DEPARTMENT OF STATE REVENUE

04-20120346.LOF

Letter of Findings: 04-20120346
Sales and Use Tax
For the Years 2008 through 2010

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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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 - Demurrage Charges/Rental Fees.

Authority: 45 IAC 2.2-4-27; Black's Law Dictionary (9th ed. 2009).

Taxpayer argues that the Department of Revenue erred when it determined that money which it receives from its customers and which it classifies as "demurrage" fees was in fact rental charges subject to sales tax.

II. Gross Retail Tax - Manufacturing Exemption.

Authority: IC § 6-8.1-5-1; IC § 6-2.5-5-3; IC § 6-2.5-5-5.1; IC § 6-2.5-5-6; Conklin v. Town of Cambridge City, 58 Ind. 130 (Ind. 1877); N. Cent. Indus. v. Dep't of Revenue, 790 N.E.2d 198 (Ind. Tax Ct. 2003); Tri-States Double Cola Bottling Co. v. Dep't of State Revenue, 706 N.E.2d 282 (Ind. Tax Ct. 1999); Mynsberge v. Dep't of State Revenue, 716 N.E.2d 629 (Ind. Tax Ct. 1999); General Motors Corp. v. Indiana Dept. of State Revenue, 578 N.E.2d 399 (Ind. Tax Ct. 1991); Rotation Products Corp. v. Indiana Dep't of State Revenue, 690 N.E.2d 795 (Ind. Tax Ct. 1998); Indianapolis Fruit Co. v. Indiana Dep't of State Revenue, 691 N.E.2d 1379 (Ind. Tax Ct. 1998); Indiana Dept. of State Rev. v. Kimball Int'l Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988); Indiana Dep't of State Revenue v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974); 45 IAC 2.2-5-10; American Heritage Dictionary of the English Language (1969).

Taxpayer maintains that the Department erred when it determined that Taxpayer's production facility did not perform a manufacturing function.

III. Gross Retail Tax - Exemption Certificates.

Authority: IC § 6-2.5-8-8.

Taxpayer states that the audit failed to consider exemption certificates from certain of its customers in determining Taxpayer's sales tax liability.

IV. Gross Retail Tax - Cylinder Parts.

Authority: IC § 6-2.5-5-8; IC § 6-8.1-5-1.

Taxpayer argues that it is entitled to a sales tax exemption for parts purchased and used on or with Taxpayer's gas cylinders.

V. Gross Retail Tax - Installation Charges.

Authority: IC § 6-2.5-1-5; IC § 6-2.5-5-8.

Taxpayer maintains that the installation costs it charges its customers are exempt from sales tax.

VI. Gross Retail Tax - Duplicate Assessments.

Authority: IC § 6-2.5-2-1.

Taxpayer states that the Department's audit mistakenly assessed tax on transactions in which the tax was collected by its vendor.

VII. Gross Retail Tax - Purchases for Rental.

Authority: IC § 6-2.5-5-8; IC § 6-8.1-5-1.

Taxpayer states that it - or more precisely a company it acquired - purchased various items which it rented to its customers and that the purchases were therefore exempt from sales tax.

VIII. Gross Retail Tax - Out-of-State Transactions.

Authority: IC § 6-2.5-3-1; IC § 6-2.5-3-2.

Taxpayer claims that it purchased cylinders which were used by its out-of-state business location and that these cylinders are not subject to Indiana's gross retail tax.

IX. Ten-Percent Negligence Penalty.

Authority: IC § 6-8.1-5-1; IC § 6-8.1-10-2.1; 45 IAC 15-11-2.

Taxpayer asks that the Department exercise its authority to abate the ten-percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana business which produces and sells various industrial gases used for laboratory, medical, and industrial purposes. The Indiana Department of Revenue ("Department") conducted a sales tax audit of Taxpayer's business records and tax returns for the tax years 2008, 2009, and 2010. The audit resulted in the assessment of additional sales 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 representatives explained the basis for the protest. This Letter of Findings results.

I. Gross Retail Tax - Demurrage Charges/Rental Fees.

DISCUSSION

Taxpayer sells industrial gases which are delivered in metal cylinders. The audit report stated that "[T]axpayer is put on notice that cylinder rental is taxable regardless of the terms used by the [T]axpayer to reclassify the cylinder rental revenue to penalty revenue."

