

DEPARTMENT OF STATE REVENUE

04-20150205.LOF

Letter of Findings Number: 04-20150205
Use Tax
For Tax Years 2011-13

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 This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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 documentation provided by construction contractor proved neither that sales tax had been properly paid at the time of purchase nor that a unique purchase was eligible for exemption. Therefore, the Department's proposed assessments for use tax on the remainder of the items under protest were proper.

ISSUE**I. Use Tax--Additional Purchases.**

Authority: IC § 6-2.5-4-9; IC § 6-2.5-3-2; IC § 6-2.5-3-8; IC § 6-2.5-2-2; IC § 6-2.5-4-26; IC § 6-8.1-5-1; IC § 6-8.1-5-4; IC § 6-2.5-2-1; 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).

Taxpayer protests proposed assessments for additional use tax.

STATEMENT OF FACTS

Taxpayer is an Indiana business operating as a construction contractor. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not paid sales tax on certain taxable purchases for the tax years 2011, 2012, and 2013. The Department therefore issued proposed assessments for use tax, penalties, and interest for those years. Taxpayer protests a portion of the use tax assessments. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Use Tax--Additional Purchases.**DISCUSSION**

Taxpayer protests the imposition of use tax on certain purchases it made during the tax years 2011 through 2013. Specifically, Taxpayer protests that purchases from one specific vendor ("Vendor") in all three years should not be subject to use tax because Vendor both paid sales tax itself at the time it acquired the tangible personal property ("TPP") and it accounted for sales tax in the amount it listed on its invoices. Also, Taxpayer protests the imposition of use tax on the one-time purchase and donation of statuary for an exempt organization. The Department based its determinations that use tax was due on these transactions because the invoices from the vendor did not list sales tax and the donation of the statuary constituted use by Taxpayer.

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.

Sales tax is imposed by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

Use tax is imposed under IC § 6-2.5-3-2(a), which states:

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.

[45 IAC 2.2-3-4](#) further explains:

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.

Therefore, when sales tax is not paid at the time TPP is purchased, use tax will be imposed unless the purchase is eligible for an exemption.

Also, the Department refers to [45 IAC 2.2-3-8](#), which provides:

- (a) In general, all sales of tangible personal property are taxable, and all sales of real property are not taxable. The conversion of tangible personal property into realty does not relieve the taxpayer from a liability for any owing and unpaid state gross retail tax or use tax with respect to such tangible personal property.
- (b) All construction material purchased by a contractor is taxable either at the time of purchase, or if purchased exempt (or otherwise acquired exempt) upon disposition unless the ultimate recipient could have purchased it exempt (see 6-2.5-5 [\[45 IAC 2.2-5\]](#)).

(Emphasis in original).

In this case, Taxpayer is in the construction business and purchased construction material. Some of those transactions are at issue in this protest.

Taxpayer makes several arguments in its protest that its purchases from a Vendor should not be subject to use tax. First, Taxpayer argues that Vendor paid sales tax when it purchased the TPP thereby eliminating the need for Taxpayer to pay sales or use tax on its purchase of the TPP. Taxpayer provided invoices which show that Vendor purchased TPP and paid sales tax on those purchases. This, Taxpayer believes, shows that sales tax was paid in relation to the TPP and that it therefore did not need to pay sales or use taxes on its purchase of the TPP.

The Department does not agree with this conclusion. The fact that Vendor may have incorrectly paid sales tax when it purchased TPP for resale does not alleviate the requirement for Taxpayer to pay sales or use tax on its purchase of the TPP, as provided by IC § 6-2.5-2-1(a) and IC § 6-2.5-3-2(a). [45 IAC 2.2-2-2](#) provides:

The retail merchant, acting as an agent for the state of Indiana, must collect the tax. The tax is borne by the customer. Consideration is a necessary element of taxable transaction.

Therefore, sales tax and use tax are imposed on the consumer of TPP, which in this case was Taxpayer. Taxpayer's transactions stand on their own merits, separate from any prior transactions.

Next, Taxpayer provided copies of invoices from Vendor along with notations explaining how Vendor calculated sales tax as part of the overall amount charged to Taxpayer. The notations include the amounts Vendor paid for the TPP along with sales tax Vendor paid on those purchases. Hauling charges were also included in the "unit price" Vendor listed as the cost of the TPP it sold to Taxpayer. Taxpayer believes that this establishes that Vendor did in fact charge Taxpayer sales tax and that use tax is not now due.

