

Letter of Findings Number: 04-20110150
Use Tax
For the Years 2008-2009

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Use Tax—Advertisements.

Authority: IC § 6-2.5-5-17; IC § 6-8.1-5-1; [45 IAC 2.2-5-26](#)

Taxpayer protests the Department's assessment of use tax on what Taxpayer claims are newspaper advertising inserts.

II. Use Tax—Prizes.

Authority: IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-4-2.

Taxpayer protests the imposition of use tax on items given away as prizes.

STATEMENT OF FACTS

Taxpayer is a corporation doing business in Indiana. Taxpayer sells merchandise via direct customer sales.

Taxpayer often places scratch-off tickets in newspapers. The tickets entitle the customer to various prizes. The Indiana Department of Revenue ("Department") agreed with Taxpayer that a majority of the tickets constituted "advertising material" exempt from sales and use tax. However, the Department determined that a portion of the tickets were sent via direct mail and assessed use tax on that portion of the tickets.

In addition, the Department also assessed Taxpayer use tax on the purchase price of the prizes distributed on winning tickets. Taxpayer protested only these issues; all other issues in the audit have been resolved or agreed to by Taxpayer. Additional facts will be supplied as necessary.

I. Use Tax—Advertisements.

DISCUSSION

Taxpayer protests the assessment of additional use tax on items it claims were included as newspaper inserts. The issue is whether the items were in fact newspaper inserts.

IC § 6-8.1-5-1(c) provides in relevant part:

The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.

IC § 6-2.5-5-17 provides a sales tax exemption for newspapers, while [45 IAC 2.2-5-26\(d\)\(2\)](#) includes advertising inserts in the definition of "newspaper." If the tickets were in fact placed in newspapers as advertising materials, the tickets would be exempt as advertising inserts.

In this case, Taxpayer has stated that its scratch-off tickets taxed by the Department were in fact placed in newspapers as advertising inserts. Taxpayer has provided certain information that it claims supports its arguments that the tickets were in fact distributed to newspapers. The information includes its purchase of 500,000 tickets (the audit assessed roughly 389,000 tickets), along with documents that indicate the transmittal of over 110,000 tickets to various newspapers after the date of the purchase order supplied by Taxpayer.

However, the audit actually determined the number of tickets assessed by determining the number sent via mail. In other words, the audit presumed all the tickets were nontaxable and, after consultation with Taxpayer's representative, determined the number of tickets (389,000) which were in fact taxable. Though Taxpayer has provided documentation related to several newspapers, the audit methodology affirmatively established the number of taxable tickets. Taxpayer's invoices notwithstanding, Taxpayer has not provided sufficient information to determine that all or part of the assessment related to Taxpayer's ticket purchases should be reversed.

FINDING

Taxpayer's protest is respectfully denied.

II. Use Tax—Prizes.

DISCUSSION

Taxpayer also protests the imposition of use tax on items transferred to third parties as prizes. The Department acknowledges that the transfer of the prizes from Taxpayer to third parties is not a retail transaction subjecting the third party to use tax or Taxpayer to sales tax collection duties. The issue is whether the tangible personal property transferred as prizes is subject to use tax.

IC § 6-2.5-3-2(a) 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." In addition, 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.

Taxpayer's use of the tangible personal property did not qualify for any exemption from sales or use tax. The only remaining issue is whether the tangible personal property was purchased in a retail transaction.

Taxpayer states that it purchased the tangible personal property given away as a prize in wholesale transactions as opposed to retail transactions. However, IC § 6-2.5-4-2(a) states that, "A person is a retail merchant making a retail transaction when he is making wholesale sales." Thus, even if Taxpayer's purchase qualified as a wholesale sale, a wholesale sale is a retail transaction within the meaning of IC § 6-2.5-3-2(a). Thus, Taxpayer's purchase of tangible personal property occurred in a retail transaction for use tax. Because no exemption applies to Taxpayer's use of the tangible personal property, use tax was properly imposed.

FINDING

Taxpayer's protest is respectfully denied.

SUMMARY

Taxpayer's protest is respectfully denied on both issues.

Posted: 10/26/2011 by Legislative Services Agency
An [html](#) version of this document.