

Letter of Findings: 04-20100282
Sales and Use Tax
For the Years 2006, 2007, 2008

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ISSUES

I. Use Tax – Imposition of Tax.

Authority: IC § 6-2.5-1-5; IC § 6-2.5-1-6; IC § 6-2.5-2-1; IC § 6-2.5-2-2; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-8.1-5-1; IC § 8.1-5-4; Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue v. Interstate Warehousing, 783 N.E.2d 248 (Ind. 2003).

Taxpayer protests the imposition of use tax on the purchase of tangible personal property.

II. Tax Administration – Penalty.

Authority: IC § 6-8.1-10.2.1; [45 IAC 15-11-2](#).

Taxpayer protests the proposed assessment of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer, a sole proprietor, installs and repairs heating and air conditioning systems and repairs refrigeration systems for restaurants and retail stores. Taxpayer's customers are residential, commercial, and not for profit entities. Taxpayer performs both lump sum and "time and material" jobs.

The Indiana Department of Revenue ("Department") conducted an audit which determined that Taxpayer owed use tax on various transactions. Taxpayer was accordingly assessed additional tax, penalty, and interest. Taxpayer protested the assessment of tax and penalty. A hearing was held and this Letter of Findings ensues. Additional facts will be provided as necessary.

I. Use Tax – Imposition of Tax.

DISCUSSION

The Department notes that all tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(b),(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 86 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Furthermore, exemption statutes are to be strictly construed against the taxpayer. Indiana Dep't of State Revenue v. Interstate Warehousing, 783 N.E.2d 248 (Ind. 2003).

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-3-2(a). 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. IC § 6-2.5-3-2. An exemption from the use tax is granted for transactions when sales tax was paid at the time of purchase pursuant to IC § 6-2.5-3-4.

IC § 6-8.1-5-4(a) provides:

Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.

Accordingly, it is Taxpayer's responsibility to retain the documentation that supports the amounts it used to determine the tax owed. Additionally, IC § 6-8.1-5-1(b) states, "If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available." Based on Taxpayer's records being found to be incomplete, the auditor used the best information available to determine a taxable amount.

A. Tax imposed on 50 percent of lump sum contracts.

Taxpayer is protesting the amount of use tax assessed on its purchases of materials used in lump sum contracts. The audit found that Taxpayer had lump sum contracts with his customers when he was doing improvements to real estate such as installing air conditioners and furnaces. The auditor could not determine if Taxpayer had or had not paid the sales tax on these purchases. Therefore, based on the best information available, the auditor determined that 50 percent of the invoiced amount on the lump sum contracts was for materials. Then, where it could be determined that sales tax was paid at the time of purchase of the materials, Taxpayer was given credit for the sales tax.

Subsequent to the hearing, Taxpayer provided additional invoices showing tax paid on purchases. Using the same approach the auditor used during the audit, a supplemental review of these invoices will give Taxpayer credit for sales tax paid to the extent that these invoices have not already been taken into account in the audit.

B. A 2008 purchase invoice.

Taxpayer protests that an invoice for Bay Insulation is counted as part of the improvements for 2008 then also in the capital improvements for 2008. Taxpayer is correct. The invoice should only be taxed once.

C. 2006-2008 Capital purchases.

Taxpayer protested the use tax assessed on its purchase of a 2006 Chevy cargo van (\$26,667). Since the conclusion of the audit, Taxpayer has provided a purchase document that shows that Taxpayer received a trade-in allowance of \$19,200.39. Indiana imposes a sales tax on retail sales. IC § 6-2.5-2-1. The sales tax is measured by the gross retail income received by the retail merchant from the purchaser. IC § 6-2.5-2-2. Gross retail income does not include the value of "any tangible personal property received in a like-kind exchange...." IC § 6-2.5-1-5(b). A like-kind exchange is the exchange of personal property of the "same kind or character, regardless of grade or character." IC § 6-2.5-1-6.

Taxpayer, therefore, should be given credit for this trade-in allowance of \$19,200.39 received for a "like-kind exchange."

Subsequent to the hearing Taxpayer also provided additional invoices for capital purchases. A supplemental review will verify the invoices of capital purchases and give Taxpayer credit to the extent sales tax has not already been credited to Taxpayer in the audit.

FINDINGS

Taxpayer's protest of the imposition of additional use tax is sustained subject to a supplemental review of the additional invoices Taxpayer provided subsequent to the hearing. The supplemental review will give Taxpayer credit for sales tax paid on purchases to the extent these invoices have not already been taken into account in the audit.

Sales tax will only be assessed once on the Bay Insulation invoice.

Taxpayer will be given credit for this trade-in allowance of \$19,200.39 on the Chevy cargo van received for a "like-kind exchange."

Lastly, a supplemental review will verify the invoices of capital purchases and give Taxpayer credit to the extent sales tax has not already been credited to Taxpayer in the audit.

II. Tax Administration – Penalty.

DISCUSSION

Taxpayer protests the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1. Indiana Regulation [45 IAC 15-11-2](#)(b) clarifies the standard for the imposition of the negligence penalty as follows:

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.

Additionally [45 IAC 15-11-2](#)(c) states:

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. Taxpayer has not established to the Department's satisfaction that he exercised ordinary business care and prudence in maintaining his records in such a fashion that the Department can readily determine Taxpayer's tax burden.

FINDING

Taxpayer's protest as to the imposition of penalty is respectfully denied.

SUMMARY

Taxpayer has been sustained in part, subject to supplemental review on Issue I.

Taxpayer is respectfully denied on Issue II.

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