

Letter of Findings Number: 04-20110367
Use Tax
For Tax Years 2008-09

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ISSUE

I. Use Tax—Direct Mailers and Postage.

Authority: Galligan v. Indiana Dep't of State Revenue, 825 N.E.2d 467 (Ind. Tax 2005); Frame Station, Inc. v. Indiana Dep't of State Revenue, 771 N.E.2d 129 (Ind. Tax 2002); Chrome Deposit Corp. v. Indiana Dep't of State Revenue, 557 N.E.2d 1110 (Ind. Tax 1990); IC § 6-2.5-1-1; IC § 6-2.5-1-5; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-4-1; IC § 6-8.1-5-1; [45 IAC 2.2-3-4](#); [45 IAC 2.2-3-20](#).

Taxpayer protests the imposition of use tax on direct mailers and associated postage.

STATEMENT OF FACTS

Taxpayer is an Indiana business. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not paid sales tax on all taxable purchases during the audit years of 2008 and 2009. The Department therefore issued proposed assessments for use tax and interest for those years. Taxpayer protests the imposition of use tax on the amounts it paid for direct mailers and postage associated with the direct mailers. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Use Tax—Direct Mailers and Postage.

DISCUSSION

Taxpayer protests the imposition of use tax on amounts it paid direct mail vendors to send bills to customers. Taxpayer states that the direct mailings are a service and thus are not taxable. Taxpayer also states that the postage paid to the direct mail vendors is not taxable. 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 sales tax is imposed by IC § 6-2.5-2-1, which 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.

The use tax is imposed under IC § 6-2.5-3-2(a), which 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.

Also, [45 IAC 2.2-3-4](#) provides:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Also, [45 IAC 2.2-3-20](#) states:

All purchases of tangible personal property which are delivered to the purchaser for storage, use, or consumption in the state of Indiana are subject to the use tax. The use tax must be collected by the seller if he is a retail merchant described in Reg. 6-2.5-3-6(b)(010) [[45 IAC 2.2-3-19](#)] or if he has Departmental permission to collect the tax. If the seller is not required to collect the tax or fails to collect the tax when required to do so, the purchaser must remit the use tax directly to the Indiana Department of Revenue.

Therefore, when tangible personal property is acquired in a retail transaction and is stored, used, or consumed in Indiana, Indiana use tax is due if sales tax has not been paid at the point of purchase. The Department determined that Taxpayer had not paid sales tax on some taxable purchases and so imposed Indiana use tax on those purchases. Regarding the direct mailers, the Department only imposed use tax on those mailers sent to Indiana customers.

IC § 6-2.5-1-1 states:

- (a) Except as provided in subsection (b), "unitary transaction" includes all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated.
- (b) "Unitary transaction" as it applies to the furnishing of public utility commodities or services means the public utility commodities and services which are invoiced in a single bill or statement for payment by the

consumer.

IC § 6-2.5-4-1(e) provides:

The gross retail income received from selling at retail is only taxable under this article to the extent that the income represents:

- (1) the price of the property transferred, without the rendition of any service; and
- (2) except as provided in subsection (g), 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. For purposes of this subsection, a transfer is considered to have occurred after delivery of the property to the purchaser.

(Emphasis added).

Also of relevance is IC § 6-2.5-1-5(a), which provides:

Except as provided in subsection (b), "gross retail income" means the total amount of consideration, including cash, credit, property, and services, for which tangible personal property is sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for:

- (1) the seller's cost of the property sold;
- (2) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller;
- (3) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges;
- (4) delivery charges; or
- (5) consideration received by the seller from a third party if:
 - (A) the seller actually receives consideration from a party other than the purchaser and the consideration is directly related to a price reduction or discount on the sale;
 - (B) the seller has an obligation to pass the price reduction or discount through to the purchaser;
 - (C) the amount of the consideration attributable to the sale is fixed and determinable by the seller at the time of the sale of the item to the purchaser; and
 - (D) the price reduction or discount is identified as a third party price reduction or discount on the invoice received by the purchaser or on a coupon, certificate, or other documentation presented by the purchaser. For purposes of subdivision (4), delivery charges are charges by the seller for preparation and delivery of the property to a location designated by the purchaser of property, including but not limited to transportation, shipping, postage, handling, crating, and packing.

