

Letter of Findings Number: 10-0358
Sales Tax
For Tax Years 2007-2008

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ISSUES

I. Sales and Use Tax—Imposition.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-4-4; IC § 6-2.5-9-3; IC § 6-2.5-5-25; IC § 6-8.1-3-3; IC § 6-8.1-5-1; [45 IAC 2.2-3-4](#); [45 IAC 2.2-4-8](#); [45 IAC 2.2-5-55](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Greensburg Motel Associates, LP v. Indiana Dep't of State Revenue, 629 N.E.2d 1302 (Ind. Tax Ct. 1994); Sales Tax Information Bulletin 10 (June 2008) 20080702 Ind. Reg. 045080515NRA; Sales Tax Information Bulletin 10 (July 2004) 27 Ind. Reg. 3385.

Taxpayer protests the assessment of sales tax on various additional items and meals provided to guests, and assessment of use tax on taxpayer's purchases of various items.

II. Tax Administration—Negligence Penalty.

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

Taxpayer requests that the Department exercise its discretion to abate the ten-percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is a corporation that owns and operates a hotel in Indiana. After an audit, the Indiana Department of Revenue ("Department") determined that taxpayer owed additional sales and use tax, and assessed tax, interest, and negligence penalties for the 2007 and 2008 tax years ("Tax Years"). The Department found that taxpayer had made sales to Indiana customers of certain ancillary items, such as pay-per-view movies, telephone service, video game systems, roll-away beds and other additional items, without collecting sales tax. The Department also found that Taxpayer had made sales of meals as part of banquet room accommodations to certain Indiana customers without collecting sales tax. The Department further found that Taxpayer had purchased a variety of items or materials without paying sales tax at the time of purchase, or without remitting use tax to the Department. Taxpayer protests the imposition of additional sales and use tax. An administrative hearing was conducted, and this Letter of Findings results. Further facts will be supplied as required.

I. Sales and Use Tax—Imposition.

DISCUSSION

The Department found discrepancies between the amount of sales tax taxpayer collected from customers for rental of hotel rooms and the amount of sales tax taxpayer remitted. The Department found that taxpayer had understated these sales tax amounts, based upon taxpayer's subtraction of alleged exempt sales. The Department's audit determined that taxpayer had not collected sales tax on extra room charges for rollaway beds, movies, video game systems, phone calls, pets, and other ancillary items. In addition, the Department assessed sales tax on meals served to hotel guests whose organizations rented the hotel's banquet room exempt. Finally, the Department assessed additional sales tax on a variety of items or materials taxpayer could not show evidence of sales tax paid during the audit.

All tax assessments are prima facie evidence that the Department's claim for the tax is valid; 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).

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. IC § 6-2.5-1-2(a) defines a "retail transaction" as:

[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](#).

IC § 6-2.5-4-4 provides:

(a) A person is a retail merchant making a retail transaction when the person rents or furnishes rooms, lodgings, or other accommodations, such as booths, display spaces, banquet facilities, and cubicles or spaces used for adult relaxation, massage, modeling, dancing, or other entertainment to another person:

(1) if those rooms, lodgings, or accommodations are rented or furnished for periods of less than thirty (30) days; and

(2) if the rooms, lodgings, and accommodations are located in a hotel, motel, inn, tourist camp, tourist cabin, gymnasium, hall, coliseum, or other place, where rooms, lodgings, or accommodations are regularly furnished for consideration.

(b) Each rental or furnishing by a retail merchant under subsection (a) is a separate unitary transaction

regardless of whether consideration is paid to an independent contractor or directly to the retail merchant. IC § 6-2.5-9-3 sets out the responsibilities of a retail merchant:

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.

In addition, [45 IAC 2.2-4-8](#) states:

(a) For the purpose of the state gross retail tax and use tax: Every person engaged in the business of renting or furnishing for periods of less than thirty (30) days any accommodation including booths, display spaces and banquet facilities, in any place where accommodations are regularly furnished for a consideration is a retail merchant making retail transactions in respect thereto and the gross income received therefrom shall constitute gross retail income from retail unitary transactions.

(b) In general, the gross receipts from renting or furnishing accommodations are taxable. An accommodation which is rented for a period of thirty (30) days or more is not subject to the gross retail tax.

(c) There is no exemption for purchases made by persons who are engaged in renting or furnishing accommodations. Such persons are deemed to purchase or otherwise acquire tangible personal property for use or consumption in the regular course of their business.

(d) The renting or furnishing of an accommodation for less than thirty (30) days constitutes a retail merchant making a retail transaction. Every person so engaged must collect the gross retail tax on the gross receipts from such transactions. The tax is borne by the person or organization who uses the accommodation.

(e) The tax is imposed on the gross receipts from "furnishing" an accommodation. The gross receipts subject to tax include the amount which represents consideration for the rendition of those services which are essential to the furnishing of the accommodation, and those services which are regularly provided in furnishing the accommodation. Such amounts are subject to tax even when they are separately itemized on the statement or invoice.

(Emphasis added).

The Department refers to the second sentence of [45 IAC 2.2-4-8\(e\)](#), which states, "[t]he gross receipts subject to tax include the amount which represents consideration for the rendition of those services which are essential to the furnishing of the accommodation, and those services which are regularly provided in furnishing the accommodation." (Emphasis added). The provision of movies, telephones, pets, and the other above-referenced items clearly falls within the definition of services which are regularly provided in furnishing the accommodation of a hotel room.

