

Letter of Findings: 04-20100415
Sales and Use Tax
For the Tax Years 2007, 2008, 2009

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ISSUES

I. Sales Tax – Imposition – Room Rentals to Not-for-Profits and Government Entities.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-4; IC § 6-2.5-4-4; IC § 6-2.5-5-16; IC § 6-2.5-5-24; IC § 6-2.5-5-25; IC § 6-2.5-8-8; IC § 6-8.1-5-1; [45 IAC 2.2-4-8](#); [45 IAC 2.2-5-24](#); [45 IAC 2.2-5-25](#); [45 IAC 2.2-8-12](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dept. of State Revenue v. Kimball Int'l Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988); General Motors Corp. v. Indiana Dept. of State Revenue, 578 N.E.2d 399, 404 (Ind. Tax Ct. 1991) aff'd 599 N.E.2d 588 (Ind. 1992); Sales Tax Information Bulletin 4 (August 2008); Sales Tax Information Bulletin 10 (June 2008); 18 U.S.C. § 701.

Taxpayer protests the imposition of sales tax on rentals to members of not-for-profits and government employees where exemption certificates were provided.

II. Use Tax – Exemption – Consumables Provided During Occupancy.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-4-4; IC § 6-2.5-5-35; IC § 6-8.1-5-1; Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dept. of State Revenue v. Kimball Int'l Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988); General Motors Corp. v. Indiana Dept. of State Revenue, 578 N.E.2d 399, 404 (Ind. Tax Ct. 1991) aff'd 599 N.E.2d 588 (Ind. 1992); Sales Tax Information Bulletin 66 (July 2007).

Taxpayer protests the imposition of use tax on items it claims were consumed in the course of their guests' occupancy of Taxpayer's facilities.

III. Tax Administration–Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of a ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is a partnership that operates hotels in Indiana. The Indiana Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer for the years 2007, 2008, and 2009. As a result of the audit Taxpayer was assessed additional sales and use tax, as well as penalty and interest. Taxpayer protested the assessments and penalty. A hearing was held and this Letter of Findings ensues. Additional information will be provided as required.

I. Sales Tax – Imposition – Room Rentals to Not-for-Profits and Government Entities.

DISCUSSION

The Department 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).

The Department's audit found that Taxpayer did not charge guests sales tax on some room rentals which should have had sales tax charged. The Department found that in these instances Taxpayer was issued exemption certificates from members of not-for-profit entities or government employees, but the rooms were paid for by the individuals and not the not-for-profit or government entities.

Taxpayer protests that the guests in question were either governmental employees or members of exempt organizations and were therefore exempt from sales tax. Taxpayer asserted that it had been provided exemption certificates by these guests and that Taxpayer had relied on these exemption certificates in good faith.

Taxpayer further asserts that it conducts its credit card transactions under the Payment Card Industry Data Security Standards. Taxpayer explains that these standards provide strict guidelines to help thwart fraud within the credit card industry and consider it an unreasonable requirement to keep copies of guest credit card information on hand. Taxpayer believes that the tax exemption documents should suffice in lieu of credit card information. In addition, subsequent to hearing in a letter dated October 1, 2010, Taxpayer states that it is against the law to copy government identification and cites to "US Code Title 18, Part 1, Chapter 33, Head Section 701."

In accordance with IC § 6-2.5-2-1(a), a sales tax, known as state gross retail tax, is imposed on Indiana retail transactions unless a valid exemption is applicable. In accordance with IC § 6-2.5-2-1(b) while the acquirer of the tangible personal property is liable for the sales tax, charged by the retail merchant as a separate added amount, the retail merchant collects the tax as an agent for the state.

An exemption from the sales tax is granted for transactions when sales tax was paid at the time of purchase pursuant to IC § 6-2.5-3-4. Certain other sales and use tax exemptions are also offered. IC § 6-2.5 et seq.

