

Letter of Findings: 10-0195
Sales and Use Tax
For the Tax Years 2007 and 2008

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ISSUES

I. Sales Tax – Imposition.

Authority: IC § 6-2.5-2-1; IC § 6-8.1-5-1; IC § 6-2.5-5-39; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Commissioner's Directive 25 (July 2004); Sales Tax Information Bulletin 28 (July 2004); Sales Tax Information Bulletin 28S (May 2007); Sales Tax Information Bulletin 28S (February 2008); Sales Tax Information Bulletin 28S (December 2009).

Taxpayer protests the imposition of sales tax on its sales to Indiana and out-of-state customers.

II. Tax Administration – Interest.

Authority: IC § 6-8.1-10-1.

Taxpayer protests the imposition of interest.

III. 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, an Indiana company, manufactures and sells both motorcycle camper trailers ("Campers") and motorcycle cargo trailers ("Trailers"), which are less than 2200 lbs. Pursuant to an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer failed to collect and remit sales tax on some Campers and Trailers, which Taxpayer had sold to out-of-state customers who picked up the merchandise at Taxpayer's Indiana facility during 2007 and 2008. The Department's audit assessed additional sales tax, interest, and penalty.

Taxpayer protested the imposition of additional sales tax, interest, and penalty. A hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales Tax – Imposition.

DISCUSSION

The Department's audit assessed Taxpayer additional sales tax on its sales to out-of-state customers because Taxpayer failed to collect sales tax when the out-of-state customers took possession of the Trailers at the time of the sales at Taxpayer's Indiana facility. Taxpayer, to the contrary, asserted that, pursuant to [45 IAC 2.2-5-21](#), it was not responsible for collecting sales tax on the sales to out-of-state customers.

As a threshold issue, 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. IC § 6-2.5-2-1 states:

- (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.

Taxpayer, manufacturer of Campers and Trailers, sells its products, and, thus, is a retail merchant.

Therefore, Taxpayer is responsible for collecting and remitting the sales tax.

A. Sales to Indiana Customers.

At the administrative hearing, Taxpayer pointed to one of the transactions listed in the Department's audit summary, a sale of an XL 1800 trailer on April 22, 2007, and stated that the customer is an Indiana resident. Taxpayer further explained that although it did not collect the sales tax upon the sale of XL 1800 trailer, dated April 22, 2007, the customer did pay six (6) percent Sales/Use Tax, two days later, when he registered the trailer at the Indiana Bureau of Motor Vehicles (BMV) on April 24, 2007. To support its protest, Taxpayer provided documentation demonstrating that the customer paid the sales/use tax at the BMV when he registered the trailer. Taxpayer thus believed it should be discharged from the responsibility of collecting the sales tax.

Taxpayer has provided sufficient documentation demonstrating that the tax had been paid. Taxpayer thus is not responsible for collecting the sales tax on this sale. The Department will remove this assessment in a supplemental audit review.

B. Sales of Campers.

At the administrative hearing, Taxpayer pointed to two transactions, dated July 5 and July 10, 2007, listed in the Department's audit summary, page seven (7). Taxpayer maintained that these two campers qualified for an

exemption provided by the recreational vehicles statute but the Department's audit mistakenly treated them as Trailers and assessed Indiana sales tax.

IC § 6-2.5-5-39, in relevant part, provides:

(b) As used in this section, "recreational vehicle" means a vehicle with or without motive power equipped exclusively for living quarters for persons traveling upon the highways. The term includes a travel trailer, a motor home, a truck camper with a floor and facilities enabling it to be used as a dwelling, and a fifth wheel trailer.

(c) A transaction involving a cargo trailer or a recreational vehicle is exempt from the state gross retail tax if:

(1) the purchaser is a nonresident;

(2) upon receiving delivery of the cargo trailer or recreational vehicle, the person transports it within thirty (30) days to a destination outside Indiana;

(3) the cargo trailer or recreational vehicle will be titled or registered for use in another state or country;

(4) the cargo trailer or recreational vehicle will not be titled or registered for use in Indiana; and

(5) the cargo trailer or recreational vehicle will be titled or registered in a state or country that provides an exemption from sales, use, or similar taxes imposed on a cargo trailer or recreational vehicle that is purchased in that state or country by an Indiana resident and will be titled or registered in Indiana.