Taxpayer disagrees stating that "Sales Tax has not traditionally been applied to demurrage penalties which are akin to late charges for failure to timely return cylinders to Taxpayer, essentially the containers by which the gases purchased by customers are transported to such customers." Taxpayer however notes that it does enter into lease agreements with its customers and it does collect sales tax on those charges which it categorizes as "lease payments."

In contrast, Taxpayer explains that "where the customer is not willing to enter a lease arrangement, the customer is not entitled to retain usage of the cylinder beyond one day. . ." In such instances, if the customer retains the cylinder more than 24 hours, "Taxpayer charges the customer a demurrage amount for each extra day retained. . . ."

The Department's audit relied on 45 IAC 2.2-4-27 which provides in part as follows:

> (a) In general, the gross receipts from renting or leasing tangible personal property are taxable. This regulation [45 IAC 2.2] only exempts from tax those transactions which would have been exempt in an equivalent sales transaction.
> (b) Every person engaged in the business of the rental or leasing of tangible personal property, other than a public utility, shall be deemed to be a retail merchant in respect thereto and such rental or leasing transaction shall constitute a retail transaction subject to the state gross retail tax on the amount of the actual receipts from such rental or leasing.
> (c) In general, the gross receipts from renting or leasing tangible personal property are subject to tax. The rental or leasing of tangible personal property constitutes a retail transaction, and every lessor is a retail merchant with respect to such transactions. The lessor must collect and remit the gross retail tax or use tax

> on the amount of actual receipts as agent for the state of Indiana. The tax is borne by the lessee, except when the lessee is otherwise exempt from taxation.
> (d) The rental or leasing of tangible personal property, by whatever means effected and irrespective of the terms employed by the parties to describe such transaction, is taxable.

Taxpayer characterizes these fees as penalties for retaining a cylinder longer than the time agreed to in the parties' sales agreement.

The term "demurrage" is defined as "Liquidated damages owed by a charterer to a shipowner for the charterer's failure to load or unload cargo by the agreed time." Black's Law Dictionary 498 (9th ed. 2009). "Contract demurrage" is defined as "Demurrage paid by a vessel's charterer if the time to load or unload the vessel at port takes longer than that agreed on in the charterer's contract with the shipowner." Id.

Clearly Taxpayer is required to collect sales tax for any and all rental agreements "by whatever means effected." 45 IAC 2.2-4-27(d). Taxpayer can call rental payments whatever it wants; the payments can be called "rent," "lease," "demurrage," "penalties," or "fees." When Taxpayer "rents" a cylinder, the charges are subject to sales tax.

However, where Taxpayer does not enter into a rental/lease agreement, delivers gases to its customers by means of cylinders, allows the customers a brief time in which to transfer the gas, any late penalties are not subject to tax because there is no underlying lease or rental agreement. The charges are akin to fees imposed for late return of a library book. The late book return charge is not subject to tax because the library never entered into a rental agreement with the patron.

However, if Taxpayer charges a rental fee due on delivery and for a fixed period of time, any subsequent payments - whether labeled as fees, charges, or demurrage - are subject to tax because there is an underlying rental agreement which governed the initial delivery of the tank.

For this particular Taxpayer, under these particular circumstances, any late penalties - with no underlying rental agreement - are not subject to sales tax.

FINDING

Taxpayer's protest is sustained.

II. Gross Retail Tax - Manufacturing Exemption.

DISCUSSION

Taxpayer argues that it is entitled to the "manufacturing exemption" and that the Department's decision to the contrary is erroneous.

Taxpayer explains as follows:

> The gases sold to customers are largely gases manufactured by Taxpayer to certain specifications through a process involving several steps. Taxpayer buys gases in liquid form, converts them into a gaseous form, through a vaporization process, and then within specified cylinders, mixes them into the new gas required by the customer.

Taxpayer provides an example: "[A] mixture of carbon dioxide and argon creates a gas which is substantially different from either carbon dioxide or argon and a mixture of nitrogen and argon produces a gas which is substantially different from either nitrogen or argon."

Taxpayer relies on IC § 6-2.5-5-3(b) which states:

> Except as provided in subsection (c), transactions involving manufacturing machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property. (Emphasis added).