In applying any tax exemption, the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." *Indiana Dept. of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988). The taxpayer claiming exemption has the burden of showing the terms of the exemption statute are met. *General Motors Corp. v. Indiana Dept. of State Revenue*, 578 N.E.2d 399, 404 (Ind. Tax Ct. 1991) *aff'd* 599 N.E.2d 588 (Ind. 1992) (Internal citations omitted). Additionally "[e]xemption statutes are strictly construed because an exemption releases property from the obligation of bearing its fair share of the cost of government." *Id.*

The sales tax is imposed on certain rental transactions including the rental of hotel rooms. IC § 6-2.5-4-4 states:

- (a) A person is a retail merchant making a retail transaction when the person rents or furnishes rooms, lodgings, or other accommodations, such as booths, display spaces, banquet facilities, and cubicles or spaces used for adult relaxation, massage, modeling, dancing, or other entertainment to another person:
 - (1) if those rooms, lodgings, or accommodations are rented or furnished for periods of less than thirty (30) days; and
 - (2) if the rooms, lodgings, and accommodations are located in a hotel, motel, inn, tourist camp, tourist cabin, gymnasium, hall, coliseum, or other place, where rooms, lodgings, or accommodations are regularly furnished for consideration.
- (b) Each rental or furnishing by a retail merchant under subsection (a) is a separate unitary transaction regardless of whether consideration is paid to an independent contractor or directly to the retail merchant. [45 IAC 2.2-4-8](#) elaborates:
- (a) For the purpose of the state gross retail tax and use tax: Every person engaged in the business of renting or furnishing for periods of less than thirty (30) days any accommodation including booths, display spaces and banquet facilities, in any place where accommodations are regularly furnished for a consideration is a retail merchant making retail transactions in respect thereto and the gross income received therefrom shall constitute gross retail income from retail unitary transactions.
- (b) In general, the gross receipts from renting or furnishing accommodations are taxable. An accommodation which is rented for a period of thirty (30) days or more is not subject to the gross retail tax.
- (c) There is no exemption for purchases made by persons who are engaged in renting or furnishing accommodations. Such persons are deemed to purchase or otherwise acquire tangible personal property for use or consumption in the regular course of their business.
- (d) The renting or furnishing of an accommodation for less than thirty (30) days constitutes a retail merchant making a retail transaction. Every person so engaged must collect the gross retail tax on the gross receipts from such transactions. The tax is borne by the person or organization who uses the accommodation.
- (e) The tax is imposed on the gross receipts from "furnishing" an accommodation. The gross receipts subject to tax include the amount which represents consideration for the rendition of those services which are essential to the furnishing of the accommodation, and those services which are regularly provided in furnishing the accommodation. Such amounts are subject to tax even when they are separately itemized on the statement or invoice.
- (f) The tax is imposed on the gross receipts from accommodations which are furnished for periods of less than thirty (30) days.

IC § 6-2.5-5-16 states:

Transactions involving tangible personal property, public utility commodities, and public utility service are exempt from the state gross retail tax, if the person acquiring the property, commodities, or service:

- (1) is the state of Indiana, an agency or instrumentality of the state, a political subdivision of the state, or an agency or instrumentality of a political subdivision of the state, including a county solid waste management district or a joint solid waste management district established under [IC 13-21](#) or [IC 13-9.5-2](#) (before its repeal); and
- (2) predominantly uses the property, commodities, or service to perform its governmental functions.

Next, IC § 6-2.5-5-24(a) states:

Transactions are exempt from the state gross retail tax to the extent that the gross retail income from those transactions is derived from gross receipts that are:

- (1) derived from sales to the United States government, to the extent the state is prohibited by the Constitution of the United States from taxing that gross income;
- (2) derived from commercial printing that results in printed materials, excluding the business of photocopying, that are shipped, mailed, or delivered outside Indiana;
- (3) United States or Indiana taxes received or collected as a collecting agent explicitly designated as a collecting agent for a tax by statute for the state or the United States;
- (4) collections by a retail merchant of a retailer's excise tax imposed by the United States if:
 - (A) the tax is imposed solely on the sale at retail of tangible personal property;
 - (B) the tax is remitted to the appropriate taxing authority; and
 - (C) the retail merchant collects the tax separately as an addition to the price of the property sold;

