

DEPARTMENT OF STATE REVENUE

04-20170027.LOF

Letter of Findings Number: 04-20170027
Sales Tax
For Tax Years 2013-15

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 This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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 and explanation showing that certain sales were to exempt customers. Therefore, those purchases were not subject to sales tax and business did not need to collect sales tax as a retail merchant. Waiver of penalty was warranted.

ISSUE

I. Sales Tax—Imposition.

Authority: IC § 6-2.5-1-27; IC § 6-2.5-2-1; IC § 6-2.5-5-5.1; IC § 6-2.5-8-8; 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).

Taxpayer protests the imposition of sales tax on sales to some customers.

II. Tax Administration—Negligence Penalty.

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

Taxpayer protests the imposition of penalties.

STATEMENT OF FACTS

Taxpayer is an Indiana electricity supplier. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not collected sales tax on some taxable sales of electricity during the tax years 2013, 2014, and 2015. Also, the Department determined that Taxpayer made some taxable purchases as a consumer upon which sales tax was not paid at the time of the transactions. The Department therefore issued proposed assessments for sales tax, use tax, penalty, and interest for those years. Taxpayer protested the imposition of sales tax on some sales of electricity, as well as related penalty on those sales. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Sales Tax—Imposition.

DISCUSSION

Taxpayer protests the imposition of sales tax on sales to some of its customers during the tax years 2013-15. Taxpayer states that those customers were exempt from paying sales tax on their purchases of electricity. The Department based its determination that tax was due on the basis that the exemption certificates on file had the wrong meter numbers on them and so were not valid. Taxpayer argues that the meters were one-for-one replacements for the meters whose numbers were on the exemption certificates supplied by the customers and that the customers were still exempt.

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.

Next, IC § 6-2.5-1-27 provides:

"Tangible personal property" means personal property that:

- (1) can be seen, weighed, measured, felt, or touched; or
- (2) is in any other manner perceptible to the senses.

The term includes electricity, water, gas, steam, and prewritten computer software.
(Emphasis added).

Also, IC § 6-2.5-5-5.1 provides in relevant parts:

- (a) As used in this section, "tangible personal property" includes electrical energy, natural or artificial gas, water, steam, and steam heat.
 - (b) Transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for direct consumption as a material to be consumed in the direct production of other tangible personal property in the person's business of manufacturing, processing, refining, repairing, mining, agriculture, horticulture, floriculture, or arboriculture. This exemption includes transactions involving acquisitions of tangible personal property used in commercial printing.
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Therefore, electricity is generally subject to sales tax unless the consumer is eligible for an exemption. As a retail merchant, Taxpayer is required to collect and remit sales tax on taxable sales.

Next, IC § 6-2.5-8-8 provides:

- (a) 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 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.
- (b) The following are the only persons authorized to issue exemption certificates:
 - (1) Retail merchants, wholesalers, and manufacturers, who are registered with the department under this chapter.
 - (2) Organizations which are exempt from the state gross retail tax under [IC 6-2.5-5-21](#), [IC 6-2.5-5-25](#), or [IC 6-2.5-5-26](#) and which are registered with the department under this chapter.
 - (3) Persons who are exempt from the state gross retail tax under [IC 6-2.5-4-5](#) and who receive an exemption certificate from the department.
 - (4) Other persons who are exempt from the state gross retail tax with respect to any part of their purchases.
- (c) The department may also allow a person to issue a blanket exemption certificate to cover exempt purchases over a stated period of time. The department may impose conditions on the use of the blanket exemption certificate and restrictions on the kind or category of purchases that are exempt.
- (d) A seller that accepts an incomplete exemption certificate under subsection (a) is not relieved of the duty to collect gross retail or use tax on the sale unless the seller obtains:
 - (1) a fully completed exemption certificate; or
 - (2) the relevant data to complete the exemption certificate; within ninety (90) days after the sale.
- (e) If a seller has accepted an incomplete exemption certificate under subsection (a) and the department

requests that the seller substantiate the exemption, within one hundred twenty (120) days after the department makes the request the seller shall:

