DEPARTMENT OF STATE REVENUE

04-20100103.LOF

Letter of Findings Number: 10-0103
Sales and Use Tax
Tax Years: 2006 – 2008

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ISSUES

I. Sales and Use Tax Exemption – Inventory Withdrawals.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-5-40; IC § 6-8.1-5-1; Indiana Dep't of State Revenue v. Interstate Warehousing, 783 N.E.2d 248 (Ind. 2003); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d. 289 (Ind. Tax Ct. 2007); 45 IAC 2.2-3-15; Black's Law Dictionary 537 (6th ed. 1991); Black's Law Dictionary 578, 844 (8th ed. 2004); Webster's II New Riverside University Dictionary 962 (1988); Sales Tax Information Bulletin 75 (September 2007); Sales Tax Information Bulletin 75 (October 2008); Tax Policy Directive 8 (September 2009); LOF 0420030097.

Taxpayer protests the denial of refund of use tax paid on the purchase of items Taxpayer claims were used in research and development.

II. Sales and Use Tax – Research and Development Exemption.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-5-40; IC § 6-8.1-5-1; Indiana Dep't of State Revenue v. Interstate Warehousing, 783 N.E.2d 248 (Ind. 2003); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d. 289 (Ind. Tax Ct. 2007); Black's Law Dictionary 537 (6th ed. 1991); Black's Law Dictionary 578 (8th ed. 2004); Sales Tax Information Bulletin 75 (September 2007); Sales Tax Information Bulletin 75 (October 2008).

Taxpayer protests the denial of refund of use tax paid on the purchase of items Taxpayer claims were used in research and development.

III. Sales and Use Tax – Software Licenses.

Authority: IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-13-1; IC § 6-2.5-13-2 (repealed effective Jan. 1, 2008); IC § 6-8.1-5-1; Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Taxpayer protests the denial of refund of use tax paid on certain of its software purchases.

IV. Sales and Use Tax – Temporary Storage.

Authority: IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-8.1-5-1; Miles, Inc. v. Indiana Dep't of State Revenue, 659 N.E.2d 1158 (Ind. Tax Ct. 1995); Indiana Dep't of State Revenue v. Interstate Warehousing, 783 N.E.2d 248 (Ind. 2003); LOF 04980120.

Taxpayer protests the imposition of use tax on convention materials it stores in Indiana.

V. Sales and Use Tax – Computer Based Information Technologies.

Authority: IC § 6-2.5-1-27; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-4-1; IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); 45 IAC 2.2-1-1; 45 IAC 2.2-4-1; 45 IAC 2.2-4-2; Sales Tax Information Bulletin 8 (May 2002).

Taxpayer protests the assessment of use tax on computer based subscription companies.

VI. Sales and Use Tax – Tank Rentals.

Authority: IC § 6-2.5-3-2; IC § 6-2.5-4-1; IC § 6-2.5-4-10; IC § 6-2.5-5-9; IC § 6-2.5-5-40; IC § 6-8.1-5-1; Indiana Dep't of State Revenue v. Interstate Warehousing, 783 N.E.2d 248 (Ind. 2003); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d. 289 (Ind. Tax Ct. 2007); 45 IAC 2.2-5-16; Black's Law Dictionary 578 (8th ed. 2004); Sales Tax Information Bulletin 75 (September 2007); Sales Tax Information Bulletin 75 (October 2008).

Taxpayer protests the assessment of use tax on the purchase of gas, and gas tanks and cylinders that Taxpayer claims were used in research and development.

VII. Tax Administration - **Ten Percent Negligence Penalty.**

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2.

The Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is an international corporation headquartered in Indiana. Taxpayer is engaged in the business of manufacturing and distributing medical implants and surgical instruments utilized in the medical industries. Taxpayer has manufacturing facilities in Indiana.

The Indiana Department of Revenue (Department) conducted a sales and use tax audit. During the audit, Taxpayer filed a claim for refund of use taxes paid on various items. At the conclusion of the audit, the Department denied a portion of the claim for refund. The Department also assessed additional use tax, interest, and penalty. Taxpayer protests the assessment of tax and denial of refund on the basis of a variety of exemptions from sales and use tax. A hearing was held and this Letter of Findings results.

ISSUES

I. Sales and Use Tax Exemption – Inventory Withdrawals.

DISCUSSION

During the tax years at issue, Taxpayer withdrew inventory, both products that were in development and products that were finished, which Taxpayer claims were used for research and development purposes. These items included implants, both the finished items and individual components of those items, as well as surgical instruments used to implant the implants. Taxpayer remitted use tax on these withdrawals. Taxpayer now requests refunds of the use taxes paid on these inventory withdrawals, claiming the withdrawn items were used for research and development and were exempt from the gross retail tax. The Department denied the request for refund during the audit.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." 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.

Specifically, IC § 6-2.5-2-1 provides as follows:

(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.

(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

IC § 6-2.5-3-2(a) provides for the complementary use tax:

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.

In this case, the audit found that Taxpayer had made purchases which were subject to use tax, which was properly paid and should not be refunded.

However, Taxpayer argues it is entitled to the research and development exemption set out in IC § 6-2.5-5-40 on several of the items that it purchased for various different reasons. That exemption provides a sales tax exemption "for research and development equipment purchased after June 30, 2007." Sales Tax Information Bulletin 75 (October 2008), 20081029 Ind. Reg. 045080815NRA.

