

Letter of Findings: 04-20130486
Gross Retail Tax
For the 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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 - Public Transportation Exemption.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-5-1 to -40; IC § 6-2.5-5-27; 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); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480; (Ind. Tax Ct. 2012); Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); [45 IAC 2.2-5-61](#); [45 IAC 2.2-8-12\(f\)](#).

Taxpayer argues that it sold motor vehicles for which it was not required to collect sales tax on the ground that the purchasers were entitled to claim the "public transportation" exemption.

II. Gross Retail Tax - Out-of-State Delivery.

Authority: IC § 6-2.5-2-1(a); IC § 6-2.5-1-2; IC § 6-2.5-4-1(a); IC § 6-2.5-4-1(b); IC § 6-2.5-5-15 (Repealed July 1, 2004); IC § 6-5.1-5-1; IC § 6-8.1-5-4; IC § 34-37-1-7; Jordan v. Deery, 609 N.E.2d 1104 (Ind. 1993); Commissioner's Directive 25 (July 2004); Sales Tax Information Bulletin 28 (July 2004); Sales Tax Information Bulletin 28S (April 2012); Sales Tax Information Bulletin 28S (October 2011).

Taxpayer maintains that it was not required to collect sales tax on sales of motor vehicles which Taxpayer delivered to out-of-state customers.

III. Gross Retail Tax - Administrative Error.

Authority: IC § 6-8.1-5-1(c).

Taxpayer states that the Department's audit made administrative or computational errors in preparing the final audit report.

IV. Gross Retail Tax - Agricultural Exemption.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2(a); IC § 6-2.5-5-1; IC § 6-2.5-8-8; [45 IAC 2.2-8-12\(b\)](#); [45 IAC 2.2-8-12\(d\)](#).

Taxpayer argues it was not required to collect sales tax when it sold items to persons who were entitled to claim the agricultural exemption.

V. Gross Retail Tax - Like-Kind Trade.

Authority: IC § 6-2.5-1-5; IC § 6-2.5-1-6; IC § 6-2.5-2-1; IC § 6-2.5-2-2; Sales Tax Information Bulletin 28S (April 2012); Sales Tax Information Bulletin 28S (October 2011), 20110928 Ind. Reg. 045110549NRA; Sales Tax Information Bulletin 28S (December 2009). 20100127 Ind. Reg. 045100029NRA.

Taxpayer states it was not required to collect sales tax when it entered into "like-kind" exchanges with its customer(s).

VI. Gross Retail Tax - Gifts.

Authority: [45 IAC 2.2-3-4](#); 2013 IRS Publication 946, <http://www.irs.gov/publications/p946/ch02.html>

Taxpayer maintains that it was not required to pay sales tax (or self-assess use tax) when it acquired property as a gift.

VII. Gross Retail Tax - Casual Sale Transaction.

Authority: IC § 6-2.5-3-2(a); IC § 6-8.1-5-1; [45 IAC 2.2-1-1](#)(d).

Taxpayer argues that it was not required to pay sales tax (or self-assess use tax) when it acquired items in a "casual sale transaction."

VIII. Gross Retail Tax - Sale for Resale.

Authority: IC § 6-2.5-5-8; [45 IAC 2.2-5-15](#).

Taxpayer states that it was not required to collect sales tax from customers who purchased a motor vehicle when the customers intended to resell the vehicle.

IX. Gross Retail Tax - Storage and Delivery.

Authority: IC § 6-8.1-5-1(c).

Taxpayer maintains that it was not required to collect/pay sales tax when a purchase price included costs for "storage and delivery."

STATEMENT OF FACTS

Taxpayer is an Indiana business which sells used cars. Taxpayer sells cars at retail and at wholesale. According to the audit report, "Many of the vehicles purchased by the [T]axpayer for resale were wrecked vehicles purchased from insurance companies." Taxpayer also bought cars from on-line auto auctions.

