DEPARTMENT OF STATE REVENUE

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Letter of Findings Number: 10-0033
Sales and Use Tax
Tax Years: 2007 and 2008

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ISSUE

I. Sales to Out-of-State Customers – Gross Retail Tax.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-2.5-5-15 (Repealed July 1, 2004); IC § 6-8.1-5-1; 45 IAC 15-11-2; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Commissioner's Directive 25 (July 2004); Sales Tax Information Bulletin 28 (July 2004); Sales Tax Information Bulletin 28S (May 2007); Sales Tax Information Bulletin 28S (December 2009).

Taxpayer protests the assessment of gross retail tax.

II. Tax Administration – Ten Percent Negligence Penalty.

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

Taxpayer protests the imposition of the negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana corporation that sells used automobiles. Taxpayer often sold automobiles to residents of Kentucky. The Department conducted a sales and use tax audit of the 2007 and 2008 tax years. The audit determined that Taxpayer should have collected sales tax on the sale of vehicles to Kentucky residents during the tax years in question, and was charged sales tax as a result. Taxpayer was also assessed penalty and interest. Taxpayer protests the assessment of sales tax and the assessment of penalty. A hearing was held on the matter, and this Letter of Findings results.

I. Sales to Out-of-State Customers – Gross Retail Tax.

DISCUSSION

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(a) imposes a sales tax on retail transactions made in Indiana. IC § 6-2.5-1-2 defines a retail transaction as "a transaction of a retail merchant that constitutes selling at retail as described in IC § 6-2.5-4-1... or that is described in any other section of IC § 6-2.5-4." IC § 6-2.5-4-1(a) provides that "[a] person is a retail merchant making a retail transaction when he engages in selling at retail." IC § 6-2.5-4-1(b) further explains that a person sells at retail when he "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration."

IC § 6-2.5-5-15 (Repealed July 1, 2004) originally exempted sales of vehicles to out-of-state customers. The Department issued Commissioner's Directive 25 (July 2004) and Sales Tax Information Bulletin 28 (July 2004) to address the change in law. Commissioner's Directive 25 stated that the repeal of IC § 6-2.5-5-15 "only affect[ed] situations where the purchaser [took] possession of the vehicle prior to taking the vehicle out-of-state." The Directive stated that:

> [The] repeal does not affect out of state sales by dealers. For a sale of a vehicle to be considered out of state, the purchaser must take possession via delivery outside of Indiana. No exemption certificate is required when making an out of state sale. However, the sales contract must specify that the vehicle is to be delivered out of state and the dealer must maintain shipping documentation to verify that the vehicle was delivered to the purchaser at a specific out of state location.

Sales Tax Information Bulletin 28 provided that the dealer was required to collect the tax and provide forms ST-108 to the purchaser to show that the tax had been paid in Indiana. If the purchaser claimed an exemption, form ST-108E was to be completed and signed by the purchaser with a copy retained by the dealer.

Sales Tax Information Bulletin 28 was updated in May of 2007 becoming Sales Tax Information Bulletin 28S (May 2007). The language from the previous bulletin was removed and the following added.

> A vehicle or trailer sold in interstate commerce is not subject to the Indiana sales tax. To qualify as being "sold in interstate commerce" the vehicle or trailer must be physically delivered, by the selling dealer, to a delivery point outside Indiana. The delivery may be made by the dealer or the dealer may hire a third party carrier. **Terms and method of delivery must be indicated on the sales invoice. The dealer must document terms of delivery and must keep a copy of such terms of delivery to substantiate the interstate sale.** The exemption does not apply to sales to out-of-state buyers in which the buyer takes physical possession of a vehicle or trailer in Indiana, nor is the exemption valid if the buyer, and not the seller, hires a third party carrier to transport the vehicle or trailer outside Indiana. If the buyer hires the carrier,

the carrier is acting as an agent for the buyer, and thus the buyer takes physical possession within Indiana. Possession taken within the state does not qualify as an interstate sale. (**Emphasis added**) See also Sales Tax Information Bulletin 28S (December 2009).

There were seventeen vehicles at issue in the audit that Taxpayer sold to Kentucky residents without collecting Indiana sales tax. Taxpayer objects to the Department's decision requiring it to pay sales tax on the sale of the vehicles to out-of-state customers. Taxpayer maintains that it had no knowledge of the change in law regarding "drive-out" sales and that it never received official notification that the procedures had changed.

