

Letter of Findings: 04-20110015; 09-20110014; 10-20110013
Gross Retail Tax, County Innkeeper Tax, and Food and Beverage Tax
For the Years 2007, 2008, and 2009

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ISSUES

I. Hotel Accommodations – Gross Retail Tax / Innkeepers' Tax.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-4-4; IC § 6-2.5-5-25; IC § 6-8.1-3-3; IC § 6-8.1-5-1; IC § 6-9-8-2; *Mynsberge v. Dep't of State Revenue*, 716 N.E.2d 629 (Ind. Tax Ct. 1999); *Tri-States Double Cola Bottling Co. v. Dep't of State Revenue*, 706 N.E.2d 282 (Ind. Tax Ct. 1999); *Indiana Dept. of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454 (Ind. Ct. App. 1988); Sales Tax Information Bulletin 10 (June 2008); Sales Tax Information Bulletin 10 (June 2004); Sales Tax Information Bulletin 10 (June 2002); Letter of Findings 04-20091028 (April 29, 2010); Letter of Findings 04-20090967 (April 29, 2010); Letter of Findings 04-20060286 (December 18, 2006).

Taxpayer argues for an exemption from Gross Retail (Sales) or Innkeepers' Tax on the sale of hotel accommodations to not-for-profit entities.

II. Government Agencies – Gross Retail Tax / Innkeepers' Tax.

Authority: IC § 6-8.1-5-1(c); Sales Tax Information Bulletin 4 (August 2008); Sales Tax Information Bulletin 4 (July 2007); Sales Tax Information Bulletin 4 (May 2002).

Taxpayer argues for an exemption from collecting sales tax and Innkeepers' Tax when it rented hotel accommodations to federal government agencies.

III. Meals and Beverages – Gross Retail Tax / Food and Beverage Tax.

Authority: IC § 6-2.5-5-25; IC § 6-9-12-3; IC § 6-9-12-4; [45 IAC 2.5-5-55](#); Sales Tax Information Bulletin 10 (June 2008).

Taxpayer argues for an exemption from sales tax and food and beverage tax on the price paid by not-for-profit organizations for numerous meals and beverages sold to not-for-profit organizations.

IV. Tax Administration – Taxpayer Education.

Authority: IC § 6-8.1-3-3.5; IC § 6-8.1-12-3.

Taxpayer argues that the Department has an obligation to notify taxpayers of changes in educational or informational communications.

STATEMENT OF FACTS

Taxpayer operates a hotel located in central Indiana with more than 220 guest rooms. Within the hotel, taxpayer operates a restaurant, lounge, "business center," and both snack and gift shops. Taxpayer provides meeting, convention, catering, and banquet facilities.

The Department of Revenue ("Department") conducted an audit review of taxpayer's business records for the 2007, 2008, and 2009 tax years ("Tax Years"). As a result of that audit, the Department issued proposed notices of additional Gross Retail (sales) tax, County Innkeepers' Tax, and Food and Beverage 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 representatives explained the basis for the protest. This Letter of Findings results.

I. Hotel Accommodations – Gross Retail Tax / Innkeepers' Tax.

DISCUSSION

As a threshold issue, taxpayer bears responsibility to establish that the existing tax assessments are incorrect. IC § 6-8.1-5-1(c) states that, "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 maintains that it was not required to collect sales or Innkeepers' Tax from organizations which presented taxpayer an exemption certificate when the organizations rented individual guest rooms. Taxpayer argues that it was not required to collect sales tax or Innkeepers' Tax from organizations which presented taxpayer an exemption certificate when the organization purchased prepared meals on behalf of the organization's members and guests.

Indiana imposes a sales tax on retail transactions. IC § 6-2.5-2-1 states as follows:

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.

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.
- (c) For purposes of this section, "consideration" includes a membership fee charged to a customer.
- (d) Notwithstanding subsection (a), a person is not a retail merchant making a retail transaction if:
 - (1) the person is a promoter that rents a booth or display space to an exhibitor; and
 - (2) the booth or display space is located in a facility that:
 - (A) is described in subsection (a)(2); and
 - (B) is operated by a political subdivision (including a capital improvement board established under [IC 36-10-8](#) or [IC 36-10-9](#)) or the state fair commission.

This subsection does not exempt from the state gross retail tax the renting of accommodations by a political subdivision or the state fair commission to a promoter or an exhibitor.

