

Letter of Findings: 04-20160460; 04-20160461
Gross Retail and Use Tax
For the Years 2012 through 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Out-of-State Wholesaler was not entitled to offset an assessment of additional sales and use tax determined by means of a statistical sample because the transactions at issue were included in the pool of transactions from which the sample was derived but which were not included in the sample; it was also not entitled to rely on exemption certificates issued by states other than Indiana.

ISSUES

I. Gross Retail Tax - Nonreturnable Packaging Materials.

Authority: IC § 6-2.5-1-2; 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 § 6-8.1-3-12(b); IC § 6-8.1-5-1(c); 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 2.2-5-16\(a\)-\(b\)](#).

Taxpayer argues it is entitled to a refund of sales tax paid on the purchase of packaging materials.

II. Gross Retail Tax - Exemption Certificates.

Authority: IC § 6-2.5-2-1(a); IC § 6-2.5-2-1(b); IC § 6-2.5-8-8(a); IC § 6-2.5-9-3.

Taxpayer maintains it was not required to collect sales tax on sales to Indiana customers from whom it obtained exemption certificates in "good faith."

STATEMENT OF FACTS

Taxpayer is an out-of-state business which sells swimming pool equipment, parts and supplies and other backyard related products to wholesale customers around the world. Taxpayer operates Indiana distribution facilities.

The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's tax returns and business records. The audit did so by means of a "statistical" sample and methodology to which Taxpayer did not agree. The review resulted in the issuance of two different audit reports. The first report addressed the period from January 2012 to October 2013 during which Taxpayer operated a single Indiana business location. The second report addressed the period from November 2013 through 2014 during which Taxpayer operated a second Indiana business location and filed sales tax returns on a consolidated basis.

The audit(s) resulted in an assessment of additional sales and use tax. Taxpayer disagreed with a portion of the assessment believing it could submit additional documentation which would decrease the assessment. Taxpayer submitted a protest to that effect. An administrative hearing was conducted by telephone during which Taxpayer's representative explained the basis for the protest. This Letter of Findings results.

I. Gross Retail Tax - Nonreturnable Packaging Materials.

DISCUSSION

The issue is whether Taxpayer can purchase nonreturnable packaging materials without paying sales tax.

Taxpayer bought stretch film and plastic strapping materials on three occasions from a single Indiana vendor. Each of the three invoices indicates that Indiana sales tax was charged. Taxpayer believes that the packaging materials were exempt and that it should now receive an offsetting credit for the amount of sales tax (\$328.65) it paid on these three purchases.

As with any such assessment, it is the Taxpayer's responsibility to establish that the assessment of additional sales and/or use tax 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).

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.

[45 IAC 2.2-5-16](#) provides in relevant part an exemption as follows:

- (a) The state gross retail tax shall not apply to sales of nonreturnable wrapping materials and empty containers to be used by the purchaser as enclosures or containers for selling contents to be added, and returnable containers containing contents sold in a sale constituting selling at retail and returnable containers sold empty for refilling.
- (b) In general the gross proceeds from the sale of tangible personal property in a transaction of a retail merchant constituting selling at retail are taxable. This regulation [\[45 IAC 2.2\]](#) provided an exemption for wrapping materials and containers.
- (c) General rule. The receipt from a sale by a retail merchant of the following types of tangible personal property are exempt from state gross retail tax:
 - (1) Nonreturnable containers and wrapping materials including steel strap and shipping pallets to be used by the purchaser as enclosures for selling tangible personal property.
 - (2) Deposits for returnable containers received as an incident to a transaction of a retail merchant constituting selling at retail.
 - (3) Returnable containers sold empty for refilling.

Taxpayer uses the stretch wrap and plastic strapping materials to ship its pool supplies and equipment to its various wholesale customers. Based on the information supplied, the Department is prepared to agree that it was not required to pay sales tax on the purchases of those materials because the three transactions fall squarely within the exemption described in [45 IAC 2.2-5-16](#). The stretch wrap and plastic strapping are "non-returnable wrapping materials" which are "used by the purchaser as enclosures for selling tangible personal property."

However, the analysis is ultimately fruitless. The Department exercised its statutory authority to employ a statistical sample of Taxpayer's transactions to determine Taxpayer's sale and use tax liability. IC § 6-8.1-3-12(b) allows, as follows, the Department to employ a sampling methodology in determining a taxpayer's liability:

The department may audit any returns with respect to the listed taxes using statistical sampling. If the taxpayer and the department agree to a sampling method to be used, the sampling method is binding on the taxpayer and the department in determining the total amount of additional tax due or amounts to be refunded.

In this case, the three invoices were included in the universe of transactions from which the sample was derived but which were not part of the sample. Taxpayer can no more search within that universe for an offsetting refund than the Department can now seek to locate within that same universe non-exempt transactions. Taxpayer has the opportunity to challenge any of transactions which constituted the "sample" in an effort to establish that the assessment was wrong as required by IC § 6-8.1-5-1(c). Taxpayer has failed to do so.

FINDING

Taxpayer's protest is respectfully denied.

II. Gross Retail Tax - Exemption Certificates.

DISCUSSION

The issue is whether Taxpayer was entitled to rely on various out-of-state exemption documents and Indiana (ST-105) exemption certificates when it sold pool equipment and supplies.

Taxpayer failed to obtain exemption certificates from a number of its customers. The audit granted a 75 day extension in order to allow Taxpayer "to obtain Form AD-70, Special Sales/Use Tax Exemption Certificate[s] from its customers." Following that 75 day extension, Taxpayer requested and was granted an additional 45 days in which to obtain the exemption certificates. As to those AD-70 certificates that were obtained, the audit report notes:

Sales in which the [T]axpayer was able to obtain Form AD-70 and/or other evidence indicating that the sales would be considered exempt have been removed from the statistical sample.

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 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.

IC § 6-2.5-5-8(a) provides as follows:

A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.

Taxpayer has now provided three additional ST-105 forms it had received from its customers. Taxpayer also provided copies of various documents from California, Illinois, New York, Michigan, Georgia, Tennessee, and Indiana and asks that the Department to adjust the assessment to reflect purportedly exempt sales.

The Department is prepared to accept the three form ST-105 ("General Sales tax Exemption Certificates"). Department acknowledges exemption certificates from "Quick Pools," Jesse Tremain Tile and Marble," and "Overbeck Pool" because the audit assessed tax on transactions with those entities. However, the Department does not agree that the Department should accept the California, Illinois, New York, Michigan, Georgia, and Tennessee documents. Whatever information may or may not be in these out-of-state exemption certificates, the documents do not meet the requirements set out in IC § 6-2.5-5-8(a). The out-of-state documents are not in the form prescribed or recognized by the Department.

FINDING

Taxpayer's protest is sustained in part and denied in part. The audit division is requested to review the three newly submitted ST-105 forms and to make whatever adjustments to the assessment as are warranted.

SUMMARY

The Department does not agree that Taxpayer may now pick-and-choose evidence from outside the pool of transactions in order to minimize an assessment based upon the limited sample of transactions considered during the audit; the Department does agree that the Department's Audit Division should take into consideration the additional ST-015 forms as evidence that transactions within the sample were exempt.

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