

Letter of Findings Number: 09-0967
Sales Tax
For Tax Years 2006-08

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ISSUES

I. Sales Tax—Imposition.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-4-4; IC § 6-2.5-5-16; IC § 6-2.5-5-24; IC § 6-2.5-5-25; IC § 6-2.5-8-8; IC § 6-8.1-5-1; [45 IAC 2.2-4-8](#); [45 IAC 2.2-8-12](#); Sales Tax Information Bulletin 4 (August 2008); Sales Tax Information Bulletin 10 (June 2008).

Taxpayer protests the imposition of sales tax on certain room rentals for which it did not charge sales tax.

II. Tax Administration—Negligence Penalty.

Authority: IC § 6-8.1-10-1; 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 operates an Indiana hotel. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer did not charge sales tax on some room rentals which should have had sales tax charged. The Department therefore issued proposed assessments for sales tax, ten percent negligence penalties, and interest for the tax years 2006, 2007, and 2008. Taxpayer protests that the guests in question were either governmental employees or members of exempt organizations and were therefore exempt from sales tax. Taxpayer therefore protests the imposition of sales tax, penalties, and interest. An administrative hearing was held 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 its rental of rooms to certain guests. Taxpayer states that the guests in question were exempt from sales tax either because they were government employees or were members of exempt organizations. 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 § 6-2.5-4-4, which states:

(a) A person is a retail merchant making a retail transaction when the person rents or furnishes rooms, lodgings, or other accommodations, such as booths, display spaces, banquet facilities, and cubicles or spaces used for adult relaxation, massage, modeling, dancing, or other entertainment to another person:

(1) if those rooms, lodgings, or accommodations are rented or furnished for periods of less than thirty (30) days; and

(2) if the rooms, lodgings, and accommodations are located in a hotel, motel, inn, tourist camp, tourist cabin, gymnasium, hall, coliseum, or other place, where rooms, lodgings, or accommodations are regularly furnished for consideration.

(b) Each rental or furnishing by a retail merchant under subsection (a) is a separate unitary transaction regardless of whether consideration is paid to an independent contractor or directly to the retail merchant. (Emphasis added.)

Also, IC § 6-2.5-2-1 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, [45 IAC 2.2-4-8](#) states:

(a) For the purpose of the state gross retail tax and use tax: Every person engaged in the business of renting or furnishing for periods of less than thirty (30) days any accommodation including booths, display spaces and banquet facilities, in any place where accommodations are regularly furnished for a consideration is a retail merchant making retail transactions in respect thereto and the gross income received therefrom shall constitute gross retail income from retail unitary transactions.

(b) In general, the gross receipts from renting or furnishing accommodations are taxable. An accommodation which is rented for a period of thirty (30) days or more is not subject to the gross retail tax.

(c) There is no exemption for purchases made by persons who are engaged in renting or furnishing accommodations. Such persons are deemed to purchase or otherwise acquire tangible personal property for

use or consumption in the regular course of their business.

(d) The renting or furnishing of an accommodation for less than thirty (30) days constitutes a retail merchant making a retail transaction. Every person so engaged must collect the gross retail tax on the gross receipts from such transactions. The tax is borne by the person or organization who uses the accommodation.

(e) The tax is imposed on the gross receipts from "furnishing" an accommodation. The gross receipts subject to tax include the amount which represents consideration for the rendition of those services which are essential to the furnishing of the accommodation, and those services which are regularly provided in furnishing the accommodation. Such amounts are subject to tax even when they are separately itemized on the statement or invoice.

(f) The tax is imposed on the gross receipts from accommodations which are furnished for periods of less than thirty (30) days.

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).

Next, IC § 6-2.5-5-16 states:

Transactions involving tangible personal property, public utility commodities, and public utility service are exempt from the state gross retail tax, if the person acquiring the property, commodities, or service:

(1) is the state of Indiana, an agency or instrumentality of the state, a political subdivision of the state, or an agency or instrumentality of a political subdivision of the state, including a county solid waste management district or a joint solid waste management district established under [IC 13-21](#) or [IC 13-9.5-2](#) (before its repeal); and

(2) predominantly uses the property, commodities, or service to perform its governmental functions.

Next, IC § 6-2.5-5-24(a) states:

Transactions are exempt from the state gross retail tax to the extent that the gross retail income from those transactions is derived from gross receipts that are:

(1) derived from sales to the United States government, to the extent the state is prohibited by the Constitution of the United States from taxing that gross income;

(2) derived from commercial printing that results in printed materials, excluding the business of photocopying, that are shipped, mailed, or delivered outside Indiana;

(3) United States or Indiana taxes received or collected as a collecting agent explicitly designated as a collecting agent for a tax by statute for the state or the United States;

(4) collections by a retail merchant of a retailer's excise tax imposed by the United States if:

(A) the tax is imposed solely on the sale at retail of tangible personal property;

(B) the tax is remitted to the appropriate taxing authority; and

(C) the retail merchant collects the tax separately as an addition to the price of the property sold;

(5) collections of a manufacturer's excise tax imposed by the United States on motor vehicles, motor vehicle bodies and chassis, parts and accessories for motor vehicles, tires, tubes for tires, or tread rubber and laminated tires, if the excise tax is separately stated by the collecting taxpayer as either an addition to or an inclusion in the price of the property sold; or

(6) amounts represented by an encumbrance of any kind on tangible personal property received by a retail merchant in reciprocal exchange for tangible personal property of like kind.

