

Letter of Findings: 09-0746
Gross Retail Tax
For the Years 2006, 2007, and 2008

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ISSUES

I. 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 § 6-2.5-4-10; IC § 6-8.1-5-1(c); [45 IAC 2.2-4-1](#)(a); Sales Tax Information Bulletin 2 (December 2006); Sales Tax Information Bulletin 8 (May 2002).

Taxpayer argues that the price it paid for various computer based technologies is not subject to sales/use tax.

II. Electronic Subscriptions – Gross Retail Tax.

Authority: IC § 6-8.1-5-1(c); [45 IAC 2.2-4-1](#)(a).

Taxpayer maintains that the price it paid to subscribe to certain software programs is not subject to sales or use tax.

III. Invoices for Labor – Gross Retail Tax.

Authority: IC § 6-2.5-1-5(a); IC § 6-2.5-3-2(a); IC § 6-8.1-5-1(c); Sales Tax Information Bulletin 8 (May 2002).

Taxpayer objects to the Department of Revenue's decision assessing sales/use tax on invoices on the ground that the invoices represent the purchase of labor or services.

STATEMENT OF FACTS

Taxpayer is an Indiana business which sells new and used cars. Taxpayer operates a second "economy center" which sells cars to "high risk" individuals on a "buy here pay here" basis. The Department of Revenue (Department) conducted an audit review of Taxpayer's business records and tax returns. The audit resulted in the assessment of additional sales/use 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 representatives explained the basis for the protest. This Letter of Findings results.

I. Computer Based Information Technologies – Gross Retail Tax.

DISCUSSION

The Department found that Taxpayer had purchased "online database access 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 sales or 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](#)."

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.

Specifically, the Department's regulation provides that, "Where ownership of tangible personal property is transferred for a consideration, it will be considered a transaction of a retail merchant constituting selling at retail unless the seller is not acting as a 'retail merchant.'" [45 IAC 2.2-4-1](#)(a).

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. Experian: Taxpayer purchased a subscription to receive "auto check" histories. The histories are accessed by means of the Internet. Depending on the level of subscription service purchased, the customer receives a certain number of reports. For example, if the customer pays \$179 per month, the customer receives 40 reports. Under that plan, customer pays an additional \$8 for each report in excess of 40.

The issue presented by Taxpayer's contract with Experian is 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 reports obtained from Experian. Those reports are obtained pursuant to a 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 Experian was subject to sales tax.

B. Mobile Productivity: Taxpayer paid a monthly fee for access to a software product obtained from Mobile Productivity. The agreement with Mobile Productivity was for the "purchase or lease of [a] Computer Infrastructure" which an "Advanced Repair Guidance and Information System [] between Mobile Productivity, a provider of such systems and services, and [Taxpayer] the customer."

The vendor permitted "automatic synchronization of repair order information" by means of interface software. According to the contract with Mobile Productivity, Taxpayer was required to provide space for Mobile Productivity for the "installation of server, route, and wireless access point equipment...." In addition to the equipment stipulated under the agreement, Taxpayer was also licensed to use "one copy of the specified version of [] Microsoft software products...."

After reviewing the license agreement between Taxpayer and Mobile Productivity, the Department is unable to agree with Taxpayer's contention that it was simply purchasing a research service. Taxpayer paid a monthly fee to license and use software and hardware. The agreement constituted a "retail transaction" as described in [45 IAC 2.2-4-1\(a\)](#).

C. Reply Inc.: Taxpayer paid a fee to Reply Inc. or alternatively "Reply.com." Under the vendor's agreement with Taxpayer, Reply Inc. promised to "Deliver new car inquiries... from potential customers in [a] designated territory." The contract established the parameters under which the "new inquiries" would be obtained. Taxpayer wanted inquiries only for potential customers seeking a certain brand of automobile and wanted them from potential customers only with a certain Zip Code. Reply Inc. charged \$12.95 for each "inquiry" during the first 30 days of the contract; following that 30 days, Reply Inc. charged \$20.95 for each inquiry. (Prices during October 2009 briefly reverted to \$12.95).

Taxpayer purchased customer inquiries from Reply Inc. Therefore, Taxpayer is purchasing "tangible personal property" as described in [45 IAC 2.2-4-1\(a\)](#) and in Sales Tax Information Bulletin 8 (May 2002) 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.

D. Motion Dealer Sub-Prime: Taxpayer entered into a "Software Agreement" with this particular vendor. The parties' agreement indicates that Taxpayer was entering into a "non exclusive license... to use the Software that is delivered with each System that is ordered on the front of [the] agreement."

The actual purpose of this software is somewhat vague, but it would seem that Taxpayer is paying to rent this software or for a "maintenance agreement" to assure that the software functions properly. Either way, the agreement is clear that when the contract is terminated, the vendor intends "to remove Software from all computer databases at said Dealership." If Taxpayer was paying a rental fee for the software, the agreement falls within the purview of IC § 6-2.5-4-10 which states that, "A person, other than a public utility, is a retail merchant making a retail transaction when he rents or leases tangible personal property to another person other than for subrent or sublease."

If Taxpayer was paying for a "maintenance agreement," that agreement is subject to tax as described in Sales Tax Information Bulletin 2 (December 2006). "Software maintenance agreements and optional warranties are presumed to be subject to sales and use tax."