In addition to the state-level sales tax, Marion County also imposes an "Innkeepers' Tax" on hotel accommodations. IC § 6-9-8-2 states as follows:

- (a) Each year a tax shall be levied on every person engaged in the business of renting or furnishing, for periods of less than thirty (30) days, any lodgings in any hotel, motel, inn, tourist camp, tourist cabin, or any other place in which lodgings are regularly furnished for a consideration.
- (b) This tax shall be in addition to the state gross retail tax and use tax imposed on such persons by [IC 6-2.5](#). The county fiscal body may adopt an ordinance to require that the tax be reported on forms approved by the county treasurer and that the tax shall be paid monthly to the county treasurer. If such an ordinance is adopted, the tax shall be paid to the county treasurer not more than twenty (20) days after the end of the month the tax is collected. If such an ordinance is not adopted, the tax shall be imposed, paid, and collected in exactly the same manner as the state gross retail tax is imposed, paid, and collected under [IC 6-2.5](#).
- (c) All of the provisions of [IC 6-2.5](#) relating to rights, duties, liabilities, procedures, penalties, definitions, exemptions, and administration shall be applicable to the imposition and administration of the tax imposed by this section except to the extent such provisions are in conflict or inconsistent with the specific provisions of this chapter or the requirements of the county treasurer. Specifically, and not in limitation of the foregoing sentence, the terms "person" and "gross income" shall have the same meaning in this section as they have in [IC 6-2.5](#).
- (d) If the tax is paid to the department of state revenue, the returns to be filed for the payment of the tax under this section may be either a separate return or may be combined with the return filed for the payment of the state gross retail tax as the department of state revenue may determine by rule. (e) If the tax is paid to the department of state revenue, the amounts received from this tax shall be paid monthly by the treasurer of state to the treasurer of the capital improvement board of managers of the county upon warrants issued by the auditor of state.

The Marion County Innkeepers' Tax incorporates the "rights duties, liabilities, procedures, penalties, definitions, exemptions" and administrative procedures set out in IC § 6-2.5. IC § 6-9-8-2(c). Simply stated: if a transaction is exempt for sales tax purposes, it is exempt for purposes of determining the Innkeepers' Tax.

Asserting that it collected from its customers exemption certificates or otherwise exempted transactions from either sales tax or the Innkeepers' Tax based upon customers' payment methods, taxpayer argues that the exemption set out in IC § 6-2.5-5-25 applies. That statute provides that:

- (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.

However, Sales Tax Information Bulletin 10 provides the Department's stated position that hotel accommodations rented for the private benefit of the recipient fall outside the purview of the not-for-profit exemption. Sales Tax Information Bulletin 10 (June 2008), 20080702 Ind. Reg. 045080515NRA, states:

For a purchase by a nonprofit organization to qualify for exemption, the article purchased must be used for the same purpose as that for which the organization is being exempted. Purchases for the private benefit of any member of the organization or for individuals, such as meals and lodgings, are not eligible for exemption.

See also Sales Tax Information Bulletin 10 (July 2004) (27 Ind. Reg. 3385)(repeating that "[p]urchases for the private benefit of any member of the organization or for individuals such as meals and lodgings are not eligible for exemption." (Emphasis added)); Sales Tax Information Bulletin 10 (June 2002) (25 Ind. Reg. 3936)(restating that "[p]urchases for the private benefit of any member of the organization or for any other individual, such as meals or lodgings, are not eligible for exemption.").

In addition to the statutory "burden" imposed by IC § 6-8.1-5-1(c), 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).

IC § 6-2.5-5-25, like all tax exemption provisions, is strictly construed against exemption from the tax. Tri-States Double Cola Bottling Co. v. Dep't of State Revenue, 706 N.E.2d 282, 283 (Ind. Tax Ct. 1999); Mynsberge v. Dep't of State Revenue, 716 N.E.2d 629, 636 (Ind. Tax Ct. 1999).

Therefore, in order for the taxpayer to prevail on the issue, the taxpayer bears the burden of proving that the assessment is incorrect and that the "strictly construed" exemption should apply to the facts and circumstances surrounding the particular transactions.

Taxpayer argues that its own accounting practices prior to the Tax Years should take precedence; that its continuing practice of obtaining exemption certificates should relieve taxpayer from collecting sales tax or the Innkeepers' Tax from not-for-profit organizations. Nonetheless, since August 2005, the Department's "General Sales Tax Exemption Certificate," (ST-105) has specifically stated that the exemption applies to "Sales to nonprofit organizations claiming exemption pursuant to Sales Tax Information Bulletin [] 10" but that the exemption may "not be used for personal hotel rooms and meals."

