

Letter of Findings: 04-20140402
Sales and Use Tax
For the Years 2011 and 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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, a C corporation, was required to maintain adequate records to demonstrate that it properly reported sales tax on sales inside its convenience store. Retail Merchant also was required to maintain adequate records to demonstrate that it paid sales/use tax on its purchases to be used for its business.

ISSUE

I. Sales & Use Tax - Imposition.

Authority: IC § 6-2.5-1-2; 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 § 6-2.5-5-8; IC § 6-2.5-9-3; IC § 6-8.1-5-1; IC § 6-8.1-5-4; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); 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); Rhoades v. Indiana Dep't of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); USAir, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466 (Ind. Tax. Ct. 1993); Hyatt Corp. v. Dep't of State Revenue, 695 N.E.2d 1051, 1056 (Ind. Tax Ct. 1998); 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](#).

Taxpayer protests the assessment of additional sales tax and use tax.

STATEMENT OF FACTS

Taxpayer operates a gas station, a convenience store, and a self-service laundry facility at the same location in Indiana. The Indiana Department of Revenue ("Department") conducted a sales/use tax audit of Taxpayer's business records for tax years 2011 and 2012.

Pursuant to the audit, the Department determined that Taxpayer sold various items (tangible personal property) without collecting sales tax or exemption certificates from customers who claimed that they were exempt from the sales tax. The Department's audit also determined that Taxpayer purchased certain tangible personal property to be used in the course of its business without paying sales tax or use tax. As a result, the Department assessed additional sales and use tax, penalty, and interest.

Taxpayer protests the assessment of additional sales tax and use tax. A hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales & Use Tax - Imposition.

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, "all statutes are presumptively constitutional." Indiana Dep't of State Rev. v. Caterpillar, Inc., 15 N.E.3d 579, 587 (Ind. 2014) (citing UACC Midwest, Inc. v. Indiana Dep't of State Rev. 629 N.E.2d 1295, 1299 (Ind. Tax Ct. 1994)). When an agency is charged with enforcing a statute, the jurisprudence defers to the agency's reasonable interpretation of that statute "over an equally reasonable interpretation by another party." Caterpillar, Inc., 15 N.E.3d at 583.

The Department's audit imposed additional sales tax on the ground that Taxpayer, as retail merchant, failed to properly maintain adequate records to substantiate the amount of exempt sales occurring inside of its convenience store. Specifically, the audit noted that Taxpayer failed to provide complete source records for the audit. As a result, the audit was not able to verify the sales, taxable or otherwise, occurring inside Taxpayer's convenience store against the exempt sales claimed by Taxpayer in its monthly sales tax returns (ST-103MP forms). The audit also found that Taxpayer purchased several items to be used during the course of its business without paying sales tax or use tax.

Taxpayer disagreed, claiming that the audit assessment was overstated. This Letter of Findings addresses the issues raised by Taxpayer as follows:

A. Sales Tax on Inside Convenience Store Sales.

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 is a retail merchant making a retail transaction when he engages in selling at retail. IC § 6-2.5-4-1(a). A retail merchant - such as Taxpayer - is required to "collect the tax as [an] agent for the state." IC § 6-2.5-2-1(b). The retail merchant "holds those taxes in trust for the state and is personally liable for the payment of those taxes" IC § 6-2.5-9-3.

The audit in this instance found that Taxpayer reported that 46.56[percent] (for the 2011 tax year) and 46.56[percent] (for the 2012 tax year) of the sales occurring inside its convenience store were exempt without retaining adequate records to substantiate the returns it filed. The audit noted, in relevant part, that:

These percentages are outside the parameters of 2[percent]-15[percent] normally associated with a convenience store based upon audits of similar businesses. Partial records were presented for review which did not allow the auditor to verify the exempt sales as reported by the taxpayer.

As a result, the audit allowed Taxpayer to claim twenty (20) percent of the sales inside its store to be exempt and reclassified the remaining as taxable sales. This audit adjustment resulted in the assessment of additional sales tax.