Taxpayer explains its business model to its customers.

[Taxpayer] is a company dealing in auto & truck salvage. Vehicles are usually purchased from insurance companies that declare them totaled to settle insurance claims. Therefore any vehicle bought from us can be considered to be or to have been either wrecked-flood-fire-theft-rebuilt unless otherwise described below. Mileage is not guaranteed.

Taxpayer sells vehicles to out-of-state customers. In certain instances, Taxpayer states that it delivered vehicles to out-of-state customers.

The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's returns and business records. The audit resulted in the assessment of additional sales/use tax.

The audit stated that "sales tax was not collected on all taxable transactions," that "[w]hen the sales invoices were examined, handwriting discrepancies were found in many instances," and that when Forms ST-108E ("Certificate of Gross Retail or Use Tax Exemption for the Purchase of a Motor Vehicle or Watercraft") were examined, the audit found "numerous instances where sales tax was not collected on taxable transaction[s]." However, when the audit reviewed Forms ST-108 ("Certificate of Gross Retail or Use Tax Paid on the Purchase of a Motor Vehicle or Watercraft"), the audit found that "the correct amount of sales tax was collected in almost all instances where the transaction had been taxed."

Taxpayer objected to the assessment of additional tax and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representative explained the basis for the protest. Following the April 2, 2014, hearing, Taxpayer was provided an additional 30 days in which to obtain and provide additional documentation. Taxpayer provided additional documentation which was reviewed and considered when drafting this Letter of Findings.

I. Gross Retail Tax - Public Transportation Exemption.

DISCUSSION

Taxpayer argues that it was not required to collect sales tax on items it sold to customers engaged in public transportation.

Indiana imposes a gross retail (sales) tax on retail transactions in Indiana. IC § 6-2.5-2-1. The legislature has provided a number of exemptions to the imposition of that tax. See IC § 6-2.5-5-1 to -40. One of those exemptions is provided at IC § 6-2.5-5-27 which states that, "Transactions involving tangible personal property and services are exempt from the state gross retail tax, if the person acquiring the property or service directly uses or consumes it in providing public transportation for persons or property."

The principle is reiterated at [45 IAC 2.2-5-61](#) which states in relevant part:

(a) The state gross retail tax shall not apply to the sale and storage or use in this state of tangible personal property which is directly used in the rendering of public transportation of persons or property.

(b) Definition: Public Transportation. Public transportation shall mean and include the movement, transportation, or carrying of persons and/or property for consideration by a common carrier, contract carrier, household goods carrier, carriers of exempt commodities, and other specialized carriers performing public transportation service for compensation by highway, rail, air, or water, which carriers operate under authority issued by, or are specifically exempt by statute or regulation from economic regulation of, the public service commission of Indiana, the Interstate Commerce Commission, the aeronautics commission of Indiana, the U.S. Civil Aeronautics Board, the U.S. Department of Transportation, or the Federal Maritime Commissioner; however, the fact that a company possesses a permit or authority issued by the P.S.C.I., I.C.C., etc., does not of itself mean that such a company is engaged in public transportation unless it is in fact engaged in the transportation of persons or property for consideration as defined above.

(c) In order to qualify for exemption, the tangible personal property must be reasonably necessary to the rendering of public transportation. The tangible personal property must be indispensable and essential in directly transporting persons or property.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment 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." *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). Thus, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Poorly developed and non-cogent arguments are subject to waiver. *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of state Revenue*, 977 N.E.2d 480, 486, fn. 9 (Ind. Tax Ct. 2012).

Taxpayer provided copies of form ST-108E "Certificate of Gross Retail or Use Tax Exemption for the Purchase of a Motor Vehicle or Watercraft." However, the audit found that "rarely were these documents valid." The audit report included "a list of discrepancies found with these forms."

