DEPARTMENT OF STATE REVENUE

04-20130680.LOF

Letter of Findings Number: 04-20130680
Use Tax
For Tax Years 2010 - 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 This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

The definition of "delivery charges" included postage charges and was therefore taxable for the years at issue in an audit. Property acquired by a tanning salon was not for incorporation as a material part of other tangible personal property and was thus taxable.

ISSUE

I. Use Tax–Miscellaneous Issues.

Authority: IC § 6-8.1-5-1; IC § 6-2.5-1-5; IC § 6-8.1-5-4; IC § 6-2.5-3-2; Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Indiana Dept. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Wendt LLP v. Indiana Dept. of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); 45 IAC 2.2-3-4; Commissioner's Directive 23 (April 2004).

Taxpayer protests the proposed assessment of sales/use tax.

STATEMENT OF FACTS

Taxpayer operates tanning salons in Indiana. The Indiana Department of Revenue ("Department") conducted a sales and use tax audit. As a result of that audit, Taxpayer filed a protest with the Department. An administrative hearing was held, and this Letter of Findings ("LOF") results. More facts will be provided below as needed.

I. Use Tax– Miscellaneous Issues.

DISCUSSION

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Indiana Dept. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing. . .[courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579, 583 (Ind. 2014). Thus, all interpretations of Indiana tax law contained within this decision, as well as the preceding audit, shall be entitled to deference.

The Department conducted a sales and use tax audit for the years at issue. Regarding sales tax, the audit report states "[t]he records are deemed to be materially correct. No changes are proposed." Turning to the use tax portion of the audit, the report states that "Taxpayer has a use tax accrual system in place and remitted use tax for 2010 and 2011, but no use tax was remitted for 2012." The audit report also states that Taxpayer "did not remit use tax on the vendors/items assessed" in the audit and therefore "the assessment is in addition to the amount of use tax the taxpayer remitted." For 2012, the Department reviewed purchase invoices. That review found that "[a] list of items that were not resold, but were consumed by the taxpayer and did not have tax paid was compiled." That list included items such as spray tan solution, postage fee for mailers sent to customers,

coupon books, towels, chairs, floor mats, and air freshener.

The Department notes that use tax is imposed by IC § 6-2.5-3-2, which states that:

> (a) An excise tax, known as the use tax, is imposed 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.

Also, 45 IAC 2.2-3-4 states:

> Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Turning to the protest, Taxpayer's representative states that the protest is regarding "four parts of the audit"–advertising (postage charges), cost of goods, supplies, and use tax for prior years. Taxpayer's protest letter then addresses only three of the four listed parts. Taxpayer's protest letter does not appear to address supplies, and Taxpayer has failed to present a sufficiently developed argument on that issue. Thus Taxpayer's argument is denied regarding supplies. See Wendt LLP v. Indiana Dept. of State Revenue, 977 N.E.2d 480, 485 n.9 (Ind. Tax Ct. 2012) (stating in a footnote parenthetical "that poorly developed and non-cogent arguments are subject to waiver" by the Indiana Tax Court) (quoting Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138, 1145 (Ind. Tax. Ct. 2010).

(1) Postage Charges

Taxpayer states "[a]dvertising invoices were paid as one amount" but that "the invoice was separated in to two parts." Taxpayer further states:

> One line entry was the cost preparing the card. This cost was subject to sales tax by the vendor. Second line was postage. The Audit picked up the second line entry amounts making them subject to sales tax. We disagree with the additional tax.

Taxpayer cites to IC § 6-2.5-1-5 and Commissioner's Directive 23, stating that the "vendor statement shows two separate charges []." The statute states in pertinent part that:

> (a) Except as provided in subsection (b), "gross retail income" means the total amount of consideration, including cash, credit, property, and services, for which tangible personal property is sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for:
> (1) the seller's cost of the property sold;
> (2) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller;
> (3) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges;
> (4) delivery charges; or
> (5) consideration received by the seller from a third party if:
> (A) the seller actually receives consideration from a party other than the purchaser and the consideration is directly related to a price reduction or discount on the sale;
> (B) the seller has an obligation to pass the price reduction or discount through to the purchaser;
> (C) the amount of the consideration attributable to the sale is fixed and determinable by the seller at the time of the sale of the item to the purchaser; and
> (D) the price reduction or discount is identified as a third party price reduction or discount on the invoice received by the purchaser or on a coupon, certificate, or other documentation presented by the purchaser.
> For purposes of subdivision (4), delivery charges are charges by the seller for preparation and delivery of the property to a location designated by the purchaser of property, including but not limited to transportation, shipping, postage, handling, crating, and packing.

