**DEPARTMENT OF STATE REVENUE**

04-20110289.LOF

**Letter of Findings: 04-20110289**
**Sales and Use Tax**
**For the Tax Years 2008 through 2010**

**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 It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register.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 the document will provide the general public with information about the Department's official position concerning a specific issue.

**ISSUE**

**I. Sales Tax – Imposition.**

**Authority:** IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-2.5-9-3; IC § 6-8.1-5-1; 45 IAC 2.2-3-7; 45 IAC 2.2-4-1; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Frame Station, Inc. v. Indiana Dep't of Revenue, 771 N.E.2d 129 (Ind. Tax Ct. 2002); Sales Tax Information Bulletin 21 (May 2002); Sales Tax Information Bulletin 60 (July 2006).

Taxpayer protests the assessment of sales tax on "lawn care applications."

**STATEMENT OF FACTS**

Taxpayer is a full service landscaping company that provides landscaping design, landscaping building, "hardscaping," "waterscaping," landscaping lighting, custom landscape maintenance, bed planting, lawn applications, and mowing services. Pursuant to an audit, the Indiana Department of Revenue ("Department") assessed Taxpayer sales and use tax, interest, and penalty. Taxpayer timely protested. An administrative hearing was held, and this Letter of Findings ensues. Additional facts will be provided as necessary.

**I. Sales Tax – Imposition.**

**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(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

The Department's audit determined that Taxpayer failed to collect and remit the correct amount of sales tax in its "lawn care applications" transactions, which included the application of lawn fertilizer to the lawn. When Taxpayer billed its customers for the "lawn care applications," it separated the charge into an amount for "materials" and an amount for "services." Taxpayer only collected tax on the amount it listed for "materials."

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. IC § 6-2.5-1-2 defines a retail transaction as "a transaction of a retail merchant that constitutes selling at retail as described in IC § 6-2.5-4-1... or that is described in any other section of IC § 6-2.5-4." A retail transaction is defined as occurring when a person "acquires tangible personal property... and transfers that property to another person for consideration." IC § 6-2.5-4-1(b)(1)-(2). Additionally, IC § 6-2.5-4-1(c)(2) provides that it "does not matter whether the property is transferred... alone or in conjunction with other property or services."

Pursuant to IC § 6-2.5-4-1(e), the amount of the retail transaction that is subject to sales and use tax includes "the price of the property transferred" and "any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records." Further, 45 IAC 2.2-4-1(b)(3) states that the amount of the retail transaction that is subject to tax includes the amounts collected for "services performed or work done on behalf of the seller prior to transfer of such property at retail."

In Frame Station, Inc. v. Indiana Dep't of Revenue, 771 N.E.2d 129 (Ind. Tax Ct. 2002), the court held that when customers were charged separate amounts for labor and materials for custom framing services the labor charges were subject to sales tax. Id. at 131. In arriving at that decision, the court reasoned that the focus of analysis should be "whether [Taxpayers'] services were performed before or after it transferred property to its customers." Id. The court found that services that are performed prior to the transfer of the property are taxable, and services that are performed after the transfer of the property are taxable to the extent that the services represent a "unitary transaction" and are "inextricable and indivisible" from the property being transferred. Id.

Accordingly, the determinative fact is when the services were performed by Taxpayer. Since the services occur prior (or concurrently) to the transfer of the fertilizer, the services are subject to sales and use tax. The fact that the services are listed separately from the amount for the fertilizer on the customers' invoices is not relevant.

In fact, Sales Tax Information Bulletin 21 (May 2002) (25 Ind. Reg. 3939), in relevant part, further explains:

**Sales by a Lawn Care Company**

The relationship between a lawn care company and its customer is contractual. The customer agrees to pay a set price and the company agrees to apply the necessary chemicals to a lawn for its proper care and maintenance. The chemical cannot be purchased separately from the company and applied by the customer. A unitary transaction is the purchase of tangible personal property and services under a single agreement for

which a total combined charge is calculated. A retail unitary transaction is a unitary transaction that is also a retail transaction. A retail transaction means a transaction that constitutes selling at retail. A lawn care application is a retail transaction because the lawn care company acquires tangible personal property (chemicals) and transfers them to its customers for consideration in the ordinary course of its regularly conducted business.