(5) collections of a manufacturer's excise tax imposed by the United States on motor vehicles, motor vehicle bodies and chassis, parts and accessories for motor vehicles, tires, tubes for tires, or tread rubber and laminated tires, if the excise tax is separately stated by the collecting taxpayer as either an addition to or an inclusion in the price of the property sold; or

(6) amounts represented by an encumbrance of any kind on tangible personal property received by a retail merchant in reciprocal exchange for tangible personal property of like kind.

(Emphasis added).

[45 IAC 2.2-5-25](#) provides:

(a) There is not a blanket exemption from the sales tax for purchases by governmental agencies and units. It provides that only the purchase of tangible personal property used by the governmental agency in connection with a governmental function may be purchased exempt from sales tax.

(b) Purchases by a governmental agency or subdivision to be used in connection with or for a proprietary activity are subject to the sales tax.

(c) Proprietary activities by governmental agencies and subdivisions include:

(1) Activities in connection with the sale of tangible personal property, such as college book stores, food services, concessions, etc.

(2) Activities in connection with the rental of tangible personal property made to the general public.

(d) In every case in which a governmental agency engages in a proprietary type activity as defined above, the agency must pay sales tax on the purchase of all tangible personal property used in connection therewith.

(e) The construction of buildings and structures for use in proprietary activities such as concession stands, is subject to sales tax on the tangible personal property incorporated therein.

(f) Governmental agencies should refer to the gross income tax regulations and instructions for other examples of proprietary type activities.

(Emphasis added).

[45 IAC 2.2-5-24](#), in relevant part, states:

(e) Purchases must be invoiced directly to the governmental entity and paid out of governmental funds. Purchases of tangible personal property, public utility services, and commodities by the state or a subdivision thereof are exempt from gross retail tax, provided the purchases are invoiced directly to the governmental entity and paid for out of government funds. Purchases which are for use by the governmental entity, but which are not invoiced directly to the state or subdivision or are not paid for out of governmental funds, are subject to the gross retail tax.

(Emphasis added).

Next, IC § 6-2.5-5-25 states:

(a) Transactions involving tangible personal property or service are exempt from the state gross retail tax, if the person acquiring the property or service:

(1) is an organization described in section 21(b)(1) of this chapter;

(2) primarily uses the property or service to carry on or to raise money to carry on its not-for-profit purpose; and

(3) is not an organization operated predominantly for social purposes.

(b) Transactions occurring after December 31, 1976, and involving tangible personal property or service are exempt from the state gross retail tax, if the person acquiring the property or service:

(1) is a fraternity, sorority, or student cooperative housing organization described in section 21(b)(1)(A) of this chapter; and

(2) uses the property or service to carry on its ordinary and usual activities and operations as a fraternity, sorority, or student cooperative housing organization.

(Emphasis added).

IC § 6-2.5-8-8 states:

(a) A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a **proper** exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.

(b) The following are the only persons authorized to issue exemption certificates:

(1) retail merchants, wholesalers, and manufacturers, who are registered with the department under this chapter;

(2) organizations which are exempt from the state gross retail tax under [IC 6-2.5-5-21](#), [IC 6-2.5-5-25](#), or [IC 6-2.5-5-26](#) and which are registered with the department under this chapter; and

(3) other persons who are exempt from the state gross retail tax with respect to any part of their purchases.

(c) The department may also allow a person to issue a blanket exemption certificate to cover exempt purchases over a stated period of time. The department may impose conditions on the use of the blanket exemption certificate and restrictions on the kind or category of purchases that are exempt.

(d) A seller that accepts an incomplete exemption certificate under subsection (a) is not relieved of the duty to collect gross retail or use tax on the sale unless the seller obtains:

- (1) a fully completed exemption certificate; or
- (2) the relevant data to complete the exemption certificate;

within ninety (90) days after the sale.