That statute was amended, effective July 1, 2013, to state in relevant part: "Delivery charges do not include postage charges that are separately stated on the invoice, bill of sale, or similar document." Thus it would appear Taxpayer is relying on statutory language that was not applicable to the years at issue. Likewise, it would appear Taxpayer is relying on the wrong version of Commissioner's Directive 23. The applicable one for Taxpayer is the

one issued effective April 2004 (Commissioner's Directive 23 (April 2004), 27 Ind. Reg. 2615). As the current Commissioner's Directive 23 (July 2013), 20130828 Ind. Reg. 045130394NRA, notes: "Effective July 1, 2013, SEA 0608-2013 amends IC 6-2.5-1-5 and removes separately stated 'postage charges' from the definition of delivery charges subject to sales tax as part of the gross retail income of a transaction." Since for the years at issue, 2010 to 2012, the postage charges were taxable as part of delivery charges, Taxpayer's protest on this issue is denied.

(2) Cost of Goods

Taxpayer states that the "Cost of Goods using Spray Solution and Light Bulbs should not be assessed tax." The Taxpayer's argument on this issue is that the spray solution is exempt under IC § 6-2.5-5-6. Turning to that statute, it states:

> Transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for incorporation as a material part of other tangible personal property which the purchaser manufactures, assembles, refines, or processes for sale in his business. This exemption includes transactions involving acquisitions of tangible personal property used in commercial printing.

Taxpayer argues that the spray solution "is included in a taxable sale[.]" Taxpayer continues: "The Tanning process requires this solution as an integral part of arriving at the desired tan for the customer. The business is not end [sic.] user of the solution product." Taxpayer argues that the auditor in effect "tax[ed] two times on the product," sales tax on the sale of the solution and use tax on the solution. Taxpayer's reliance on IC § 6-2.5-5-6 is misplaced, since the solution is not being incorporated into other tangible personal property as part of manufacturing or processing. The statute cited by Taxpayer is inapplicable to Taxpayer's business as a tanning salon. And, the Department notes that the auditor stated in the audit report that the supplies "used in providing the service [are] subject to use tax." Taxpayer also states that light bulbs should be exempt under the same statute. Again, Taxpayer is not acquiring the property "for incorporation as a material part of other tangible personal property which the purchaser manufactures, assembles, refines, or processes for sale in his business." Taxpayer's protest on the spray solution and light bulbs is denied.

(3) Use Tax for Prior Years

The protest letter states that Taxpayer is disputing the prior year use tax ratio method. Taxpayer states there "is no recognition for payment previously made for 2010 and 2011" and that "[o]ur disagreement resides strictly that Use Tax payments in 210 [sic.] and 2011 were not applied to these calculated amounts. Taxpayer's representative, however, then notes the following:

> We acknowledge that no payments were provided by our client. We believe those payments were obtainable by the Auditor because Use Tax would have been segregated on the ST-103 form. We further disagree with the Use Tax computation based on supporting statements found after the audit. Included with this protest are copies of the materials purchased out of State that our client used in calculating the Use Tax for 2010 and 2011.

In subsequent correspondence to the Department, Taxpayer states: "What I can't tell you is how much the taxpayer paid in use tax for 2010 and 2011 because the taxpayer did not keep a copy of the ST-103 form submitted for those years." Regarding Taxpayer not having records for the very thing Taxpayer is protesting, the Department notes that IC § 6-8.1-5-4(a) imposes record keeping requirements:

> Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.

And as stated at the outset of this LOF, under IC § 6-8.1-5-1(c) the "burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

The Audit Report states that "Taxpayer has a use tax accrual system in place and remitted use tax for 2010 and 2011, but no use tax was remitted for 2012. The taxpayer did not remit use tax on the items assessed in this audit. Therefore, the assessment is in addition to the amount of use tax the taxpayer remitted." Taxpayer's protest regarding use tax for prior years is also denied.

In conclusion, Taxpayer has provided insufficient documentation and analysis to meet the burden imposed by IC § 6-8.1-5-1(c) for all categories under protest.

FINDING

Taxpayer's protest is denied.

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An html version of this document.