

**Letter of Findings: 04-20120367**  
**Sales and Use Tax**  
**For the Years 2009 and 2010**

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**ISSUE**

**I. Sales and Use Tax – Exemption.**

**Authority:** IC § 6-8.1-5-1; IC § 6-8.1-5-4; IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; [45 IAC 2.2-8-12](#); [45 IAC 2.2-3-12](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue 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 use tax on its purchases of waterers, heaters, and plugs it used in a water trough it constructed for a dairy farm customer.

**STATEMENT OF FACTS**

Taxpayer is an Indiana construction company that specializes in building barns for farming operations. The Indiana Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer for the years 2009 and 2010. Pursuant to the audit, Taxpayer was assessed additional use tax and interest. Taxpayer protested two charges included in the assessment: the first charge was on an invoice for a waterer, heater, and plugs; the second charge was for a \$179 item charged to a credit card. An administrative hearing was held on Taxpayer's protest. Subsequent to the hearing, Taxpayer withdrew its protest of the \$179 item. This Letter of Findings therefore only addresses the taxability of the transaction relating the waterer, heater, and plugs. Additional facts will be provided as necessary.

**I. Sales and Use Tax – Exemption.**

**DISCUSSION**

The Department's audit found that Taxpayer had made purchases which were subject to sales tax where Taxpayer had failed to pay the sales tax and where Taxpayer had also failed to self-assess and remit use tax. Therefore, the audit assessed the use tax. Specifically, the Department found that Taxpayer purchased a waterer, heater, and plugs (on the same invoice) without paying sales tax on its purchase of the items or collecting and remitting sales tax on its subsequent sale of these items. Taxpayer protests the assessment on the basis that it was including these items in the construction of a barn for one of its customers, a dairy farm, that purportedly qualifies for exemption under IC § 6-2.5-5-2, the "agricultural machinery, tools, and equipment" exemption.

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. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

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). Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-3-2(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).

An exemption from the use tax is granted for transactions when sales tax was paid at the time of purchase pursuant to IC § 6-2.5-3-4. There are also additional exemptions from sales tax and use tax. IC § 6-2.5-5 et seq. A statute which provides a tax exemption, however, is strictly construed against the taxpayer. Indiana Dep't of State Revenue v. RCA Corp., 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). 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.

Every person subject to a listed tax must keep books and records that allow the Department to determine the amount, if any, of a person's liability for that tax by reviewing those books and records. IC § 6-8.1-5-4(a).

The law establishes that Taxpayer, as a retail merchant, has a duty to collect and remit sales tax on its sales of tangible personal property (as a contractor). 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.

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, "[u]nless 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." Thus, in the absence of the properly signed and properly executed exemption certificates, the Department's audit properly assessed sales tax on the otherwise taxable sales.

Additionally, [45 IAC 2.2-3-12](#)(a) further explains that "[t]angible personal property purchased to become a part of an improvement to real estate under a contract with an organization entitled to exemption is eligible for exemption when purchased by the contractor."

In this instance, the Department's audit noted that Taxpayer charged its customer pursuant to a lump sum contract but did not pay sales tax or self-assess use tax on the materials it used to perform the lump sum contract. Taxpayer did not present any exemption certificate to the Department at the time of the audit. Thus, the audit properly assessed use tax.

At the hearing, Taxpayer asserted that it was not responsible for sales/use tax because its customer was exempt. Subsequently, Taxpayer submitted additional documentation including copies of the contract, invoices, and the customer's exemption certificate to support its protest.

Upon reviewing Taxpayer's documentation, the Department agrees that Taxpayer has provided sufficient documentation to demonstrate that the purchase of the contested items was exempt.

**FINDING**

Taxpayer's protest is sustained.

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