

**Letter of Findings: 04-20120148  
Gross Retail Tax  
For the Years 2008, 2009, and 2010**

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**ISSUES**

**I. Tangible Property – Gross Retail Tax.**

**Authority:** IC § 6-2.5-1-2; IC § 6-2.5-2-1(a); IC § 6-2.5-2-1(b); IC § 6-2.5-3-1(a); IC § 6-2.5-3-2(a); IC § 6-2.5-4-1(b), (c); IC § 6-8.1-5-1(c); USAir, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466 (Indiana Tax Ct. 1993); Rhoade v. Indiana Dep't of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); [45 IAC 2.2-4-2](#); [45 IAC 2.2-4-2\(a\)](#).

Taxpayer argues that the price it paid to certain vendors was not subject to sales tax because the underlying transactions did not represent the transfer of "tangible personal property."

**II. Injectable Product – Gross Retail Tax.**

**Authority:** IC § 6-2.5-5-18(a); IC § 6-8.1-5-1(c); [45 IAC 2.2-5-36](#).

Taxpayer states that its purchases of "injectable product" are not subject to sales or use tax.

**III. Taxable Transaction – Gross Retail Tax.**

**Authority:** IC § 6-8.1-5-1(c).

Taxpayer maintains that it was not required to pay use tax on the purchase of a picture frame because sales tax was paid at the time of the original transaction.

**IV. Purchase for Resale – Gross Retail Tax.**

**Authority:** IC § 6-2.5-5-8(b); IC § 6-8.1-5-4(a).

Taxpayer states that it is not required to pay use tax on the purchase of contact lenses because it purchased the lenses with the intention of reselling them to its own customers.

**STATEMENT OF FACTS**

Taxpayer is a vision care and hearing loss center. Taxpayer provides eye care services, vision testing, Lasik surgery, and cataract treatment. Taxpayer sells contact lenses, eye glasses, hearing aids, and certain other related items. The Department of Revenue ("Department") conducted an audit review of Taxpayer's records. The audit resulted in the assessment of additional sales/use tax. Taxpayer disagreed with a portion of the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representative explained the basis for the protest. This Letter of Findings results.

**I. Tangible Property – Gross Retail Tax.**

**DISCUSSION**

Taxpayer argues that the audit improperly assessed tax on transactions which did not involve the acquisition of "tangible personal property."

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A person who acquires property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). Indiana also imposes a complementary excise tax called "the use tax" 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." IC § 6-2.5-3-2(a). Use means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a). The use tax is functionally equivalent to the sales tax. See Rhoade v. Indiana Dep't of State Revenue, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002). By complementing the sales tax, the use tax ensures that non-exempt retail transactions (particularly out-of-state retail transactions) that escape sales tax liability are nevertheless taxed. Id.; USAir, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466, 468–69 (Ind. Tax Ct. 1993). The use tax ensures that, after such goods arrive in Indiana, the retail purchasers of the goods bear their fair share of the tax burden. To trigger imposition of Indiana's use tax, tangible personal property must (as a threshold matter) be acquired in a retail transaction. Rhoade, 774 N.E.2d at 1048. A taxable retail transaction occurs when: (1) a party acquires tangible personal property as part of its ordinary business for the purpose of reselling the property; (2) that property is then exchanged between parties for consideration; and (3) the property is used in Indiana. See IC § 6-2.5-1-2; IC § 6-2.5-4-1(b), (c); IC § 6-2.5-3-2(a).

Taxpayer argues that the audit assessed sales/use tax on transactions for which it did not acquire "tangible personal property."

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "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." "In construing tax statutes a liberal rule of interpretation must be indulged in order to aid the taxing power of the state." Dep't of Treasury of Indiana v. Dietzen's Estate, 215 Ind. 528, 532, 21 N.E.2d 137, 139 (1939). See also Fell v. West, 73 N.E. 719, 722 (Ind. App. 1905) ("The statutes of this state relating to the assessment and collection of taxes are liberally construed in favor of the taxing powers.")

[45 IAC 2.2-4-2](#) contains a provision exempting the purchase of services from sales tax. [45 IAC 2.2-4-2\(a\)](#) states that, "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." However, "Where, in conjunction with rendering professional services... the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail...." Id.

Taxpayer paid money to "Aesthetic Advancements." Taxpayer explains that the payments were the price paid for its employees to receive specialized training. Taxpayer's documentation is sufficient to establish that the payments were indeed for the purchase of "intangibles" and that no tangible personal property was acquired.

