

Letter of Findings Number: 04-20100587
Use Tax
For Tax Years 2007-09

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ISSUE

I. Use Tax—Equipment Rental.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-3-7; IC § 6-8.1-5-1; [45 IAC 2.2-4-26](#); Sales Tax Information Bulletin 60 (20060823 Ind. Reg. 045060287NRA).

Taxpayer protests the imposition of use tax on the rental of construction equipment which it believes is exempt from use tax.

STATEMENT OF FACTS

Taxpayer is an Indiana corporation. During the audit period, Taxpayer rented construction equipment to its customers and also performed construction services using the same equipment itself. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had made purchases or rentals of tangible personal property in the audit years of 2007, 2008, and 2009, without paying sales tax at the time of purchase. The Department therefore issued proposed assessments for use tax and interest on those purchases and/or rentals for 2007, 2008, and 2009. Taxpayer protests that one of its customers is an exempt entity and that it was not required to charge sales tax on the transactions with that customer and that it therefore does not owe tax on those transactions. An administrative hearing was held and this Letter of Findings results. Prior to the hearing, Taxpayer and the Department agreed to remove assessments for sales tax regarding sales to customers which had not paid Taxpayer for those purchases. Further facts will be supplied as required.

I. Use Tax—Equipment Rental.

DISCUSSION

Taxpayer protests the imposition of use tax on certain rentals during the tax years 2007, 2008, and 2009. Taxpayer states that it performed construction services for an exempt customer and that it believed such transactions would be exempt from sales tax. The Department considered such transactions to subject Taxpayer itself to sales or use tax on its use of the equipment used in the provision of the construction services. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

The sales tax is imposed under IC § 6-2.5-2-1, which 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.

A complimentary use tax is imposed under IC § 6-2.5-3-2(a), which states:

An 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, regardless of the location of that transaction or of the retail merchant making that transaction.

Taxpayer protests that its customer was an exempt entity and that it was therefore not required to collect sales tax on the provision of construction services to that entity. IC § 6-2.5-3-4 provides:

(a) The storage, use, and consumption of tangible personal property in Indiana is exempt from the use tax if:

(1) the property was acquired in a retail transaction in Indiana and the state gross retail tax has been paid on the acquisition of that property; or

(2) the property was acquired in a transaction that is wholly or partially exempt from the state gross retail tax under any part of [IC 6-2.5-5](#), except [IC 6-2.5-5-24](#)(b), and the property is being used, stored, or consumed for the purpose for which it was exempted.

(b) If a person issues a state gross retail or use tax exemption certificate for the acquisition of tangible personal property and subsequently uses, stores, or consumes that property for a nonexempt purpose, then the person shall pay the use tax.

Also, IC § 6-2.5-3-7 provides:

(a) A person who acquires tangible personal property from a retail merchant for delivery in Indiana is presumed to have acquired the property for storage, use, or consumption in Indiana, unless the person or the retail merchant can produce evidence to rebut that presumption.

(b) A retail merchant is not required to produce evidence of nontaxability under subsection (a) if the retail merchant receives from the person who acquired the property an exemption certificate which certifies, in the

form prescribed by the department, that the acquisition is exempt from the use tax.

Taxpayer also refers to Sales Tax Information Bulletin 60 (20060823 Ind. Reg. 045060287NRA), which provides on page two:

"Time and material contract" is a contract in which all the charges for labor, construction materials, and other items are stated separately.

Information Bulletin 60 also provides on page two:

If a construction contractor purchases construction materials to be used in a time and material contract, the construction contractor is a retail merchant and may purchase the construction materials exempt from sales tax. However, the construction contractor must collect sales tax on the resale of the construction materials and remit the sales tax, unless the customer presents a properly completed ST-105 General Sales Tax Exemption Certificate.

Taxpayer believes that these passages provide that it was not responsible for paying sales or use tax on its use of rental equipment in providing services to its exempt customer. Taxpayer is incorrect.

As provided on page three of Information Bulletin 60:

Utilities, machinery, tools, forms, supplies, equipment, or any other items used or consumed by the construction contractor and which do not become incorporated into real property are not exempt regardless of the exempt status of the person for whom the contract is performed.

(Emphasis added).

This is supported by [45 IAC 2.2-4-26](#), which provides:

(a) A person making a contract for the improvement to real estate whereby the material becoming a part of the improvement and the labor are quoted as one price is liable for the payment of sales tax on the purchase price of all material so used.

(b) A person selling tangible personal property to be used as an improvement to real estate may enter into a completely [sic.] separate contract to furnish the labor to install or construct such improvement, in which case the sales tax shall be collected and remitted by such seller on the materials sold for this purpose. Such sales of materials must be identifiable as a separate transaction from the contract for labor. The fact that the seller subsequently furnished information regarding the charges for labor and material used under a flat bid quotation shall not be considered to constitute separate transactions for labor and material.

(c) Tangible personal property purchased to become a part of an improvement to real estate under a contract with an organization entitled to exemption is eligible for exemption when purchased by the contractor.

(d) In order to be exempt on such purchases the contractor must be registered as a retail merchant and must obtain an exemption certificate from the exempt organization, and must issue an exemption certificate to his supplier.

(e) Utilities, machinery, tools, forms, supplies, equipment or any other items used by or consumed by the contractor and which do not become a part of the improvement to real estate are not exempt regardless of the exempt status of the person for whom the contract is performed.

(Emphasis added).

Therefore, the machinery which Taxpayer used to provide services to its customer did not become incorporated into real property, and therefore were not exempt. Taxpayer's customer's exempt status is not relevant to Taxpayer's rental of the construction machinery.

In conclusion, the Department has agreed to remove assessments for sales tax regarding sales to customers which had not paid Taxpayer for those purchases. Taxpayer's protest of the imposition of use tax on its rental of construction equipment is denied. That machinery was not incorporated into real property and is therefore taxable to Taxpayer, as provided above.

FINDING

Taxpayer's protest is sustained regarding sales for which it has not been paid. Taxpayer's protest is denied regarding its rental of construction equipment.

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