IC § 6-2.5-5-40 states as follows:

(a) As used in this chapter, "research and development activities" does not include any of the following:
- (1) Efficiency surveys.
- (2) Management studies.
- (3) Consumer surveys.
- (4) Economic surveys.
- (5) Advertising or promotions.
- (6) Research in connection with literary, historical, or similar projects.
- (7) Testing for purposes of quality control.

(b) As used in this section, "research and development equipment" means tangible personal property that:
- (1) consists of or is a combination of:
  - (A) laboratory equipment;
  - (B) computers;
  - (C) computer software;
  - (D) telecommunications equipment; or
  - (E) testing equipment;
- (2) has not previously been used in Indiana for any purpose; and
- (3) is acquired by the purchaser for the purpose of research and development activities devoted directly to experimental or laboratory research and development for:
  - (A) new products;
  - (B) new uses of existing products; or
  - (C) improving or testing existing products.

(c) A retail transaction:
- (1) involving research and development equipment; and
- (2) occurring after June 30, 2007; is exempt from the state gross retail tax.

The Department's position on how this statute is to be interpreted is set out in Sales Tax Information Bulletin

75 (October 2008), which states:

> Research and development equipment means tangible personal property that consists of laboratory equipment, computers, computer software, telecommunications equipment, or testing equipment that has not previously been used in Indiana for any purpose and is acquired by the purchaser and devoted directly to experimental or laboratory research and development for new products, new uses of existing products, or improving or testing existing products.
>
> Research and development equipment does not include hand powered tools or property with a useful life of less than one year. (See also Sales Tax Information Bulletin 75 (September 2007), 20071003 Ind. Reg. 045070635NRA).

The rules of statutory construction require that exemption statutes be strictly construed against the Taxpayer. Indiana Dep't of State Revenue v. Interstate Warehousing, 783 N.E.2d 248, 250 (Ind. 2003).

Taxpayer makes the argument that the inventory it withdrew should be considered "testing equipment" for purposes of IC § 6-2.5-5-40. Taxpayer correctly points out that this term is defined in the statute. Taxpayer cites to Indiana Dep't. of State Revenue v. Trump Indiana, Inc., 814 N.E.2d 1017 (Ind. Tax Ct. 2004), where the court said the following:

> When the Indiana General Assembly chooses a word without defining it, the court "must examine the statute as a whole and attribute the common and ordinary meaning to the undefined word, unless doing so would deprive the statute of its purpose or effect." Because the General Assembly did not define "tangible personal property" for purposes of the sales and use tax, we apply the ordinary meaning of the phrase. Black's Law Dictionary defines personal property as "any movable or intangible thing that is subject to ownership and not classified as real property."

814 N.E.2d at 1021. Because "testing equipment" is not defined by statute, Taxpayer cites to Black's Law Dictionary 537 (6th ed. 1991) to provide a definition of "equipment": "furnishings, or outfit for the required purposes. Whatever is needed in equipping; the articles comprised in an outfit; equippage."

Taxpayer believes that under this broad definition, the inventory it withdrew would be considered testing equipment, as the items were "outfit[ed] for the required purposes." Taxpayer maintains that the inventory items it withdrew were "used solely for research and development and allow for the creation of new and improved implants and instruments." Taxpayer also maintains that the inventory "has not previously been used in Indiana for any purpose" and "devoted directly to experimental or laboratory research and development" for purposes of IC § 6-2.5-5-40(b)(2) & (3).

However, Taxpayer did not cite to the full definition of "equipment" found in Black's Law Dictionary 537 (6th ed. 1991) also provides that:

> Under the U.C.C., goods include " equipment" if they are used or bought for use primarily in business (including farming or a profession) or by a debtor who is a nonprofit organization or a governmental subdivision or agency **or if the goods are not included in the definitions of inventory**, farm products or **consumer goods**.

(**Emphasis added**). Additionally, the most recent version of Black's Law Dictionary 578 (8th ed. 2004) defines "equipment" as:

> The articles or implements used for a specific purpose or activity (esp. a business operation). Under the UCC, equipment includes goods if (1) the goods are used in or bought for a business enterprise (including farming or a profession) or by a debtor that is a nonprofit organization or a governmental subdivision or agency, and (2) **the goods are not inventory, farm products, or consumer goods**. UCC § 9–102(a)(33).
>
> "Inventory" is then defined in part as:
>
> **3.** Raw materials or goods in stock <the dealership held a sale to clear out its October inventory>. **4.** Bankruptcy. Personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service; raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock <the debtor was found to have inventory that was valued at $300,000>. Black's Law Dictionary 844 (8th ed. 2004).

As these items in question are "inventory," the items do not meet the "common and ordinary definition" of "equipment," since "equipment" and "inventory" are mutually exclusive terms.

Further, Taxpayer's inventory was not acquired for the "purpose of research and development," but was instead acquired first as Taxpayer's own inventory. The products were also first devoted as inventory before they were devoted directly to this activity. Furthermore "[t]esting for purposes of quality control" is specifically listed in IC § 6-2.5-5-40(a) as not being included within the meaning of "research and development." Webster's II New Riverside University Dictionary 962 (1988) defines "quality control" as "[a] system for maintaining proper standards in manufactured goods, esp. by regular inspection of the product." Therefore, since the inventory in question does not meet the definition of "equipment," was not acquired for, or first devoted to, research and development, and is instead used for purposes of quality control, Taxpayer does not qualify for the research and development exemption under IC § 6-2.5-5-40.