Taxpayer paid money to "Cumulus" which Taxpayer indicates were costs charged for radio advertising. Taxpayer has provided documentation sufficient to establish that the charges were attributable to the cost of "intangible" advertising services and not subject to sales or use tax.

Taxpayer paid money to Yodle, Inc. Taxpayer states that the company "provides local online advertising...." and that Yodle "provides only non-taxable services...." To that end, Taxpayer has provided a copy of the business's web page from which the Department is asked to determine the nature of the transaction Taxpayer entered into with Yodle. Taxpayer asks too much; the documentation is insufficient to discern the nature of the transaction or whether the transaction involved the provision of tangible personal property.

Taxpayer paid money to "Glacial Multimedia" and that "[n]o physical product is involved in this process...." Taxpayer has provided copies of both the invoices and a description of Glacial Multimedia's services. Based on that information, Taxpayer has met its burden of demonstrating that the purchases were not subject to sales or use tax.

#### FINDING

Taxpayer's protest is sustained in part and denied in part.

### II. Injectable Product – Gross Retail Tax.

#### DISCUSSION

Taxpayer paid money to "Aesthetic Advancements" for "injectable product." Taxpayer explains that the "injectable product" is "available by prescription only... and is not subject to sales or use tax." Taxpayer has not explained or defined the exact nature of this "injectable" product.

Taxpayer apparently relies on IC § 6-2.5-5-18(a) as the basis for its argument that the purchase of "injectable product" is exempt:

Sales or rentals of durable medical equipment, mobility enhancing equipment, prosthetic devices, artificial limbs, orthopedic devices, dental prosthetic devices, eyeglasses, contact lenses, and other medical supplies and devices are exempt from the state gross retail tax, if the sales or rentals are prescribed by a person licensed to issue the prescription

Under IC § 6-8.1-5-1(c), Taxpayer has failed to establish whether the "injectable product" is exempt or was used in a taxable or non-taxable fashion. If the product was simply used or consumed in Taxpayer's medical practice and not prescribed to a patient, then the product was taxable. See [45 IAC 2.2-5-36](#) ("The gross retail tax shall apply to the following purchase transactions made by licensed practitioners... medical supplies consumed in professional use.")

#### FINDING

Taxpayer's protest is respectfully denied.

### III. Taxable Transaction – Gross Retail Tax.

#### DISCUSSION

Taxpayer paid money to "The Great Frame Up." Taxpayer was unable to supply a copy of the invoices but assures that Department that sales tax must have been paid at the time of the original transaction because Taxpayer does "not have a sales tax exemption certificate." Taxpayer concludes that sales tax must have been paid to the vendor at the time of the original sale.

Taxpayer may well be correct but the documentation is insufficient to sustain Taxpayer's position. The Department is unable to conclude that Taxpayer has met its burden of demonstrating under IC § 6-8.1-5-1(c) of demonstrating that the assessment was incorrect.

#### FINDING

Taxpayer's protest is respectfully denied.

### IV. Purchase for Resale – Gross Retail Tax.

#### DISCUSSION

Taxpayer paid money to Wisconsin Vision Associates. Taxpayer was unable to locate the original invoices but has provided information which purports to establish that Wisconsin Vision is exclusively in the business of

selling contact lenses and that Taxpayer purchased the lenses to resell the lenses to its own patients.

IC § 6-2.5-5-8(b) provides an exemption for transactions in which tangible personal property is purchased with the intent of reselling that property:

Transactions involving tangible personal property... are exempt from state gross retail tax if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of the person's business without changing the form of the property.

Given the nature of both the transactions and the vendor, the Department is prepared to agree that the Taxpayer has met its burden under IC § 6-8.1-5-1(c) of demonstrating that purchase of contact lenses was exempt.

However, Taxpayer is cautioned that under IC § 6-8.1-5-4(a), taxpayers are required to keep books and records adequate to determine whether or not tax is due and that credit card receipts standing alone may be insufficient to make that determination:

Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and cancelled checks.

#### FINDING

Taxpayer's protest is sustained.

#### SUMMARY

Insofar as transactions in which Taxpayer purportedly acquired intangible property, Taxpayer's protest is denied in part and sustained in part as set out in Part I above; contact lenses purchased from Wisconsin Vision Associates are exempt from sales tax as described in Part IV above; in all other respects, Taxpayer's protest is denied.

*Posted: 08/29/2012 by Legislative Services Agency*

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