The Department does not agree with this conclusion. The Department refers to IC § 6-2.5-2-1(b), which explains that the person who acquires property in a retail transaction is liable for the tax on the transaction and shall pay

the tax to the retail merchant as a separate added amount to the consideration in the transaction. The invoices provided by Taxpayer in support of its protest show that sales tax was not added as a separate amount to the consideration for the TPP. Taxpayer's notes on the invoices break out what Vendor paid in sales tax when it purchased the TPP, but those notes do not establish that sales tax was added as a separate amount on the invoices for Taxpayer's purchases as required by IC § 6-2.5-2-1(b).

Finally, Taxpayer states that the argument could be made that Vendor was acting as an agent for Taxpayer and that Vendor's payment of sales tax was actually Taxpayer's payment of sales tax. The Department notes that Taxpayer has provided no documentation to suggest, let alone establish, that either Vendor or Taxpayer considered themselves to be in an agency relationship. Taxpayer has not presented a sufficiently developed argument for the Department to address. 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) (citing *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax. Ct. 2010)).

Regarding Taxpayer's second item under protest, Taxpayer states that it believes that its purchase and donation of statuary for an exempt customer qualifies for the exemption described by [45 IAC 2.2-4-26](#), which provides:

- (a) A person making a contract for the improvement to real estate whereby the material becoming a part of the improvement and the labor are quoted as one price is liable for the payment of sales tax on the purchase price of all material so used.
- (b) A person selling tangible personal property to be used as an improvement to real estate may enter into a completely [sic.] separate contract to furnish the labor to install or construct such improvement, in which case the sales tax shall be collected and remitted by such seller on the materials sold for this purpose. Such sales of materials must be identifiable as a separate transaction from the contract for labor. The fact that the seller subsequently furnished information regarding the charges for labor and material used under a flat bid quotation shall not be considered to constitute separate transactions for labor and material.
- (c) 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.
- (d) In order to be exempt on such purchases the contractor must be registered as a retail merchant and must obtain an exemption certificate from the exempt organization, and must issue an exemption certificate to his supplier.
- (e) Utilities, machinery, tools, forms, supplies, equipment or any other items used by or consumed by the contractor and which do not become a part of the improvement to real estate are not exempt regardless of the exempt status of the person for whom the contract is performed.

(Emphasis added).

Taxpayer points out that this customer was an exempt organization that could have purchased the statuary itself exempt from sales and use taxes. This, Taxpayer states, means that its purchase of the statuary is exempt under [45 IAC 2.2-4-26](#)(c). The Department does not agree with this conclusion.

The Department notes that the underlying statute which establishes the exemption is IC § 6-2.5-4-9, which states:

- (a) A person is a retail merchant making a retail transaction when the person sells tangible personal property which:
 - (1) is to be added to a structure or facility by the purchaser; and
 - (2) after its addition to the structure or facility, would become a part of the real estate on which the structure or facility is located.
- (b) Notwithstanding subsection (a), a transaction described in subsection (a) is not a retail transaction, if the ultimate purchaser or recipient of the property to be added to the structure or facility would be exempt from the state gross retail and use taxes if that purchaser or recipient had directly purchased the property from the supplier for addition to the structure or facility.

As provided by IC § 6-2.5-4-9(b), the purchase of TPP is exempt if the ultimate purchaser would be exempt. In this case, the ultimate purchaser and recipient was Taxpayer, not Taxpayer's customer. Taxpayer entered into a construction contract which would have made the exempt customer the ultimate purchaser and recipient of the statuary. However, Taxpayer decided to purchase the statuary itself and so received the statuary in a transaction involving the statuary producer and Taxpayer. This was the only retail transaction that took place. Taxpayer then donated the statuary to its exempt customer. The donation was not a retail transaction since there was no consideration involved. It was a separate action which took place after Taxpayer purchased the statuary. While this was a generous act on Taxpayer's part, the tax consequences of that act were to make Taxpayer itself the

ultimate purchaser. Since Taxpayer was the ultimate purchaser and since Taxpayer is not an exempt organization, the purchase of the statutory constituted use as described by IC § 6-2.5-3-2(a) and was not eligible for the exemption provided by IC § 6-2.5-4-9.

In conclusion, Taxpayer's documentation does not support its position that it does not owe use tax on purchases from Vendor. It is not relevant if Vendor paid sales tax itself when it purchased the TPP it resold to Taxpayer because Taxpayer purchased the TPP in retail transactions, thereby triggering the imposition of sales or use tax on those transactions. The invoices from Vendor do not separately state sales tax as an added amount to consideration, as required by IC § 6-2.5-2-1(b). Taxpayer was the ultimate purchaser of the statutory it donated to its exempt customer, therefore the exemption provided by IC § 6-2.5-4-9(b) does not apply to Taxpayer. Taxpayer has not met the burden of proving the proposed assessments wrong, as required by IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is denied.

Posted: 02/24/2016 by Legislative Services Agency
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