

Letter of Findings: 04-20120555
Gross Retail Tax
For the Years 2009, 2010, and 2011

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ISSUE

I. Lump Sum Contracts – Gross Retail Tax.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-2(a); IC § 6-8.1-5-1(c); IC § 6-8.1-5-4; IC § 6-8.1-5-4(c); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Sales Tax Information Bulletin 60 (April 2011).

Taxpayer argues that it is not required to self-assess use tax on purchases of material necessary to perform lump sum contracts.

STATEMENT OF FACTS

Taxpayer is an Indiana business which sells, services, and installs furnaces and air conditioning equipment. The Department of Revenue ("Department") conducted an audit review of Taxpayer business records and sales/use tax returns. The audit concluded that Taxpayer owed additional sales/use tax.

Taxpayer disagreed with the assessment and submitted a protest to that effect. In addition to filing the protest, Taxpayer delivered to the Department's Legal Division numerous documents which – according to Taxpayer – would refute the original audit's assessment.

Taxpayer's objection was that "the discrepancies are related to all the Duncan Supply invoices for the years in question. The statements did not show the sales tax paid on it but upon looking at the actual sales, the sales tax amount was on there."

Those records were transferred to the Audit Division which conducted a supplemental review. That successive review found that the amount of the assessment should be reduced based on those supplemental documents.

Taxpayer remained unsatisfied. Therefore, an administrative hearing was conducted by phone during which Taxpayer's representatives explained the basis for the protest. This Letter of Findings results.

I. Lump Sum Contracts – Gross Retail Tax.

DISCUSSION

Taxpayer argues that it does not owe tax because it pays sales tax each and every time it acquires materials used to fulfill lump sum construction contracts.

At the outset, it is useful to set out the Department guidance on this issue found in Sales Tax Information Bulletin 60 (April 2011), 20110427 Ind. Reg. 045110247NRA.

If a construction contractor purchases construction materials pursuant to a lump sum contract, the construction contractor pays either (1) sales tax at the time the construction materials are purchased; or (2) use tax at the time the construction materials are incorporated into real property if the contractor purchased or acquired the construction materials exempt from sales tax and the owner of the real property could not have purchased the materials exempt from sales tax (as evidenced by a customer's properly completed ST-105 General Sales Tax Exemption Certificate).

Taxpayer maintains that it paid sales tax on all of the materials it bought to complete its lump sum contracts and that all of the contracts it enters into with its customers are lump sum contracts. According to Taxpayer, the evidence establishes that it owes neither sales nor use tax.

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-3-2(a). 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. IC § 6-2.5-3-2.

It is a taxpayer's obligation to maintain books and records sufficient to accurately determine the taxpayer's tax liability. "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." IC § 6-8.1-5-4. In addition, IC § 6-8.1-5-4(c) provides that, "A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times." IC § 6-8.1-5-4(c).

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "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." *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012).

According to the audit report, "It should be noted that the [T]axpayer did not remit any Use Tax to the Department." Taxpayer agrees that it did not remit use tax during the audit years.

Since Taxpayer did not collect sales tax from its customers and did not self-report sales tax, Taxpayer must have – by simple elimination – must have paid sales tax to its vendors each and every time it purchased materials incorporated into the lump sum contracts Taxpayer indicates it entered into with its customers.

However, the audit report found that Taxpayer engaged in both "time and material" contracts and "lump sum" contracts. In addition, the audit found that some of Taxpayer's vendors charged sales tax and some did not.

The audit found instances of "numerous missing invoices evidenced by many gaps in the numeric sequence of the sales invoices made available."

The supplemental audit addressed Taxpayer's initial objection that the additional assessment is entirely attributable to a misreading of the invoices received from Duncan Supply. The Department stated that it "was in agreement that an additional \$734 sales tax paid to vendors should be allowed as credit in the audit report." However, the supplemental audit found that there was no evidence – as Taxpayer asserted – that Taxpayer did not "mark-up" the cost of the materials consumed in completing lump sum jobs. In addition, the Department's supplemental audit was unable to verify or document "over \$100,000 in purchases" and noted the absence of original documentation such as "general ledgers, trial balances, [and] job folders."

Taxpayer asks that the Hearing Officer conduct yet a third audit of Taxpayer's records, make a competent decision that both the original audit and supplemental audit were faulty, and conclude that Taxpayer has met its statutory burden of demonstrating that the additional assessment of sales/use tax was "wrong." The Department must decline Taxpayer's invitation. The original audit began December 2011 and concluded July 2012; the supplemental audit conducted an extensive review of the documentation provided subsequent to the original audit. The administrative hearing is not an appropriate venue to second-guess the result of those audits where a Taxpayer has not made a compelling, documented argument that the assessment was wrong.

FINDING

Taxpayer's protest is respectfully denied.

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