

Letter of Findings Number: 04-20120032
Sales/Use Tax
For Tax Years 2008, 2009, and 2010

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ISSUE

I. Sales/Use Tax – Imposition.

Authority: IC § 6-2.5-1-1; IC § 6-2.5-1-5; IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-4-1; IC § 6-8.1-5-1; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Rhoades v. Indiana Dep't of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); USAir, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466 (Ind. Tax Ct. 1993); [45 IAC 2.2-1-1](#); [45 IAC 2.2-8-12](#); Sales Tax Information Bulletin 21 (May 2002); Sales Tax Information Bulletin 28S (February 2008).

Taxpayer protests the proposed assessments, claiming it was not responsible for some of the sales/use tax.

STATEMENT OF FACTS

Taxpayer is an Indiana automobile dealership that sells new and used cars. Taxpayer also provides various services, including wheel alignments, oil changes, and other routine automobile maintenance and repairs.

In 2011, the Indiana Department of Revenue ("Department") conducted a sales/use tax audit of Taxpayer for 2008 through 2010 tax years. Pursuant to the audit, the Department determined that Taxpayer did not collect and remit sales tax on tangible personal property sold to its customers for the years at issue. The Department's audit also determined that Taxpayer did not pay sales tax or self assess and remit use tax on certain purchases of tangible personal property, which Taxpayer used for its business.

Taxpayer protested a portion of the assessments and submitted copies of six (6) invoices prior to the hearing to support its protest. An administrative hearing was held and Taxpayer requested and was given more time to submit additional documentation to support its protest after the hearing. However, Taxpayer did not submit any additional documentation after the hearing. Thus, this Letter of Findings is based on the information within Taxpayer's protest file. Additional facts will be provided as necessary.

I. Sales/Use Tax – Imposition.

DISCUSSION

The Department's audit determined that Taxpayer failed to collect sales tax on tangible personal property, which it sold to its customers during years 2008, 2009, and 2010. The Department's audit also determined that Taxpayer failed to pay sales tax or self-assess use tax on its purchases of tangible personal property used for its business. Taxpayer, at the hearing, claimed that it was not responsible for taxes on a list of the items outlined in the audit summary. However, it should be noted that Taxpayer did not provide any supporting documentation after the hearing.

As a threshold issue, all tax assessments are prima facie evidence that the Department's assessment of tax is presumed correct. "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." 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); Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012).

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 Rhoades 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. *Id.* 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).

A. Sales Tax – Exempt Sales.

Taxpayer claimed that the Department's audit erroneously assessed sales tax on tangible personal property it sold to its customers because its customers were exempt from sales tax.

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.**

(Emphasis added).

IC § 6-2.5-4-1, in relevant part, provides:

- (a) A person is a retail merchant making a retail transaction when he engages in selling at retail.
- (b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:
 - (1) acquires tangible personal property for the purpose of resale; and
 - (2) transfers that property to another person for consideration.

...

(e) 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.

IC § 6-2.5-1-5(a) further outlines what is included in the gross retail income. Additionally, [45 IAC 2.2-8-12](#), in relevant part, provides:

- (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.

In this instance, the Department's audit noted that Taxpayer is a retail merchant and should have collected and remitted sales tax on its sales of tangible personal property to its customers. Taxpayer did not do so. Nor did Taxpayer collect and provide the exemption certificates, which it collected from its customers, to the Department's auditor during the audit. The auditor was therefore unable to verify whether certain sales were exempt from the sales tax.

Pursuant to [45 IAC 2.2-8-12\(b\)](#), "Retail merchants are required to collect sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used for an exempt purpose." [45 IAC 2.2-8-12\(d\)](#) also cautions that, "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 for the seller to obtain an exemption certificate in order to avoid the necessity for such proof." In the absence of the properly signed and executed exemption certificates, the Department's audit properly assessed sales tax on the otherwise taxable sales.

