

Letter of Findings Number: 04-20160008
Use Tax
For Tax Years 2012-14

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 This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Business was able to produce documentation showing that certain purchases were either exempt purchases for resale or that sales tax was paid at the time of purchase. Other purchases were eligible for the agricultural exemption. Therefore, those purchases are not subject to use tax. Three transactions under protest remain subject to use tax.

ISSUE

I. Use Tax—Imposition.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-5-2; IC § 6-2.5-5-8; IC § 6-8.1-5-1; 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); [45 IAC 2.2-3-4](#); [45 IAC 2.2-5-15](#).

Taxpayer protests the imposition of use tax on certain transactions.

STATEMENT OF FACTS

Taxpayer is an Indiana business involved in direct agricultural production as well as retail sales of agricultural-related items. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not paid sales tax on all items of tangible personal property ("TPP") which it purchased during the tax years 2012, 2013, and 2014. The Department therefore issued proposed assessments for use tax, penalty, and interest for those years. Taxpayer protested the proposed assessments and an administrative hearing was held. This Letter of Findings results. Further facts will be supplied as required.

I. Use Tax—Imposition.

DISCUSSION

Taxpayer protests the imposition of use tax on certain purchases of TPP it made during the 2012-14 tax years. The Department determined that Taxpayer had purchased some items of TPP during those years but had not paid sales tax at the time of purchase. The Department separately listed transactions of expense purchases and of asset purchases. Taxpayer protests that some of the items upon which the Department imposed use tax were either purchased for resale or had sales tax paid at the time of purchase. Therefore, Taxpayer argues, those purchases were not subject to sales or use taxes. In its protest, Taxpayer refers to specific purchases to which it protests the imposition of use tax in the order they are listed in the Department's audit report. For instance, if the first item listed in the audit report is under protest, Taxpayer refers to it as "item 1." The first asset listed in the audit report is referred to as "asset 1." Therefore, those items will be referred to in that manner in this Letter of Findings.

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 by 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 tangible personal property is used, stored, or consumed in Indiana, use tax is due unless sales tax was paid at the time of the transaction.

The first category of items under protest is TPP which Taxpayer states it purchased for resale to its customers. Of relevance is IC § 6-2.5-5-8(b), which states:

Transactions involving tangible personal property other than a new motor vehicle are exempt from the state gross retail tax if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of the person's business without changing the form of the property.

The exemption is further clarified by [45 IAC 2.2-5-15](#), which states:

- (a) The state gross retail tax shall not apply to sales of any tangible personal property to a purchaser who purchases the same for the purpose of reselling, renting or leasing, in the regular course of the purchaser's business, such tangible personal property in the form in which it is sold to such purchaser.
 - (b) General rule. Sales of tangible personal property for resale, rental or leasing are exempt from tax if all of the following conditions are satisfied:
 - (1) The tangible personal property is sold to a purchaser who purchases this property to resell, rent or lease it;
 - (2) The purchaser is occupationally engaged in reselling, renting or leasing such property in the regular course of his business; and
 - (3) The property is resold, rented or leased in the same form in which it was purchased.
 - (c) Application of general rule.
 - (1) The tangible personal property must be sold to a purchaser who makes the purchase with the intention of reselling, renting or leasing the property. This exemption does not apply to purchasers who intend to consume or use the property or add value to the property through the rendition of services or performance of work with respect to such property.
 - (2) The purchaser must be occupationally engaged in reselling, renting or leasing such property in the regular course of his business. Occasional sales and sales by servicemen in the course of rendering services shall be conclusive evidence that the purchaser is not occupationally engaged in reselling the purchased property in the regular course of his business.
 - (3) The property must be resold, rented or leased in the same form in which it was purchased.
- (Emphasis added).

Therefore, if TPP is purchased for resale, rental, or leasing in the ordinary course of the purchaser's business, it is exempt from sales and use taxes unless the purchaser uses or consumes the property through the rendition of

services or performance of work with respect to such property, as provided by IC § 6-2.5-5-8(b) and [45 IAC 2.2-5-15\(c\)\(1\)](#).

Taxpayer states that it did resell the TPP at issue in this protest in the ordinary course of its business and that its purchase of the TPP was therefore exempt from sales and use taxes. In the course of the protest process, Taxpayer supplied additional documentation and analysis to support its position. After review, Taxpayer has supplied sufficient documentation to establish that items 5, 9, 19, 27, and 45 were resold in the ordinary course of its business and so were eligible for the exemption provided by IC § 6-2.5-5-8(b).

The next category of items under protest is items upon which Taxpayer states that sales tax was paid at the point of purchase, use tax was remitted during the appropriate tax year, or that the item was a vehicle upon which sales tax was paid at the time the vehicle was registered. In either case, Taxpayer states that use tax is not now due on the purchase of these items. As stated above, under IC § 6-2.5-3-2(a) use tax is due when sales tax is not paid at the time TPP is purchased and the TPP is used, stored, or consumed in Indiana. In the course of the protest process, Taxpayer has supplied sufficient documentation and analysis to establish that items 61, 97, 103, and 105, as well as assets 2, 6, 7, and 8 either had sales tax paid at the time of purchase, or that use tax was previously remitted and so use tax is not now due on those items.

