

**Letter of Findings Number: 10-0416**  
**Use Tax**  
**For Tax Years 2007-08**

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**ISSUES**

**I. Use Tax— Computer Software Maintenance.**

**Authority:** IC § 6-8.1-5-1(c); Sales Tax Information Bulletin 2 (December 2006), 20100804 Ind. Reg. 045100497NRA.

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

**II. Use Tax—Catering.**

**Authority:** IC § 6-2.5-5-20; IC § 6-2.5-4-1(g); IC § 6-8.1-5-1(c).

Taxpayer protests the imposition of use tax for catering.

**STATEMENT OF FACTS**

According to the Audit Report, Taxpayer "operates a placement agency" that "helps people find jobs and careers in industrial, clerical, and professional positions for clients in the Indiana and Illinois areas." The Department conducted an audit and found items "where sales tax was not paid at the time of the purchase nor was use tax self-assessed." Taxpayer protested that it did not "believe that the monthly maintenance payments to ["Company A"] should be subject to use tax." Taxpayer also protested a catering bill. An administrative hearing was conducted and this Letter of Findings results. Further facts will be supplied as required.

**I. Use Tax— Computer Software Maintenance.**

**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 not subject to use tax.

At the outset, the Department notes that under IC § 6-8.1-5-1(c) "burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." The Department further notes that Sales Tax Information Bulletin 2 (December 2006), 20100804 Ind. Reg. 045100497NRA, states in relevant part:

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. [Emphasis added]

Taxpayer did not provide a copy of the software maintenance agreement to the Hearing Officer; however, Taxpayer did forward a copy of an e-mailed letter from Company A regarding the matter. That letter states:

[Company A] invoices [Taxpayer] \$270.00 per month. This is strictly for software support services for [. . .] and does not include any product purchases.

Taxpayer has not rebutted the presumption "that tangible personal property in the form of updates will be transferred." Although the letter states that it "does not include any product purchases," the letter from "Company A" does not sufficiently explain what is included in the software support services. The letter from Company A is silent regarding the relevant question of whether or not updates are received.

**FINDING**

Taxpayer's protest is denied.

**II. Use Tax—Catering.**

**DISCUSSION**

Taxpayer protests the imposition of use tax with respect to catering. Taxpayer initially in its protest letter stated, "I also do not believe that the entire catering bill from [Company G] should be subject to use tax. A portion of this bill should be for food which would not be taxable."

IC § 6-2.5-5-20 states:

(a) Sales of food and food ingredients for human consumption are exempt from the state gross retail tax.

(b) For purposes of this section, the term "food and food ingredients for human consumption" includes the following items if sold without eating utensils provided by the seller:

(1) Food sold by a seller whose proper primary NAICS classification is manufacturing in sector 311, except subsector 3118 (bakeries).

(2) Food sold in an unheated state by weight or volume as a single item.

(3) Bakery items, including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, danish, cakes,

tortes, pies, tarts, muffins, bars, cookies, and tortillas.

(c) Except as otherwise provided by subsection (b), for purposes of this section, the term "food and food ingredients for human consumption" does not include:

- (1) candy;
- (2) alcoholic beverages;
- (3) soft drinks;
- (4) food sold through a vending machine;
- (5) food sold in a heated state or heated by the seller;
- (6) two (2) or more food ingredients mixed or combined by the seller for sale as a single item (other than food that is only cut, repackaged, or pasteurized by the seller, and eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer as recommended by the federal Food and Drug Administration in chapter 3, subpart 3-401.11 of its Food Code so as to prevent food borne illnesses);
- (7) food sold with eating utensils provided by the seller, including plates, knives, forks, spoons, glasses, cups, napkins, or straws (for purposes of this subdivision, a plate does not include a container or packaging used to transport the food); or
- (8) tobacco. [ Emphasis added]

Thus although it is true that under IC § 6-2.5-5-20(a) sales of food and food ingredients are not taxable, IC § 6-2.5-5-20(c) notes what is not—for tax purposes—"food and food ingredients for human consumption[.]" Additionally, IC § 6-2.5-4-1(g) states:

Gross retail income does not include income that represents charges for serving or delivering food and food ingredients furnished, prepared, or served for consumption at a location, or on equipment, provided by the retail merchant. However, the exclusion under this subsection only applies if the charges for the serving or delivery are stated separately from the price of the food and food ingredients when the purchaser pays the charges. [ Emphasis added]

Taxpayer, as noted supra, bears the burden of proof under IC § 6-8.1-5-1(c). Taxpayer has not met its burden regarding the argument that the entire catering bill should not be subject to tax. Taxpayer did not provide at the hearing a copy of the catering contract, nor did Taxpayer provide a copy of the invoice.

Regarding the same catering bill, Taxpayer in the alternative argues that the applicable taxes were already paid to Company G for the catering. Taxpayer at the hearing stated that it could not find a copy of the invoice/receipt. Taxpayer did provide a copy of an unsigned letter from Company G to Taxpayer regarding the matter. The letter states in relevant part:

We have looked through our records and cannot locate our July 2007 receipts. We have obtained a copy of the check (copy attached) by which you paid for our services. We have you set up on our computer as a taxable vendor. Thus, we charged you sales tax for the food and beverages covered in the \$8,598.50.

The Audit Report has the catering amount as \$7,165.50. Thus the check and the audit amount have a difference of \$1,433. Despite the assertion by Company G that since it has the Taxpayer "set up on [its] computer as a taxable vendor," the letter and the check do not show that sales tax was paid. All it shows is that there was a difference of \$1,433—it does not show that sales tax was assessed and paid (twenty percent of \$7,165 is \$1,433; Taxpayer at the hearing stated there was a twenty percent gratuity). The Department does not find this documentation to be persuasive. Taxpayer has failed to meet its burden of proof under IC § 6-8.1-5-1(c).

#### **FINDING**

Taxpayer's protest is denied.

#### **CONCLUSION**

In summary, Taxpayer's protests of the sales/use tax are denied.

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