DEPARTMENT OF STATE REVENUE

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Letter of Findings: 09-0863
Sales and Use Tax
For the Years 2006, 2007, and 2008

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales and Use Tax – Imposition.

Authority: IC § 6-2.5-1-1 et seq.; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-1-5; IC § 6-8.1-5-1; 45 IAC 2.2-4-1; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Sales Tax Information Bulletin 14 (December 2002).

Taxpayer protests the assessment of use tax on the 20,000 envelope mailer invoice.

II. Tax Administration – Negligence Penalty.

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

Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is a car dealership selling new and used vehicles in Indiana. Pursuant to an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer failed to collect sales tax on some of its sales of vehicles. The Department's audit also concluded that Taxpayer purchased tangible personal property without paying sales tax at the time of the purchases or self-assessing and remitting the use tax due to the Department. Therefore, the Department's audit assessed Taxpayer sales tax, use tax, interest, and penalty.

Taxpayer paid the proposed assessments under protest. A hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales and Use Tax – Imposition.

DISCUSSION

In 2008, Taxpayer contracted with an advertising agency to produce and send promotional mailers to Indiana residents on behalf of Taxpayer. Upon completion of its contractual obligation, the advertising agency sent Taxpayer a "20,000 envelope mailer" invoice (Mailer), breaking down the charges, including, but not limited to, "Postage," for the products and services which the advertising agency rendered.

The Department's audit assessed Taxpayer use tax on the total amount stated in Mailer because Taxpayer failed to pay sales tax or self-assess and remit the use tax due. Taxpayer's protest letter, dated October 14, 2009, seemingly protested the assessment of use tax on Mailer in general. While stating that Mailer was not a unitary transaction, Taxpayer only enclosed a copy of the invoice without other explanations. Subsequently, at the administrative hearing, Taxpayer specifically pointed to "Postage" listed in Mailer and maintained that "Postage" should not be subject to sales and/or use tax. This Letter of Findings, therefore, will be limited to an analysis of the "Postage" protest.

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).

Indiana imposes a sales tax on retail transactions and a complementary use tax on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-1-1 et seq.

IC § 6-2.5-2-1 provides:

(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.

IC § 6-2.5-3-2 provides:

(a) An 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, regardless of the location of that transaction or of the retail merchant making that transaction.

Accordingly, all sales of tangible personal property are taxable. An exemption from use tax is granted for a transaction where the gross retail tax ("sales tax") was paid at the time of purchase pursuant to IC § 6-2.5-3-4.

The Department's Sales Tax Information Bulletin 14 (December 2002) addresses purchases and sales by advertising agencies and, in relevant part, states:

Retail Sales by Advertising Agencies:

The transfer of tangible personal property for a consideration shall constitute a retail sale by the advertising agency and is subject to Gross Retail tax unless transferred to the principal for whom the agency purchased

the tangible personal property as outlined in the above paragraph.

45 IAC 2.2-4-1 further illustrates:

(a) Where ownership of tangible personal property is transferred for a consideration, it will be considered a transaction of a retail merchant constituting selling at retail unless the seller is not acting as a "retail merchant".

(b) All elements of consideration are included in gross retail income subject to tax. Elements of consideration include, but are not limited to:

(1) The price arrived at between purchaser and seller.

(2) Any additional bona fide charges added to or included in such price for preparation, fabrication, alteration, modification, finishing, completion, **delivery**, or other services performed in respect to or labor charges for work done with respect to such property prior to transfer.

(3) No deduction from gross receipts is permitted for services performed or work done on behalf of the seller prior to transfer of such property at retail.

IC § 6-2.5-1-5, in pertinent part, provides:

(a) Except as provided in subsection (b), "gross retail income" means the total amount of consideration, including cash, credit, property, and services, for which tangible personal property is sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for:

(1) the seller's cost of the property sold;

(2) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller;

(3) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges;

(4) delivery charges; or

(5) consideration received by the seller from a third party if:

(A) the seller actually receives consideration from a party other than the purchaser and the consideration is directly related to a price reduction or discount on the sale;

(B) the seller has an obligation to pass the price reduction or discount through to the purchaser;

(C) the amount of the consideration attributable to the sale is fixed and determinable by the seller at the time of the sale of the item to the purchaser; and

(D) the price reduction or discount is identified as a third party price reduction or discount on the invoice received by the purchaser or on a coupon, certificate, or other documentation presented by the purchaser.

For purposes of subdivision (4), **delivery charges are charges by the seller for preparation and delivery of the property to a location designated by the purchaser of property**, including but not limited to transportation, shipping, **postage**, handling, crating, and packing.

In this instance, to promote its business and to increase its sales, Taxpayer engaged the advertising agency to produce and deliver promotional materials to Taxpayer's prospective customers. Taxpayer did not just purchase the stamps from the post office. Rather, Taxpayer contracted with the advertising agency to "design, print, and process" the promotion materials and directly deliver the promotion materials to Taxpayer's prospective customers. The advertising agency did so via mail to fulfill its contractual obligation. Had the advertising agency failed to deliver as it had agreed to under their agreement, Taxpayer would not have paid the advertising agency. Thus, the postage charge was actually the advertising agency's delivery charge to complete its delivery and, therefore, as specifically stated in the ending flush language of IC § 6-2.5-1-5(a), postage is included in the definition of delivery charges.

In short, Taxpayer's payment on Mailer, including delivery, constituted a retail sale by the advertising agency because Mailer that contained the promotion materials was transferred for a consideration. Since Taxpayer did not pay sales tax, use tax is properly imposed.

FINDING

Taxpayer's protest on the purchase of Mailer is respectfully denied.

II. Tax Administration – Negligence Penalty.

DISCUSSION

Taxpayer also protests the imposition of the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1, the Department may assess a ten (10) percent negligence penalty if the taxpayer:

(1) fails to file a tax return;

(2) fails to pay the full amount of tax shown on the tax return;

(3) fails to remit in a timely manner the tax held in trust for Indiana (e.g., a sales tax); or

(4) fails to pay a tax deficiency determined by the Department to be owed by a taxpayer.

45 IAC 15-11-2(b) further 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.

The Department may waive a negligence penalty as provided in 45 IAC 15-11-2(c), in part, 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 failed to provide sufficient documentation establishing that its failure to pay tax or timely remit tax was due to reasonable cause and not due to negligence.

FINDING

Taxpayer's protest on the imposition of the negligence penalty is respectfully denied.

SUMMARY

For the reasons discussed above, Taxpayer's protest on the purchase of Mailer is respectfully denied. Taxpayer's protest on the imposition of the negligence penalty is also respectfully denied.

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