The collateral exemption, IC § 6-2.5-5-5.1(b), states:

> Transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for direct consumption as a material to be consumed in the direct production of other tangible personal property in the person's business of manufacturing, processing, refining, repairing, mining, agriculture, horticulture, floriculture, or arboriculture. This exemption includes transactions involving acquisitions of tangible personal property used in commercial printing. (Emphasis added).

Taxpayer also relies on the exemption set out at IC § 6-2.5-5-6, which states in its entirety:

> Transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for incorporation as a material part of other tangible personal property which the purchaser manufactures, assembles, refines, or processes for sale in his business. This exemption includes transactions involving acquisitions of tangible personal property used in commercial printing. (Emphasis added).

In reviewing these "production" exemption statutes, the Indiana Tax Court has explained that, "All three exemption provisions require that the taxpayer engage in production before qualifying for the exemption" and that "[p]roduction does not have different meanings under different exemption provisions." Indianapolis Fruit Co. v. Indiana Dep't of State Revenue, 691 N.E.2d 1379, 1383 (Ind. Tax Ct. 1998) (Internal citation omitted).

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."

In applying any tax exemption, the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." Indiana Dept. of State Rev. v. Kimball Int'l Inc., 520 N.E.2d 454, 456 (Ind. Ct. App. 1988).

IC § 6-2.5-5-3(b), IC § 6-2.5-5-5.1(b), and IC § 6-2.5-5-6, like all tax exemption provisions, are strictly construed against exemption from tax. See, Tri-States Double Cola Bottling Co. v. Dep't of State Revenue, 706 N.E.2d 282, 283 (Ind. Tax Ct. 1999); Mynsberge v. Dep't of State Revenue, 716 N.E.2d 629, 636 (Ind. Tax Ct. 1999). Nevertheless, the Department is well aware of the countervailing rule that a "statute must not be construed so narrowly that it does not give effect to legislative intent because the intent of the legislature embodied in a statute constitutes the law." General Motors Corp. v. Indiana Dept. of State Revenue, 578 N.E.2d 399, 404 (Ind. Tax Ct. 1991).

The law is consistent; in order to qualify for the exemption, the finished product must be substantially different from the original components. The issue here is whether the industrial gases which Taxpayer sells to its customers have undergone a "substantial" change.

45 IAC 2.2-5-10(k) provides:

> Processing . . . is defined as the performance by a business of an integrated series of operations which places tangible personal property in a form, composition, or character different from that in which it was acquired. The change in form, composition, or character must be a substantial change. Operations such as distilling, brewing, pasteurizing, electroplating, galvanizing, anodizing, impregnating, cooking, heat treating, and slaughtering of animals for meal or meal products are illustrative of the types of operations which constitute processing . . . although any operation which has such a result may be processing. . . . A processed . . . end product, however, must be substantially different from the component materials used. (Emphasis added).

As the Tax Court has explained, whether or not a change is "substantial" depends on, among other factors, the complexity of the activity undertaken by the processor, the addition of new parts by the processor, and the difference between the end result and the initial components. See N. Cent. Indus. v. Dep't of Revenue, 790 N.E.2d 198, 201-02 (Ind. Tax Ct. 2003). Taxpayer maintains that the industrial gases it sells to its customers have undergone a substantial change from the various gases which Taxpayer uses to produce that sellable product.

Taxpayer's argument turns on whether industrial gases have undergone a "substantial" change. "Substantial" is defined in the dictionary as "[c]onsiderable in importance, value, degree, amount or extent." American Heritage Dictionary of the English Language 1284 (1969), while "considerable" is defined as, "Fairly large in amount,

extent, or degree . . . important; significant." Id. at 284.

The Tax Court's decision in Rotation Products Corp. v. Indiana Dep't of State Revenue, 690 N.E.2d 795 (Ind. Tax Ct. 1998) is instructive on the question of whether or not a commodity has undergone a "substantial change." In that case, the court set out a four-part test to determine whether or not the petitioner was in the business of "manufacturing" as follows:

> The case law reveals three factors germane to this fact-sensitive inquiry. The first is an adaptation of the requirement of a substantially different end product: the substantiality and complexity of the work done on the existing article and the physical changes to the existing article, including the addition of new parts. The other two factors derive from the observations of the courts dealing with this issue: a comparison of the article's value before and after the work, and how favorably the performance of the remanufactured article compares with the performance of newly manufactured articles of its kind. Additionally, this Court concludes that another factor is applicable to this inquiry: whether the work performed was contemplated as a normal part of the life cycle of the existing article. This additional factor will prevent work that merely perpetuates existing products from qualifying for an industrial exemption. Id. at 802-03 (internal citations omitted).

