

Letter of Findings Number: 04-20120413
Use Tax
For Tax Years 2009-11

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ISSUE

I. Use Tax—Imposition.

Authority: Galligan v. Indiana Dep't of State Revenue, 825 N.E.2d 467, 480 (Ind. Tax Ct. 2005); Frame Station, Inc. v. Indiana Dep't of State Revenue, 771 N.E.2d 129 (Ind. Tax Ct. 2002); IC § 6-2.5-1-1; IC § 6-2.5-1-5; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-4-1; IC § 6-2.5-5-3; IC § 6-8.1-5-1; [45 IAC 2.2-3-4](#).

Taxpayer protests the imposition of use tax on some transactions.

STATEMENT OF FACTS

Taxpayer is an Indiana business. In the course of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not paid sales tax on some transactions upon which tax should have been paid during the tax years 2009, 2010, and 2011. Therefore, the Department issued proposed assessments for use tax and interest for those years. Taxpayer protested that some of those purchases were not subject to sales and use tax. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Use Tax—Imposition.

DISCUSSION

Taxpayer protests the imposition of use tax on five categories of transactions during the tax years 2009, 2010, and 2011. The Department determined that these transactions were subject to sales and use taxes. Taxpayer states that the five categories under protest are not subject to sales and use taxes for various reasons. The Department 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).

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).

Use tax is imposed under IC § 6-2.5-3-2(a), which states:

An 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.

[45 IAC 2.2-3-4](#) further explains:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Therefore, when tangible personal property is used, stored, or consumed in Indiana, use tax is due unless sales tax was paid at the time of the transaction.

The first category under protest is in regards to equipment which Taxpayer believes qualifies as exempt manufacturing equipment. Taxpayer states that the Department included the amount paid for a paint system used in Taxpayer's production line. The relevant statute is IC § 6-2.5-5-3(b), which states:

Except as provided in subsection (c), transactions involving manufacturing machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property.

Therefore, when a taxpayer uses machinery, tools, or equipment in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property, the purchased machinery, tools, or equipment is exempt from sales and use tax. In this case, Taxpayer has provided sufficient documentation to show that the paint line is directly used in the direct production of its goods. Taxpayer has met the burden imposed under IC § 6-8.1-5-1(c).

The second category under protest is a wastewater tank which is part of Taxpayer's paint line. The Department considered the wastewater tank to be a post-production piece of equipment which did not have a direct effect on the direct production of Taxpayer's goods. As part of the hearing process, Taxpayer provided

documentation and analysis to show that the wastewater tank is an integral part of the exempt paint line. Therefore, the wastewater tank is also exempt under IC § 6-2.5-5-3(b).

The third category under protest concerns forklifts and related items. Taxpayer argues that the Department agreed to a thirty-eight percent taxable rate for forklifts and that the same rate should apply to battery chargers for the forklifts. Again, IC § 6-2.5-5-3(b) provides an exemption for machinery, tools, and equipment which is directly used in the direct production process. In this case, the battery chargers are not directly used in the direct production of Taxpayer's goods. The forklift batteries themselves would be subject to the same tax rate as the forklifts since they power the forklifts as they transport work-in-process, but the chargers only have a direct effect on the batteries, not on Taxpayer's goods. Taxpayer has not met the burden imposed by IC § 6-8.1-5-1(c).

The fourth category under protest concerns amounts which Taxpayer states were charged for installation services on four invoices. Taxpayer believes that these amounts are not subject to sales and use tax and that they should be removed from the Department's calculations of use tax due. Taxpayer provided copies of the four invoices in support of its position that the Department included delivery charges as amounts subject to sales tax. The first relevant statute is IC § 6-2.5-1-1, which states:

(a) Except as provided in subsection (b), "unitary transaction" includes all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated.

(b) "Unitary transaction" as it applies to the furnishing of public utility commodities or services means the public utility commodities and services which are invoiced in a single bill or statement for payment by the consumer.

(Emphasis added).

Also of relevance is IC § 6-2.5-1-5(a), which provides:

Except as provided in subsection (b), "gross retail income" means the total amount of consideration, including cash, credit, property, and services, for which tangible personal property is sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for:

- (1) the seller's cost of the property sold;
- (2) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller;
- (3) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges;
- (4) delivery charges; or
- (5) consideration received by the seller from a third party if:
 - (A) the seller actually receives consideration from a party other than the purchaser and the consideration is directly related to a price reduction or discount on the sale;
 - (B) the seller has an obligation to pass the price reduction or discount through to the purchaser;
 - (C) the amount of the consideration attributable to the sale is fixed and determinable by the seller at the time of the sale of the item to the purchaser; and
 - (D) the price reduction or discount is identified as a third party price reduction or discount on the invoice received by the purchaser or on a coupon, certificate, or other documentation presented by the purchaser. For purposes of subdivision (4), delivery charges are charges by the seller for preparation and delivery of the property to a location designated by the purchaser of property, including but not limited to transportation, shipping, postage, handling, crating, and packing.