When Taxpayer sold the "lawn care applications" to its customers, it applied tangible personal property, such as fertilizer, to its customers' lawn to complete the transaction. The fertilizer was transferred for consideration and, therefore, was subject to sales tax.

Taxpayer, as a registered retail merchant, is responsible for collecting and remitting sales tax on retail transactions. "The retail merchant is required to collect the tax [due on the retail transaction] as [an] agent for the state." IC § 6-2.5-2-1(b). The retail merchant "has a duty to remit Indiana [sales] or use taxes... to the department, [to] hold those taxes in trust for the state, and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state." IC § 6-2.5-9-3(2). Thus, when a retail merchant fails to collect and hold the taxes in trust for the state, the retail merchant is personally liable for the sales tax, interest, and penalties due to the state for those sales. Since Taxpayer failed to collect and remit the correct amount of sales tax in its "lawn care applications" transactions, Taxpayer is personally liability for the sales tax due for those sales.

Taxpayer asserts that it is a "construction contractor" providing improvements to realty and that the service charges were properly excluded from sales tax. Taxpayer maintains that it billed for the services under time and materials contracts, thus, Taxpayer properly only taxed the materials portion. Taxpayer cites that it properly followed Sales Tax Information Bulletin 60 (July 2006) for all its transactions.

While the Department's audit recognized that a majority of Taxpayer's sales qualified as an "improvement to realty" where Taxpayer acted as a "contractor," the audit has not assessed tax on those situations and the tax issues raised in those instances do not relate to Taxpayer's obligation as a retail merchant to collect and remit sales tax on items which do not themselves become improvements to realty. Taxpayer appears to assert that because Taxpayer is a "contractor" making "improvements to realty" in a majority of the situations it should be allowed to account for all its transaction this way. However, Taxpayer is mistaken. The tax consequences for each transaction are determined according to the facts and law for that particular transaction. Therefore, it must be determined whether the transactions involving the "lawn care applications" are a retail merchant's sales of tangible personal property or are a "contractor's" conversions of "construction materials" that are permanently affixed to real property as an "improvement to realty."

The Department has defined "construction materials" and "contractors" in its regulations at 45 IAC 2.2-3-7, which states, in relevant part:

(a) Contractors. For purposes of this regulation [45 IAC 2.2] "contractor" means any person engaged in converting construction material into realty. The term "contractor" refers to general or prime contractors, subcontractors, and specialty contractors, including but not limited to persons engaged in building, cement work, carpentry, plumbing, heating, electrical work, roofing, wrecking, excavating, plastering, tile and road construction.

(b) Construction material. For purposes of this regulation [45 IAC 2.2], "construction material" means any tangible personal property to be used for incorporation in or improvement of a facility or structure constituting or becoming part of the land on which such facility or structure is situated.

(Emphasis added).

Additionally, as explained in Sales Tax Information Bulletin 60 (July 2006) (20060823 Ind. Reg. 045060287NRA), an "improvement to realty," occurs when personal property is "incorporated into and becomes a permanent part of the real property." While the Bulletin provides examples of what is and/or what is not considered an "improvement to realty," it first outlines three requirements in determining whether the use of the personal property is considered an "improvement to realty." Id. The Bulletin also states that the personal property must be immovable, annexed, adapted, and became "a permanent part of the land so that it would pass with the land upon a sale." Id.

Although the fertilizer is spread onto the lawn, it does not become a permanent part of a facility or structure that becomes part of the land. Unlike the boards of a fence that are incorporated into a structure that becomes permanently part of the realty, the fertilizer is consumed by the lawn, must be continually applied to the lawn, and does not become "a permanent part of the land so that it would pass with the land upon a sale." Therefore, the fertilizer is not a "construction material" and is not tangible personal property that is converted into realty. Thus, Taxpayer's transactions involving the "lawn care applications" where it applied tangible personal property, such as fertilizer, to its customers' lawn to complete the transaction are a retail merchant's sales of tangible personal property. Accordingly, Taxpayer "lawn care applications" that include the transfer of tangible personal property are properly subject to sales tax.

**FINDING**

Taxpayer's protest is respectfully denied.

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