

Letter of Findings: 10-0403
Gross Retail Tax
For the Year 2006

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ISSUES

I. Gross Retail Tax – Imposition.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-2.5-5-26; IC § 6-2.5-5-21; IC § 6-8.1-5-1; [45 IAC 2.2-4-1](#); [45 IAC 2.2-5-57](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the imposition of the Gross Retail (sales) Tax on its sales of tangible personal property.

II. 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 organization, sells tangible personal property through auctions. Pursuant to an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer failed to collect and remit sales tax on the sales of tangible personal property for tax year 2006. The Department also found that Taxpayer failed to obtain proper exemption certificates on several sales of tangible personal property for which the customers claimed statutory exemptions were applicable. The Department's audit thus assessed Taxpayer additional sales tax, interest, and penalty.

Taxpayer timely protests the assessment. A hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Gross Retail Tax – Imposition.

DISCUSSION

The Department's audit determined that Taxpayer not only failed to collect and remit sales tax on the sales of tangible personal property but also failed to obtain proper exemption certificates on several sales of tangible personal property for which the customers claimed statutory exemptions were applicable. Taxpayer, to the contrary, claimed that it was a not-for-profit organization and the sales to its customers were exempt from sales tax.

As a threshold issue, all tax assessments are prima facie evidence that the Department's assessment of tax is presumed correct; 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).

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.

IC § 6-2.5-4-1, in pertinent part, provides:

- (a) A person is a retail merchant making a retail transaction when he engages in selling at retail.
- (b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:
 - (1) acquires tangible personal property for the purpose of resale; and
 - (2) transfers that property to another person for consideration.
- (c) For purposes of determining what constitutes selling at retail, it does not matter whether:
 - (1) the property is transferred in the same form as when it was acquired;
 - (2) the property is transferred alone or in conjunction with other property or services; or
 - (3) the property is transferred conditionally or otherwise.

[45 IAC 2.2-4-1](#) further illustrates:

- (a) Where ownership of tangible personal property is transferred for a consideration, it will be considered a transaction of a retail merchant constituting selling at retail unless the seller is not acting as a "retail merchant".
- (b) All elements of consideration are included in gross retail income subject to tax. Elements of consideration include, but are not limited to:
 - (1) The price arrived at between purchaser and seller.
 - (2) Any additional bona fide charges added to or included in such price for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other services performed in respect to or labor

charges for work done with respect to such property prior to transfer.

(3) No deduction from gross receipts is permitted for services performed or work done on behalf of the seller prior to transfer of such property at retail.

Accordingly, Taxpayer, a registered retail merchant selling tangible personal property at auctions, is responsible for collecting and remitting to the Department the sales tax due.

Taxpayer claimed that it was a not-for-profit organization and, therefore, as a not-for-profit organization, it was exempt from collecting sales tax.

IC § 6-2.5-5-26 states:

(a) Sales of tangible personal property are exempt from the state gross retail tax, if:

- (1) the seller is **an organization that is described in section 21(b)(1) of this chapter**;
- (2) the organization **makes the sale to make money to carry on a not-for-profit purpose**; and
- (3) the organization does not make those sales during more than thirty (30) days in a calendar year.

(b) Sales of tangible personal property are exempt from the state gross retail tax, if:

- (1) the seller is an organization described in section 21(b)(1) of this chapter;
- (2) the **seller is not operated predominantly for social purposes**;
- (3) the **property sold is designed and intended primarily either for the organization's educational, cultural, or religious purposes, or for improvement of the work skills or professional qualifications of the organization's members; and**
- (4) the **property sold is not designed or intended primarily for use in carrying on a private or proprietary business**.

(c) The exemption provided by this section does not apply to an accredited college or university's sales of books, stationery, haberdashery, supplies, or other property. (**Emphasis added**).

IC § 6-2.5-5-21(b), in relevant part, further provides:

(1) the seller meets the filing requirements under subsection (d) and is any of the following:

(A) A fraternity, a sorority, or a student cooperative housing organization that is connected with and under the supervision of a postsecondary educational institution if no part of its income is used for the private benefit or gain of any member, trustee, shareholder, employee, or associate.

