

**Letter of Findings: 09-0926
Gross Retail Tax
For 2006 and 2007**

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ISSUES

I. Consignment Sales – Gross Retail Tax.

Authority: IC § 6-2.5-1-2(a); IC § 6-2.5-2-1; IC § 6-2.5-3-2(a); IC § 6-2.5-3-2(b); IC § 6-2.5-3-4; IC § 6-2.5-3-6(d); IC § 6-8.1-5-1(c); IC § 6-2.5-9-3(2); IC § 9-31-3-1; IC § 9-31-3-3; Sales Tax Information Bulletin 20 (October 2009); Sales Tax Information Bulletin 20 (May 2007); Sales Tax Information Bulletin 20 (September 2006); Black's Law Dictionary (7th ed. 1999).

Taxpayer argues that it was not required to collect sales tax when it sold boats held on consignment.

II. Freight Charges – Gross Retail Tax.

Authority: IC § 6-2.5-1-5; IC § 6-2.5-1-5(a)(2); IC § 6-2.5-1-5(a)(4).

Taxpayer claims it was not required to collect sales tax on costs invoiced to its customers and designated as "freight."

III. Duplicate Invoice – Administration.

Authority: IC § 6-8.1-5-1(c).

Taxpayer states that the Department of Revenue erred in assessing sales/use tax on what it maintains are duplicate invoices.

IV. Out-of-State Delivery – Gross Retail Tax.

Authority: IC § 6-8.1-5-1(c); Sales Tax Information Bulletin 28WC (August 2008); Commissioner's Directive 25 (July 2004).

Taxpayer argues that the Department of Revenue erroneously assessed sales/use tax on the sale of a boat delivered by third-party carrier to a Vermont customer.

V. Warranty Parts – Gross Retail Tax.

Authority: IC § 6-2.5-3-1(a); IC § 6-2.5-3-2(a); IC § 6-8.1-5-1(c); *Rhoades v. Ind. Dep't of State Revenue*, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); *USAir, Inc. v. Ind. Dept of State Revenue*, 623 N.E.2d 466 (Ind. Tax Ct. 1993); Sales Tax Information Bulletin 2 (December 2006).

Taxpayer argues that it is not required to pay use tax on parts used to complete warranty repairs.

STATEMENT OF FACTS

Taxpayer operates an Indiana marina and resort. The marina sells new and used boats, piers, hoists, and other boating accessories. Taxpayer also offers boat storage services, launch facilities, picnic grounds, and a service department.

The Indiana Department of Revenue (Department) conducted an audit review of Taxpayer's business records and tax returns. The audit concluded that Taxpayer failed to forward to the state all the sales tax it had collected from its customers. In addition, the audit found that Taxpayer failed to assess sales tax on all taxable sales. Taxpayer objected to the assessment of additional sales/use tax and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representatives explained the basis for its protest. This Letter of Findings results.

I. Consignment Sales – Gross Retail Tax.

DISCUSSION

Taxpayer objects to the assessment of sales tax on "consignment sales" arguing that sales tax is collected when the customer registers the boat with the Bureau of Motor Vehicles.

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."

A "consignment sale" is the "sale of an owner's property... by a third party entrusted to make the sale." Black's Law Dictionary 1337 (7th ed. 1999). The term "consignee" means the "[o]ne to whom goods are consigned." *Id.* at 303.

There is no dispute that Taxpayer is the "consignee" for the sale of these particular boats, and there is no dispute that Taxpayer is an Indiana retail merchant. The issue is whether it should have collected sales tax when it sold the consigned boats.

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. IC § 6-2.5-1-2(a) defines a "retail transaction" stating that:

"Retail Transaction" means a transaction of a retail merchant that constitutes selling at retail as described in [IC 6-2.5-4-1](#) that constitutes making a wholesale as described in [IC 6-2.5-4-2](#), or that is described in any other section of [IC 6-2.5-4](#).

IC § 6-2.5-9-3(2) sets out the responsibilities of a retail merchant:

An individual who: (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and (2) has a duty to remit state gross retail or use taxes (as described in [IC 6-2.5-3-2](#)) to the department; holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

Taxpayer's consignment sales took place during 2006 and 2007. The issue of whether these consignment sales are subject to sales tax is addressed at Sales Tax Information Bulletin 20 (May 2007) which states "[t]he sale of consigned tangible personal property is a retail sale and the consignee must register as a retail merchant and must collect and remit sales tax." Sales Tax Information Bulletin 20 (September 2006); See "The sale of consigned tangible personal property is a retail sale and the consignee must register as a retail merchant and must collect and remit sales tax." See generally Sales Tax Information Bulletin 20 (October 2009); "The sales of consigned tangible personal property is a retail sale, and the consignee must register as a retail merchant and must collect and remit sales tax based on the gross retail income of the consignment sale."

