

**Letter of Findings: 10-0408**  
**Gross Retail Tax**  
**For 2006 and 2007**

**NOTICE:** Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

**ISSUE**

**I. Auction Sales – Gross Retail Tax.**

**Authority:** IC § 6-2.5-5-2; IC § 6-2.5-8-8(a); IC § 6-2.5-9-3(2); IC § 6-8.1-5-1(c); *Mynsberge v. Dep't of State Revenue*, 716 N.E.2d 629 (Ind. Tax Ct. 1999); *Tri-States Double Cola Bottling Co. v. Dep't of State Revenue*, 706 N.E.2d 282 (Ind. Tax Ct. 1999); *Indiana Dep't of State Rev. v. Kimball Int'l Inc.*, 520 N.E.2d 454 (Ind. Ct. App. 1988); [45 IAC 2.2-4-33](#); [45 IAC 2.2-5-4](#); [45 IAC 2.2-5-4\(c\)\(1\)](#).

Taxpayer argues that it was not required to collect gross retail (sales) tax from its customers when it sold certain items at auction to those customers.

**STATEMENT OF FACTS**

Taxpayer is an auction business specializing in selling farm machinery, real estate, antiques, and "fine art." Taxpayer also conducts business liquidation and estate auctions. The Department of Revenue (Department) conducted an audit review of Taxpayer's 2006 and 2007 business records.

The audit found that Taxpayer owed sales tax and issued a report to that effect. Taxpayer disagreed with that assessment and filed a protest. A series of three administrative hearings were conducted and, over a period of time, Taxpayer submitted additional documentation purporting to establish that it owed a lesser amount of tax. This Letter of Findings results.

**I. Auction Sales – Gross Retail Tax.**

**DISCUSSION**

According to the audit report, Taxpayer failed to collect any sales tax during 2006 and 2007. In addition, Taxpayer failed to obtain or retain exemption certificates on sales which it believed were exempt.

Nonetheless, Taxpayer believes that most – if not nearly all – of its 2006 and 2007 sales were exempt and that the initial audit assessment should be adjusted.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

In applying any tax exemption, the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." *Indiana Dep't. of State Rev. v. Kimball Int'l Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988).

IC § 6-2.5-5-2 provides a sales tax exemption:

- (a) Transactions involving agricultural machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for his direct use in the direct production, extraction, harvesting, or processing of agricultural commodities.
- (b) Transactions involving agricultural machinery or equipment are exempt from the state gross retail tax if:
  - (1) the person acquiring the property acquires it for use in conjunction with the production of food and food ingredients or commodities for sale;
  - (2) the person acquiring the property is occupationally engaged in the production of food or commodities which he sells for human or animal consumption or uses for further food and food ingredients or commodity production; and
  - (3) the machinery or equipment is designed for use in gathering, moving, or spreading animal waste.

IC § 6-2.5-5-2 like all tax exemption provisions, is strictly construed against exemption from tax. *Tri-States Double Cola Bottling Co. v. Dep't of State Revenue*, 706 N.E.2d 282, 283 (Ind. Tax Ct. 1999); *Mynsberge v. Dep't of State Revenue*, 716 N.E.2d 629, 636 (Ind. Tax Ct. 1999).

"Retail transactions" are subject to sales tax under IC § 6-2.5-2-1(a). Pursuant to IC § 6-2.5-4-12(a), "A person is a retail merchant making a retail transaction when he sells tangible personal property at auction."

Additionally, IC § 6-2.5-9-3(2) provides:

An individual who: (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and (2) has a duty to remit state gross retail or use taxes (as described in [IC 6-2.5-3-2](#)) to the department; holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

The Department's rule specifically governs auction sales. [45 IAC 2.2-4-33](#) provides:

Every person engaged in the business of making sales at auction of tangible personal property owned by such person or others, shall be and constitute a retail merchant making retail transactions in respect thereto and the gross income received therefrom shall constitute gross retail income of a retail merchant received from retail transactions.

Accordingly, every person in the business of making sales at auction, regardless of whether or not the person owns the property, is a retail merchant receiving gross retail income that is subject to sales tax; that retail merchant has a duty to remit to the state that tax.

