DEPARTMENT OF STATE REVENUE

04-20100432.LOF

Letter of Findings Number: 10-0432
Use Tax
For Tax Years 2007-08

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ISSUES

I. Use Tax–Delivery Charges; Environmental Charges.

Authority: IC § 6-8.1-5-1(c); IC § 6-2.5-1-5; IC § 6-2.5-4-1(e); Commissioner's Directive 23 (April 2004), 27 Ind. Reg. 2615; IC 6-2.5-1-1(a); 45 IAC 2.2-1-1(a); 45 IAC 2.2-4-1(b)(3); IC 6-8.1-3-17(a).

Taxpayer protests the imposition of use tax on fuel charges, one time charge/minimum stop charges, and environmental charges; Taxpayer also makes an "accord and satisfaction" argument.

II. Tax Administration–Negligence Penalty and Interest.

Authority: IC § 6-8.1-10-1(e); IC § 6-8.1-10-2.1; 45 IAC 15-11-2(b),(c); 45 IAC 15-3-2(d)(1).

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

STATEMENT OF FACTS

Taxpayer operates a laundry. Taxpayer "rents uniforms, towels, linens, and other items to customers from various industries." The Audit Report notes that Taxpayer has Indiana and Michigan delivery routes. Following the audit, Taxpayer protested "reimbursements for fuel and environmental charges as taxable delivery charges." Taxpayer also protested "'one-time' charge or 'minimum stop charge' as taxable delivery charges." Taxpayer also protested the imposition of a negligence penalty. An administrative hearing was conducted and this Letter of Findings results. Further facts will be supplied as required.

I. Use Tax–Delivery Charges; Environmental Charges.

DISCUSSION

At the outset, the Department notes that under IC § 6-8.1-5-1(c) "[T]he burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Taxpayer in its protest states in part:

> Taxpayer disputes reimbursements for fuel and environmental charges as taxable delivery charges. The fuel and environmental charges were added as a result of the unprecedented increase in fuel due to Hurricane Katrina.

And further:

> [T]here is a lack of causation between the delivery of textiles and the fuel/environmental charges. The additional charges would apply whether a customer picks up their textiles or whether the taxpayer brings the textiles to the customer.

At the hearing, Taxpayer argued that its tax accountant never told Taxpayer to collect sales tax for delivery charges. Taxpayer argued the fuel charge was because of rising fuel costs, that the minimum stop charge was a convenience charge for customers who do infrequent business with Taxpayer, and that the environmental charge is for cleaning costs/waste water treatment.

The Audit Report notes that the "Fuel Charge" is "a charge to cover the rising cost of fuel without raising the actual rental cost of the item[,]" and that the "Environmental Charge" is "a charge to cover the rising cost of water and chemical cleanup, etc., without raising the actual rental cost of the item."

IC § 6-2.5-1-5 states in relevant part:

> (a) Except as provided in subsection (b), "gross retail income" means the total gross receipts, of any kind or character, received in a retail transaction, including cash, credit, property, and services, for which tangible personal property is sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for:
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> (1) the seller's cost of the property sold;
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> (2) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller;
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> (3) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges;
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> (4) delivery charges; or

IC § 6-2.5-4-1(e) states:

> The gross retail income received from selling at retail is only taxable under this article to the extent that the income represents:
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> (1) the price of the property transferred, without the rendition of any service; and
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> (2) except as provided in subsection (g), 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)

And Commissioner's Directive 23 (April 2004), 27 Ind. Reg. 2615, states, "Delivery charges are included in gross retail income and subject to tax regardless of shipping terms. Delivery that is made by or on the behalf of the seller of tangible personal property will be taxable whether or not the delivery charge is separately stated." IC 6-2.5-1-1(a) states:

Except as provided in subsection (b), "unitary transaction" includes all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated.

Also of importance is 45 IAC 2.2-1-1(a) which states:

(a) Unitary Transaction. For purposes of the state gross retail tax and use tax, such taxes shall apply and be computed in respect to each retail unitary transaction. A unitary transaction shall include all items of property and/or services for which a total combined charge or selling price is computed for payment irrespective of the fact that services which would not otherwise be taxable are included in the charge or selling price.

(Emphasis added)

And as the Audit Report noted, under 45 IAC 2.2-4-1(b)(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."

Turning to the fuel charge, the fuel comes within the scope of being part of the delivery charges, and as seen above, delivery charges are taxable. Thus Taxpayer's protest of the fuel related delivery charges is denied. With regards to the so-called "special fees" (i.e., one-time charge and the minimum stop charge), Taxpayer at hearing argued that this charge is for administrative costs for customers that conduct infrequent business with Taxpayer. In its protest letter Taxpayer states, "[t]hese charges are assessed as penalty and do not bear a direct correlation to the delivery cost." The Audit Report describes the "One Time Charge" as being "when a customer purchased or rented an item that was not on their 'usual' invoice[,]" and the "Minimum Stop Charge" as "represent[ing] a minimum value on the tangible items rented. It guarantees a minimum amount of rented product." The one-time charge and the minimum stop charge, despite Taxpayer's assertion that it is an administrative cost charge, are taxable as being part of the unitary transaction. Similarly, the Department also finds that the environmental charge is subject to tax under IC § 6-2.5-4-1(e).

Taxpayer argues that its partial liability payment constitutes an "accord and satisfaction" of its entire liability. Taxpayer states in its protest letter that it enclosed a (partial) draft, and that "negotiation of the draft constitutes an agreement...." The Department notes that IC§ 6-8.1-3-17(a) provides the exclusive manner for settlement of tax liability. Thus Taxpayer's accord and satisfaction argument that "negotiation of the draft constitutes an agreement," given IC § 6-8.1-3-17(a), is without merit and is inoperative against the Department.

FINDING

Taxpayer's protest is denied.

II. Tax Administration–Negligence Penalty and Interest.

DISCUSSION

In its protest letter, Taxpayer "asks for an abatement of penalties on any additional sums...." The Department notes that interest, under IC § 6-8.1-10-1(e), cannot be waived. The negligence penalty was imposed pursuant to IC § 6-8.1-10-2.1. Regarding negligence, 45 IAC 15-11-2(b), states:

"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.

(Emphasis added)

And 45 IAC 15-11-2(c) provides in pertinent part:

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 argues that it "received no advice from its accountants to change its practices regarding taxable delivery charges[,]" and that "[t]o assess taxpayer now amounts to ex post facto taxation." It is not clear what Taxpayer means by "ex post facto taxation"–the applicable statutes and regulations were in place and effective for the audit period at issue. As 45 IAC 15-11-2(b) notes, "Ignorance of the listed tax laws, rules and/or regulations is treated as negligence." Taxpayer has failed to show reasonable cause for the deficiency, and is thus denied regarding its protest of the penalty.

FINDING

Taxpayer's protest is denied.

CONCLUSION

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

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