DEPARTMENT OF STATE REVENUE

04-20090764.LOF

Letter of Findings: 09-0764
Gross Retail Tax
For 2006, 2007, and 2008

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ISSUES

I. Overhead Bridge Cranes – Gross Retail Tax.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1(a); IC § 6-2.5-4-1(a); IC § 6-2.5-4-1(b); IC § 6-2.5-8-8(a); IC § 6-8.1-5-1(c); Indiana Dept. of State Rev. v. Kimball Int'l Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988).

Taxpayer argues that it was not required to collect tax on the sale of two bridge cranes to a Michigan customer.

II. Equipment Sales – Gross Retail Tax.

Authority: IC § 6-8.1-5-1(c).

Taxpayer maintains that transactions involving a Camaro, an engine, forklift, "roller," electric truck, air compressor, and a Freightliner dump truck were not "retail sales" subject to sales tax.

III. Exemption Certificates.

Authority: IC § 6-2.5-8-8(a); IC § 6-8.1-5-1(c).

Taxpayer states that it can produce exemption certificates establishing that it was not required to collect sales tax on the sale of a "Grain Bed Truck," on the sale of a W-18 loader, and on the sale of an engine.

IV. Computational Changes – Gross Retail Tax.

Authority: IC § 6-8.1-5-1(c).

Taxpayer argues that the audit report contains certain errors which should be corrected.

V. Ten-Percent Negligence Penalty.

Authority: IC § 6-8.1-5-1(c); IC § 6-8.1-10-2.1(a)(3); IC § 6-8.1-10-2.1(a)(4); IC § 6-8.1-10-2.1(d); 45 IAC 15-11-2(b); 45 IAC 15-11-2(c).

Taxpayer asks that the Department exercise its authority to abate the ten-percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is a C corporation which sells heavy equipment, vehicles, trailers, forklifts, backhoes, trucks, buses, and other similar, related equipment. Taxpayer operates from two Indiana locations. Both locations are registered with the Bureau of Motor Vehicles as "authorized" dealers.

The Department of Revenue (Department) conducted an audit review of Taxpayer's business records and tax returns. The audit resulted in the assessment of additional sales/use tax. Taxpayer disagreed with portions of the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer and Taxpayer's representative explained the basis for the assessment. This Letter of Findings results.

I. Overhead Bridge Cranes – Gross Retail Tax.

DISCUSSION

In 2006, Taxpayer sold two overhead bridge cranes to a Michigan customer. The invoice indicates that Taxpayer was paid $41,000 for the cranes but that the "Customer will provide Tax Exemption information prior to close of this sale."

Taxpayer indicates that the sale was "cancelled" and that the Michigan business resold the cranes without having taken delivery. The cranes were then resold to an Alabama company.

IC § 6-2.5-2-1(a) imposes 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."

Although Taxpayer admits it received by wire transfer $41,000 for the two cranes, it argues it was not required to collect sales tax because the Michigan customer can verify the transaction was exempt. Indeed, Taxpayer has provided a statement from the customer indicating that, "Under the laws of the state of Michigan, I am exempt from sales tax on my purchase." In addition, Taxpayer asserts that Michigan does not issue exemption certificates.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

In applying any tax exemption, the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." Indiana Dept. of State Rev. v. Kimball Int'l Inc., 520 N.E.2d 454, 456 (Ind. Ct. App. 1988).

In this instance, the Michigan customer is incorrect; Michigan indeed does issue – and indeed requires – exemption certificates. See Michigan Dep't of Treasury Form 3372. However, the issue is irrelevant because this was not a Michigan transaction. The sales occurred in Indiana and Indiana law requires as follows:

> 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. IC § 6-2.5-8-8(a).

Taxpayer makes a secondary argument. Taxpayer argues that the sale to the Michigan customer was reversed and that the equipment was sold to an Alabama customer which was purportedly exempt from Indiana sales tax on the ground that Taxpayer shipped the cranes to the Alabama location. However, whether or not the sale to the Alabama customer was or was not exempt is entirely irrelevant because the Department did not assess tax on this particular transaction; the Department assessed tax on the sale to the Michigan customer.

Because there is no indication that the sale to the Michigan customer was exempt, Taxpayer has failed to meet its burden of proof under IC § 6-8.1-5-1(c) sufficient to establish that it was not required to collect sales tax on the sale of the cranes to the Michigan customer.

FINDING

Taxpayer's protest is respectfully denied.

II. Equipment Sales – Gross Retail Tax.

DISCUSSION

The audit review found that Taxpayer sold its single shareholder cars, equipment, and a truck but that no sales tax was collected. Taxpayer argues that these sales were booked incorrectly because the items were actually given by the shareholder to Taxpayer. According to Taxpayer, "These items were never taken from [Taxpayer's] inventory, simply used to adjust large note balance and show the bank [shareholder] held some collateral against notes." Elsewhere in the written protest, Taxpayer states that shareholder "never removed the asset from [Taxpayer's] inventory, but simply added the money to his loan and in exchange kept the [vehicle] listed as collateral to satisfy the bank that [shareholder] has some collateral against loans to [Taxpayer]." Taxpayer further explains that each sale "was written as an alternative means of lending money to [Taxpayer] without having it get 'lost' in the course of doing business and never repaid. By charging a specific vehicle against the money, the item was held by [shareholder] until sold and then it's put back on the books, the sale registered through [Taxpayer] and sales tax collected when applicable."