Under Indiana law, every person in the business of making sales on consignment is a retail merchant receiving gross retail income that is subject to sales tax and is responsible for collecting that sales tax. Because Taxpayer is a retail merchant regularly engaged in retail transactions, it has an obligation to collect and remit sales tax on consignment sales.

Nonetheless, Taxpayer objects arguing that it was the primary responsibility of the Bureau of Motor Vehicles ("BMV") to collect sales tax from the individuals purchasing boats from Taxpayer. Under IC § 9-31-3-1, "[E]very motorboat principally used on the waters of Indiana must be registered and numbered" with the Indiana Bureau of Motor Vehicles. But, there is no authority under Title 9 for the BMV to collect sales tax. The only tax the BMV is authorized to collect on watercraft transactions is the use tax. IC § 9-31-1-3 states, the BMV "shall receive payments of the use tax on watercraft that is required by [IC 6-2.5-3-2](#) and [IC 6-2.5-3-6](#)." (Emphasis added). Indeed, IC § 6-2.5-3-2(b) imposes use tax on the storage, use, or consumption of watercraft in Indiana if the property is acquired in an isolated or occasional transaction and is required to be titled, licensed or registered in Indiana, and if, according to IC § 6-2.5-3-4, sales tax has not already been paid on the acquisition of the watercraft or it is otherwise exempt from sales and use tax. IC § 6-2.5-3-6(d) authorizes the BMV to collect this use tax; the BMV is not authorized to collect sales tax on transactions entered into by retail merchants such as Taxpayer.

As noted above, Taxpayer is a retail merchant regularly engaged in the sale of boats. The boats were not sold or "acquired in an isolated or occasional transaction...." See IC § 6-2.5-3-2(b). Therefore, Taxpayer was required to collect sales tax when it sold boats on consignment.

Taxpayer errs when it claims that it was not required to collect sales tax on consignment sales.

FINDING

Taxpayer's protest is respectfully denied.

II. Freight Charges – Gross Retail Tax.

DISCUSSION

Taxpayer maintains that the Department's audit erred when it assessed sales tax on "freight" charges. 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 gross receipts, of any kind or character, received in a retail transaction 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) the value of exempt personal property given to the purchaser where taxable and exempt personal property have been bundled together and sold by the seller as a single product or piece of merchandise
- (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).

Taxpayer states that its delivery or "freight" charges are not subject to sales tax and that the Department's audit erred when it assessed additional tax.

IC § 6-2.5-1-5(a)(2) and (a)(4) are explicit; "delivery" and "all costs of transportation" constitute "gross retail income" subject to sales tax.

FINDING

Taxpayer's protest is respectfully denied.

III. Duplicate Invoice – Administration.

DISCUSSION

Taxpayer points to two entries on the audit report. One entry is found on page 41 and the other entry is found on page 38. Both entries are for the sale of a boat. Both entries list the identical purchase price. Taxpayer states that the entries are duplicates and that one of the entries should be removed. Taxpayer has produced a "Buyers Order" which appears to be the original invoice for the particular transaction at issue.

Under IC § 6-8.1-5-1(c), it is Taxpayer's responsibility to demonstrate that the assessment related to these entries was incorrect. In this case, Taxpayer has done so. The invoice lists the names of two individuals. One of the audit report entries uses the name of one of the buyers while the other entry uses the name of the other buyer. Taxpayer has demonstrated that one of the two entries should be removed and the amount of tax assessed should be adjusted to reflect that change.

FINDING

Taxpayer's protest is sustained.

IV. Out-of-State Delivery – Gross Retail Tax.

DISCUSSION

Taxpayer points to an invoice for the sale of a boat dated August 2007. The audit lists this invoice on page 52 of the audit report. Taxpayer charged \$41,424 but collected no sales tax on the sale.

Taxpayer argues that it was not required to charge sales tax because the boat was sold to an out-of-state customer.

Sales Tax Information Bulletin 28WC (August 2008) addresses the issue of sales conducted in "interstate commerce."

