

DEPARTMENT OF STATE REVENUE

04-20160634.LOF

Letter of Findings Number: 04-20160634
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 This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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.

ISSUES

I. Sales Tax–Imposition.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-7; 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. Use Tax–Imposition.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-5-9; IC § 6-8.1-5-1; IC § 6-8.1-5-4; *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); [45 IAC 2.2-3-4](#).

Taxpayer protests the imposition of use tax on some purchases.

III. Tax Administration–Negligence Penalties.

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 business. As the result of an audit covering sales and use taxes for the tax years 2013, 2014, and 2015, the Indiana Department of Revenue ("Department") determined that Taxpayer had not collected and remitted the proper amount of sales tax as a retail merchant and had not remitted the proper amount of use tax as a consumer for the tax years at issue. The Department therefore issued proposed assessments for sales tax, use tax, penalties, and interest. Taxpayer protested the imposition of a portion of the sales tax, a portion of the use tax, and the penalties. 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 a portion of the amount of sales tax which the Department assessed against Taxpayer as a retail merchant. The Department based the assessment after review of Taxpayer's sales which were listed as exempt. For those sales listed as exempt, but for which no exemption certificate was found, the Department

determined that the sales were not exempt and included them as taxable sales upon which Taxpayer should have collected and remitted sales tax. Taxpayer protested that it did have exemption certificates for twelve (12) of those customers.

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 § 6-2.5-3-7 states:

- (a) A person who acquires tangible personal property from a retail merchant for delivery in Indiana is presumed to have acquired the property for storage, use, or consumption in Indiana, unless the person or the retail merchant can produce evidence to rebut that presumption.
- (b) *A retail merchant is not required to produce evidence of nontaxability under subsection (a) if the retail merchant receives from the person who acquired the property an exemption certificate which certifies, in the form prescribed by the department, that the acquisition is exempt from the use tax.*
(Emphasis added).

In the course of the protest process, Taxpayer provided copies of exemption certificates for twelve of its customers. Taxpayer states that, having received the exemption certificates, it is not responsible as a retail merchant to collect sales tax from those customers. After review of the exemption certificates, the Department agrees with Taxpayer. As provided by IC § 6-2.5-3-7(b), a retail merchant is not required to produce evidence of nontaxability if the retail merchant receives from the person who acquired the property an exemption certificate which certifies, in the form prescribed by the department, that the acquisition is exempt from the use tax. In the instant case, Taxpayer has met the terms of IC § 6-2.5-3-7(b) and is not required to produce evidence of nontaxability. Therefore, any sales to these twelve customers will be removed from the Department's calculations of sales tax due. Taxpayer has met the burden imposed under IC § 6-8.1-5-1(c) of proving this portion of the proposed sales tax assessment wrong.

FINDING

Taxpayer's protest is sustained.

II. Use Tax—Imposition.

DISCUSSION

Taxpayer protests a portion of the Department's imposition of use tax. Due to the large number of transactions, the Department reviewed a sample of Taxpayer's purchases for the tax years and determined the percentage of purchases upon which sales or use tax had been paid compared to the percentage upon which sales or use tax should have been paid. The Department then subtracted the percentage which was paid from the percentage which should have been paid and arrived at the compliance percentage. That compliance percentage was then applied to Taxpayer's total purchases to determine the amount of use tax still due. Taxpayer protests the inclusion of three categories of purchases as taxable in the Department's calculations. The removal of these transactions, Taxpayer argues, will result in a lower amount of use tax due for the tax years.

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.

Use tax is imposed by IC § 6-2.5-3-2(a), which states:

An 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, regardless of the location of that transaction or of the retail merchant making that transaction.

Also, [45 IAC 2.2-3-4](#) provides:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, *unless the Indiana state gross retail tax has been collected at the point of purchase. (Emphasis added).*

Therefore, when tangible personal property is used, stored, or consumed in Indiana, use tax is due unless sales tax was paid at the time of the transaction.

Next, IC § 6-8.1-5-4(a) provides:

Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.

The first category which Taxpayer states should not be included in the Department's calculations of taxable sales is a purchase by one of Taxpayer's employees at a national home repair retailer in the amount of forty-four dollars and ninety-eight cents (\$44.98). Taxpayer states that, although it was unable to locate a receipt from the transaction which would verify that sales tax was paid on the purchase, it believes that it is reasonable to assume that sales tax was paid since the retailer collected sales tax on every other transaction included in the sample population.

