

Letter of Findings: 04-20150519.lof
Gross Retail and Use Tax
For the Year 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Lump Sum Contractor was not entitled to a refund of sales tax paid on the purchase or lease of woodworking equipment.

ISSUE

I. Sales and Use Tax - Manufacturing Equipment.

Authority: IC § 6-2.5-2-1(a); IC § 6-2.5-2-1(b); IC § 6-2.5-3-1(a); IC § 6-2.5-3-2(a); IC § 6-2.5-5-3(b), (c); IC § 6-8.1-5-1(c); IC § 6-8.1-5-2(g); Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Rhoades v. Indiana Dep't of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); Indiana Dept. of State Rev. v. Kimball Int'l Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988); Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974); [45 IAC 2.2-3-12\(c\)](#); [45 IAC 2.2-4-25](#); [45 IAC 2.2-5-8](#); [45 IAC 2.2-5-8\(a\)](#); Sales Tax Information Bulletin 60 (April 2011).

Taxpayer argues that it is entitled to a refund of sales or use tax paid on the purchase of various items of woodworking equipment.

STATEMENT OF FACTS

Taxpayer is an Indiana business which contracts with hotels and motels to install cabinets, countertops, desks, tile, millwork and other items. Taxpayer bills its clients on a "lump sum" basis.

The Indiana Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer's financial records and tax returns.

The audit resulted in an assessment of tax. Taxpayer protested the assessment, an administrative hearing was conducted, and a Letter of Findings issued October 30, 2014, 20141231 Ind. Reg. 045140492NRA, denying Taxpayer's protest on the ground that Taxpayer was not a manufacturer.

Despite the decision contained in the Letter of Findings, Taxpayer persisted and submitted a form GA-110L claim for a refund of sales tax. The form was dated April 23, 2014. The Department issued a refund check dated October 28, 2014, for the amount requested in addition to interest.

The Department decided that it made a mistake in issuing the refund. In a letter dated January 22, 2015, the Department stated "this refund was issued erroneously as a duplication of the audit refund amounts." The Department issued a notice of "Proposed Assessment" dated January 26, 2015, for the amount originally refunded Taxpayer.

Taxpayer protested on the ground that it was entitled to the refund. An administrative hearing was conducted during which Taxpayer's representative explained the basis for the protest. This Letter of Findings results.

I. Sales and Use Tax - Manufacturing Equipment.

DISCUSSION

The issue is whether Taxpayer should have paid sales or use tax on the purchase or lease of woodworking equipment.

Taxpayer leased or bought woodworking equipment. Taxpayer argued that it should not have paid sales or use tax on the sale or lease of the equipment, that the Department "thoroughly investigated" the refund claim, that the refund check was properly issued, and that it should not now be required to return that refund amount.

Taxpayer pointed out what it regards as a number of errors on the part of the Department. Taxpayer stated that - contrary to the January 22 Department letter - it did not file an "amended return" but filed a form GA-110L. Taxpayer further stated that the refund was not a "duplication of the audited refund amount." Taxpayer claimed that the October 30, 2014, Letter of Findings did not address the substance of the Taxpayer's refund request.

Setting aside any miscommunication, errors, previous statements, emails, and so on, the deciding issue is whether or not the equipment purchased and used by Taxpayer is or is not exempt from sales tax. If the equipment is exempt, Taxpayer should not have paid the tax and is entitled to the refund. If the equipment is not exempt, Taxpayer correctly paid tax on the transactions, any refund issued by the Department should not have been granted, and Taxpayer should return money to which it is not entitled.

As a threshold issue, it is the Taxpayer's responsibility to establish that the 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 Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Thus, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position 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, fn. 9 (Ind. Tax Ct. 2012). 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, interpretations of Indiana tax law contained within this decision, as well as the preceding audit investigation, are entitled to deference.

In addition, Taxpayer has the burden of establishing that it is entitled to the sought after exemption. In applying any tax exemption, the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." *Indiana Dept. of State Rev. v. Kimball Int'l Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988). 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 (citing *Conklin v. Town of Cambridge City*, 58 Ind. 130, 133 (1877)).

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 *Rhoads v. Indiana Dep't of State Revenue*, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002).

However, as authority for its conclusion that certain of its equipment is exempt, Taxpayer relies on the statute, IC § 6-2.5-5-3, which states in part:

- (b) Except as provided in subsection (c), transactions involving manufacturing machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property.

(c) The exemption provided in subsection (b) does not apply to transactions involving distribution equipment or transmission equipment acquired by a public utility engaged in generating electricity.

The Department's regulation, [45 IAC 2.2-5-8](#), explains that a taxpayer is entitled to purchase machinery, tools, and equipment without payment of the gross retail tax when the equipment is used in the direct production of tangible personal property. [45 IAC 2.2-5-8\(a\)](#) emphasizes that the exemption is limited to that equipment "directly used by the purchaser in direct production."

However, the exemption which Taxpayer seeks is not available to lump-sum contractors. [45 IAC 2.2-4-25](#) defines "contractors" as follows:

For purposes of this regulation [[45 IAC 2.2](#)], "contractor" means any person engaged in converting construction material into realty. The term "contractor" refers to general or prime contractors, subcontractors, and specialty contractors, including but not limited to persons engaged in building, cement work, carpentry, plumbing, heating, electrical work, roofing, wrecking, excavating, plastering, tile and road construction.

On the issue of tools and equipment used by "contractors," the Department's regulation, [45 IAC 2.2-3-12\(c\)](#) provides:

Utilities, machinery, tools, forms, supplies, equipment or any other items used or consumed by the contractor 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. See also Sales Tax Information Bulletin 60 (April 2011), 20110427 Ind. Reg. 045110247NRA.

Taxpayer is a lump-sum contractor which builds and installs cabinets, countertops, tile and the like. For purposes of the exemption, Taxpayer has not established it is a "manufacturer" and entitled to the exemption available to manufacturers. The tools and equipment Taxpayer bought or leased were not exempt from tax, the Department issued a refund of the tax in error, the Department was within its authority in seeking a return of the refund, and Taxpayer is now required to return the money pursuant to IC § 6-8.1-5-2(g). ("If any part of a listed tax has been erroneously refunded by the department, the erroneous refund may be recovered through the assessment process . . .").

FINDING

Taxpayer's protest is respectfully denied.

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