

DEPARTMENT OF STATE REVENUE

04-20150377.LOF

Letter of Findings Number: 04-20150377
Use Tax
For Tax Years 2012-13

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 This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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 heating, ventilation, and air conditioning service ("HVAC") 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 § 6-2.5-3-2; IC § 6-2.5-3-8; IC § 6-2.5-2-1; IC § 6-2.5-5-2; 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](#); [45 IAC 2.2-3-8](#); [45 IAC 2.2-5-4](#)

Taxpayer protests proposed assessments for additional use tax.

STATEMENT OF FACTS

Taxpayer is an Indiana business providing HVAC services. As the result of an investigation, the Indiana Department of Revenue ("Department") determined Taxpayer had under-remitted sales/use tax for the tax years 2012 and 2013. The Department therefore issued proposed assessments for sales/use tax, penalties, and interest for those years. Taxpayer protests these proposed 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 2012 through 2013. Specifically, Taxpayer protests that the purchase of a John Deere tractor and baler were exempt from sales tax under the agricultural exemption and the one time purchase of the farm machinery, although listed as the purchase of a capital asset, was, in actuality, a distribution to a shareholder. In addition, Taxpayer protests that some purchases were taxed twice during the audit.

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 tangible personal property 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 [\[45 IAC 2.2-5\]](#)).

In this case, Taxpayer is in the HVAC business, but purchased agricultural equipment, namely a John Deere tractor and baler and purchased construction material. Those transactions are at issue in this protest. Because Taxpayer purchased these items without paying sales tax at the time of purchase, the Department assessed use tax on them.

Taxpayer argues in its protest that its purchases of the John Deere tractor and baler should not be subject to use tax. Taxpayer states that it believes that its purchase and distribution to a shareholder of the John Deere tractor and baler was exempt for sales/use tax because the recipient of the distribution used the John Deere tractor and baler for farming, which qualifies for the exemption described by [45 IAC 2.2-5-4](#), which provides:

- (a) Agricultural exemption certificates may be used only if the purchaser is occupationally engaged in the business of producing food or commodities for human, animal, or poultry consumption for sale or for further use in such production.
- (b) The department has determined that persons occupationally engaged in producing food and commodities as used in the Indiana sales and use tax act, shall mean and include only those persons, partnerships, or corporations whose intention it is to operate a farm at a profit and not those persons who intend to operate a farm for pleasure as a hobby. Operations similar to those of a pony farm, riding stable, or the production and raising of dogs and pets, are not classified as farms for the purpose of the state gross retail tax act.

Taxpayer points out that its shareholder engages in farming and could have purchased the John Deere tractor and baler itself exempt from sales and use taxes. This, Taxpayer states, means that its purchase of the statutory is exempt under [45 IAC 2.2-5-4](#). The Department does not agree with this conclusion.

The Department notes that the underlying statute which establishes the exemption is IC § 6-2.5-5-2, which states:

- (a) Transactions involving agricultural machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for his direct use in the direct production, extraction, harvesting, or processing of agricultural commodities.
- (b) Transactions involving agricultural machinery or equipment are exempt from the state gross retail tax if:

- (1) the person acquiring the property acquires it for use in conjunction with the production of food and food ingredients or commodities for sale;
- (2) the person acquiring the property is occupationally engaged in the production of food or commodities which he sells for human or animal consumption or uses for further food and food ingredients or commodity production; and
- (3) the machinery or equipment is designed for use in gathering, moving, or spreading animal waste.

(Emphasis in original).

As provided by IC § 6-2.5-5-2 (a) and (b), the purchase of John Deere tractor and baler is exempt if the ultimate purchaser would be exempt. In this case, the ultimate purchaser and recipient was Taxpayer, not Taxpayer's shareholder. Taxpayer engages in providing HVAC services and contracting. However, Taxpayer decided to purchase the John Deere tractor and baler itself and so received the John Deere tractor and baler in a transaction involving the farm implements dealer and Taxpayer. This was the only retail transaction that took place. Taxpayer then distributed the John Deere tractor and baler to its shareholder. The distribution was not a retail transaction since there was no consideration involved. It was a separate action, which took place after Taxpayer purchased the John Deere tractor and baler. While this was a business decision 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 engaged in the production of food or commodities, the purchase of the John Deere tractor and baler constituted use as described by IC § 6-2.5-3-2(a) and was not eligible for the exemption provided by IC § 6-2.5-5-2. Taxpayer has not met the burden of proving the proposed assessments wrong, as required by IC § 6-8.1-5-1(c).

Next, Taxpayer protests the assessment of use tax on some items it purchased for office use. Specifically, the auditor reviewed sales invoices from the purchase of items where no sales tax was paid at the time of purchase, and reviewed account classifications on Taxpayer's federal tax returns. The Taxpayer, in hearing, demonstrated some instances where an item was assessed use tax based on the sales invoice and was assessed use tax again based on the account classification, so that Taxpayer was assessed use tax twice on a few office supply items.

Taxpayer sufficiently demonstrated in materials provided for the hearing, instances where items were assessed use tax twice during the same audit.

FINDING

Taxpayer's protest is denied in part and sustained in part.

Posted: 05/25/2016 by Legislative Services Agency

An [html](#) version of this document.