

Letter of Findings Number: 09-0721
Utility Receipts Tax
For Tax Years 2005-2007

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ISSUES

I. Utility Receipts Tax—Imposition.

Authority: IC § 6-2.3-1-4; IC § 6-2.3-1-14; IC § 6-2.3-2-1; IC § 6-2.3-3-5; IC § 6-8.1-5-1.

Taxpayer protests the imposition of utility receipts tax on certain gross receipts.

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 (10) percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is a telecommunications company providing telephone services to Indiana customers. Taxpayer paid Utility Receipts Tax ("URT") on its gross receipts. After an audit, the Indiana Department of Revenue ("Department") assessed additional Utility Receipts Tax, penalties, and interest for the tax years 2005, 2006, and 2007. The Department found that Taxpayer had failed to include a variety of receipts as gross receipts subject to the URT. Taxpayer protested this assessment. Taxpayer presented additional documentation that was not available at the time of audit. After reviewing the additional documentation, the Department agreed to make certain adjustments. An administrative hearing was held, and this resulting Letter of Findings will address the remaining protest issues. Further facts will be supplied as required.

I. Utility Receipts Tax—Imposition.

DISCUSSION

Pursuant to IC § 6-8.1-5-1(c), all tax assessments are presumed to be accurate, and the taxpayer bears the burden of proving that an assessment is incorrect.

The URT is imposed by IC § 6-2.3-2-1 as follows:

An income tax, known as the utility receipts tax, is imposed upon the receipt of:

- (1) the entire taxable gross receipts of a taxpayer that is a resident or a domiciliary of Indiana; and
- (2) the taxable gross receipts derived from activities or businesses or any other sources within Indiana by a taxpayer that is not a resident or a domiciliary of Indiana.

"Gross receipts" for purposes of the Indiana's URT is defined at IC § 6-2.3-1-4 as follows:

"Gross receipts" refers to anything of value, including cash or other tangible or intangible property that a taxpayer receives in consideration for the retail sale of utility services for consumption before deducting any costs incurred in providing the utility services.

In summary, the URT is an income tax imposed on the receipts from retail sales of utility services for consumption by the purchaser. The utility services subject to tax include telecommunication services. IC § 6-2.3-1-14(6).

Taxpayer asserts that certain of the receipts that the Department determined were subject to URT are not from "retail sales," but are from "wholesale sales" that are not subject to the URT under IC § 6-2.3-3-5(a). Taxpayer maintains that certain of the receipts in its "Special Access Revenue" account no. 508300, "Switched Access Revenue" account no. 508420, and "Special Access Revenue" account no. 508430 are not "retail sales" because the receipts are from sales to "other carriers." Taxpayer further states that it is only protesting the amounts that are not from "end users."

Pursuant to IC § 6-2.3-3-5(a), "Gross receipts do not include a wholesale sale to another generator or reseller of utility services." (Emphasis Added). The statute provides an exclusion for receipts received from wholesale sales, which means the utility services were sold with the intention of being resold as utility services and not with the intention of being consumed. When the telecommunications services are sold to "other carriers" and consumed, the telecommunications services are not purchased in a wholesale sale. Thus, when the "other carriers" are providers of non-telecommunications services—such as "DSL-Internet services," "Frame Relay services," "ATM data transfer services," the "other carriers" consume the Taxpayer's telecommunications services. While these "other carriers" may be sellers of non-telecommunications services, the "other carriers" are not "resellers of utilities services." Therefore, the receipts from the "other carriers" are not from a "wholesale sale to another generator or reseller of utility services," as required by IC § 6-2.3-3-5(a).

A. "Switched Access Revenue."

Taxpayer has provided sufficient information to demonstrate that the receipts in the "Switched Access Revenue" account no. 508420 are from "wholesale sales" and are not subject to the URT. Therefore, Taxpayer's

protest to the imposition of URT on its receipts in the "Switched Access Revenue" account no. 508420 is sustained.

B. "Special Access."

Taxpayer has failed to provide sufficient information to demonstrate that the receipts in the "Special Access Revenue" account no. 508300 and "Special Access Revenue" account no. 508430 are from "wholesale sales" and are not from sales to the "other carriers" that are consumers of Taxpayer's telecommunications services. Thus, Taxpayer has failed to meet its burden under IC § 6-8.1-5-1(c).

Therefore, Taxpayer's protest to the imposition of URT on its receipts in the "Special Access" account no. 508300 and "Special Access Revenue" account no. 508430 is denied.

FINDING

Taxpayer's protest to the imposition of URT on its receipts in the "Switched Access Revenue" account no. 508420 is sustained, as discussed in subpart A. Taxpayer's protest to the imposition of URT on its receipts in the "Special Access Revenue" account no. 508300 and "Special Access Revenue" account no. 508430 is denied, as discussed in subpart B.

II. Tax Administration—Negligence Penalty.

DISCUSSION

The Department issued proposed assessments and ten (10) percent negligence penalties for the tax years in question. Taxpayer protests the imposition of the penalties. The Department refers to IC § 6-8.1-10-2.1(a)(3), which provides, "[I]f a person... incurs, upon examination by the department, a deficiency that is due to negligence... the person is subject to a penalty."

The Department may waive a negligence penalty as provided in [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.

Taxpayer has provided sufficient information to establish that its failure to pay the deficiency in this instance was not due to Taxpayer's negligence, but was due to reasonable cause as required by [45 IAC 15-11-2\(c\)](#).

FINDING

Taxpayer's protest is sustained.

CONCLUSION

Taxpayer's assessments will be adjusted to reflect the items that were agreed to prior to the issuance of this Letter of Findings. Taxpayer's protest to the imposition of URT on its receipts in the "Switched Access Revenue" account no. 508420 is sustained, as discussed in subpart A. Taxpayer's protest to the imposition of URT on its receipts in the "Special Access Revenue" account no. 508300 and "Special Access Revenue" account no. 508430 is denied, as discussed in subpart B. Taxpayer's protest to the imposition of penalty is sustained, as discussed in Issue II.

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