

**Letter of Findings Number: 04-20120404**  
**Sales Tax**  
**For Tax Years 2009-10**

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**ISSUE**

**I. Sales Tax—Utilities.**

**Authority:** IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-8.1-10-1; IC § 6-8.1-5-1; [45 IAC 2.2-4-1](#); [45 IAC 2.2-4-11](#); [45 IAC 15-11-2](#).

Taxpayer protests the imposition of sales tax on hydrant rentals.

**STATEMENT OF FACTS**

Taxpayer is an Indiana municipal utility. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not collected and remitted sales tax on certain transactions during the tax years 2009 and 2010. The Department therefore issued proposed assessments for sales tax and interest for those years. Taxpayer protested the imposition of sales tax on hydrant rentals listed as subject to tax and interest. An administrative hearing was held and this Letter of Findings results. Additional facts will be supplied as required.

**I. Sales Tax—Utilities.**

**DISCUSSION**

Taxpayer protests the imposition of sales tax on some transactions it conducted as a retail merchant during the tax years 2009 and 2010. The Department based its determination on the fact that Taxpayer is a retail merchant and that there was no documentation to establish the nature of the transactions. Taxpayer argues that the transactions were only maintenance fees and access fees, without any transfer of tangible personal property ("TPP"), which in this case is water. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom a proposed assessment is made, as provided by IC § 6-8.1-5-1(c). During the hearing, the Hearing Officer explained that under IC § 6-8.1-10-1(e) the Department is not permitted to waive interest, therefore that issue will not be further addressed.

Sales tax 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.

(Emphasis added).

Also, [45 IAC 2.2-4-11](#) states:

- (a) In general, the furnishing of electricity, gas, water, steam or steam heating services by public utilities to consumers is subject to the state gross retail tax.
- (b) A power subsidiary or a person engaged as a public utility in furnishing or selling electrical energy, natural or artificial gas or mixtures thereof, water, or steam or steam heating services to a person for domestic or commercial consumption shall be a retail merchant in respect thereto, and the gross income received therefrom, shall constitute gross retail income of a retail merchant received from a retail transaction.
- (c) The gross receipts of power subsidiaries on public utilities from the furnishing or selling of gas, electricity, water, or steam are subject to the state gross retail tax. The tax applies to the total receipts of such power subsidiary or public utilities for services furnished or sold, irrespective of whether the actual net charge is based upon actual consumption, a flat rate charge, or a minimum charge. The tax is borne by the consumers.
- (d) The term "public utilities" as used in this regulation [[45 IAC 2.2](#)] means any organization which is engaged in the furnishing or selling of electricity, natural or artificial gas or mixtures thereof, water, steam or steam heating, and having the right of eminent domain or subject to government regulation in connection with the furnishing of public utility services. The term includes governmental units and not-for-profit organizations which furnish public utility services.

Therefore, since Taxpayer is a retail merchant, it is responsible for collecting and remitting sales tax when it sells tangible personal property to its customers in retail transactions. In this case, the Department determined that Taxpayer was selling tangible personal property (i.e. water) to its customers but that it had not collected and remitted sales tax on some of those transactions. Taxpayer protests that it was not selling tangible personal property in the transactions in question and that those transactions were therefore not taxable.

IC § 6-2.5-4-1, in pertinent part, provides:

- (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.

[45 IAC 2.2-4-1](#) states as follows:

(a) Where ownership of tangible personal property is transferred for a consideration, it will be considered a transaction of a retail merchant constituting selling at retail unless the seller is not acting as a "retail merchant".

(b) All elements of consideration are included in gross retail income subject to tax. Elements of consideration include, but are not limited to:

- (1) The price arrived at between purchaser and seller.
- (2) Any additional bona fide charges added to or included in such price for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other services performed in respect to or labor charges for work done with respect to such property prior to transfer.
- (3) No deduction from gross receipts is permitted for services performed or work done on behalf of the seller prior to transfer of such property at retail.

According to Taxpayer, the "maintenance fees" are a separate, line item on the consumers' water bill, are segregated in Taxpayer's financial records, and are used for the maintenance and update of the public fire hydrant system. Taxpayer is correct;

the "maintenance fees" are not subject to the state's gross retail tax because the fees are separately stated and do not represent the transfer of "tangible personal property." Taxpayer has met the burden imposed by IC § 6-8.1-5-1(c).

#### **FINDING**

Taxpayer's protest is sustained.

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