A watercraft sold in "interstate commerce" is not subject to the Indiana sales tax. To qualify as being "sold in interstate commerce," the watercraft must be physically delivered by the selling dealer to a delivery point outside Indiana. The delivery can be by the dealer, or the dealer can hire a third-party carrier. The terms and method of delivery must be indicated on the sales invoice. The dealer must document the terms of delivery and must keep a copy of such terms of delivery to substantiate why sales tax was not collected. (ST-108E is not used to support this exemption.) This exemption does not apply to sales to out-of-state buyers in which the buyer takes physical possession of the watercraft in Indiana, nor is the exemption valid if the buyer, and not the seller, hires a third-party carrier to transport the watercraft 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 for sales tax purposes. In addition, Commissioner's Directive 25 (July 2004) states that – in regards to out-of-state purchasers; For a sale of a vehicle to be considered out of state, the purchaser must take possession via delivery outside of Indiana. No exemption certificate is required when making an out of state sale. However, the sales contract must specify that the vehicle is to be delivered out of state and the dealer must maintain shipping documentation to verify that the vehicle was delivered to the purchaser at a specific out of state location. (Emphasis added).

The invoice in question states, "Per our agreement with the buyer, a 3rd party Transportation Company will deliver the boat from [Taxpayer's location] to Vermont."

IC § 6-8.1-5-1(c) requires that the Taxpayer prove that the assessment of sales tax on this particular transaction was wrong.

Taxpayer has established that the boat was sold to a Vermont resident and that a third-party carrier delivered the boat to Vermont. However, Taxpayer has not established who hired the third party carrier and has not maintained records sufficient "to verify that the vehicle was delivered to the purchaser at a specific out of state location." Commissioner's Directive 25. If Taxpayer hired the carrier, then the sale would have been exempt. If the

Vermont buyer hired the carrier, then the transaction is not exempt because – in effect – the buyer took possession of the boat in Indiana.

FINDING

Taxpayer's protest is respectfully denied.

V. Warranty Parts – Gross Retail Tax.

DISCUSSION

The audit found that Taxpayer had purchased parts and supplies without paying sales tax when it bought those items and without self-assessing use tax when the Taxpayer used or consumed the items. Therefore, the audit assessed use tax. Taxpayer disagrees with that portion of the assessment related to parts used to complete repair covered under warranty.

Among other aspects of Taxpayer's business, Taxpayer repairs boats. In doing so it acquires parts and supplies. Some of the repairs are performed pursuant to warranty agreements with its customers. That being so, Taxpayer does not charge the customers at the time the repairs are completed.

Sales Tax Information Bulletin 2 (December 2006) 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. (Emphasis added).

According to this Bulletin, Taxpayer should have collected sales tax from customers when it sold them the warranties. If Taxpayer had done so, it would not be subject to either sales or use tax on the parts used to fulfill the terms of the warranty because the sales tax was paid on the initial warranty charge.

However, in Taxpayer's case, the facts are somewhat different. There is no indication that Taxpayer collected sales tax when it sold the warranties to its customers because Taxpayer apparently regarded the warranties as purely a "service." In addition, Taxpayer argues that the parts supplied pursuant to the warranties are not subject to sales/use tax because the parts are not "sold" to the customer.

As noted above, IC § 6-8.1-5-1(c), requires Taxpayer to demonstrate that the proposed assessment is wrong.

Taxpayer concludes that because it did not collect sales tax on the warranties and because it provided parts pursuant to repairs conducted under warranty, the parts are not subject to sales or use tax.

Taxpayer misunderstands the nature of the use tax. Indiana's 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 the transaction." IC § 6-2.5-3-2(a). Use means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a). The use tax is functionally equivalent to sales tax. *Rhoades v. Ind. Dep't of State Revenue*, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002). Because the use tax complements the sales tax, the use tax ensures that non-exempt retail transaction that escape sales tax liability are nevertheless taxed. *Rhoades*, 774 N.E.2d at 1047; *USAir, Inc. v. Ind. Dept of State Revenue*, 623 N.E.2d 466, 468-69 (Ind. Tax Ct. 1993).

In this particular instance, Taxpayer avoided paying sales tax at the time the parts were bought. The parts were purchased in order for Taxpayer to fulfill its part of the bargain it made with its warranty customers. Therefore, Taxpayer made "use" of the parts and is now subject to the use tax imposed under IC § 6-2.5-3-2(a).

FINDING

Taxpayer's protest is respectfully denied.

SUMMARY

The audit division is requested to remove one of the duplicate invoices found on pages 41 and 38; in all other respects, Taxpayer's protest is denied.

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