The audit report points to instances in which the "signature of the purchaser" was "actually an illegible scribble." When the audit asked the Taxpayer's representative if the representative had entered the signatures, "the answer was in the affirmative." However, Taxpayer has provided employee affidavits which state that the affiant was "not aware that anyone associated with [Taxpayer] wrote anything on its sales invoices or associated Forms ST-108E in any attempt to mislead anyone, including the Department of Revenue."

The audit also found instances where the reason for the exemption claimed by the purchaser was not stated.

In certain instances, the customers' Department of Transportation ("DOT") numbers were included as a testament to the exemption. The audit report states, "Since the forms were seldom signed with a valid signature when a DOT number was used, the [audit] researched these numbers on the website www.safersys.org." The audit found that some of the DOT numbers were for private carriers not engaged in public transportation or that the number was simply invalid.

Based on a review of the documentation submitted by Taxpayer - and adopting Taxpayer's numbering of its documentation - the Department is prepared to accept that the documentation supplied for transactions 24, 43, and 213 (as designated on copies of the invoices provided by Taxpayer) as sufficient to establish that the

transactions are exempt from sales tax based upon the public transportation exemption.

The remainder of the documentation is insufficient or incomplete. For example, the form ST-108E requires that the customer provide its "SSN, TID, or FID" and states that the requisite identification number is "Mandatory." The Department is unable to accept those forms which lack the identification number. As provided in [45 IAC 2.2-8-12\(f\)](#) "An exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed." (Emphasis added).

FINDING

Taxpayer's protest is sustained in part and denied in part. The Audit Division is requested to review transactions designated by Taxpayer as "24, 43, and 213" and make whatever adjustment to the proposed assessment as warranted.

II. Gross Retail Tax - Out-of-State Delivery.

DISCUSSION

IC § 6-2.5-2-1(a) imposes sales tax on retail transactions made in Indiana. IC § 6-2.5-1-2 defines a retail transaction as "a transaction of a retail merchant that constitutes selling at retail as described in IC § 6-2.5-4-1 . . . or that is described in any other section of IC § 6-2.5-4." IC § 6-2.5-4-1(a) provides that "[a] person is a retail merchant making a retail transaction when he engages in selling at retail." IC § 6-2.5-4-1(b) further explains that a person sells at retail when he "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration."

IC § 6-2.5-5-15 (Repealed July 1, 2004) originally exempted sales of vehicles to out-of-state customers. The Department issued Commissioner's Directive 25 (July 2004), 27 Ind. Reg. 3381, and Sales Tax Information Bulletin 28 (July 2004), 27 Ind. Reg. 3387, to address the change in law. Commissioner's Directive 25 stated that the repeal of IC § 6-2.5-5-15 "only affect[ed] situations where the purchaser [took] possession of the vehicle prior to taking the vehicle out-of-state." The Directive stated that:

[The] repeal does not affect out of state sales by Indiana dealers. For a sale of a vehicle to be considered out of state, the purchaser must take possession via delivery outside of Indiana. No exemption certificate is required when making an out of state sale. However, the sales contract must specify that the vehicle is to be delivered out of state and the dealer must maintain shipping documentation to verify that the vehicle was delivered to the purchaser at a specific out of state location.

Sales Tax Information Bulletin 28S (April 2012), 20120530 Ind. Reg. 045120259NRA, provides as follows:

A vehicle or trailer sold in **interstate commerce** is not subject to the Indiana sales tax. To qualify as being "sold in interstate commerce," the vehicle or trailer **must be physically delivered, by the selling dealer to a delivery point outside Indiana**. The delivery may be made by the dealer, or the dealer may hire a third-party carrier. Terms and the method of delivery must be indicated on the sales invoice. The dealer must document terms of delivery and must keep a copy of such terms of delivery to substantiate the interstate sale. The exemption does not apply to sales to out-of-state buyers in which the buyer takes physical possession of a vehicle or trailer in Indiana, nor is the exemption valid if the buyer, and not the seller, hires a third-party carrier to transport the vehicle or trailer outside Indiana. If the buyer hires the carrier, the carrier is acting as an agent for the buyer; thus, the buyer takes physical possession within Indiana. Possession taken within the state does not qualify as an interstate sale. (**Emphasis in original**) See also Sales Tax Information Bulletin 28S (October 2011), 20110928 Ind. Reg. 045110549NRA; Sales Tax Information Bulletin 28S (December 2009), 20100127 Ind. Reg. 045100029NRA.

