

**Letter of Findings Number: 04-20130695
Sales and Use Tax
For Tax Years 2010-12**

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 This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.

ISSUES

I. Sales Tax—Imposition.

Authority: IC § 6-2.5-1-5; IC § 6-2.5-2-1; IC § 6-2.5-8-8; IC § 6-8.1-5-1; IC § 6-2.5-4-1; [45 IAC 2.2-4-2](#); [45 IAC 2.2-4-21](#); [45 IAC 2.2-4-25](#); [45 IAC 2.2-4-26](#); [45 IAC 2.2-8-12](#).

Taxpayer protests the assessment of sales tax.

II. Use Tax—Imposition.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-8.1-5-1; [45 IAC 2.2-3-4](#).

Taxpayer protests the assessment of use tax.

STATEMENT OF FACTS

Taxpayer is an Indiana business. The Indiana Department of Revenue ("Department") conducted a sales and use tax audit for the years 2010-12. The audit resulted in the assessment of additional sales tax, use tax, negligence penalties, and interest for the years at issue. Taxpayer protested the imposition of sales and use tax on certain items. An administrative hearing was conducted and this Letter of Findings results. Further facts will be presented as required.

I. Sales Tax—Imposition.

DISCUSSION

Taxpayer protests a portion of the proposed sales tax assessments for the tax years 2010, 2011, and 2012. The Department reviewed Taxpayer's sales transactions and imposed sales tax on items of tangible personal property ("TPP") upon which sales tax had not been collected at the time of sale. Taxpayer protests that some of the items listed as taxable by the Department are actually exempt from sales tax. Specifically, Taxpayer argues that the Department erred in assessing sales tax on transactions it entered into with certain customers on the grounds that the transactions involved customers with exemption certificates, involved performance of services, and involved the installation of TPP into real property via a lump-sum contract. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

Sales tax is imposed by IC § 6-2.5-2-1, which states:

- (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.

[45 IAC 2.2-8-12](#) in relevant parts provides:

- (c) All retail sales of tangible personal property for delivery in the state of Indiana shall be presumed to be subject to sales or use tax until the contrary is established. The burden of proof is on the buyer and also on the seller unless the seller receives an exemption certificate. 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. The mere filing of a Registered Retail Merchant Certificate number is not sufficient to relieve the seller of the responsibility to collect the sales tax or prove exempt use by the buyer.

...

(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.

...

IC § 6-2.5-8-8 further explains in relevant parts:

(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.

...

(d) A seller that accepts an incomplete exemption certificate under subsection (a) is not relieved of the duty to collect gross retail or use tax on the sale unless the seller obtains:

(1) a fully completed exemption certificate; or

(2) the relevant data to complete the exemption certificate; within ninety (90) days after the sale.

...

(Emphasis added).

Therefore, when TPP is sold in Indiana, the retail merchant shall collect the tax due on the retail transaction as an agent for the state as provided by IC § 6-2.5-2-1(b). A retail transaction subject to the state's sales tax necessarily involves the transfer of TPP. However, a retail transaction will not be subject to the state's sales tax where properly completed exemption certificates exist. Rather than supplying an exemption certificate dated after the corresponding transaction(s), a retail merchant shall provide a properly completed AD-70.

Taxpayer protests the imposition of sales tax on transactions it had with several customers it believed to be exempt. In the course of the protest process, Taxpayer provided exemption certificates supporting its position that sales tax was not due on certain transactions as provided by IC § 6-2.5-8-8. The Department will conduct a supplemental audit and, with regards to any properly completed exemption certificates, remove any sales to those customers listed as taxable in the audit report.

First, the Department refers to IC § 6-2.5-1-5(b), which states:

"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.

...

Next, [45 IAC 2.2-4-25](#)(a) provides:

Contractor. For purposes of this regulation, "contractor" means any person engaged in converting construction material into realty. The term "contractor" refers to general or prime contractors, subcontractors, and specialty contractors, including but not limited to persons engaged in building, cement work, carpentry, plumbing, heating, electrical work, roofing, wrecking, excavating, plastering, tile and road construction. (Emphasis added).