(Emphasis added).

The next relevant statute is IC § 6-2.5-4-1, which states in relevant parts:

(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.

(d) Notwithstanding subsection (b), a person is not selling at retail if he is making a wholesale sale as described in section 2 of this chapter.

(e) The gross retail income received from selling at retail is only taxable under this article to the extent that the income represents:

- (1) the price of the property transferred, without the rendition of any service; and
- (2) except as provided in subsection (g), any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records.

For purposes of this subsection, a transfer is considered to have occurred after delivery of the property to the purchaser.

....

(Emphasis added).

In *Frame Station, Inc. v. Indiana Dep't of State Revenue*, 771 N.E.2d 129 (Ind. Tax Ct. 2002), the Indiana Tax Court discussed the taxable status of services provided before or after the transfer of tangible personal property. In that case, the court stated:

The transfer of property occurs when the buyer (1) agrees to buy property from a seller, (2) pays the purchase price, and (3) takes ownership and possession of the property. In this case, the evidence shows that customers pay the total price for their framed art when they pick it up, after all framing services have been performed. Therefore, Framemakers' services are performed prior to the transfer of property and constitute taxable retail unitary transactions under Indiana Code Section 6-2.5-4-1(e).

Id. at 131.

(Internal notations omitted).

In *Galligan v. Indiana Dep't of State Revenue*, 825 N.E.2d 467, 480-81 (Ind. Tax Ct. 2005), the Indiana Tax Court wrote:

As mentioned earlier, the provision of services is, generally, not taxable. As a practical matter, however, "mixed transactions" often occur where tangible personal property is sold in order to complete a service contract, or where services are provided in order to complete the sale of tangible personal property. For these mixed transactions, distinguishing the taxable sale of property from the non-taxable sale of services is often difficult. Accordingly, the legislature has set forth several parameters for imposing tax on these transactions. First, taxable property does not escape taxation merely because it is transferred in conjunction with the provision of non-taxable services. Ind.Code Ann. § 6-2.5-4-1(c)(2) (West 1994) (amended 2004). Second, services, generally outside the scope of taxation, are subject to tax to the extent the income represents "any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records." A.I.C. § 6-2.5-4-1(e)(2) (emphasis added). Finally, the legislature imposes tax on services that are provided in a retail unitary transaction, "a unitary transaction that is also a retail transaction." Ind.Code Ann. § 6-2.5-1-2(b) (West 1994). A unitary transaction is one which "includes all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated." Ind.Code Ann. § 6-2.5-1-1(a) (West 1994).

(Emphasis in original).

After review of the invoices in question, the Department is not convinced that the delivery and installation charges are not taxable. While two of the invoices include line items listing delivery and/or installation charges, those entries are included in the subtotal which Taxpayer's vendors charged as a total combined charge to Taxpayer. This constitutes a unitary transaction, as provided by IC § 6-2.5-1-1(a). The remaining invoices simply list a total amount charged, which on its face is a unitary transaction. Taxpayer has not met the burden imposed by IC § 6-8.1-5-1(c) for this category of items under protest.

The fifth category of items under protest is in regard to items which the Department considered to be rental of trailers. Taxpayer protests that what the Department considered to be trailer rentals was in fact only a description by Taxpayer's vendor listing the costs that went into providing transportation services. As described above, a unitary transaction is one which includes all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated. However, upon review of the invoice in question, it is clear that no tangible personal property was furnished in this transaction. Therefore, only services were provided and as such were not subject to sales and use tax. Taxpayer has met its burden under IC § 6-8.1-5-1(c).

In conclusion, Taxpayer has met its burden of proving that sales and use taxes were not due on items protested under categories 1, 2, and 5, regarding exempt manufacturing equipment, the wastewater storage tank, and the trailers listed on the service vendor's invoice. Taxpayer has not met the burden imposed under IC § 6-8.1-5-1(c) regarding its protest of items listed in categories 3 and 4, consisting of battery chargers and installation charges. Since use tax was calculated on some of these items as separate capital asset purchases and since use tax was calculated on some of these items under a sample and projection method for ordinary purchases, a supplemental audit will recalculate the amount of use tax due using the appropriate method for either category.

FINDING

Taxpayer's protest is sustained in part and denied in part, as described above.

Posted: 06/26/2013 by Legislative Services Agency
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