Taxpayer presents an alternative theory. Taxpayer reports use tax on the cost of items withdrawn from its inventory of products for sale. Taxpayer purchases these items from a related company. Along with the inventory

previously discussed that was used for product testing purposes, the items withdrawn were used for education, training, and marketing. Taxpayer then sells the withdrawn inventory after Taxpayer determines that the item has served its purpose. Taxpayer argues that it should receive a credit for items that were pulled and resold. The credit amount would be the cost of the inventory when withdrawn less the selling price of the inventory when sold.

45 IAC 2.2-3-15 provides that:

> If any person who issues an exemption certificate in respect to the state gross retail tax or use tax and thereafter makes any use of the tangible personal property covered by such certificate, or in any way consumes, stores, or sells such tangible personal property, where such use, consumption, storage or sale is in a manner which is not permitted by such exemption, such use, consumption, or storage shall become subject to the use tax (or such sale shall become subject to the gross retail tax), and such person shall become liable for the tax or gross retail tax due thereon.

Taxpayer argues that the amount of "such use" of the inventory items is the difference between the cost of the item withdrawn from inventory and the selling price of the item. Taxpayer believes that it is being taxed for more than its use of the inventory withdrawals. Taxpayer compares their situation to that of a car dealership whose demo vehicles are also at time personally used by its employees, and which, pursuant to Tax Policy Directive 8 (September 2009) 20090930 Ind. Reg. 045090767NRA, is held to the following standard:

> Personal use of automobile demonstrators by full-time salespersons will be measured by the value reportable to the Internal Revenue Service or charged to the full-time salesperson in accordance with the provisions of Revenue Procedures 2001-56 times the sales tax rate.

Taxpayer also compares this situation to a car rental business (citing to Letter of Findings 04-20030097 (February 17, 2005)) that purchases cars exempt for the purpose of renting them to customers, but which has to pay a use tax on the vehicles to the extent that they were used by the employees of the company for personal business. Taxpayer believes that it should receive the same treatment.

However, in these situations, the vehicles in question are used for both exempt and non-exempt purposes while it is in possession of the car dealership or the car rental business. As Taxpayer contends, the inventory while in its possession was used in a non-exempt manner, and the extent of this use was 100 percent, or at least Taxpayer did not argue otherwise. The state's use tax is measured by the way in which the item is "used" by the purchaser. If the item is used in an exempt manner, there is no taxable use. If the item is used in a non-exempt manner, then use tax liability accrues. Since Taxpayer's use of this inventory was apparently only non-exempt, the use tax liability is on the full value of the item.

That Taxpayer ultimately sells the inventory is beside the point. The sale is a separate transaction. Neither the Tax Policy Directive nor the Letter of Findings to which Taxpayer cited stands for the proposition that the dealer or the car rental facility should receive a credit for the value purchased versus the value sold of the vehicles. Further, Taxpayer's evidence of what their credit should be is merely a single page listing a series of dollar figures. There are no supporting documents to support any of this information.

For the reasons listed above, Taxpayer has failed to meet its burden of proof. Taxpayer's inventory at issue neither qualifies for the research and development under IC § 6-2.5-5-40, nor is Taxpayer due a use tax credit on the cost of the inventory when withdrawn less the selling price of the inventory when sold.

FINDING

Taxpayer's protest is respectfully denied.

II. Sales and Use Tax – Research and Development Exemption.

Taxpayer further protests the denial of refund of use tax paid on various other items that it believes falls under the research and development exemption. On these items, the audit applied the Department's policy as stated in Sales Tax Information Bulletin 75 (October 2008) and denied these items an exemption under IC § 6-2.5-5-40.

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.

IC § 6-2.5-5-40 states as follows:

(a) As used in this chapter, "research and development activities" does not include any of the following:
  (1) Efficiency surveys.
  (2) Management studies.
  (3) Consumer surveys.
  (4) Economic surveys.
  (5) Advertising or promotions.
  (6) Research in connection with literary, historical, or similar projects.
  (7) Testing for purposes of quality control.

(b) As used in this section, "research and development equipment" means tangible personal property that:
  (1) consists of or is a combination of:

(A) laboratory equipment;
(B) computers;
(C) computer software;
(D) telecommunications equipment; or
(E) testing equipment;

(2) has not previously been used in Indiana for any purpose; and

(3) is acquired by the purchaser for the purpose of research and development activities devoted directly to experimental or laboratory research and development for:

(A) new products;
(B) new uses of existing products; or
(C) improving or testing existing products.

(c) A retail transaction:

(1) involving research and development equipment; and

(2) occurring after June 30, 2007; is exempt from the state gross retail tax.

The Department's interpretation of the statute is set out in Sales Tax Information Bulletin 75 (October 2008), which states:

> Research and development equipment means tangible personal property that consists of laboratory equipment, computers, computer software, telecommunications equipment, or testing equipment that has not previously been used in Indiana for any purpose and is acquired by the purchaser and devoted directly to experimental or laboratory research and development for new products, new uses of existing products, or improving or testing existing products.
>
> Research and development equipment does not include hand powered tools or property with a useful life of less than one year. (See also Sales Tax Information Bulletin 75 (September 2007)).