Taxpayer has provided an affidavit describing Taxpayer's process. The affidavit explains that Taxpayer "receives gases such as argon, nitrogen, oxygen, hydrogen, helium, carbon dioxide, propane, compressed air and nitrous oxide in their pure, oftentimes liquid refrigerated form." The affidavit explains that Taxpayer "changes the physical nature of these elements in its manufacturing process by converting them into a gaseous state via a vaporization process." In addition, Taxpayer "further processes these newly created gases by utilizing sophisticated equipment and experienced personnel to achieve the appropriate end state needed for the gas product being manufactured."

Apart from Taxpayer's assertion, however, Taxpayer has not provided substantive documentation or explanation about Taxpayer's mixing of gases and the end products that result. A long history of Indiana law is clear that Taxpayer has a substantial burden in establishing that it is entitled to the exemption it seeks. As explained by the Indiana Supreme Court in Conklin v. Town of Cambridge City, 58 Ind. 130, 133 (Ind. 1877):

> Exemptions from taxation are not, and ought not to be especially favored by the courts; and where such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law. (Emphasis added).

Bearing in mind the statutory burden set out in IC § 6-8.1-5-1(c), the Department is not prepared to agree that Taxpayer's products have undergone the "substantial change" necessary for the associated equipment to fall within the exemption. Taxpayer essentially combines gases to produce its end-product but there is insufficient information to establish that the final product has undergone the "substantial change" as required in the statute.

The Department's conclusion is supported by the particularity with which the General Assembly drafted the exemption statutes. As noted in Indiana Dept of State Revenue v. RCA Corp., 310 N.E.2d 96, 100 (Ind. App. 1974):

> Indiana was years behind most other states in enacting a sales tax statute. It had the benefit of other state's experience in judicial interpretation of the exemptions, including the manufacturing exemption. The Indiana Legislature wrote its exemption in words different from those used in any statute construed in the cases RCA cites, or in any cases we have read. Indiana requires that for the sale to be exempt the property purchases must not only be "used directly" in the manufacturing process (as do the statues of other states) but that it must be "directly used . . . in the direct production, manufacture . . . ."

Indiana drafted IC § 6-2.5-5-3(b), IC § 6-2.5-5-5.1(b), and IC § 6-2.5-5-6 to require that a manufacturer's raw materials undergo "substantial change" before the manufacturer can claim the exemption. Bearing in mind that Taxpayer bears the burden of demonstrating that the proposed assessment is wrong, that the exemption statutes are "strictly construed" against exemption, that the Legislature drafted the manufacturing exemptions narrowly, and that a weighing of the Rotation Products "factors" above does not decisively support Taxpayer's argument, the Department is unable to agree that the industrial gases sold to its customers meet the requirements necessary to sustain Taxpayer's protest.

FINDING

Taxpayer's protest is respectfully denied.

III. Gross Retail Tax - Exemption Certificates.

DISCUSSION

Taxpayer maintains that the Department's audit failed to consider exemption certificates from three of its customers in determining Taxpayer's sales tax liability. Indiana code, IC § 6-2.5-8-8(a), provides as follows:

> 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.

Taxpayer argues that the audit overlooked various exemption certificates from its customers. Those exemption certificates are found at "C-1" in Taxpayer's materials. The Audit Division is requested to review those certificates and to make whatever adjustment is warranted.

Taxpayer raises a second issue related to exemption certificates. Taxpayer argues that the audit "erroneously disallowed exemption certificates from companies with multiple locations." Taxpayer complains that the audit "limited each exemption certificate to one location and disallowed the rest." Taxpayer cites to an instance in which a grocery store chain presented one exemption certificate "for eligible exempt items on behalf of all its locations" but "it was clear that all transactions were with the same customer . . . ." The exemption certificate presented was for a location in one Indiana municipality. Taxpayer believes that the certificate should be used for locations throughout the state with an identical or similar name. The Department disagrees, finding that Taxpayer's stance presents record-keeping, logistical, and practical difficulties. For example, the exemption certificate identifies "[business] Partnership I." This particular business may have affiliates with similar names but which are owned by different entities. This particular business may be entitled to purchase Taxpayer's industrial gases for exempt purposes while entities with similar - but not identical - names may not be entitled to claim the exemption. In the example of which Taxpayer complains, the business operates grocery stores, gas stations, bakeries from hundreds of locations all of which operate under separate tax identification numbers and from locations across the state. When exemption certificates are presented as proof of exemption, they must be identifiably related to specific transactions where exemption can be demonstrated upon inquiry. This is not the case here. Taxpayer's protest on this issue is therefore denied.

