DEPARTMENT OF STATE REVENUE

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Letter of Findings Number: 09-0315
Sales and Use Tax
For Tax Years 2004-2006

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ISSUES

I. Use Tax–Imposition.

Authority: IC § 6-2.5-1-1; IC § 6-2.5-1-2; IC § 6-2.5-1-24; IC § 6-2.5-1-27; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-4-1; IC § 6-8.1-5-1; 45 IAC 2.2-1-1; 45 IAC 2.2-4-1; 45 IAC 2.2-4-2; Sales Tax Information Bulletin 2 (May 2002); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the imposition of use tax.

II. Sales Tax–Imposition.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-2.5-9-3; IC § 6-8.1-5-1; 45 IAC 2.2-8-12; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the imposition of sales tax.

STATEMENT OF FACTS

Taxpayer is a retailer of consumer products in Indiana and other states. After an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer owed additional sales and use tax and assessed tax, interest, and negligence penalties for the 2004, 2005, and 2006 tax years. The Department found that Taxpayer had purchased a variety of materials without paying sales tax at the time of purchase or remitting use tax to the Department. The Department also found that Taxpayer had made a number of sales to Indiana customers without collecting sales tax or obtaining the necessary exemption certificates. Taxpayer protested the imposition of use tax on certain of its purchases and the imposition of sales tax on certain of its sales. After the audit and prior to the hearing, Taxpayer presented additional documentation that was not available at the time of audit. After reviewing the additional documentation, the auditor agreed to make several adjustments that were presented to Taxpayer in the form of a revised spreadsheet. An administrative hearing was held that addressed the remaining protest issues, and this Letter of Findings results.

I. Use Tax–Imposition.

DISCUSSION

The Department notes that all tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes "an excise tax, known as the use tax," on tangible personal property that is acquired in retail transactions and is stored, used, or consumed in Indiana. IC § 6-2.5-3-2(a). An exemption from the use tax is granted for transactions when sales tax was paid at the time of purchase pursuant to IC § 6-2.5-3-4. Since Taxpayer failed to pay sales tax at the time of the purchase, the Department found that the purchases were subject to use tax.

Taxpayer maintains that certain of its purchases are not subject to use tax. Taxpayer argues that it accrued use tax on certain items that are being taxed, that exempt labor is being taxed, that exempt promotional services are being taxed, and that exempt computer software/hardware maintenance agreements are being taxed.

A. Use Tax Accrued.

Taxpayer maintains that use tax is being imposed on three items for which it had previously remitted use tax to the Department. During the hearing, Taxpayer presented pages from its fixed assets general ledger account to demonstrate that use tax was accrued for the three purchases. However, Taxpayer's documentation merely implies that Taxpayer intended to remit use tax. The documentation presented is insufficient and fails to demonstrate that the use tax was remitted to the Department for these purchases.

Therefore, Taxpayer has failed to meet its burden under IC § 6-8.1-5-1(c), and Taxpayer's protest for the imposition of use tax on these items is respectfully denied.

B. Labor.

Taxpayer maintains that its "generator and emergency backup" purchase is partially exempt because it contains charges for labor, which is a charge for services that are not subject to use tax. During the hearing, Taxpayer presented an email from an employee that said the invoiced amount for the "generator and emergency backup" purchase includes charges for labor in additional to materials. However, Taxpayer failed to provide documentation to support these assertions. While an email from an employee can be a helpful tool to explain other documentation, an email alone is self-serving and is insufficient to rebut the presumption of the

Department's assessment.

Nonetheless, even taking Taxpayer's assertions at face value, the mere fact that an amount paid in a transaction might have a labor component is not determinative. Pursuant to IC § 6-2.5-4-1(e), the amount of the retail transaction that is subject to sales tax includes "the price of the property transferred" and "any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records." Further, 45 IAC 2.2-4-1(b)(3) provides that the amount of the retail transaction that is subject to tax includes the amounts collected for "services performed or work done on behalf of the seller prior to transfer of such property at retail." Thus, when services are performed or work is done to tangible personal property before the tangible personal property is transferred to the purchaser, then the amount of the charges for the services or work done is also subject to sales tax.

Moreover, services that are performed as part of a retail "unitary transaction" are subject to sales and use tax. IC § 6-2.5-1-2(b). A retail "unitary transaction" is one in which items of personal property and services are furnished under a single order or agreement and for which a total combined charge or price is calculated. IC § 6-2.5-1-1(a). A unitary transaction includes all items of property and services for which a total combined selling price is computed irrespective of the fact that the cost of services, which would not otherwise be taxable, is included in the selling price. 45 IAC 2.2-1-1(a).

