DEPARTMENT OF STATE REVENUE

04-20130485.LOF

Letter of Findings: 04-20130485
Gross Retail Tax
For the Years 2009, 2010, and 2011

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.

ISSUES

I. Gross Retail Tax – Exemption Certificates.
Authority: IC § 6-2.5-2-1(a); IC § 6-2.5-2-1(b); IC § 6-2.5-8-8(a); IC § 6-8.1-5-1(c).

Taxpayer argues that it is not responsible for collecting sales tax from customers which provided it properly completed exemption certificates.

II. Gross Retail Tax – Lump Sum Contracts.
Authority: IC § 6-8.1-5-1(c); 45 IAC 2.2-4-26(a); Sales Tax Information Bulletin 60 (April 2011); Sales Tax Information Bulletin 60 (July 2006).

Taxpayer states it was not responsible for paying sales or use tax on tangible personal property purchased pursuant to "lump sum" contracts.

III. Gross Retail Tax – Invoices.
Authority: IC § 6-2.5-2-1(a); IC § 6-2.5-2-1(b); IC § 6-8.1-5-1(c).

Taxpayer maintains it is not required to pay sales tax on items for which it can now demonstrate that it had previously paid tax.

STATEMENT OF FACTS

Taxpayer is a multi-state company which operates an Indiana manufacturing facility. The Department of Revenue ("Department") conducted an audit review of Taxpayer's business records and tax returns. The audit resulted in the assessment of additional sales and use tax. Taxpayer disagreed with a portion of the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representative explained the basis for the protest. This Letter of Findings results.

I. Gross Retail Tax – Exemption Certificates.

DISCUSSION

IC § 6-2.5-2-1(a) imposes "[a]n excise tax, known as the state gross retail tax . . . on transactions made in Indiana." Under IC § 6-2.5-2-1(b), the retail merchant is required to "collect the tax as agent for the state."

Under certain circumstances, the retail merchant – such as Taxpayer – is not required to collect sales tax. For example, under IC § 6-2.5-8-8(a), "A person . . . who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax." Once the purchaser provides a properly completed exemption certificate, the retail merchant is under no obligation to collect sales tax on the transaction. IC § 6-2.5-8-8(a) states that, "A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase."

Taxpayer has provided exemption certificates which purportedly relieve Taxpayer from responsibility for collecting sales tax on certain transactions for which the audit review otherwise assessed tax.

The assessments contained in the original audit review report are presumed correct. IC § 6-8.1-5-1(c) states that, "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid." Once the assessment has been made, "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Id.

Because taxpayer has belatedly provided exemption certificates relevant to a number of the challenged assessments, Taxpayer has met its burden of demonstrating that certain of the original sales tax assessments may be incorrect. Therefore, the Audit Division is respectfully requested to review the newly submitted exemption certificates and to make whatever adjustments as may be warranted.

FINDING

Subject to the results of the supplemental audit, Taxpayer's protest is sustained.

II. Gross Retail Tax – Lump Sum Contracts.

DISCUSSION

Taxpayer argues it was not responsible for paying sales tax on or self-assessing use tax on items purchased pursuant to lump-sum contracts for improvements to the Taxpayer's realty.

The issue Taxpayer raises is addressed at 45 IAC 2.2-4-26(a):

> A person making a contract for the improvement to real estate whereby the material becoming a part of the improvement and the labor are quoted as one price is liable for the payment of sales tax on the purchase price of all material so used.

In other words, the contractor is responsible and liable for the payment of sales tax in "lump sum" contracts for improvements to Taxpayer's realty.

The Department has defined what a "lump sum contract" means at Sales Tax Information Bulletin 60 (July 2006), 20060823 Ind. Reg. 045060287NRA. See also Sales Tax Information Bulletin 60 (April 2011), 20110427 Ind. Reg. 045110247NRA.

"Lump sum contract" is a contract in which all of charges are quoted as a single price. A construction contractor may furnish a breakdown of the charges for labor, materials and other items without changing the nature of the lump sum contract.

Sales Tax Information Bulletin 60 also explains the tax consequences of these forms of contracts.

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.

Therefore, a lump sum contractor pays sales tax at the time it purchases materials necessary to fulfill those contracts unless the customer issues the contractor an exemption certificate. The documentation submitted by Taxpayer establishes that the following transactions were for lump sum contracts for improvements to realty.

Concrete Constructors	$22,800.00
A & S Service	7,500.00
A & S Service	18,248.00
A & S Service	31,900.00
Burgett CCM	2,325.00

Taxpayer has met its burden under IC § 6-8.1-5-1(c) of demonstrating that it is not required to pay sales tax on the specific transactions with the three vendors listed above.

FINDING

To the extent Taxpayer provided information establishing that it entered into lump sum contracts for the improvement to realty with the three vendors noted, Taxpayers' protest is sustained.

III. Gross Retail Tax – Invoices.

DISCUSSION

The Department's audit assessed tax on transactions for which no documentation was available at the time of the original audit.

As noted in Part I above, IC § 6-2.5-2-1(a) imposes "[a]n excise tax, known as the state gross retail tax . . . on transactions made in Indiana." Under IC § 6-2.5-2-1(b), the retail merchant is required to "collect the tax as agent for the state."

Taxpayer maintains that it can provide documentation establishing that it paid sales tax at the time of its original purchase.

MacAllister Machine	$ 331.39
MacAllister Machine	807.54
MacAllister Machine	1,043.78
Airgas	443.69
Menards	67.05
Menards	147.55
Menards	42.59
Menards	58.78
Menards	62.17
Applied Tech	459.74
Applied Tech	507.00
Uline	85.42
WW Grainger	1.27
WW Grainger	30.10
WW Grainger	32.64
WW Grainger	43.64
WW Grainger	46.23
WW Grainger	51.71
WW Grainger	70.09
WW Grainger	127.59
WW Grainger	160.34
WW Grainger	160.34

WW Grainger	290.19
WW Grainger	16.29
WW Grainger	46.78
WW Grainger	62.66
WW Grainger	76.86
WW Grainger	86.79
WW Grainger	89.87
WW Grainger	164.90
WW Grainger	179.96
WW Grainger	226.99
WW Grainger	274.62
WW Grainger	300.90
WW Grainger	490.06

Taxpayer has met its burden under IC § 6-8.1-5-1(c) of establishing that it paid sales tax on the 35 transactions noted.

FINDING

To the extent Taxpayer provided invoices establishing it paid sales tax on the transactions listed above, Taxpayer's protest is sustained.

SUMMARY

The Audit Division is requested to review the exemption certificates Taxpayer provided and to make whatever adjustments to the original assessment that are warranted; to the extent of the transactions listed in Part II, Taxpayer is not required to pay sales tax on the lump sum contract agreements; Taxpayer established that it previously paid sales tax on the 35 invoiced transactions provided and noted in Part III. In all other respects, Taxpayer's protest is denied.

Posted: 04/30/2014 by Legislative Services Agency
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