DEPARTMENT OF STATE REVENUE

04-20130101.LOF

Letter of Findings: 04-20130101
Gross Retail Tax
For the Years 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.

ISSUE

I. Gross Retail Tax - Maintenance Agreements.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-5-4-1; IC § 6-2.5-5 et seq. ; IC § 6-8.1-5-1(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); 45 IAC 2.2-4-2; Sales Tax Information Bulletin 2 (November 2011); Sales Tax Information Bulletin 2 (December 2006).

Taxpayer argues that the money it receives from selling maintenance contracts to its customers is not subject to sales or use tax on the ground that Taxpayer is primarily a service provider.

STATEMENT OF FACTS

Taxpayer is an Indiana business which sells, installs, and repairs cash-handling equipment such as ATMs and currency counters. The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's business records. The audit resulted in the assessment of additional gross retail (sales) tax. Taxpayer disagreed with a portion of that 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. Additional facts will be provided as needed.

I. Gross Retail Tax - Maintenance Agreements.

DISCUSSION

Taxpayer sells maintenance contracts to its customers for the products sold and installed by Taxpayer at its customers' locations. Taxpayer did not collect sales tax from its customers when it sold them the maintenance contracts. The Department's audit concluded that Taxpayer should have collected the tax.

Taxpayer disagrees on the ground that it is a service provider and that the money earned from providing services is not subject to sales 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. IC § 6-2.5-5 et seq. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-1-2; IC § 6-2.5-5-4-1. 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.

The presumption in Indiana is that all retail sales are subject to sales tax unless expressly exempted by statute. IC § 6-2.5-2-1 ("An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana . . .").

As a threshold issue, it is the Taxpayer's responsibility to establish that the sales tax assessment on the sale of its maintenance agreements 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." See also 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 Department's Sales Tax Information Bulletin 2 (December 2006) (Effective August 2010), 20100804 Ind. Reg.

045100497NRA addresses the sale of optional warranties and maintenance agreements such as those sold by Taxpayer:

> Optional warranties and maintenance agreements that contain the right to have property supplied in the event it is needed are subject to sales tax if there is a reasonable expectation that tangible personal property will be provided. Any parts or tangible personal property supplied pursuant to this type of agreement are not subject to sales or use tax.

See also Sales Tax Information Bulletin 2 (November 2011), 20111228 Ind. Reg. 045110764NRA.

Although Taxpayer admits that Information Bulletin 2 is "relevant," it argues that the bulletin "alone provides an incomplete basis on which to make the decision about retail sales taxability." In particular, Taxpayer cites to 45 IAC 2.2-4-2, which provides in part:

> (a) Professional services, personal services, and services in respect to property not owned by the person rendering such services are not "transactions of a retail merchant constituting selling at retail", and are not subject to gross retail tax. Where, in conjunction with rendering professional services, personal services, or other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail unless:
> (1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property;
> (2) The tangible personal property purchased is used or consumed as a necessary incident to the service;
> (3) The price charged for tangible personal property is inconsequential (not to exceed 10[percent]) compared with the service charge; and
> (4) The serviceman pays gross retail tax or use tax upon the tangible personal property at the time of acquisition.

The regulation Taxpayer references states a four-part test, the first of which is whether a taxpayer is primarily a service provider. Taxpayer argues that it "is primarily a service company." Taxpayer explains that most of its employees "are devoted entirely to performing services . . . ." and that most of its revenues were earned from providing services to its customers. However, Taxpayer's own website describes, as of July 11, 2014, that it is a "leading provider of cash handling equipment and software solutions to financial institutions and retailers . . ." The fact that Taxpayer devotes significant resources to servicing this equipment does not render it "primarily" a service provider.

In addition, Taxpayer states that parts provided to its customers pursuant to its service contracts do not become the customer's permanent property. Taxpayer points to a provision in its contract which provides, "Any parts removed and replaced by [Taxpayer] become its property." Taxpayer explains that "in essence they, the [T]axpayer and customer, have an agreement whereby, although parts may frequently and periodically come from and go back to the [Taxpayer], the ongoing functionality and operation of the machine is the true consideration transferred and guaranteed."

Nonetheless, Taxpayer itself admits that its "contracts state that any defective parts will be replaced at no charge to the customer . . . ." As stated in a sample agreement, Taxpayer agrees to provide its customers "Repair Service" which includes "problem diagnosis, malfunction correction, troubleshooting, parts replacement, [and] customer interaction . . . ." (Emphasis added).

Taxpayer's argument somewhat misses the mark. Indiana's sales tax is a transaction tax. The ultimate acquisition, distribution, or disposition of the defective parts is predicated on a private agreement between Taxpayer and its maintenance agreement customers and is not the subject of this protest. The transactions here at issue are those in which Taxpayer sells maintenance agreements - containing the obligation to supply tangible personal property - to its customers. Those agreements clearly provide the customers "a reasonable expectation that tangible personal property will be provided." Of course, Taxpayer's customers also expect that Taxpayer's employees will provide the services necessarily incidental to the installation of the required parts, but the sales of the maintenance agreements is clearly a transaction in which Taxpayer promises to provide services and parts for a single price pursuant to the parties' maintenance agreements.

Under IC § 6-8.1-5-1(c), Taxpayer has failed to meet its burden of establishing that the proposed assessment is "wrong."

FINDING

Taxpayer's protest is respectfully denied.

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An html version of this document.