

Letter of Findings Number: 10-0363
Use Tax
For Tax Years 2007 and 2008

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ISSUE

I. Use Tax—Imposition.

Authority: IC § 6-2.5-3-2; IC § 6-8.1-5-1; [45 IAC 2.2-3-4](#); [45 IAC 2.2-4-21](#); [45 IAC 2.2-4-22](#); [45 IAC 2.2-4-23](#); Sales Tax Information Bulletin 60 (July 2006).

Taxpayer protests the imposition of use tax on certain of its purchases.

STATEMENT OF FACTS

Taxpayer operates a business in Indiana. After an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer owed additional use tax for the 2007 and 2008 tax years. The Department determined that Taxpayer had made purchases without paying sales tax at the time of purchase or remitting use tax to the Department. Taxpayer protested the imposition of use tax on certain of its purchases asserting that the purchases were for improvements to realty that were performed by contractors on a lump sum contract basis. An administrative hearing was held, and this Letter of Findings results. Further facts will be supplied as required.

I. Use Tax—Imposition.

DISCUSSION

Taxpayer protests the imposition of use tax on certain of its purchases. Taxpayer maintains that the purchases were for improvements to realty that were performed by contractors on a lump sum contract basis. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

The use tax is imposed under IC § 6-2.5-3-2(a), which states:

An 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, regardless of the location of that transaction or of the retail merchant making that transaction.

Also, [45 IAC 2.2-3-4](#) provides:

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.

Also of relevance is [45 IAC 2.2-4-21](#), which states:

(a) In general, all sales of tangible personal property are taxable, and all sales of real property are not taxable. The conversion of tangible personal property into realty does not relieve a liability for any owing and unpaid state gross retail tax or use tax with respect to such tangible personal property.

(b) All construction material purchased by a contractor is taxable either at the time of purchase, or if purchased exempt (or otherwise acquired exempt) upon disposition unless the ultimate recipient could have purchased it exempt (see 6-2.5-5 [45 IAC 2.2-5](#)).

Also, [45 IAC 2.2-4-22](#) states:

(a) A contractor may purchase construction material exempt from the state gross retail tax only if he issues either an exemption certificate or a direct pay certificate to the seller at the time of purchase.

(b) A contractor, who purchases construction material exempt from the state gross retail tax or otherwise acquires construction material "tax-free", is accountable to the Department of Revenue for the state gross retail tax when he disposes of such property unless the ultimate recipient could have purchased it exempt (See 6-2.5-5 [45 IAC 2.2-5](#)).

(c) A contractor has the burden of proof to establish exempt sale or use when construction material, which was acquired "taxfree", is not subject to either the state gross retail tax or use tax upon disposition.

(d) Disposition subject to the state gross retail tax. A contractor-retail merchant has the responsibility to collect the state gross retail tax and to remit such tax to the Department of Revenue whenever he disposes of any construction material in the following manner:

(1) Time and material contract. He converts the construction material into realty on land he does not own and states separately the cost for the construction materials and the cost for the labor and other charges (only the gross proceeds from the sale of the construction material are subject to tax); or

(2) Construction material sold over-the-counter. Over the counter sales of construction materials will be treated as exempt from the state gross retail tax only if the contractor receives a valid exemption certificate issued by the person for whom the construction is being performed or by the customer who purchases

over-the-counter, or a direct pay permit issued by the customer who purchases over-the-counter.

(e) Disposition subject to the use tax. With respect to construction material a contractor acquired tax-free, the contractor is liable for the use tax and must remit such tax (measured on the purchase price) to the Department of Revenue when he disposes of such property in the following manner:

- (1) He converts the construction material into realty on land he owns and then sells the improved real estate;
- (2) He utilizes the construction material for his own benefit; or
- (3) Lump sum contract. He converts the construction material into realty on land he does not own pursuant to a contract that includes all elements of cost in the total contract price.

A disposition under C. [subsection (e)(3) of this section] will be exempt from the use tax if the contractor received a valid exemption certificate from the ultimate purchaser (purchaser) or recipient of the construction material (as converted), provided such person could have initially purchased such property exempt from the state gross retail tax.

(Emphasis added).

Finally, [45 IAC 2.2-4-23](#) states:

A contractor has no further liability for either the state gross retail tax or use tax with respect to construction material acquired by the contractor in a taxable transaction, provided the contractor disposes of such property in the following manner:

- (1) He converts the construction materials into realty on land he owns and then sells the improved real estate;
- (2) He utilizes the construction material for his own benefit and does not resell or transfer such property to others; or
- (3) Lump sum contract. He converts the construction material into realty on land he does not own pursuant to a contract that includes all elements of cost in the total contract price.

(Emphasis added).

Accordingly, the fact that tangible personal property was incorporated into real property does not relieve a taxpayer of its obligation to pay sales or use tax. A contractor may convert tangible personal property into realty under a "lump sum contract" or under a "time and materials contract." Sales Tax Information Bulletin 60 (July 2006), 20060823 Ind. Reg. 045060287NRA, defines a "lump sum contract" as "a contract in which all of charges are quoted as a single price. A construction contractor may furnish a breakdown of the charges for labor, material and other items without changing the nature of the lump sum contract." A "time and materials contract" is defined as "a contract in which all charges for labor, construction materials and other items are separately stated." Id. Generally, in a lump sum contract between a taxpayer and its contractor, the contractor bears responsibility for paying the tax on the construction materials. In a time and materials contract between a taxpayer and its contractor, the contract acts as a retail merchant and sales or use tax is due from the taxpayer on the cost of the materials.

A review of the documentation supplied in the protest process shows that certain of Taxpayer transactions were with contractors that used "lump sum contracts" for the jobs in question and that Taxpayer did not issue exemption certificates to those contractors. Therefore, Taxpayer's protest is sustained for the following transactions:

- Halloween Productions, \$90,000.00, audit report p.6;
- Ace Golf Netting, \$187,575.00, audit report p.6;
- Dave Deep Clean & Window Tinting, \$4,600.00, audit report p.4.

However, the documentation Taxpayer supplied for certain of the transactions established that the contractors operated under "time and materials contracts." Moreover, several of the invoices demonstrated, at best, that Taxpayer purchased tangible personal property for vendors that Taxpayer, himself, converted into realty. Therefore, Taxpayer's protest to the imposition of use tax on these other transactions, which are not included in the above list, is denied.

FINDING

Taxpayer's protest is sustained in part and denied in part. Taxpayer's protest to the imposition of use tax is sustained on the "Halloween Productions," "Ace Golf Netting," and "Dave Deep Clean & Window Tinting" transactions that are listed above. Taxpayer's protest to the imposition of use tax is denied for the other transactions.

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