

Letter of Findings Number: 04-20120141
Sales/Use Tax
For Tax Years 3/31/2008 – 12/31/2010

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ISSUE

I. Sales/Use Tax—Various Items.

Authority: IC § 6-8.1-5-1(c); *Wendt LLP v. Indiana Dept. of State Revenue*, 977 N.E.2d 480 (Ind. Tax Ct. 2012); IC § 6-2.5-2-1; IC § 6-2.5-3-2(a); IC § 6-2.5-3-4; IC § 6-2.5-3-5; Revenue Ruling 2008-16ST (November 14, 2008); Commissioner's Directive 23 (April 2004).

Taxpayer protests the imposition of use tax on various items.

STATEMENT OF FACTS

Taxpayer is a restaurant chain. Taxpayer was audited by the Indiana Department of Revenue for sales and use tax. Taxpayer filed a protest regarding the proposed assessment for sales/use tax. An administrative telephone hearing was conducted and this Letter of Findings results. Further facts will be supplied as required below.

I. Sales/Use Tax—Various Items.

DISCUSSION

The Department initially notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c). See also *Wendt LLP v. Indiana Dept. of State Revenue*, 977 N.E.2d 480, 485 n.9, (Ind. Tax Ct. 2012) (stating in a footnote parenthetical "that poorly developed and non-cogent arguments are subject to waiver" by the Indiana Tax Court) (citing *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010)).

Sales tax in Indiana is imposed by IC § 6-2.5-2-1, which states:

(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.

A complementary 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." IC § 6-2.5-3-2(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.

Taxpayer provided a table of items that it was protesting, those items being the following:

2008:

For 2008, Taxpayer protests three items. The first item is an invoice from a vendor [hereinafter referred to as "Company R"], and Taxpayer states that its "[r]eason for appeal" is,

This was a Help Desk charge. Should we be taxed although there is no expectation of TPP use in utilizing the services of the Help Desk?

And also:

Help Desk charge—Should this be taxable although there is no expectation of TPP use in utilizing the services of the Help Desk?

At the hearing, Taxpayer stated that Company R provides the point of sale for restaurants, and that the help desk call is simply to resolve server issues, or items reporting incorrectly. Taxpayer merely asserts its position without sufficiently developing a cogent argument for the Department to address. As noted, under IC § 6-8.1-5-1(c), Taxpayer bears the burden of proof. Taxpayer's protest is denied for this issue.

Taxpayer then protests another item for Company R, this time stating:

Per Revenue Ruling []2008-16ST, this is non-taxable. Additionally—the amount \$4040.58 was taken from the totals on invoice [] allocated. This item is a duplicate of previously identified items added together.

And also:

Application hosting of our POS back office system (similar to web hosting)[.]

The Revenue Ruling that Taxpayer cites to (Revenue Ruling 2008-16ST (November 14, 2008), 20081217 Ind. Reg. 045080927NRA) does deal, in part, with "Web Hosting Fee[s]" and does find that web hosting fees are a service charge and are not subject to sales and use tax in Indiana. Taxpayer provides an invoice that has a line that states, "ML SA Net Hosting Services" and the Audit Report lists it as "ML Net Hosting." Taxpayer has met its burden regarding the issue of Net Hosting services, and its protest is sustained.

Next, Taxpayer argues that regarding Company R there is a "[c]harge [that] is listed three times (on both

2008 & 2009) additional tax due listings. The charge appears on the referenced invoice once." Taxpayer's protest for this issue is sustained subject to audit verification. The Audit Division is requested to review the invoice, and if it is erroneously listed multiple times, to make the requisite correction.

2009:

For the year 2009, Taxpayer protests a charge from Company D. Taxpayer states:

The invoice noted that the charges were for installation services only. Per the Commissioners Directive [23, dated April 2004, installation charges when separately [sic] stated are non-taxable.

At the hearing, Taxpayer argued that Company D installed the water heater, and that the water heater itself was purchased from another company.

Commissioner's Directive 23 (April 2004), 27 Ind. Reg. 2615, states in pertinent part:

As of March 18, 2004, separately stated installation charges are not subject to sales tax.

The invoice that Taxpayer provided from Company D states, "Installed water heater provided by [another company]...." It appears that the Department's audit included both the installation invoice from Company D, and the purchase invoice from another company. Taxpayer's protest as it relates to the sales tax for installation of the water heater is sustained.

Next, Taxpayer argues that it paid a Canadian vendor sales tax at a 5 percent rate, and thus should get credit for that amount and only owe the State of Indiana use tax on the difference between the Canadian and Indiana rate. IC § 6-2.5-3-5 states:

A person is entitled to 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.

Since Canada is not "another state, territory, or possession of the United States." Taxpayer is not entitled to the credit. Furthermore, the invoice that Taxpayer provided from the Canadian vendor does not match the amount listed in the audit report. Taxpayer's protest is denied.

Taxpayer also argues that tax was paid to Company T, and provided invoices to that effect. The Audit Division is requested to review the documentation provided with Taxpayer's February 6, 2012, protest letter. Taxpayer's protest of this issue is sustained subject to that Audit verification.

2010:

Taxpayer argues that in 2010 tax was paid to two different vendors, Company S and Company P. Taxpayer states regarding Company S, "Tax was paid to the vendor—per attached." Regarding Company P, "Per the vendor invoice, the transactions were taxed." For these items, the Audit Division is requested to review the documentation that Taxpayer has provided. Taxpayer's protests regarding Company S and Company P are sustained subject to Audit verification of each.

FINDING

Taxpayer's protest is denied, except for the following specific issues: Taxpayer's protest regarding Net Hosting services by Company R is sustained; Taxpayer's protest regarding a charge being listed three times for Company R is sustained subject to Audit verification; Taxpayer's protest of the installation charges for a water heater is sustained; Taxpayer's protest regarding tax paid to Company T is sustained, subject to Audit verification; and Taxpayer's protest for tax paid to Company S and to Company P is sustained, also subject to Audit verification. As noted, Taxpayer's protest for all other items is denied.

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