E. United Auto Finance.com: Taxpayer entered into an "Internet Performance Agreement." Under the agreement, United Auto promised to "make available Leads which shall be directed through [Taxpayer's] Dealer Contract Page on an exclusive basis." Under the terms of the agreement, Taxpayer paid \$425 and then agreed to pay United Auto \$22 for each subsequent valid lead. As noted in "C" above, the purchase of leads is considered a taxable sale under [45 IAC 2.2-4-1\(a\)](#) and as explained in Sales Tax Information Bulletin 8 (May 2002).

FINDING

Taxpayer's protest is respectfully denied.

II. Electronic Subscriptions – Gross Retail Tax.

DISCUSSION

Taxpayer provided 17 invoices for which there is no corresponding contract or formal agreement was immediately available. Taxpayer believes that the 17 invoices represent – for various reasons – non-taxable transactions.

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

Without stating as such, Taxpayer apparently relies on "Where ownership of tangible personal property is transferred for a consideration, it will be considered a transaction of a retail merchant constituting selling at retail unless the seller is not acting as a 'retail merchant.'" [45 IAC 2.2-4-1\(a\)](#). Taxpayer apparently believes that the 17 invoices represent transactions in which it is paying for a service and not tangible personal property.

Based on the information found on the face of each invoice and on the supplemental information provided by Taxpayer following the administrative hearing, the Department is unable to agree that Taxpayer has met its burden of demonstrating that the following invoices demonstrate that the transaction is not subject to sales or use tax.

Ariss, Inc.
Arkona
Carfax
Cross-Sell
DealerTrack
Focus Inc.
MPower Auto, Inc.
SalesMaster Systems LLC
vAuto, Inc.
AMTC
AutoInternet Marketing
AllData
Alligator Auto Finance
Promotions of America
Kelley Blue Book

The invoices cited above are either insufficiently detailed to understand the underlying transaction, clearly indicate Taxpayer is purchasing an on-line subscription, or that Taxpayer is purchasing tangible personal property such as postcards or "sales leads."

However, based on the information found on the face of each invoice, the Department agrees that Taxpayer has met its burden of demonstrating that the following invoices clearly demonstrate that the transaction is not subject to sales or use tax.

PulseTrakcom
Motley Fool

FINDING

Taxpayer's protest is denied in part and sustained in part.

III. Invoices for Labor – Gross Retail Tax.

DISCUSSION

Taxpayer has presented five invoices which Taxpayer argues represents charges for labor or services and that no tangible personal property as involved in the purchase. Specifically, taxpayer explains that, "These items only have an invoice from the vendor [and] these items fall under the unitary transaction or other area of the audit protest. As such, Taxpayer believes that the Department erred in assessing tax.

Taxpayer provided an invoice from "L & D Mail Masters" labeled "Prepayment Invoice for Services." The invoice indicates that Taxpayer is paying L & D for "full color postcards" and for postage. Of course, the postcards constitute "tangible personal property" pursuant to IC § 6-2.5-3-2(a) and are properly subject to sales/use tax. The "postage" portion of the charge is addressed at IC § 6-2.5-1-5(a) which states that gross retail income is money received in a retail transaction without any deduction for delivery charges. The statute also provides that "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." [IC 6-2.5-1-5\(a\)](#) (Emphasis added) Therefore, postage is a delivery charge for purposes of calculating gross retail income, and is subject to gross retail income tax. As a result, the entire amount paid to "L & D Mail Masters" is subject to sales/use tax.

Taxpayer provided an invoice from J & G Plus, LLC indicating that Taxpayer paid for "3 year license Norman Antivirus." Based on the information provided, "Norman Antivirus" is apparently computer software the taxability of which is addressed at Sales Tax Information Bulletin 8 (May 2002) which states as follows:

Pre-written programs, not specifically designed for one purchaser, developed by the seller for sale or lease on the general market in the form of tangible personal property and sold or leased in the form of tangible

personal property are subject to tax irrespective of the fact that the program may require some modification for a purchaser's particular computer. Pre-written or canned computer programs are taxable because the intellectual property contained in the canned program is no different than the intellectual property in a videotape or a textbook.

Because Taxpayer purchased pre-written computer software, the amount paid to J & G Plus, LLC is subject to sales/use tax.

Taxpayer provided two invoices from "Mappins Brothers Signs." The invoice indicates that Taxpayer purchased "Letters" which cost \$4.00 each. Taxpayer states that the "Mappins Brothers Signs" provided a non-taxable service. However, other than assert that the transaction is not subject to sales/use tax, Taxpayer has done nothing which would substantiate its claim. Under IC § 6-8.1-5-1(c), the Department is unable to agree that Taxpayer has successfully proven that the charges are exempt.

Taxpayer has provided invoices from "Xerox Capital." Taxpayer does not argue that the rental charges from Xerox capital are exempt but that the audit double-counted the invoices. In effect, Taxpayer maintains that one of the invoices is an annual summary invoice for all the monthly invoices which precede the summary invoice. A review of the final invoice does indicate that the charge indicated larger than the preceding charges. However, there is nothing on that final invoice which indicates that it is a summary or restatement of the previous charges. Again, based on IC § 6-8.1-5-1(c), the Taxpayer's challenge to the audit's treatment of the Xerox charges has not been substantiated.

FINDING

Taxpayer's protest is respectfully denied.

SUMMARY

Taxpayer is sustained insofar as the assessment of sales/use tax on invoices attributable to PulseTrakcom and Motley Fool; in all other respects, Taxpayer's protest is denied.

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