Therefore, Taxpayer has failed to meet its burden under IC § 6-8.1-5-1(c), and Taxpayer's protest for the imposition of use tax on "labor" is respectfully denied.

C. "Promotional Expenses."

Taxpayer maintains that its "promotional expenses" are exempt services that are not subject to use tax. During the hearing, Taxpayer provided an invoice for "promotional expenses" from a vendor and a general ledger entry for what it claims are similar "promotional expenses" with another vendor. Taxpayer asserts that these charges are for services only and are not subject to use tax. Taxpayer argues that any promotional products given away pursuant to these promotions were not given away by Taxpayer, but were given away by the vendors.

Taxpayer has not provided a contract or any other information to substantiate its claim about the property being transferred. Additionally, the invoice provided by Taxpayer details a single charge for 220 items at $150 per item. As previously stated, services that are performed as part of a retail "unitary transaction" are subject to sales and use tax. IC § 6-2.5-1-2(b).

Alternatively, Taxpayer maintains that these promotional expenses covered stores in multiple states and that only a percentage of the invoice amounts should be subject to Indiana use Tax. Taxpayer argues the invoice should be taxed by Indiana based upon the percentage of Indiana stores compared to its stores nationwide. Presumably, Taxpayer is attempting to apply the "temporary storage exception" to these invoices. IC § 6-2.5-3-1(b) provides a specific exception (the "temporary storage exception") to the imposition of Indiana use tax for property which is temporarily stored in Indiana but which is subsequently used solely outside of Indiana.

However, the invoice that Taxpayer provided indicates that the products were all delivered in Indiana, and Taxpayer has not provided documents that demonstrate that Taxpayer removed any of the items from Indiana for use solely outside Indiana.

Therefore, Therefore, Taxpayer has failed to meet its burden under IC § 6-8.1-5-1(c), and Taxpayer's protest for the imposition of use tax on its "promotional expenses" is respectfully denied.

D. Delivery Supplies.

Taxpayer maintains that the line item entitled "delivery supplies and expenses" is for items that Taxpayer uses when it delivers its products to its customers for which it charges delivery fees to its customers.

However, Taxpayer has not provided documentation to support its assertions. Therefore, Taxpayer has failed to meet its burden under IC § 6-8.1-5-1(c), and Taxpayer's protest for the imposition of use on the line item entitled "delivery supplies and expenses" is respectfully denied.

E. Computer Software/Hardware Maintenance Agreement.

The Department found that Taxpayer had purchased "software maintenance agreements" from Vendor 1 and Vendor 2 without paying sales tax at the time of the purchase or remitting use tax to the Department. Taxpayer asserts that these software maintenance agreements are for services and are not subject to use tax.

1. "Vendor 1."

Taxpayer maintains that it did not receive updates from Vendor 1 ("V1") and, therefore, the software maintenance agreement is not subject to use tax. During the hearing, Taxpayer provided invoices for purchases of computer software maintenance from V1 during the 2004 and 2005 tax years. Taxpayer also presented an email from an employee which said that Taxpayer did not receive updates under these V1 maintenance agreements. However, Taxpayer failed to provide any documentation to support these assertions. While an email from an employee can be a helpful tool to explain other documentation, an email alone is self-serving and is insufficient to rebut the presumption of the Department's assessment.

Additionally, the Department refers to Sales Tax Information Bulletin 2 (May 2002), which in the examples state that sales and use tax applies to the sale of an optional warranty or maintenance agreement in the software situation if there is a guarantee of the transfer of tangible personal property (updates or upgrades) pursuant to the

agreement.

Accordingly, under this version of Information Bulletin 2 that applies to the tax periods May 2002 to November 2006, if the optional maintenance or warranty agreement guaranteed the transfer of tangible personal property, then the maintenance or warranty agreement is subject to sales and use tax. Taxpayer has not shown that the transfer of tangible personal property was not guaranteed because no copy of a maintenance agreement was provided, and, thus, Taxpayer has not met its burden of proof. Therefore, Taxpayer's protest for the imposition of use tax on the V1 maintenance agreements is denied.

2. "Vendor 2."

