

Letter of Findings: 04-20140324
Use Tax
For the Tax Years 2011 through 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 This document is effective as of its date of publication and remains in effect until the date it is superseded by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

A landscaper's purchases of chemicals used in its lawn care application transactions qualified for the resale exemption from Indiana sales and use tax, and its purchases of third-party "delivery services" were not subject to Indiana sales and use tax.

ISSUE

I. Use Tax-Imposition.

Authority: IC § 6-2.5-1-1; IC § 6-2.5-1-2; IC § 6-2.5-1-27; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-4-1; IC § 6-2.5-5-1 et seq.; IC § 6-2.5-5-8; IC § 6-8.1-5-1; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); [45 IAC 2.2-4-1](#); Sales Tax Information Bulletin 21 (May 2002); Commissioner's Directive 23 (April 2004).

Taxpayer protests the assessment of use tax on its purchase of certain chemicals used in its lawn care application transactions and "delivery services."

STATEMENT OF FACTS

Taxpayer is a full service landscaping company that provides landscaping design and installation, landscape maintenance, tree service, plant health care, and lawn care applications to customers located in Indiana. The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's business records employing a statistical sampling methodology covering the 2011 and 2012 tax years. As a result of the audit, the Department determined that Taxpayer correctly collected sales tax on its transactions with its customers, but owed additional use tax on its purchases for the 2011 and 2012 tax years. The Department found that Taxpayer had not paid sales tax or self assessed and remitted use tax on certain of its purchases of tangible personal property that were selected as part of the Department's statistical sample. For each of these purchases, the Department made an adjustment in the sample to show that use tax was owed. The Department's adjustments resulted in Taxpayer owing additional use tax for the years in question. Pursuant to the audit results, the Department issued proposed assessments for additional use tax and interest for the 2011 and 2012 tax years. Taxpayer protested the assessment of use tax from certain of its transactions selected in the sample. Taxpayer protested that the Department improperly determined that certain of Taxpayer's chemical purchases that were used in its lawn care applications were subject to tax. Taxpayer also protested that the Department improperly determined that Taxpayer's purchases of third-party delivery services were subject to tax. An administrative hearing was held, and this Letter of Findings ensues. Additional facts will be provided as necessary.

I. Use Tax-Imposition.

DISCUSSION

As a threshold matter, the Department notes that all tax assessments are presumed to be valid and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes an excise tax called "the state gross retail tax" (or sales tax) on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A person who acquires property in a retail transaction (a retail purchaser) is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). Indiana also imposes a complementary excise tax called the

"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 of the retail merchant making that transaction." IC § 6-2.5-3-2(a). In general, all purchases of tangible personal property are subject to sales and/or use tax. An exemption from use tax is granted for transactions where sales tax was paid at the time of the purchase pursuant to IC § 6-2.5-3-4. In certain circumstances, additional enumerated exemptions from sales and/or use tax are available. IC § 6-2.5-5-1 et seq.

A. Lawn Care Applications: Chemicals.

The Department's audit determined that Taxpayer had purchased certain chemicals which were subject to Indiana use tax. In instances where Taxpayer had purchased the chemicals without paying sales tax at the time of the transaction or remitting use tax to the Department, the Department made an adjustment in the statistical sample to show that use tax was owed. In instances where Taxpayer had purchased the chemicals and paid sales or use tax on the purchases, no adjustments were made in the statistical sample. The Department's adjustments made for the purchases in the statistical sample resulted in the Department's assessment of additional use tax.

Taxpayer maintains that the Department improperly determined that Taxpayer's purchases of certain chemicals that were used in its lawn care application transactions were subject to use tax. Taxpayer asserts that its purchases of the chemicals from "Vendor A" (see Taxpayer's Exhibit's A and B) are exempt from Indiana sales and use tax as these purchases qualify for the "resale exemption." Taxpayer states that it properly billed and collected sales tax from its customers for the lawn care application transactions, which included the transfer of the chemicals to the customers. Thus, Taxpayer contends that adjustments are required for these chemical purchases from "Vendor A" to show that no use tax was due and/or to show that credit is due for sales tax that it improperly paid.

The "resale exemption" is found in IC § 6-2.5-5-8. Specifically, IC § 6-2.5-5-8(b) provides that an exemption for "[t]ransactions involving tangible personal property ... if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of the person's business" Therefore, the issue becomes whether Taxpayer purchased the chemicals in question to be "resold" in the ordinary course of Taxpayer's business.

In the instant case, Taxpayer provides lawn care application transactions in the ordinary course of its business. Lawn care application transactions are "retail transactions" subject to sales tax. A retail transaction is a transaction made by 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 § 6-2.5-1-2. "Selling at retail" means a retail merchant "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration" in the ordinary course of the merchant's business. IC § 6-2.5-4-1(b). Tangible personal property is personal property that "can be seen, weighed, measured, felt, or touched" IC § 6-2.5-1-27.

Transactions that include tangible personal property and services "which are furnished under a single order or agreement and for which a total combined charge or price is calculated" are retail unitary transactions. IC § 6-2.5-1-1(a). Pursuant to IC § 6-2.5-4-1(e), the amount of the retail transaction that is subject to sales tax includes "the price of the property transferred" and "any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records." Further, [45 IAC 2.2-4-1\(b\)\(3\)](#) states that the amount of the retail transaction that is subject to tax includes the amounts collected for "services performed or work done on behalf of the seller prior to transfer of such property at retail." Therefore, the sales tax due on a retail unitary transaction is based on the total price of the transaction.

