

DEPARTMENT OF STATE REVENUE

Revenue Ruling #2016-06ST
August 31, 2016

NOTICE: Under [IC 4-22-7-7](#), this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the department's official position concerning a specific issue.

ISSUES

Sales and Use Tax - Application to the Procurement of Human Tissue

Authority: [IC 6-2.5-1-1](#); [IC 6-2.5-1-11.5](#); [IC 6-2.5-1-27](#); [IC 6-2.5-2-1](#); [IC 6-2.5-3-2](#); [IC 6-2.5-4-1](#); [IC 6-2.5-4-15](#); [IC 6-2.5-5-16](#); [IC 6-2.5-5-18](#); [IC 6-2.5-5-19](#); [IC 6-2.5-5-25](#); [IC 6-2.5-5-40](#); [IC 35-46-5-1](#); [45 IAC 2.2-1-1](#); [45 IAC 2.2-4-2](#); [45 IAC 2.2-5-27](#); [45 IAC 2.2-5-35](#); 42 U.S.C.A. § 274e; 42 U.S.C.A. § 289g-2(a); Black's Law Dictionary (10th ed. 2014).

A company ("Taxpayer") is seeking a determination that it is a service provider and that its procurement of human tissue is not a retail transaction not subject to Indiana gross retail and use tax.

STATEMENT OF FACTS

Taxpayer is a non-transplantable human tissue bank. Taxpayer describes their business in detail as follows:

During the past decade, with advancements in medicine and medical technology, there has been a growing need for non-transplantable human tissue. [Taxpayer] is able to meet this essential need by educating the public about the societal and medical research related benefits of whole body donation, and receives these donations from donors at a variety of venues including hospitals, funeral homes, and hospices. These donations are subject to legal consent and authorization from the donor and/or their next of kin. By donating to [Taxpayer], donors and their families are able to meet their own or loved ones' wishes to help support and further the advancement of scientific and medical research.

Founded in 2000, [Taxpayer] is a non-transplantable human tissue bank that provides services associated with the processing, storage, preparation and transportation of tissue specimen to clients for medical research and training purposes. [Taxpayer]'s customers include medical facilities, hospitals, universities, academic medical centers, medical training organizations and medical device manufacturers, amongst others. [Taxpayer] receives donated human bodies shortly after the time of death in order to provide the medical community with either complete, intact cadavers, or portions of human tissue according to its customers' specific needs associated with their training and research requirements. [Taxpayer] makes no payments to a donor's estate or their family for the donated remains. Highly skilled experts are used to remove parts in such a way as to preserve the integrity and usefulness of those bodies and requested tissue for specific training and research purposes. Any tissues that are not recovered for a qualified use are cremated and either disposed of or returned to the next of kin upon request.

In general, public policy and social norms rule out establishing a marketplace for the sale of vital human organs and body tissue. Commodifying the human body and its organs, thereby transforming what should be an act of altruism into a commercial transaction, is viewed as contrary to our basic social values (Public Policy and the Sale of Human Organs, Cynthia B. Cohen, Kennedy Institute of Ethics Journal, Vol 12, #1 (2002)). This has resulted in federal and state statutes and regulations outlawing the sale of human tissue. Specifically, the National Organ Transplant Act ("NOTA") of 1984 bans the sale of human organs and tissue for transplant, but allows tissue banks to charge fees for tissue and services associated with procuring and preparing tissue. In addition, 42 U.S. Code § 274e(a) states that "It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce." Further, the federal Public Health Service Act prohibits the sale of human fetal tissue as stated in 42 U.S. Code § 289g-2(a), "It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human fetal tissue for valuable consideration if the transfer affects interstate commerce." Additionally, the Uniform Anatomical Gift Act (adopted by Indiana under [IC §35-46-5-1](#)), governs both tissue for transplantation into living patients as well as the making of anatomical gifts for the advancement of science. Section 16 of the Uniform Anatomical Gift Act (2006) states

that "A person may charge a reasonable amount for the removal, processing, preservation, quality control, storage, transportation, implantation, or disposal of a part."