The rules of statutory construction require that exemption statutes be strictly construed against the Taxpayer. Indiana Dep't of State Revenue v. Interstate Warehousing, 783 N.E.2d 248, 250 (Ind. 2003). Further, "[t]he burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d. 289, 292 (Ind. Tax Ct. 2007).

1. Laboratory storage racks and cabinets

Taxpayer believes that its purchase of storage racks and cabinets used in its laboratories qualify for the research and development exemption. Taxpayer maintains that "[t]he function of the laboratory racks and cabinets is to store experimental products and lab supplies that are directly devoted to R & D," and goes on to say that [t]he laboratory racks and cabinets qualify as "laboratory equipment" because they are located in the lab and provide a function that is devoted to R & D as defined in the statute."

Taxpayer again cites to Black's Law Dictionary 537 (6th ed. 1990) to provide a definition of "equipment": "furnishings, or outfit for the required purposes. Whatever is needed in equipping; the articles comprised in an outfit; equippage." However, the Department must again point out that the more recent definition of "equipment" in Black's Law Dictionary 578 (8th ed. 2004) is:

> The articles or implements used for a specific purpose or activity (esp. a business operation). Under the UCC, equipment includes goods if (1) the goods are used in or bought for a business enterprise (including farming or a profession) or by a debtor that is a nonprofit organization or a governmental subdivision or agency, and (2) **the goods are not inventory, farm products, or consumer goods**. UCC § 9–102(a)(33).

While the storage racks and cabinets are arguably "equipment" according to Black's Law Dictionary, and one could reasonably draw a conclusion that they would also be considered "laboratory equipment," Taxpayer has not proven that this equipment "has not previously been used in Indiana for any purpose... and... is acquired by the purchaser **for the purpose of research and development activities devoted directly to experimental or laboratory research and development**" (**Emphasis added**). IC § 6-2.5-5-40.

Taxpayer notes that the term "devoted directly" found in IC § 6-2.5-5-40 is different than the term "direct use in direct production" found in IC § 6-2.5-5-5.1. However, by Taxpayer's own admission, the storage racks and cabinets are used for the purpose of storing items. The storage racks and cabinets are not devoted directly to laboratory research and development. They are at least one step removed from the process of research and development. These items are more closely analogous to tile on the floor upon which such lab equipment rests.

Since exemption statutes are strictly construed against the Taxpayer requesting the exemption, the Department is unable to expand the phrase "devoted directly to experimental or laboratory research and development" to be understood to mean materials used to store items that are actually being used and consumed in research and development. Therefore, storage racks and cabinets do not qualify for the research and development sales tax exemption pursuant to IC § 6-2.5-5-40.

2. Competitor Products

Taxpayer believes that its purchase of its competitors' products used in its own laboratories should qualify for the research and development exemption. Taxpayer maintains that these products "are used for clinical trials and other testing or experimental purposes." However, Taxpayer has not sufficiently described what the competitor

products are or how they would be considered testing and laboratory equipment beyond declaring that they are so. Therefore, Taxpayer has not sufficiently proven that this equipment "has not previously been used in Indiana for any purpose... and... is acquired by the purchaser **for the purpose of research and development activities devoted directly to experimental or laboratory research and development**" (**Emphasis added**). IC § 6-2.5-5-40.

3. Human body parts and cadavers

Taxpayer believes that its purchase of human body parts and cadavers qualify for the research and development exemption. As Taxpayer explains, the "human body parts and cadavers are used in conjunction with new and improved implants and instruments for research and testing purposes." In these "simulated surgeries," the purpose of the cadavers and body parts is to test the implant.

The Department is willing to concede that human body parts and cadavers could be considered "equipment" according to Black's Law Dictionary. However, Taxpayer also provided evidence in support of its arguments that stated that some of the cadavers and body parts were used in training exercises for surgeons, which allowed the surgeons to better learn how to insert and attach the implants within the human body. This indicates that the cadavers and other body parts are not devoted to research and development. Further, although Taxpayer provided evidence to show that the cadavers and other body parts had a useful life of over one year, these are still expensed items which are useful only a few times at most. Since exemption statutes must be strictly construed against the Taxpayer requesting the exemption, the Department cannot expand the statutory definition of equipment to be used in research and development to include materials to be used and consumed in research and development. Therefore, the protested items do not qualify for the research and development sales tax exemption pursuant to IC § 6-2.5-5-40.

4. Flasks, tubes, and glassware

Taxpayer believes that its purchase of flasks, tubes, and other glassware should qualify for the research and development exemption. In this situation, the Department applied its policy as stated in Sales Tax Information Bulletin 75 (September 2007) and denied the protested flasks because they were materials that had a useful life of less than one year and were "expensed." The Taxpayer argued that the statute concerning the research and development exemption did not differentiate between capitalized purchases and expensed purchases. The statute, however, sets out five groups of durable equipment that would be capitalized as research and development equipment exempt from the sales tax. The protested items are not durable property such as computers, software programs, laboratory equipment, telecommunications equipment, and testing equipment that will last over one year and be capitalized.

Although Taxpayer argues that the flasks, tubes, and glassware have a useful life of over one year, they provided no evidence to substantiate this claim. The legislature did not add a category for materials that would be consumed within a year and expensed. Since exemption statutes must be strictly construed against the Taxpayer requesting the exemption, the Department cannot expand the statutory definition of equipment to be used in research and development to include materials to be used and consumed in research and development. Therefore, the protested items do not qualify for the research and development sales tax exemption pursuant to IC § 6-2.5-5-40.

