

Letter of Findings: 04-20100334
Sales Tax
For the Years 2005, 2006, 2007, 2008, and 2009

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ISSUES

I. Sales and Use Tax – Imposition.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-4-1; IC § 6-2.5-1-5; IC § 6-8.1-5-1; [45 IAC 15-3-2](#); [45 IAC 2.2-3-3](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the assessment of sales tax.

II. Tax Administration – Negligence Penalty.

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

Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer, an out-of-state company, is a full service printer engaged in business in Indiana. The Indiana Department of Revenue ("Department") conducted a sales tax audit for tax years 2005 through 2009. The audit determined that Taxpayer failed to maintain adequate records required by law and also failed to collect sales tax on tangible personal property which Taxpayer sold and delivered to customers in Indiana for these years.

Pursuant to the audit, the Department assessed Taxpayer additional sales tax on sales of tangible personal property, interest, and penalty. Taxpayer timely protests the assessments. A hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales and Use Tax – Imposition.

DISCUSSION

The Department's audit assessed additional sales tax because Taxpayer failed to collect sales tax on tangible personal property which it sold to customers in Indiana during tax years 2005 through 2009. Taxpayer, to the contrary, claims that it was not responsible for collecting sales tax because it did not engage in business in Indiana. Alternatively, Taxpayer asserts that its sales to its Indiana customers were exempt from Indiana sales tax. Taxpayer also maintains that, in 2004, 2007, and 2010, it contacted the Department and the Department's employees told Taxpayer that it is not responsible for collecting and remitting Indiana sales tax to the Department.

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; 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 Dept of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

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.

IC § 6-2.5-3-1(c) defines:

"A retail merchant engaged in business in Indiana" includes any retail merchant who makes retail transactions in which a person acquires personal property or services for use, storage, or consumption in Indiana and who:

- (1) maintains an office, place of distribution, sales location, sample location, warehouse, storage place, or other place of business which is located in Indiana and which the retail merchant maintains, occupies, or uses, either permanently or temporarily, either directly or indirectly, and either by the retail merchant or through a representative, agent, or subsidiary;
- (2) maintains a representative, agent, salesman, canvasser, or solicitor who, while operating in Indiana

under the authority of and on behalf of the retail merchant or a subsidiary of the retail merchant, sells, delivers, installs, repairs, assembles, sets up, accepts returns of, bills, invoices, or takes orders for sales of tangible personal property or services to be used, stored, or consumed in Indiana;

(3) is otherwise required to register as a retail merchant under [IC 6-2.5-8-1](#); or

(4) may be required by the state to collect tax under this article to the extent allowed under the Constitution of the United States and federal law.

[45 IAC 2.2-3-3](#) further explains:

A retail merchant engaged in business in Indiana shall include:

(1) Any retail merchant engaged in selling at retail for use, storage, or consumption in Indiana and maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, and office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business in Indiana.

(2) Any retail merchant engaged in selling at retail for use, storage, or consumption in Indiana and having any representative, agent, salesman, canvasser or solicitor operating in Indiana under the authority of the retail merchant or its subsidiary for the purpose of selling, delivering, or taking orders for the sale of any tangible personal property for use, storage, or consumption in Indiana.

In this instance, in addition to calling perspective Indiana clients from Taxpayer's office, Taxpayer states that its employees, "who also have some part time sales responsibilities," "occasionally" use their own cars to call on the Indiana clients and take "proof sheets" or samples of paper to the customers in Indiana. Taxpayer also maintains that "some employees live in Indiana and very rarely drop off goods to Indiana clients on their way home." Regardless of the frequency of its business activities in Indiana, Taxpayer is a retail merchant engaged in business in Indiana pursuant to the above mentioned statutes and regulations. Thus, Taxpayer is responsible for collecting sales tax on its sales to Indiana customers.

Alternatively, Taxpayer asserts that its sales to the customers were exempt from Indiana sales tax. Specifically, Taxpayer submits additional documentation claiming that some of its Indiana customers were not-for-profit organizations. Thus, Taxpayer believes that it is not responsible for collecting sales tax. Upon reviewing Taxpayer's documentation, the following transactions were exempt from sales tax and the Department will recalculate Taxpayer's liabilities in a supplemental audit review.

Audit	Date	Reference	Customer	Item Description	Amount
Pg 11	5/4/2008	1883	XXX MP CO	XXXXXXXXX	\$100
Pg 11	5/5/2008	2798	XXX MP CO	XXXXXXXXX	\$196

Taxpayer also claims that it is not responsible for collecting sales tax on its charges of "postage," which were used in mailing the promotion materials on behalf of its Indiana customers.