Next, [45 IAC 2.2-4-21](#) states:

(a) In general, all sales of tangible personal property are taxable, and all sales of real property are not taxable. The conversion of tangible personal property into realty does not relieve a liability for any owing and unpaid state gross retail tax or use tax with respect to such tangible personal property.

(b) All construction material purchased by a contractor is taxable either at the time of purchase, or if purchased exempt (or otherwise acquired exempt) upon disposition unless the ultimate recipient could have purchased it exempt.

[45 IAC 2.2-4-26](#)(a) provides:

A person making a contract for the improvement to real estate whereby the material becomes a part of the improvement and the labor quoted as one price is liable for the payment of sales tax on the purchase price of all material so used.

Regarding the installation of TPP into real property, the installation at issue was a stairwell in a private residence. As provided by [45 IAC 2.2-4-26\(a\)](#), Taxpayer was not required to collect sales tax from the customer. After reviewing the documentation supplied during the protest process, the Department determined that taxpayer was not required to collect sales tax on this project.

IC § 6-2.5-4-1 states:

- (a) A person is a retail merchant making a retail transaction when he engages in selling at retail.
- (b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:
 - (1) acquires tangible personal property for the purpose of resale; and
 - (2) transfers that property to another person for consideration.

Also, [45 IAC 2.2-4-2](#) states:

- (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.

Services alone are not retail transactions and are not subject to sales tax. However, sales tax will be collected when TPP is transferred along with the services. Taxpayer provided invoices supporting its argument that some transactions in question were transactions for services and not transfers of TPP. The Department will conduct a supplemental audit and, with regards to any transactions strictly for services, remove any sales to those customers listed as taxable in the audit report.

Taxpayer has met the burden imposed under IC § 6-8.1-5-1(c) of proving the proposed assessments wrong regarding some of the protested items. Taxpayer has provided exemption certificates and invoices to support its protest. Transactions with valid exemption certificates and transactions for strictly services are not subject to sales tax. Additionally, sales tax will not be collected on Taxpayer's installation of a stairwell in a private residence. The Department will conduct a supplemental audit to determine the amounts subject to sales tax.

FINDING

Taxpayer's protest is sustained regarding exemption certificates to the extent verified by audit. Taxpayer's protest is sustained regarding installing of TPP into real property charged in a lump-sum. Taxpayer's protest is sustained regarding services provided to the extent verified by audit.

II. Use Tax—Imposition

DISCUSSION

Taxpayer protests a portion of the proposed use tax assessments for the tax years 2010, 2011, and 2012. The Department reviewed certain purchases and imposed use tax on items of TPP upon which sales tax had not been paid. Taxpayer argues that sales tax had actually been paid on some of the purchases. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

As provided above in Issue I, Sales tax is imposed by IC § 6-2.5-2-1, which states:

- (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.

Use tax is imposed under IC § 6-2.5-3-2(a), which states:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property as acquired in a retail transaction regardless of the location of that transaction or of the retail merchant making that transaction.

[45 IAC 2.2-3-4](#) further explains:

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.

Therefore, when TPP is used, stored, or consumed in Indiana, use tax is due unless sales tax was paid at the time of the transaction. A transaction subject to the state's sales tax necessarily involves the transfer of TPP. The state's use tax is triggered when a person exercises ownership over TPP.

Taxpayer protests the imposition of use tax on grounds that it paid sales tax on some of the purchases at issue. In the course of the protest process, Taxpayer provided third party invoices supporting its position that sales tax had been paid on some of its purchases. The Department will conduct a supplemental audit and, with regards to transactions upon which sales tax has already been paid, remove any purchases from those transactions listed as taxable in the audit report.

FINDING

Taxpayer's protest is sustained regarding use tax to the extent verified by audit.

SUMMARY

Taxpayer's Issue I protest regarding the imposition of sales tax is sustained to the extent verified by audit.
Taxpayer's Issue II protest regarding the imposition of use tax is sustained to the extent verified by audit.

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