

Letter of Findings: 04-20150655
Sales and Use Tax
For the Years 2012, 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Company was liable for use tax on various purchases of tangible personal property that were used in Indiana because it failed to pay sales tax or self-assess and remit the Indiana use tax.

ISSUE

I. Sales and Use Tax - Imposition.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-4-1; IC § 6-2.5-5; IC § 6-8.1-5-1; IC § 6-8.1-5-4; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); 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); Miller Brewing Co. v. Indiana Dep't of State Revenue, 903 N.E.2d 64 (Ind. 2009); Indiana Dep't of State Rev. v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Rhoades v. Indiana Dep't of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); USAir, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466 (Ind. Tax Ct. 1993); Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974); [45 IAC 2.2-3-4](#); [45 IAC 2.2-3-14](#); [45 IAC 2.2-3-16](#); [45 IAC 2.2-5-6](#); [45 IAC 2.2-5-8](#); [45 IAC 2.2-5-9](#); [45 IAC 2.2-5-10](#); [45 IAC 2.2-5-61](#).

Taxpayer protests the assessment of use tax on tangible personal property which it used in Indiana and depreciated on its tax returns.

STATEMENT OF FACTS

Taxpayer is an out-of-state company that operated two gymnasiums in Indiana during the audit period. Taxpayer purchased and used various gym equipment, including, but not limited to tanning beds, dumbbells, and treadmills, in Indiana. The Indiana Department of Revenue ("Department") conducted a sales and use tax audit for tax years 2007 through 2013. Pursuant to the audit, the Department determined that Taxpayer did not pay sales tax or self-assess use tax on certain purchases of tangible personal property used in the course of its business. As a result, the Department's audit assessed additional use tax, negligence penalty, and interest.

Taxpayer protests. A phone hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales and Use Tax - Imposition.

DISCUSSION

The Department's audit found that Taxpayer purchased and used gym equipment without paying sales or use tax. As a result, the audit assessed use tax on some of Taxpayer's purchases. Taxpayer, to the contrary, claimed that the audit assessment was overstated. Thus, the issue in this case is whether the Department's assessment was overstated.

Indiana mandates that every person who is subject to a listed Indiana tax must keep books and records, including all source documents, "so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records." IC § 6-8.1-5-4(a). "If the [D]epartment reasonably believes that a person has not reported the proper amount of tax due, the [D]epartment shall make a proposed assessment of

the amount of the unpaid tax on the basis of the best information available to the [D]epartment." IC § 6-8.1-5-1(a). All tax assessments are prima facie evidence that the Department's claim for the unpaid 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 Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012). "Each assessment and each tax year stands alone." *Miller Brewing Co. v. Indiana Dep't of State Revenue*, 903 N.E.2d 64, 69 (Ind. 2009). 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); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012). Also, "all statutes are presumptively constitutional." *Indiana Dep't of State Rev. v. Caterpillar, Inc.*, 15 N.E.3d 579, 587 (Ind. 2014) (citing *UACC Midwest, Inc. v. Indiana Dep't of State Rev.*, 629 N.E.2d 1295, 1299 (Ind. Tax Ct. 1994)). 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." *Caterpillar, Inc.*, 15 N.E.3d at 583.

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). "Use" means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a). The use tax is functionally equivalent to the sales tax. See *Rhoads v. Indiana Dep't of State Revenue*, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002).

By complementing the sales tax, the use tax ensures that non-exempt retail transactions (particularly out-of-state retail transactions) that escape sales tax liability are nevertheless taxed. *Rhoads*, 774 N.E.2d at 1048; *USAir, Inc. v. Indiana Dep't of State Revenue*, 623 N.E.2d 466, 468 - 69 (Ind. Tax Ct. 1993). The use tax ensures that, after such goods arrive in Indiana, the retail purchasers of the goods bear their fair share of the tax burden. *Rhoads*, 774 N.E.2d at 1050. To trigger imposition of Indiana's use tax, tangible personal property must (as a threshold matter) be acquired in a retail transaction. IC § 6-2.5-3-2(a); *USAir, Inc.*, 623 N.E.2d at 468 - 69. A taxable retail transaction occurs when (1) a party acquires tangible personal property as part of its ordinary business for the purpose of reselling the property; (2) that property is then exchanged between parties for consideration; and (3) the property is used in Indiana. See IC § 6-2.5-1-2; IC § 6-2.5-4-1(b) and (c); IC § 6-2.5-3-2(a).