(Emphasis added).

Also, in *Frame Station, Inc. v. Indiana Dep't of State Revenue*, 771 N.E.2d 129 (Ind. Tax Ct. 2002), the Indiana Tax Court discussed the taxable status of services provided before or after the transfer of tangible personal property. In that case, the court stated:

The transfer of property occurs when the buyer (1) agrees to buy property from a seller, (2) pays the purchase price, and (3) takes ownership and possession of the property. In this case, the evidence shows that customers pay the total price for their framed art when they pick it up, after all framing services have been performed. Therefore, Framemakers' services are performed prior to the transfer of property and constitute taxable retail unitary transactions under Indiana Code Section 6-2.5-4-1(e).

Id. at 131.

(Internal notations omitted).

Taxpayer believes that the main purpose of the transactions at issue is the billing services provided by the vendors. Taxpayer states that the transactions are therefore not subject to Indiana sales or use tax. Taxpayer refers to *Galligan v. Indiana Dep't of State Revenue*, 825 N.E.2d 467, 482 (Ind. Tax 2005) in which the Indiana Tax Court wrote:

Eberle Enterprises, Inc. constructs concrete curbs. (Trial Tr. at 65-66.) Galligan testified at trial that IP hired Eberle to slip form some curbs on a project. (Trial Tr. at 65-66.) As part of that process, Eberle furnished flumes and plastic. (Trial Tr. at 66.) The flumes were used to carry concrete down into the ditches, and the plastic was used to protect the concrete curbs from rain and freezing. (Trial Tr. at 66.)

As stated earlier, when the transfer of property and the rendition of services are concurrent, the Court must look to other factors to determine whether the transaction is inextricable and indivisible, such as the service-provider's records, the overall nature of its business, as well as the nature of the unitary transactions themselves. See *Cowden*, 575 N.E.2d at 723. Based on the only evidence presented at trial (i.e., Galligan's testimony), this Court finds that the overall nature of Eberle's business was to provide a service, and the use of flumes and plastic in providing that service was incidental. (See Trial Tr. at 66.) Such a finding supports the divisibility of the transactions at issue. Cf. *Cowden*, 575 N.E.2d at 723. Consequently, the Department's assessment of use tax against these transactions is REVERSED.

Taxpayer believes that its transactions with its vendors are the same as this example from Galligan.

Therefore, Taxpayer believes that its transactions are exempt from sales and use taxes.

The Department does not agree with this conclusion and notes that the court in Galligan also wrote: As mentioned earlier, the provision of services is, generally, not taxable. As a practical matter, however, "mixed transactions" often occur where tangible personal property is sold in order to complete a service contract, or where services are provided in order to complete the sale of tangible personal property. For these mixed transactions, distinguishing the taxable sale of property from the non-taxable sale of services is often difficult. Accordingly, the legislature has set forth several parameters for imposing tax on these transactions. First, taxable property does not escape taxation merely because it is transferred in conjunction with the provision of non-taxable services. Ind. Code Ann. § 6-2.5-4-1(c)(2) (West 1994) (amended 2004). Second, services, generally outside the scope of taxation, are subject to tax to the extent the income represents "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." A.I.C. § 6-2.5-4-1(e)(2) (emphasis added). Finally, the legislature imposes tax on services that are provided in a retail unitary transaction, "a unitary transaction that is also a retail transaction." Ind. Code Ann. § 6-2.5-1-2(b) (West 1994). A unitary transaction is one which "includes all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated." Ind. Code Ann. § 6-2.5-1-1(a) (West 1994).

Id. at 480-81.

