DEPARTMENT OF STATE REVENUE

04-20150315.LOF
04-20150318.LOF

Letter of Findings Number: 04-20150315; 04-20150318
Sales/Use Tax
For Tax Years 2012, 2013, and 2014

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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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 responsible for the use tax on several cars which it purchased at retail transactions and used to promote its business and to give away in Indiana.

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 § 6-2.5-5-24; IC § 6-8.1-5-1; 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); Hopping v. Wood, 526 N.E.2d 1205 (Ind. Ct. App. 1988); Rule v. Flaming, 152 N.E.181 (Ind. Ct. App. 1926); Gammon Theological Seminary v. Robbins, 27 N.E. 341 (Ind. 1890); 45 IAC 2.2-3-4; 45 IAC 2.2-3-14; 45 IAC 2.2-5-53; 45 IAC 2.2-5-54; Sales Tax Information Bulletin 28S (April 2012).

Taxpayer protests the Department's proposed assessments, claiming that it was not responsible for sales tax or use tax on various vehicles which it gave away.

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 out-of-state company operating casinos in Indiana. The Indiana Department of Revenue ("Department") conducted a sales/use tax audit for the 2012, 2013, and 2014 tax years. Both Taxpayer and the Department agreed to utilize a statistical sample method to project the audit results. The audit determined that Taxpayer purchased certain tangible personal property to be used for its business activities but did not pay taxes on the purchases. The audit thus assessed additional tax, interest, and penalty for the tax years at issue.

Taxpayer disagreed in part and protested the assessment on certain purchases. Taxpayer also requested that the penalty be abated. An administrative hearing was held during which Taxpayer's representatives explained the basis of the protest. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales/Use Tax - Imposition.

DISCUSSION

The Department's audit assessed additional tax because Taxpayer purchased certain tangible personal property to be used for its business activities but did not pay taxes on the purchases.

Taxpayer, to the contrary, believes that the Department's assessments were overstated. Taxpayer argued that it was not responsible for taxes on several vehicles that it gave away to its patrons who won the promotional contests during the tax years at issue. Specifically, Taxpayer claimed that the transactions were non-Indiana sales because the winners were non-Indiana residents, they had the cars delivered to locations outside of Indiana, and the winners used the vehicles outside of Indiana.

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 "[r]etail 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). Selling at retail occurs when a person "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration." IC § 6-2.5-4-1(b). The retail merchant shall collect the tax as agent for the state." Id. The purchaser "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." Id.

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 1047-50 (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).

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 other sales tax exemptions also available as outlined in IC § 6-2.5-5. Similarly, the exemptions listed in IC § 6-2.5-5 also generally apply to transactions which are subject to Indiana use tax. 45 IAC 2.2-3-14(2). One particular exemption relevant to this present case is a retail transaction that qualifies as being in interstate commerce. IC § 6-2.5-5-24(b); See also 45 IAC 2.2-5-53; 45 IAC 2.2-5-54. Specifically, 45 IAC 2.2-5-54(b), in relevant part, provides that:

> Sales of tangible personal property which are delivered to the purchaser in a state other than Indiana for use in a state other than Indiana are not subject to gross retail tax or use tax, provided the property is not intended to be subsequently used in Indiana.

The Department's Sales Tax Information Bulletin 28S (April 2012), 20120530 Ind. Reg. 045120259NRA ("Information Bulletin 28S"), addresses issues concerning sales of motor vehicles. The Information Bulletin 28S further explains, in relevant part, as follows:

> **IV. INTERSTATE COMMERCE EXEMPTION**
>
> A vehicle . . . sold in interstate commerce is not subject to the Indiana sales tax. To qualify as being "sold in interstate commerce," the vehicle . . . must be physically delivered, by the selling dealer to a delivery point outside Indiana. The delivery may be made by the dealer, or the dealer may hire a third-party carrier. Terms

> and the method of delivery must be indicated on the sales invoice. The dealer must document terms of delivery and must keep a copy of such terms of delivery to substantiate the interstate sale. The exemption does not apply to sales to out-of-state buyers in which the buyer takes physical possession of a vehicle or trailer in Indiana, nor is the exemption valid if the buyer, and not the seller, hires a third-party carrier to transport the vehicle or trailer outside Indiana. If the buyer hires the carrier, the carrier is acting as an agent for the buyer; thus, the buyer takes physical possession within Indiana. Possession taken within the state does not qualify as an interstate sale. (**Emphasis is original**) (Emphasis added).