The next category of purchases under protest is items which were services and not TPP. As explained above, under IC § 6-2.5-3-2(a) use tax is due when sales tax is not paid at the time TPP is purchased and the TPP is used, stored, or consumed in Indiana. Services are not subject to sales or use taxes. In the course of the protest process, Taxpayer has provided sufficient documentation and analysis to establish that items 26, and 72 were for services and were not the purchase of TPP. Therefore, as provided by IC § 6-2.5-3-2(a), use tax is not due on these transactions.

The next category of items under protest concerns what Taxpayer considers duplicate entries of the same transaction. Taxpayer states that item 64 and item 65 are duplicates of a purchase of 520 gallons of on road fuel and that the transaction should only be included once. After review of the audit report, the Department agrees that the same transaction has been listed twice and that the second entry of \$621.22 should be removed from the Department's calculations of use tax due.

The final category of items under protest concerns those which Taxpayer states were used in direct agricultural production. IC § 6-2.5-5-2 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 added).

In the course of the protests process, Taxpayer provided documentation and analysis supporting its position that the various items were used directly in agricultural production and therefore met the agricultural exemption provided under IC § 6-2.5-5-2. After review of the documentation and analysis, the Department agrees that items 1, 4, 6, 11, 15, 20, 21, 22, 25, 37, 49, 51, 52, 54, 56, 62, 63, 77, 91, and 101 as well as assets 2 and 4 qualify for the agricultural exemption provided by IC § 6-2.5-5-2. Also, item 50 and item 55 have invoices which list specific items, some of which are for exempt agricultural production and some of which are not exempt. Therefore, those transactions will be partially exempt in the percentages of exempt items listed on the invoices and non-exempt items.

Taxpayer also protests the imposition of use tax on item 28 and item 31. Taxpayer states that item 28 was used fifty percent of the time to load manure and fifty percent of the time to load seed into a planter, while item 31 was used one hundred percent of the time to load seed into a planter. While the fifty percent use of item 28 to load manure was exempt under IC § 6-2.5-5-2(b)(3), the Department does not agree that the fifty percent use to load seed was exempt. The planter was exempt since it was directly used in agricultural production (i.e., planting seed), but the loading of the seed preceded the first production step and so the loader was not directly used in

agricultural production. Similarly, item 31 did not qualify for the agricultural exemption since it was used one hundred percent to load seed into a planter.

Also, asset 1 (also referred to in the audit report and protest materials as "asset 187") was considered to be one third taxable use by the Department. Taxpayer protests that the item was one hundred percent used in agricultural production. In the course of the protest process, Taxpayer provided sufficient documentation and analysis to establish that asset 1 was used entirely in direct agricultural production. Therefore, asset 1 was exempt from sales and use taxes under IC § 6-2.5-5-2.

Similarly, asset 3 was considered to be fifty percent exempt and fifty percent taxable. Taxpayer states that asset 3 was a grain bin and that the bin was used one hundred percent for agricultural use and therefore was one hundred percent non-taxable. However, after review of the audit report and the protest materials, the Department cannot agree with Taxpayer's protest on asset 3. The audit report refers to asset 3 as a grain cart, not a grain bin. While Taxpayer states that the bin is used for agriculture, there are various possible uses for grain bins. For instance, a bin could be used for drying and also for storage. The drying activity is exempt while the storage is not. Since Taxpayer has not elaborated on the use of the bin, the Department cannot agree with the protest on this point. Also, even assuming that the protest letter has a typo and that it should have said "cart" and not "bin," carts also have various possible uses with various taxable status attached to each use. Again, Taxpayer has not elaborated or verified the use of the TPP listed as asset 3 and has not met the burden imposed under IC § 6-8.1-5-1(c).

The final category under protest is a single item which Taxpayer states was the rental of TPP in a state other than Indiana. As provided by IC § 6-2.5-3-2(a), use tax is imposed on the use, storage, or consumption of TPP in Indiana. In this case, the TPP was not used, stored, or consumed in Indiana, therefore Indiana use tax is not due on this transaction.

In conclusion, Taxpayer is sustained on the majority of items and assets under protest. As provided above, most of the items and assets meet one of several exemptions or have already had sales or use taxes paid on the transactions. Taxpayer has met its burden under IC § 6-8.1-5-1(c) regarding these transactions. The only three transactions under protest which are denied are fifty percent of item 28, one hundred percent of item 31, and the grain bin/cart listed as asset 3. Taxpayer has not met its burden under IC § 6-8.1-5-1(c) regarding these transactions.

FINDING

Taxpayer is sustained in part and denied in part, as provided above.

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