

**Letter of Findings: 04-20110560**  
**Use Tax**  
**For the Years 2008-2009**

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**ISSUES**

**I. Use Tax—Imposition.**

**Authority:** IC § 6-2.5-1-1; IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-8.1-5-1; [45 IAC 2.2-1-1](#).

Taxpayer protests the imposition of use tax on its purchase of furniture.

**II. Use Tax—Imposition.**

**Authority:** IC § 6-2.5-4-9; IC § 6-8.1-5-1; [45 IAC 2.2-3-8](#); [45 IAC 2.2-3-9](#).

Taxpayer protests the imposition of use tax on its purchases of materials used in its construction projects.

**III. Sales and Use Tax—"Labor Charges."**

**Authority:** IC § 6-8.1-5-1.

Taxpayer argues that the Department has imposed use tax on "labor charges."

**STATEMENT OF FACTS**

Taxpayer is an Indiana corporation engaged in the business of building and remodeling apartment complexes. Taxpayer bills its customers on a "lump sum" contract basis. After an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer owed use tax and assessed interest for the tax years 2008 and 2009. Taxpayer purchased items for installation in the apartment complexes. The Department found that Taxpayer had neither paid sales tax at the time of purchase nor remitted use tax to the Department on these purchases. Taxpayer protests this imposition of use tax and interest. An administrative hearing was conducted, and this Letter of Findings results. Further facts will be provided as required.

**I. Sales and Use Tax—Imposition.**

Taxpayer protests the imposition of use tax on furniture. During the audit, Taxpayer was unable to provide documentation for some of its purchases. The auditor was, therefore, unable to verify that the transactions were not subject to Indiana use tax.

Pursuant to IC § 6-8.1-5-1(c), all tax assessments are presumed to be accurate, and the taxpayer bears the burden of proving that an assessment is incorrect.

IC § 6-2.5-2-1 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.

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.

Accordingly, Indiana imposes a sales tax on retail transactions and a complementary use tax on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-1-1 et seq. An exemption from the use tax is granted for transactions where the gross retail tax ("sales tax") was paid at the time of purchase pursuant to IC § 6-2.5-3-4. Since Taxpayer did not pay sales tax at the time of purchase, the Department found that the purchases were subject to use tax.

Taxpayer maintains that use tax is being imposed on an intercompany payment of \$17,268.76, on p.5 of audit report. Taxpayer initially claimed that this amount was paid to a related entity of Taxpayer to reimburse the related entity for "furniture that was supposed to be for [Taxpayer]. The purchase was made with tax at Walmart as a retail sale." Subsequently, Taxpayer stated:

I am providing sales receipts via credit card statements for the items in the invoice from [related entity]....

The total of the items notated add up to less than [the] total of the invoice from [related entity]. The remaining balance was a service charge for decorating, labor for picking the items up, ordering them, and coordinating them. This fee is typical, if not less than competitors, for picking out the furniture, technology, and office furniture. It was also a service, with no sales tax applied.

During the hearing Taxpayer presented an invoice to Taxpayer from a vendor, a related entity ("related entity vendor"), and a copy of the related entity vendor's credit card statement showing payments made to various vendors. While Taxpayer did not provide evidence that the related entity paid sales tax at the time of purchase, a

vendor's incorrect payment of sales tax would not relieve Taxpayer of its obligation to pay the Department the assessed use tax.

Based upon the documentation presented, Taxpayer and the related entity vendor engaged in a transaction for the transfer of tangible personal property that is subject to sales and/or use tax. The invoice presented by Taxpayer demonstrates that Taxpayer paid a single unitary amount of \$17,268.76 for a list of various pieces of furniture. Thus, this invoice did not reflect that a "decorating service fee," or any other "service fee," was charged. Services that are performed as part of a retail "unitary transaction" are subject to sales and use tax. IC § 6-2.5-1-2(b). A retail "unitary transaction" is one in which items of personal property and services are furnished under a single order or agreement and for which a total combined charge or price is calculated. IC § 6-2.5-1-1(a). A unitary transaction includes all items of property and services for which a total combined selling price is computed irrespective of the fact that the cost of services, which would not otherwise be taxable, is included in the selling price. [45 IAC 2.2-1-1\(a\)](#).

