

Letter of Findings Number: 10-0316
Sales and Use Tax
For the 2007 and 2008 Tax Years

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ISSUE

I. Sales and Use Tax - Imposition.

Authority: IC § 6-2.5-1-1; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-3-7; IC § 6-2.5-5-8; IC § 6-2.5-8-8; IC § 6-8.1-5-1; [45 IAC 2.2-4-27](#); [45 IAC 2.2-5-15](#).

Taxpayer protests the imposition of sales and use tax on its purchase of a front loader, dozer, a number of forklifts, a utility vehicle, and materials used in specific construction projects.

STATEMENT OF FACTS

Taxpayer is an Indiana corporation which engages in construction services. After an audit, the Indiana Department of Revenue ("Department") determined that taxpayer owed sales and use tax for the 2007 and 2008 tax years ("Tax Years"). The Department found that taxpayer had purchased a front loader, dozer, a number of forklifts, and a utility vehicle without paying sales tax at the time of purchase, and assessed use tax on the purchases. The Department also assessed use tax on materials used by Taxpayer for specific construction projects. Taxpayer protested these assessments of use tax. A hearing was held, and this Letter of Findings results. Additional facts will be supplied as required.

I. Sales and Use Tax - Imposition.

DISCUSSION

Pursuant to IC § 6-8.1-5-1(c), all tax assessments are presumed to be accurate, and the taxpayer bears the burden of proving that an assessment is incorrect.

The Department found that Taxpayer had purchased a front loader, dozer, and a number of forklifts without paying sales tax at the time of purchase, and assessed use tax on the purchases.

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(a) provides:

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, 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. An exemption from the use tax is granted for transactions where the sales tax was paid at the time of purchase pursuant to IC § 6-2.5-3-4. Since taxpayer failed to pay sales tax at the time of purchase, the Department's audit determined that taxpayer owed use tax on those purchases.

In its protest, taxpayer asserted that it paid the Department sales tax on its purchase of the utility vehicle. However, taxpayer has failed to provide any evidence of such payment, and, therefore, cannot claim an exemption from use tax on this item.

Taxpayer asserts that it purchased the front loader, dozer, and the forklifts in order to rent those machines to customers. IC § 6-2.5-5-8(b) provides for an exemption from sales tax for purchases of tangible personal property that are purchased "for resale, rental, or leasing in the ordinary course of [taxpayer]'s business without changing the form of the property."

[45 IAC 2.2-5-15](#) clarifies the purchase for rental exemption as follows:

- (a) The state gross retail tax shall not apply to sales of any tangible personal property to a purchaser who purchases the same for the purpose of reselling, renting or leasing, in the regular course of the purchaser's business, such tangible personal property in the form in which it is sold to such purchaser.

General rule. Sales of tangible personal property for resale, rental or leasing are exempt from the tax if all of the following conditions are satisfied:

- (1) the tangible personal property is sold to a purchaser who purchases this property to resell, rent or lease it;
- (2) The purchaser is occupationally engaged in reselling, renting or leasing such property in the regular course of his business; and

(3) The property is resold, rented or leased in the same form in which it was purchased.

(c) Application of General rule.

(1) The tangible personal property must be sold to a purchaser who makes the purchase with the intention of reselling, renting or leasing the property. This exemption does not apply to purchasers who intend to consume or use the property or add value to the property through the rendering of services or performance of work with respect to the property.

(2) The purchaser must be occupationally engaged in reselling, renting or leasing such property in the regular course of his business. Occasional sales and sales by servicemen in the course of rendering services shall be conclusive evidence that the purchaser is not occupationally engaged in reselling the purchased property in the regular course of his business.

(3) The property must be resold, rented or leased in the same form in which it was purchased.

(Emphasis added)

Taxpayer's primary occupation is providing construction services. Taxpayer has not presented any evidence to overcome the Department's determination that Taxpayer was not in the business of buying and renting front loaders, dozers, and forklifts during the Tax Years. Since taxpayer was not occupationally engaged in the purchase and renting of tangible personal property, taxpayer's purchase of the front loader, dozer, and forklifts does not qualify for exemption from the sales and use taxes pursuant to IC § 6-2.5-5-8(b). Taxpayer's purchases of the front loader, dozer, and forklifts were like any other retail transaction. Accordingly, Taxpayer incurred its Indiana sales tax liability at the time of purchase and possession of the front loader, dozer, and forklifts.

Taxpayer presented an alternative argument for an exemption from sales or use tax regarding the front loader, dozer, and a snow plow attachment. Taxpayer asserts that, in addition to renting these items, it also uses these items to provide snow removal services for a school corporation.

[45 IAC 2.2-4-27\(d\)\(3\)](#) provides guidance in the analysis of services performed with tangible personal property:

(A) The renting or leasing of tangible personal property, together with the services of an operator shall be subject to the tax when control of the property is exercised by the lessee. Control is exercised when the lessee has exclusive use of the property, and the lessee has the right to direct the manner of the use of the property. If these conditions are present, control is deemed to be exercised even though it is not actually exercised.

(B) The rental of tangible personal property together with an operator as part of a contract to perform a specific job in a manner to be determined by the owner of the property or the operator shall be considered the performance of a service rather than a rental or lease provided the lessee cannot exercise control over such property and operator.

(C) When tangible personal property is rented or leased together with the service of an operator, the gross retail tax or use tax is imposed on the property rentals. The tax is not imposed upon the charges for the operator's services, provided such charges are separately stated on the invoice rendered by the lessor to the lessee.

(D) Notwithstanding any other provision of this regulation [\[45 IAC 2.2\]](#) any lessee leasing or renting a vehicle(s) from any lessor, including an individual lessor, with or without operators, driver(s), or even if the operator (driver) himself is the lessor, regardless of control exercised, shall not be subject to the gross retail tax or use tax, if the leased or rented vehicle(s) are directly used in the rendering of public transportation.

When taxpayer provided snow removal services for a customer, taxpayer acted as a service provider. The equipment that taxpayer used to perform its services was subject to sales and use tax. Whether taxpayer uses the equipment to perform a service for an exempt entity, such as a school corporation, does not matter.

Finally, taxpayer asserts that materials used for a particular job for the same school corporation should enjoy an exemption from sales tax. The Department refers to IC § 6-2.5-3-7(b), which states:

A retail merchant is not required to produce evidence of nontaxability under subsection (a) if the retail merchant receives from the person who acquired the property an exemption certificate which certifies, in the form prescribed by the department, that the acquisition is exempt from the use tax.

The Department also refers again to IC § 6-2.5-8-8, which states:

(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.

During the course of the protest, Taxpayer provided copies of ST-105 exemption certificates submitted by the school corporation, as purchaser, to taxpayer.

Form ST-105 is the Department's standard Indiana exemption certificate, prescribed by the Department for compliance with IC § 6-2.5-3-7(b) and IC § 6-2.5-8-8. Taxpayer, therefore, has presented evidence sufficient to support its claim for an exemption from sales tax with respect to the subject contract for construction services for a school corporation.

FINDING

Taxpayer has not met its burden of proof to overcome the Department's assessment of use tax on taxpayer's purchase of a front loader, dozer, snow plow attachment, a number of forklifts, and a utility vehicle. However, taxpayer has presented sufficient evidence to support its claim for an exemption from sales tax with respect to the subject contract for construction services for a school corporation. Therefore, taxpayer's protest of the sales and use tax assessment is denied in substantial part, but sustained in part, subject to a supplemental audit.

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