

Letter of Findings: 09-1038
Sales and Use Tax
For the Years 2006, 2007, 2008

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ISSUES

I. Use Tax – Imposition – Credit Reports.

Authority: IC § 6-8.1-5-1; IC § 6-2.5-3-2; IC § 6-2.5-2-1; [45 IAC 2.2-4-1](#); Sales Tax Information Bulletin 8 (May 2002), 25 Ind. Reg. 3934; Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the imposition of use tax on credit reports.

II. Use Tax – Imposition – National Information Solutions Cooperative ("NISC") Billing Services.

Authority: IC § 6-8.1-5-1; IC § 6-2.5-1-2; IC § 6-2.5-3-4; IC § 6-2.5-4-1; IC § 6-2.5-1-5; [45 IAC 2.2-3-4](#); [45 IAC 2.2-4-1](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Frame Station, Inc. vs. Indiana Dep't of Revenue, 771 N.E.2d 129 (Ind. Tax Ct. 2002).

Taxpayer protests the imposition of use tax on NISC charges for processing fees and postage.

III. Use Tax – Imposition – Computer Software Maintenance and Support Service Contracts.

Authority: [45 IAC 2.2-4-2](#); Sales Tax Information Bulletin 2 (December 2006).

Taxpayer protests the imposition of use tax on certain computer software maintenance and service contracts.

IV. Use Tax – Imposition – Transformers, Substation Equipment, Recloser.

Authority: Sales Tax Information Bulletin 51 (July 2007).

Taxpayer protests the imposition of use tax on transformers, substation equipment, and a recloser.

V. Tax Administration – Negligence Penalty and Interest.

Authority: IC § 6-8.1-10-1; IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the ten percent negligence penalty and interest.

STATEMENT OF FACTS

Taxpayer is non-profit organization that distributes and sells electricity. Taxpayer also sells heaters and surge protectors, as well as commission sales of telephone and internet services. Taxpayer is not regulated by the Indiana Utility Regulatory Commission. The Indiana Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer. The Department's audit found that Taxpayer had overpaid sales tax and credited Taxpayer for the overpayments. However, the audit found that Taxpayer had underpaid use tax on several items and assessed additional use tax, penalty and interest accordingly. Taxpayer protested the assessment of use tax. A hearing was held and this Letter of Findings ensues. Additional facts will be provided as necessary.

I. Use Tax – Imposition – Credit Reports.

DISCUSSION

The Department notes that all tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(b), (c); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-3-2(a). A complementary 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. IC § 6-2.5-3-2. An exemption from the use tax is granted for transactions when sales tax was paid at the time of purchase pursuant to IC § 6-2.5-3-4.

In this case, the audit found that Taxpayer had made purchases which were subject to sales tax but failed to pay that tax. Therefore, the audit assessed the complementary use tax. Taxpayer protests, arguing that it is purchasing a non-taxable service.

Specifically, the Department's regulation provides that, "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.'" [45 IAC 2.2-4-1\(a\)](#).

Taxpayer asserts that the costs for the credit reports constitute services that are not subject to sales and use tax. Taxpayer stated that it subscribed to services from TransUnion, a vendor-repository that provided credit reports to Taxpayer. Taxpayer maintains that there is no report available to purchase until information is furnished by Taxpayer. When that information is provided the vendor compiles the report and sells the finished report to Taxpayer. Taxpayer also maintains that the vendor provides the credit information for the exclusive use of Taxpayer for a specific purpose and only if the taxpayer requests the information by providing specific confidential

input.