(e) If a seller has accepted an incomplete exemption certificate under subsection (a) and the department requests that the seller substantiate the exemption, within one hundred twenty (120) days after the department makes the request the seller shall:

- (1) obtain a fully completed exemption certificate; or
- (2) prove by other means that the transaction was not subject to state gross retail or use tax.

(Emphasis added).

Finally, regulation [45 IAC 2.2-8-12](#) provides:

(a) Exemption certificates may be issued [sic.] only by purchasers authorized to issue such certificates by the Department of Revenue. Retail merchants, manufacturers, wholesalers and others who must register with the Department of Revenue and who qualify to purchase exempt from tax under this Act [\[IC 6-2.5\]](#) may issue exemption certificates with respect to exempt transactions. All persons or entities not required to register with the Department as retail merchants, manufacturers, or wholesalers, and who are exempt under this Act [\[IC 6-2.5\]](#) with respect to all or a portion of their purchases are authorized to issue exemption certificates with respect to exempt transaction provided an exemption number has been assigned by the Department of Revenue, or provided that the Department of Revenue has specifically provided a form and manner for issuing exemption certificates without the need for assigning an exemption number.

(b) Retail merchants are required to collect the sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used by the purchaser for an exempt purpose.

(c) All retail sales of tangible personal property for delivery in the state of Indiana shall be presumed to be subject to sales or use tax until the contrary is established. The burden of proof is on the buyer and also on the seller unless the seller receives an exemption certificate.

(d) Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important to the seller to obtain an exemption certificate in order to avoid the necessity for such proof. The mere filing of a Registered Retail Merchant Certificate number is not sufficient to relieve the seller of the responsibility to collect the sales tax or prove exempt use by the buyer.

(e) No exemption certificates are required for sales in interstate commerce, however, proper records must be maintained to substantiate such sales.

(f) An exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed.

(g) An exemption certificate or other evidence supporting an exempt sale must be maintained by the seller for at least three (3) years after the due date of the tax return upon which such exempt transaction is reported.

(h) Exemption certificates may be reproduced provided no change is made in the wording or content.

(Emphasis added).

Read together, these statutes and regulations provide that a hotel operator is a retail merchant when renting accommodations for less than thirty days. However, certain sales and rentals are exempt from sales and use tax when the purchaser or renter is the federal government or an exempt organization.

In its audit report, the Department referred to Sales Tax Information Bulletin 4 (August 2008), 20080827 Ind. Reg. 045080656NRA, which explained that sales to local, state, or federal government employees were exempt only if the government directly paid for those purchases. If the employee paid for the purchase directly, the exemption did not apply even if the employee were to be reimbursed by the government for the purchase. The Department also referred to Sales Tax Information Bulletin 10 (June 2008), 20080702 Ind. Reg. 045080515NRA, which explained that if a member of an exempt organization directly paid for a purchase, that transaction was taxable even if the exempt organization would reimburse the member.

Taxpayer believes that the room rentals in question are exempt under either IC § 6-2.5-5-16, IC § 6-2.5-5-24, or IC § 6-2.5-5-25, since the guests were local, state, or federal government employees, or were members of exempt organizations. Taxpayer states that these guests presented exemption certificates and other identification supporting their claim of exemption. Taxpayer protests that there is no statutory or regulatory authority which allows the Department to place it in the position of policing exemption certificates. The Department disagrees and refers to [45 IAC 2.2-8-12\(b\)](#).

As explained by the two information bulletins referenced above, sales to the exempt organizations are direct sales to the exempt organizations, not to the members. IC § 6-2.5-5-16, IC § 6-2.5-5-24, and IC § 6-2.5-5-25 all provide that the relevant exemptions apply to sales to the organizations, not individuals. If the individuals pay for the rooms, those transactions are then between the hotel and the individual. Even if the exempt organization or government later reimburses the individual, the initial transaction was between the hotel and a non-exempt

person.