Accordingly, as a general rule, all purchases of tangible personal property are taxable. [45 IAC 2.2-5-6\(a\)](#); [45 IAC 2.2-5-8\(a\)](#); [45 IAC 2.2-5-9\(a\)](#); [45 IAC 2.2-5-10\(a\)](#); [45 IAC 2.2-5-61\(j\)](#). An exemption from the use tax is granted for transactions where the sales tax was paid at the time of purchase pursuant to IC § 6-2.5-3-4 and [45 IAC 2.2-3-4](#). There are various tax exemptions available under [IC 6-2.5-5](#); these enumerated exemptions also apply to transactions which are subject to Indiana use tax. [45 IAC 2.2-3-14](#). A statute which provides a tax exemption, however, is strictly construed against the taxpayer. *Indiana Dep't. of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." *Id.* at 101 (internal citations omitted). Additionally, "[I]f liability for Indiana use tax shall be reduced by a credit for the amount of any sale, purchase, or use tax paid to any other state . . . with respect to the tangible personal property on which Indiana use tax applies." [45 IAC 2.2-3-16](#).

In this instance, Taxpayer is an out-of-state company, which had two Indiana operations. The audit noted, in relevant part, as follows:

Audit is assessing use tax on purchases made for gym equipment and tools put into service at the two Indiana [] locations on which sales tax was not remitted to the vendor. [Taxpayer] did not accrue any use tax. . . .

Audit limited the review to capital assets. However, audit is assessing both the asset as well as delivery charges that were frequently not capitalized. . . .

The records provided by [Taxpayer] included some of the purchase invoices for the capital assets. Audit was also provided an asset listing Audit used this listing along with detailed depreciation schedules to compare to the asset invoices. Where invoices were provided and taxes were paid to another state, audit is giving credit for the tax paid. . . . Where no invoice was provided for Indiana assets per the asset listings or Indiana assets per the detailed depreciation schedules, audit is assessing tax as no documentation to

support that tax was paid to the vendor. . . .

Taxpayer protested numerous items on which the audit imposed tax. Taxpayer identified several arguments which formed the basis of its protest, including (1) Taxpayer did not use the item or items in Indiana, (2) the audit assessed use tax twice on the same item or items, (3) the out-of-state sales tax was collected at the time of the purchases, (4) the assessment on various items was higher than the actual cost.

Taxpayer stated that "the auditor requested invoices to support equipment purchases over that seven year period of time and attempted to agree these records to [Taxpayer's] tax filings which included depreciation schedules." Taxpayer claimed that:

[D]ue to the fact that many invoices were grouped for depreciation schedules, it became a challenge . . . to agree purchases to the depreciation schedules. . . . This resulted in the auditor duplicating many equipment purchases by including all items located in actual invoices, plus items from depreciation schedules and other internal equipment lists that included the same equipment found in the invoices. Further, the auditor used dollar figures from internally produced listing, which were often estimates and not final figures charged by vendors or paid by [Taxpayer].

This Letter of Findings addresses Taxpayer's arguments, as follows:

A. Items were not used in Indiana.

Taxpayer protested items 2 and 4 which were listed in the audit report. Taxpayer claimed that it purchased two "tanning beds," but it never received the beds. Taxpayer thus argued that it was not liable for the Indiana use tax because it could not have used the beds in Indiana. Taxpayer asserted that the auditor erroneously relied on Taxpayer's depreciation schedule. To support its protest, Taxpayer provided a copy of its criminal complaint claiming that it filed a complaint against the seller.

Taxpayer further protested the assessment of Item 412, stating that "[t]he auditor included the entire amount listed, when notes on the list indicated that only 1/3 of this amount related to assets [used in Indiana]. Taxpayer stated that it "often purchased assets for many locations over three states." Taxpayer argued that it should be only responsible for 1/3 of the use tax because the remaining 2/3 were not subject to Indiana use tax. In addition to its calculation, Taxpayer offered "[Indiana] Equipment Re-Cap," which contained a list of items presumably used in Indiana locations. The document referenced the Quote Q161511, in the amount of \$39,615.59. Taxpayer also provided a "Confirmed Order" (referencing Q161511) which listed "Total \$13,820.60."

Similarly, Taxpayer also protested items 14-15, 20-21, and 50-58, stating that these items were used outside of Indiana. Taxpayer however did not provide supporting documentation on the remainder of items which it claimed were used outside of Indiana.

Upon review, however, the Department is not able to agree that those items were not subject to Indiana use tax. Specifically, a criminal complaint alone was insufficient to support its protest that it never used the beds in Indiana because Taxpayer listed the beds (Items 2 and 4) in its depreciation schedule that it used for its business in Indiana and claimed the tax deductions in its 2007 return. If Taxpayer never received the beds to be used in its business, it should not have depreciated the beds in its depreciation schedule in 2007. To qualify for the tax deductions, Taxpayer must own the assets and the assets must be placed into service. See <https://www.irs.gov/businesses/small-businesses-self-employed/a-brief-overview-of-depreciation> (explaining in part that the taxpayer must own the property, the taxpayer must use the property in business or in an income-producing activity, and the property cannot be disposed in same year) (last visited May 8, 2017).