During the course of the protest, Taxpayer provided a sample invoice from the vendor that indicated that Taxpayer was billed a certain set amount for each report provided to Taxpayer. Taxpayer also provided a copy of the agreement. Taxpayer's agreement reflects a fairly typical arrangement: with a user-name and password given by the vendor-repository, Taxpayer can search, retrieve, and print what is produced and offered by the vendor-repository. Upon Taxpayer's demand, i.e., entering the search term or terms (typically an individual's name or social security number), the vendor-repository transfers the credit reports to Taxpayer and Taxpayer then pays the vendor-repository for the credit reports based on the volume of the reports Taxpayer purchased. Taxpayer receives the credit reports, either in printout form, by electronically storing them in its computer, or simply by viewing the generated reports. Essentially, Taxpayer requested an individual credit report for one of its potential customers and was billed for each credit report requested or was charged a flat fee for either unlimited access or a maximum number of records depending on the type of arrangement. The issue is whether this "information" or credit/vehicle report is subject to sales tax and use tax.

The issue of whether that "information" is subject to sales and use tax is addressed in the Sales Tax Information Bulletin 8 (May 2002) (25 Ind. Reg. 3934) which states as follows:

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.

Taxpayer purchased credit reports. The vendor-repository compiled the individual credit information, in report formats, and sold the reports in substantially the same form as they were produced. Taxpayer did not contract with the vendor to perform and provide a service, such as collecting specific and customized information or compiling Taxpayer's information. Instead, Taxpayer purchased the completed products, i.e., credit reports, after the vendor compiled and furnished standard information in the standard report formats. The reports consist of information "compiled by a computer [and] sold or reproduced for sale in substantially the same form as it is so produced...." Therefore, the reports – by whatever means transmitted – constitute "tangible personal property" obtained in a retail transaction. Pursuant to Sales Tax Information Bulletin 8, the credit reports/vehicle reports are tangible personal property and, therefore, taxable. Since Taxpayer did not pay sales tax at the time of the purchases, use tax is properly imposed.

FINDING

Taxpayer's protest is respectfully denied.

II. Use Tax - Imposition – National Information Solutions Cooperative ("NISC") Billing Services. DISCUSSION

The Department notes that all tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(b), (c); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Taxpayer contracts with an outside entity to send its monthly billing statements to its customers. The outside entity prints, folds, stuffs the envelopes, addresses the envelopes, puts postage on the envelopes, and puts them into the mail. The entity charges sales tax on the paper and envelopes, but did not charge sales tax on processing fees and postage. The auditor assessed tax on the remaining charges under [45 IAC 2.2-3-4](#), which states "Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase."

IC § 6-2.5-4-1 defines "selling at retail" and states in relevant part:

- (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.
- (d) Notwithstanding subsection (b), a person is not selling at retail if he is making a wholesale sale as described in section 2 of this chapter.
- (e) The gross retail income received from selling at retail is only taxable under this article to the extent that the income represents:
 - (1) the price of the property transferred, without the rendition of any service; and
 - (2) [...] any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records.

For purposes of this subsection, a transfer is considered to have occurred after delivery of the property to the purchaser.

(Emphasis added).

Under [45 IAC 2.2-4-1](#) all of these amounts are subject to tax, as follows:

(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.

(Emphasis added).

In *Frame Station, Inc. vs. Indiana Dep't of Revenue*, 771 N.E.2d 129 (Ind. Tax Ct. 2002), the Tax Court held that when customers were charged separate amounts for labor and materials for custom framing services, the labor charges were subject to sales tax. *Id.* at 131. In arriving at that decision, the court reasoned that the issue is "whether [Taxpayers'] services were preformed before or after it transferred property to its customers." *Id.* The court found that services that are performed prior to the transfer of the property are taxable, and services that are performed after the transfer of the property are taxable to the extent that the services represent a "unitary transaction" and are "inextricable and indivisible" from the property being transferred. *Id.* Accordingly, the determinative fact is when the services were performed.

Taxpayer maintains that the auditor assessed use tax on these as unitary transactions, but contends that the labor portions were stated separately. However, the auditor did not assess the amounts as unitary transactions, but assessed them as amounts subject to use tax as part of the consideration for the retail sale. As these services were preformed prior to transfers, pursuant to [45 IAC 2.2-4-1](#) and *Frame Station*, the auditor was correct to do so.