Taxpayer provided the Department with affidavits purportedly filled out and signed by out-of-state customers. Taxpayer provided the affidavits in order to establish that it delivered customer vehicles to the customer's out-of-state location.

An affidavit is defined as a "written state of fact which is sworn to as the truth before an authorized officer." *Jordan v. Deery*, 609 N.E.2d 1104, 1110 (Ind. 1993).

IC § 34-37-1-7 sets out the requirements when an affidavit is prepared in an out-of-state location.

When an affidavit taken in another state is:

- (1) certified by the officer or justice of the peace taking the affidavit, under the:
 - (A) hand of the officer or justice of the peace; and
 - (B) seal of office, if the officer or justice of the peace has a seal; and
- (2) attested by the clerk of the:
 - (A) circuit or district court; or
 - (B) court of common pleas;of the county where the officer exercises the duties of office, under the hand of the clerk and seal of the court; and the clerk certifies that the officer or justice of the peace is, by the laws of the other state, duly empowered to administer oaths and affirmations and to take affidavits, the affidavit is sufficiently authenticated and may be received and used in any Indiana court.

The affidavits provide that Taxpayer "made all arrangements and shipped the following vehicle to me." Taxpayer states that the affidavits indicate an "Out of State sale in which vehicle was delivered by Taxpayer to a location outside Indiana." These customers were located in states such as Kentucky, Ohio, Michigan, Iowa, Mississippi, Tennessee, Texas, North Carolina, West Virginia, Pennsylvania, and Ontario Canada.

The substance of each affidavit was completed by Taxpayer; the name and address of the purchaser was completed by Taxpayer; the year, make, model and vehicle identification number (VIN) was completed by Taxpayer. The only portion of the affidavit completed by the individual customer was the signature line. The affidavits were completed and signed after the sales transaction occurred. For example, the invoice may have been dated 2012 but the affidavit was signed in 2013.

During the administrative review of Taxpayer's protest, the Department contacted 60 of the individuals who had purportedly signed the affidavits. Twenty-five of the persons who were contacted responded to the Department's survey. Twenty-three responded indicating that they had signed the original affidavits; two of the persons indicated they had not signed the original affidavits.

When asked whether the affiant actually filled out the original affidavit, twenty-three of the respondents indicated they had not filled out the affidavit while two of the respondents indicated that they had completed the document.

When asked whether Taxpayer had delivered the vehicle to the respondents' home state, twenty-three of the respondents indicated that the vehicle had been delivered as indicated in the original affidavit while two of the respondents indicated that the Taxpayer did not deliver the vehicle and that they had accepted delivery of the vehicle in Indiana.

When asked whether the affiant had signed the affidavit before an "authorized officer" as required under IC § 34-37-1-7, twenty-three of the respondents indicated they had not while two respondents indicated they had signed the affidavit in the presence of an "authorized officer."

In addition to reviewing the affidavit, the Department reviewed the original invoices corresponding to the affidavits submitted. Of the invoices presented, 65 contained no indication that the car was either shipped or delivered to an out-of-state location or that Taxpayer charged any of its customers for delivery of vehicles as distant as Canada.