The Department's stated position on the issue appears clear and consistent. Any member of a not-for-profit organization making purchases for that member's private benefit does not enjoy an exemption and hotel room accommodations – secured for a not-for-profit's member – are inherently a "private benefit." The sponsoring not-for-profit organization enjoys a tangential "benefit" at best. As stated in Sales Tax Information Bulletin 10 (June 2008), "Purchases for the private benefit of any member of the organization or for individuals, such as meals and lodgings, are not eligible for exemption." Letter of Findings 04-20090967 (April 29, 2010) furthers the Department's position: "[E]ach 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." See also Letter of Findings 04-20091028 (April 29, 2010)(restating the two-step exempt hotel rental analysis); Letter of Findings 04-20060286 (December 18, 2006)(stating that the retail merchant must collect a valid exemption certificate which "certifies, in the form prescribed by the department, that the acquisition is exempt from the [sales and] use tax.").

Taxpayer has not provided sufficient evidence or explanation to support its challenge to the imposition of sales tax and Innkeepers' Tax on the sale of hotel accommodations.

FINDING

Taxpayer's protest is respectfully denied.

II. Government Agencies – Gross Retail Tax / Innkeepers' Tax.

DISCUSSION

Taxpayer maintains that it was not required to collect sales tax or Innkeepers' Tax on the rental of hotel rooms to federal governmental agencies.

The Department sets out its position on this issue for the Tax Years in Sales Tax Information Bulletin 4 (August 2008), 20080827 Ind. Reg. 045080656NRA, which states in part:

The United States Constitution prohibits any state from imposing any tax directly on the U.S. government or any of its agencies, unless the Congress consents to being taxed. Thus, much federal purchasing, leasing, and renting of tangible personal property; the use of utilities; meals consumed in restaurants; and other normally taxable goods or services (including accommodations for fewer than 30 days) are exempt from Indiana sales and other transaction-based taxes.

However, the fact that the U.S. government may ultimately reimburse an employee who paid the tax does not exempt such a purchase from tax. For example, if an employee of the Internal Revenue Service pays for lodging costs from his own funds, tax should be collected at the time of payment. But if the same employee pays for the lodging with a credit card in the name of and billed directly to the Internal Revenue Service, this is a direct expenditure by the U.S. government. Therefore, this is exempt from the sales tax. A vendor is not

required to collect sales tax on sales made directly to the U.S government if the exemption can be verified by documenting the facts and circumstances of the transaction. (Emphasis added).

See also Sales Tax Information Bulletin 4 (July 2007), 20070801 Ind. Reg. 045070434NRA; Sales Tax Information Bulletin 4 (May 2002), 25 Ind. Reg. 3931 (containing the same explanation of the Department's position).

Prior to, or during the administrative hearing, taxpayer did not provide additional evidence that would allow the Department to verify those transactions which occurred between itself and the U.S. government.

Under IC § 6-8.1-5-1(c), Taxpayer has failed to meet its burden of establishing that it conducted transactions directly with the U.S. government and, therefore, that taxpayer complied with the requirements found in Sales Tax Information Bulletin 4.

FINDING

Taxpayer's protest is denied.

III. Meals and Beverages – Gross Retail Tax / Food and Beverage Tax.

DISCUSSION

The audit found that taxpayer had not charged nor collected sales tax, or food and beverage tax, on numerous food and beverage purchases by not-for-profit organizations or government entities.

IC § 6-9-12 imposes a tax designated as the "Marion County Food and Beverage Tax." The tax is imposed on any "transaction in which food or beverage is furnished, prepared, or served: (1) for consumption at a location, or on equipment, provided by a retail merchant; (2) in a county in which a consolidated first class city is located; and (3) by a retail merchant for a consideration." IC § 6-9-12-3(a). The exemptions allowed to retail merchants under IC § 6-2.5 are also allowed for taxpayers that are subject to Indiana's county Food and Beverage Tax. IC § 6-9-12-4.

Taxpayer maintains that it was not required to collect the sales tax, or Food and Beverage Tax, again arguing that exemption certificates or respective customers' specific payment methods exempted the subject transactions from either sales tax or the Food and Beverage Tax. For purposes of this Letter of Findings, the Department agrees with taxpayer's assertion that, "Since the Marion County Food and Beverage Tax incorporates the provisions of 6-2.5 relating to rights, duties, liabilities, procedures, penalties, definitions, exemptions, and administration, to the extent that any provision of accommodations in Marion County are subject to sales tax, then those transactions are also subject to food and beverage tax." However, the Department is unable to agree that the purchases are exempt pursuant to IC § 6-2.5-5-25 because providing food and beverages to the organizations' constituents and/or guests does not – on its face – advance the not-for-profit's purpose. Sales Tax Information Bulletin 10 (June 2008) clearly provides that:

For a purchase by a nonprofit organization to qualify for exemption, the article purchased must be used for the same purpose as that for which the organization is being exempted. Purchases for the private benefit of any member of the organization or for individuals, such as meals and lodgings, are not eligible for exemption. (Emphasis in original).

