

Letter of Findings Number: 04-20120011
Sales Tax
For Tax Years 2008-2010

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ISSUES

I. Sales Tax—Exemption Certificates.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-8-8; IC § 6-8.1-5-1; [45 IAC 2.2-8-12](#).

Taxpayer protests the assessment of sales tax on certain sales.

II. Tax Administration—Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of a ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana retail merchant. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not collected sales tax on some sales it made in its role as a retail merchant and that Taxpayer had not paid sales tax as a customer on some purchases it made during the tax years 2008 through 2010. The Department therefore issued proposed assessments for sales tax, use tax, ten percent negligence penalty, and interest. Taxpayer initially protested the imposition of penalty. An administrative hearing was held in which Taxpayer's employees explained why Taxpayer believed a waiver of penalty was appropriate. A few days later, the Hearing Officer received a Power of Attorney form (POA-1) authorizing an independent party to represent Taxpayer in this protest. Along with the POA-1, Taxpayer's representative stated that Taxpayer was protesting the imposition of sales tax on Taxpayer's sales to some customers. No additional administrative hearing was conducted regarding this new information, but it and the supporting documentation provided by the representative have been reviewed and incorporated into this Letter of Findings in addition to Taxpayer's initial protest of penalty. Further facts will be provided as required.

I. Sales Tax—Exemption Certificates.

DISCUSSION

Taxpayer protests the Department's assessment of sales tax on sales to two of Taxpayer's customers on the grounds that those customers had provided exemption certificates. Taxpayer provided copies of the exemption certificates for the two customers. 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).

Initially, the Department refers to IC § 6-2.5-2-1 which provides:

- (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.

(Emphasis added).

Pursuant to IC § 6-2.5-8-8:

- (a) A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.
- (b) The following are the only persons authorized to issue exemption certificates:
 - (1) retail merchants, wholesalers, and manufacturers, who are registered with the department under this chapter;
 - (2) organizations which are exempt from the state gross retail tax under [IC 6-2.5-5-21](#), [IC 6-2.5-5-25](#), or [IC 6-2.5-5-26](#) and which are registered with the department under this chapter; and
 - (3) other persons who are exempt from the state gross retail tax with respect to any part of their purchases.
- (c) The department may also allow a person to issue a blanket exemption certificate to cover exempt purchases over a stated period of time. The department may impose conditions on the use of the blanket exemption certificate and restrictions on the kind or category of purchases that are exempt.

(Emphasis added).

In addition, [45 IAC 2.2-8-12](#) provides:

- (a) Exemption certificates may be issued [sic.] only by purchasers authorized to issue such certificates by the Department of Revenue. Retail merchants, manufacturers, wholesalers and others who must register with the

Department of Revenue and who qualify to purchase exempt from tax under this Act [\[IC 6-2.5\]](#) may issue exemption certificates with respect to exempt transactions. All persons or entities not required to register with the Department as retail merchants, manufacturers, or wholesalers, and who are exempt under this Act [\[IC 6-2.5\]](#) with respect to all or a portion of their purchases are authorized to issue exemption certificates with respect to exempt transaction provided an exemption number has been assigned by the Department of Revenue, or provided that the Department of Revenue has specifically provided a form and manner for issuing exemption certificates without the need for assigning an exemption number.

(b) Retail merchants are required to collect the sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used by the purchaser for an exempt purpose.

(c) All retail sales of tangible personal property for delivery in the state of Indiana shall be presumed to be subject to sales or use tax until the contrary is established. The burden of proof is on the buyer and also on the seller unless the seller receives an exemption certificate.

(d) Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important to the seller to obtain an exemption certificate in order to avoid the necessity for such proof. The mere filing of a Registered Retail Merchant Certificate number is not sufficient to relieve the seller of the responsibility to collect the sales tax or prove exempt use by the buyer.

(e) No exemption certificates are required for sales in interstate commerce, however, proper records must be maintained to substantiate such sales.

(f) An exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed.

(g) An exemption certificate or other evidence supporting an exempt sale must be maintained by the seller for at least three (3) years after the due date of the tax return upon which such exempt transaction is reported.

(h) Exemption certificates may be reproduced provided no change is made in the wording or content. (Emphasis added).

As provided by IC § 6-2.5-8-8(a), a seller accepting a valid exemption certificate has no duty to collect or remit the state gross retail or use tax on a purchase. A review of the two exemption certificates at issue shows that one is valid and one is not. Despite the fact that the valid exemption certificate is dated from 1996, it does have the required information on it. The invalid exemption certificate is not only missing required information such as an Indiana or Federal taxpayer identification number; it is not an Indiana exemption certificate. It is an exemption certificate for a neighboring state. The Department cannot accept this exemption certificate as valid for exemption from Indiana sales tax.

In conclusion, Taxpayer has met the burden of proving the proposed assessment of sales tax incorrect regarding Taxpayer's sales to the customer with the valid exemption certificate, as required by IC § 6-8.1-5-1(c). Taxpayer has not met the burden of proving the proposed assessment of sales tax regarding Taxpayer's sales to the customer with the non-Indiana exemption certificate. The Department will conduct a supplemental audit to remove the sales to the customer with the valid exemption certificate.

FINDING

Taxpayer's protest is sustained in part and denied in part, as described above.

II. Tax Administration—Negligence Penalty.

DISCUSSION

The Department issued a proposed assessment including a ten percent negligence penalty for the tax years in question. Taxpayer protests the imposition of penalty and states that its overall compliance rate was quite high and that it did act reasonably in its sales and use tax compliance duties. The Department refers to IC § 6-8.1-10-2.1(a), which states in relevant part:

If a person:

...

(3) incurs, upon examination by the department, a deficiency that is due to negligence;

...

the person is subject to a penalty.

The Department refers to [45 IAC 15-11-2\(b\)](#), which states:

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.

(Emphasis added).

[45 IAC 15-11-2\(c\)](#) provides in pertinent part:

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.

In this case, Taxpayer incurred an assessment which the Department determined was due to negligence under [45 IAC 15-11-2\(b\)](#), and so was subject to a penalty under IC § 6-8.1-10-2.1(a). After review of the circumstances in this case, Taxpayer has established that the assessment arose due to reasonable cause and not due to negligence, as required by [45 IAC 15-11-2\(c\)](#).

FINDING

Taxpayer's protest is sustained.

CONCLUSION

Taxpayer is sustained on Issue I regarding the imposition of sales tax to the customer with the valid exemption certificate. Taxpayer is denied on Issue I regarding the imposition of sales tax to the customer with the invalid exemption certificate. Taxpayer is sustained on Issue II regarding imposition of penalty.

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