

Letter of Findings Number: 04-20160604
Gross Retail Tax
For Tax Years 2013-2015

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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Retail Merchant provided sufficient documentation to show that the protested transactions were not Indiana transactions and not subject to Indiana sales tax. Retail Merchant's negligence penalty will also be waived.

ISSUES

I. Gross Retail Tax - Out of State Sales.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-2.5-9-3; IC § 6-8.1-5-1; IC § 6-8.1-5-4; IC § 6-2.5-13-1; Indiana Dept. 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); Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Indiana Dep't of State Rev. v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); [45 IAC 2.2-2-1](#).

Taxpayer argues that it sold tangible personal property to customers, that were out-of-state locations, and that it was not required to collect Indiana sales tax on those transactions.

II. Tax Administration—Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana manufacturer. The Indiana Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer's business records for tax years 2013 through 2015. The audit concluded that Taxpayer failed to collect sales tax on certain transactions with its customers and assessed Taxpayer additional sales tax, penalty, and interest.

Taxpayer protested the Department's assessment as it applied to a specific selection of sales and provided additional evidence to support its protest. Taxpayer also protested the imposition of penalty. This Letter of Findings is based on the additional evidence provided by Taxpayer during a phone hearing and the information contained within the protest file. Further facts will be supplied as required.

I. Gross Retail Tax - Out of State Sales.

DISCUSSION

The Department assessed sales tax on certain transactions in which Taxpayer did not collect or remit sales tax at the time of purchase. During the audit, the Department used a block sampling method consisting of 2015 sales and projected that number to the remaining years at issue. Taxpayer protests the imposition of sales tax on certain transactions in the sample regarding 2015 transactions as taxable. Taxpayer stated those transactions were not Indiana transactions subject to Indiana sales tax.

All tax assessments are prima facie evidence that the Department's claim for the tax is valid; the taxpayer bears

the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Indiana Dept. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463,466 (Ind. 2012). Thus, the taxpayer is required to provide documentation explaining and supporting its challenge that the Department's assessment 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); see also Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012). When an agency is charged with enforcing a statute, the jurisprudence defers to the agency's reasonable interpretation of that statute "over an equally reasonable interpretation by another party." Indiana Dep't of State Rev. v. Caterpillar, Inc., 15 N.E.3d 579, 583 (Ind. 2014).

Indiana imposes a sales tax on retail transactions made in Indiana. IC § 6-2.5-2-1(a); [45 IAC 2.2-2-1](#). A retail transaction is a transaction made by a retail merchant that constitutes "selling at retail." IC § 6-2.5-1-2(a). Selling at retail occurs when a person "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration." IC § 6-2.5-4-1(b). A person who acquires tangible personal property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). A retail merchant, such as Taxpayer, is required to "collect the tax as agent for the state." IC § 6-2.5-2-1(a). The retail merchant "must keep books and records so that the department can determine the amount, if any, of the [retail merchant's] liability for tax by reviewing those books and records." IC § 6-8.1-5-4(a). Additionally, 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.

The Indiana retail merchant is not responsible for collecting the Indiana sales tax if the retail transactions, i.e., sales, are considered non-Indiana sales. That is, sales are not subject to the Indiana sales tax when the tangible personal property sold is delivered, and therefore sourced, to a place outside of Indiana. The Indiana Code dictates how a retail sale should be sourced.

IC § 6-2.5-13-1(d) states:

- (1) When the product is received by the purchaser at a business location of the seller, the sale is sourced to that business location.
- (2) When the product is not received by the purchaser at a business location of the seller, the sale is sourced to the location where receipt by the purchaser (or the purchaser's donee, designated as such by the purchaser) occurs, including the location indicated by instructions for delivery to purchaser (or donee), known to the seller.
- (3) When subdivisions (1) and (2) do not apply, the sale is sourced to the location indicated by an address for the purchaser that is available from the business records of the seller that are maintained in the ordinary course of the seller's business when use of this address does not constitute bad faith.
- (4) When subdivisions (1), (2), and (3) do not apply, the sale is sourced to the location indicated by an address for the purchaser obtained during the consummation of the sale, including the address of a purchaser's payment instrument, if no other address is available, when use of this address does not constitute bad faith.
- (5) When none of the previous rules of subdivision (1), (2), (3), or (4) apply, including the circumstance in which the seller is without sufficient information to apply the previous rules, then the location will be determined by the address from which tangible personal property was shipped, from which the digital good or the computer software delivered electronically was first available for transmission by the seller, or from which the service was provided (disregarding for these purposes any location that merely provided the digital transfer of the product sold).

As mentioned earlier, Taxpayer is required to maintain and preserve documentation on its sales so the Department can correctly determine Taxpayer's tax liability. During the protest process Taxpayer provided invoices for the transactions in question for 2015. Each invoice contained a "Bill To" address and a "Send To" address. For each invoice both addresses contained a non-Indiana address. Taxpayer also provided a statement from the customer stating that, "[Customer] has all [tangible personal property] delivered or direct shipped to their location."

Taxpayer provided sufficient documentation to show that the protest transactions were not Indiana transactions. Therefore the protested transactions are not subject to Indiana sales tax. Taxpayer met its burden to provide the Department's assessment incorrect as provided by IC § 6-8.1-5-1(c). Since Taxpayer's audit was based on a statistical sample for 2015 the projection rate will be adjusted accordingly pursuant to this decision.

FINDING

Taxpayer's protest is sustained.

II. Tax Administration—Penalty.

Taxpayer requested that the Department abate the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1(a), the Department may assess a negligence penalty if the taxpayer:

- (1) fails to file a return for any of the listed taxes;
- (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
- (3) incurs, upon examination by the department, a deficiency that is due to negligence;
- (4) fails to timely remit any tax held in trust for the state; or
- (5) is required to make a payment by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department.

[45 IAC 15-11-2](#)(b) further states:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty when "the taxpayer affirmatively establishes that the failure . . . was due to reasonable cause and not due to negligence." [45 IAC 15-11-2](#)(c). The taxpayer "must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section." *Id.* The Department is mindful that "[r]easonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case." *Id.*

Since Taxpayer only protested certain items the remaining assessment still contains penalty on those items. However, in this instance, Taxpayer has demonstrated that its actions were reasonable as described in [45 IAC 15-11-2](#)(c). Thus, Taxpayer's request for penalty abatement is sustained on the remaining items not protested.

FINDING

Taxpayer's protest of the negligence penalty is sustained.

SUMMARY

Taxpayer's protest regarding sales tax is sustained. Taxpayer's protest regarding negligence penalty is sustained.

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