Taxpayer has presented no legal authority that the Department was required to notify taxpayer individually of the change in law. As a non insubstantial business, taxpayer is under an obligation to understand and comply with Indiana tax requirements. As explained in 45 IAC 15-11-2(b), "Ignorance of the listed tax laws, rules and/or regulations is treated as negligence."

Assuming for the moment that the Department was under a good-faith obligation to alert automobile dealers of the change in law, there is evidence that the Department did just that by contacting automobile trade associations, publishing a notice on the Department's website, communicating with Indiana businesses holding a Registered Retail Merchant's Certificate, and issuing a press release.

With that in mind, according to Taxpayer, of the seventeen vehicles that Taxpayer sold to Kentucky residents at issue in the audit, eleven of the seventeen vehicles were transported by Taxpayer to the purchasers in Kentucky. After delivery, Taxpayer says that the purchasers registered the vehicles in Kentucky, and the purchasers then paid Kentucky sales tax at the time the purchasers titled their vehicles. Taxpayer further maintains that even though the vehicles were not delivered by Taxpayer to the remaining six out-of-state customers, these customers also subsequently registered and paid the sales tax in Kentucky at Kentucky's sales tax rates.

Taxpayer was able to provide sufficient documentation to show that the eleven vehicles that were delivered to Kentucky residents were made in interstate commerce. Therefore, Taxpayer was not required to collect sales tax from those eleven customers. (Stock numbers: 4707, 4682, 4539, 4592, 4524, 4679A, 4522, 4512, 4428, 4417, 4383). Registered Indiana retail merchants that sell vehicles to out-of-state customers are held to a high standard, and the terms of Sales Tax Information Bulletin 28S must be strictly complied with.

Taxpayer claims that after each of the six transactions in which Taxpayer did not deliver the vehicles, the out-of-state customers still subsequently registered and paid the sales tax in Kentucky at Kentucky's sales tax rates. Thus, Taxpayer further argues that it should not be liable for collecting taxes on the vehicles that it sold and did not deliver to Kentucky because doing so would have resulted in double-taxation.

Taxpayer is mistaken. After 2004, when the out-of-state customers come to Indiana and take possession of tangible personal property in Indiana before they return to their home states, the transactions occur and are completed in Indiana and, therefore, are subject to Indiana sales tax. Taxpayer, as a retail merchant, is thus responsible for collecting Indiana sales tax for transactions that occur in Indiana, unless the customers are entitled to exemptions. Whether the purchasers paid the sales tax in their home states is irrelevant to Taxpayer's protest. Had Taxpayer properly collected the sales tax from these out-of-state purchasers, the purchasers would have been able to apply the Indiana tax paid as a credit against their home states' tax levied on the same vehicles. Therefore, as it pertains to the six vehicles that Taxpayer sold to out-of-state residents and which Taxpayer did not deliver the vehicles to Kentucky, Taxpayer's protest that it was not required to collect Indiana sales tax is denied.

FINDING

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

II. Tax Administration – Ten Percent Negligence Penalty.

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty and interest for the tax years in question. Taxpayer protests the imposition of penalty, requesting that it be waived.

Taxpayer protests 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.

45 IAC 15-11-2(c) provides that:

> 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 case, Taxpayer incurred a deficiency which the Department determined was due to negligence under 45 IAC 15-11-2(b), and so was subject to a penalty under IC § 6-8.1-10-2.1(a).

Taxpayer has not sufficiently established that its failure to pay the sales tax was due to reasonable cause and not due to negligence, as required by 45 IAC 15-11-2(c). Therefore, the negligence penalty shall not be waived, except to the extent that the penalty was applied to assessments which were protested and sustained.

FINDING

Taxpayer's protest is respectfully denied.

SUMMARY

Taxpayer's challenge to the imposition of tax on the sale of vehicles to out-of-state customers is denied in part and sustained in part. The audit report should be corrected to remove sales tax on the eleven vehicles stipulated in Part I of this Letter of Findings. As to Part II, the protest is denied, and the penalty will continue to apply to the sales tax assessments on the remaining six vehicles.

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