DEPARTMENT OF STATE REVENUE

04-20140445.LOF

Letter of Findings Number: 04-20140445
Sales/Use Tax
For The 2013 Tax Year

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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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 liable for the tax on a new vehicle which it purchased, used, and eventually sold because the new vehicle was brought into Indiana and for which sales tax was not paid at the time of the purchase; company exercised right/power of ownership over the vehicle and it did not qualify for any Indiana exemptions. Company demonstrated that it was not negligent and thus the penalty should be abated.

ISSUES

I. Sales/Use Tax - Imposition.

Authority: IC § 6-2.5-1-2; 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 § 6-2.5-5-8; IC § 6-8.1-5-1; IC § 6-2.5-9-3; IC § 9-13-2-111; 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); Rhoade 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); Monarch Beverage Co. Inc. v. Indiana Dep't of State Revenue, 589 N.E.2d 1209 (Ind. Tax Ct. 1992); Hyatt Corp. v. Dep't of State Revenue, 695 N.E.2d 1051 (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); Miles, Inc. v. Indiana Dep't of Revenue, 659 N.E.2d 1158 (Ind. Tax Ct. 1995); 45 IAC 2.2-3-4; 45 IAC 2.2-3-14.

Taxpayer protests the assessment of sales/use tax.

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 Indiana company in the business of selling used vehicles in Indiana. In 2013, Taxpayer purchased a new vehicle from a franchise-dealership (also known as factory authorized dealer) in a state other than Indiana. Taxpayer claimed that its purchase of that new vehicle ("Vehicle at Issue") was exempt from the sales tax at the time of the transaction. Taxpayer subsequently brought the Vehicle at Issue to Indiana where its business is located. Taxpayer did not title the vehicle, nor did it pay the tax due. Months later, Taxpayer sold the Vehicle at Issue to a purchaser overseas and the Vehicle at Issue was shipped overseas.

Pursuant to the best information available, in 2014 the Indiana Department of Revenue ("Department") determined that the Indiana sales/use tax was due and subsequently assessed Taxpayer additional tax, penalty, and interest accordingly.

Taxpayer protested the proposed assessment. An administrative hearing was held. This Letter of Findings results. Further facts will be provided as necessary.

I. Sales/Use Tax - Imposition.

DISCUSSION

Pursuant to the best information available to the Department, the Department determined that Taxpayer purchased the Vehicle at Issue exempt from sales tax but it did not qualify for any statutory exemptions. In a letter to Taxpayer, the Department explained:

> The Department has received information that you purchased a new vehicle exempt from tax which was for resale. We find that you are not a franchisee for the vehicle purchased. According to IC [§] 6-2.5-5-8 such purchase is not exempt from tax when purchased by a non-franchisee for resale. We bill accordingly.

Taxpayer, to the contrary, claimed that it was not responsible for sales tax because it purchased the Vehicle at Issue out-of-state in interstate commerce and it resold the Vehicle at Issue to a licensed auto dealer overseas in foreign commerce which was exempt from Indiana sales tax. Taxpayer maintained that it was not liable for the tax on both transactions. To the state where it purchased the Vehicle at Issue, Taxpayer claimed that it was a "DEALER" and purchased the Vehicle at Issue for resale; and to Indiana, Taxpayer asserted that the transaction occurred out-of-state and was not subject to Indiana tax. Taxpayer further claimed that it was not responsible to collect and remit the Indiana sales tax on the Vehicle at Issue because it was sold to a purchaser overseas.

The Department assessed tax on the ground that Taxpayer was not entitled to a statutory exemption when it purchased the Vehicle at Issue. Thus, the issue is whether Taxpayer's purchase was exempt under IC § 6-2.5-5-8.

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). 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.

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 Rhoade 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. Rhoade, 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. Rhoade, 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). "The use tax is also imposed on the storage, use, or consumption of a vehicle . . . if the vehicle . . . (1) is acquired in a transaction that is an isolated or occasional sale; and (2) is required to be titled, licensed, or registered by this state for use in Indiana." IC § 6-2.5-3-2(b).

