

Supplemental Letter of Findings: 40-20100253; 04-20100254
Gross Retail Tax and Utility Receipts Tax
For the Years 2006, 2007, and 2008

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ISSUES

I. Maintenance Fees – Gross Retail Tax.

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(c); [45 IAC 2.2-4-1](#).

Taxpayer argues that the money it charges its residents in the form of fire hydrant maintenance fees is not subject to sales/use tax.

II. Maintenance Fees – Utility Receipts Tax.

Authority: IC § 6-2.3-1-14; IC § 6-2.3-2-1; IC § 6-2.3-3-2; IC § 6-2.3-3-10; IC § 6-8.1-5-1(c).

Taxpayer argues that the money it charges its residents in the form of fire hydrant maintenance fees is not subject to Utility Receipts Tax.

STATEMENT OF FACTS

Taxpayer is an Indiana municipal utility. Taxpayer provides water and sewage service to business and household consumers. The Department of Revenue (Department) conducted a sales and a Utility Receipts Tax audit review of Taxpayer's records and found that Taxpayer owed additional tax. Taxpayer disagreed with the assessment of additional sales and Utility Receipts Tax and submitted a protest to that effect.

An administrative hearing was conducted during which Taxpayer's representative explained the basis for the protest. A Letter of Findings was issued in which Taxpayer's protest was sustained in part and denied in part.

Taxpayer requested a rehearing in which to clarify a particular issue. A second administrative hearing was conducted, and this Supplemental Letter of Findings results.

I. Maintenance Fees – Gross Retail Tax.

DISCUSSION

Taxpayer charges its customers a regular, fixed fee to maintain its public fire hydrant system. For purposes of this Supplemental Letter of Findings only and for simplicity sake, this charge is referred to as a "maintenance fee." On the sample invoice provided by Taxpayer, the amount is designated as "hydrant main." The fee does not cover the cost of any water which is or may be delivered by means of the public hydrant system. For purposes of this Supplemental Letter of Findings, the disputed fee does not cover costs charged to individual users who maintain a private or dedicated hydrant. Whether referred to as a "maintenance fee" or "hydrant maint," the fees at issue do not give the utility customer any individual possessory right to a particular hydrant; the hydrants are simply the common and shared municipal fire hydrant system.

As defined by Taxpayer's representative during the supplemental hearing, the issue is simply whether the fees are or are not subject to Indiana's gross retail tax.

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."

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](#) states as follows:

- (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.

According to Taxpayer, the "maintenance fees" are a separate, line item on the consumers' water bill, are segregated in the Taxpayer's financial records, and are used for the maintenance and update of the public fire hydrant system. Taxpayer is correct; the "maintenance fees" are not subject to the state's gross retail tax because the fees are separately stated and do not represent the transfer of "tangible personal property."

FINDING

Taxpayer's protest is sustained.

II. Maintenance Fees – Utility Receipts Tax.

DISCUSSION

Taxpayer argues that the money it charges its water utility consumers for the maintenance of the municipality's fire hydrant system is not subject to the Utility Receipts Tax. The fees at issue are the identical fees described in Part I above. The purpose for which these fees are collected is the same. The facts described in Part I above are identical.

The Utility Receipts Tax is imposed pursuant to IC § 6-2.3-2-1 which states:

An income tax, known as the utility receipts tax, is imposed upon the receipt of:

- (1) the entire taxable gross receipts of a taxpayer that is a resident or a domiciliary of Indiana; and
- (2) the taxable gross receipts derived from activities or businesses or any other sources within Indiana by a taxpayer that is not a resident or a domiciliary of Indiana.

IC § 6-2.3-1-14 states that:

"Utility service" means furnishing any of the following:

- (1) Electrical energy.
- (2) Natural gas, either mixed with another substance or pure, used for heat, light, cooling, or power.
- (3) Water.
- (4) Steam.
- (5) Sewage (as defined in [IC 13-11-2-200](#)).
- (6) Telecommunication services.

IC § 6-2.3-3-10 states:

Gross receipts include receipts received for installation, maintenance, repair, equipment, or leasing services provided to a commercial or domestic consumer that are directly related to the delivery of utility services to the commercial or domestic consumer or the removal of equipment from a commercial or domestic consumer upon the termination of service. (Emphasis added).

IC § 6-2.3-3-2 provides:

Notwithstanding any other provisions of this article, receipts that would otherwise not be taxable under this article are taxable gross receipts under this article to the extent that the amount of the nontaxable receipts are not separated from the taxable receipts on the records or returns of the taxpayer.

In the case of the "maintenance fees" Taxpayer charges its customers, the money received is not subject to the Utility Receipts Tax pursuant to IC § 6-2.3-3-10 or IC § 6-2.3-2-1. Although the fees are designated by the Taxpayer for the cost of maintaining the municipality's shared fire hydrant system the system is not "directly related to the delivery of utility services to the [municipality's] commercial or domestic consumer[s]." IC § 6-2.3-3-10 (Emphasis added). The "maintenance fees are the municipality's method of allocating the cost of maintaining the hydrants and its fire protection services to the municipality's residents. Taxpayer has met its burden of demonstrating that "maintenance fees" are not subject to the Utility Receipts Tax. IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is sustained.

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