

**Letter of Findings Number: 09-0687
Sales and Use Tax
For Tax Years 2006-07**

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Sales and Use Tax—Imposition.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-8-8; IC § 6-8.1-5-1; [45 IAC 2.2-8-12](#).

Taxpayer protests the imposition of sales tax on some sales it made during the audit period.

STATEMENT OF FACTS

Taxpayer is a retailer in Indiana. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not collected and remitted the proper amount of sales tax on sales of gasoline and diesel during the tax years 2006 and 2007. Also, the Department determined that certain of Taxpayer's purchases for its own use were purchased without paying sales tax. The Department therefore issued proposed assessments for sales tax, use tax, negligence penalties, and interest for those years. Taxpayer protested the proposed assessments on the grounds that some of the petroleum sales were to exempt customers and that some of the items it purchased were for resale.

The Department reviewed the protested items and agreed that Taxpayer had provided exemption certificates for some sales of petroleum products. The Department also agreed that Taxpayer had provided adequate explanation and documentation to establish that some of the items upon which use tax had been imposed were in fact purchased for resale. The Department and Taxpayer came to agreement on these items and that the use tax due was \$5,351.53 for 2006 and \$3,852.28 for 2007. That review and those amounts of use tax due are hereby incorporated into this Letter of Findings.

As part of the Department's review, additional sales tax exemption certificates regarding the sale of petroleum products were provided. The Department determined that, of the eighty-four exemption certificates provided for review, sixty-two had been examined during the original audit. Of the remaining twenty-two certificates, thirteen were found to be properly filled out on forms prescribed by the Department. The Department agreed to remove sales to those thirteen customers from the category of taxable sales. The only remaining issue is in regards to sales tax on the sale of petroleum products to those of Taxpayer's customers not counted as exempt in the original audit or initial review. An administrative hearing was held to address this issue and this Letter of Findings results. Further facts will be supplied as required.

I. Sales Tax—Imposition.

DISCUSSION

Taxpayer protests the imposition of sales tax on some of the sales included as taxable in the Department's audit calculations for the years 2006 and 2007. Due to the volume of sales over the course of the two years at issue, the Department used a sample period to determine the percentage of taxable and exempt sales. The Department then applied the taxable percentage from the sample period to all sales for the whole audit period. This resulted in assessments for additional sales tax which the Department determined Taxpayer should have collected and remitted over the two years.

Taxpayer protests that some of the sales included as taxable in the sample period were actually exempt and that, when these sales are moved from "taxable" to "exempt" status in the taxable sales calculations, the overall taxable percentage will be reduced as will the Department's assessments. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

The first relevant statute is IC § 6-2.5-2-1, which states:

- (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.
- (Emphasis added).

Next, IC § 6-2.5-8-8 states:

- (a) A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.

- (b) The following are the only persons authorized to issue exemption certificates:
- (1) retail merchants, wholesalers, and manufacturers, who are registered with the department under this chapter;
 - (2) organizations which are exempt from the state gross retail tax under [IC 6-2.5-5-21](#), [IC 6-2.5-5-25](#), or [IC 6-2.5-5-26](#) and which are registered with the department under this chapter; and
 - (3) other persons who are exempt from the state gross retail tax with respect to any part of their purchases.

(c) The department may also allow a person to issue a blanket exemption certificate to cover exempt purchases over a stated period of time. The department may impose conditions on the use of the blanket exemption certificate and restrictions on the kind or category of purchases that are exempt. (Emphasis added).

Finally, regulation [45 IAC 2.2-8-12](#) provides:

(a) Exemption certificates may be issued [sic.] only by purchasers authorized to issue such certificates by the Department of Revenue. Retail merchants, manufacturers, wholesalers and others who must register with the Department of Revenue and who qualify to purchase exempt from tax under this Act [\[IC 6-2.5\]](#) may issue exemption certificates with respect to exempt transactions. All persons or entities not required to register with the Department as retail merchants, manufacturers, or wholesalers, and who are exempt under this Act [\[IC 6-2.5\]](#) with respect to all or a portion of their purchases are authorized to issue exemption certificates with respect to exempt transaction provided an exemption number has been assigned by the Department of Revenue, or provided that the Department of Revenue has specifically provided a form and manner for issuing exemption certificates without the need for assigning an exemption number.

(b) Retail merchants are required to collect the sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used by the purchaser for an exempt purpose.

(c) All retail sales of tangible personal property for delivery in the state of Indiana shall be presumed to be subject to sales or use tax until the contrary is established. The burden of proof is on the buyer and also on the seller unless the seller receives an exemption certificate.

(d) 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. The mere filing of a Registered Retail Merchant Certificate number is not sufficient to relieve the seller of the responsibility to collect the sales tax or prove exempt use by the buyer.

(e) No exemption certificates are required for sales in interstate commerce, however, proper records must be maintained to substantiate such sales.

(f) An exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed.

(g) An exemption certificate or other evidence supporting an exempt sale must be maintained by the seller for at least three (3) years after the due date of the tax return upon which such exempt transaction is reported.

(h) Exemption certificates may be reproduced provided no change is made in the wording or content. (Emphasis added).

Therefore, as provided by IC § 6-2.5-8-8(a), a seller accepting a valid exemption certificate has no duty to collect or remit the state gross retail or use tax on a purchase. However, as provided by [45 IAC 2.2-8-12\(f\)](#), an exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed.

As part of the protest process, Taxpayer has provided several exemption certificates which it believes will reduce the sales tax assessments. A supplemental audit will be required to verify that the exemption certificates are executed in the prescribed and approved form and that all information requested on such form is completed. The supplemental audit will take those valid exemption certificates and compare those customers against the list of customer purchases listed under taxable sales. The amount of those customers' purchases which are on the list of taxable sales and for which valid exemption certificates have now been provided will be removed from the taxable purchases, along with sales to the thirteen customers which the Department agreed were exempt in the initial review. The taxable percentage in the sample period will then be recalculated and applied to the sales over the whole two years at issue.

FINDING

Taxpayer's sales tax protest is sustained to the extent that the supplemental audit verifies the validity of the exemption certificates. Also, the use tax assessments will be reduced to \$5,351.53 for 2006 and \$3,852.28 for 2007, as discussed in the Statement of Facts.

Posted: 05/26/2010 by Legislative Services Agency
An [html](#) version of this document.