

## DEPARTMENT OF STATE REVENUE

04-20140107.LOF

**Letter of Findings Number: 04-20140107**  
**Sales and Use Tax**  
**For Tax Periods 2010 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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 on sales of tangible personal property because retail merchant failed to establish that its customer was a general contractor, that any tax was paid on lump sum contract, and failed to show an exempt government agency was one of its named purchasers.

### ISSUE

#### I. Sales & Use Tax - Imposition.

**Authority:** IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-2.5-5-1 et seq.; IC § 6-2.5-8-8; IC § 6-2.5-9-3; IC § 6-8.1-3-12; 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, Sales Tax Division v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974); 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); [45 IAC 2.2-3-12](#).

Taxpayer protests the assessment of sales tax on its sales of tangible personal property.

### STATEMENT OF FACTS

Taxpayer is an Indiana corporation in the business of selling building supplies and installing tangible personal property as a sub-contractor to customers in Indiana and outside of Indiana. The Indiana Department of Revenue ("Department") conducted a sales/use tax audit for tax years 2010, 2011, and 2012 (the "Tax Years at Issue"). Taxpayer and the Department agreed to utilize statistical sampling to determine the total amount of Taxpayer's additional sales tax due for those years. The Department also found that Taxpayer purchased and used certain tangible personal property for its business activities without paying sales tax or self-assessing use tax for the Tax Years at Issue. As a result, the Department's audit assessed additional sales and use tax for the Tax Years at Issue.

Taxpayer protested the assessments of sales tax. Specifically, Taxpayer protested the assessment of sales tax regarding Invoice Numbers 136116, 145359, 134139, 135612, 143951, 146118, and 131442, which were selected sample transactions pursuant to the projection agreement. A hearing was held. During the hearing, Taxpayer withdrew its protest concerning Invoice Numbers 134139, 135612, and 143951. This Letter of Findings ensues and addresses the remaining protest of the assessment. Additional facts will be provided as necessary.

#### I. Sales & Use Tax - Imposition.

### DISCUSSION

Based on the statistical sampling projection, the Department's audit assessed Taxpayer additional sales tax for the Tax Years at Issue. Taxpayer protested the assessment regarding Invoice Numbers 136116, 145359, 146118, and 131442 ("Invoices at Issue").

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); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012).

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 "purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). The purchaser in general "shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction." *Id.* "The retail merchant shall collect the tax as agent for the state." *Id.* If the retail merchant fails to do so, the retail merchant "is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state." IC § 6-2.5-9-3.

"Retail transaction" is "a transaction of a retail merchant that constitutes selling at retail as described in [IC 6-2.5-4-1](#) . . . or . . . in any other section of [IC 6-2.5-4](#)." IC § 6-2.5-1-2(a).

IC § 6-2.5-4-1 (as in effect for tax years at issue), in relevant part, provides:

- (a) A person is a retail merchant making a retail transaction when he engages in selling at retail.
- (b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:
  - (1) acquires tangible personal property for the purpose of resale; and
  - (2) transfers that property to another person for consideration.
- (c) For purposes of determining what constitutes selling at retail, it does not matter whether:
  - (1) the property is transferred in the same form as when it was acquired;
  - (2) the property is transferred alone or in conjunction with other property or services; or
  - (3) the property is transferred conditionally or otherwise.

. . .

There are exemptions available for sales tax. IC § 6-2.5-5-1 et seq. 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. A purchaser who claims a statutory exemption is required to provide a properly executed exemption certificate at the time of the retail transaction. IC § 6-2.5-8-8.

Taxpayer here is a retail merchant and, therefore, is responsible for collecting and remitting the sales tax to the Department. Alternatively, Taxpayer is required to obtain exemption certificates at the time of retail transactions when its customers claim their purchases or uses of the tangible personal property are exempt from the tax. In order for the Department to determine the proper amount of the tax due, Taxpayer is also required to keep books and records, which include "all source documents necessary to determine the tax, including invoices, register tapes, receipts and canceled checks." IC § 6-8.1-5-4(a).

During the protest process, Taxpayer asserted that it was not responsible for the sales tax on the Invoices at Issue. In addition to a signed ST-105, Taxpayer submitted copies of the Invoices at Issue to support its protest.

Upon reviewing Taxpayer's supporting documentation, however, the Department is not able to agree. First, referencing its Invoice Number 136116 (in the amount of \$375), Taxpayer stated that it was not responsible for the tax because the purchaser was a general contractor for an Ohio customer. Taxpayer asserted that the materials were shipped and used in Ohio and therefore were not subject to Indiana sales tax. However, the Invoice Number 136116 alone is not sufficient to show the purchaser was a general contractor. Nor was the Invoice itself sufficient to show that the materials were shipped and used outside Indiana. Specifically, the Invoice stated that the materials were sold to the purchaser who is an Indiana business located in Indiana.

Second, Taxpayer, referencing Invoice Numbers 145359 (in the amount of \$1,598.11) and 146118 (in the amount of \$5,849.45), claimed that each of them "is a lump sum contract for improvement to realty." Taxpayer maintained that "[u]se tax was paid on the concrete block and the customer should not have been subject to sales tax." Similar to the discussion of Invoice Number 136116, Taxpayer provided no verifiable documents to support its assertion that tax was paid pursuant to lump sum contracts, if any. The Invoices showed that the materials were sold to the purchaser who is an Indiana business located in Indiana.

Third, Taxpayer, referencing Invoice Number 131442 (in the amount of \$14,842.65) and the ST-105 exemption

certificate, claimed that "the job was an exempt job for . . . a governmental unit." Even if, assuming that the ST-105 exemption certificate is properly executed, Taxpayer seemed to assert that it was not responsible for the sales tax pursuant to [45 IAC 2.2-3-12\(a\)](#), which states:

Tangible personal property purchased to become a part of an improvement to real estate under a contract with an organization entitled to exemption is eligible for exemption when purchased by the contractor.

Taxpayer however merely submitted a copy of the ST-105 exemption certificate to support its protest without providing other verifiable documents, including the contract for that "exempt job." The Department is not able to agree that Taxpayer was not responsible for the sales tax because the government agency at issue was not the named purchaser on the Invoice Number 131442.

Finally, Taxpayer challenged the results of the audit claiming that "the sample size for this audit was less than the sample size used during a prior audit, yet [Taxpayer's] total records and sales dollars had increased during the current periods." While Taxpayer may argue that a different sampling population may have resulted in less tax liability, it nonetheless failed to demonstrate clear error on the part of the audit. Both Taxpayer and the Department agreed to and, therefore, were bound by the projection results pursuant to IC § 6-8.1-3-12(b).

In short, given the totality of the circumstances, in the absence of other supporting documentation, the Department is not able to agree that Taxpayer met its burden to demonstrate that it was not responsible for the sales tax.

### FINDING

Taxpayer's protest is respectfully denied.

*Posted: 10/28/2015 by Legislative Services Agency*  
An [html](#) version of this document.