

Letter of Findings: 09-0962
Sales and Use Tax
For the Years 2006, 2007, 2008

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ISSUES

I. Use Tax – Electronic Subscriptions – CARFAX Reports.

Authority: IC § 6-8.1-5-1; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Sales Tax Information Bulletin 8 (May 2002).

Taxpayer protests the imposition of use tax on its purchase of CARFAX vehicle report subscriptions.

II. Tax Administration – Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the assessment of negligence penalty.

STATEMENT OF FACTS

Taxpayer operates a new and used car dealership in Indiana, with a service and body shop department. The Indiana Department of Revenue ("Department") conducted income, withholding and sales and use tax audits of Taxpayer for the years 2006, 2007, and 2008. There were no adjustments pursuant to the income and withholding audits. The sales and use tax audit, which was conducted on a projection basis, resulted in the assessment of additional sales and use tax, penalty and interest. Taxpayer agreed to the sales tax issues and some of the use tax issues and remitted partial payment. Taxpayer protested the use tax assessments on its CARFAX vehicle report subscription and the penalty. The CARFAX related adjustments were not subject to the projection agreement. Taxpayer submitted some additional documentation subsequent to the audit and requested that the Department's determination be made on the basis on of the information in Taxpayer's file in lieu of a hearing. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Use Tax – Electronic Subscriptions – CARFAX Reports.

DISCUSSION

The Department found that Taxpayer had purchased a subscription to CARFAX and no sales tax was collected or use tax remitted to the Department. The Department's audit proceeded to impose use tax on those items, as well as penalty and interest.

The Department notes that all tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(b), (c); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

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. An exemption from the use tax is granted for transactions when sales tax was paid at the time of purchase pursuant to IC § 6-2.5-3-4.

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. Taxpayer protests arguing that it is purchasing a non-taxable service. Taxpayer makes several other points in support of its protest which are addressed here first.

Taxpayer asserts that the costs for CARFAX reports are not taxable tangible personal property but rather constitute services that are not subject to sales and use tax. Taxpayer stated that it subscribed to services from a vendor-repository - i.e., CARFAX - that provided vehicle reports to Taxpayer under agreement. Taxpayer maintains that there is no report available to purchase until information is furnished by Taxpayer. When that information is provided the vendor compiles the report and sells the finished report to the Taxpayer. Taxpayer also maintains that the vendor(s) provide the credit information for the exclusive use of Taxpayer for a specific purpose and only if Taxpayer requests the information by providing specific confidential input.

Taxpayer does not gain exclusive use and right of control of compiled information, which was supplied by Taxpayer to the vendor to be merely organized by the vendor. Nowhere in the agreements does Taxpayer gain exclusive right to any specific information. Nowhere in the agreements does Taxpayer specify that vendors collect specific and customized information for Taxpayer to become the sole owner of the information.

In fact, the typical arrangement for these vehicle reports works as follows: with a user-name and password given by the vendor-repository, Taxpayer can search, retrieve, and print what is produced and offered by the vendor-repository. Upon Taxpayer's demand, i.e., entering the search term or terms (typically the vehicle's VIN

number), the vendor-repository transferred the vehicle reports to Taxpayer and Taxpayer then paid the vendor-repository for the vehicle reports based on the volume of the reports Taxpayer purchased. Taxpayer received the vehicle reports, either in printout form, by electronically storing them in its computer, or simply by viewing the generated reports. Essentially, Taxpayer requested an individual vehicle report for one of its potential customers, or for itself, and was billed for each vehicle report requested or was charged a flat fee for either unlimited access or a maximum number of records depending on the type of arrangement. The issue is whether this "information" or vehicle report is subject to sales and use tax.

The issue of whether that "information" is subject to sales and use tax is addressed in the 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 CARFAX vehicle reports. The vendor-repository compiled the individual vehicle information, in report formats, and sold the reports in substantially the same form as they were produced. Taxpayer did not contract with the vendor to perform and provide a service, such as collecting specific and customized information or compiling Taxpayer's information. Instead, Taxpayer purchased the completed products, i.e., CARFAX vehicle reports, after the vendor compiled and furnished standard information in the standard report formats. The reports consist of information "compiled by a computer [and] sold or reproduced for sale in substantially the same form as it is so produced...." Therefore, the reports – by whatever means transmitted – constitute "tangible personal property" obtained in a retail transaction. Pursuant to Sales Tax Information Bulletin 8, the vehicle reports are tangible personal property and, therefore, taxable.

Taxpayer also argues that the CARFAX reports are purchased to determine the condition of used vehicles that are acquired for inventory, and, also, they are furnished to buyers of used vehicles as assurance of the condition of the vehicle. Taxpayer argues, that, as such, the reports are an integral part of a retail transaction upon which sales tax is collected as part of the purchase price of the vehicle. For the sake of argument, even if what Taxpayer represents is correct, Taxpayer would still have to demonstrate that it included the charges for these reports in the cost of the vehicles it sold. Taxpayer has not provided any documentation that shows that Taxpayer broke down the charge for the CARFAX reports separately on the invoices of the vehicles it sold during the years at issue.

Since Taxpayer did not pay sales tax at the time of the purchase of the CARFAX reports, use tax is properly imposed.

FINDING

Taxpayer's protest is respectfully denied.

II. Tax Administration – Negligence Penalty.

DISCUSSION

The Taxpayer also protested the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1. Indiana Regulation [45 IAC 15-11-2](#)(b) clarifies the standard for the imposition of the negligence penalty as follows:

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 standard for waiving the negligence penalty is given at [45 IAC 15-11-2](#)(c) 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.

Taxpayer has affirmatively established, as required by [45 IAC 15-11-2\(c\)](#), that its failure to pay sales tax on its purchases was due to reasonable cause and not due to negligence.

FINDING

Taxpayer's protest is sustained.

CONCLUSION

Taxpayer's protest of the assessment of use tax on CARFAX vehicle report subscriptions is denied.
Taxpayer's protest of the negligence penalty is sustained.

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