5. Mobile equipment

Taxpayer believes that its purchase of a forklift should qualify for the research and development exemption. Taxpayer considers this forklift "specialized," and moves equipment within the laboratories. However, like the storage racks and cabinets, the forklift is not devoted directly to laboratory research and development. It is at least one step removed from the process of research and development. Since exemption statutes are strictly construed against the Taxpayer requesting the exemption, the Department is unable to expand the phrase "devoted directly to experimental or laboratory research and development" to be understood to mean materials used to move items that are actually being used and consumed in research and development. Therefore, a forklift does not qualify for the research and development sales tax exemption pursuant to IC § 6-2.5-5-40.

6. Computer Software

Taxpayer purchased software from Siemens Product Lifecycle Management ("PLM"). This software is an integrated system of several different programs that, as Taxpayer says, "manage the entire lifecycle of a product efficiently and effectively." Taxpayer points to IC § 6-2.5-5-40(b)(1)(B) & (C), which provides that research and development equipment "means tangible personal property that... (1) consists of or is a combination of... (B) computers[and] (C) computer software..." However, the Siemens product pamphlet that Taxpayer provided does not indicate that the software is "devoted directly to experimental or laboratory research and development." In fact, it covers a variety of tasks, from research and development, quality control, to manufacturing. Since Taxpayer did not explain to what extent this software was devoted to research and development versus activities that are not research and development, this software does not qualify for the research and development sales tax exemption pursuant to IC § 6-2.5-5-40.

FINDING

Taxpayer's protest is respectfully denied.

III. Sales and Use Tax – Software Licenses.

DISCUSSION

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

Taxpayer requested a refund on sales or use tax paid on software and software licenses it had purchased. The Department denied the request for a refund, determining that use tax was properly paid on the purchases.

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. 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 where the gross retail tax ("sales tax") was paid at the time of purchase pursuant to IC § 6-2.5-3-4.

Taxpayer asserts that it purchased software and software licenses from SAP America, Inc. ("SAP") and various other software companies. The audit found that Taxpayer purchased one license for multiple users of each type of software. Taxpayer denies the audit's conclusion, claiming that it purchased multiple licenses and paid a fee for each license for the software that was purchased. The auditor also denied the refund in part because Taxpayer did not file a "multiple points of use" ("MPU") exemption form pursuant to IC § 6-2.5-13-2 (repealed effective Jan. 1, 2008). Taxpayer denies that it was required to file an MPU form, because Taxpayer purchased multiple licenses and paid a fee on each license.

Taxpayer ultimately protests denial of refund of use tax paid on the software/licenses that are being used outside of the United States. Taxpayer asserts that certain of its software/license purchases, where multiple copies of the software/license were purchased, are not all subject to Indiana use tax because its use does not meet the definition of taxable storage or use under IC § 6-2.5-3-1 or IC § 6-2.5-3-2. IC § 6-2.5-3-1 provides that "'Storage' means the keeping or retention of tangible personal property in Indiana for any purpose except the subsequent use of that property solely outside Indiana." Taxpayer maintains that its temporary storage of the software/licenses in Indiana did not give rise to a taxable use because Taxpayer purchased, from out-of-state vendors, software that was temporarily retained in Indiana for use outside of Indiana.

Taxpayer submitted numerous invoices for the software/license purchases, a chart showing the number of users of each software/license in the various states, and other documentation. Contrary to Taxpayer's argument, all of the SAP invoices and a few of the other software invoices revealed the purchase of only one software/license for multiple users. The "Software License Agreement" for each of the SAP software products indicates that Taxpayer was the licensee, paying a "net license fee," which allows a specified number of Taxpayer's employees to use the software under the terms of the license. The invoices also indicate that only one license was purchased. Therefore, Taxpayer's protest is denied for all SAP purchases where only one software/license was purchased.

Moreover, for the few invoices that did show that multiple copies of the software or licenses were purchased for multiple people, Taxpayer has neither established that only foreign users would be using the software, nor has it established that Indiana sales tax was paid, as each invoice of this type were from out of state vendors and merely say that a "tax" or "state tax" was paid. Therefore, since these invoices alone don't establish that foreign users were using the software, or that sales tax was paid to Indiana, Taxpayer's protest is denied, to the extent that the information provided by Taxpayer did not account for all the use of the software/licenses.

FINDING

Taxpayer's protest is respectfully denied.

IV. Sales and Use Tax – Temporary Storage.

DISCUSSION

Pursuant to IC § 6-8.1-5-1(c), all tax assessments are presumed accurate, and the taxpayer bears the burden of proving that an assessment is incorrect.

Taxpayer purchased promotional exhibits from out-of-state vendors that they then brought to medical conventions outside Indiana. Taxpayer was assessed use tax on these purchases. Taxpayer maintains that these convention exhibits are stored in Indiana, but are only used outside Indiana, and therefore are not subject to Indiana use tax.

IC § 6-2.5-3-2(a) states that "[a]n 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." Indiana law provides an exemption from use tax. Use tax is not imposed on the "keeping, retaining, or exercising of any right or power over tangible personal property, if: (1) the property is delivered into Indiana by or for the purchaser of the property; (2) the property is delivered in Indiana for the sole purpose of being processed, printed, fabricated, or manufactured into, attached to, or incorporated into other tangible personal property; and (3) **the property is subsequently transported out of state for use solely outside Indiana**." IC § 6-2.5-3-2(e). (**Emphasis added**). IC § 6-2.5-3-1(b) provides that "'Storage' means the keeping or retention of tangible personal property in Indiana for any purpose **except the subsequent use of that property solely outside Indiana**." (**Emphasis added**).