Additionally, Sales Tax Information Bulletin 21 (May 2002), 25 Ind. Reg. 3939, in relevant part, further explains:

Sales by a Lawn Care Company

The relationship between a lawn care company and its customer is contractual. The customer agrees to pay a set price and the company agrees to apply the necessary chemicals to a lawn for its proper care and maintenance. The chemical cannot be purchased separately from the company and applied by the customer. A unitary transaction is the purchase of tangible personal property and services under a single agreement for which a total combined charge is calculated. A retail unitary transaction is a unitary transaction that is also a retail transaction. A retail transaction means a transaction that constitutes selling at retail. A lawn care application is a retail transaction because the lawn care company acquires tangible personal property (chemicals) and transfers them to its customers for consideration in the ordinary course of its regularly conducted business.

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Purchases by a Lawn Care Company

The purchase of chemicals by a lawn care company to be later furnished to a customer for lawn care treatment is a sale for resale and therefore exempt from the Indiana sales tax.

The purchase of tangible personal property other than chemicals for use in the lawn care business, such as chemical applicators, sprayers, and transport vehicles, is subject to the Indiana sales/use taxes.

Accordingly, when a taxpayer sells lawn care applications to its customers, it applies tangible personal property—i.e. chemicals—to its customers' lawn to complete the transactions. These chemicals, in the lawn care application, are transferred to the customer for consideration and, therefore, the "lawn care application" transactions are retail transactions that are subject to sales tax. See IC § 6-2.5-2-1; IC § 6-2.5-4-1. Correspondingly, when the taxpayer purchases the "chemicals" for use in the lawn care applications—i.e., the retail transactions—the chemicals purchases qualify for the resale exemption and are exempt from Indiana sales and use tax. See IC § 6-2.5-5-8(b).

During the hearing, Taxpayer presented documentation—which included customer invoices for lawn care application transactions, a document describing the detailed steps of its lawn care applications, and vendor invoices showing its purchases of the chemicals to be used in the lawn care applications—to demonstrate that the chemicals in question were acquired from one of its suppliers and then were resold by Taxpayer to customers. The information presented by Taxpayer establishes that certain chemicals from "Vendor A" are purchased for resale to customers. Since the transactions involved chemicals that were purchased for resale, the chemical purchase transactions are not subject to sales and use tax.

Accordingly, Taxpayer's protest of the assessment of sales and use tax from its purchases of "chemicals" from "Vendor A" (see Taxpayer's Exhibit A and B) is sustained.

B. "Delivery Services."

The Department's audit determined that Taxpayer had made certain purchases from "Company H" that were subject to Indiana use tax. The Department made adjustments for the purchases that were selected in the statistical sample to show that use tax was owed. The Department's adjustments made for the purchases in the statistical sample resulted in the Department's assessment of additional use tax.

Taxpayer maintains that the Department improperly found that Taxpayer's purchases from "Company H" (see Taxpayer's Exhibit A) were transactions that were subject to use tax. Taxpayer asserts that the "Company H" transactions represent third-party "delivery services" transactions which are not transactions subject to sales and use tax. Taxpayer cites to Commissioners Directive 23. Commissioners Directive 23 (April 2004), 27 Ind. Reg. 2615, explains that while delivery charges that are part of a retail transaction are subject to Indiana sales and use tax "[d]elivery charges [that are] billed and furnished by a third party are exempt" from Indiana sales and use tax.

Initially, the Department determined that use tax was due on Taxpayer's "Company H" purchases (which the auditor described as transactions for "23 Tons Concrete," "15 CY Pulverized Top Soil," etc. in the audit report). At the time of the audit, the Department was unable to verify the exact nature of the transactions and based upon this wording from the "Company H's" invoices found that the transactions were transactions for tangible personal property—i.e., concrete and soil—that were subject to Indiana sales and use tax. Since Taxpayer had not paid sales tax at the time of the transactions, the Department assessed use tax on these purchases.

As stated previously, Indiana imposes "an excise tax, known as the use tax," on tangible personal property that is acquired in retail transactions and is stored, used, or consumed in Indiana. IC § 6-2.5-3-2(a). A taxable retail transaction includes the amounts the customer paid to the retail merchant for the "price of the property transferred" and for the price of any services that occur prior to the transfer of the property to the purchaser, including any delivery charges. IC § 6-2.5-4-1(e). Therefore, delivery charges are subject to Indiana sales and use tax when they occur as part of a retail transaction unless the delivery charges are billed and furnished by a third party as explained in Commissioner's Directive 23.

During the hearing, Taxpayer was asked to provide documentation establishing the nature of these transactions. Taxpayer presented documentation—including purchase invoices from "Vendor M" for the concrete and soil that

were delivered to Taxpayer by "Company H"—to demonstrate that the charges on the "Company H" invoices were delivery charges that were billed and furnished by a third party. The information presented by Taxpayer establishes that the "Company H" invoices did represent delivery charges that were billed and furnished by a third party. Since the transactions involved the performance of a service by a third-party that did not include the transfer of property, the transactions are not subject to sales and use tax.

Accordingly, Taxpayer's protest to the assessment of use tax on the third-party "delivery services" from "Company H" (see Taxpayer's Exhibit A) transactions is sustained.

FINDING

Taxpayer's protest to the assessment of use tax on certain "chemicals" from "Vendor A" (see Taxpayer's Exhibits A and B) used in "lawn care applications" is sustained, as discussed in subpart A. Taxpayer's protest to the assessment of use tax on third-party "delivery services" from "Company H" (see Taxpayer's Exhibit A) is sustained, as discussed in subpart B. The Audit Division is requested to review the original assessment and adjust the statistical sample as necessary to the extent that Taxpayer made purchases of chemicals which are exempt pursuant to IC § 6-2.5-5-8(b) and purchases of exempt third-party "delivery services."

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