FINDING

Taxpayer's protest is denied in part but is sustained subject to audit review of the exemption certificates which were submitted during the administrative hearing process.

IV. Gross Retail Tax - Cylinder Parts.

DISCUSSION

Taxpayer argues that its purchase of "cylinder parts and valves" are exempt because "these items of property are part of its "manufacturing process" or "they are accessories to the cylinders sold or leased by Taxpayer and are attached or joined in various manners with such cylinders to enhance their performance."

Insofar as the argument that the devices are part of its manufacture of industrial gases, the Department has determined that Taxpayer did not meet its burden to show that the gases it produces undergo the requisite "substantial change" as set out in Part II above necessary to obtain the exemption.

IC § 6-2.5-5-8(b) provides: "[t]ransactions involving tangible personal property . . . are exempt from the state gross retail tax if the person acquires it for resale, rental, or leasing in the ordinary course of the person's business without changing the form of the property."

Taxpayer asserts that it rents cylinder parts and valves in the ordinary course of its business but has provided no documentation to that effect.

Taxpayer has failed to meet its burden under IC § 6-8.1-5-1(c) of establishing that any portion of the audit's conclusion related to parts and cylinders is "wrong."

FINDING

Taxpayer's protest is respectfully denied.

V. Gross Retail Tax - Installation Charges.

DISCUSSION

Taxpayer maintains that the Department's audit mistakenly assessed sales tax on installation costs it charges its customers. In support of its argument, Taxpayer cites to IC § 6-2.5-1-5(b) which provides in part:

> "Gross retail income" does not include that part of the gross receipts attributable to . . . (6) installation charges that are separately stated on the invoice, bill of sale, or similar document given to the purchaser[.] IC § 6-2.5-5-8(b)(6).

Taxpayer has provided sample invoices which purportedly entitle Taxpayer to the exemption. Taxpayer errs because, although the invoices include "installation" as part of the agreed-upon price, the installation charges are not "separately stated" as required under IC § 6-2.5-1-5(b)(6).

FINDING

Taxpayer's protest is respectfully denied.

VI. Gross Retail Tax - Duplicate Assessments.

DISCUSSION

Taxpayer claims that the Department's audit mistakenly assessed sales tax on purchases for which the original vendors collected tax at the time of the transactions. Taxpayer provided invoices which purport to demonstrate that it paid sales tax to the vendors.

IC § 6-2.5-2-1 provides as follows:

> (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
>
> (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state. (Emphasis added).

Taxpayer raises a legitimate concern but only in part. Only one of the invoices - with a company called ITS - included a separate charge for sales tax; the remaining invoices state that the listed price "includes tax" or that the cost of the transaction is the "total." These remaining invoices do not state the sales tax as "a separate added amount to the consideration in the transaction," therefore sales tax cannot be deemed to have been paid.

The Audit Division is requested to review the ITS invoice and to the extent that the original audit assessed duplicate sales tax, is requested to adjust the original assessment and assure that Taxpayer was not assessed taxes on an item on which the tax had already been paid.

FINDING

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

VII. Gross Retail Tax - Purchases for Rental.

DISCUSSION

Taxpayer explains that it acquired a company which was in the rental business. Taxpayer explained that, "The auditor erroneously taxed the acquisition of the systems despite the fact that they were acquired to be leased to customers." Taxpayer provided a blank sample agreement. The agreement states that it rents "units" for a specified price.

Taxpayer apparently relied on IC § 6-2.5-5-8 which provides, in part: "[t]ransactions involving tangible personal property are exempt from the state gross retail tax if the person acquires it for resale, rental, or leasing in the ordinary course of his business without changing the form of the property." IC § 6-2.5-5-8(b)(6).

As noted previously, IC § 6-8.1-5-1(c) provides that "[t]he 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."

