller for preparation and delivery of the property to a location designated by the purchaser of property, including but not limited to transportation, shipping, postage, handling, crating, and packing.

(b) "Gross retail income" does not include that part of the gross receipts attributable to:
(1) the value of any tangible personal property received in a like kind exchange in the retail transaction, if the value of the property given in exchange is separately stated on the invoice, bill of sale, or similar document given to the purchaser;
(2) the receipts received in a retail transaction which constitute interest, finance charges, or insurance premiums on either a promissory note or an installment sales contract;
(3) 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;
(4) interest, financing, and carrying charges from credit extended on the sale of personal property if the amount is separately stated on the invoice, bill of sale, or similar document given to the purchaser;
(5) any taxes legally imposed directly on the consumer that are separately stated on the invoice, bill of sale, or similar document given to the purchaser; or
(6) installation charges that are separately stated on the invoice, bill of sale, or similar document given to the purchaser.

(c) A public utility's or a power subsidiary's gross retail income includes all gross retail income received by the public utility or power subsidiary, including any minimum charge, flat charge, membership fee, or any other form of charge or billing. (Emphasis added).

There is apparently no dispute that the cost of delivering business furniture to Taxpayer's customers is subject to sales tax. See IC § 6-2.5-1-5(a)(4); There is no dispute that "separately stated" installation charges are not subject to sales tax. See IC § 6-2.5-1-5(b)(6).

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."

In this particular instance, Taxpayer asks the Department to discern the cost of the installation charges by reference to Taxpayer's internal documentation and that the documents entitled "Estimating Report – With Line Details" prove that the original assessment was incorrect.

In addition, Taxpayer points to Cowden & Sons v. Dept. of State Revenue, 575 N.E.2d 718 (Ind. Tax Ct. 1991), as supporting the proposition that "delivery charges were not subject to sales tax because [Cowden's] records demonstrated Cowden's intent to treat its non-taxable delivery service transactions separately from its sales of taxable tangible personal property, even though the invoices provided to its customers did not delineate the breakdown." Even assuming for the moment that Taxpayer's analysis of the Tax Court's decision is Cowden is correct, the Department must question whether that particular decision is any longer relevant. The Department's position on the case is set out in Commissioner's Directive 23 (April 2004). "The Tax Court decision in Cowden & Sons v. Dept. of State Revenue 575 N.E.2d 718 (Ind. Tax 1991) is no longer valid due to the statutory changes made by P.L. 257-2003 and HEA 1365-2004."

Nonetheless, the Department is unable to fly in the face of the explicit words of IC § 6-2.5-1-5(b)(6) which states that "installation charges that are separately stated on the invoice, bill of sale, or similar document given to the purchaser." In Taxpayer's case, the installation charges were not "separately stated on the invoice... given to the purchaser." The fact that Taxpayer can distinguish for itself the cost of the delivery and the cost of installation by means of the various "Estimating Report – With Line Details" is not relevant.

Taxpayer has failed to prove that the original assessment was wrong.

FINDING

Taxpayer's protest is respectfully denied.

II. Administration – Ten-Percent Negligence Penalty.

DISCUSSION

Taxpayer believes that it acted with ordinary business care and prudence and that the Department should abate the ten-percent penalty.

IC § 6-8.1-10-2.1(a)(3) requires that a ten-percent penalty be imposed if the tax deficiency results from the taxpayer's negligence. IC § 6-8.1-10-2.1(a)(4) requires a ten-percent penalty if the taxpayer "fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment."

IC § 6-8.1-10-2.1(d) states that, "If a person subject to the penalty imposed under this section can show that

the failure to... pay the full amount of tax shown on the person's return... or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall wave the penalty."

Departmental regulation 45 IAC 15-11-2(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." Id.

IC § 6-8.1-10-2.1(d) allows the Department to waive the penalty upon a showing that the failure to pay the deficiency was based on "reasonable cause and not due to willful neglect." Departmental regulation 45 IAC 15-11-2(c) requires that 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 IC § 6-8.1-5-1(c), "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." An assessment – including the negligence penalty – is presumptively valid.

The audit assessed the penalty because Taxpayer did not self-assess use tax on tangible personal property stored, used, or consumed in Indiana where the tax was not collected at the time of the original purchase and also because it failed to charge sales tax on delivery and installation charges. The Department believes that Taxpayer erred in determining its sales and use tax liability and finds no support for its argument as set out in Part I above. However, there is insufficient information to establish that Taxpayer's position was so egregious as to constitute "willful neglect." Based on a "case-by-case" analysis and after reviewing "the facts and circumstances of each taxpayer" the Department agrees that the ten-percent negligence penalty should be abated.

FINDING

Taxpayer's protest is sustained.

SUMMARY

Taxpayer is sustained as to the contested ten-percent negligence penalty; in all other respects, Taxpayer's protest is denied.

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