Bearing in mind that the audit found that Taxpayer's own employees admitted that they had signed documents on behalf of the customer, that a limited number of the affiants denied having signed the affidavits, that only two of the affiants reported that they had filled out the substantive portion of the affidavit, that only two of the affiants indicated that they had signed the affidavit in the presence of an "authorized officer" as required under Indiana law, that 65 of the invoices gave no indication that vehicles were believed delivered to locations as far as Canada, and that IC § 6-8.1-5-1(c) requires that Taxpayer demonstrate the assessment was "wrong," the Department concludes that the affidavits are not entirely reliable. Taxpayer has failed to meet its burden on IC § 6-8.1-5-1(c) of establishing that the proposed assessment was "wrong."

In addition, Taxpayer is reminded that it is required under Indiana law to maintain original records sufficient to establish the taxability of its transactions. IC § 6-8.1-5-4(a) provides that, "Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for tax by reviewing those books and records." Affidavits - however well prepared - are a secondary resource which would not have been necessary had Taxpayer maintained records establishing the parameters of the original transaction or records establishing that it arranged for delivery of the vehicles.

FINDING

Taxpayer's protest is respectfully denied.

III. Gross Retail Tax - Administrative Error.

DISCUSSION

Taxpayer cites to instances in which the audit report purportedly includes administrative errors and asks that those errors be corrected.

In particular, Taxpayer explains:

There are five assets listed on the Audit report (Aud. Rpt. Nos. 4, 117, 135, 208, and 209) that the Taxpayer asserts either a) it never owned, b) is a duplicate of another item on the Audit Report, or c) that the Taxpayer collected and remitted sales tax for the sale.

Taxpayer has provided no evidence establishing that it paid sales tax on any of the items at issue or that the audit assessed tax on an item which it never owned. Taxpayer has failed to meet its burden under IC § 6-8.1-5-1(c) of establishing that the assessment was wrong. However, the Audit Division is requested to review the entries cited by Taxpayer to assure that there are no duplicate assessments and to make whatever adjustments may be warranted as a result of any duplicate assessments.

FINDING

Taxpayer's protest is denied in part and sustained in part subject to review by the Department's Audit Division.

IV. Gross Retail Tax - Agricultural Exemption.

DISCUSSION

Taxpayer maintains that it was not required to collect sales tax on transactions in which the customer presented an exemption certificate claiming that the item purchased was being used for exempt agricultural purposes.

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. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-3-2(a). 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.

IC § 6-2.5-5-1 provides a sales tax exemption for animals, equipment, and supplies purchased for "agricultural purposes."

Transactions involving animals, feed, seed, plants, fertilizer, insecticides, fungicides, and other tangible personal property are exempt from the state gross retail tax if:

- (1) the person acquiring the property acquires it for his direct use in the direct production of food and food ingredients or commodities for sale or for further use in the production of food and food ingredients or commodities for sale; and
- (2) the person acquiring the property is occupationally engaged in the production of food and food ingredients or commodities which he sells for human or animal consumption or uses for further food and food ingredient or commodity production.

The relevant regulation is [45 IAC 2.2-8-12\(b\)](#) which states, "Retail merchants are required to collect sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used for an exempt purpose."

The regulation cautions that, "Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important to the seller to obtain an exemption certificate in order to avoid the necessity for such proof." [45 IAC 2.2-8-12\(d\)](#).

[45 IAC 2.2-8-12](#)(f) further cautions, "An exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed."

IC § 6-2.5-8-8 states:

(a) A person, authorized under subsection (b), 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. The person shall issue the certificate on forms and in the manner prescribed by the department. 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. (Emphasis added).

Taxpayer has provided forms ST-108 and ST-108E which - as Taxpayer states - were "signed by the purchaser indicating [a]gricultural use."

Form ST-108 provides that the form "allows the dealer to indicate the amount of tax collected from the purchaser." The form further provides that, "If an exemption from the tax is claimed, the purchaser and the dealer must complete form **ST-108E** and submit it to the license branch at the time of licensing. ST-108E serves as an affidavit of exemption by the purchaser and lists the exemptions available to qualified purchases." (**Emphasis in original**).