Taxpayer was asked to provide documentation that the equipment remained in Taxpayer's inventory, that it was never sold to shareholder, and/or that it was sold to a third-party. Specifically, Taxpayer was asked to provide copies of vehicle titles establishing who owned the equipment, to whom it was sold, and when the vehicles were sold. This documentation was not provided.

The invoices at issue clearly state that Taxpayer "sold" the items to shareholder and that the shareholder's transactions involved "traded in" other equipment to offset the purchase price. In addition, the invoice for the sale of the truck establishes that shareholder paid by check for the purchase price.

Of course the Department is not in a position to judge the financial dealings between Taxpayer, its shareholder, and the financial institution or whether these transactions somehow provided assurances to Taxpayer's bank. However, based on the available information, the documentation establishes that Taxpayer sold these items to its shareholder, that the shareholder traded in equipment as part of the sales transaction, and that the shareholder paid for the items by check.

As noted above, 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(c) (Emphasis added).

There is little to indicate that these particular transactions were exempt. The audit correctly determined that the transactions were subject to tax.

FINDING

Taxpayer's protest is respectfully denied.

III. Exemption Certificates.

DISCUSSION

Taxpayer argues that it can provide exemption certificates and that these certificates should be accepted by the Department.

As noted previously, Taxpayer has "[t]he burden of proving that the proposed assessment is wrong...." IC § 6-8.1-5-1(c).

IC 6-2.5-8-8(a) describes sales tax exemption certificates:

> 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.

Taxpayer has produced one exemption certificate purportedly received from the purchaser of a "1977 GMC Grain Bed Truck." However, the Department's certificate plainly indicates that **"This exemption certificate can not** [sic] **be issued for the purchase of Utilities, Vehicles, Watercraft, or Aircraft**." (Emphasis in original). The Department is unable to accept Taxpayer's contention that the sale of the GMC truck was exempt because the exemption is inapplicable for this particular sale.

Taxpayer has produced a second exemption certificate related to the sale of a "Cummins Engine," a third exemption certificate related to the sale of a "Case W-18," and a fourth exemption certificate for which there is no specific related transaction.

Taxpayer has provided sufficient information to establish that it properly accepted an exemption certificate covering the sale of the Cummins Engine. Taxpayer has not provided information sufficient to establish that the remaining transactions were either exempt or that an exemption certificate was properly accepted for the related transactions.

FINDING

Taxpayer's protest is sustained in part and denied in part. One of the four exemption certificates was properly accepted.

IV. Computational Changes – Gross Retail Tax.

DISCUSSION

Taxpayer argues that the audit contains certain computational and procedural errors. Taxpayer suggests that certain audit items "appeared post audit were not on the original list presented to the taxpayer." However, in a memo submitted following Taxpayer's original protest, the auditor notes that the all items were sent to Taxpayer's representative "before the audit was finally written and turned in."

There is nothing substantive to bolster Taxpayer's contention that the audit fabricated items contained within the original audit report.

Under IC § 6-8.1-5-1(c), Taxpayer has failed to meet its burden of demonstrating that the items in question were erroneous.

FINDING

Taxpayer's protest is respectfully denied.

V. Ten-Percent Negligence Penalty.

DISCUSSION

Taxpayer believes that it is entitled to abatement of the ten-percent negligence penalty because the "taxpayer paid all sales tax using the best information available to do so and had no willful intent to under report any sales or use tax with the department."

IC § 6-8.1-10-2.1(a)(3) requires that a ten-percent penalty be imposed if the tax deficiency results from the taxpayer's negligence. IC § 6-8.1-10-2.1(a)(4) requires a ten-percent penalty if the taxpayer "fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment."

IC § 6-8.1-10-2.1(d) states that, "If a person subject to the penalty imposed under this section can show that the failure to... pay the full amount of tax shown on the person's return... or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall wave the penalty."

Departmental regulation 45 IAC 15-11-2(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." Id.

IC § 6-8.1-10-2.1(d) allows the Department to waive the penalty upon a showing that the failure to pay the deficiency was based on "reasonable cause and not due to willful neglect." Departmental regulation 45 IAC 15-11-2(c) requires that 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 IC § 6-8.1-5-1(c), "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." An assessment – including the negligence penalty – is presumptively valid.

Given the number of items for which taxpayer failed to self-assess use tax, and the fact that the taxpayer had no established internal procedure by which to self-assess use tax, the Department is unable to agree that the taxpayer exercised ordinary business care in determining its use tax liabilities.

Based on a "case-by-case" analysis and after reviewing "the facts and circumstances of each taxpayer" the Department is unable to agree that the ten-percent negligence penalty should be abated.

FINDING

Taxpayer's protest is respectfully denied.

SUMMARY

Taxpayer has established it was not required to charge sales tax on the sale of the Cummins engine and that

a supplementary audit should be conducted to review that charge from the original assessment. In all other respects, Taxpayer's protest is denied.

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