

**Letter of Findings Number: 09-1020
Sales and Use Tax
For Tax Years 2006-08**

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ISSUES

I. Sales Tax—Imposition.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-5-8; IC § 6-2.5-8-8; IC § 6-8.1-5-1; [45 IAC 15-11-2](#); Sales Tax Information Bulletin 28S (October 2007), 20071031 Ind. Reg. 04507071NRA.

Taxpayer protests the imposition of sales tax on several items which it believes are not taxable.

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 percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is a retail merchant in Indiana. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not collected and remitted sales tax on all of its sales upon which sales tax should have been collected and remitted. Accordingly, the Department issued proposed assessments for sales tax, a small amount of use tax for items Taxpayer used directly, ten percent negligence penalties, and interest for the tax years 2006, 2007, and 2008. Taxpayer protests the imposition of sales tax on several items included as taxable in the Department's audit report. Taxpayer also protests the imposition of ten percent negligence penalties. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Sales Tax—Imposition.

DISCUSSION

Taxpayer protests the imposition of sales tax on several sales which it believes were either exempt from sales tax or upon which sales tax was properly collected and remitted at the time of the sale. Taxpayer provided four separate protest letters, along with documentation with each letter. The final letter, dated August 27, 2010, included a list of all items under protest in all four letters combined. Therefore, this letter of findings will discuss the items included on that list and will consider the documentation included with all four letters.

Taxpayer states that, due to the fact that it was unaware of the need to keep records stating such, it did not include out-of-state delivery information on vehicle sales. Taxpayer also states that several items which the Department considered taxable sales were actually reimbursements to Taxpayer from related businesses and employees of Taxpayer. Taxpayer also protests that the Department misread some documents and did not allow proper credit for sales tax already paid or overstated the amounts of the sales. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

Taxpayer's first point of protest is that several sales which the Department included as taxable in its calculation of taxable sales were actually sales to exempt purchasers. 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. (Emphasis added).

Next, IC § 6-2.5-8-8 provides:

- (a) 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.
- (b) The following are the only persons authorized to issue exemption certificates:
 - (1) retail merchants, wholesalers, and manufacturers, who are registered with the department under this chapter;
 - (2) organizations which are exempt from the state gross retail tax under [IC 6-2.5-5-21](#), [IC 6-2.5-5-25](#), or [IC 6-2.5-5-26](#) and which are registered with the department under this chapter; and
 - (3) other persons who are exempt from the state gross retail tax with respect to any part of their purchases.
- (c) The department may also allow a person to issue a blanket exemption certificate to cover exempt

purchases over a stated period of time. The department may impose conditions on the use of the blanket exemption certificate and restrictions on the kind or category of purchases that are exempt. (Emphasis added).

In the course of the hearing process, Taxpayer was able to provide exemption certificates for two of its customers who made multiple purchases. As provided by IC § 6-2.5-8-8(a), 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. Therefore, since Taxpayer has provided exemption certificates from those two customers, purchases by those customers will be removed from the Department's calculation of taxable sales. Taxpayer has met its burden under IC § 6-8.1-5-1(c) regarding the purchases by those two customers.

The second point of protest concerns sales of vehicles to out-of-state customers. The Department reviewed Taxpayer's invoices and found that there was no information concerning delivery of the vehicles. In the audit report, the Department referred to Sales Tax Information Bulletin 28S (October 2007), 20071031 Ind. Reg. 045070718NRA, which provided:

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 the 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).

The Department therefore concluded that, since there was no delivery information on the sales invoices, the exemption did not apply to these sales.

Taxpayer protests that it has never been a member of the automobile dealer associations which were among the groups notified of the requirements for documentation regarding the inclusion of delivery terms and methods on the sales invoices. Taxpayer states that no one ever informed it of the need for delivery terms and methods to be listed on sales invoices. The Department refers to [45 IAC 15-11-2\(b\)](#), which provides that ignorance of the law is considered negligence. The Department notified the automobile dealers associations as a courtesy and as an effort to disseminate relevant information as widely as possible. The Department is under no obligation to notify specific taxpayers of specific provisions in the tax code or regulations. It is the responsibility of any taxpayer to know and follow Indiana's tax rules and regulations.