IC § 6-2.5-1-5, in pertinent part, provides:

(a) Except as provided in subsection (b), "gross retail income" means the total amount of consideration, including cash, credit, property, and services, for which tangible personal property is sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for:

(1) the seller's cost of the property sold;

(2) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller;

(3) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges;

(4) delivery charges; or

(5) consideration received by the seller from a third party if:

(A) the seller actually receives consideration from a party other than the purchaser and the consideration is directly related to a price reduction or discount on the sale;

(B) the seller has an obligation to pass the price reduction or discount through to the purchaser;

(C) the amount of the consideration attributable to the sale is fixed and determinable by the seller at the time of the sale of the item to the purchaser; and

(D) the price reduction or discount is identified as a third party price reduction or discount on the invoice received by the purchaser or on a coupon, certificate, or other documentation presented by the purchaser.

For purposes of subdivision (4), **delivery charges are charges by the seller for preparation and delivery of the property to a location designated by the purchaser of property**, including but not limited to transportation, shipping, **postage**, handling, crating, and packing.

In this instance, Taxpayer charged its customers "postage" to deliver the promotional materials to the potential customers of its customers. Taxpayer's customers did not just purchase the stamps from the post office. Rather, Taxpayer's customers paid Taxpayer for the delivery of their purchases—the promotion materials and directly delivered the promotion materials to their prospective customers. Thus, the postage charge was actually

the delivery charge and, therefore, as specifically stated in the concluding flush language of IC § 6-2.5-1-5(a), postage is included in the definition of delivery charges and subject to Indiana sales tax.

Additionally, Taxpayer maintains that it contacted the Department "three times as to the requirements of collecting sales tax" and was informed by the Department that "we were not required to collect sales tax." Thus, Taxpayer believes that it is not responsible for the Indiana sales tax.

Taxpayer's reliance is misplaced. [45 IAC 15-3-2\(e\)](#) states:

Oral opinions or advice will not be binding upon the department. However, taxpayers may inquire as to whether or not the department will make a ruling or determination based on the facts presented by the taxpayer. If the taxpayer wishes a ruling by the department, the formal request must be in writing. A taxpayer may also orally receive technical assistance from the department in preparation of returns. However this advice is advisory only and is not binding in the latter examination of returns.

In this instance, Taxpayer did not request a ruling from the Department pursuant to [45 IAC 15-3-2\(e\)](#). Rather, Taxpayer placed phone calls to the Department and spoke to state employees obtaining oral opinions or advice.

Given the totality of the circumstances, in the absence of other supporting documentation, the Department is not able to agree that Taxpayer has met its burden.

FINDING

Taxpayer's protest is sustained in part and respectfully denied in part. Taxpayer's sales to its customer (XXX MP CO) concerning transaction reference numbers 1883 and 2798 are exempt. However, the remainders of Taxpayer's sales were subject to Indiana sales tax and Taxpayer is responsible for collecting and remitting the sales tax to the Department. The Department will recalculate Taxpayer's tax liability in a supplemental audit review.

II. Tax Administration – Negligence Penalty.

DISCUSSION

Taxpayer also protests the imposition of the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1, the Department may assess a ten (10) percent negligence penalty if the taxpayer:

- (1) fails to file a tax return;
- (2) fails to pay the full amount of tax shown on the tax return;
- (3) fails to remit in a timely manner the tax held in trust for Indiana (e.g., a sales tax); or
- (4) fails to pay a tax deficiency determined by the Department to be owed by a taxpayer.

[45 IAC 15-11-2\(b\)](#) further 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.

The Department may waive a negligence penalty as provided in [45 IAC 15-11-2\(c\)](#), in part, as follows: 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. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

In this instance, the Department's audit noted that Taxpayer is a non-filer and did not maintain adequate records. Additionally, Taxpayer did not provide sufficient documentation establishing that its failure to pay tax or timely remit tax was due to reasonable cause and not due to negligence.

FINDING

Taxpayer's protest on the imposition of the negligence penalty is respectfully denied.

SUMMARY

For the reasons discussed above, Taxpayer's protest is sustained in part and respectfully denied in part.

Taxpayer's sales to its customer (XXX MP CO) concerning transaction reference numbers 1883 and 2798 were exempt. However, the remainders of Taxpayer's sales were subject to Indiana sales tax and Taxpayer is responsible for collecting and remitting the sales tax to the Department. Taxpayer's protest on the imposition of the negligence penalty is also respectfully denied. The Department will recalculate Taxpayers tax liability in a supplemental audit review.

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