Second, Item 412 was dated "07/13/11" in the audit report. Taxpayer's "Equipment Re-Cap" demonstrated that items were in Indiana as of "07/13/11." Thus, the Department is not able to agree that Taxpayer only used 1/3 in Indiana pursuant to its April 29, 2011, Confirmed Order and its handwritten calculation.

Finally, Taxpayer did not provide verifiable documents to support that Items 14-15, 20-21, and 50-58 were used outside of Indiana. Thus, the Department does not need to address Taxpayer's protest of Items 14-15, 20-21, and 50-58.

In short, the Department is not able to agree that Taxpayer met its burden of proof on the items it claimed were not used in Indiana.

B. Items were Assessed Twice.

Taxpayer complained that the audit should not have relied on Taxpayer's depreciation schedule and asset listing to make adjustments because Taxpayer "grouped" its invoices "for depreciation purposes." Taxpayer contended the audit made duplicate assessments on the same items, as follows: (1) Items 7, 16 and 17 (were included in Items 87-119, 121-161, and 239), (2) Items 8, 10 and 11 (were included in Items 245-265), (3) Item 19 (were included in 201 and 206), (4) Items 37-41 (were included in Items 341-345), (5) Items 79 and 372, (6) Item 245 (referencing Items 245-265), (7) Items 254-257, (8) Items 264-265 (referencing Items 262-263), (9) Items 269-270, (10) Items 277-282, (11) Items 285 and 296-300, (12) Items 356-357, (13) Item 375 (referencing Items 76-78, 207-226, 266-268), (14) Items 392-395 (referencing Items 77 and 392-395), and (15) Items 433-478 (included Item 43, referencing Items 435-478). Taxpayer offered sample proposals, order forms, and invoices to support its protest.

Upon review, however, Taxpayer's reliance on those documents is misplaced. Specifically, Taxpayer only offered partial information that cannot be verified or Taxpayer's documents demonstrated that the descriptions of items may be the same, but the purchase dates were different. For example, Items 18 and 49 were purchased in fall 2007, but the items Taxpayer claimed to be duplicate under the same descriptions were purchased in March 2008. The price of the items at issue was also different. Taxpayer thus failed to substantiate that the audit imposed use tax on the same items. In short, the Department is not able to agree that Taxpayer met its burden of proof on the items it claimed were assessed twice.

C. Sales Tax was Paid at the time of Purchases.

The audit assessed Indiana use tax because Taxpayer's records showed no sales tax was paid on those items and no exemption certificates. It should be noted that Indiana imposed six (6) percent sales or use tax prior to March 1, 2008. Beginning March 1, 2008, a purchaser is responsible for the sales or use tax at seven (7) percent. During the audit Taxpayer was not able to provide invoices or other verifiable documents to show that tax was paid on various purchases, including (1) Item 67, (2) Items 358, 363, 367, 369, 373 and 374, (3) 398-399, 400-411, and 423-416, (4) Items 428-431, (5) Items 479-480, and (6) Items 489-492. Taxpayer offered various documents to support its protest, claiming that out-of-state sales tax was collected.

Upon review, the Department is prepared to agree that Taxpayer was entitled to credits on out-of-state sales tax paid concerning Items 67, 358, 363, 369, 374, 398-399, 428-431, 479-480, and 489-492 pursuant to [45 IAC 2.2-3-16](#). Taxpayer, however, is not entitled to the credit on the remaining protest items in this section.

D. Assessments on Estimates.

Taxpayer protested the audit assessment on four (4) items, which were dated "02/01/08." (Items 240-243; "Lifefitness; Cross-trainer Inspire w/ TV"; Invoice Number 2865501). Taxpayer stated, in relevant part, that:

The cross-trainers included in this invoice however were purchased at a price of \$3,441.56 but are included in the auditor's report at a cost of \$3,697.56 each, a difference of \$256 per unit. Therefore, the total amount disputed related to these four items is \$1,204.

Taxpayer provided the Invoice (Number 2865501) to support its protest.

Upon review, however, Taxpayer is mistaken. The Invoice Number 2865501, dated April 18, 2008, stated that "Unit Price" is "\$3,441.56" per unit, and also listed the "Extension" is "\$3,766.24" per unit. The Invoice also contained a handwritten note of "3,697.56." The "3,697.56" notation presumably could have been the actual amount Taxpayer paid per unit to the vendor on the purchases and subsequently listed in its depreciation schedule. Thus, given the totality of the circumstances, in the absence of other supporting documentation, such as the actual payment for the purchases, the Department is not able to agree that the assessment of those four items were overstated.

FINDING

Taxpayer's protest is sustained in part and denied in part. Taxpayer's protest is sustained regarding Items 67, 358, 363, 369, 374, 398-399, 428-431, 479-480, and 489-492 pursuant to [45 IAC 2.2-3-16](#). The Department will credit Taxpayer in a supplemental audit review. The remainder of Taxpayer's protest is respectfully denied.

