

**Letter of Findings: 04-20100254**  
**Sales Tax**  
**For the Years 2006, 2007, and 2008**

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**ISSUE**

**I. Sales and Use Tax – Imposition.**

**Authority:** IC § 6-2.5-1-1 et seq.; IC § 6-2.5-1-27; IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-8.1-5-1; [45 IAC 2.2-4-1](#); [45 IAC 2.2-4-13](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the imposition of additional sales tax.

**STATEMENT OF FACTS**

Taxpayer, a municipal agency, sells water to its customers. Pursuant to an audit, the Indiana Department of Revenue ("Department") discovered that Taxpayer failed to collect sales tax on sales of tangible personal property. Additionally, the Department's audit also found that Taxpayer failed to collect sales tax concerning its sales recorded under its "Fire Protection" account. The Department's audit thus assessed Taxpayer additional sales tax and interest.

Taxpayer protests the Department's assessments. A hearing was held. This Letter of Finding ensues. Additional information will be provided as necessary. Please refer to Letter of Findings 40-20100253 for additional information and issues raised related to Taxpayer's protest of utility receipts tax.

**I. Sales and Use Tax – Imposition.**

**DISCUSSION**

Pursuant to the audit, the Department assessed Taxpayer additional sales tax on its sales of tangible personal property and water because Taxpayer did not collect sales tax at the time of the retail transactions. Taxpayer only protests the additional sales tax on the sales recorded under its "Fire Protection" account. Taxpayer asserted that the "Fire Protection" account was the charge for hydrant maintenance and, therefore, was not sales of water subject to sales tax.

As a threshold issue, all tax assessments are prima facie evidence that the Department's assessment of tax is presumed correct; 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).

Indiana imposes a sales tax on retail transactions and a complementary use tax on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-1-1 et seq. "Tangible personal property," as defined in IC § 6-2.5-1-27, "means personal property that: (1) can be seen, weighed, measured, felt, or touched; or (2) is in any other manner perceptible to the senses," including "electricity, **water**, gas, steam, and prewritten computer software." (**Emphasis added**).

IC § 6-2.5-2-1 states:

- (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 § 6-2.5-4-1, in pertinent part, provides:

- (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) transfers that property to another person 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.

[45 IAC 2.2-4-1](#) further illustrates:

- (a) 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".
- (b) All elements of consideration are included in gross retail income subject to tax. Elements of consideration include, but are not limited to:

- (1) The price arrived at between purchaser and seller.
- (2) Any additional bona fide charges added to or included in such price for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other services performed in respect to or labor charges for work done with respect to such property prior to transfer.
- (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.

Accordingly, Taxpayer, a retail merchant selling tangible personal property and water, is responsible for collecting and remitting to the Department the sales tax due.

[45 IAC 2.2-4-13](#) provides:

- (a) In general, the furnishing of electricity, gas, water, steam, or steam heating services by public utilities to consumers is subject to tax.
- (b) The gross receipt of every person engaged as a power subsidiary or a public utility derived from selling electrical energy, gas, water, or steam to consumers for direct use in direct manufacturing, mining, production, refining, oil or mineral extraction, irrigation, agriculture, horticulture, or another public utility or power subsidiary described in [IC 6-2.5-4-5](#) shall not constitute gross retail income of a retail merchant received from a retail transaction. Electrical energy, gas, water, or steam will only be considered directly used in direct production, manufacturing, mining, refining, oil or mineral extraction, irrigation, agriculture, or horticulture if the utilities would be exempt under [IC 6-2.5-5-1](#).
- (c) Sales of public utility services or commodities to consumers engaged in manufacturing, mining, production, refining, oil or mineral extraction, irrigation, agriculture, horticulture, or another public utility or power subsidiary described in [IC 6-2.5-4-5](#), based on a single meter charge, flat rate charge, or other charge, are excepted if such services are separately metered or billed and will be used predominantly for the excepted purposes.
- (d) Sales of public utility services and commodities to consumers engaged in manufacturing, mining, production, refining, oil or mineral extraction, irrigation, agriculture, or horticulture, based on a single meter charge, flat rate charge, or other charge, which will be used for both excepted and nonexcepted purposes are taxable unless such services and commodities are used predominantly for excepted purposes.
- (e) Where public utility services are sold from a single meter and the services or commodities are utilized for both exempt and nonexempt uses, the entire gross receipts will be subject to tax unless the services or commodities are used predominantly for excepted purposes. Predominant use shall mean that more than fifty percent (50 [percent]) of the utility services and commodities are consumed for excepted uses.

In this instance, Taxpayer maintained that the receipts, which recorded under the "Fire Protection" account, were fees for the maintenance of the town's hydrants and not sales of water. Taxpayer, thus, argued that the receipts, under the "Fire Protection" account, were not subject to sales tax. To support its protest, Taxpayer submitted a copy of Ordinance No. 2009-2, as well as a sample copy of the "Customer Bill," "Disconnect Notice," and "Customer Agreement." Taxpayer stated that the "Customer Bill" demonstrated that it charged its customers a fixed monthly fee for hydrant maintenance and it did not collect any tax. Therefore, Taxpayer claimed that the receipts under the "Fire Protection" account are charges for hydrant maintenance and not subject to sales tax.

Taxpayer is mistaken. Taxpayer's Ordinance No. 2009-2 stated that the "Fire Protection" contains three categories, designated as: (1) private hydrant, (2) public hydrant, and (3) automatic sprinklers. Among those categories, the charges relating to private hydrants and sprinklers systems were sales of water. Although Taxpayer's documentation showed that it separately charges its customers a fixed monthly fee for hydrant maintenance, Taxpayer's documentation failed to demonstrate that the "Fire Protection" account only represented the receipts for charges of maintaining public hydrants.

In short, given the totality of the circumstances, in the absence of other documentation, the Department is not able to agree with Taxpayer that it has met its burden demonstrating the Department's proposed assessment is wrong.

#### **FINDING**

Taxpayer's protest on the imposition of sales tax is respectfully denied.

*Posted: 03/23/2011 by Legislative Services Agency*  
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