Accordingly, when a vehicle is sold and delivered by a dealership to an Indiana location, the transaction is an Indiana retail transaction subject to Indiana sales tax or use tax. Additionally, when a vehicle is sold by an Indiana dealership and the dealership delivered the vehicle to a location outside of Indiana, the transaction is not an Indiana retail transaction subject to Indiana sales or use tax when verifiable records document the delivery to a place outside of Indiana.

In this instance, Taxpayer contended that it was not liable for the additional tax on several vehicles that it gave away. Taxpayer asserted that, through various promotional contests, it gave away various cars to its patrons who won the contests during the tax years at issue. Taxpayer further referenced its "Official Rules," stating that "[w]inners are responsible for any and all taxes, licenses, registrations and other fees." Additionally, Taxpayer maintained, in relevant part, that:

> [It] pays the car dealership for the vehicle. Some of the dealerships are not located in the [State of] Indiana. [It] does not take title to the vehicle nor delivery. The dealership works [] directly with the customer regarding delivery.

To support its protest, Taxpayer provided additional documentation, including copies of the "Buyers Order" or purchase order ("Orders") for the vehicles at issue. Taxpayer did not offer any supporting documents concerning delivery.

Upon review, however, Taxpayer's reliance on its supporting documentation is misplaced. First, Taxpayer asserted that to receive the gifts, the winners selected the cars and worked with the dealerships they preferred and Taxpayer just paid the agreed amount (less the additional charges for upgrade features). However, all of Taxpayer's Orders, except two, state that Taxpayer was the purchaser of the vehicles. Whether the winners took possession of the give-away cars at the dealerships or at Taxpayer's Indiana casinos was irrelevant; and whether Taxpayer was required to obtain certificates of title is beyond the scope of this protest.

In this instance, Taxpayer offered its patrons that it will give certain models of vehicles to the winners of the vehicle give-away drawings; in exchange, the patrons agreed to participate in Taxpayer's promotional activities. Specifically, to gift the winners, Taxpayer must have the right of ownership concerning the tangible personal property it intended to give away, whether actually in its possession or otherwise. Additionally, "[d]elivery is an indispensable requirement without which a gift fails. . . ." Hopping v. Wood, 526 N.E.2d 1205, 1207 (Ind. Ct. App. 1988); see Rule v. Flaming, 152 N.E.181, 183 (Ind. Ct. App. 1926) (explaining that "[d]elivery is essential; it may be either actual, by manual tradition, of the subject of the gift, or constructive, by delivery of the means of obtaining possession. Constructive delivery is always sufficient when actual, manual delivery is either impracticable or inconvenient"); see also Gammon Theological Seminary v. Robbins, 27 N.E. 341, 342-43 (Ind. 1890) (explaining that "[w]hile a delivery is absolutely necessary to the validity of a gift, it is not necessary that there should always be a manual transfer of the thing given. It will be sufficient if the delivery be as complete as the thing and the circumstances of the parties will permit").

Thus, it was Taxpayer who purchased the cars and used the cars to first promote its business and subsequently to give away. It was Taxpayer, not the dealership, who promised to give the vehicles to the winners. To fulfill its contractual obligations, regardless of actually possessing the vehicles or otherwise, Taxpayer acquired the vehicles from the dealerships. Taxpayer's purchases were retail transitions, subject to sales tax. Taxpayer subsequently exercised its right of ownership to give away and to ensure the winners had the vehicles as it had promised. Taxpayer's action met the statutory "use" of the vehicles under IC § 6-2.5-3-2(a) and its use was subject to use tax.

As mentioned earlier, Indiana sales tax and use tax are transactional taxes on retail transactions. IC § 6-2.5-2-1(b); IC § 6-2.5-3-2(a). The purchaser or the user is responsible for the taxes. Id. Thus, the purchaser or the user cannot avoid its responsibility of paying the tax by contracting away that responsibility. Given the totality of the circumstances, Taxpayer was the purchaser and the user of the vehicles which it gave away. Since Taxpayer did not pay sales tax at the time of the purchases, use tax is properly assessed.

FINDING

Taxpayer's protest is denied.

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 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.

In this instance, during the hearing, Taxpayer offered various reasons to support its request that the Department abate the negligence penalty. Specifically, in addition to its overall compliance history, Taxpayer documented that, it promptly addressed issues found pursuant to the audit. The Department thus agrees that Taxpayer provided sufficient documentation to demonstrate that the negligence penalty should be abated.

FINDING

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

SUMMARY

Taxpayer's protest of the imposition of additional sales tax and use tax is denied. Taxpayer's protest of the imposition of negligence penalty is sustained.

Posted: 05/25/2016 by Legislative Services Agency
An html version of this document.