IC § 6-2.5-1-2 states:

(a) "Retail transaction" means a transaction of a retail merchant that constitutes selling at retail as described in [IC 6-2.5-4-1](#), that constitutes making a wholesale sale as described in [IC 6-2.5-4-2](#), or that is described in any other section of [IC 6-2.5-4](#).

(b) "Retail unitary transaction" means a unitary transaction that is also a retail transaction.

The "postage" portion of the charge is addressed at IC § 6-2.5-1-5(a) which states that gross retail income is money received in a retail transaction without any deduction for delivery charges. The statute also provides that "delivery charges are charges by the seller for preparation and delivery of the property to a location designated by the purchaser of property, including but not limited to transportation, shipping, postage, handling, crating, and packing." [IC 6-2.5-1-5\(a\)](#) (Emphasis added). Therefore, postage is a delivery charge for purposes of calculating gross retail income, and is subject to gross retail income tax.

Therefore, based on the above, both the processing fees and the postage are subject to use tax, because they are charges incurred as part of the retail sale; i.e., before delivery.

FINDING

Taxpayer's protest is respectfully denied.

III. Use Tax – Imposition – Computer Software Maintenance and Support Service Contracts.

DISCUSSION

The Department found that Taxpayer had purchased "software maintenance agreements" without paying sales tax at the time of the purchase or remitting use tax to the Department. Taxpayer asserts that these software maintenance agreements are for services and are not subject to use tax.

Taxpayer refers to Sales Tax Information Bulletin 2 (December 2006), 20100804 Ind. Reg. 045100497NRA:

In the case of software maintenance agreements or optional warranties, the presumption is that tangible personal property in the form of updates will be transferred. Software maintenance agreements and optional warranties are presumed to be subject to sales and use tax. This presumption can be rebutted if the taxpayer can demonstrate that no updates were actually received.

Taxpayer presented a copy of the maintenance/service agreement and invoices for services performed over the period of the audit years. The maintenance agreement specifically states that Taxpayer will have to separately purchase any subsequent updates. And the charges for maintenance services fell well within the parameters of [45 IAC 2.2-4-2](#) as also required by the Information Bulletin.

Taxpayer has met its burden to show that it has not received additional updates.

FINDING

Taxpayer's protest is sustained.

IV. Use Tax – Imposition – Transformers, Substation Equipment, Recloser.

DISCUSSION

The Department's audit imposed use tax on the transformers, substation equipment, and recloser purchased from Taxpayer's energy supplier ("Supplier"). Taxpayer protests the imposition of tax stating that Supplier, which constructs all of Taxpayer's substations, itself paid the tax to the Department.

First, according to Sales Tax Information Bulletin 51 (July 2007), 20100804 Ind. Reg. 045100497NRA, "[t]he purchase of distribution and transmission equipment acquired by a public utility engaged in generating electricity is not exempt from the sales and use tax. Taxpayer presented documentation from Supplier indicating that it paid sales tax on these items.

FINDING

Taxpayer's protest is sustained.

V. Tax Administration – Negligence Penalty and Interest.**DISCUSSION**

The Taxpayer also protested the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1. Indiana Regulation [45 IAC 15-11-2](#)(b) clarifies the standard for the imposition of the negligence penalty as follows:

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 standard for waiving the negligence penalty is given at [45 IAC 15-11-2](#)(c) 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 has not affirmatively established, as required by [45 IAC 15-11-2](#)(c), that its failure to pay use tax on its remaining purchases was due to reasonable cause and not due to negligence.

Under IC § 6-8.1-10-1(e), the Department may not waive interest.

FINDING

Taxpayer's protest is respectfully denied.

CONCLUSION

Taxpayer's protest of the imposition of tax on credit reports is denied – Issue I.

Taxpayer's protest of the imposition of tax on NISC processing fees and postage is denied – Issue II.

Taxpayer's protest of the imposition of tax on computer software maintenance and service agreements is sustained – Issue III.

Taxpayer's protest of the imposition of tax on a transformer, substation equipment and a recloser is sustained – Issue IV.

Taxpayer's protest of the imposition of penalty and interest is denied – Issue V.

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