Therefore, each exempt hotel room rental consists of two steps. The first step is to present a properly completed exemption certificate. The second step is to present payment by the exempt organization or governmental organization and confirm that the exemption certificate is actually being used by the exempt organization listed on the exemption certificate. Both steps are necessary and are immediately verifiable. These steps are verifiable by any retail merchant, including but not limited to hotels. As evidenced by the Information Bulletins referenced above, the Department has issued clear guidance on the treatment of the transactions at issue.

Taxpayer also indicates that it operates its credit card transactions under the Payment Card Industry Data Security Standards, which it claims preclude it from maintaining copies of credit card statements for fraud and identity protection concerns. However, a private arrangement within a particular industry does not trump clear requirements stated by the Indiana statutes and regulations referenced above. The State imposes an additional burden of verification in the transactions referenced under this item of protest.

Lastly, Taxpayer's reference to US Code Title 18, Part 1, Chapter 33, Head Section 701 ("18 U.S.C. § 701") is mistaken. The federal code section deals with the improper use of official badges, identification cards, and other governmental insignia and does not apply here. 18 U.S.C. § 701 states:

Whoever manufactures, sells, or possesses any badge, identification card, or other insignia, of the design prescribed by the head of any department or agency of the United States for use by any officer or employee thereof, or any colorable imitation thereof, or photographs, prints, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any such badge, identification card, or other insignia, or any colorable imitation thereof, except as authorized under regulations made pursuant to law, shall be fined under this title or imprisoned not more than six months, or both.

(Emphasis added).

The provision of exemption certificates to Taxpayer by its guests is not sufficient, in this instance, to overcome Taxpayer's burden to show that the transactions were indeed exempt. The exemption certificates must be accompanied by proof of payment by the non-for-profit or government entities. Therefore, the Department's audit properly imposed sales tax on these transactions.

FINDING

Taxpayer's protest is respectfully denied on this issue.

II. Use Tax – Exemption – Consumables Provided During Occupancy.

DISCUSSION

The Department assessed Taxpayer use tax on its use of several items which Taxpayer claims are exempt under IC § 6-2.5-5-35. The imposition of use tax on the following items is protested: room key cards and the envelopes in which the cards are inserted, PC Elite folders, guest comment cards, guest notebooks, guest pens, "thank you" matches available at hotel bars. Taxpayer has provided a list of these items attached to an October 1, 2010, letter it provided subsequent to the hearing.

The Department 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).

In accordance with IC § 6-2.5-2-1(a), a sales tax, known as state gross retail tax, is imposed on Indiana retail transactions unless a valid exemption is applicable. IC § 6-2.5-2-1(b) states:

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.

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 when sales tax was paid at the time of purchase pursuant to IC § 6-2.5-3-4. Certain other sales and use tax exemptions are offered. IC § 6-2.5 et seq.

In applying any tax exemption, the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." *Indiana Dept. of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988). The taxpayer claiming exemption has the burden of showing the terms of the exemption statute are met. *General Motors Corp. v. Indiana Dept. of State Revenue*, 578 N.E.2d 399, 404 (Ind. Tax Ct. 1991) aff'd 599 N.E.2d 588 (Ind. 1992) (Internal citations omitted). Additionally "[e]xemption statutes are strictly construed because an exemption releases property from the obligation of bearing its fair share of the cost of government." *Id.*

IC § 6-2.5-5-35 provides an exemption from the sales tax if the person acquiring the property is engaged in the business of renting or furnishing rooms, lodgings, or accommodations in a commercial hotel, motel, inn, tourist camp, or tourist cabin, and the property acquired is used up, removed, or otherwise consumed during the occupation of the room by a guest, or the property is rendered not reusable after the property's first use by a guest during the occupation of the rooms, lodgings, or accommodations.

It is established that Taxpayer is a retail merchant engaged in the business of renting or furnishing rooms,

lodgings or accommodations. IC § 6-2.5-4-4.

