DEPARTMENT OF STATE REVENUE

04-20100163.LOF

Letter of Findings: 10-0163
Sales and Use Tax
For the Year 2007

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 It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register.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 Tax – Imposition of Indiana Sales Tax.

Authority: IC § 6-8.1-5-1; IC § 6-2.5-2-1; IC § 6-2.5-4-1; Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Maurer v. Indiana Dep't. of State Revenue, 607 N.E.2d 985 (Ind. Tax Ct. 1993); Monarch Beverage Company v. Indiana Dep't of State Revenue, 589 N.E.2d 1209 (Ind. Tax Ct. 1992); Ohio Department of Taxation FAQs - Sales & Use Tax: Motor Vehicles & Watercraft, http://www.tax.ohio.gov/faqs/Sales/sales_watercraft.stm#4 (last visited June 28, 2010).

An Ohio car dealer protests the imposition of Indiana sales tax on the transfer of a vehicle to an Indiana Casino for a raffle held by the Casino. The vehicle was won by an Ohio resident and titled and registered in Ohio. Taxpayer remitted the sales tax paid by Casino to Ohio.

II. Tax Administration – Negligence Penalty.

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

Taxpayer protests the imposition of ten-percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Ohio car dealership. Taxpayer concluded the sale of a vehicle, a Cadillac Escalade, to an Indiana casino ("Casino") on September 7, 2007, and collected Indiana sales tax from the Casino. Taxpayer had already delivered the vehicle to Casino a little over a month prior to the conclusion of the sale so that Casino could display the Escalade during the month of August as part of Casino's promotional raffle of the vehicle. The raffle, which was won by an Ohio resident, took place on September 3, 2007. At some point after the raffle, the Ohio dealer picked up the vehicle from Casino and took it back to its Ohio dealership where the winner picked it up. At that point title was physically transferred from the dealership to the winner of the raffle. The Ohio dealer remitted the sales tax it had collected from Casino to Ohio.

A Department investigation found that there was no evidence that the sales tax had been remitted to the Indiana Department of Revenue ("Department"). Taxpayer was assessed for the amount of sales tax it had collected and, as the Department argued, should have been remitted to Indiana. Taxpayer was also assessed penalty and interest. Taxpayer protested the assessment of sales tax and penalty. A hearing was held and this Letter of Findings results. Additional facts will be provided as necessary.

I. Sales Tax – Imposition of Indiana Sales Tax.

DISCUSSION

Taxpayer protests that the vehicle was not sold or titled to Casino but rather funded the acquisition of the vehicle from Taxpayer for an award to the ultimate winner of a promotion. Taxpayer states that the "funding" included the agreed six percent sales tax rate. Taxpayer argues that had the winner been an Indiana resident, then sales tax would have been remitted to Indiana as required in order to properly title the vehicle to the winner, however since the winner was an Ohio resident, the sales tax was rightly paid to Ohio. Taxpayer concludes that "to be required by Indiana to pay sales tax on a unit neither sold nor delivered to an Indiana resident is neither just nor tenable."

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(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes an excise tax, known as the state sales tax, on retail transactions made within the state. IC § 6-2.5-2-1(a). A retail transaction occurs when, among other things, a retail merchant in the ordinary course of his regularly conducted trade or business acquires tangible personal property for the purpose of resale and transfers that property to another person for consideration. IC § 6-2.5-4-1(a),(b).

Here there are two transfers of the tangible personal property to consider in order to determine (1) if a retail transaction occurred, and, (2) if one did occur, to which state, Indiana or Ohio, the sales tax is due. The first is the transfer of the Escalade from Taxpayer to Casino for display and raffle at Casino in Indiana. The second is the transfer of the tangible personal property to the Ohio resident who won the raffle in Indiana.

Irrespective of whether the second transfer is deemed to have been consummated in Indiana or Ohio, it did not statutorily obligate the winner of the raffle for payment of sales (or use) tax in either Indiana or Ohio, because both Ohio and Indiana law agree that the Ohio resident did not take part in a retail transaction and therefore there is no sales tax owed by the winner of the raffle. Maurer v. Indiana Dep't. of State Revenue, 607 N.E.2d 985, 989

(Ind. Tax Ct. 1993); Ohio Department of Taxation FAQs - Sales & Use Tax: Motor Vehicles & Watercraft, http://www.tax.ohio.gov/faqs/Sales/sales_watercraft.stm#4 (last visited June 28, 2010).

As for the first transfer, Taxpayer, an Ohio dealership, transferred tangible personal property, the Escalade, to Casino in Indiana for consideration. In Maurer the court found that a charity raffled-automobile, for which the charity had paid the fair market value to the dealer and the raffle winner had picked up from the dealer, was acquired by the charity in a retail transaction subject to tax (but for the charity's exemption from taxation). Id. at 988.

Taxpayer believes that it is the conveyance of title to the Ohio resident in Ohio which described the end of the retail transaction and therefore where sales tax was owed. The matter of titling in the context of retail transactions and sales/use tax was addressed in Maurer and the Tax Court concluded that the linchpin of taxability under the Indiana retail sales tax statute is "consideration," not transfer of title to property:

> In Indiana, however, transfer of title is not dependent upon delivery of title documents. See Monarch Beverage Co., 589 N.E.2d at 1214, n. 13 (quoting IND. CODE 26-1-2-401(2)). Rather, unless otherwise agreed, title passes on receipt of consideration. Id. at 1213. It is well settled that title "certificates do not convey title and they are not conclusive proof of title in him who is therein designated as the owner." Champa v. Consol. Fin. Corp. (1953), 231 Ind. 580, 592, 110 N.E.2d 289, 294 (quoting Nichols v. Bogda Motors (1948), 118 Ind.App. 156, 77 N.E.2d 905, 907) (emphasis in original).
>
> Id.

Casino's promise to pay consideration – which it fulfilled on September 7, 2007 – and its exercise of control over the tangible property (displaying the vehicle, selling raffle tickets, as well as awarding the vehicle to the winner of the contest) consummates the retail transaction. Furthermore, a mere promise is sufficient as consideration if it is the result of a bargained for exchange. Monarch Beverage Company v. Indiana Dep't of State Revenue, 589 N.E.2d 1209, 1212 (Ind. Tax Ct. 1992).

Therefore, Taxpayer and Casino engaged in a retail transaction subject to sales tax. IC § 6-2.5-4-1(b). Casino has exercised ownership over the car. Casino paid Taxpayer consideration for the car. Taxpayer remitted the sales tax it collected from Casino to Ohio on the premise that the retail transaction was completed in Ohio. As stated above, neither Ohio nor Indiana would have obligated the Ohio resident to pay sales tax on tangible personal property she won in a raffle. Taxpayer was under an obligation to collect Indiana sales tax from Casino and remit said tax to the Indiana Department of Revenue.

FINDING

Taxpayer's protest is respectfully denied.

II. Tax Administration – Negligence Penalty.

DISCUSSION

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 remit sales tax to Indiana on its sale of the Escalade to Casino in Indiana was due to reasonable cause and not due to negligence.

FINDING

Taxpayer's protest is sustained.

CONCLUSION

Taxpayer's protest of the use tax assessment is denied. Taxpayer's protest of the negligence penalty is sustained.

Posted: 09/01/2010 by Legislative Services Agency
An html version of this document.