Taxpayer cites to the Tax Court's decision in Miles Inc. v. Ind. Dep't of Revenue, 659 N.E.2d 1158 (Ind. Tax

Ct. 1995), in support of its position. In that case, the petitioner was assessed use tax on certain promotional materials temporarily stored at petitioner's Indiana warehouse. The court held that the petitioner was not subject to the use tax but found that the storage of the promotional materials at the petitioner's Indiana warehouse facility and the withdrawal of those materials for subsequent shipment outside of Indiana did not constitute a taxable "use" but fell under the storage exception contained in IC § 6-2.5-3-1(b). Id. at 1164.

Taxpayer claims that its purchase and use of promotional exhibits is identical to the situation in Miles. However, unlike in Miles, the exhibits left Indiana for five days in 2008 and five days in 2009, and **returned** to Indiana for storage. The intent of IC § 6-2.5-3-2(e)(3) that "the property [at issue] is subsequently transported out of state for use solely outside Indiana," would not seem to include items that are stored in Indiana a majority of the time, and return to Indiana after its brief use out of the state. This evidences that there is nothing temporary about the storage in Indiana. It is, in fact, perpetual. Its primary purpose in Indiana is to be stored; in other words, to use Indiana as its home base for storage. This would seem to go against the nature of the exemption, making it fall under IC § 6-2.5-3-2(a) as storage subject to use tax. Further citations to a Letter of Findings where exhibit displays were held to be exempt do not support Taxpayer's argument, since there is no indication that the exhibit displays in the LOF returned to Indiana for storage. See LOF 04980120, January 1, 2000. Because the rules of statutory construction require that exemption statutes be strictly construed against the Taxpayer, Taxpayer has not met its burden of proof. Indiana Dep't of State Revenue v. Interstate Warehousing, 783 N.E.2d 248, 250 (Ind. 2003).

Since "use tax[ ]is imposed on the storage... 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," use tax has been properly assessed on the purchase of the exhibits.

FINDING

Taxpayer's protest is denied.

V. Sales and Use Tax – Computer Based Information Technologies.

DISCUSSION

Taxpayer utilizes three different web-based information services. The audit determined that these services were web-based software, which Taxpayer pays a fee to access and which was not exempt from use tax. Taxpayer maintains that there is a subscription fee, but that they are strictly services based on the internet.

The Department again 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(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

IC § 6-2.5-3-2(a) states that "[a]n 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." Further, 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.

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).

IC § 6-2.5-4-1 defines "retail transactions" stating in part as follows:

(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) transfer that property to another 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.

IC § 6-2.5-1-27 provides that "tangible personal property" would also include "prewritten computer software." 45 IAC 2.2-4-2(a) states that:

Professional services, personal services, and services in respect to property not owned by the person rendering such services are not "transactions of a retail merchant constituting selling at retail", and are not subject to gross retail tax. Where, in conjunction with rendering professional services, personal services, or other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail unless:

(1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property;

(2) The tangible personal property purchased is used or consumed as a necessary incident to the service;

(3) The price charged for tangible personal property is inconsequential (not to exceed 10%) compared with the service charge; and

(4) The serviceman pays gross retail tax or use tax upon the tangible personal property at the time of acquisition.

Sales Tax Information Bulletin 8 (May 2002), 25 Ind. Reg. 3934, provides in part:

As a general rule, transactions involving computer software are not subject to Indiana Sales or Use Tax provided the software is in the form of a custom program specifically designed for the purchaser. Pre-written programs, not specifically designed for one purchaser, developed by the seller for sale or lease on the general market in the form of tangible personal property and sold or leased in the form of tangible personal property are subject to tax irrespective of the fact that the program may require some modification for a purchaser's particular computer. Pre-written or canned computer programs are taxable because the intellectual property contained in the canned program is no different than the intellectual property in a videotape or a textbook.

The question is whether the services are "information services" or if they are "web-based software."

A. GHX

Global Healthcare Exchange, Inc. ("GHX") provides a web-based service, wherein customers input data for a purchase order for Taxpayer to GHX, who will in turn "reconfigure" the data in the purchase order for Taxpayer to access**.** Taxpayer then uses the reconfigured data from GHX to fulfill the order for its customers. After that, Taxpayer apparently inputs data to GHX in order for Company A to bill the Customer for Taxpayer. GHX refers to this "on-line, independent electronic trading system" as the "Exchange." GHX charges a subscription fee for access to the Exchange, but, as Taxpayer explains "[n]either tangible personal property, nor software or updates were ever transferred to [Taxpayer] as a result of [Taxpayer's] purchase of this web-based service."

The user agreement between taxpayer and GHX provides that GHX agrees "to supply Product information for display on the [Exchange] and enter into contracts with Purchasers to sell Products using the [Exchange]." The user agreement goes on to state that Taxpayer is "grant[ed]... a non-exclusive right and license to access and use [Exchange] solely for [Taxpayer's] internal use in the United States" for three specific purposes. The first purpose of Exchange is "developing, maintaining and accessing information with respect to the feature, characteristics and availability of Products from Suppliers for reference purposes and to create an accurate item master file." The second purpose of Exchange is "conveying information between Suppliers and Purchasers, directly and through third parties, relative to the purchase and sale of Products and otherwise facilitating the formation and performance of contracts between Users for the purchaser of Products." The third purpose of Exchange is "providing information with respect to the fulfillment of orders for Products, summary information regarding the purchase and sale of Products, and other information that may be of interest to Users."

