DEPARTMENT OF STATE REVENUE

04-20090898.LOF

Letter of Findings Number: 09-0898
Sales and Use Tax
For Tax Years 2005, 2006, and 2007

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 It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register.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 the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales and Use Tax – Imposition.

Authority: IC § 6-2.5-1-1 et seq.; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-5-8; IC § 6-8.1-5-1; 45 IAC 2.2-4-27; Indiana Dep't of State Revenue v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974); 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 on tangible personal property.

II. Tax Administration – Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2.

Taxpayer protests the imposition of a ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer, an Indiana S corporation, sells and distributes snack items, including chips, pretzels, and cookies. Pursuant to an audit, the Indiana Department of Revenue ("Department") assessed Taxpayer additional sales/use tax on tangible personal property, including slushie machines as well as handheld inventory devices and printers because Taxpayer did not pay sales tax at the time of the retail transactions nor did Taxpayer self-assess and remit to the Department the use tax due.

Taxpayer protested the assessments. A hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales and Use Tax – Imposition.

DISCUSSION

The Department's audit assessed Taxpayer use tax on tangible personal property, including slushie machines because Taxpayer did not pay sales tax nor did it self-assess and remit to the Department the use tax due. The Department's audit also noted that Taxpayer rented the handheld inventory devices and printers without paying sales tax or self-assessing and remitting to the Department the use tax accordingly. Taxpayer, to the contrary, claimed that it was not responsible for the sales and/or use tax on the slushie machines and handheld inventory devices and printers.

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; 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).

IC § 6-2.5-2-1 provides:

(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:

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.

Accordingly, Indiana imposes a sales tax on retail transactions and a complementary use tax on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-1-1 et seq. An exemption from the use tax is granted for transactions where the gross retail tax ("sales tax") was paid at the time of purchase pursuant to IC § 6-2.5-3-4. There are also additional exemptions from sales tax and use tax. A statute which provides a tax exemption, however, is strictly construed against the taxpayer. Indiana Dep't of State Revenue v. RCA Corp., 310 N.E.2d 96, 97 (Ind. Ct. App. 1974).

A. Slushie Machines

Taxpayer claimed that it was not responsible for the use tax on the slushie machines because the slushie machines were gifts from one of the shareholders. Alternatively, Taxpayer asserted that it leased the slushie machines to business locations and, therefore, it was entitled to the exemption pursuant to IC § 6-2.5-5-8(b).

Taxpayer did not provide any documentation to support its claim that the slushie machines were gifts from its shareholder and that the sales tax was paid. Taxpayer, however, submitted a copy of blank "Equipment Consignment Agreement" and stated that Taxpayer "leased the slushie machines to business locations by written contract. This contract requires the business to purchase a minimum amount of product per month in lieu of a

monetary rental/lease fee for the machine use."

IC § 6-2.5-5-8(b) states:

Transactions involving tangible personal property other than a new motor vehicle are exempt from the state gross retail tax if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of the person's business without changing the form of the property.

In this instance, Taxpayer only demonstrated that the "Equipment Consignment Agreement" was just a blank form and nothing more. There was no valid rental or lease until both the lessor and the lessee signed the lease agreement and agreed to the terms. Thus, Taxpayer failed to substantiate its assertion that it leased the slushie machines in the ordinary course of its business without changing the form of the slushie machines.

Even if, for the purpose of argument, Taxpayer did purchase the slushie machines to rent and lease to business establishments, while Taxpayer was entitled to the sales tax on its purchase of the slushie machines, Taxpayer, as a lessor, was a retail merchant, and must collect the sales tax on its rentals of the slushie machines from its lessees, based on Taxpayer's alleged leases, and remit to the Department pursuant to 45 IAC 2.2-4-27(c). Taxpayer did not provide any documentation demonstrating that it had collected and remitted the sales tax to the Department based on the rentals and leases of the slushie machines.

Given the totality of circumstances, in the absence of other documentation, the Department is not able to agree with Taxpayer that it has met its burden to demonstrate that the Department's proposed assessment is wrong. Since sales tax was not paid on its purchases of the slushie machines, the use tax was properly imposed.