Sales Tax Information Bulletin 66 (July 2007), 20070801 Ind. Reg. 045070445NRA, which provides guidance on the application of IC § 6-2.5-5-35, states in its entirety:

I. General Information:

[IC 6-2.5-5-35](#) provides an exemption from the sales tax if the person acquiring the property is engaged in the business of renting or furnishing rooms, lodgings, or accommodations in a commercial hotel, motel, inn, tourist camp, or tourist cabin, and the property acquired is used up, removed, or otherwise consumed during the occupation of the room by a guest, or the property is rendered not reusable after the property's first use by a guest during the occupation of the rooms, lodgings, or accommodations.

II. Items Considered Exempt:

Items that would be included are complimentary toiletry items such as soap, shampoo, tissue paper, plastic cups and any other items not reusable.

III. Non Exempt Items:

The purchase of beds, linens, television sets and other furniture would not be exempt when they are purchased by the person engaged in the business of renting or furnishing room, lodgings or accommodations. The exemption provided in [IC 6-2.5-5-35](#) does not apply to the purchase or use of electricity, water, gas or steam.

The items Taxpayer protested were not subject to use tax are: key cards and the envelopes in which the cards are inserted, PC Elite folders, guest comment cards, guest notebooks, guest pens, and "thank you" matches available at hotel bars. In Taxpayer's protest letter dated July 6, 2010, Taxpayer described the use of some of these items:

Items removed by a guest: disposable room keys, hotel logo pens and notepads. Note: these items were identified as Hotel and Maintenance Supplies ([45 IAC 2.2-3-13](#)) per the IDOR explanation of audit adjustments.

Items nonreusable due to guest use: disposable check out folders which contain the guest folio, disposable guest room keycard packets which hold the room key and have a specific room number written on them, Priority Club folders which are disposable check out folders specific to the member guests, disposable cups, and guest book response cards.

The emphasis of the relevant exemption statute and the Department's Information Bulletin is on the tangible property Taxpayer's guests consume wholly or render unusable - for the guests' benefit - during their occupancy of Taxpayer's facilities. In other words, Taxpayer must show that particular items (1) are completely consumed, used up (not just used), or removed during occupancy, and (2) are used by the guests for the guests' benefit.

Taxpayer provided samples of all of the protested items. Of the items Taxpayer protests the keycard packets, the folders that contain the guest folio, as well as the Priority Club folders are exempt because they all have a particular guest's information written on the item itself for the benefit of the guests and are therefore not reusable by Taxpayer.

All the other items are denied. The disposable room keys may be reused by Taxpayer when recoded for new guests. The guest response cards are used by Taxpayer for Taxpayer's benefit. The hotel logo pens and notepads are not exclusively used by guests.

FINDING

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

III. Tax Administration–Negligence Penalty.

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty for the tax years in question. Taxpayer protests the imposition of penalty. The Department refers to IC § 6-8.1-10-2.1(a), which states in relevant part:

If a person:

...

(3) incurs, upon examination by the department, a deficiency that is due to negligence;

...

the person is subject to a penalty.

The Department refers to [45 IAC 15-11-2\(b\)](#), which 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.

[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.

In this case, the Department determined tax liabilities were incurred due to negligence under [45 IAC 15-11-2\(b\)](#), and so Taxpayer was subject to a penalty under IC § 6-8.1-10-2.1(a). Taxpayer has affirmatively established that it had reasonable cause for its actions. Taxpayer therefore has established that it exercised ordinary business care, as required by [45 IAC 15-11-2\(c\)](#). The negligence penalty will be waived.

FINDING

Taxpayer's protest of the ten-percent negligence penalty is sustained.

SUMMARY

Issue I - Taxpayer is denied on its protest that exemption certificates alone from individuals affiliated with government or not-for-profit agencies is enough to relieve it of the sales tax liability.

Issue II – Taxpayer's use of the keycard packets, the folders that contain the guest folio, as well as the Priority Club folders are exempt. All the other items are denied.

Issue III – Taxpayer is sustained on its protest of the negligence penalty.

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