Furthermore, "[s]ales and use taxes are transactional taxes imposed on the gross income received from a retail transaction. Therefore, sales or use tax can be collected more than once on the same item if the item is the subject of more than one non-exempt retail transaction." Monarch Beverage Co. Inc. v. Indiana Dep't of State Revenue, 589 N.E.2d 1209, 2014 (Ind. Tax Ct. 1992) (finding that in the absence of applicable exemptions, the purchaser-taxpayer must pay sales/use taxes on two distinct and separate taxable events/transactions, which it first purchased/titled the trailers and then subsequently transferred the ownership to a third party and leased the same trailers back pursuant to a lease agreement).

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 under IC 6-2.5-5; these enumerated exemptions also apply to transactions which are subject to Indiana use tax. 45 IAC 2.2-3-14. 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, referencing IC § 6-2.5-5-8(c)(1) and Miles, Inc. v. Indiana Dep't of Revenue, 659 N.E.2d 1158 (Ind. Tax Ct. 1995), claimed that its purchase of the Vehicle at Issue was exempt. Specifically, Taxpayer claimed that it purchased the Vehicle at Issue from an out-of-state franchise-dealership and resold to a purchaser overseas (i.e., use out-of-state). Thus, Taxpayer asserted that its purchase of the Vehicle at Issue was exempt from the Indiana sales/use tax because Vehicle at Issue was purchased in interstate commerce to be resold in foreign commerce. To support its protest, Taxpayer submitted additional documentation including copies of purchase/sales agreements, bill of landing and warehouse receipt.

Upon review, however, Taxpayer's reliance on its interpretation of exemption is misplaced. Specifically, Taxpayer here purchased the Vehicle at Issue - a new vehicle - from an out-of-state franchise-dealership; the purchase was a retail transaction. A new vehicle is "a motor vehicle" that "has not been previously titled under IC 9-17 and carries a manufacturer's certificate of origin" or "has never been transferred by a manufacturer, distributor, or dealer to an ultimate purchaser." IC § 9-13-2-111; IC § 6-2.5-5-8(a). Transactions involving a new motor vehicle may be exempt from the state gross retail tax. IC § 6-2.5-5-8(c). Specifically, under relevant statutory provisions, a transaction could be exempt when "[the] transaction in which a **person that has a franchise in effect at the time of the transaction for the vehicle trade name, trade or service mark, or related characteristics acquires a new motor vehicle for resale** . . . **in the ordinary course of the person's business**." IC § 6-2.5-5-8(c)(1) (**Emphasis added**). Additionally, a transaction could be exempt when "a person that is a franchisee appointed by a manufacturer or converter manufacturer licensed under IC 9-23 acquires a new motor vehicle that has at least one (1) trade name, service mark, or related characteristic as a result of modification or further manufacture by the manufacturer or converter manufacturer for resale . . . in the ordinary course of the person's business." IC § 6-2.5-5-8(c)(2).

Thus, in order to purchase new vehicles exempt for the purpose of resale/lease under IC § 6-2.5-5-8, a purchaser-taxpayer must demonstrate (1) that it "has a franchise in effect at the time of the transaction for the vehicle trade name, trade or service mark, or related characteristics" or it is "a franchisee appointed by a manufacturer or converter manufacturer"; (2) that it is occupationally engaged in reselling/leasing these vehicles in the regular course of its business; and (3) that the vehicles purchased are resold/leased. Id. The purchaser-taxpayer is not entitled to the exemption when it has no franchise in effect at the time of the transaction or it is not occupationally engaged in reselling/leasing these vehicles purchased; nor is the purchaser-taxpayer entitled to the exemption when it purchases these new vehicles, stores and/or uses them. IC § 6-2.5-3-2. When the vehicles are resold, the purchaser-taxpayer is responsible for collecting the sales tax at the time of the transaction as "a separate added amount to the consideration in the transaction." IC § 6-2.5-2-1(b).