Taxpayer protests that the telephones and movie rentals are provided by separate vendors and that taxpayer should not be expected to collect tax on those items; that taxpayer should enjoy a "pass-through" exemption from sales tax. The Department refers to *Greensburg Motel Associates, LP v. Indiana Dep't of State Revenue*, 629 N.E.2d 1302 (Ind. Tax Ct. 1994), in which the Indiana Tax Court discussed a motel operator's claim that consumable items, non-consumable items, and utilities were exempt from sales tax under the resale exemption. Specifically, the *Greensburg Motel Associates* court stated:

In *Indiana Bell Telephone Co. v. Indiana Department of State Revenue*, 627 N.E.2d 1386 (Ind. Tax Ct. 1994), the court, quoting *USAir v. Indiana Department of State Revenue*, 542 N.E.2d 1033 (Ind. Tax Ct. 1989), aff'd 582 N.E.2d 777 (Ind. Tax Ct. 1992), stated "[t]o subdivide the cost of [an airline] ticket into percentages to cover the various services rendered by the airline... strain[s] the meaning of the term 'resale.' When a passenger buys a ticket he buys many services." 627 N.E.2d at 1389. Likewise, when a guest rents a room from *Lees Inns*, the guest buys the benefits of many services, including consumable items, non-consumable items, and utilities. Accordingly, it is an artificial conclusion to divide the cost of *Lees Inns'* room rental into resales and leases.

Id. at 1305.

While the court in that case discussed the resale exemption, clearly the *Greensburg Motel Associates* court considers a room rental to encompass all services to be included in the transaction between the hotel operator and the guest. In the instant case, the type of services regularly provided in furnishing accommodations include telephone service, movie rental, and pet allowances, and are, therefore, subject to sales tax. The individual guests buy all services from taxpayer and not from third-party vendors, as described and decided by *Greensburg Motel Associates*. Taxpayer has not met the burden imposed by IC § 6-8.1-5-1(c).

During the Tax Years, taxpayer provided meals to alleged nonprofit organizations while such organizations rented taxpayer's banquet room. Taxpayer claims application of a sales tax exemption for those meals.

IC § 6-2.5-5-25 provides an exemption from sales tax on transactions involving tangible personal property or service "if the person acquiring the property or service... (2) primarily uses the property or service to carry on or to raise money to carry on its not-for-profit purpose[.]"

[45 IAC 2.2-5-55\(b\)\(3\)](#) adds that "[t]he article purchased must be used for the same purpose as that for which the organization is being exempted. Purchases for the private benefit of any member of the organization or for any other individual, such as meals or lodging, are not eligible for exemption. Purchases used for social purposes

are never exempt." If meals are prepared and served by a qualified nonprofit organization as a fundraising activity, the proceeds of which are used for the purpose for which such organization is granted exemption from sales tax, and such organization does not conduct selling activities of any nature on more than 30 days in a calendar year, such organization is not required to collect sales tax. See Sales Tax Information Bulletin 10 (July 2004) 27 Ind. Reg. 3385; Sales Tax Information Bulletin 10 (June 2008) 20080702 Ind. Reg. 045080515NRA.

Taxpayer has not presented evidence indicating anyone other than taxpayer served the subject meals. Taxpayer further has not shown that the meal service further served the purposes of the respective renting organizations. Because taxpayer does not fit, nor resemble, the definition of a nonprofit organization, taxpayer has not overcome the Department's determination that taxpayer should have collected sales tax on the meals allegedly furnished in conjunction with the rental of taxpayer's banquet room.

Finally, taxpayer protests a portion of additional use tax amounts that the Department assessed on various items, such as banquet chairs, televisions, appliances, and a boiler, purchased by taxpayer during the Tax Years. [45 IAC 2.2-3-4](#) provides that:

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.

During the hearing, taxpayer conceded that taxpayer could not provide invoices or other documents during the audit showing that taxpayer had paid sales tax on the above-referenced purchases. Taxpayer's protest letter included copies of invoices that document some of taxpayer's purchases. These documents indicate that sales tax was paid on certain items taxpayer purchased. As a result of taxpayer's additional documents and explanations, taxpayer has satisfied its burden of proof with respect to a reduction of use tax due on a few select items. However, during the hearing, taxpayer also conceded that taxpayer cannot produce additional invoices to overcome the Department's assessment of use tax on the remaining items and Tax Years at issue.

FINDING

Taxpayer's protest of the Department's imposition of sales tax on additional items provided to guests is respectfully denied. Taxpayer's protest of additional sales tax imposed on meals served by taxpayer to guests renting taxpayer's banquet room is also denied. With respect to the Department's imposition of use tax on additional purchases, taxpayer's protest is sustained to the extent that invoices submitted during the hearing show sales tax paid on certain purchases, subject to review in a supplemental audit.

II. Tax Administration—Negligence Penalty.

DISCUSSION

Taxpayer protests the imposition of the ten-percent negligence penalty pursuant to IC § 6-8.1-10-2.1. [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.

Taxpayer has provided sufficient information to establish that its failure to pay sales and use tax was not due to Taxpayer's negligence, but was due to reasonable cause as required by [45 IAC 15-11-2\(c\)](#). While taxpayer's current circumstances show that taxpayer acted with reasonable cause, taxpayer should be on notice that should these circumstances arise again, penalty waiver may not be warranted.

FINDING

Taxpayer's protest to the imposition of the penalty is sustained.

CONCLUSION

Taxpayer's protest of the Department's imposition of sales tax on additional items provided to guests is respectfully denied. Taxpayer's protest of additional sales tax imposed on meals served by taxpayer to guests renting taxpayer's banquet room is also denied. With respect to the Department's imposition of use tax on additional purchases, taxpayer's protest is sustained to the extent that invoices submitted during the hearing show sales tax paid on certain purchases, subject to review in a supplemental audit. Taxpayer's protest of the penalty is sustained.