In this instance, there is no question that Taxpayer entered into retail transactions for which – absent an exemption – Taxpayer was required to collect sales tax. At the hearing, Taxpayer simply claimed those sales were exempt but presented no supporting documentation. Specifically, special exemption certificates would have been required when Taxpayer claimed those sales were exempt after the Department concluded the audit. Thus,

the Department is not able to agree that Taxpayer met its burden of proof to demonstrate that it was not responsible for collecting the sales tax.

Taxpayer is reminded that sales tax becomes due at the time of the transaction; either the purchaser is exempt at the time of the transaction or it is not exempt. If the purchaser claims an exemption, the exemption certificate should be obtained at the time the transaction occurs otherwise the burden of proving the transaction was exempt becomes measurably more difficult.

In short, Taxpayer's protest is denied.

B. Use Tax.

Taxpayer claimed that the Department's audit erroneously assessed use tax on purchases, which it used for its business activities.

IC § 6-2.5-3-2, in relevant part, states:

(a) 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.

...

(c) The use tax is imposed on the addition of tangible personal property to a structure or facility, if, after its addition, the property becomes part of the real estate on which the structure or facility is located. However, the use tax does not apply to additions of tangible personal property described in this subsection, if:

- (1) the state gross retail or use tax has been previously imposed on the sale or use of that property; or
- (2) the ultimate purchaser or recipient of that property would have been exempt from the state gross retail and use taxes if that purchaser or recipient had directly purchased the property from the supplier for addition to the structure or facility.

(d) The use tax is imposed on a person who:

- (1) manufactures, fabricates, or assembles tangible personal property from materials either within or outside Indiana; and
- (2) uses, stores, distributes, or consumes tangible personal property in Indiana.

IC § 6-2.5-3-4 provides:

(a) The storage, use, and consumption of tangible personal property in Indiana is exempt from the use tax if:

- (1) the property was acquired in a retail transaction in Indiana and the state gross retail tax has been paid on the acquisition of that property; or
- (2) the property was acquired in a transaction that is wholly or partially exempt from the state gross retail tax under any part of [IC 6-2.5-5](#), except [IC 6-2.5-5-24](#)(b), and the property is being used, stored, or consumed for the purpose for which it was exempted.

(b) If a person issues a state gross retail or use tax exemption certificate for the acquisition of tangible personal property and subsequently uses, stores, or consumes that property for a nonexempt purpose, then the person shall pay the use tax.

1. Purchases for which Taxpayer Paid Sales Tax.

At the hearing, Taxpayer, referring to copies of the invoices, stated that it paid sales tax and thus it is not responsible for the use tax pursuant to IC § 6-2.5-3-4(a)(1).

Taxpayer's documentation demonstrates that Taxpayer paid sales tax on the following items at the time of its purchases.

| Date | Reference | Item Description | Amount |
|------------|-------------|----------------------------------|-----------|
| 02/05/2008 | Check 33850 | Commercial cable | \$ 45.00 |
| 01/26/2009 | Check 36811 | LM remote | \$ 35.00 |
| 07/14/2009 | Check 38227 | Gear & Sprocket assy., lubricant | \$ 53.50 |
| 05/07/2010 | Check 40420 | Torsion springs, lubricant | \$ 222.58 |
| 10/05/2010 | Check 41713 | Commercial circuit board, hinge | \$ 144.06 |

Taxpayer's documentation, however, failed to demonstrate that it paid tax on the transaction, dated November 22, 2010, Check 42118, for Scan tool, in the amount of \$850.

In short, Taxpayer's protest of the above mentioned five (5) transactions is sustained; however, its protest of the transaction regarding the "Scan tool" is denied. The Department will recalculate Taxpayer's tax liabilities in a supplemental audit review.

2. Purchases of Fertilizer Application.

Taxpayer claimed that it was not responsible for sales/use tax on the "fertilizer application" because the "fertilizer application" is a nontaxable service. Taxpayer, however, did not provide any documentation to support its claim.

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.