See also [45 IAC 2.2-5-55\(b\)\(3\)](#)(adding that "[t]he article purchased must be used for the same purpose as that for which the organization is being exempted. Purchases for the private benefit of any member of the organization or for any other individual, such as meals or lodging, are not eligible for exemption. Purchases used for social purposes are never exempt."). If a qualified not-for-profit organization prepares and serves meals as a fundraising activity, and uses the proceeds received for the purpose for which such organization is granted exemption from sales tax, and such organization does not conduct selling activities of any nature on more than 30 days in a calendar year, such meal preparation and service does not require the collection of sales tax. See Sales Tax Information Bulletin 10 (July 2004) 27 Ind. Reg. 3385; Sales Tax Information Bulletin 10 (June 2008) 20080702 Ind. Reg. 045080515NRA.

Taxpayer has not shown that taxpayer's food and beverage service further served the purposes of the respective exempt organizations. Because taxpayer does not fit, nor resemble, the definition of a not-for-profit organization, taxpayer has not overcome the Department's determination that taxpayer should have collected sales tax and Food and Beverage Tax on the food and beverages allegedly furnished in conjunction with the rental of taxpayer's rooms and meeting facilities.

The Department's General Sales Tax Exemption Certificate clearly states that the certificate "[m]ay not be used for personal hotel rooms and meals."

FINDING

Taxpayer's protest is respectfully denied.

IV. Tax Administration – Taxpayer Education.

Taxpayer further asserts that it collected exemption certificates, or otherwise controlled "the exempt nonprofit sales" in good faith and argues for an obligation that the Department notify taxpayers whenever the Department revises communications falling within the Department's taxpayer education and information program.

IC § 6-8.1-12-3 provides that the aforementioned program must include:

(1) Communications with taxpayers listed in section 2 of this chapter that explain in simplified terms the most common errors of taxpayer noncompliance that the taxpayers are likely to encounter.

(2) Communications with taxpayers described in section 2(1) of this chapter that explain in simplified terms the duties of the taxpayer and the most common areas of noncompliance by this group of taxpayers.

(3) Participation in small business seminars and similar programs organized by state and local agencies.

(4) Review and revision of taxpayer educational materials produced by the department to identify the most common errors of taxpayer noncompliance that the taxpayers are likely to encounter.

The Department completes its obligation by making guidelines available for public inspection and copying under IC § 6-8.1-3-3.5:

Subject to subsection (b), the department shall publish in the Indiana Register under [IC 4-22-7-7](#) and make available for public inspection and copying under [IC 5-14-3](#) information bulletins, revenue rulings (including, after complying with subsections (b) through (e), letters of findings), and other guidelines that:

(1) are issued by the department; and

(2) concern a listed tax.

(b) When the department issues a letter of findings, the department shall provide a copy of the letter of findings to the taxpayer to which the letter of findings pertains. The department shall notify the taxpayer of the taxpayer's right to delete information described under subsection (c).

By taxpayer's own admission, taxpayer routinely accessed and followed the guidelines provided in the Department's communications. Pursuant to IC § 6-8.1-3-3.5, the Department publishes its letters of findings and information bulletins in the Indiana Register. The Department's creation, publication, and periodic revision of the applicable sales tax information bulletins falls within the requirements of IC§ 6-8.1-12-3.

FINDING

Taxpayer's protest is respectfully denied.

SUMMARY

Taxpayer's challenge to the imposition of tax on the rental of hotel accommodations to not-for-profit organizations is denied. Taxpayer's protest challenging the imposition of tax on transactions paid for directly by the U.S. government is also denied. Taxpayer's protest challenging the imposition of sales tax, or Food and Beverage Tax, on food and beverages sold to not-for-profit or government entities is denied. Finally, taxpayer's challenge to the imposition of the aforementioned taxes on the aforementioned transactions based upon taxpayer's argument that the Department failed to abide by its obligations under the taxpayer education and information program is respectfully denied.

Posted: 06/29/2011 by Legislative Services Agency

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