Given the totality of the circumstances, in the absence of other supporting documentation, the Department is not able to agree that Taxpayer met its burden of proving that the Department's assessment was wrong. Taxpayer's obligation to pay sales or use tax arose at the time of Taxpayer's purchase of the furniture from related entity vendor. Since Taxpayer did not pay sales tax on the invoice at the time of its purchase, use tax is properly imposed.

### FINDING

Taxpayer's protest to the imposition of use tax on furniture is respectfully denied.

## II. Sales and Use Tax—Imposition.

### DISCUSSION

Taxpayer protests the assessment of use tax on certain of the construction materials consumed in lump sum contracts that were performed for "Section 482 housing projects."

Pursuant to IC § 6-2.5-4-9(a):

(a) A person is a retail merchant making a retail transaction when the person sells tangible personal property which:

(1) is to be added to a structure or facility by the purchaser; and(2) after its addition to the structure or facility, would become a part of the real estate on which the structure or facility is located.

[45 IAC 2.2-3-9](#) states in relevant part:

(a) A contractor may purchase construction material exempt from the state gross retail tax only if he issues either an exemption certificate or a direct pay certificate to the seller at the time of purchase.

(b) A contractor who purchases construction material exempt from the state gross retail tax or otherwise acquires construction material "tax-free" is accountable to the Department of Revenue for the state gross retail tax when he disposes of such property.

(e) Disposition subject to the use tax. With respect to construction materials a contractor acquired tax-free, the contractor is liable for the use tax and must remit such tax (measured on the purchase price) to the Department of Revenue when he disposes of such property in the following manner:

(1) He converts the construction material into realty on land he owns and then sells the improved real estate;

(2) He utilizes the construction material for his own benefit; or

(3) Lump sum contract. He converts the construction material into realty on land he does not own pursuant to a contract that includes all elements of cost in the total contract price.

(Emphasis added).

[45 IAC 2.2-3-8\(a\)](#) states:

(a) In general, all sales of tangible personal property are taxable, and all sales of real property are not taxable. The conversion of tangible personal property into realty does not relieve the taxpayer from a liability for any owing and unpaid state gross retail tax or use tax with respect to such tangible personal property.

(Emphasis added).

Taxpayer states that it hired subcontractors to perform construction work on a lump sum basis for certain "Section 482 housing" projects. Taxpayer maintains that it does not provide exempt certificates to its subcontractors and that its subcontractors sign purchase orders for "lump sum" construction contracts where all sales and use taxes are to be paid by the subcontractors. Additionally, Taxpayer argues that certain of the invoices are exempt because the charges are for "services," such as spreading gravel, and do not represent the transfer of tangible personal property.

During the protest process, Taxpayer submitted additional documentation—including invoices, purchase order contracts with certain subcontractors, and two letters from subcontractors to demonstrate the nature of the transactions. Based upon the document presented, Taxpayer has provided sufficient evidence to establish that the following transactions are not subject to use tax:

Douglas Plumbing, audit report p.4, \$41,000 transaction, \$27,060 taxed;

S & L Builders, LLC, audit report p.4, \$95,169 transaction, \$62,811 taxed;

S & L Builders, LLC, audit report p.5, \$34,532 transaction, \$22,791 taxed;

Additionally, based upon the document presented, Taxpayer has provided sufficient evidence to establish that part of the Hoosier Concrete Pumping, Inc. \$5,150 payment (audit report p. 4, check no. 161) was not subject to use tax. Taxpayer provided four invoices and 3 purchase order contracts to demonstrate the nature of this payment. One of these invoices demonstrates that the transaction (invoice no. 8576) was a transaction where the contractor operated under "time and materials contract." For this transaction, the \$365 paid for the concrete materials is subject to use tax. Therefore, Taxpayer's protest is sustained in part in the amount of \$4,785 and is denied in part in the amount of \$365.

