

## DEPARTMENT OF STATE REVENUE

04-20140337.LOF

**Letter of Findings Number: 04-20140337**  
**Sales Tax**  
**For Tax Years 2010, 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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 was required to collect sales tax or, alternatively, obtain properly executed exemption certificates from customers who claimed their purchases were exempt from Indiana sales tax. Retail merchant was not liable for tax on tangible personal property it sold to and shipped to customers located outside Indiana. Retail merchant affirmatively established that penalty should be abated.

### ISSUES

#### I. Sales Tax - Imposition.

**Authority:** IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-2.5-8-8; IC § 6-2.5-9-3; IC § 6-2.5-13-1; IC § 6-8.1-5-1; IC § 6-8.1-5-4; 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); [45 IAC 2.2-8-12](#).

Taxpayer protests the Department's proposed assessments on certain sales, claiming some of its customers were exempt from sales tax.

#### 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 a company doing business in Indiana. Taxpayer sells tangible personal property to its customers in Indiana and outside of Indiana. In 2013, the Indiana Department of Revenue ("Department") conducted a sales/use tax audit for 2010, 2011, and 2012 tax years. 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 found that Taxpayer failed to maintain adequate records. The Department also found that Taxpayer did not collect and remit sales tax on various Indiana retail transactions, nor did it obtain the properly executed exemption certificates from those customers who claimed the exemptions. During the audit, the Department permitted Taxpayer additional time to contact those customers to obtain the properly executed special exemption certificates, AD-70 forms. In the absence of the properly executed exemption certificates, the Department imposed additional sales tax and interest for the tax years at issue.

Subsequently, Taxpayer submitted additional supporting documentation and protested the audit assessment on various transactions. An administrative hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

#### I. Sales Tax - Imposition.

### DISCUSSION

The Department's audit assessed sales tax on various retail transactions in which Taxpayer sold tangible

personal property to its customers but failed to collect sales tax or properly executed exemption certificates. Taxpayer contended that it was not responsible for the sales tax because (1) its customers claimed that those sales were exempt from sales tax or (2) certain tangible personal property was sold and shipped to customers located outside of Indiana. Additionally, Taxpayer claimed that two Indiana customers remitted use tax on the tangible personal property they purchased; thus, Taxpayer argued that it should not be held responsible for the sales tax it did not collect.

The issue in this case is whether Taxpayer's documentation sufficiently demonstrates that it was not responsible for the sales tax because its sales to its customers were exempt, non-taxable, or its customers remitted use tax as a result.

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).

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 (namely, a 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.* The retail merchant "has a duty to remit [Indiana sales] or use taxes . . . to the department; holds those taxes in trust for the state and 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(2).

"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.

When a purchaser claims that a retail transaction is exempt from the sales tax, the purchaser is required to provide and the retail merchant (i.e., seller) must collect a properly executed exemption certificate. IC § 6-2.5-8-8 further provides the general rules for exemption certificates. "A person . . . , who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. IC § 6-2.5-8-8(a). **The person shall issue the certificate on forms and in the manner prescribed by the department.** A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase." *Id.* (**Emphasis added**). Moreover, retail merchants "must keep books and records so that the department can determine the amount, if any, of [their] liability for that tax by reviewing those 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).

Additionally, "Retail merchants are required to collect the sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used by the purchaser for an exempt purpose." [45 IAC 2.2-8-12](#)(b). "An exemption certificate issued by a purchaser **shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed.** [45 IAC 2.2-8-12](#)(f) (**Emphasis added**).

Accordingly, for Indiana sales tax purposes, sales of tangible personal property by retail merchants (i.e., sellers) are taxable, unless specifically exempt by a statute. The sellers are required to collect sales/use tax at the time of the transactions or, alternatively, to obtain properly executed exemption certificates from customers who claim the statutory exemptions.

There is no dispute that Taxpayer is a retail merchant engaged in retail transactions (selling tangible personal

property) in Indiana, which requires that Taxpayer collect and remit the sales tax to Indiana in regards to those sales unless a valid exemption certificate is presented. IC § 6-2.5-2-1(b); IC § 6-2.5-8-8. Taxpayer may also be excused from collecting Indiana sales/use tax if the items are sold to and received by customers at locations outside of Indiana. IC § 6-2.5-13-1(b) (stating that "[t]his section . . . applies only to the determination of a seller's obligation to pay or collect and remit a sales or use tax with respect to the seller's retail sale of a product"). "Receive" or "receipt" for the purposes of sourcing retail sales denotes "taking possession of tangible personal property; . . . do not include possession by a shipping company on behalf of the purchaser." IC § 6-2.5-13-1(a)(1).