(Emphasis added).

Next, IC § 6-2.5-5-25 states:

(a) Transactions involving tangible personal property or service are exempt from the state gross retail tax, if the person acquiring the property or service:

(1) is an organization described in section 21(b)(1) of this chapter;

(2) primarily uses the property or service to carry on or to raise money to carry on its not-for-profit purpose; and

- (3) is not an organization operated predominantly for social purposes.
- (b) Transactions occurring after December 31, 1976, and involving tangible personal property or service are exempt from the state gross retail tax, if the person acquiring the property or service:
 - (1) is a fraternity, sorority, or student cooperative housing organization described in section 21(b)(1)(A) of this chapter; and
 - (2) uses the property or service to carry on its ordinary and usual activities and operations as a fraternity, sorority, or student cooperative housing organization.

(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).

Read together, these statutes and regulations provide that a hotel operator is a retail merchant when renting accommodations for less than thirty days. However, certain sales and rentals are exempt from sales and use tax when the purchaser or renter is the federal government or an exempt organization.

In its audit report, the Department referred to Sales Tax Information Bulletin 4 (August 2008), which explained that sales to local, state, or federal government employees were exempt only if the government directly paid for those purchases. If the employee paid for the purchase directly, the exemption did not apply even if the employee were to be reimbursed by the government for the purchase. The Department also referred to Sales Tax Information Bulletin 10 (June 2008) which explained that if a member of an exempt organization directly paid for a purchase, that transaction was taxable even if the exempt organization would reimburse the member.

Taxpayer believes that the room rentals in question are exempt under either IC § 6-2.5-5-16, IC § 6-2.5-5-24, or IC § 6-2.5-5-25, since the guests were local, state, or federal government employees, or were members of exempt organizations. Taxpayer states that these guests presented exemption certificates and other identification supporting their claim of exemption. Taxpayer protests that there is no statutory or regulatory authority which allows the Department to place it in the position of policing exemption certificates. The Department disagrees and refers to [45 IAC 2.2-8-12\(b\)](#).

As explained by the two information bulletins referenced above, sales to the exempt organizations are direct sales to the exempt organizations, not to the members. IC § 6-2.5-5-16, IC § 6-2.5-5-24, and IC § 6-2.5-5-25 all provide that the relevant exemptions apply to sales to the organizations, not individuals. If the individuals pay for the rooms, those transactions are then between the hotel and the individual. Even if the exempt organization or government later reimburses the individual, the initial transaction was between the hotel and a non-exempt person.

Therefore, each exempt hotel room rental consists of two steps. The first step is to present a properly completed exemption certificate. The second step is to present payment by the exempt organization or governmental organization and confirm that the exemption certificate is actually being used by the exempt

organization listed on the exemption certificate. Both steps are necessary and are immediately verifiable. These steps are verifiable by any retail merchant, including but not limited to hotels.

Taxpayer further protests that it would be placed at a disadvantage if it were to be required to follow these steps. Taxpayer states that other hotels do not follow these steps and customers are willing to go across the street or across town to avoid paying sales tax when the customer believes that the room should be exempt. Taxpayer provided a copy of a strongly-worded letter sent to Taxpayer from such a customer at a hotel Taxpayer operates in another state.

The Department acknowledges that Indiana's sales tax laws are not always properly enforced by every retail merchant. However, the Department does not agree that this relieves any retail merchant of its duties regarding the collection of sales tax. The Department expects each retail merchant to understand and follow Indiana's sales tax laws, even if their competitors do not. If the Department becomes aware of a particular taxpayer's failure to follow the tax laws, it will make its best effort to correct the situation.

In conclusion, the hotel room rentals in question were paid by individuals, which disqualified those rentals from exemption. The exemption applies to government agencies and exempt organizations, not to individuals associated with those entities. All retail merchants, including hotel operators, are required to follow Indiana's sales tax laws and regulations, even if its competitors are not doing so. Taxpayer has not met the burden of proving the proposed assessments wrong, as required by IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is denied.

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 and interest. As provided by IC § 6-8.1-10-1(e), the Department may not waive interest. 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 tax liabilities were 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 it had reasonable cause for its actions. 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 regarding the imposition of penalty and denied regarding the imposition of interest.

CONCLUSION

Taxpayer is denied on Issue I regarding the imposition of sales tax. Taxpayer is sustained on Issue II regarding the imposition of penalty but denied regarding the imposition of interest.

Posted: 06/23/2010 by Legislative Services Agency
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