DEPARTMENT OF STATE REVENUE

04-20120222.LOF

Letter of Findings Number: 04-20120222
Sales and Use Tax
For Tax Periods January 1, 2006 through July 30, 2011

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ISSUE

I. Sales Tax–Imposition.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-2.5-3-5; IC § 6-8.1-5-1; IC § 6-2.5-9-3; IC § 6-2.5-13-1; 45 IAC 2.2-2-1; Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the assessment of Indiana sales tax.

STATEMENT OF FACTS

Taxpayer is a national company with its headquarters out of state and a branch office in Kentucky. Taxpayer sells and services printers, copiers, scanners and fax machines. Taxpayer also rents and leases these office machines. The services include installation, training, supply sales, and maintenance and repairs. The Kentucky location delivered goods in company owned vehicles and performed repairs and other services on-site for Indiana customers. The Kentucky location was sold on July 30, 2011. Taxpayer had no Indiana locations, was not registered as an Indiana retail merchant, and was a non-filer for Indiana sales and use tax purposes.

The Indiana Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer for the tax periods January 1, 2006, through July 30, 2011. Pursuant to the audit, Taxpayer was assessed Indiana sales tax on taxable sales for which Taxpayer had not collected nor remitted Indiana sales tax. Taxpayer protested the assessment arguing that it had collected Kentucky sales tax on the transactions. A hearing was held and this Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales Tax–Imposition.

DISCUSSION

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(b), (c); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

The Department's audit proposed an adjustment to assess Indiana sales tax on the sales of tangible personal property shipped or delivered to Indiana customers. This adjustment was proposed according to 45 IAC 2.2-2-1 which imposes sales tax on retail transactions in Indiana.

IC § 6-2.5-4-1(a)-(c) defines a "retail merchant" involved in "retail transactions," as follows:

(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.

(c) For purposes of determining what constitutes selling at retail, it does not matter whether:

(1) the property is transferred in the same form as when it was acquired;

(2) the property is transferred alone or in conjunction with other property or services; or

(3) the property is transferred conditionally or otherwise.

Accordingly, a retail merchant performing retail transactions is a person who obtains and sells tangible personal property. Pursuant to IC § 6-2.5-2-1(a), retail transactions that are made in Indiana are subject to the state gross retail tax ("sales tax"). Moreover, "the retail merchant is required to collect the tax [due on the retail transaction] as [an] agent for the state." IC § 6-2.5-2-1(b). Furthermore, the retail merchant "has a duty to remit Indiana [sales] or use taxes... to the department, [to] hold those taxes in trust for the state, and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state." IC § 6-2.5-9-3(2).

Therefore, Taxpayer, as a retail merchant, has a duty to collect and remit sales tax on its sales of tangible personal property. When Taxpayer fails to collect and hold the taxes in trust for the state, Taxpayer is personally liable for the sales tax, interest, and penalties due to the state for those sales. Since Taxpayer failed to collect the Indiana sales tax from its Indiana customers, the Department assessed sales tax liabilities on the Taxpayer.

The Department's examination of invoices showed charges for on-site sales and services for customers in Indiana – replacement of rollers; cleaning and testing of equipment; replacement of parts; installation of items by technicians – for which no Indiana sales tax had been collected or remitted to Indiana. The audit allowed Taxpayer time to obtain exemption certificates from its customers. In addition, the audit excluded from the list of taxable sales items that were sold to obviously exempt customers such as municipalities and not-for-profit organizations.

Taxpayer does not now disagree that it should have collected and remitted Indiana sales tax. Taxpayer states, however, that at the time of the transactions it did not know it had a duty to collect Indiana sales tax and argued that it had collected Kentucky sales tax on the transactions and that the time is closed for Taxpayer to file Kentucky amended returns to request refunds of the Kentucky sales tax it collected and remitted to Kentucky. Taxpayer also points out that it is burdensome for Taxpayer to contact its customers to verify if its customers in the meantime paid Indiana use tax on these transactions. Taxpayer also states that it has since sold its Kentucky branch and no longer operates in either Kentucky or Indiana.

As preliminary matter, Taxpayer is presumed to know the law, especially in light of the fact that Taxpayer is a sophisticated, experienced business and conducts business in multiple states.

At the hearing Taxpayer was asked to provide invoices showing that it had collected and paid Kentucky sales tax on the transactions. Taxpayer stated that the Department's auditor had reviewed the invoices. The Department's audit makes no mention of Taxpayer having collected and/or remitted Kentucky sales tax. The Department's audit did retain copies of some of Taxpayer's invoices for several apparently exempt organizations such as churches, hospitals and state and/or local government entities. These records also include invoices for one of Taxpayer's customers who is not an exempt entity and from whom no Kentucky sales tax was collected. Therefore, in the absence of any of the remaining invoices for the assessed transactions, this Letter of Findings cannot confirm that Kentucky sales tax was collected or remitted.

Even had Taxpayer been able to demonstrate that it collected and remitted Kentucky sales tax, Taxpayer would still not have been relieved of its obligation to collect and remit Indiana sales tax, nor would it have received credit for any Kentucky sales tax it may have collected and remitted. IC § 6-2.5-3-5 provides for "a credit against the use tax imposed on the use, storage, or consumption of a particular item of tangible personal property equal to the amount, if any, of sales tax, purchase tax, or use tax paid to another state, territory, or possession of the United States for the acquisition of that property." (Emphasis added). However, IC § 6-2.5-3-5 does not apply to Taxpayer's situation. Taxpayer has not been assessed use tax, but has been assessed sales tax. Taxpayer sold tangible personal property and services to Indiana customers, which accepted delivery in Indiana. Pursuant to IC § 6-2.5-13-1(d)(2), Taxpayer's sales, which are accepted in Indiana, are completed here and are sourced to Indiana. Since the sales were completed here, the sales are Indiana retail transactions that are subject to the Indiana sales tax rather than the Kentucky sales tax.

In this case, Taxpayer owes Indiana sales tax on its sales of the property on which it had improperly paid sales tax to Kentucky. Thus, Taxpayer does not receive a credit for the sales tax paid to Kentucky. Taxpayer remedies for the sales tax it improperly paid to Kentucky are with Kentucky.

FINDING

Taxpayer's protest is respectfully denied.

Posted: 12/26/2012 by Legislative Services Agency
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