

Letter of Findings Number: 40-20110069
Utility Receipts Tax
For Tax Years 2003-2005

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ISSUE

I. Utility Receipts Tax—Imposition.

Authority: IC § 6-2.3-1-4; IC § 6-2.3-1-14; IC § 6-2.3-2-1; IC § 6-2.3-3-5; IC § 6-8.1-5-1; Internet Tax Freedom Act § 1105(5)(B), 47 U.S.C. § 151 (as amended Nov. 1, 2007).

Taxpayer protests the imposition of utility receipts tax on certain gross receipts.

STATEMENT OF FACTS

Taxpayer is a telecommunications company providing telephone services to Indiana customers. Taxpayer paid utility receipts tax ("URT") on its gross receipts. After an audit, the Indiana Department of Revenue ("Department") assessed additional URT, penalties, and interest for the tax years 2003, 2004, and 2005. The Department found that Taxpayer had failed to include certain receipts as gross receipts subject to the URT. Taxpayer protested this assessment and presented additional documentation that was not available at the time of audit. An administrative hearing was held, and this Letter of Findings ensues. Further facts will be supplied as required.

I. Utility Receipts Tax—Imposition.

DISCUSSION

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 URT is imposed by IC § 6-2.3-2-1 as follows:

An income tax, known as the utility receipts tax, is imposed upon the receipt of:

- (1) the entire taxable gross receipts of a taxpayer that is a resident or a domiciliary of Indiana; and
- (2) the taxable gross receipts derived from activities or businesses or any other sources within Indiana by a taxpayer that is not a resident or a domiciliary of Indiana.

"Gross receipts" for purposes of the Indiana's URT is defined at IC § 6-2.3-1-4 as follows:

"Gross receipts" refers to anything of value, including cash or other tangible or intangible property that a taxpayer receives in consideration for the retail sale of utility services for consumption before deducting any costs incurred in providing the utility services.

In summary, the URT is an income tax imposed on the receipts from retail sales of utility services for consumption by the purchaser. The utility services subject to tax include telecommunication services. IC § 6-2.3-1-14(6).

Taxpayer asserts that certain of the receipts that the Department determined were subject to URT are not from "retail sales," but are from "wholesale sales" that are not subject to the URT under IC § 6-2.3-3-5(a). Taxpayer maintains that certain of the receipts in its "Special Access Revenue" account no. 5083 and its "Revenue" account no. 5086 are not "retail sales" because the receipts are from sales to other telecommunications carriers. During the hearing, Taxpayer presented documentation that provided the name and "access customer name abbreviation" number of certain of its customers from which it received these revenues. The receipts in question from these accounts are from the Taxpayer's provision of "dedicated circuits such as Sonet, DS1s, and DS3 to interexchange carriers," of "collocation services and frame relay services" to local exchange carriers, of services to wireless carriers, and of services to incumbent local exchange carriers.

Pursuant to IC § 6-2.3-3-5(a), "Gross receipts do not include a wholesale sale to another generator or reseller of utility services." (Emphasis Added). The statute provides an exclusion for receipts received from wholesale sales, which means the utility services were sold with the intention of being resold as utility services and not with the intention of being consumed. Therefore, when the telecommunications services are sold to other carriers and consumed by those other carriers, the telecommunications services are not excluded because they are not from wholesale sales. Thus, if the other carriers are using the telecommunication services to provide non-telecommunications services, the other carriers are consuming the Taxpayer's telecommunications services.

While the revenues in Taxpayer's "Special Access Revenue" account no. 5083 and its "Revenue" account no. 5086 may be charged directly to end users in certain circumstances, Taxpayer has provided sufficient documentation demonstrating that the receipts in question from its "Special Access Revenue" account no. 5083 and its "Revenue" account no. 5086 were received from telecommunications carriers. Therefore, to the extent Taxpayer's customers purchased these telecommunications services to resell them as telecommunications services, Taxpayer's receipts would be excluded from the URT. However, Taxpayer did not provide sufficient

information detailing whether the customers resold the telecommunications services or consumed them in the provision of non-telecommunications services. From the information provided, it appears that Taxpayer's telecommunications customers could be using these telecommunications services in the provision of Internet access services, which are an information service and not a telecommunications service. Thus, Taxpayer's customers that are using these telecommunications services in the provision of Internet access services would be consumers of Taxpayer's telecommunications services, and these receipts would be subject to the URT.

Nonetheless, the Department is prohibited from taxing the "Internet access" receipts that are derived from providing of telecommunications services to a provider of Internet access services. See Internet Tax Freedom Act § 1105(5)(B), 47 U.S.C. § 151 (as amended Nov. 1, 2007) (Prohibiting States from taxing Internet access and includes in the definition of Internet access an Internet access provider's purchase of telecommunications that are used in the provision of the Internet access until 2014). Therefore, even though the Taxpayer did not provide this information detailing its customers' use of the services between telecommunications services and non-telecommunications Internet access services, as the State is prohibited from taxing the "Internet access" receipts, Taxpayer's receipts from these telecommunications carriers cannot, at present, be subject to URT.

Therefore, Taxpayer's protest to the imposition of URT on the receipts in its "Special Access Revenue" account no. 5083 and its "Revenue" account no. 5086 that were received from the telecommunications carriers is sustained.

FINDING

Taxpayer's protest to the imposition of URT on the receipts in its "Special Access Revenue" account no. 5083 and its "Revenue" account no. 5086 that were received from the telecommunications carriers is sustained.

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