

**Letter of Findings Number: 04-20140145**  
**Use Tax**  
**For the Years 2010 to 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 This document is effective as of its date of publication and remains in effect until the date it is superseded by the publication of another document in the Indiana Register.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—Prospective Treatment.**

**Authority:** IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-8.1-3-3; City Securities Corp. v. Dept. of State Revenue, 704 N.E.2d 1122 (Ind. Tax Ct. 1998).

Taxpayer argues that the majority of the Department's assessment is contrary to how Taxpayer was treated in prior audits, which entitles Taxpayer to prospective treatment on those items.

**STATEMENT OF FACTS**

Taxpayer is an Indiana corporation that operated a business in Indiana. Taxpayer sold its business operations in November of 2012. The Indiana Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer's business records. As a result of the audit, the Department determined that Taxpayer owed additional use tax for the 2010, 2011, and 2012 tax years. The Department found that Taxpayer had made purchases on which sales tax was not paid at the time of purchase nor was use tax remitted to the Department, and issued proposed assessments for the additional use tax and interest due for the purchases. Taxpayer protests the imposition of use tax on certain of its purchases. Taxpayer argues that the majority of the Department's assessment is contrary to how Taxpayer was treated in prior audits, which entitles Taxpayer to prospective treatment on those items. Therefore, Taxpayer asserts that the assessments on these items should be abated. An administrative hearing was held, and this Letter of Findings results.

**I. Use Tax—Prospective Treatment.**

**DISCUSSION**

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A person who acquires property in a retail transaction is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). Indiana also imposes a complementary excise tax called "the 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 location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). In general, all purchases of tangible personal property are subject to sales and/or use tax. An exemption from use tax is granted for transactions where sales tax was paid at the time of the purchase pursuant to IC § 6-2.5-3-4. In certain circumstances, additional enumerated exemptions from sales and/or use tax are available.

The Department found that Taxpayer made purchases without paying sales tax at the time of the purchases, and assessed use tax on the purchases. Taxpayer asserts that the treatment of certain items in the current audit should be prospective only in treatment. Taxpayer argues that it had been allowed an exemption on the items in question in two prior audits.

IC § 6-8.1-3-3(b) states that "[n]o change in the department's interpretation of a listed tax may take effect before the date the change is: (1) adopted in a rule under this section; or (2) published in the Indiana Register . . . if the change would increase a taxpayer's liability for a listed tax." Under IC § 6-8.1-3-3, the Department is without authority to reinterpret a taxpayer's tax liability without promulgating and publishing a regulation giving Taxpayer notice of that reinterpretation. Absent any indication that the Department has changed its interpretation of the gross retail tax, IC § 6-8.1-3-3 does not require the Department to give effect to Taxpayer's sales tax liabilities only on a prospective basis.

In *City Securities Corp. v. Dept. of State Revenue*, 704 N.E.2d 1122 (Ind. Tax Ct. 1998), the plaintiff taxpayer argued that the Department could not impose gross income tax on the gain realized from the sale of tax-exempt bonds, because that gain had been treated as exempt for 42 years. *Id.* at 1128-29. The plaintiff taxpayer argued that, in the absence of a new rule or regulation, the Department's assessment of gross income taxes against the gain realized from the sale of the tax-exempt bonds was invalid because it was a new interpretation of the law. *Id.* The Tax Court found that, despite the intervening adoption of regulations to the contrary, the Department could not impose the additional taxes when the Department had permitted plaintiff taxpayer to claim an exemption from the taxes subsequent to the adoption of the intervening regulations. *Id.* Nevertheless, the Tax Court also held that the plaintiff taxpayer, having been placed on notice of its additional tax liability, was responsible for paying the tax on a prospective basis. *Id.* The court explained that the plaintiff taxpayer "cannot complain that it does not now have notice of the Department's policy with respect to taxing the gain from the sale of exempt bonds. Therefore, beginning with the first full tax year after the issuance of this opinion, [the plaintiff taxpayer] is considered to have notice of the Department change in policy." *Id.*

Here, the Department's audit report, in making the assessment on the items in question, notes that "none of these items are exempt for [ ] taxpayer." However, "in two prior audits, the auditors allowed an exemption . . . so the taxpayer claimed exemption in 2011." This allowance of an exemption for the items in question for several years through two prior audits places Taxpayer in a similar position to the company in *City Securities*, which had been permitted an exemption for several years when a current audit changed the Department's position. Accordingly, while Taxpayer cannot be said to qualify for the exemption after further review, the fact that Taxpayer had claimed an exemption for the items in question for several years with the Department's prior approval through two audits leads to the conclusion that Taxpayer should be permitted the exemption for these items for the tax years in question. However, Taxpayer will be treated similarly to the company in *City Securities* and for periods after Taxpayer was put on notice by the auditor's changes Taxpayer is not permitted the exemption for the items in question. Notwithstanding, the Department notes that, in this instance, since Taxpayer sold the business in November 2012 and the audit was completed in September 2013, there are no future periods at issue for Taxpayer.

#### FINDING

Taxpayer's protest is sustained.

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