Based on a review of the documentation submitted by Taxpayer - and adopting Taxpayer's numbering of its documentation - the Department is prepared to agree that the documentation supplied for transactions 35 and 122 is sufficient to establish that the transactions are exempt from sales tax.

Taxpayer's protest is sustained in part and denied in part. The Audit Division is requested to review transactions designated as "35 and 122" and make whatever adjustments to the proposed assessment as warranted.

FINDING

Taxpayer is sustained in part and denied in part.

V. Gross Retail Tax - Like-Kind Trade.

DISCUSSION

Taxpayer argues that it was not required to collect sales tax on that portion of the purchase price acquired in a "like-kind" exchange.

Indiana imposes a sales tax on retail sales. IC § 6-2.5-2-1. The sales tax is measured by the gross retail income received by the retail merchant from the purchaser. IC § 6-2.5-2-2. Gross retail income does not include the value of "any tangible personal property received in a like-kind exchange" IC § 6-2.5-1-5. A like-kind exchange is the exchange of personal property of the "same kind or character, regardless of grade or character." IC § 6-2.5-1-6.

Sales Tax Information Bulletin 28S (April 2012), 20120530 Ind. Reg. 045120259NRA, provides:

A like-kind exchange means a motor vehicle traded for another motor vehicle or a trailer traded for another trailer. A trade-in of a motor vehicle for a trailer is not a "like-kind exchange" and is not deductible in the calculation of the amount of the taxable gross retail income received by the dealer. See also Sales Tax Information Bulletin 28S (October 2011), 20110928 Ind. Reg. 045110549NRA; Sales Tax Information Bulletin 28S (December 2009), 20100127 Ind. Reg. 045100029NRA.

A review of the documents Taxpayer provided indicates that Taxpayer accepted as a trade in such things as a motorcycle or "4-Wheeler" which do not qualify as a "like-kind" exchange. Nonetheless, the Audit Division is requested to review transaction 16, 22, and 63 to adjust the proposed assessment as may be warranted.

Taxpayer's protest is sustained in part and denied. The Audit Division is requested to review transactions designated as "16, 22, and 63" and make whatever adjustments to the proposed assessment as warranted.

FINDING

Taxpayer's protest is sustained in part and denied in part.

VI. Gross Retail Tax - Gifts.

DISCUSSION

Taxpayer argues that it received gifts of a "Max Trailer" and a "Massey Ferg[u]son Trailer" and that it was not required to self-assess use tax on the value of the two vehicles.

Taxpayer indicates that transactions 9, 3, 4, represent gifts which are not subject to sales tax. Taxpayer errs in part because transactions 9 and 3 are duplicate affidavits. The Department's audit included the items because they were specifically included on Taxpayer's depreciation schedule. The audit found that the transactions were subject to use tax pursuant to [45 IAC 2.2-3-4](#) which provides:

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.

Taxpayer claimed depreciation on a \$5,505 "car trailer" and a \$2,500 "Massey Ferg[u]son 35" trailer. However, in order to qualify for the depreciation, the "property must have been acquired by purchase." 2013 IRS Publication 946, <http://www.irs.gov/publications/p946/ch02.html> (last visited July 2, 2014). Taxpayer has not established that the items were gifts or that it was not required to self-assess use tax on the items if they were.

FINDING

Taxpayer's protest is respectfully denied.

VII. Gross Retail Tax - Casual Sale Transaction.

DISCUSSION

Taxpayer maintains it was not required to pay sales tax - or self-assess use tax - on the value of items it received by means of a casual sale.

Indiana imposes a 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 the location of the retail merchant making that transaction." IC § 6-2.5-3-2(a).

However, [45 IAC 2.2-1-1](#)(d) provides an exemption for "casual sales." The regulation states:

The Indiana gross retail tax is not imposed on gross receipts from casual sales of motor vehicles and sales of rental property. A casual sale is an isolated or occasional sale by the owner of tangible personal property purchased or otherwise acquired for his use or consumption, where he is not regularly engaged in the business of making such sales.