A transaction involving a cargo trailer or recreational vehicle that does not meet the requirements of subdivision (5) is not exempt from the state gross retail tax.

(d) A purchaser must claim an exemption under this section by submitting to the retail merchant an affidavit stating the purchaser's intent to:

(1) transport the cargo trailer or recreational vehicle to a destination outside Indiana within thirty (30) days after delivery; and

(2) title or register the cargo trailer or recreational vehicle for use in another state or country.

The department shall prescribe the form of the affidavit, which must include an affirmation by the purchaser under the penalties for perjury that the information contained in the affidavit is true. The affidavit must identify the state or country in which the cargo trailer or recreational vehicle will be titled or registered.

(e) The department shall provide the information necessary to determine a purchaser's eligibility for an exemption claimed under this section to retail merchants in the business of selling cargo trailers or recreational vehicles.

In this instance, Taxpayer only provided copies of the invoices without other documentation demonstrating that these two transactions qualified for the statutory exemption pursuant to IC § 6-2.5-5-39. Therefore, the Department is not able to agree that Taxpayer has met its burden demonstrating that the two campers are exempt from sales tax.

In short, Taxpayer should remain responsible for collecting and remitting the sales tax on the two campers.

C. Sales to Out-of-State Customers.

Taxpayer stated that its Trailers weigh less than 2200 lbs and, therefore, the statutory exemption afforded to "cargo trailer" under IC § 6-2.5-5-39 does not apply. Taxpayer, however, claimed that, pursuant to [45 IAC 2.2-5-21](#) it was not responsible for collecting sales tax on the sales of Trailers when the out-of-state customers came to Indiana, took possession of Trailers at Taxpayer's Indiana facility, and, subsequently, returned to and registered Trailers at their home states, other than Indiana.

IC § 6-2.5-5-39(a) states:

As used in this section, "cargo trailer" means a vehicle:

(1) without motive power;

(2) designed for carrying property;

(3) designed for being drawn by a motor vehicle; and

(4) having a gross vehicle weight rating of at least two thousand two hundred (2,200) pounds.

Upon reviewing Taxpayer's documentation, Taxpayer is correct that its Trailers are less than 2200 lbs and cannot be qualified as "cargo trailers" as defined by the above statute. Thus, Taxpayer is correct to conclude that the exemption provided by IC § 6-2.5-5-39 is not applicable in this instance. Nevertheless, general rules concerning sales of trailers remain applicable in this case.

Taxpayer, however, is mistaken in believing that [45 IAC 2.2-5-21](#) applies in this instance. IC § 6-2.5-5-15 (Repealed July 1, 2004) originally exempted sales of vehicles to out-of-state customers. [45 IAC 2.2-5-21](#) was promulgated in 1982 to provide an administrative interpretation regarding IC § 6-2.5-5-15. Since IC § 6-2.5-5-15 was repealed, [45 IAC 2.2-5-21](#) is no longer a valid legal authority. Thus, Taxpayer's reliance on [45 IAC 2.2-5-21](#) is misplaced.

Upon the repeal of IC § 6-2.5-5-15, the Department issued Commissioner's Directive 25 (July 2004) and Sales Tax Information Bulletin 28 (July 2004) to address the change in law. Commissioner's Directive 25 stated that the repeal of IC § 6-2.5-5-15 "only affect[ed] situations where the purchaser [took] possession of the vehicle prior to taking the vehicle out-of-state." The Directive stated that:

[The] repeal does not affect out of state sales by dealers. For a sale of a vehicle to be considered out of state, **the purchaser must take possession via delivery outside of Indiana.** No exemption certificate is

required when making an out of state sale. However, the sales contract must specify that the vehicle is to be delivered out of state and the dealer must maintain shipping documentation to verify that the vehicle was delivered to the purchaser at a specific out of state location. (**Emphasis added**).