The Department noted that Taxpayer should have collected and remitted the sales tax on those sales. Taxpayer did not do so. Nor did Taxpayer provide to the Department's audit the properly executed exemption certificates, which it should have collected from its customers. The auditor was therefore unable to verify whether certain sales were exempt from the sales tax. The Department thus instructed Taxpayer to obtain properly executed special post-transaction exemption certificates, AD-70 forms. Without these properly executed special exemption certificates, Taxpayer as retail merchant is not relieved from its duty to collect the sales tax. In the absence of the properly signed and executed exemption certificates (AD-70 forms), the Department's audit properly assessed sales tax on the otherwise taxable sales. Without the valid exemption certificates, Taxpayer is liable for the sales tax. IC § 6-2.5-9-3.

In summary, pursuant to [45 IAC 2.2-8-12\(b\)](#), "Retail merchants are required to collect sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used for an exempt purpose." [45 IAC 2.2-8-12\(d\)](#) also cautions that, "Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important for the seller to obtain an exemption certificate in order to avoid the necessity for such proof." In the absence of the properly signed and executed exemption certificates, the Department's audit properly assessed sales tax on the otherwise taxable sales.

There is no question that Taxpayer entered into retail transactions for which - absent an exemption - Taxpayer was required to collect sales tax. Taxpayer is reminded that sales tax becomes due at the time of the transaction; either the purchaser is exempt at the time of the transaction or it is not exempt. If the purchaser claims an exemption, the exemption certificate should be obtained at the time the transaction occurs otherwise the burden of proving the transaction was exempt becomes measurably more difficult.

During the protest process, Taxpayer submitted additional AD-70 forms signed by its customers to support its contention that those sales were exempt. In light of the additional supporting document provided by Taxpayer, the Department's Audit Division is requested to review the newly submitted AD-70 forms in a supplemental audit. That is, pending the result of the supplemental audit review, the Department will recalculate Taxpayer's tax liability after verifying the validity of those AD-70 forms.

Taxpayer also submitted additional documentation to demonstrate that it sold and shipped certain items to its customers outside of Indiana. Since customers received the items at their locations outside of Indiana and thus those transactions were concluded outside of Indiana and not subject to Indiana sales/use tax. The Department's Audit Division is requested to review the newly submitted records regarding shipping/delivery in a supplemental audit. That is, pending the result of the supplemental audit review, the Department will recalculate Taxpayer's tax liability after verifying these items were received by Taxpayer's customers at their locations outside of Indiana.

Finally, Taxpayer, referencing two statements from its Indiana customers claimed that Taxpayer should not be held responsible for the sales tax on the items it sold because the customers stated that they remitted use tax on the purchases. However, neither Taxpayer nor its customers offered the source documents or records to substantiate that tax was remitted. Thus, given the totality of the circumstances, in the absence of other verifiable documentation, the Department is not able to agree that Taxpayer met its burden to demonstrate that the assessment is wrong.

In short, pending the Department's supplemental audit review, Taxpayer's protest is sustained on exemption certificates and sales to customers who received the tangible personal property outside of Indiana. Taxpayer however remains responsible for sales tax concerning sales to its two Indiana customers.

## FINDING

Taxpayer's protest is sustained in part and denied in part. Taxpayer's protest regarding exemption certificates and sales to customers outside Indiana is sustained subject to results of the Department's supplemental audit review.

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Taxpayer's protest is denied on sales to Indiana customers who claimed use tax was remitted.

## 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."

In this instance, Taxpayer stated that its headquarters are outside Indiana and it made good faith effort to obtain source records and necessary documents from its headquarters as well as its customers. Additionally, Taxpayer asserted that the audit at issue is its first Indiana audit. Given the totality of the circumstances, the Department is prepared to agree that Taxpayer affirmatively demonstrated a reasonable cause for penalty abatement.

### FINDING

Taxpayer's protest of the negligence penalty is sustained.

### SUMMARY

For the reasons discussed above, on Issue I, Taxpayer's protest is sustained in part and denied in part. Taxpayer's protest regarding exemption certificates and sales to customers outside Indiana is sustained subject to results of the Department's supplemental audit review. Taxpayer's protest is denied on sales to Indiana customers who claimed use tax was remitted.

On Issue II, Taxpayer's protest of the negligence penalty is sustained.

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