

DEPARTMENT OF STATE REVENUE

04-20140252.LOF

Letter of Findings Number: 04-20140252
Sales/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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Company was not liable for the use tax on various purchases because it demonstrated that sales tax was paid at the time of its purchases; it remained liable for various purchases because its documentation was insufficient to establish tax was paid. Company demonstrated that it was not negligent and thus the penalty should be abated.

ISSUES

I. Sales/Use Tax - Imposition.

Authority: IC § 6-2.5-1-1; 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](#); 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); 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); 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 2.2-4-2](#).

Taxpayer protests the Department's proposed assessments on certain purchases, claiming that it was not liable for use tax because it already paid tax or it purchased nontaxable services.

II. Tax Administration - Negligence Penalty.

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

Taxpayer requests that the Department abate the negligence penalty.

STATEMENT OF FACTS

Taxpayer is an out-of-state company doing business in Indiana. The Indiana Department of Revenue ("Department") conducted a sales/use tax audit of Taxpayer's business records for the tax years 2010, 2011, and 2012. Pursuant to the audit, the Department determined that Taxpayer purchased various items to be used for its business activities in Indiana but it did not pay sales tax, nor did it self-assess use tax. The Department's audit thus assessed additional use tax, interest, and penalty.

Taxpayer protested the Department's assessment and submitted additional documents to support its protest. A hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales/Use Tax - Imposition.

DISCUSSION

Taxpayer protested the audit proposed assessment on various transactions concerning five (5) vendors (hereinafter "Vendor V, Vendor A, Vendor D, Vendor H, and Vendor B"). Taxpayer claimed that it either paid sales/use tax on those transactions or the transactions were nontaxable services.

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 "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. Rhoades, 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. Rhoades, 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) and (c); IC § 6-2.5-3-2(a) and (b).

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 various tax exemptions available outlined in IC § 6-2.5-5. 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).

Throughout the protest process, Taxpayer stated that it was not responsible for the use tax because it paid sales tax at the time of its purchases or its purchases were nontaxable services. To support its protest, Taxpayer submitted additional documentation, including copies of contracts (or agreements) and invoices.

Upon reviewing Taxpayer's supporting documentation, the Department is prepared to agree that Taxpayer met its burden to demonstrate that it was not responsible for the use tax on the transactions regarding Vendor V, Vendor A, and Vendor B. However, the Department is not able to agree that Taxpayer was not responsible for the use tax on transactions concerning Vendor D and Vendor H, as follows:

A. Transactions concerning Vendor D.

Taxpayer stated that in addition to various purchases, such as cameras and accessories, from Vendor D, it paid a monthly fee for Vendor D's services. Specifically, Taxpayer explained that after it had the cameras installed in the vehicles, the cameras recorded the drivers' behavior when the vehicles were on the roads. The recorded information was subsequently uploaded to Vendor D's system which Taxpayer could access the information when necessary. The monthly fee was paid for the services.

As mentioned earlier, Indiana sales/use tax is imposed on retail transactions of tangible personal property. Services in general are not subject to sales/use tax. [45 IAC 2.2-4-2\(a\)](#). However, "in conjunction with rendering . . . services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail" Id. "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). "Retail unitary transaction" is "a unitary transaction that is also a retail transaction." IC §

6-2.5-1-2(b). "[U]nitary transaction' includes all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated." IC § 6-2.5-1-1(a).

In this instance, upon review, Taxpayer's agreements were executed in 2014, not the 2012 tax year at issue. Thus, the agreements were irrelevant and beyond the scope of this protest. The invoices at issue referred to specific quantities—presumably numbers of cameras, parts, or accessories. In the absence of other verifiable documentation, the Department is not able to agree that it purchased nontaxable services. Since Taxpayer did not pay sales tax on those purchases, use tax is properly imposed.

B. Transactions concerning Vendor H.

Taxpayer purchased eight (8) vehicles with special features from an out-of-state manufacturer. The manufacturer delivered the vehicles to Taxpayer at its designated Indiana location but did not collect Indiana sales tax. Taxpayer claimed that it engaged a third party title processing company to handle the logistics of registering the vehicles, including paying the applicable federal and state excise taxes and fees. Taxpayer, referencing the copies of the processing company's invoices, asserted that it paid sales/use tax at the time when the processing company titled the vehicles.

Upon review, however, Taxpayer's reliance on the invoices is misplaced. Specifically, the manufacturer's invoices appear to contain and designate specific vehicle identification number (VIN) for each of the vehicles delivered. However, the processing company's invoices simply stated "DISBURSE - SALES TAX: 6024" or "DISBURSE - SALES TAX: 6028," for example. These invoices did not contain any verifiable information corresponding with the VIN of the vehicles which were delivered by the manufacturer. Thus, in the absence of other supporting documentation, the Department is not able to agree that Taxpayer met its burden of proof that the tax was paid.

FINDING

Taxpayer's protest of Vendor V, Vendor A, and Vendor B is sustained, however, its protest of Vendor D and Vendor H is respectfully denied.

II. Tax Administration - Negligence Penalty.

DISCUSSION

The Department's audit imposed a ten percent negligence penalty for the tax period in question. Taxpayer requested that the Department abate the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1(a), the Department may assess a ten (10) percent 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 as provided in [45 IAC 15-11-2](#)(c), as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, 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. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

In this instance, Taxpayer requested that the Department abate the negligence penalty for various reasons. Primarily, Taxpayer asserted that it maintains a reasonably good history of compliance and makes "a good faith effort and taken reasonable steps to resolve all items [at issue] . . . in a timely manner."

Upon review, the Department agrees that the negligence penalty should be abated. The audit noted that Taxpayer was reasonably in compliance and "No adjustments" was made regarding sales tax. As to the use tax in dispute, Taxpayer made reasonable effort to obtain documents which were not in its possession to demonstrate that tax was paid.

FINDING

Taxpayer's protest of the imposition of negligence penalty is sustained.

SUMMARY

On Issue I, Taxpayer's protest of Vendor V, Vendor A, and Vendor B is sustained, however, its protest of Vendor D and Vendor H is respectfully denied. As to Issue II, Taxpayer's protest of the imposition of negligence penalty is sustained. The Department will recalculate Taxpayer's liability in a supplemental audit.

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