However, Taxpayer's protest to the imposition of use tax on the other transactions is denied. For example, some of the transactions protested were not taxed in the audit. Some of the transactions were taxed as transactions where the contractor operated under "time and materials contracts," only the materials portions were subject to tax, and Taxpayer has failed to present evidence that demonstrated otherwise. Since Taxpayer failed to provide documentation that supported its assertions about the transactions in question, Taxpayer has failed to meet its burden to show that the assessment was incorrect under IC § 6-8.1-5-1. Therefore, the Department finds no reason to disagree with the audit's conclusion that these materials in the remaining protested transactions are subject to use tax.

#### **FINDING**

Taxpayer's protest as to the \$41,000 Douglas Plumbing transaction—on p. 4 of the audit report in which \$27,060 was subjected to tax—is sustained. Taxpayer's protest as to the \$95,169 S & L Builders, LLC transaction—on p. 4 of the audit report in which \$62,811 was subject to tax—is sustained. Taxpayer's protest as to the \$34,532 S & L Builders, LLC transaction—on p. 5 of the audit report in which \$22,791 was subject to tax—is sustained. Taxpayer's protest as to the \$5,150 Hoosier Concrete Pumping, Inc. payment—on p. 4 of the audit report—is sustained in part in amount of \$4,785 and is denied in part in the amount of \$365. However, Taxpayer's protest is denied for the other transactions in question.

#### **III. Sales and Use Tax—"Labor Charges."**

#### **DISCUSSION**

The Department imposed use tax for the "materials portion" of a transaction (audit report p. 4, referenced as check no. 179, in the amount of \$21,837.00) on which Taxpayer did not pay sales tax at the time of the retail transaction. Taxpayer asserts that the Department has assessed use tax on a transaction which represented only "labor" or "services charges." Taxpayer maintains that the transaction in question did not involve the transfer of any tangible personal property. Taxpayer states that the transaction in question represented an amount paid to the telephone company for it to move a telephone pole from the middle of an access road to the outside edge of the parking lot at one of Taxpayer's apartment complex construction sites.

As noted previously, 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).

During the hearing, Taxpayer presented additional documentation to demonstrate the nature of the transaction in question. Based upon this additional documentation, Taxpayer has presented sufficient documentation to demonstrate that the transaction in question did not represent the transfer of tangible personal property, but represented "service charges" to move a telephone pole. Therefore, Taxpayer has provided sufficient evidence to establish that the transaction in question was not subject to sales and use tax.

#### **FINDING**

Taxpayer's protest to the imposition of use tax on "labor charges" in the amount of \$21,837.00 is sustained.

#### **SUMMARY**

Taxpayer's protest as to the \$41,000 Douglas Plumbing transaction—on p. 4 of the audit report in which \$27,060 was subjected to tax—is sustained, as discussed in Issue II. Taxpayer's protest as to the \$95,169 S & L Builders, LLC transaction—on p. 4 of the audit report in which \$62,811 was subject to tax—is sustained, as discussed in Issue II. Taxpayer's protest as to the \$34,532 S & L Builders, LLC transaction—on p. 5 of the audit report in which \$22,791 was subject to tax—is sustained, as discussed in Issue II. Taxpayer's protest as to the \$5,150 Hoosier Concrete Pumping, Inc. payment—on p. 4 of the audit report—is sustained in part in amount of \$4,785 and is denied in part in the amount of \$365, as discussed in Issue II. Taxpayer's protest to the imposition of use tax on "labor charges" in the amount of \$21,837.00—on p. 4 of the audit report, referenced as check no. 179—is sustained, as discussed in Issue III. In all other respects, Taxpayer's protest is denied.

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