

Letter of Findings Number: 04-20130630
Use Tax
For Tax Years 2010, 2011, and 2012

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 This document is effective as of its date of publication and remains in effect until the date it is superseded by the publication of another document in the Indiana Register.

ISSUE

I. Use Tax – Liability.

Authority: IC § 6-8.1-5-1(c); IC § 6-2.5-1-1(a); IC § 6-2.5-1-2; IC § 6-2.5-1-5(a); IC § 6-2.5-1-27; IC § 6-2.5-2-1; IC § 6-2.5-3-1(a); IC § 6-2.5-3-2(a); IC § 6-2.5-3-3; IC § 6-2.5-3-6(b); IC § 6-2.5-4-1; 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); Rhoades v. Indiana Dept. of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); USAir, Inc. v. Indiana Dept. of State Revenue, 623 N.E.2d 466 (Ind. Tax Ct. 1993); Ind. Dept. of State Revenue v. AOL, 963 N.E.2d 498 (Ind. 2012); [45 IAC 2.2-2-1](#); [45 IAC 2.2-3-4](#); Tax Policy Directive 9 (December 1995).

Taxpayer protests the imposition of use tax on the purchase of mailers.

STATEMENT OF FACTS

Taxpayer is a corporation. Taxpayer contracted with two vendors ("Vendor 1" and "Vendor 2") to print and distribute discount coupons and promotional materials ("mailers") in zip codes with close proximity to Taxpayer's physical location. All mailers were sent to Indiana addresses. Taxpayer did not pay sales or use tax on the purchase price of the mailers. The Indiana Department of Revenue ("Department") audited Taxpayer and proposed an assessment of base tax and interest on the purchase price of the mailers. Taxpayer protests the proposed assessment of use tax. An administrative hearing was held, and this Letter of Findings results. Additional facts will be supplied as necessary.

I. Use Tax – Liability.

DISCUSSION

Taxpayer protests the assessment of use tax on the purchase price of mailers. All tax assessments are prima facie evidence that the Department's claim for the tax is valid, and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). The issue before the Department is whether Taxpayer met its burden to prove the Department's assessment is incorrect.

Indiana imposes a sales tax on retail transactions made in Indiana. IC § 6-2.5-2-1(a); [45 IAC 2.2-2-1](#). Indiana imposes a complementary use tax on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction" regardless of the merchant's or transaction's location. IC § 6-2.5-3-2(a); [45 IAC 2.2-3-4](#). The use tax is "functionally equivalent to [the] sales tax." Rhoades v. Indiana Dept. of State Revenue, 774 N.E.2d 1044, 1047-48 (Ind. Tax Ct. 2002). "Indeed, the purpose of the use tax is merely to prevent evasion of the sales tax." Ind. Dept. of State Revenue v. AOL, 963 N.E.2d 498, 501 (Ind. 2012).

The sales and use taxes apply only to retail transactions. A retail transaction is a transaction made by a retail merchant that constitutes "selling at retail." IC § 6-2.5-1-2. Selling at retail means a retail merchant "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration" in the ordinary course of the merchant's business. IC § 6-2.5-4-1. Tangible personal property is personal property that "can be seen, weighed, measured, felt, or touched . . ." IC § 6-2.5-1-27.

Transactions that include tangible personal property and services "which are furnished under a single order or agreement and for which a total combined charge or price is calculated" are retail unitary transactions. IC § 6-2.5-1-1(a). The use tax on retail unitary transactions is "measured by the gross retail income received." IC § 6-2.5-3-3. The gross retail income received is the total value of the purchase price without deductions for, among others, "(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 . . ." IC § 6-2.5-1-5(a). Therefore, the use tax due on a retail unitary transaction is based on the total purchase price.