Pursuant to the terms of the user agreement between Taxpayer and GHX, GHX retained ownership of Exchange, specifically providing that taxpayer obtained only "a non-exclusive right and license to access and use" Exchange. Essentially, this arrangement is one in which a service is provided, for which Taxpayer is paying, without having to acquire any sort of tangible personal property in the form of software in order to gain access to this service.

Taxpayer has met its burden of proof. Therefore, Taxpayer's protest as it relates to purchases from GHX is sustained**.**

B. Verispan LLC

Taxpayer also utilized the services of Verispan LLC ("Verispan"), a company which, according to the "Master Service Agreement" between Verispan and Taxpayer "maintains certain de-identified healthcare data in proprietary databases developed by Verispan through the application of methods and standards of judgment, from which Versipan has developed a variety of data products useful in the healthcare industry." Essentially, Verispan monitors and manages data, and provides its customers customizable reporting through its web site for a fee. Taxpayer asserts that because it did not receive the transfer of property that has been compiled or packaged for sale to the general public, the service fees charged by Verispan are not subject to sales or use tax.

The issue presented by Taxpayer's contract with Verispan is addressed in Sales Tax Information Bulletin 8 (May 2002) 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.

Accordingly, a taxpayer purchases a service when a service provider takes the taxpayer's information, reorganizes it into a new format, and returns the newly organized information to the taxpayer. However, a taxpayer purchases tangible personal property from a vendor when the vendor compiles or packages the vendor's own information for sale to the general public. Any transfer of this type of property in any format, electronic or otherwise, is subject to sales and use tax.

Taxpayer did not furnish the "information from which [the] reports [were] compiled," as the information came from Verispan's "de-identified healthcare data in proprietary databases." 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 vehicle reports are tangible personal property and, therefore, taxable.

Further, 45 IAC 2.2-1-1(a) states that:

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.

The "Master Service Agreement" between Taxpayer and Verispan provides that "Verispan provide[s] certain products and related services to" Taxpayer. The "subscription fees" to the databases involved a "unitary transaction" in which at least one element of the transaction included the transfer of such compiled or packaged property.

The Department has consistently held that the fees used to access web-based subscription databases that provide reports based on the database vendor's own information are subject to sales and use tax. For instance, CARFAX subscriptions are subject to tax, because a customer submits the criteria for their search to CARFAX, and the vendor-repository transfers vehicle reports to Taxpayer. Taxpayer either pays the vendor-repository for the vehicle reports, or pays a subscription fee for a certain number of reports, based on the type of agreement arranged. Taxpayer received the vehicle reports, either in printout form, by electronically storing them in its computer, or simply by viewing the generated reports. In other words, just as with CARFAX, Taxpayer requested an individual report for itself and was charged a flat fee for access to the particular web-based database.

Taxpayer has failed to meet its burden to proof. Therefore, Taxpayer's protest as it relates to purchases from Verispan is denied.

C. Dun & Bradstreet

Taxpayer also utilized the services of Dun & Bradstreet ("D & B"), which charges a service fee to Taxpayer for customized information services. According to Taxpayer's description of the arrangement, Taxpayer requests specific customer information through D & B's web-based application. Taxpayer inputs specific criteria from which customized reports are produced. Taxpayer concludes that the customized reports are not compiled or packaged for sale to the public as canned reports and therefore are not subject to sales and use tax. However, for the same reasons as listed in Part B above, Taxpayer is paying for reports, which are subject to sales and use tax. Therefore, Taxpayer's protest as it relates to D & B is denied.

FINDING

Taxpayer's protest is sustained as to Item A. Taxpayer's protest is respectfully denied as to Items B & C.

VI. Sales and Use Tax – Tank Rentals.

DISCUSSION

Taxpayer rents gas tanks and cylinders that are used in the production and research and development processes. The Department assessed use tax on the rental of these gas tanks and cylinders. Taxpayer believes that the rental of these gas tanks and cylinders is exempt from use tax.

Pursuant to IC § 6-8.1-5-1(c), all tax assessments are presumed accurate, and the taxpayer bears the burden of proving that an assessment is incorrect. See also Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Further, the rules of statutory construction require that exemption statutes be strictly construed against the Taxpayer. Indiana Dep't of State Revenue v. Interstate Warehousing, 783 N.E.2d 248, 250 (Ind. 2003).

IC § 6-2.5-3-2(a) states that "[a]n 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."

IC § 6-2.5-4-1 defines "retail transactions" stating in part as follows:

(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) transfer that property to another 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.

IC § 6-2.5-4-10 states in pertinent part that:

(a) A person, other than a public utility, is a retail merchant making a retail transaction when he rents or leases tangible personal property to another person other than for subrent or sublease.

(b) A person is a retail merchant making a retail transaction when the person sells any tangible personal property which has been rented or leased in the regular course of the person's rental or leasing business.

IC § 6-2.5-5-9 provides in pertinent part that:

(a) As used in this section, "returnable containers" means containers customarily returned by the buyer of the

contents for reuse as containers.