B. Handheld Inventory Devices and Printers (Computers)

Pursuant to 45 IAC 2.2-4-27, the Department's audit assessed use tax on Computers because Taxpayer did not pay sales tax when it rented the Computers nor did Taxpayer self-assess and remit to the Department the use tax due accordingly. Taxpayer claimed that the Computers were supplied by the Franchisor and the Franchisor paid sales tax when the Franchisor purchased them.

45 IAC 2.2-4-27, in pertinent part, provides:

(a) In general, the gross receipts from renting or leasing tangible personal property are taxable. This regulation [45 IAC 2.2] only exempts from tax those transactions which would have been exempt in an equivalent sales transaction.

(b) Every person engaged in the business of the rental or leasing of tangible personal property, other than a public utility, shall be deemed to be a retail merchant in respect thereto and such rental or leasing transaction shall constitute a retail transaction subject to the state gross retail tax on the amount of the actual receipts from such rental or leasing.

(c) In general, the gross receipts from renting or leasing tangible personal property are subject to tax. The rental or leasing of tangible personal property constitutes a retail transaction, and every lessor is a retail merchant with respect to such transactions. The lessor must collect and remit the gross retail tax or use tax on the amount of actual receipts as agent for the state of Indiana. The tax is borne by the lessee, except when the lessee is otherwise exempt from taxation.

To support its protest, Taxpayer submitted a copy of an e-mail showing its correspondence with the alleged Franchisor. The e-mail stated that "Yes. We paid tax in Indiana when the computers were purchased."

Notably, the Department's audit assessed Taxpayer use tax on Taxpayer's rentals of the Computers pursuant to 45 IAC 2.2-4-27. Whether or not the Franchisor paid sales tax when it purchased the Computers was irrelevant. Taxpayer did not provide any documentation showing that Taxpayer paid the sales tax upon renting the Computers from the Franchisor. Since Taxpayer rented the Computers, it was responsible for the sales tax of the rentals.

Given the totality of circumstances, in the absence of other documentation, the Department is not able to agree with Taxpayer that it has met its burden demonstrating the Department's proposed assessment is wrong. Since the sales tax on the rental of the Computers was not paid on the rental of the Computers, use tax was properly imposed.

FINDING

Taxpayer's protest is respectfully denied.

II. Tax Administration – Negligence Penalty.

DISCUSSION

Taxpayer also protests the imposition of the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1, the Department may assess a ten (10) percent negligence penalty if the taxpayer:

(1) fails to file a tax return;
(2) fails to pay the full amount of tax shown on the tax return;
(3) fails to remit in a timely manner the tax held in trust for Indiana (e.g., a sales tax); or
(4) fails to pay a tax deficiency determined by the Department to be owed by a taxpayer.

45 IAC 15-11-2(b) further states:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a

taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty as provided in 45 IAC 15-11-2(c), in part, as follows:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. 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 this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

(1) the nature of the tax involved;

(2) judicial precedents set by Indiana courts;

(3) judicial precedents established in jurisdictions outside Indiana;

(4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;

(5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

In this instance, Taxpayer maintained that "[t]he Indiana Tax Code is not written so that the lay person would easily be able to file their own corporate or personal taxes without the fear of repercussions." Submitting copies of its 2006 and 2007 corporate income tax returns, Taxpayer asserted that it "relied on [a] Certified Public Accountant (CPA) to be competent enough in his job to file [Taxpayer's] corporate tax return" since the "State of Indiana was willing to certify him as a CPA because of his competency level."

Taxpayer is mistaken. While Taxpayer employed the accountant, as its agent, on behalf of Taxpayer, to ensure Taxpayer's compliance of the Indiana statutes, Taxpayer, as the principal, was responsible for its agent's compliance failure. Aside from its assertion, Taxpayer did not provide documentation to establish that its failure to pay tax or timely remit tax was due to reasonable cause and not due to negligence.

FINDING

Taxpayer's protest on the imposition of the negligence penalty is denied.

SUMMARY

For the reasons discussed above, Taxpayer's protest on the imposition of use tax is respectfully denied. Taxpayer's protest on the imposition of negligence penalty is also respectfully denied.

Posted: 05/26/2010 by Legislative Services Agency
An html version of this document.