

**Letter of Findings: 04-20110490
Sales and Use Tax
For the Years 2008, 2009, 2010**

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ISSUE

I. Sales and Use Tax – Imposition.

Authority: IC § 6-2.5-1-2; 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 § 6-2.5-5-8; IC § 6-8.1-5-1; IC § 6-8.1-5-4; [45 IAC 2.2-3-4](#); [45 IAC 2.2-3-7](#); [45 IAC 2.2-3-14](#); [45 IAC 2.2-3-20](#); [45 IAC 2.2-5-8](#); 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); Rhoade 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); Indiana Dep't of State Revenue v. Kimball Int'l Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988); Tri-States Double Cola Bottling Co. v. Dep't of State Revenue, 706 N.E.2d 282 (Ind. Tax Ct. 1999); Mynsberge v. Indiana Dep't of State Revenue, 716 N.E.2d 629 (Ind. Tax Ct. 1999); Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974); Indiana Dep't. of Revenue v. Interstate Warehousing, 783 N.E.2d 248 (Ind. 2003).

Taxpayer protests the imposition of additional use tax by presenting additional documentation showing tax paid or exemption.

STATEMENT OF FACTS

Taxpayer is a general contractor and subcontractor that installs wall and floor tile, and granite countertops. The Indiana Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer for the years 2008 through 2010. As a result of the audit Taxpayer was assessed use tax and related interest. Taxpayer protested the assessments. A hearing was held and this Letter of Findings ensues. Additional facts will be presented as needed.

Sales and Use Tax – Imposition.

DISCUSSION

Most of Taxpayer's jobs are billed lump sum, with some exempt jobs and labor-only jobs that are billed for time and materials. Many of Taxpayer's customers are government, hospital, and not-for-profit organizations.

In making the assessment, the audit cited to [45 IAC 2.2-3-4](#) (which imposes use tax on tangible personal property purchased in a retail transaction that is stored, used or otherwise consumed in Indiana) and [45 IAC 2.2-3-14](#) (which exempts use tax on transactions where sales tax was already paid or which are otherwise specifically exempt from sales and use tax). At the hearing, Taxpayer did not provide the Department's auditor sufficient documentation to show that Taxpayer either paid sales tax on a particular item, or that the item was purchased subject to exemption.

The Department's audit review of Taxpayer's use tax records, purchase invoices, and job records revealed various purchases on which tax was due but neither paid to the vendor upon purchase by Taxpayer nor self-assessed as use tax when used by Taxpayer.

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 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. *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).

Generally, all purchases of tangible personal property by persons engaged in the direct production, manufacture, fabrication, assembly, or finishing of tangible personal property are taxable. [45 IAC 2.2-5-8\(a\)](#). A statute which provides a tax exemption, however, is strictly construed against the taxpayer. Indiana Dep't. of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." Id. at 101. Thus, in applying any tax exemption, the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." Indiana Dep't of State Revenue v. Kimball Int'l Inc., 520 N.E.2d 454, 456 (Ind. Ct. App. 1988). The exemption on which Taxpayer relies, like all tax exemption provisions, is strictly construed against exemption from the tax. Tri-States Double Cola Bottling Co. v. Dep't of State Revenue, 706 N.E.2d 282, 283 (Ind. Tax Ct. 1999); Mynsberge v. Indiana Dep't of State Revenue, 716 N.E.2d 629, 636 (Ind. Tax Ct. 1999).

The person who acquires property in a retail transaction is liable for the sales tax on the transaction and, unless exempt, shall pay the tax to the retail merchant. The retail merchant shall collect the tax as agent for the state. IC § 6-2.5-2-1(b). If the Department reasonably believes that a person has not reported the proper amount of tax due, the Department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the Department. IC § 6-8.1-5-1(a). 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. IC § 6-8.1-5-4(a). A person must allow inspection of the books and records and returns by the Department or its authorized agents at all reasonable times. IC § 6-8.1-5-4(c).

IC § 6-2.5-3-4(a)(2) allows for a use tax exemption for tangible personal property that is acquired in a transaction that is exempt from sales tax under IC § 6-2.5-5, and the property is being stored, used, or consumed for the purpose for which it was exempted. One of those exemptions is found at [IC 6-2.5-5-8\(b\)](#) which states that,

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

When a taxpayer claims it is entitled to a tax exemption, it bears the burden of proving that the terms of the exemption have been met. Indiana Dep't. of Revenue v. Interstate Warehousing, 783 N.E.2d 248, 250 (Ind. 2003). The Department will strictly construe the exemption statutes against the taxpayer claiming the exemption. Id.

Taxpayer fits the definition of a "contractor" under [45 IAC 2.2-3-7\(a\)](#) because Taxpayer converts construction material into realty. As a contractor, Taxpayer qualifies for exemption only on materials that are resold to their customers under a time and materials contract, or are provided as part of a lump-sum improvement to realty where the customer is exempt. Taxpayer is subject to tax on all other purchases. Under [45 IAC 2.2-3-20](#), where the tax was not paid to the vendor at the time of taxable purchases, the taxpayer is responsible for payment of use tax directly to the Department.

At the hearing and subsequent to it, Taxpayer provided documentation contesting fourteen (14) transactions. For all but three of these transactions, Taxpayer provided invoices showing that the sales tax was paid to the vendors when Taxpayer purchased these items.

For two of the transactions, Taxpayer presented exemption certificates (one from a school and the other from a church) to demonstrate that the transactions were exempt. However for these two transactions, Taxpayer did not provide sufficient documentation to show that the exemption certificates are associated with the particular transactions. Also, one of these two exemption certificates was dated in 2012 for a 2009 transaction. Taxpayer has therefore not met its burden to show that the transactions listed on the audit summary line 13 of page 10 and line 6 of page 20 are exempt.

The documentation Taxpayer presented for the last transaction listed on page 24 of the audit summary was not relevant to show whether sales tax was paid. Taxpayer has therefore not met its burden to show that this transaction is exempt.

Therefore, Taxpayer has met its burden to show that it paid sales tax on eleven (11) of the protested transactions. However, Taxpayer did not meet its burden to show that the remaining three (3) contested transactions are either exempt or already subjected to sales tax.

FINDING

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

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