Additionally, for a retail transaction, including a unitary transaction, to be subject to use tax, the tangible personal property must be "used, stored, or otherwise consumed" in Indiana. [45 IAC 2.2-3-4](#). For the purposes of Indiana use tax, "[u]se" means the exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a). The Indiana Tax Court has recognized that "[t]his is a broad definition" and that "[a]lmost any act not otherwise exempt will constitute a taxable use." USAir, Inc. v. Indiana Dept. of State Revenue, 623 N.E.2d

466, 469 (Ind. Tax Ct. 1993). This includes having tangible personal property mailed to Indiana recipients. AOL, 963 N.E.2d at 504.

The person who acquires property in a retail transaction or who uses, stores, or consumes property acquired in a retail transaction in Indiana is responsible for payment of use tax on the transaction. IC § 6-2.5-3-6(b). While a retail merchant may have a duty to collect the sales tax due on a retail transaction, its failure to do so does not relieve the person who "acquires property in a retail transaction" or who "uses, stores, or consumes the tangible personal property acquired in a retail transaction" from personal liability for the tax due. IC § 6-2.5-2-1(b); IC § 6-2.5-3-6(b).

Taxpayer protests the proposed assessment of use tax on the purchase price of the mailers. Taxpayer's protest letter states:

I am writing this letter to protest the sales tax the department is collecting for the services purchased from [Vendor 1] and [Vendor 2]. The sellers did not charge sales tax to [Taxpayer] and has never collected from other clients. [sic] All the advertisers we have dealt with has [sic] never collected for sales tax for this type advertising. We feel this has been an issue that has not been addressed by the department. I am enclosing a letter I received [from Vendor 2] on where they stand on this issue.

With its protest letter, Taxpayer provided a letter it received on Vendor 2 letterhead dated June 3, 2013 ("June 3rd letter"). The letterhead does not include contact information for Vendor 2. The letter does not contain a signature block, and it is unsigned. Taxpayer provided a copy of an invoice from a vendor showing the purchase of 20,000 mailers and stated at the hearing that this invoice was representative of the Taxpayer's transactions regarding the mailers at issue. After the administrative hearing, Taxpayer provided additional information including two affidavits, a copy of the audit report, copies of two court decisions, and a copy of a Department Letter of Finding dated in 1996.

The two affidavits include legal conclusions and statements which admit to being outside the affiant's personal knowledge. They also reiterate, nearly word for word, the contents of the June 3rd letter. Taxpayer has not provided original documents which support the statements made in the affidavits, and the Department can give little weight to the unsupported assertions therein. Taxpayer has not explained how the court decisions or the Letter of Finding dated 1996 support its argument in this case. Additionally, Letters of Finding more than six years old are deemed null and void and no longer of any effect. Tax Policy Directive 9 (December 1995).

The audit report concluded that the transactions at issue were unitary transactions subject to Indiana use tax. Taxpayer has not shown that this is an incorrect conclusion. In fact, Taxpayer provided documentation showing just the opposite. A review of the invoice provided by Taxpayer shows that the layout, proof, printing, insertion, internet placement, addressing, postage, envelopes, and distribution of the mailers were all included in one price. The invoice did not itemize the cost of each item of tangible personal property as separate from the services provided. Instead, one value was given for the combined order of tangible personal property and services. All of Taxpayer's retail transactions like this are "unitary" within the meaning of IC § 6-2.5-1-1(a). All the Taxpayer's unitary transactions involving tangible personal property which was used in Indiana (i.e. mailed to Indiana addresses) are subject to use tax.

Additionally, Taxpayer argues that the vendors have never collected sales tax on the purchase price of mailers. However, the vendors' failure to collect sales tax does not relieve Taxpayer from personal liability for the tax due. IC § 6-2.5-2-1(b); IC § 6-2.5-3-6(b).

Taxpayer has not met its burden to show that the Department's proposed assessment of use tax on the purchase of mailers is incorrect. Taxpayer's protest is respectfully denied.

FINDING

Taxpayer's protest is respectfully denied.

Posted: 05/28/2014 by Legislative Services Agency
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