

**Letter of Findings Number: 09-0939**  
**Sales Tax**  
**For Tax Years 2006-08**

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**ISSUES**

**I. Sales Tax—Imposition.**

**Authority:** IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-4-1; IC § 6-2.5-8-1; IC § 6-8.1-5-1.

Taxpayer protests the imposition of sales tax on sales to Taxpayer's Indiana customers.

**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 is an out-of-state business which made sales to Indiana customers. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had made sales in Indiana and should have collected sales tax on those sales. The Department therefore issued proposed assessments for sales tax, penalties, and interest for the tax years 2006, 2007, and 2008. Taxpayer protests that the sales did not take place in Indiana and that the proposed assessments are incorrect. An administrative hearing was held via telephone 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 for the years 2006-08. Taxpayer protests that it licensed the software to Indiana customers and that it did not have the minimum contacts with Indiana which would subject it to Indiana sales tax collections requirements. 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 § 6-2.5-3-1(c) states:

"A retail merchant engaged in business in Indiana" includes any retail merchant who makes retail transactions in which a person acquires personal property or services for use, storage, or consumption in Indiana and who:

- (1) maintains an office, place of distribution, sales location, sample location, warehouse, storage place, or other place of business which is located in Indiana and which the retail merchant maintains, occupies, or uses, either permanently or temporarily, either directly or indirectly, and either by the retail merchant or through a representative, agent, or subsidiary;
- (2) maintains a representative, agent, salesman, canvasser, or solicitor who, while operating in Indiana under the authority of and on behalf of the retail merchant or a subsidiary of the retail merchant, sells, delivers, installs, repairs, assembles, sets up, accepts returns of, bills, invoices, or takes orders for sales of tangible personal property or services to be used, stored, or consumed in Indiana;
- (3) is otherwise required to register as a retail merchant under [IC 6-2.5-8-1](#); or
- (4) may be required by the state to collect tax under this article to the extent allowed under the Constitution of the United States and federal law.

IC § 6-2.5-4-1 states in relevant part:

- (a) A person is a retail merchant making a retail transaction when he engages in selling at retail.
- (b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:
  - (1) acquires tangible personal property for the purpose of resale; and
  - (2) transfers that property to another person for consideration.
- (c) For purposes of determining what constitutes selling at retail, it does not matter whether:
  - (1) the property is transferred in the same form as when it was acquired;
  - (2) the property is transferred alone or in conjunction with other property or services; or

(3) the property is transferred conditionally or otherwise.

(d) Notwithstanding subsection (b), a person is not selling at retail if he is making a wholesale sale as described in section 2 of this chapter.

(e) The gross retail income received from selling at retail is only taxable under this article to the extent that the income represents:

(1) the price of the property transferred, without the rendition of any service; and

(2) except as provided in subsection (g), 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.

For purposes of this subsection, a transfer is considered to have occurred after delivery of the property to the purchaser.....

IC § 6-2.5-8-1, states in relevant part:

(a) A retail merchant may not make a retail transaction in Indiana, unless the retail merchant has applied for a registered retail merchant's certificate.

(b) A retail merchant may obtain a registered retail merchant's certificate by filing an application with the department and paying a registration fee of twenty-five dollars (\$25) for each place of business listed on the application. The retail merchant shall also provide such security for payment of the tax as the department may require under [IC 6-2.5-6-12](#).

(c) The retail merchant shall list on the application the location (including the township) of each place of business where the retail merchant makes retail transactions. However, if the retail merchant does not have a fixed place of business, the retail merchant shall list the retail merchant's residence as the retail merchant's place of business. In addition, a public utility may list only its principal Indiana office as its place of business for sales of public utility commodities or service, but the utility must also list on the application the places of business where it makes retail transactions other than sales of public utility commodities or service.

....

The Department determined that Taxpayer was selling its software in retail transactions in Indiana. The Department therefore issued proposed assessments for sales tax which Taxpayer should have collected from sales to its Indiana customers.

Taxpayer protests that it did not sell software to its Indiana customers in Indiana retail transactions. Taxpayer states that its Indiana-based employees are sales staff and technical advisors who serve regional, non-Indiana clients and do not engage in selling to Indiana customers. Taxpayer provided documentation supporting its position that these employees worked out of their homes rather than from Taxpayer's business location in another state and that they did not serve Indiana customers.

Therefore, IC § 6-2.5-3-1(c) requires that a retail merchant either have some place of business or a representative, agent, salesman, canvasser, or solicitor who, while operating in Indiana under the authority of and on behalf of the retail merchant or a subsidiary of the retail merchant, sells, delivers, installs, repairs, assembles, sets up, accepts returns of, bills, invoices, or takes orders for sales of tangible personal property or services to be used, stored, or consumed in Indiana in order to be classified as a retail merchant engaged in business in Indiana. Since the available documentation shows that Taxpayer does not meet these criteria, Taxpayer is not classified as a retail merchant engaged in business in Indiana. While Taxpayer's customers might owe use tax on their licenses of Taxpayer's products, Taxpayer is not required to collect sales tax on sales to its Indiana customers. Taxpayer has met its burden under IC § 6-8.1-5-1(c).

#### FINDING

Taxpayer's protest is sustained.

## II. Tax Administration—Negligence Penalty.

#### DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty for the tax years in question. Taxpayer protests the imposition of penalty. The Department refers to IC § 6-8.1-10-2.1(a), which states in relevant part:

If a person:

....

(3) incurs, upon examination by the department, a deficiency that is due to negligence;

....

the person is subject to a penalty.

The Department refers to [45 IAC 15-11-2\(b\)](#), which 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.

[45 IAC 15-11-2\(c\)](#) provides in pertinent part:

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.

In this case, the Department determined a tax liability was incurred due to negligence under [45 IAC 15-11-2\(b\)](#), and so Taxpayer was subject to a penalty under IC § 6-8.1-10-2.1(a). Taxpayer has affirmatively established that there was no deficiency, as discussed in Issue I. Taxpayer therefore has established that it exercised ordinary business care, as required by [45 IAC 15-11-2\(c\)](#). The negligence penalty will be waived.

**FINDING**

Taxpayer's protest is sustained.

**CONCLUSION**

Taxpayer is sustained on both Issue I and on Issue II.

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