

Supplementary Letter of Findings: 04-20110314
Sales and Use Tax
For the Years 2002 through 2008

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ISSUE

I. Tangible Personal Property – Gross Retail Tax.

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

Taxpayer disagrees with the Department of Revenue's decision imposing tax on the purchase of various items of tangible personal property and "capital assets."

STATEMENT OF FACTS

Taxpayer is an Indiana business which develops and sells equipment and supplies used for the "point of sale" production and sale of personalized children's music. Taxpayer sells its equipment and supplies to customers in Indiana, customers in states outside Indiana, and to customers in foreign locations.

Taxpayer historically failed to collect and remit sales tax or self-assess use tax. To correct that omission, Taxpayer entered into a "Voluntary Compliance Agreement" in which it promised to register for and pay sales and use tax.

Taxpayer failed to fulfill the terms of the agreement. The Department of Revenue ("Department") abrogated the agreement and scheduled an audit review of Taxpayer's business records.

The audit commenced on April 2010. The audit report found that Taxpayer purchased "various capital assets" and items of tangible personal property during the years under review without paying sales tax or self-assessing use tax. However, the audit found itself "stymied by a lack of source documents" and that Taxpayer had failed to provide documentation that certain items were purchased in order to resell those items.

The audit review was completed approximately one year after it was begun. The audit resulted in the assessment of sales and use tax. Taxpayer objected and submitted a protest to that effect. Taxpayer provided additional records and a spreadsheet. Upon Taxpayer's request, a "Supplementary Audit" was conducted approximately four months after the first audit report was issued. That supplemental audit – and a review of the documents provided at that time – resulted in an adjustment to the original assessment. However, Taxpayer did not wish to accept the supplemental audit results.

Taxpayer disagreed with that revised assessment and indicated that the matter should proceed at the administrative protest level. An administrative hearing was conducted. During the hearing, Taxpayer's representative explained that Taxpayer did not have sufficient opportunity during the course of the original audit to locate and produce the original documentation and that – even at the time of the administrative hearing – Taxpayer would require an additional ten days in which to assemble and produce the necessary documentation. Taxpayer was permitted additional time following the hearing in which to produce the information.

Eventually "three... boxes of documents and one CD" were provided. However neither Taxpayer nor its representative were able to explain how the undifferentiated documents in any way related to the contested assessment. Letter of Findings 04-20110314 (20120125 Ind. Reg. 045120031 NRA) was issued on November 23, 2011, concluding that Taxpayer had failed to meet "its burden of proof demonstrating that the proposed assessment is not correct."

Taxpayer objected and requested a rehearing. The rehearing was granted with the understanding that the necessary documentation would be gathered, assembled, and presented during the rehearing. That rehearing was conducted and this Supplementary Letter of Findings results.

I. Tangible Personal Property – Gross Retail Tax.

DISCUSSION

Taxpayer maintains that a review of its records will establish that it owes no sales or use tax. Taxpayer presented five boxes of additional documents the contents of which were indexed and organized. In addition, Taxpayer also supplied a portable computer hard drive which – according to Taxpayer – contains all the information necessary to establish that it paid sales or use tax on the tangible personal property and capital assets it purchased during the years under review.

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. 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 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 *Rhoads 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). An exemption from use tax is granted for transactions where the sales tax was paid at the time of purchase pursuant to IC § 6-2.5-3-4.

IC § 6-8.1-5-1(b), in part, states "[i]f 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. The amount of the assessment is considered a tax payment not made by the due date and is subject to [IC 6-8.1-10](#) concerning the imposition of penalties and interest."

IC § 6-8.1-5-4, in pertinent part, provides:

(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. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.

(b) A person must retain the books and records described in subsection (a), and any state or federal tax return that the person has filed:

(1) For an unlimited period, if the person fails to file a return or receives notice from the department that the person has filed a suspected fraudulent return, or an unsigned or substantially blank return.

Taxpayer has provided nothing to establish that the original audit – nor the supplemental audit – was provided with requisite information necessary to establish that it had paid sales tax or self-assessed use tax on the purchases made during the years at issue. Similarly, there is nothing which establishes that the original Letter of Findings erred when it determined that Taxpayer had not met its burden of proof necessary to establish that the assessment was incorrect.

However, it is apparent that Taxpayer has assembled, organized and provided – albeit somewhat belatedly – documentation sufficient to justify review of both the original audit and supplemental audit assessment.

This Supplemental Letter of Findings makes no determination as to the final amount of sales or use tax which may be due from Taxpayer because the Hearing Officer lacks the necessary expertise to either review the thousands of pages of physical and electronic documents which Taxpayer now offers or to arrive at a definitive final tax assessment. The Audit Division has agreed to review the documentation and prepare a "supplemental-supplemental" report. Nonetheless, it is reasonable to assume that this is the final review opportunity which the Department will provide Taxpayer on this matter.

FINDING

Subject to the findings of the Audit Division, Taxpayer's protest is sustained.

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