**A. Exemption Certificates:** Nonetheless, Taxpayer believes that some of the items it sold are exempt because Taxpayer obtained exemption certificates from certain of the buyers. Taxpayer apparently references IC § 6-2.5-8-8(a), which states:

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.

Taxpayer has submitted numerous exemption certificates containing the names of persons or businesses which – Taxpayer claims – were the customers who purchased items at one of Taxpayer's auction sales. Along with the exemption certificates, Taxpayer has provided a list of the particular items sold at each of the auctions. Alongside each item listed, Taxpayer has made a notation indicating which of Taxpayer's customers bought which particular item. For example, Taxpayer has an exemption certificate from "Company A." On the list of items purchased, Taxpayer has noted that "Company A" bought a particular item on a particular sale day. However, there is nothing which independently verifies that exempt "Company A" actually purchased that item. Taxpayer simply asks the Department to accept at face value its assurances that exempt "Company A" purchased certain items and that it was not required to collect sales tax on those particular items. As noted above, tax exemptions – such as the one to which Taxpayer aspires – are strictly construed and that it is the Taxpayer who has the burden of demonstrating that the proposed assessment is wrong. After numerous attempts to provide sufficient documentary evidence establishing that the bulk of the subject transactions were exempt from sales, the Department must conclude that Taxpayer has failed to meet its burden of demonstrating that the proposed assessment is wrong. However, it should be noted that at the time the original audit was completed, the Department had reviewed and accepted exemption certificates that were presented at that time.

**B. Agricultural Exemption:** Subsequent to the original audit, Taxpayer pointed out what it believed to be purchases which were exempt under the "agricultural exemption" found at [45 IAC 2.2-5-4](#). In very small part, that exemption states that "The state gross retail tax shall not apply to: (1) Sales to farmers and to other persons occupationally engaged in the business of producing food and agricultural commodities for human, animal, and poultry consumption...." [45 IAC 2.2-5-4\(c\)\(1\)](#).

Nonetheless, the exemption does not apply to all items purchased by persons in the agricultural business.

(c) The following is a partial list of items which are considered subject to the sales tax.

Fences, posts, gates, and fencing materials.

Water supply systems for personal use.

Drains.

Any motor vehicle which is required by the motor vehicle law to be licensed for highway use.

Ditchers and graders.

Paints and brushes.

Refrigerators, freezers, and other household appliances.

Garden and lawn equipment, parts, and supplies.

Electricity for lighting and other non-agricultural use.

Any materials used in the construction or repair of non-exempt: buildings, silos, grain bins, corn cribs, barns, houses, and any other permanent structures.

Items of personal apparel, including footwear, gloves, etc., furnished primarily for the convenience of the workers if the workers are able to participate in the production process without it.

Pumps.

All saws.

All tools, including forks, shovels, hoes, welders, power tools, and hand tools.

Building materials or building hardware such as lumber, cement, nails, plywood, brick, paint.

Plumbing, electrical supplies, and accessories, pumps.

Horses, ponies, or donkeys not used as draft animals in the production of agricultural products.

Food for non-exempt horses, ponies, etc.

Fertilizer, pesticides, herbicides, or seeds to be used for gardens and lawns.

Field tile or culverts.

Graders, ditchers, front end loaders, or similar equipment (except equipment designed to haul animal waste).

Any replacement parts or accessories for the above items. [45 IAC 2.2-5-4\(c\)](#) (Emphasis added)

In order to qualify for the exemption, the item purchased must be "directly used in the direct production of food or agricultural items...." and the item "must have an immediate effect on the article being produced." [45 IAC 2.2-5-3\(c\)\(2\)](#). As noted above, Taxpayer has provided a listing of the items which it sold at one of its auctions. Included on that list are items which may be exempt from tax pursuant to the exemption found at [45 IAC 2.2-5-4](#); for example, Taxpayer includes on its lists the sale of "bales of straw," "JD Grain Drill," and "JD Tractor." However, Taxpayer has failed to demonstrate that these particular items were bought by a purchaser claiming the exemption. Certainly the items may be used in an exempt manner by a customer who is entitled to claim the exemption. However, absent additional substantive information, there is insufficient information to establish that "bales of straw," "JD Grain Drill," "JD Tractor," and similar items were purchased by a customer entitled to claim the exemption.

#### **FINDING**

Taxpayer's protest is respectfully denied.

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