[45 IAC 2.2-1-1](#), in relevant part, illustrates:

(a) Unitary Transaction. For purposes of the state gross retail tax and use tax, such taxes shall apply and be computed in respect to each retail unitary transaction. A unitary transaction shall include all items of property and/or services for which a total combined charge or selling price is computed for payment irrespective of the fact that services which would not otherwise be taxable are included in the charge or selling price.

(b) Unitary Transaction--Public Utility. For purposes of the state gross retail tax and use tax, all public utility services and commodities subject to said taxes invoiced in a single billing or statement, including a minimum charge, submitted to a consumer for payment shall constitute a unitary transaction.

(c) Retail Transaction. The state gross retail tax is imposed on retail transactions made in Indiana. Three general categories are designated as "retail transactions". The first category is described as transactions of a retail merchant that constitute selling at retail as described in [IC 6-2.5-4-1](#). The second category is described as transactions of a retail merchant that constitute making a wholesale sale as described in [IC 6-2.5-4-2](#). The third category is described as a transaction that is described in any other section of [IC 6-2.5-4](#).

Additionally, the Department's Sales Tax Information Bulletin 21 (May 2002), 25 Ind. Reg. 3939 ("Information Bulletin 21") addressing issues concerning "Lawn Care Applications," states, in relevant part, that:

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.

The sales tax is imposed on the gross retail income received in a retail unitary transaction. The gross retail income received includes the price of the property transferred plus any bona fide charges made for preparation, fabrication, alteration, modification, finishing, completing, delivery, or other service performed in respect to the property before its transfer. Because the chemicals are not transferred until they are applied to the lawn, the application charges are included in the company's gross retail income. Therefore, the entire contract price is subject to the Indiana sales tax.

In this instance, the Department's audit noted that Taxpayer purchased "fertilizer applications," which are taxable unitary retail transactions outlined in the Information Bulletin 21. Taxpayer thus should have paid sales tax. Since sales tax was not paid, use tax is properly imposed.

In short, Taxpayer's protest is denied.

3. Purchases of Consumable Supplies.

The Department assessed Taxpayer use tax on consumable supplies which Taxpayer purchased and used to repair and service motor vehicles, including "Flush kits, brake cleaner," "Radiator service kits, [and] Transmission service kits." Taxpayer did not pay sales tax at the time of purchase, nor did it self-assess and remit use tax to the Department. Taxpayer argued that it was not responsible for the tax because it did not sell the items to its customers, nor did it purchase them for its own use. Taxpayer asserted that the items at issue became "waste" as a result. Thus, Taxpayer maintained that the Department's audit erroneously assessed tax. It should be noted again that Taxpayer did not provide any documentation to support its protest.

The Department's Sales Tax Information Bulletin 28S (February 2008), 20080130 Ind. Reg. 045080050NRA, which addresses issues concerning sales of motor vehicles and trailers, in pertinent part, provides:

IV. SHOP SUPPLIES CONSUMED BY A DEALER

Consumable supplies used by a dealer, such as masking paper and tape, oil dry, sandpaper, buffing pads, rags and cleaning supplies, used to repair and service motor vehicles are not exempt purchases by the dealer. The dealer should pay sales tax upon these type purchases or remit use tax on the cost of these purchases on their sales tax returns. The purchaser (dealer) becomes the final consumer of such items because its customer does not become the owner of such consumable supplies. Although the dealer may charge the customer a fee for the dealer's consumption of these materials, such items are not being sold to the customer in a retail transaction and sales tax is not to be collected from the customer.

Accordingly, Taxpayer, in this instance, used those consumable supplies to perform its services. Therefore, Taxpayer is responsible for the sales/use tax on the purchases of the consumable supplies. Since Taxpayer did not pay sales tax, use tax is properly imposed.

In short, Taxpayer's protest is denied.

FINDING

Taxpayer's protest is sustained in part and denied in part. Taxpayer's protest is sustained on the five (5) transactions outlined in Part B.1. The remainder of Taxpayer's protest, however, is respectfully denied. The Department will recalculate Taxpayer's tax liabilities in a supplemental audit.

Posted: 09/26/2012 by Legislative Services Agency
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