

Letter of Findings Number: 10-0315P
Use Tax
For the Years 2006-2008

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ISSUES

I. Use Tax—Applicability.

Authority: IC § 6-2.5-3-2.

Taxpayer protests the imposition of use tax on a vehicle.

II. Use Tax—Criminal Background Reports.

Authority: [45 IAC 2.2-4-2](#); Sales Tax Information Bulletin 8, 25 Ind. Reg. 3934 (May 2002)

Taxpayer protests use tax imposed on electronically-received criminal background reports.

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 is a company doing business in Indiana. The Indiana Department of Revenue ("Department") audited Taxpayer and determined that it had not remitted use tax on certain purchases. Taxpayer protested the imposition of use tax on a vehicle and on criminal background checks, along with the negligence penalty imposed on the entire assessment. The Department conducted a hearing and this Letter of Findings results.

I. Use Tax—Applicability.

DISCUSSION

Taxpayer protests the assessment of use tax with respect to a vehicle it purchased in 2006. In particular, Taxpayer protests that it paid Indiana sales tax when it purchased the vehicle. Under [IC 6-2.5-3-2\(c\)\(1\)](#), property upon which Indiana sales tax had previously been paid is exempt from use tax. Taxpayer provided a copy of the vehicle's purchase order establishing that it paid sales tax on the purchase of the vehicle; therefore, the vehicle was exempt from use and Taxpayer's protest is sustained.

FINDING

Taxpayer's protest is sustained.

II. Use Tax—Criminal Background Reports.

DISCUSSION

Taxpayer protests the assessment of use tax with respect to the purchase of criminal background reports. Taxpayer received the reports electronically as opposed to receiving physical copies of the relevant reports. Taxpayer claimed that it subscribed to a service, and, as a service, the transactions were not subject to sales and/or use tax.

[45 IAC 2.2-4-2](#), in relevant part, states:

(a) Professional services, personal services, and services in respect to property not owned by the person rendering such services are not "transactions of a retail merchant constituting selling at retail", and are not subject to gross retail tax. Where, in conjunction with rendering professional services, personal services, or other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail unless:

- (1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property;
- (2) The tangible personal property purchased is used or consumed as a necessary incident to the service;
- (3) The price charged for tangible personal property is inconsequential (not to exceed 10 [percent]) compared with the service charge; and
- (4) The serviceman pays gross retail tax or use tax upon the tangible personal property at the time of acquisition.

Notably, only when the four requirements mentioned above are fulfilled, is a taxpayer entitled to the exemption pursuant to [45 IAC 2.2-4-2](#).

However, Sales Tax Information Bulletin 8, 25 Ind. Reg. 3934 (May 2002), in relevant part, states:

F. Sale of Miscellaneous Data:

The sale of statistical reports, graphs, diagrams or any other information produced or compiled by a computer and sold or reproduced for sale in substantially the same form as it is so produced is considered to be the sale of tangible personal property unless the information from which such reports was compiled was furnished by the same person to whom the finished report is sold.

The charge for reports compiled by a computer exclusively from data furnished by the same person for whom the data is prepared is considered to be for a service and is not subject to sales or use tax unless it is part of a unitary transaction which is subject to sales or use tax.

In Taxpayer's case, the criminal background reports are "information produced or compiled by a computer and sold or reproduced for sale in substantially the same form as it is so produced." Taxpayer did not provide evidence demonstrating whether the criminal background report provider met any element of [45 IAC 2.2-4-2](#). Thus, the criminal background reports, even in digital form, are not services as defined by [45 IAC 2.2-4-2](#) but rather tangible personal property and thus subject to use tax.

FINDING

Taxpayer's protest is denied.

III. Tax Administration–Negligence Penalty.

DISCUSSION

Taxpayer protests the imposition of the ten percent negligence penalty on the sales tax payments that it made after the due date for the payments.

Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. IC § 6-8.1-10-2.1. The Indiana Administrative Code, [45 IAC 15-11-2](#) further provides:

(b) "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.

(c) 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 presented information to demonstrate that it acted reasonably with regard to its use tax accrual during the audit period. However, Taxpayer is also alerted that similar issues in future audits may result in penalties not being abated.

FINDING

Taxpayer's protest is sustained.

CONCLUSION

Taxpayer's protest is sustained with regard to the use tax imposed on a vehicle. Taxpayer's protest is denied with regard to criminal background reports. Taxpayer's protest of the negligence penalty is sustained.

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