

Letter of Findings: 04-20100607
Gross Retail Tax
For the Years 2007, 2008, and 2009

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ISSUE

I. Lump Sum Contracts – Gross Retail Tax.

Authority: IC § 6-8.1-5-1(c); [45 IAC 2.2-3-9](#)(a); Sales Tax Information Bulletin 60 (July 2006).

Taxpayer argues that it is not subject to use tax on the cost of materials furnished pursuant to what Taxpayer argues were "lump sum contracts."

STATEMENT OF FACTS

Taxpayer is an Indiana business which provides insurance restoration services. The Department of Revenue (Department) conducted an audit review of Taxpayer's business records. The audit resulted in an assessment of additional sales/use tax. Taxpayer disagreed with a portion of the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representative explained the basis for the protest. This Letter of Findings results.

I. Lump Sum Contracts – Gross Retail Tax.

DISCUSSION

As noted above, Taxpayer performs insurance restoration services for industrial, commercial, and residential clients. On occasion, Taxpayer hires subcontractors to perform a portion of this work. The audit found that some of the subcontractors billed Taxpayer on a "time and material basis" but that no sales tax was collected. In other cases, the subcontractors' invoices were ambiguous. Were these invoices for performing a "time and material" contract or for a "lump sum contract?"

During the course of the audit, Taxpayer supplied additional information about these subcontractors but was unable to supply complete information on all subcontractors.

The audit assessed sales tax on what it categorized as "time and material" contracts pursuant to [45 IAC 2.2-3-9](#)(a). As explained in Sales Tax Information Bulletin 60 (July 2006) (20060823 Ind. Reg. 045060287NRA). "If a construction contractor purchases construction materials pursuant to a time and material contract, the construction contractor is a retail merchant and may purchase the construction material exempt from sales tax but must collect sales tax on the resale of the construction material and remit the sales tax."

Because no sales tax was charged on what were purportedly "time and material" contracts, the audit assessed Taxpayer tax for those amounts.

Taxpayer objects explaining that, "Our suppliers and subcontractors usually bid and bill their services in a lump sum."

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."

Taxpayer has provided letters from four of the six subcontractors in dispute. The Department is prepared to accept four of the letters as sufficient to establish that these particular subcontractors did indeed enter into "lump sum" contracts. The audit division is requested to review the four subcontractors' letters and to make whatever adjustments to the original assessment are appropriate.

However, insofar as the remaining two subcontractors, there is nothing to clearly establish that these particular subcontractors performed under "lump sum" or a "time and material" contracts.

FINDING

Taxpayer's protest is denied in part and sustained in part.

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