(Emphasis in original).

In the Galligan example cited above, the only evidence to which the court referred was Mr. Galligan's testimony. In the instant case, a review of the actual invoices at issue shows that the costs of services and tangible personal property were not separately stated. Rather, the vendor listed prices for "Unit Price," "Additional Pages," "Carrier Envelope," and "Postage" and then listed a total amount for that invoice. There was no breakdown of services and tangible personal property. This falls squarely within the definition of a unitary transaction, as provided by IC § 6-2.5-1-1(a). Taxpayer also refers to *Chrome Deposit Corp. v. Indiana Dep't of State Revenue*, 557 N.E.2d 1110 (Ind. Tax 1990) but since that case concerns the gross income tax it is not relevant to the use tax at issue in this instance and will not receive further discussion.

Taxpayer also states that the transactions qualify for the exemption explained by [45 IAC 2.2-4-2](#), which states:

(a) Professional services, personal services, and services in respect to property not owned by the person rendering such services are not "transactions of a retail merchant constituting selling at retail", and are not subject to gross retail tax. Where, in conjunction with rendering professional services, personal services, or other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail unless:

- (1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property;
- (2) The tangible personal property purchased is used or consumed as a necessary incident to the service;
- (3) The price charged for tangible personal property is inconsequential (not to exceed 10 [percent]) compared with the service charge; and
- (4) The serviceman pays gross retail tax or use tax upon the tangible personal property at the time of acquisition.

(b) Services performed or work done in respect to property and performed prior to delivery to be sold by a retail merchant must however, be included in taxable gross receipts of the retail merchant.

(c) Persons engaging in repair services are servicemen with respect to the services which they render and retail merchants at retail with respect to repair or replacement parts sold.

(d) A serviceman occupationally engaged in rendering professional, personal or other services will be presumed to be a retail merchant selling at retail with respect to any tangible personal property sold by him, whether or not the tangible personal property is sold in the course of rendering such services. If, however, the transaction satisfies the four (4) requirements set forth in 6-2.5-4-1(c)(010), paragraph (1) [subsection (a) of this section], the gross retail tax shall not apply to such transaction.

(Emphasis added).

Therefore, the value of tangible personal property transferred in the provision of a service must not exceed ten percent of the service charge in order for the exemption provided by [45 IAC 2.2-4-2](#) to apply. Here, the invoices do not establish that the value of the tangible personal property transferred is less than ten percent of the service charge and so do not establish that the transactions qualify for the exemption provided by [45 IAC 2.2-4-2](#).

Taxpayer also argues that the postage is paid upfront and that there is no "delivery charge" which could be included in any use tax calculations. Taxpayer explains that a postage account was set up prior to any activity by the vendor and that any postage used would be replenished in the account. For example: if a particular mailing cost \$1,000 in postage, \$1,000 would be deducted from the postage account. Taxpayer would then deposit \$1,000 into the postage account in order to replenish the amount of postage paid for that mailing. The invoices list the amount of postage charges for each mailing and list a postage advance of that amount on the same invoice.

Taxpayer believes that this establishes that delivery charges are not part of the amounts charged by the vendors.

The Department does not agree with this position. The use of the postage account is merely an administrative procedure for Taxpayer and the vendors. As a practical matter, the vendors pay the postal service and are in turn paid by Taxpayer. This constitutes delivery charges as provided by IC § 6-2.5-1-5(a).

In conclusion, the invoices list a total combined charge for services and tangible personal property. The transactions in question are unitary transactions subject to sales and use taxes, as provided by [IC 6-2.5-1-1\(a\)](#). The invoices do not establish that the value of the tangible personal property transferred is less than ten percent of the service charge and so do not establish that the transactions qualify for the exemption defined under [45 IAC 2.2-4-2](#). The postage is properly included as subject to use tax, as provided by IC § 6-2.5-1-5(a). Taxpayer has not met the burden of proving the proposed assessments wrong, as required by IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is denied.

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