These legal parameters have shaped the manner in which human bodies are gathered and then, in whole or in part, distributed, with no distinction on whether the parts are used for purposes of research or transplanting. As is customary for the industry, [Taxpayer] charges fees to its customers in order to recover the costs associated with the acquisition, storage, preservation, preparation and distribution of the tissue. Cost-plus pricing, rather than supply-demand metrics, establish service charges invoiced to [Taxpayer]'s customers. There are no charges for human tissue. [Taxpayer] is properly following the various longstanding nationwide legal and social norms which provide that there can be no sale of a human body or vital body parts. The Indiana legislature has seen fit to also address this topic in Code Section §35-46-5-1, which, like the Uniform Anatomical Gift Act above, states:

- a. A person who intentionally acquires, receives, sells or transfers in exchange for an item of value; (1) a human organ for use in human organ transplantation; or (2) fetal tissue, commits unlawful transfer of human tissue, a Class C felony.

The fees which [Taxpayer] lists and charges are an aggregate reflection of the services it provides related to its tissue removal, processing, preservation, storage, transportation and disposal, and are allowable under Indiana Statutes. Similarly, the above statute makes it clear that [Taxpayer] cannot be in the business of making a sale of human tissue without being subject to substantial criminal penalties. The State's reticence to assert sales tax against similar transactions can be seen in the existing exemption provided for the sale of blood and blood plasma under IC §6-2.5-5-19.5.

With this in mind, we believe that [Taxpayer] is not involved in a sale, is not a retailer and should not be taxable under Indiana Section §6-2.5-2-1(a), or any other sales or use tax definitions. We believe [Taxpayer] is a service provider, and should not be required to collect sales or use tax on its charges to its clients. To determine otherwise would contravene public policy and legal designs intent on preventing a marketplace for body parts to develop. Based on the information above, and the fact that [Taxpayer] customers are billed for services on a cost-plus basis, we believe that the transactions involving the provision of a human body or body parts to a third party for research and/or medical advancement purposes should be exempt from the Indiana sales tax.

We understand that there may be other exemptions from the Indiana sales tax available to the services in question, including customer exemptions for transactions involving tissue transfers to hospitals, universities, and medical research facilities, and possible research and development exemptions for sales to medical device manufacturers. In this instance, we are requesting the Department's opinion on the taxability of these transfers of tissue overall, and the position that [Taxpayer] should be treated as a service provider and not a retailer, without considering customer specific exemptions.

DISCUSSION

Taxpayer requests that the Department find that the transfers of tissue is a nontaxable transaction, and that Taxpayer be considered a service provider and not a retail merchant.

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\(a\)](#).

[IC 6-2.5-4-1](#) defines "retail transactions," stating in part as follows:

- (a) A person is a retail merchant making a retail transaction when he engages in selling at retail.
- (b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business he:
 - (1) acquires tangible personal property for the purpose of resale; and
 - (2) transfers that property to another person for consideration.
- (c) For purposes of determining what constitutes selling at retail, it does not matter whether:
 - (1) the property is transferred in the same form as when it was acquired;

- (2) the property is transferred alone or in conjunction with other property or services; or
- (3) the property is transferred conditionally or otherwise.

(e) The gross retail income received from selling at retail is only taxable under this article to the extent that the income represents:

- (1) the price of the property transferred, without the rendition of any service; and
- (2) except as provided in subsection (g), any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records.

For purposes of this subsection, a transfer is considered to have occurred after delivery of the property to the purchaser.

In general, all purchases of tangible personal property are subject to sales and/or use tax unless an enumerated exemption from sales and/or use tax is available. [IC 6-2.5-1-27](#) defines "tangible personal property" as follows:

"Tangible personal property" means personal property that:

- (1) can be seen, weighed, measured, felt, or touched; or
- (2) is in any other manner perceptible to the senses.

The term includes electricity, water, gas, steam, and prewritten computer software.

Applying the plain meaning of this definition, human tissue would be considered tangible personal property.

Unlike tangible personal property, sales of services generally are not retail transactions and are not subject to sales or use tax, except for certain enumerated services. [45 IAC 2.2-4-2](#) clarifies the taxability of services as follows:

(a) Professional services, personal services, and services in respect to property not owned by the person rendering such services are not "transactions of a retail merchant constituting selling at retail", and are not subject to gross retail tax. Where, in conjunction with rendering professional services, personal services, or other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail unless:

- (1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property;
- (2) The tangible personal property purchased is used or consumed as a necessary incident to the service;
- (3) The price charged for tangible personal property is inconsequential (not to exceed 10%) compared with the service charge; and
- (4) The serviceman pays gross retail tax or use tax upon the tangible personal property at the time of acquisition.

