

**Letter of Findings: 04-20160312
Gross Retail Tax
For the Years 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Indiana Social Organization was not required to pay sales or use tax on the purchase of utilities because the Department issued the Social Organization blanket exemption letter in 2012; the Department's 2016 decision imposing tax on the utilities necessitated "prospective" treatment.

ISSUE

I. Gross Retail Tax - Exempt Purchase of Utilities.

Authority: IC § 6-2.5-1-2; 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 § 6-2.5-5 et seq.; IC § 6-8.1-5-1(c); IC § 6-8.1-3-3; 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); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer argues that it was not subject to sales tax on the purchase of utilities.

STATEMENT OF FACTS

Taxpayer is an Indiana organization operating as a non-profit social organization. Taxpayer offers food and beverage services and recreational activities. The Indiana Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer's business records and tax returns.

The audit resulted in an assessment of additional sales and use tax. Taxpayer disagreed with a portion of the Department's assessment and submitted a protest to that effect. An administrative hearing was conducted by telephone during which Taxpayer's representatives explained the basis for the protest. This Letter of Findings results.

I. Gross Retail Tax - Exempt Purchase of Utilities.

DISCUSSION

Taxpayer argues that it was not required to pay sales tax on the purchase of utilities because the Department previously issued Taxpayer a "blanket" "Utility/Telecommunications Exemption" dated 2012.

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). Thus, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position 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). "[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.

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. IC §§ 6-2.5-5 et seq. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-1-2; IC § 6-2.5-4-1. A complementary 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. IC § 6-2.5-3-2.

IC § 6-2.5-1-27 provides that enumerated utilities (including electricity, natural gas, water) constitute "tangible personal" property subject to the state's sales and use tax.

During the course of the audit, the Department found that the 2012 exemption letter was erroneously issued and that Taxpayer was required to pay use tax on the purchase of electricity and natural gas. As explained in the audit report:

The [T]axpayer received a blanket exemption letter for all metered utilities [I]t was found that the blanket exemption letter was incorrectly issued in 2012 and has been revoked.

The audit report further explained in relevant part:

The [utilities] listed in the audit do not qualify for exemption from tax under [45 IAC 2.2-5-55\(3\)](#) because they were purchased by a nonprofit organization that was organized and operated predominately for social purposes.

The "blanket exemption" issued to Taxpayer by the Department in 2012, provides:

All present and future metered utility and/or telecommunications accounts, excluding sewer charges, billed under the legal name of [Taxpayer] registered under Taxpayer Identification Number [] are exempt from the requirement of paying Indiana Sales tax only. This blanket exemption letter is an exception to the normal requirement of providing an ST-109 for each utility account/meter.

Taxpayer explains that it received a refund of sales tax for the period prior to issuance of the 2012 letter and that the 2016 audit's imposition of tax creates a financial hardship. Taxpayer argues that it was entitled to rely on the Department's plain statement contained in the 2012 exemption letter; Taxpayer is correct.

Taxpayer does not now dispute that it is required to pay sales tax on the purchase of utilities and - since the issuance of the February 2016 audit report - it has done so. However, Taxpayer is not now required to retrace its steps and pay tax on the utilities purchased after the Department's issuance of the "blanket exemption" in 2012 until it received the 2016 audit. Although neither the 2012 exemption letter nor the 2016 audit report were "adopted as a rule," IC § 6-8.1-3-3 precludes the Department from "increase[ing] a taxpayer's liability for a listed tax" by means of Department's reinterpretation of the imposition statute.

FINDING

To the extent that the Department required Taxpayer to pay sales or use tax on the purchase of utilities after the issuance of the 2012 exemption letter until the date the Department issued the 2016 audit report, Taxpayer's protest is sustained.

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