Taxpayer has failed to provide sufficient information that the assessed transactions were in fact for equipment acquired for the purpose of rental.

FINDING

Taxpayer's protest is respectfully denied.

VIII. Gross Retail Tax - Out-of-State Transactions.

DISCUSSION

Taxpayer conducts business in multiple state locations. Taxpayer explains that it "acquires assets which were located and utilized" at one of its out-of-state locations. Taxpayer argues that it is not subject to sales or use tax on items which were purchased and then used at that out-of-state location. Taxpayer explains how it determined the amount of the exemption as follows:

> Taxpayer has determined the amounts of assets used [out-of-state] by multiplying the total amount of asset acquisitions by a percentage in which the numerator is cylinder rental income [out-of-state] and the denominator is all cylinder rental income.

IC § 6-2.5-3-2 states that "[a]n 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 . . . ." (Emphasis added). However, Indiana law provides a "temporary storage" exemption under IC § 6-2.5-3-2(e) which provides:

> (e) Notwithstanding any other provision of this section, the use tax is not imposed on the keeping, retaining, or exercising of any right or power over tangible personal property, if:
> (1) the property is delivered into Indiana by or for the purchaser of the property;
> (2) the property is delivered in Indiana for the sole purpose of being processed, printed, fabricated, or manufactured into, attached to, or incorporated into other tangible personal property; and
> (3) the property is subsequently transported out of state for use solely outside Indiana.

IC § 6-2.5-3-1(b) explains:

> "Storage" means the keeping or retention of tangible personal property in Indiana for any purpose except the subsequent use of that property solely outside Indiana.

Taxpayer states the items "qualify for a specific use tax exemption pursuant to I.C. § 6-2.5-3-2(e), which exempts any such items even if first transferred into Indiana . . . ." The Department disagrees because there is no temporary storage tax exemption for transactions which occurred in Indiana; if Taxpayer purchased items from an Indiana vendor, it is required to pay sales tax on that transaction even if the items acquired were eventually used at an out-of-state location. Taxpayer cites to transactions noted on pages 34 and 43 of the audit report but does not point to any specific transaction which falls within the exemption sought.

Based on the information and explanation provided, it is not possible to agree that any portion of the assessment should be modified to reflect Taxpayer's argument.

FINDING

Taxpayer's protest is respectfully denied.

IX. Ten-Percent Negligence Penalty.

DISCUSSION

Taxpayer argues that it is entitled to abatement of the ten-percent negligence penalty. Taxpayer explains that because of its comprehensive arguments . . . and given the numerous errors made by the auditor in the Proposed Assessment, the penalties should be waived due to reasonable cause and an absence of willful neglect on the part of Taxpayer.

IC § 6-8.1-10-2.1(a)(3) requires that a ten-percent penalty be imposed if the tax deficiency results from the taxpayer's negligence. IC § 6-8.1-10-2.1(a)(2) requires a ten-percent penalty if the taxpayer "fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment."

IC § 6-8.1-10-2.1(d) states that, "If a person subject to the penalty imposed under this section can show that the failure to . . . pay the full amount of tax shown on the person's return . . . or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall wave the penalty."

Departmental regulation 45 IAC 15-11-2(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." Id.

Departmental regulation 45 IAC 15-11-2(c) requires that in order to establish "reasonable cause," the taxpayer must demonstrate that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed . . . ."

Under IC § 6-8.1-5-1(c), "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." An assessment - including the negligence penalty - is presumptively valid.

The Department believes that taxpayer erred in determining its sales and use tax liability and needs to initiate a process by which it self-reports use tax. The Department does not agree that the original audit consisted of "numerous errors." However, based on a "case-by-case" analysis and after reviewing "the facts and circumstances of each taxpayer" the Department agrees that the ten-percent negligence penalty should be abated.

FINDING

Taxpayer's protest is sustained.

SUMMARY

Taxpayer's protest is sustained in part and denied in part pursuant to the each of the sections above. To summarize, Taxpayer is sustained in Issue I on the rental fees if the Taxpayer charges a rental fee due on delivery and for a fixed period of time. Any subsequent payments are subject to tax. Taxpayer is also partially sustained in Issue III subject to audit review of the exemption certificates submitted during the administrative hearing process. Lastly, Taxpayer is also sustained in Issue IX of its protest of the assessment of penalty. Taxpayer is denied on the remainder of its protest.

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