Taxpayer in this instance purchased the Vehicle at Issue from an out-of-state seller without paying sales tax in that retail transaction. Whether Taxpayer was entitled to purchase the Vehicle at Issue exempt in that state is beyond the scope of this protest, and the Department is not in the business of enforcing the tax statutes of that state. However, the Vehicle at Issue was brought into Indiana where Taxpayer exercised its ownership right/power over the Vehicle at Issue, a taxable event pursuant to IC § 6-2.5-3-2. Taxpayer argued that its purchase was exempt because it was a qualified wholesaler of auto vehicles. However, the "wholesaler" exemption does not extend to purchases of the "new vehicles" - the Indiana General Assembly specifically reserved this exemption for the person that has "a franchise in effect" or is "a franchisee appointed by a manufacturer or converter manufacturer." Taxpayer qualified neither requirement at the time of the transaction.

Taxpayer, pointing to a signed franchise agreement and a statement made by the purchaser overseas, purportedly asserted that the purchaser overseas was a person who had "a franchise in effect at the time of the transaction." The Department however is not able to agree. Taxpayer's supporting documentation demonstrated that when the out-of-state franchise-dealership sold the Vehicle at Issue, it sold to Taxpayer, not the purchaser from overseas. Taxpayer was the purchaser in that retail transaction, where Taxpayer offered its DEALER's license number to conclude its purchase exempt from the sales tax at that state. The Vehicle at Issue was brought into Taxpayer's Indiana location and Taxpayer stored and/or used the Vehicle at Issue without applicable statutory exemptions for months.

Taxpayer further argued that its purchase was not subject to Indiana tax pursuant to Miles. The Department begs to differ. In Miles, the petitioner (Miles, Inc.) purchased promotional items which were temporarily stored in Indiana for the sole purpose that those items were subsequently to be shipped to the petitioner's offices in states other than Indiana to be used by its sales representatives out-of-state. Miles, 659 N.E.2d at 1161-63. The Tax Court explained that "[i]f property is stored in Indiana for subsequent use outside Indiana, then the activities of storing, handling, and transporting the property cannot be taxed as 'uses.' To hold otherwise would subsume 'storage' with 'use,' and nullify the exception for subsequent use outside Indiana" under IC § 6-2.5-3-1(b). Id. at 1164. The Miles court concluded that the promotional items were excluded from Indiana use tax because the petitioner who purchased the promotional items for the sole purpose of storing them in Indiana temporarily and the same petitioner ultimately used the same promotional items in states other than Indiana. That was not the case here. The Vehicle at Issued was brought into Indiana and stored at Taxpayer's Indiana business location for several months. In late 2013 Taxpayer sold - the second transaction - the Vehicle at Issue to a purchaser from overseas, an unrelated third party. Taxpayer's supporting documentation showed that both Taxpayer and the purchaser from overseas executed a purchase/sales agreement at Taxpayer's business location in Indiana the same date. The agreement seemingly suggested that the purchaser from overseas paid the full amount of the sales price plus documentation fee, but no sales tax was collected at that time. Thus, since Taxpayer exercised its ownership right/power over the Vehicle at Issue in Indiana, Miles does not apply.

As discussed above, there were two distinct and separate retail transactions which Taxpayer was the non-exempt purchaser in the first and was the seller in the second. "[S]ales or use tax can be collected more than once on the same item if the item is the subject of more than one non-exempt retail transaction." Monarch Beverage, 589 N.E.2d at 1214. In this instance, Taxpayer's documents demonstrated that it was not a person that had "a franchise in effect" or is "a franchisee appointed by a manufacturer or converter manufacturer" in both transactions. When Taxpayer purchased the Vehicle at Issue, it did not qualify for the exemption under IC § 6-2.5-5-8(c) and Miles does not apply in this instance. Since Taxpayer did not pay sales tax at the retail transaction when it purchased the Vehicle at Issue and did not qualify for the exemption, pursuant to the above mentioned statutes and regulations, Indiana use tax is properly imposed.

FINDING

Taxpayer's protest 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.

Upon review, the Department agrees that for one time only the negligence penalty should be abated. Taxpayer has made reasonable effort to demonstrate that it believed that it was not liable for the tax.

FINDING

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

SUMMARY

On Issue I, Taxpayer's protest is respectfully denied. As to Issue II, Taxpayer's protest of the imposition of negligence penalty is sustained.

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An html version of this document.