Taxpayer disagreed. It prepared Excel Worksheets, summarizing the total daily sales by various categories of items it sold each month, including "Grocery," "Taxable Grocery," "Beverage," "Candy," "Cigarettes," "Tobacco," "Dairy," "Auto," "Phone Card," "Fountain," "Gas," and "Lotto," . . . etc. Taxpayer subsequently submitted copies of its "Close Monthly Reports" to support its calculation. The issue thus is whether Taxpayer's supporting documentation demonstrated that the audit incorrectly disallowed a portion of Taxpayer's claimed exempt sales that occurred inside Taxpayer's convenience store.

Upon review, however, Taxpayer's reliance on its "Close Monthly Reports" is misplaced. First, the Department noted that the "Close Monthly Reports" were not "register tapes" (also known as "Z tapes") because they did not capture the actual transactions at the time of the sales. Rather, the "Close Monthly Reports" presented by Taxpayer simply summed up the revenue by general category, taxable or otherwise, and the total taxes it collected monthly. The "Close Monthly Reports" contained no source records which can be used to determine: (1) which specific item was sold during which transaction, (2) the price of the item being sold and (3) the amount which was either subject to sales tax or was exempt. Taxpayer's "Close Monthly Reports" at best were monthly summaries of revenue for goods it presumably sold for each general category it self-designated. The Department thus is unable to agree that Taxpayer adequately maintained its books and records to support its claimed exempt sales transactions occurring inside the store. IC § 6-8.1-5-4(a).

Given the totality of the circumstances, in the absence of other supporting documentation, Taxpayer failed to meet its burden of proof to demonstrate that the proposed assessment is wrong.

B. Use Tax on Purchases of Tangible Personal Property.

As mentioned earlier, 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). "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 *Rhoades 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. *Id.*; *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. To trigger imposition of Indiana's use tax, tangible personal property must (as a threshold matter) be acquired in a retail transaction. *Id.* 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).

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 various tax exemptions available as outlined in IC § 6-2.5-5. The legislature enacted the statutory exemptions, such as IC § 6-2.5-5-8, "to mitigate the effect of tax pyramiding." *Hyatt Corp. v. Dep't of State Revenue*, 695 N.E.2d 1051, 1056 (Ind. Tax Ct. 1998). "Tax pyramiding occurs in the sales and use tax context where a tax is levied upon a tax." *Id.* 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, the 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).

The Department's audit determined that Taxpayer failed to pay sales tax or remit use tax on various items it purchased and used in its business. Taxpayer, to the contrary, claims that the audit assessment was overstated because (1) it had paid sales tax at the time of its purchases, (2) its purchases were exempt, or (3) the audit assessed the same purchases twice. Specifically, Taxpayer, during the hearing, offered additional documentation to support its protest of eleven (11) items which it designated "a" through "k."

Upon review, the Department is prepared to agree that Taxpayer provided sufficient documentation demonstrating that it had paid sales tax on the following purchases:

- b. TRM Copy Center
- e. Creative Signs
- i. ATM
- j. Teeters Products

Also, the Department is prepared to agree that the audit erred in assessing tax on "g. JE Adams." Additionally, the Department is prepared to agree that Taxpayer provided sufficient documentation demonstrating that the audit erred in assessing use tax twice on the same purchases, as follows:

- a. Mike's Heating and Air
- k. Simplex Security

For the remainder of the items, "c," "d," "f," and "h," however, the Department is not able to agree that Taxpayer provided sufficient documentation demonstrating that it was not responsible for the use tax.

In short, Taxpayer's protest to the imposition of use tax on items "a," "b," "e," "g," "i," "j," and "k" is sustained. The Department will remove these items from the assessment in a supplemental audit review.

FINDING

For the reasons stated above, Taxpayer's protest is sustained in part and denied in part. Taxpayer's protest to the imposition of use tax on items "a," "b," "e," "g," "i," "j," and "k" is sustained. The remainder of Taxpayer's protest is respectfully denied.

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