Taxpayer apparently acquired vehicles in what it classified as "casual sales." However, the Department's regulation specifies that the exemption is not available for transactions involving "motor vehicles" and sales of "rental property."

In order to justify the exemption, Taxpayer is required to establish that it did not acquire a "motor vehicle," that the seller was "not regularly engaged in the business of making such sales" or that Taxpayer should not be responsible for paying use tax on items included on its depreciation schedule. Based on a review of the documentation presented and bearing in mind that IC § 6-8.1-5-1(c) requires that the Taxpayer has the burden of establishing that the assessment was "wrong," the Department is unable to agree that the items at issue were acquired in a casual sale or that it was not required to self-assess use tax when it acquired the items.

FINDING

Taxpayer's protest is respectfully denied.

VIII. Gross Retail Tax - Sale for Resale.

DISCUSSION

IC § 6-2.5-5-8 which states that, "Transactions involving tangible personal property . . . are exempt from the state gross retail tax if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of his business without changing the form of the property." Therefore, if Taxpayer purchased the equipment for the purpose of renting or leasing to its customers, the equipment was not subject to sales or use tax. The exemption sought is reiterated at [45 IAC 2.2-5-15](#), which in relevant part states:

- (a) The state gross retail tax shall not apply to sales of any tangible personal property to a purchaser who purchases the same for the purpose of reselling, renting or leasing, in the regular course of the purchaser's business, such tangible personal property in the form in which it is sold to such purchaser.
- (b) General rule. Sales of tangible personal property for resale, renting or leasing are exempt from tax if all of the following conditions are satisfied:
 - (1) The tangible personal property is sold to a purchaser who purchases this property to resell, rent or lease it;
 - (2) The purchaser is occupationally engaged in reselling, renting or leasing such property in the regular course of his business; and
 - (3) The property is resold, rented or leased in the same form in which it was purchased.

Taxpayer has provided information sufficient to establish that transactions designated as 114 and 121 qualify for the exemption sought. The Audit Division is requested to review the designated transactions and to make whatever adjustment to the original assessment is warranted.

FINDING

Taxpayer's protest is sustained in part and denied in part.

IX. Gross Retail Tax - Storage and Delivery.

DISCUSSION

Taxpayer argues that the Department's audit erred in calculating the tax on the transaction Taxpayer designates as "113" arguing the sales price was \$17,155 and not \$21,045 specified in the audit. The former amount was included in Taxpayer's depreciation schedule. However, Taxpayer has failed to include any original documentation establishing its assertion that the sale price was the amount claimed. Taxpayer has failed to meet the burden set out in IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is respectfully denied.

SUMMARY

(1) The Audit Division is requested to review the transactions designed "24, 43, and 213" to verify that the purchasers were entitled to claim the "public transportation" exemption; (2) the Department is unable to agree that the affidavits submitted are sufficiently reliable to establish that Taxpayer delivered the vehicles in question to out-of-state locations; (3) the Audit Division is requested to review the transactions at issue in Part III to assure that the Department did not issue duplicate assessments; (4) the Audit Division is requested to review transactions designated as "35 and 122" and verify that these customers were entitled to claim the agricultural exemption; (5) the Audit Division is requested to review transactions designated as "16, 22, and 63" to verify that the customers were entitled to claim the "like-kind" exemption; (6) the Department is unable to agree that Taxpayer was not required to self-assess use tax on items purportedly received as gifts; (7) the Department is unable to agree that Taxpayer was not required to self-assess use tax on items obtained by means of "casual sales"; (8) the Audit Division is requested to review the transactions designated as 114 and 121 to verify that Taxpayer sold vehicles to customers who were entitled to claim the "sale for resale" exemption; (9) the Department is unable to agree that Taxpayer established that the Department erred in its treatment of the

transaction designated as 113.

Posted: 09/24/2014 by Legislative Services Agency
An [html](#) version of this document.