

**Letter of Findings: 04-20150381
Gross Retail Tax
For the Years 2010, 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Out-of-State Retailer was required to collect sales tax on delivery costs it charged its Indiana customers; the Department rejected Retailer's argument that it was not required to collect sales tax on the ground that its customers benefitted from the delivery of the goods.

ISSUE

I. Gross Retail Tax - Delivery Charges.

Authority: IC § 6-2.5-1-5; IC § 6-2.5-2-1(b); IC § 6-2.5-9-3; IC § 6-8.1-5-1(c); Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); 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); [45 IAC 2.2-4-3](#)(b)(2); Commissioner's Directive 23 (effective April 2004).

Taxpayer argues it was not required to collect sales tax on the price it charged its customers to deliver Taxpayer's products to Indiana customers.

STATEMENT OF FACTS

Taxpayer is an out-of-state company in the business of selling clothing, accessories, and shoes. Taxpayer operates retail stores in Indiana and also sells its goods to Indiana customers by means of Internet transactions.

The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's business records. The Department's audit concluded that Taxpayer should have collected sales tax on delivery costs Taxpayer charged Indiana customers. Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted by telephone during which Taxpayer's representative explained the basis for its protest. This Letter of Findings results.

I. Gross Retail Tax - Delivery Charges.

DISCUSSION

The issue is whether Taxpayer should have collected sales tax on the price it charged to deliver its goods to Indiana customers.

A. Audit Results

The Department's audit reviewed records of Taxpayer's sales to Indiana customers including Taxpayer's ST-103 sales tax returns, sales journals, and "work sheets." The audit found that Taxpayer failed to collect sales tax on Internet delivery charges.

The audit cited to Commissioner's Directive 23 (effective April 2004), 27 Ind. Reg. 2615, (See also Commissioner's Directive 23 (effective July 1, 2013) 20130828 Ind. Reg. 045130394NRA) as authority for its decision that Taxpayer should have been collecting sales tax on delivery charges. In part, the Directive provides:

Delivery charges that are incurred on behalf of the seller of tangible personal property continue to fall within the definition of "gross retail income" and are subject to sales tax, regardless of the shipping terms used.

B. Taxpayer's Response

Taxpayer disagrees with the assessment. Taxpayer states that its goods are "sent by common carrier FOB original and [the] relevant Indiana code section quoted is [45 IAC 2.2-4-3\(b\)\(2\)](#)." Taxpayer states that its delivery charges are "incurred on behalf of the purchaser, not the seller." Taxpayer explains that its customers have "the option to pick up the item at a store with no shipping charge." Taxpayer concludes that because it is the purchaser's choice to pay the delivery charge, the purchaser benefits by paying these charges which are "clearly incurred on behalf of the purchaser, not [Taxpayer]."

C. Hearing Analysis

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 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). 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, interpretations of Indiana tax law contained within this decision, as well as the preceding audit, are entitled to deference.

Taxpayer relies on [45 IAC 2.2-4-3\(b\)\(2\)](#) for the premise that it was not required to collect sales tax on delivery charges. The regulation provides in part:

- (a) Separately stated delivery charges are considered part of selling at retail and subject to sales and use tax if the delivery is made by or on behalf of the seller of property not owned by the buyer.
- (b) The following guidelines have been developed:
 - (1) Delivery charge separately stated with F.O.B. destination-taxable.
 - (2) Delivery charge separately stated with F.O.B. origin-non taxable.
 - (3) Delivery charge separately stated where no F.O.B. has been established-non taxable.
 - (4) Delivery charges included in the purchase price are taxable.

The cited regulation was promulgated December 1982 and remains unchanged to this day. More recently, the Indiana Legislature amended IC § 6-2.5-1-5 to read in relevant part as follows:

- (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 charges that are not separately stated on the invoice, bill of sale, or similar document, handling, crating, and packing. Delivery charges do not include postage charges that are separately stated on the invoice, bill of sale, or similar document.

(Emphasis added).

The last paragraph in subsection (a) ("For purposes of subdivision (4) . . .") was added effective March 17, 2004.

The Department is unable to agree that Taxpayer has met its burden under IC § 6-8.1-5-1(c) of establishing that the proposed assessment was wrong. In doing so, the Department rejects Taxpayer's argument that, because its customers benefitted from the delivery of Taxpayer's goods, Taxpayer was not required to collect sales tax on those delivery charges. Instead, the Department believes that the statutory provision is clear on its face. The delivery costs charged its Indiana customers were part-and-parcel of the "gross retail income" on which Taxpayer should have collected sales tax pursuant to the above mentioned statutes. Since Taxpayer failed to collect that tax, Taxpayer is now responsible for those amounts. A retail merchant - such as Taxpayer - is required to "collect the tax as agent for the state." IC § 6-2.5-2-1(b). The retail merchant "holds those taxes in trust for the state and is personally liable for the payment of those taxes" IC § 6-2.5-9-3.

FINDING

Taxpayer's protest is respectfully denied.

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