(b) Services performed or work done in respect to property and performed prior to delivery to be sold by a retail merchant must however, be included in taxable gross receipts of the retail merchant.

(c) Persons engaging in repair services are servicemen with respect to the services which they render and retail merchants at retail with respect to repair or replacement parts sold.

(d) A serviceman occupationally engaged in rendering professional, personal or other services will be presumed to be a retail merchant selling at retail with respect to any tangible personal property sold by him, whether or not the tangible personal property is sold in the course of rendering such services. If, however, the transaction satisfies the four (4) requirements set forth in [subsection (a)], the gross retail tax shall not apply to such transaction.

When services and tangible personal property are furnished in a single order for a total combined charge, it is a unitary transaction. [IC 6-2.5-1-1](#). A unitary transaction is clarified in [45 IAC 2.2-1-1\(a\)](#) as follows:

For purposes of the state gross retail tax and use tax, such taxes shall apply and be computed in respect to each retail unitary transaction. A unitary transaction shall include all items of property and/or services for which a total combined charge or selling price is computed for payment irrespective of the fact that services which would not otherwise be taxable are included in the charge or selling price.

Further, [IC 6-2.5-4-15](#) provides that "[a] person is a retail merchant making a retail transaction when the person sells tangible personal property as part of a bundled transaction." [IC 6-2.5-1-11.5](#) defines "bundled transaction" as follows:

(b) "Bundled transaction" means a retail sale of two (2) or more products, except real property and services to

real property, that are:

- (1) distinct;
- (2) identifiable; and
- (3) sold for one (1) nonitemized price.

(c) The term does not include a retail sale in which the sales price of a product varies, or is negotiable, based on other products that the purchaser selects for inclusion in the transaction.

(d) The term does not include a retail sale that:

- (1) is comprised of:
 - (A) a service that is the true object of the transaction; and
 - (B) tangible personal property that:
 - (i) is essential to the use of the service; and
 - (ii) is provided exclusively in connection with the service;
- (2) includes both taxable and nontaxable products in which:
 - (A) the seller's purchase price; or
 - (B) the sales price;

of the taxable products does not exceed ten percent (10%) of the total purchase price or the total sales price of the bundled products; or

(3) includes both exempt tangible personal property and taxable tangible personal property:

- (A) any of which is classified as:
 - (i) food and food ingredients;
 - (ii) drugs;
 - (iii) durable medical equipment;
 - (iv) mobility enhancing equipment;
 - (v) over-the-counter drugs;
 - (vi) prosthetic devices; or
 - (vii) medical supplies; and
- (B) for which:
 - (i) the seller's purchase price; or
 - (ii) the sales price;

of the taxable tangible personal property is fifty percent (50%) or less of the total purchase price or the total sales price of the bundled tangible personal property.

The determination under clause (B) must be made on the basis of either individual item purchase prices or individual item sale prices.

As Taxpayer explains, it provides the services of "processing, storage, preparation and transportation of tissue specimen to clients for medical research and training purposes." If Taxpayer sold human tissue and charged fees for the service of obtaining and delivering the tissue, it could be considered a bundled transaction subject to sales tax. Alternatively, if Taxpayer only charged for the services of obtaining and delivering human tissue, the service charges could still be subject to sales tax under [IC 6-2.5-4-1\(e\)](#), as the charges for preparation and delivery would be considered bona fide charges in respect to the human tissue. However, Taxpayer states that it "charges fees to its customers in order to recover the costs associated with the acquisition, storage, preservation, preparation and distribution of the tissue," and that "[t]here are no charges for human tissue." It is a "cost-plus billing," meaning "[a] contract in which payment is based on a fixed fee or a percentage added to the actual cost incurred." Black's Law Dictionary (10th ed. 2014). Cost-plus billing is more typically recognized as a true service charge.

Furthermore, as Taxpayer points out, the sale of human tissue does appear indeed to be essentially illegal. Under state law, [IC 35-46-5-1](#) makes the sale of human organs illegal, as described below:

- (a) As used in this section, "human organ" means the kidney, liver, heart, lung, cornea, eye, bone marrow, bone, pancreas, or skin of a human body.
- (b) As used in this section, "item of value" means money, real estate, funeral related services, and personal property. "Item of value" does not include:
 - (1) the reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ; or
 - (2) the reimbursement of travel, housing, lost wages, and other expenses incurred by the donor of a human organ related to the donation of the human organ.
- (c) A person who intentionally acquires, receives, sells, or transfers, in exchange for an item of value, a human organ for use in human organ transplantation commits unlawful transfer of human organs, a Level 5 felony.

