

Letter of Findings Number: 04-20140667
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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Retail Merchant was required to collect sales tax from customers on the "Mulch [sold,] Delivered and Installed." Retail Merchant was also responsible for the negligence penalty.

ISSUES

I. Sales 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 § 6-2.5-4-1; IC § 6-2.5-5-8; IC § 6-2.5-9-3; 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.2d 579 (Ind. 2014); [45 IAC 2.2-4-1](#); [45 IAC 2.2-5-15](#); Sales Tax Information Bulletin 21 (May 2002).

Taxpayer protests the Department's proposed assessments on sales of mulch, claiming it was not responsible for collecting sales tax from customers because tax was paid at the time of purchases.

II. Tax Administration - Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana company providing lawn care to its customers located in Indiana. To conduct its lawn care business, Taxpayer purchases various items including mulch (tangible personal property). Taxpayer subsequently sells the mulch to customers and delivers as well as installs the mulch at the locations designated by its customers.

In 2014, the Indiana Department of Revenue ("Department") conducted a sales/use tax audit for 2011, 2012, and 2013 tax years. The Department utilized Taxpayer's 2012 records to project the audit result for the tax years at issue. The audit found that Taxpayer did not collect and remit sales tax on various Indiana retail transactions. The audit also found that Taxpayer purchased various items to be used for its business without paying sales tax or use tax. The Department thus imposed additional sales/use tax, penalty, and interest for the tax years at issue.

In addition to the penalty, Taxpayer protested the assessment of additional sales tax, arguing that the Department's assessments were overstated. An administrative phone hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales Tax - Imposition.

DISCUSSION

The Department determined that Taxpayer failed to collect and remit the sales tax on the mulch it sold, delivered, and installed at the customer's locations—taxable unitary transactions. Taxpayer argued that it was not responsible

for collecting the sales tax and the assessment was overstated.

A. Audit Results.

The audit selected Taxpayer's 2012 sales invoices to project the audit result for the tax years at issue. The audit found that Taxpayer purchased mulch and paid sales tax at the time of the purchase. The audit further found that Taxpayer subsequently sold the mulch and Taxpayer delivered and installed the mulch at the locations designated by the customers. Taxpayer's sales invoices stated one price for "mulch [sold,] delivered and installed." Thus, the audit concluded that Taxpayer's sales of mulch constituted taxable unitary transactions outlined IC § 6-2.5-1-1(a).

The audit further found that Taxpayer collected no sales tax on the charge of "mulch [sold,] delivered and installed" from its customers. Thus, the audit assessed additional sales tax on those sales pursuant to IC § 6-2.5-1-1(a), IC § 6-2.5-2-1(b) and Sales Tax Information Bulletin 21 (May 2002), 25 Ind. Reg. 3939 ("Information Bulletin 21"). The audit nonetheless allowed Taxpayer a credit for the sales tax paid on the mulch purchase pursuant to [45 IAC 2.2-5-15](#) and Information Bulletin 21.

B. Taxpayer's Response.

Taxpayer protested the assessment of sales tax on the sales of mulch, claiming that it paid sales tax at the time of the purchases and it was not responsible for collecting the sales tax when it sold the mulch to its customers. Alternatively, Taxpayer argued that the total price of the sales of mulch included labor (a service) charge which was not subject to tax. Finally, Taxpayer asserted that the Department's assessment resulted in double taxation. That is, it paid sales tax twice, first, at its initial purchases of the mulch and, second, at the time when it sold the mulch.

C. Hearing Analysis.

The issue in this case is whether Taxpayer's documentation sufficiently demonstrated that it was not responsible for the additional sales tax.

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). Further, "when [courts] examine a statute that an agency is 'charged with enforcing . . . [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).

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). **"The retail merchant shall collect the tax as agent for the state."** *Id.* (Emphasis added).

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.

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

In this instance, Taxpayer referenced its sample invoices, arguing that it was not responsible for collecting the sales tax on the sales of the mulch because it already paid sales tax when it purchased the mulch. Taxpayer asserted that the Department's assessment resulted in double taxation. Taxpayer also claimed that its invoices contained a nontaxable service.

Taxpayer, however, is mistaken. Taxpayer's sample invoices stated "Brown Dyed [] Mulch, Delivered and Installed." Taxpayer's sales invoices clearly demonstrated that it entered into the taxable unitary transactions which its sales of the mulch included "delivery" and/or "installation." Pursuant to IC § 6-2.5-1-1(a) and IC § 6-2.5-4-1(e), Taxpayer is a retail merchant and should have collected and remitted the sales tax on its sales of "Brown Dyed [] Mulch, Delivered and Installed." Taxpayer did not do so. Taxpayer is thus liable for the sales tax under IC § 6-2.5-2-1 and IC § 6-2.5-9-3.

The audit further allowed Taxpayer a credit for the sales tax which Taxpayer paid on its initial purchases of the mulch pursuant IC § 6-2.5-5-8(b) and Information Bulletin 21. Therefore, Taxpayer's argument of double taxation must fail.

FINDING

Taxpayer's protest is respectfully denied.

II. Tax Administration - Negligence Penalty.

DISCUSSION

Taxpayer requested that the Department abate the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1(a), the Department may assess a negligence penalty if the taxpayer:

- (1) fails to file a return for any of the listed taxes;
- (2) 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;
- (3) incurs, upon examination by the department, a deficiency that is due to negligence;
- (4) fails to timely remit any tax held in trust for the state; or
- (5) is required to make a payment by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department.

[45 IAC 15-11-2](#)(b) further states:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty when "the taxpayer affirmatively establishes that the failure . . . was due to reasonable cause and not due to negligence." [45 IAC 15-11-2\(c\)](#). 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 this section." Id. The Department is mindful that "[r]easonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case."

Upon reviewing Taxpayer's documentation and its history of compliance, Taxpayer failed to affirmatively establish that its failure to collect and remit sales tax was not due to negligence.

FINDING

Taxpayer's protest of the negligence penalty is denied.

SUMMARY

For the reasons discussed above, Taxpayer's protest of the Department's proposed assessment of additional sales tax is denied. Taxpayer's protest of the negligence penalty is also respectfully denied.

Posted: 05/27/2015 by Legislative Services Agency

An [html](#) version of this document.