The Department is unable to agree with Taxpayer's conclusion. The requirement to keep records for review is clearly established under IC § 6-8.1-5-4(a). Here, the Department cannot assume that sales tax was paid on the transaction in question. There are several possible scenarios which could result in the sales tax not being collected by the retailer. This is precisely why the requirement to keep records such as the retail transaction receipt at issue is listed under IC § 6-8.1-5-4(a). Taxpayer has not met the burden of proving this portion of the proposed assessment wrong, as required by IC § 6-8.1-5-1(c).

The next category of transaction under protest is not actually a transaction. Rather, Taxpayer states, it was an internal write-off of \$1,166.00 which was an uncollectable account receivable. Taxpayer states that it was a journal entry that only appeared as a payment. In the course of the protest process, Taxpayer was able to provide sufficient documentation to establish that the amount at issue was in fact a write-off of an uncollectable account receivable and not a purchase of tangible personal property. Therefore, the \$1,166.00 will be removed from the Department's calculations of use tax due. Taxpayer has met the burden of proving this portion of the proposed

assessments wrong, as required by IC § 6-8.1-5-1(c).

The third category of transactions under protest is amounts listed on invoices from Taxpayer's trash service. Taxpayer states that the amount at issue was for garbage bins which its trash service provider would haul away when full. The trash service provider would then leave an empty bin behind for future trash purposes. Taxpayer argues that the bins are not rented property, but rather are returnable containers and as such are exempt from sales and/or use taxes.

The relevant statute is IC § 6-2.5-5-9, which states:

- (a) *As used in this section, "returnable containers" means containers customarily returned by the buyer of the contents for reuse as containers.*
 - (b) Sales of returnable containers are exempt from the state gross retail tax if the transaction constitutes selling at retail as defined in [IC 6-2.5-4-1](#) and if the returnable containers contain contents.
 - (c) Sales of returnable containers are exempt from the state gross retail tax if the containers are transferred empty for the purpose of refilling.
 - (d) Sales of wrapping material and empty containers are exempt from the state gross retail tax if the person acquiring the material or containers acquires them for use as nonreturnable packages for:
 - (1) selling the contents that the person adds; or
 - (2) shipping or delivering tangible personal property that:
 - (A) is owned by another person;
 - (B) is processed or serviced for the owner; and
 - (C) will be sold by that owner either in the same form or as a part of other tangible personal property produced by that owner in the owner's *[sic, owner's]* business of manufacturing, assembling, constructing, refining, or processing.
- (Emphasis added).

After review of IC § 6-2.5-5-9, the Department does not agree with Taxpayer's conclusion. IC § 6-2.5-5-9(a) plainly states that "returnable containers" means containers customarily returned by the buyer of the contents for reuse as containers. In the instant case, no one is buying the contents of the bins. Therefore, the bins do not qualify as returnable containers. Taxpayer has not met the burden of proving that this portion of the proposed assessments is incorrect, as required by IC § 6-8.1-5-1(c).

In conclusion, Taxpayer has not met the burden of proving the proposed assessments wrong regarding the transaction at Lowes and the rental of trash bins, as required by IC § 6-8.1-5-1(c). Taxpayer has met the burden imposed by IC § 6-8.1-5-1(c) of proving that the write-off of the uncollectable account receivable was not a retail transaction subject to use tax. Therefore, the Department will remove this amount from its calculations of use tax due for the tax years and will recalculate the compliance percentage. The new compliance percentage will then be applied to Taxpayer's total purchases and a new, lower amount of use tax due will be calculated.

FINDING

Taxpayer's protest is sustained in part and denied in part, as provided above.

III. Tax Administration–Negligence Penalties.

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 does not agree with Taxpayer's position. While Taxpayer has been sustained regarding a portion of the sales and use taxes at issue, there remain significant use tax liabilities for the tax years at issue. Therefore, waiver of penalties is not warranted under [45 IAC 15-11-2\(c\)](#). However, since Taxpayer was sustained regarding a portion of the sales and use taxes due, penalties will be recalculated to reflect the lower amount of base tax due.

FINDING

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

SUMMARY

Taxpayer is sustained in Issue I regarding the imposition of sales tax on sales to twelve of its customers. Taxpayer is partially sustained and partially denied in Issue II regarding the imposition of use tax. Taxpayer is denied in Issue III regarding the imposition of penalties.

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