(B) Any:

- (i) institution;
- (ii) trust;
- (iii) group;
- (iv) united fund;
- (v) affiliated agency of a united fund;
- (vi) nonprofit corporation;
- (vii) cemetery association; or
- (viii) organization;

that is organized and operated exclusively for religious, charitable, scientific, literary, educational, or civic purposes if no part of its income is used for the private benefit or gain of any member, trustee, shareholder, employee, or associate.

[45 IAC 2.2-5-57](#) illustrates:

(a) The state gross retail tax shall not apply to **sales by any qualified not-for-profit organization of tangible personal property for not more than thirty (30) days during any calendar year for the purpose of raising money to be used for carrying on the not-for-profit purpose of such organization**.

(b) In general, the gross receipts from sales by not-for-profit organizations are taxable. This subsection exempts from tax the gross receipts from the sale of tangible personal property by a qualified not-for-profit organization in connection with certain fund-raising activities as described in this regulation [[45 IAC 2.2](#)].

(c) The gross receipts from the sale or lease of tangible personal property by a qualified not-for-profit organization are exempt under this subsection **if the sales are made to raise money to further the not-for-profit purpose of the organization and if the sales are conducted for not more than thirty days during any calendar year**. Such sales may be made by all qualified not-for-profit organizations. The tangible personal property sold need not be related to the qualified purpose of the organization, provided such receipts are expended to further the exempt purpose of the organization.

(d) Any organization which makes such sales for thirty-one or more days during any calendar year is a retail merchant and, therefore, is subject to the state gross retail tax. (Refer to Regs. 6-2.5-5-26(b) [[45 IAC 2.2-5-58](#)] for exemption of certain sales by qualified not-for-profit organization which are not predominantly social.)

(e) Sales conducted for not more than thirty days. Each day during which any selling activities are conducted constitutes a "selling day" for purposes of determining whether a qualified not-for-profit organization has conducted sales for more than thirty days during any calendar year. The solicitation, acceptance, or receipts of a sales order during any day during more than thirty days during any calendar year, then all gross receipts from all sales made during the year are subject to tax. For purposes of applying these rules, the thirty days need not be consecutive.

--EXAMPLE--

(1) A church conducts a bake sale each Sunday after services. All gross receipts including the receipts collected during the first thirty selling days are subject to tax because the selling activities are conducted for more than thirty days during the calendar year.

(2) A hospital's women's auxiliary solicits orders for cookies during a three-month period. Orders are accepted at the point of solicitation but the cookies are delivered on the last day of the three-month solicitation period. These sales are taxable. Selling activities are conducted for more than thirty days during the calendar year because each day during which an order is solicited constitutes a selling date.

(f) Furthering the not-for-profit purpose of the organization. The gross receipts from fund raising sales conducted for not more than thirty days are exempt only if such receipts are expended to further the not-for-profit purpose of the exempt organization. For purposes of this section, the payment of such receipts to offset the direct cost of the product sold will be considered an expenditure to further the not-for-profit purpose of the organization.

(g) Definition. Refer to Regulation 6-2.5-5-25(a)(010)(2) [[45 IAC 2.2-5-55\(b\)](#)] for the definition of a "qualified not-for-profit organization". (**Emphasis added**).

In this instance, Taxpayer maintained that it was affiliated with several churches. Taxpayer thus claimed that it was a not-for-profit organization and its auction sales, only held twice a year, were exempt from sales tax pursuant to [45 IAC 2.2-5-57](#). To support its protest, Taxpayer submitted several statements written by its customers stating that they enjoyed and benefited from the auction sales.

Taxpayer is mistaken. Although Taxpayer maintained its affiliation with churches, Taxpayer's documentation failed to demonstrate that itself is a "qualified not-for-profit organization" and "the sales are made to raise money to further the not-for-profit purpose of the organization." Taxpayer's documentation, at best, demonstrated that it was a registered retail merchant and its customers were primarily individuals who participated in and enjoyed the events during 2006.

Thus, given the totality of the circumstances, in the absence of other documentation, the Department is not able to agree with Taxpayer that it has met its burden of demonstrating that the Department's proposed assessment was incorrect.

FINDING

Taxpayer's protest is respectfully denied.

II. 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 sufficient documentation establishing that its failure to timely remit tax held in trust was due to reasonable cause and not due to 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 the imposition of sales tax is denied. Taxpayer's protest of negligence penalty is also respectfully denied.

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An [html](#) version of this document.