

**Letter of Findings: 04-20140409
Gross Retail Tax
For the Year 2013**

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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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 - Recreational Vehicle Purchase.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-3-2(a); IC § 6-2.5-4-1(b), (c); IC § 6-8.1-5-1(c); [45 IAC 2.2-3-4](#); Gregory v. Helvering, 293 U.S. 465 (1935); Lee v. Comm'r, 155 F.3d 584 (2d Cir. 1998); Horn v. Comm'r, 968 F.2d 1229 (D.C. Cir. 1992); Comm'r v. Transp. Trading & Terminal Corp., 176 F.2d 570 (2d Cir. 1949); Helvering v. Gregory, 69 F.2d 809 (2nd Cir.1934); Rhoads v. Ind. Dep't of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); USAir, Inc. v. Ind. Dep't of State Revenue, 623 N.E.2d 466 (Ind. Tax Ct. 1993); Fell v. West, 73 N.E. 719 (Ind. Ct. App. 1905); Dept. of Treasury of Ind. v. Dietzen's Estate, 21 N.E.2d 137 (Ind. 1939); Letter of Findings 04-20110504 (December 16, 2011); Letter of Findings 04-20110496 (November 30, 2011); Letter of Findings 04-20100111 (March 29, 2010); Letter of Findings 04-20100299 (July 28, 2010); Letter of Findings 04-20100175 (August 23, 2010).

Taxpayer disagrees with the Department of Revenue's decision imposing a sales/use tax assessment on the purchase of a recreational vehicle from an Indiana vendor.

STATEMENT OF FACTS

Taxpayer is an Indiana resident who, along with his wife, is one of the two managers of a limited liability company organized and registered to do business in Montana. Taxpayer acquired a recreational vehicle from an Indiana dealer in 2013. No sales tax was paid at the time the vehicle was acquired.

The Indiana Department of Revenue ("Department") issued Taxpayer a proposed assessment for sales/use tax. Taxpayer disagreed with the proposed assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer and Taxpayer's representative explained the basis for the protest. This Letter of Findings results.

I. Gross Retail Tax - Recreational Vehicle Purchase.

DISCUSSION

Taxpayer initiated the formation of limited liability company ("LLC") in July 2011. In doing so, Taxpayer conferred with a Montana entity which assisted in the formation of the LLC. The entity publicly represents that it assists in the formation of LLC's "in accordance with Montana Revised Code." The entity advertises as follows:

Montana has no sales tax. Therefore it is an attractive venue to license company assets such as vehicles, motor homes, boats and airplanes. We assist our clientele with the simple two step process. We can assist you with the entity formation, the most popular being a domestic LLC, as well as the licensing and registration of such assets with [the] DMV.

In the 2011 "Articles of Organization for Domestic Limited Liability Company," establishing the LLC, Taxpayer is designated as the "Organizer" and "President, Mgr." On the LLC's 2012 "Company Annual Report," Taxpayer and his wife are designated as "Managers or Members." Taxpayer signed the "Company Annual Report" as the LLC's "Authorized Agent."

In December 2013, Taxpayer acquired a recreational vehicle from an Indiana RV dealer. The purchase agreement gives Taxpayer's LLC as the "Purchaser's Name." Taxpayer individually signed the agreement as "purchaser."

The Department issued Taxpayer a proposed assessment of use tax based on the acquisition price of the vehicle. In correspondence accompanying the assessment, the Department stated:

An RV was purchased by you from an Indiana vendor. The sales tax was not paid to the Indiana vendor. Possession/title transfer between the vendor and you as an Indiana resident occurred at the dealership in Indiana. A Bureau of Motor Vehicles (BMV) record search does not reveal this vehicle to have been titled nor tax paid to the BMV on this purchase. Per our Desk Audit review by the Enforcement Division of the Department of Revenue this purchase is subject to Indiana sales tax as tax was not paid to the state of purchase. The RV was titled in the state of Montana in the name of a LLC. It is believed the RV is the only asset of the LLC and LLC serves no other purpose but to avoid Indiana sales/use taxes due for vehicles that are otherwise garaged, serviced, and/or driven in Indiana by you as Indiana residents.

Taxpayer stated he "is not the owner, and was not the purchaser of the vehicle." Taxpayer asserts that the LLC "was the purchaser and is the owner." Taxpayer further explains that the "LLC has employed a registered agent continuously in the State of Montana since its establishment."

In addition, Taxpayer raises a constitutional question arguing that "it is impermissible for a state tax to discriminate against interstate commerce, especially when the tax fore[closes] tax-neutral decision making in interstate commerce." As Taxpayer explains:

Imposition of the use tax against a non-Indiana resident whose State has a reciprocal registration and titling provision is a violation of the Commerce Clause of the U.S. Constitution. There have been many cases decided in favor of the taxpayer in this area.

