

DEPARTMENT OF STATE REVENUE

04-20140437.LOF

Letter of Findings Number: 04-20140437
Sales/Use Tax
For Tax Years 2011, 2012, and 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. 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

Construction contractor was allowed to purchase public safety items required by government contracts to be used in performing contract jobs.

ISSUE

I. Sales/Use Tax - Exemption.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-4-1; IC § 6-2.5-5; IC § 6-2.5-5-16; IC § 6-8.1-5-1; Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Indiana Dep't of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); USAir, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466 (Ind. Tax Ct. 1993); Rhoades v. Indiana Dep't of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); Indiana Dep't. of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974); Indiana Dep't of State Revenue v. Kimball Int'l Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988); [45 IAC 2.2-3-4](#); [45 IAC 2.2-4-26](#); Sales Tax Information Bulletin 60 (July 2006); Sales Tax Information Bulletin 60 (April 2011).

Taxpayer protests the Department's proposed assessments on its purchase and use of public safety items, including barricades and signs, for road construction pursuant to governmental contracts.

STATEMENT OF FACTS

Taxpayer is a contractor doing preliminary demolition, excavation, and site preparation work as part of construction contracts, which include a number of government contracts. In 2014, the Indiana Department of Revenue ("Department") conducted a sales/use tax audit for 2011, 2012, and 2013 tax years. The Department found that Taxpayer did not pay sales tax or self-assess use tax on various items, including barricades and signs, it used to conduct its business activities. As a result, the Department imposed additional sales tax and interest for the tax years at issue.

Taxpayer specifically protested the proposed assessments concerning its purchase and use of barricades and signs ("Items at Issue") for three (3) contract jobs. An administrative hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales/Use Tax - Exemption.

DISCUSSION

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; 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 Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012). Thus, the taxpayer is required to provide documentation explaining and supporting its challenge that the Department's assessment 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); see also Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012). Also, when courts examine "a statute that an agency is 'charged with enforcing .

. . [the courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party." Indiana Dep't of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579, 583 (Ind. 2014) (internal citation omitted).

The Department's audit determined that Taxpayer failed to pay sales/use tax on various items it used to perform its contracts. Taxpayer argued that it was not responsible for paying sales/use tax on the Items at Issue it used to perform contracts related to government contracts. Taxpayer specifically referred to the Department's Sales Tax Information Bulletin 60 (April 2011), 20110427 Ind. Reg. 045110247NRA ("Information Bulletin 60").

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 tangible personal property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). Additionally, the purchaser "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." Id.

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). "Use" means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a). The use tax is functionally equivalent to the sales tax. See Rhoad v. Indiana 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. Rhoad v. Indiana Dep't of State Revenue, 774 N.E.2d at 1048; USAir, Inc. v. Indiana 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. Rhoad v. Indiana Dep't of State Revenue, 774 N.E.2d at 1047 - 1050 (explaining that, generally, states impose a use tax to prevent the erosion of the state's tax base when its residents make purchases in other states). To trigger imposition of Indiana's use tax, tangible personal property must (as a threshold matter) be acquired in a retail transaction. IC § 6-2.5-3-2(a); USAir, Inc., 623 N.E.2d at 468. 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). Thus, for a construction contractor, as a general rule "[u]tilities, machinery, tools, forms, supplies, equipment or any other items used by or consumed by the contractor and which do not become a part of the improvement to real estate are not exempt regardless of the exempt status of the person for whom the contract is performed." [45 IAC 2.2-4-26](#)(e).

An exemption from the use tax is granted for transactions where the sales tax was paid at the time of purchase pursuant to IC § 6-2.5-3-4 and [45 IAC 2.2-3-4](#). There are other tax exemptions also available as outlined in IC § 6-2.5-5. When a local government of the State of Indiana acquires tangible personal property to be used to perform its governmental functions, the transaction is exempt pursuant to IC § 6-2.5-5-16. Information Bulletin 60 further explains in relevant part that:

CONTRACTOR'S PURCHASES OF EQUIPMENT

Utilities, machinery, tools, forms, supplies, equipment, or any other items used or consumed by the construction contractor and which do not become incorporated into real property are not exempt regardless of the exempt status of the person for whom the contract is performed.

However, a construction contractor's purchase of **public safety equipment** required by contract to be used in the construction and repair of public roads, bridges, highways, and other public infrastructure for a governmental entity is exempt from sales and use tax. Examples include, but are not limited to, traffic signals; signs; barrels; barricades; temporary pavement markings; materials to construct temporary traffic lanes, roads, and bridges; erosion control and drainage materials; aggregates used to set grades; and field offices and communications equipment, provided such offices and equipment are exclusively for the use of government representatives.

(Emphasis in original). See also Sales Tax Information Bulletin 60 (July 2006), 20060823 Ind. Reg. 045060287NRA.

A statute which provides a tax exemption, however, is strictly construed against the taxpayer. Indiana Dep't. of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here 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." Id. at 101 (internal citations omitted). In applying any tax exemption, "[t]he general rule is that tax exemptions are strictly construed in favor of taxation and against the exemption." Indiana Dep't of State Revenue v. Kimball Int'l Inc., 520 N.E.2d 454, 456 (Ind. Ct. App. 1988).

In this instance, Taxpayer submitted copies of the work proposals, executed construction contracts, properly signed exemption certificates, and invoices to support its claim that the Items at Issue were used in connection with public safety pursuant to government construction contracts. Thus, Taxpayer has met its burden and its purchase and use of the Items at Issue were exempt from sales/use tax.

FINDING

Taxpayer's protest is sustained.

Posted: 04/29/2015 by Legislative Services Agency
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