

Letter of Findings Number: 04-20100652P
Sales/Use Tax
For Tax Years 2007- 2009

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ISSUES

I. Sales/Use Tax—Exemption Certificates.

Authority: IC § 6-8.1-5-1(c); IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-7; Indiana Dep't of State Revenue v. Interstate Warehousing, 783 N.E.2d 248, 250 (Ind. 2003); [45 IAC 2.2-8-12](#).

Taxpayer protests the assessment of tax for failure to collect sales tax and the assessment of use tax on mapping software.

II. Tax Administration—Penalty.

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

Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer sells "[h]eating elements and temperature controls for heating solids, liquids or gases...." Taxpayer was audited, with the auditor finding that "taxpayer failed to collect tax or obtain exemption certificates from customers for the sales of tangible personal property." The auditor also found that Taxpayer had "no use accrual system in place...." In addition to the proposed tax assessment, a ten percent negligence penalty was also imposed. Taxpayer filed a protest. An administrative hearing was conducted and this Letter of Findings ("LOF") results. Further facts will be supplied as required.

I. Sales/Use Tax—Exemption Certificates.

DISCUSSION

At the outset, the Department notes that under IC § 6-8.1-5-1(c): "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." The Department also notes that the rules of statutory construction require that exemption statutes be strictly construed against the Taxpayer. Indiana Dep't of State Revenue v. Interstate Warehousing, 783 N.E.2d 248, 250 (Ind. 2003).

Regarding sales tax, 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. (Emphasis added).

Also, 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, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a).

IC § 6-2.5-3-7 states in part:

- (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. However, 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.

Also, the Department notes that [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).

Taxpayer in its protest letter states that it has included "ST-105 certificates from a few of the companies" that were in the audit and requests that it be given credit for those companies. After the hearing, Taxpayer also forwarded additional documentation to the Department.

Regarding the protested items where Taxpayer was able to obtain and provide exemption certificates from companies, the Taxpayer's protest is sustained. The remaining protested issues will be addressed below.

After the hearing the Taxpayer provided the Department with an e-mail from one of its customers regarding sales tax that was not paid at the time of purchase. The e-mail from the customer to Taxpayer states that "use tax" was "paid on these invoices," and then lists five transactions. Only one of those five is relevant to Taxpayer's protest. Regarding that relevant transaction, the e-mail says "Paid \$0.00 – Should owe \$8.66." Thus despite the e-mail's first line stating use tax was paid (the State to which use tax was paid is not mentioned), for the relevant item it says "Paid \$0.00" and then lists what should have been paid. Taxpayer has not met its burden of proof under IC § 6-8.1-5-1(c).

Next, the Taxpayer argues that one of its customers filed for bankruptcy and another closed for business. Taxpayer provided the Department with an article showing that the one customer filed bankruptcy and an industrial real estate listing for the other company. Taxpayer has not met its burden of proof under IC § 6-8.1-5-1(c). In neither case has Taxpayer met the requirements of [45 IAC 2.2-8-12](#).

In a fax cover sheet Taxpayer also states that, regarding two other companies, that "[Company P] was a small machine repair shop and [Taxpayer] sold them parts to repair machines, however [Taxpayer] cannot find any info for them[.]" and that regarding "[Company C] is actually back open. They had filed bankruptcy and did a restructuring and [Taxpayer] [has] left a message for them to send [Taxpayer] their ST-105." Again, Taxpayer has not met its burden of proof. Taxpayer has not met the requirements of [45 IAC 2.2-8-12](#).

Finally, Taxpayer protests that two purchases that it made were taxed. The Audit Report states, "The taxpayer failed to pay tax on software... and other taxable purchases." At issue is computer mapping software that Taxpayer bought. Taxpayer's argument is unclear, but it appears to be as follows. Taxpayer purchased mapping software from Company G. Taxpayer then sent another company (hereinafter "Company W") a copy of the invoice(s) for the mapping software. Company W then credited Taxpayer's receivables account with Company W for Taxpayer's purchase of the mapping software from Company G. The Department notes that the relevant point is that Taxpayer bought mapping software from Company G without paying sales tax to the State of Indiana. Taxpayer has not established why Company W's crediting of Taxpayer's account with Company W has any bearing on the taxability of the purchase by Taxpayer from Company G. Taxpayer has failed to meet its burden of proof under IC § 6-8.1-5-1(c). Taxpayer owes use tax under IC § 6-2.5-3-2 for the mapping software.

FINDING

Taxpayer is sustained for the transactions that Taxpayer was able to provide the Department with ST-105 Exemption Certificates. Taxpayer's arguments are denied regarding all other protested items.

II. Tax Administration—Penalty.

DISCUSSION

Taxpayer protests the imposition of the ten percent negligence penalty. The waiver of the penalty is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. IC § 6-8.1-10-2.1. The Indiana Administrative Code, [45 IAC 15-11-2](#) further provides in relevant part:

(b) "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.

(c) 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.

(Emphasis added).

As the Audit Report noted, Taxpayer "failed to collect tax or obtain exemption certificates from customers of tangible personal property." As part of its protest, Taxpayer was able to get some of the exemption certificates. Also, per the Audit Report, Taxpayer had "no use accrual system in place even though during the audit period tax was not paid on some taxable purchases." The Department finds that Taxpayer has not "demonstrate[d] that it exercised ordinary business care and prudence" under [45 IAC 15-11-2\(c\)](#).

FINDING

Taxpayer's protest of the penalty is denied.

SUMMARY

Taxpayer is sustained for the transactions that Taxpayer was able to provide the Department with ST-105 Exemption Certificates. Taxpayer's arguments are denied regarding all other protested items. Taxpayer is also denied regarding its penalty protest.

Posted: 09/28/2011 by Legislative Services Agency
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