(b) Sales of returnable containers are exempt from the state gross retail tax if the transaction constitutes selling at retail as defined in IC 6-2.5-4-1 and if the returnable containers contain contents.

(c) Sales of returnable containers are exempt from the state gross retail tax if the containers are transferred empty for the purpose of refilling.

The Department's regulations at 45 IAC 2.2-5-16(d)(2) clarifies the exemption for "[r]eturnable containers sold at retail with contents" as follows:

To qualify for this exemption, the returnable containers must be:

(A) Sold in a taxable transaction of a retail merchant constituting selling at retail; and

(B) Billed as a separate charge by the retail merchant to his customer. If there is a separate charge for such containers, the sale of the container is exempt from tax under this regulation [45 IAC 2.2].

45 IAC 2.2-5-16(d)(3) clarifies the exemption for "[r]eturnable containers sold empty" by stating that "[t]o qualify for this exemption the returnable container must be resold with the purpose of refilling. The sale of returnable containers to the original or first user thereof is taxable."

Pursuant to IC § 6-2.5-5-9 and 45 IAC 2.2-5-16, Taxpayer would not qualify for this exemption. The exemption in IC § 6-2.5-5-9(c) is for the seller of gas to purchase "returnable containers" from the manufacturer or seller of such containers without having to pay sales tax. The sale of the container thereafter to the user of the "returnable container," is not exempt. Here, Taxpayer is not purchasing a "returnable container." Taxpayer is purchasing gas, contained in a "returnable containers," and therefore Taxpayer does not qualify for this exemption.

Taxpayer also does not qualify for the exemption in IC § 6-2.5-5-9(b). Although Taxpayer provided invoices of its gas purchases, the invoices provided do not list a separate fee for the tanks or cylinders. Taxpayer was purchasing gas, contained in a "returnable containers," and was not purchasing the containers. Therefore, Taxpayer has not met its burden of proof to establish that the gas or the canisters and tanks under IC § 6-2.5-5-9.

Taxpayer also argues that both the gas and the tanks and cylinders that hold the gas are used in research and development, and therefore qualifies for the research and development exemption. IC § 6-2.5-5-40 again states as follows:

(a) As used in this chapter, "research and development activities" does not include any of the following:

(1) Efficiency surveys.

(2) Management studies.

(3) Consumer surveys.

(4) Economic surveys.

(5) Advertising or promotions.

(6) Research in connection with literary, historical, or similar projects.

(7) Testing for purposes of quality control.

(b) As used in this section, "research and development equipment" means tangible personal property that:

(1) consists of or is a combination of:

(A) laboratory equipment;

(B) computers;

(C) computer software;

(D) telecommunications equipment; or

(E) testing equipment;

(2) has not previously been used in Indiana for any purpose; and

(3) is acquired by the purchaser for the purpose of research and development activities devoted directly to experimental or laboratory research and development for:

(A) new products;

(B) new uses of existing products; or

(C) improving or testing existing products.

(c) A retail transaction:

(1) involving research and development equipment; and

(2) occurring after June 30, 2007; is exempt from the state gross retail tax.

The Department's position on how this statute is to be interpreted is set out in Sales Tax Information Bulletin 75 (October 2008), which states:

Research and development equipment means tangible personal property that consists of laboratory equipment, computers, computer software, telecommunications equipment, or testing equipment that has not previously been used in Indiana for any purpose and is acquired by the purchaser and devoted directly to experimental or laboratory research and development for new products, new uses of existing products, or improving or testing existing products.

Research and development equipment does not include hand powered tools or property with a useful life of less than one year. (See also Sales Tax Information Bulletin 75 (September 2007).

Black's Law Dictionary 578 (8th ed. 2004) defines "equipment" as:

The articles or implements used for a specific purpose or activity (esp. a business operation). Under the UCC, equipment includes goods if (1) the goods are used in or bought for a business enterprise (including farming or a profession) or by a debtor that is a nonprofit organization or a governmental subdivision or agency, and (2) the goods are not inventory, farm products, or consumer goods. UCC § 9–102(a)(33).

The gas at issue does not meet the definition of "equipment," nor does it have a useful life of over one year. The gas canisters are not used exclusively in research and development activities, and they are used and returned on a continual basis, meaning it was used previously in Indiana. Taxpayer has not met its burden of proof to establish that the gas or the canisters and tanks are exempt. Therefore, neither the gas or the canisters and tanks qualify for the research and development sales tax exemption pursuant to IC § 6-2.5-5-40.

FINDING

Taxpayer's protest is respectfully denied.

VII. Tax Administration - **Ten Percent Negligence Penalty.**

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty and interest for the tax years in question. Taxpayer protests the imposition of penalty, requesting that it be waived.

Taxpayer protests 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.
>
> 45 IAC 15-11-2(c) provides that:
>
> 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.

In this case, Taxpayer incurred a deficiency which the Department determined was due to negligence under 45 IAC 15-11-2(b), and so was subject to a penalty under IC § 6-8.1-10-2.1(a).

Taxpayer has not sufficiently established that its failure to pay use tax was due to reasonable cause and not due to negligence, as required by 45 IAC 15-11-2(c).

FINDING

Taxpayer's protest is respectfully denied.

CONCLUSION

Taxpayer's protest is respectfully denied in whole as to Issues I, II, III, IV, VI, and VII. Taxpayer's protest is sustained as to Issue IV, Item A, and is respectfully denied as to Issue IV, Items B & C.

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