

**Letter of Findings: 04-20170185
Gross Retail Tax
For the Years 2014 and 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 This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Company provided exemption certificates to show that it properly did not remit sales tax on certain transactions. Company also provided invoices to show that certain transactions were for services only. Due to Company's additional documentation the Department's projection of additional sales shall be recalculated.

ISSUES

I. Gross Retail Tax - Exemption Certificates.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-9-3; IC § 6-2.5-8-8; IC § 6-2.5-5-4; IC § 6-8.1-5-1; *Indiana Dept. of State Rev. v. Kimball Int'l Inc.*, 520 N.E.2d 454 (Ind. Ct. App. 1988); *Tri-States Double Cola Bottling Co. v. Dep't of State Revenue*, 706 N.E.2d 282 (Ind. Tax Ct. 1999); *Mynsberge v. Dep't of State Revenue*, 716 N.E.2d 629 (Ind. Tax Ct. 1999); *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 argues that the Department erred when it determined that Taxpayer failed to remit sales tax on certain transactions.

II. Gross Retail Tax - Services.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-4-1; [45 IAC 2.2-4-2](#); [45 IAC 2.2-2-1](#).

Taxpayer argues that the Department improperly assessed additional sales tax on transactions that were for services only.

STATEMENT OF FACTS

Taxpayer is an Indiana business that sells industrial saws. The Department of Revenue ("Department") conducted an audit review of Taxpayer's business and tax records. The audit resulted in the assessment of additional sales tax. Taxpayer disagreed with a portion of the assessment. An administrative hearing was conducted during which Taxpayer's representatives explained the basis for its protest. This Letter of Findings results. Further facts will be supplied as required.

I. Gross Retail Tax - Exemption Certificates.

DISCUSSION

During the course of the audit, the Department determined that a review of invoices showed that Taxpayer should have remitted sales tax on several transactions. Pursuant to IC § 6-2.5-2-1, the Department assessed additional sales tax. Taxpayer protested the assessments because those transaction were exempt.

As a threshold issue, it is 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.

In applying any tax exemption, the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." *Indiana Dept. of State Rev. v. Kimball Int'l Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988). The exemption to which Taxpayer aspires, IC § 6-2.5-5-4, like all tax exemption provisions, is strictly construed against exemption from the tax. *Tri-States Double Cola Bottling Co. v. Dept't of State Revenue*, 706 N.E.2d 282, 283 (Ind. Tax Ct. 1999); *Mynsberge v. Dept't of State Revenue*, 716 N.E.2d 629, 636 (Ind. Tax Ct. 1999). Therefore, in order for Taxpayer to prevail on the different issues it raises, Taxpayer must demonstrate that the initial assessment was "wrong" and that it is instead entitled to a sales tax exemption which is "strictly construed" in favor of taxation.

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).

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). The purchaser in general "shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction." *Id.* "The retail merchant shall collect the tax as agent for the state." *Id.*

When a purchaser claims the purchase "is exempt from the state gross retail and use taxes," the purchaser "may issue an exemption certificate to the seller instead of paying the tax." IC § 6-2.5-8-8(a). The "seller accepting a proper exemption certificate under IC § 6-2.5-8-8 has no duty to collect or remit the state gross retail or use tax on that purchase." *Id.* However, the "seller that accepts an incomplete exemption certificate . . . is not relieved of the duty to collect gross retail or use tax on the sale unless the seller obtains . . . a fully completed exemption certificate . . . within ninety (90) days after the sale." IC § 6-2.5-8-8(d). Otherwise, as an agent for the State of Indiana, the seller "holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state." IC § 6-2.5-9-3.

The Department assessed Taxpayer with sales tax, for failure to collect sales tax at the time of certain transactions. Taxpayer protested specific assessments on certain invoices. Taxpayer provided exemption certificates for the following invoice numbers: 6040, 5986, 5954, 6967, 6959, 6930, 7894, 7686, 5468, 6402, 7563, 7173, 5094, 7334, 7150, 6257, 5245, and 7614. Thus, according to IC § 6-2.5-8-8(a), Taxpayer was not required to charge or remit sales tax due to the providing of exemption certificates by customers.

FINDINGS

Taxpayer's protest regarding the exemption certificates is sustained regarding the specified invoices. Taxpayer is denied for the remaining transactions in which exemption certificates were not supplied.

II. Gross Retail Tax - Services.

DISCUSSION

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); [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).

[45 IAC 2.2-4-2](#)(a) further explains, in pertinent part, that:

Professional services, personal services, and services in respect to property not owned by the person rendering such services are not "transactions of a retail merchant constituting selling at retail", and are not subject to gross retail tax. Where, in conjunction with rendering professional services, personal services, or other services, the serviceman also transfers tangible personal property for a consideration, this will

constitute a transaction of a retail merchant constituting selling at retail unless:

- (1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property;
- (2) The tangible personal property purchased is used or consumed as a necessary incident to the service;
- (3) The price charged for tangible personal property is inconsequential (not to exceed 10[percent]) compared with the service charge; and
- (4) The serviceman pays gross retail tax or use tax upon the tangible personal property at the time of acquisition.

During the protest, Taxpayer supplied additional invoices. The following invoices supplied by Taxpayer show the transaction was for services only: 5160, 7160, 7741, and 7872. Thus, according to the statute and regulation above Taxpayer was able to show that these two transactions were for services only and therefore were not subject to sales tax.

Taxpayer also protested additional sales. The Department found a discrepancy of total sales as reported on the sales tax return and the income tax return. The audit report stated that "a portion of the 2014 exempt sales were disallowed because an exemption certificate or other proof of exemption had not previously been obtained for some of the 2014 sales transactions." Therefore, it was determined that a percentage of these under reported sales should be determined taxable. In this instance, Taxpayer was sustained on several invoices thus, the Department will recalculate the additional sales to reflect the provided exemptions.

FINDING

Taxpayer's protest is sustained for the specified invoices.

SUMMARY

As stated in issue I, Taxpayer's protest is sustained for the listed invoices and denied for the remaining transactions. As stated in Issue II, Taxpayer is sustained for the listed invoices. Additional sales assessed will also be adjusted to reflect the sustained invoices.

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