In considering Taxpayer's objection, 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." As Indiana courts have long held, "In construing tax statutes a liberal rule of interpretation must be indulged in order to aid the taxing power of the state." *Dept. of Treasury of Ind. v. Dietzen's Estate*, 21 N.E.2d 137, 139 (Ind. 1939). "The statutes of this state relating to the assessment and collection of taxes are liberally construed in favor of the taxing powers." *Fell v. West*, 73 N.E. 719, 722 (Ind. Ct. App. 1905).

The 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.

The 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 was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

The Department's regulation, [45 IAC 2.2-3-4](#), 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.

The use tax is functionally equivalent to the sales tax. See *Rhoades v. Ind. Dep't of State Revenue*, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002). By complementing the sales tax, the use tax ensures that non-exempt retail transactions (particularly out-of-state retail transactions) that escape sales tax liability are nevertheless taxed. *Id.*; *USAir, Inc. v. Ind. Dep't of State Revenue*, 623 N.E.2d 466, 468-69 (Ind. Tax Ct. 1993). The use tax ensures that, after such goods arrive in Indiana, the retail purchasers of the goods bear their fair share of the tax burden. To trigger imposition of Indiana's use tax, tangible personal property must (as a threshold matter) be acquired in a retail transaction. *Rhoades*, 774 N.E.2d at 1048. A taxable retail transaction occurs when; (1) a party acquires tangible personal property as part of its ordinary business for the purpose of reselling the property; (2) that

property is then exchanged between parties for consideration; and (3) the property is used in Indiana. See IC § 6-2.5-1-2; IC § 6-2.5-4-1(b), (c); IC § 6-2.5-3-2(a).

The Department is unable to agree with Taxpayer's argument that the U.S. Constitution precludes imposition of the tax on the purchase of the vehicle.

In *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934), the court noted that "[a]ny one may so arrange his affairs that his taxes shall be low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes."

However, it should also be pointed out that in the Supreme Court's decision, *Gregory v. Helvering*, 293 U.S. 465 (1935), challenging the previously cited decision, the Court stated that in order to qualify for favorable tax treatment, a business reorganization must be motivated by the furtherance of a legitimate corporate business purpose. *Id.* at 469. The Court recognized that the business activity undertaken merely for the purpose of avoiding taxes was without substance and "to hold otherwise would be to exalt artifice upon reality and to deprive the statutory provision in question of all serious purpose." *Id.* at 470.

The courts have subsequently held that "in construing words of a tax statute which describe [any] commercial or industrial transactions [the court is] to understand them to refer to transactions entered upon for commercial or industrial purposes and not to include transactions entered upon for no other motive but to escape taxation." *Comm'r v. Transp. Trading & Terminal Corp.*, 176 F.2d 570, 572 (2d Cir. 1949), cert. denied, 338 U.S. 955 (1950). "[T]ransactions that are invalidated by the [sham transaction] doctrine are those motivated by nothing other than the taxpayer's desire to secure the attached tax benefit" but are devoid of any economic substance. *Horn v. Comm'r*, 968 F.2d 1229, 1236 (D.C. Cir. 1992). In determining whether a business transaction was an economic sham, two factors can be considered; "(1) did the transaction have a reasonable prospect, ex ante, for economic gain (profit), and (2) was the transaction undertaken for a business purpose other than the tax benefits?" *Id.* at 1237. The question of whether or not a transaction is a sham, for purposes of the doctrine, is primarily a factual one. *Lee v. Comm'r*, 155 F.3d 584, 586 (2d Cir. 1998). In this case, Taxpayer has failed to provide a business purpose other than the tax benefit.

Based upon a review of the law, the relevant facts, and the specific circumstances, the Department is unable to agree that the assessment of use tax on an Indiana resident's purchase of a recreational vehicle from an Indiana vendor raises legitimate constitutional issues but that the formation of the LLC was intended for no other apparent reason but "to escape taxation" or that it was "undertaken for a business purpose other than the tax benefits."

The Department is equally unable to accept the proposition that Indiana residents may avoid paying sales and use tax on tangible personal property acquired in an Indiana transaction simply by titling that property outside the state. Neither the law or simple common sense supports such a notion and the Department has consistently determined as much. See Letter of Findings 04-20110504 (December 16, 2011) (20120229 Ind. Reg. 045120088NRA); Letter of Findings 04-20110496 (November 30, 2011); (20120125 Ind. Reg. 04512003NRA); Letter of Findings 04-20100111 (March 29, 2010) 20100526 Ind. Reg. 045100324NRA; Letter of Findings 04-20100299 (July 28, 2010) 20100929 Ind. Reg. 045100591NRA; Letter of Findings 04-20100175 (August 23, 2010) 20101027 Ind. Reg. 045100650NRA.

Taxpayer has failed to meet its statutory burden under IC § 6-8.1-5-1(c) of demonstrating that the proposed assessment was "wrong."

FINDING

Taxpayer's protest is denied.

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