Federal law similarly bans the sale of human organs. As Taxpayer mentions, NOTA 1984 outlawed the sale of human organs and tissue. 42 U.S.C.A. § 274e provides in pertinent part:

(a) Prohibition

It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce. The preceding sentence does not apply with respect to human organ paired donation.

...

(c) Definitions

For purposes of subsection (a) of this section:

(1) The term "human organ" means the human (including fetal) kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart thereof and any other human organ (or any subpart thereof, including that derived from a fetus) specified by the Secretary of Health and Human Services by regulation.

(2) The term "valuable consideration" does not include the reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ.

As Taxpayer also points out, "the federal Public Health Service Act prohibits the sale of human fetal tissue . . . in 42 U.S.C.A. § 289g-2(a). . ."

While Indiana criminal law addresses the sale of human tissue, Indiana tax law is silent with regard to the applicability of sales tax to the sale or purchase of human tissue. The sale or purchase of human blood and blood plasma is addressed in [IC 6-2.5-5-18](#), which provides that purchases of blood and blood plasma are only exempt from sales tax if used for medical purposes, and [IC 6-2.5-5-19](#), which provides that a licensed practitioner may purchase blood and blood plasma exempt from sales tax if it used in direct consumption in treating the licensed practitioner's patients (or rendering professional services, per [45 IAC 2.2.-5-35](#)). However, there is no mention of human tissue, human organs, human cells, or other elements of the human body, including bone marrow. That there are exemptions for blood and blood plasma does not indicate a reticence on the part of the Indiana legislature to tax blood and blood plasma for public policy reasons relating to the sale of human bodily fluids; rather, they are grouped as exempt with other products such as oxygen and insulin because they serve a medical purpose. In fact, blood and blood plasma would be taxable if purchased by someone other than a patient or licensed practitioner for non-medical purposes.

As Taxpayer mentions, "medical facilities, hospitals, universities, academic medical centers, medical training organizations and medical device manufacturers" are amongst the people that hire Taxpayer to obtain human tissue. If the Department considered the transactions for human tissue as retail transactions subject to sales tax, some of these organizations would be able to purchase human tissue exempt from Indiana sales tax. Nonprofit hospitals purchasing human tissue would be exempt under [IC 6-2.5-5-25](#), and government-owned universities would be exempt under [IC 6-2.5-5-16](#). Universities would be exempt under [IC 6-2.5-5-25](#) (if the university is a private, nonprofit university) or [IC 6-2.5-5-16](#) (if the university is a public university). Some of Taxpayer's clientele may qualify for the research and development property exemption under [IC 6-2.5-5-40](#). However, there may be some purchasers who would not qualify for an exemption under [IC 6-2.5-5](#), and Taxpayer notes that it believes that the transactions are exempt because they are a service provider, irrespective of the entity for whom the human tissue is procured.

Taking all of this into consideration, it appears that Taxpayer is making a provision of services not subject to Indiana sales and use tax. First, Taxpayer is prohibited by state and federal law from selling human tissue, but is permitted under those same laws to charge for the costs of performing the service of procuring human tissue. Second, the structure of Taxpayer's charges are on a cost-plus basis, and thus appear to be legitimate service charges and permitted by the criminal laws as described above. Finally, although human tissue could appear to be valuable and outweigh the value of any service charges under a bundled transaction analysis, it appears that federal and state laws have made human tissue essentially valueless by prohibiting their sale. Therefore, Taxpayer is a service provider, and its charges for procuring human tissue do not constitute a retail transaction subject to Indiana sales and use tax.

RULING

Taxpayer's procurement of human tissue is the provision of a service, not a retail transaction involving the sale of tangible personal property, and therefore the charges Taxpayer makes as a service provider for procuring human

tissue are not subject to Indiana sales or use tax.

CAVEAT

This ruling is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances as stated herein are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. However, other taxpayers with substantially identical factual situations may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material respect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this ruling a change in statute, regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection.

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