However, as part of the protest process and over the course of the four separate protest letters, each with separate documentation attached, Taxpayer was able to supply documentation for several of the vehicles in question supporting its position that those vehicles were delivered to its customers outside Indiana. This documentation is sufficient to support Taxpayer's protest regarding these vehicles and those sales will be removed from the Department's calculations of taxable sales. The Department takes this opportunity to caution Taxpayer that, now that it has been notified of the requirement that delivery terms and methods must be indicated on the sales invoices, alternate documentation will not be considered acceptable in the future. Delivery terms and methods will be required to be included on the sales invoices in order to qualify for the exemption.

The third point of protest regards several individual invoices which Taxpayer states that the Department misunderstood. One invoice had been incorrectly recorded and fifty dollars (\$50) of sales tax remitted. The Department reviewed that invoice and determined that \$110.37 of sales tax was due on that particular sale. Taxpayer has provided sufficient documentation to show that the \$50 was remitted and that only the remaining \$60.37 of sales tax is due on that sale. Another invoice listed a sale of \$2,300 while Taxpayer's books show a deposit of \$300 from the same customer. The Department considered that both entries were separate and valid. Taxpayer was able to provide sufficient documentation to show that the \$300 deposit was a part of the overall sale of \$2,300. Therefore, sales tax is only due on the \$2,300 sale and not on the \$300 deposit.

Another sale totaling \$3,750.06 was reported in monthly installments, with sales tax collected and remitted on each installment. Taxpayer was able to provide documentation establishing that the sales tax was collected on the monthly installments and that the proper amount was remitted on the sale. Also, Taxpayer states that the audit report included a payment of \$5,450 as a taxable sale. Taxpayer states that it had no deposit in that amount and that the \$5,450 should therefore be removed from the list of taxable sales. This amount will be removed from the Department's calculations of taxable sales.

Another entry which the Department considered as subject to sales tax, but which had no sales tax listed, is a lease payment from another business which leases a vehicle from Taxpayer and in turn leases the vehicle to third parties. Taxpayer argues that this transaction is eligible for the rental and leasing exemption found at IC § 6-2.5-5-8(b), which states:

Transactions involving tangible personal property other than a new motor vehicle are exempt from the state

gross retail tax if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of the person's business without changing the form of the property.

The vehicle in question was not a new vehicle, therefore IC § 6-2.5-5-8(b) is applicable here. Taxpayer has provided sufficient documentation to establish that this vehicle does qualify for the rental and leasing exemption.

The fourth point of protest is several entries in Taxpayer's accounts which the Department considered as sales, but which Taxpayer states were reimbursements from related companies or employees. The other companies or the employees would have work done using Taxpayer's credit card or garage account and would then reimburse Taxpayer for the cost of the work. Taxpayer has provided sufficient documentation to establish that these were not its sales, but were in fact reimbursements and that it was not obligated to collect sales tax on these amounts.

In conclusion, all sales to the two customers who provided exemption certificates will be removed from the calculation of taxable sales. All sales which were out-of-state deliveries of vehicles and for which Taxpayer has provided supplemental documentation will be removed from the calculation of taxable sales. The amounts of taxable sales will be adjusted as described in the third protest point above. The reimbursements to Taxpayer from related companies and employees will be removed from the Department's calculation of taxable sales. A supplemental audit will be required to make these adjustments.

FINDING

Taxpayer's protest is sustained as described above.

II. Tax Administration–Negligence Penalty.

DISCUSSION

The Department issued a proposed assessment and the ten percent negligence penalty for the tax years in question. Taxpayer protests the imposition of penalty and states that the equipment discussed in Issue I was used at least for some exempt purposes. The Department refers to IC § 6-8.1-10-2.1(a), which states in relevant part:

If a person:

...

(3) incurs, upon examination by the department, a deficiency that is due to negligence;

...

the person is subject to a penalty.

The Department refers to [45 IAC 15-11-2\(b\)](#), which 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.

(Emphasis added).

[45 IAC 15-11-2\(c\)](#) provides in pertinent part:

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.

In this case, Taxpayer incurred an assessment 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). After review of the circumstances in this case, Taxpayer has established that the assessment arose due to reasonable cause and not due to negligence, as required by [45 IAC 15-11-2\(c\)](#).

FINDING

Taxpayer's protest is sustained.

CONCLUSION

Taxpayer is sustained on Issue I regarding the imposition of sales tax. Taxpayer is sustained on Issue II regarding imposition of penalty.

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