- (1) obtain a fully completed exemption certificate; or
 - (2) prove by other means that the transaction was not subject to state gross retail or use tax.
- (f) A power subsidiary (as defined in [IC 6-2.5-4-5](#)) or a person selling the services or commodities listed in [IC 6-2.5-4-5\(b\)](#) who accepts an exemption certificate issued by the department to a person who is exempt from the state gross retail tax under [IC 6-2.5-4-5](#) is relieved from the duty to collect state gross retail or use tax on the sale of the services or commodities listed in [IC 6-2.5-4-5\(b\)](#) until notified by the department that the exemption certificate has expired or has been revoked. If the department notifies a power subsidiary or a person selling the services or commodities listed in [IC 6-2.5-4-5\(b\)](#) that a person's exemption certificate has expired or has been revoked, the power subsidiary or person selling the services or commodities listed in [IC 6-2.5-4-5\(b\)](#) shall begin collecting state gross retail tax on the sale of the services or commodities listed in [IC 6-2.5-4-5\(b\)](#) to the person whose exemption certificate has expired or been revoked not later than thirty (30) days after the date of the Indiana Code 2016 notice. An exemption certificate issued by the department to a person who is exempt from the state gross retail tax under [IC 6-2.5-4-5](#) remains valid for that person regardless of any subsequent one (1) for one (1) meter number changes with respect to that person that are required, made, or initiated by a power subsidiary or a person selling the services or commodities listed in [IC 6-2.5-4-5\(b\)](#). Within thirty (30) days after the final day of each calendar year quarter, a power subsidiary or a person selling the services or commodities listed in [IC 6-2.5-4-5\(b\)](#) shall report to the department any meter number changes made during the immediately preceding calendar year quarter and distinguish between the one (1) for one (1) meter changes and the one (1) for multiple meter changes made during the calendar year quarter. Except for a person to whom a blanket utility exemption applies, any meter number changes not involving a one (1) to one (1) relationship will no longer be exempt and will require the person to submit a new utility exemption application for the new meters. Until an application for a new meter is approved, the new meter is subject to the state gross retail tax and the power subsidiary or the person selling the services or commodities listed in [IC 6-2.5-4-5\(b\)](#) is required to collect the state gross retail tax from the date of the meter change.
(Emphasis added).

In its protest, Taxpayer stated that fourteen (14) of seventeen (17) customers which the Department listed as needing new exemption certificates were exempt customers who met the conditions listed under IC § 6-2.5-8-8(f) to not need new exemption certificates. Taxpayer is not protesting sales tax imposition regarding the three customers without exemption certificates.

In the course of the protest process, Taxpayer supplied the documentation described under and required by IC § 6-2.5-8-8(f) for the fourteen remaining customers. Therefore, Taxpayer is relieved of the requirement to collect and remit sales tax regarding those fourteen customers. Also, until the date of the one-for-one meter exchanges, the previous exemption certificates for the relevant customers had the prior/correct meter numbers and were still valid. Thus, all sales up to the date of the meter exchanges were exempt.

In conclusion, all sales of electricity to the fourteen customers in question were exempt. Taxpayer has supplied the documentation required under IC § 6-2.5-8-8(f). Therefore, Taxpayer has met the burden of proving the proposed assessments wrong as imposed under IC § 6-8.1-5-1(c). The Department will recalculate the amount of sales tax due for the tax years to reflect the exempt status of the fourteen customers under protest.

FINDING

Taxpayer's protest is sustained.

II. Tax Administration—Negligence Penalty.

DISCUSSION

Taxpayer protests the imposition of penalties pursuant to IC § 6-8.1-10-2.1. Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. [45 IAC 15-11-2\(b\)](#) clarifies the standard for the imposition of the negligence penalty as follows:

"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 standard for waiving the negligence penalty is given at [45 IAC 15-11-2\(c\)](#) as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, 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. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer protests the Department's assessment of penalties. Taxpayer states that it at all times exercised the level of reasonable care, caution, and diligence expected of an ordinary taxpayer. After review of the documentation and analysis provided in the protest process, the Department agrees with Taxpayer's position. Taxpayer has been sustained on the imposition of sales tax regarding fourteen of the seventeen customers. Also, Taxpayer has implemented procedures to improve its use tax remittance compliance. Therefore, waiver of penalties is warranted under [45 IAC 15-11-2\(c\)](#).

FINDING

Taxpayer's protest to the imposition of penalties is sustained.

SUMMARY

Taxpayer is sustained in Issue I regarding the imposition of sales tax on sales to fourteen of its customers. Taxpayer is sustained in Issue II regarding the imposition of penalties.

Posted: 07/26/2017 by Legislative Services Agency
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