Sales Tax Information Bulletin 28 further provided that the dealer was required to collect the tax and provide ST-108 forms to the purchaser to show that the tax had been paid in Indiana. If the purchaser claimed an exemption, form ST-108E was to be completed and signed by the purchaser with a copy to be retained by the dealer.

Sales Tax Information Bulletin 28 was updated in January of 2005 to include "Sales & Leases of Motor Vehicles, Trailers and Watercraft" and, in relevant part, stated:

Effective July 01, 2004 all motor vehicles, trailers and watercraft purchased or leased in Indiana are subject to Indiana sales tax. This includes sales or leases to be immediately registered, licensed or titled for use in another state.

In May of 2007, the Department published Sales Tax Information Bulletin 28S (May 2007) to replace Sales Tax Information Bulletin 28 and added the following language:

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 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).

See also Sales Tax Information Bulletin 28S (February 2008) and Sales Tax Information Bulletin 28S (December 2009).

To support its protest, Taxpayer submitted additional documentation, including, but not limited to, copies of statements signed by the nonresident customers, registration records concerning the Trailers, and information of its products.

Notably, one of the statements was from a nonresident customer who attended a trade show held in Illinois on May 20, 2007, who purchased one of Taxpayer's Trailers for \$2,098. Since the transaction took place in Illinois, it was not an Indiana sale and was not subject to Indiana sales tax. Thus, Taxpayer's protest on the sale of a \$2,098 trailer, dated May 20, 2007, was sustained.

As to the remaining customers' signed statements, the customers clearly stated that they came to Taxpayer's Indiana facility and "took possession of said [T]railers in the State of Indiana" before they returned to their home states. Thus, those sales occurred in Indiana and were subject to Indiana sales tax as discussed above. Taxpayer, as a retail merchant, therefore, is responsible for collecting sales tax.

In conclusion, Taxpayer is discharged from the tax liability regarding one Indiana customer who paid the sales/use tax at the BMV. Taxpayer also is not responsible for collecting Indiana sales tax on the sale that took place at the Illinois trade show. Taxpayer, however, remains responsible for the remaining sales tax on its sales to the out-of-state customers, who took possession of Trailers at Taxpayer's Indiana facility. The Department will recalculate the assessment in a supplemental audit.

FINDING

Taxpayer's protest on Subpart A is sustained. Taxpayer's protest on Subpart B is respectfully denied. Additionally, Taxpayer's protest on Subpart C is sustained on the sale that took place at the Illinois trade show, but respectfully denied on the remaining. The Department will recalculate the assessment in a supplemental audit.

II. Tax Administration – Interest.

DISCUSSION

The Department assessed interest on the tax liabilities. Taxpayer protested the imposition of interest. IC § 6-8.1-10-1(a) provides, as follows:

If a person fails to file a return for any of the listed taxes, fails to pay the full amount of tax shown on the person's return by the due date for the return or the payment, or incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment.

Pursuant to IC § 6-8.1-10-1(e), the Department does not have the authority to waive the interest.

FINDING

Taxpayer's protest regarding the imposition of interest is respectfully denied.

III. Tax Administration – Negligence Penalty.

DISCUSSION

Taxpayer also protests the assessment 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 did not provide documentation establishing that its failure was due to reasonable cause and not due to negligence. Taxpayer simply stated that it was not aware of the change of law in 2004. As explained in [45 IAC 15-11-2](#)(b), "Ignorance of the listed tax laws, rules and/or regulations is treated as 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 issue I, Subpart A, is sustained. Taxpayer's protest on issue I, Subpart B, is respectfully denied. Additionally, Taxpayer's protest on issue I, Subpart C, is sustained on the sale that took place at the Illinois trade show, but respectfully denied on the remaining. Taxpayer's protest regarding the imposition of interest is respectfully denied. Taxpayer's protest of the negligence penalty is also respectfully denied. The Department will recalculate the assessment in a supplemental audit.

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