Taxpayer maintains that the Vendor 2 ("V2") charges were actually fees for on-call maintenance services to ensure that Taxpayer would receive assistance prior to others in times when the maintenance services were in high demand. However, the invoices themselves and other information available to the Department establish that the invoices demonstrated fees for "computer integration programming services." In effect, Taxpayer paid for software to be written specifically for Taxpayer's own use to integrate pieces of Taxpayer's existing software to work together in a new way. One of the invoices indicated that Taxpayer also purchased maintenance for this integration software. Since this type of software and maintenance on that software is not considered tangible personal property, the software maintenance is not subject to use tax in Indiana. See IC § 6-2.5-1-27 (including pre-written computer software in the definition of tangible personal property); See also IC § 6-2.5-1-24 (defining pre-written computer software).

Therefore, Taxpayer's protest for the imposition of use tax on the V2 charges for "software and software maintenance" is sustained.

FINDING

Taxpayer's protest for the imposition of use is sustained in part and denied in part. Taxpayer's protest for the imposition of use tax on the V2 invoices is sustained, as discussed in subpart E(2). Taxpayer's protest for the imposition of use tax on all of the other items protested is respectfully denied, as discussed in subparts A through E(1).

II. Sales Tax–Imposition.

DISCUSSION

The Department notes that all tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

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 defines a retail transaction as "a transaction of a retail merchant that constitutes selling at retail as described in IC § 6-2.5-4-1... or that is described in any other section of IC § 6-2.5-4." IC § 6-2.5-4-1(a) provides that "[a] person is a retail merchant making a retail transaction when he engages in selling at retail." IC § 6-2.5-4-1(b) further explains that a person sells at retail when he "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration."

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.

The Department found that Taxpayer had made a number of sales to Indiana customers without collecting sales tax or obtaining the necessary exemption certificates, and assessed sales tax on the sales transactions. Taxpayer maintains that sales tax should not be assessed on certain of the sales transactions.

A. Exempt Sales.

Taxpayer asserts that sales it made to certain customers that were exempt from sales tax. Taxpayer argues that the sales should be exempt even if Taxpayer has not received an exemption certificate from the customers.

During the audit, Taxpayer was unable to provide a number of exemption certificates. The auditor was therefore unable to verify that those sales were exempt from the sales tax. The relevant regulation is 45 IAC 2.2-8-12(b) which states, "Retail merchants are required to collect sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used for an exempt purpose." The regulation cautions that, "Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important to the seller to obtain an exemption certificate in order to avoid the necessity for such proof." 45 IAC 2.2-8-12(d).

There is no question that Taxpayer entered into retail transactions for which – absent an exemption – Taxpayer was required to collect sales tax. Taxpayer's protest is denied to the extent that it was unable to provide an exemption certificate. However, to the extent that Taxpayer has provided an exemption certificate from its customers, Taxpayer's protest is sustained.

B. Adjustments.

Taxpayer asserts that certain adjustments need to be made to the assessment. Taxpayer seeks adjustments for a sale that was recorded twice because of a credit card processing issue once and for a sale where the sales tax was submitted after the sale.

Taxpayer has provided sufficient information for adjustments to be made for the items listed in the audit report as record number 118476 in the amount of $3,118.01 and for record number 2504 in the amount of $1,813.48. Taxpayer protest for the imposition of sales tax on these two items is sustained.

FINDING

Taxpayer's protest for the imposition of sales tax is denied in part and sustained in part. Taxpayer's protest is denied to the extent that it was unable to provide an exemption certificate, as discussed in subpart A. However, to the extent that Taxpayer has provided an exemption certificate from its customer, Taxpayer's protest is sustained, as discussed in subpart A. Taxpayer's protest for the imposition of sales tax is sustained for the two items discussed in subpart B.

CONCLUSION

Taxpayer's assessments will be adjusted to reflect the items, to which the auditor agreed, as reflected in the revised spreadsheets. Taxpayer's protest to the imposition of use tax is sustained in part and denied in part, as discussed in Issue I subparts A through E(1). Taxpayer's protest for the imposition of use tax on the V2 invoices is sustained, as discussed in Issue I subpart E(2). Taxpayer's protest for the imposition of use tax on all of the other items protested is respectfully denied, as discussed in Issue I subparts A through E. Taxpayer's protest for the imposition of sales tax is denied in part and sustained in part, as discussed in Issue II subparts A and B. Taxpayer's protest is denied to the extent that it was unable to provide an exemption certificate, as discussed in Issue II subpart A. However, to the extent that Taxpayer has provided an exemption certificate from its customer, Taxpayer's protest is sustained, as discussed in Issue II subpart A. Taxpayer's protest for the imposition of sales tax is sustained for the two items discussed in Issue II subpart B.

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