

DEPARTMENT OF STATE REVENUE

04-20170160.LOF

Letter of Findings Number: 04-20170160
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 This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Documentation supplied by an auction business did not establish that it was not acting as a retail merchant in conducting its auctions. Neither did the auction business establish that any sales conducted in the auctions were to exempt customers. The Department's proposed assessments were correct as originally issued.

ISSUE

I. Sales Tax–Auction Sales.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-7; IC § 6-2.5-4-12; 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.

STATEMENT OF FACTS

Taxpayer is an Indiana auction business. As the result of an audit, the Indiana Department of Revenue ("Department") determined that for the tax years 2013, 2014, and 2015, Taxpayer conducted auctions without collecting sales tax at the time of sale. Therefore, the Department issued proposed assessments for those years for sales tax and interest. Taxpayer protested that some of the sales considered taxable by the Department were actually to exempt customers and that sales tax should not have been collected. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Sales Tax–Auction Sales.

DISCUSSION

Taxpayer protests the imposition of sales tax on some sales it conducted as an auction business in the tax years 2013-15. The Department based its position that Taxpayer under collected sales tax for those years on its review of Taxpayer's records during an audit. The Department found Taxpayer's records to be generally organized by year but otherwise incomplete. Also, the Department found that Taxpayer was not registered to collect and remit sales tax. Therefore, the Department reviewed the documents and considered thirty-seven (37) auctions conducted over the three years of the audit period to be taxable sales of tangible personal property ("TPP") upon which Taxpayer did not collect and remit sales tax. Taxpayer protests that the sales to which the Department referred were not taxable for various reasons. Also, Taxpayer states that it had been audited before and no changes were made in that audit, so it thought it was following the correct procedures.

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 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.* (Emphasis added).

Next, IC § 6-2.5-4-12 provides:

- (a) A person is a retail merchant making a retail transaction when he sells tangible personal property at auction.
- (b) Notwithstanding subsection (a), a person is not a retail merchant making a retail transaction when:
 - (1) he makes isolated or occasional sales of tangible personal property at auction;
 - (2) the sales occur on the premises of the owner of the tangible personal property; and
 - (3) the owner of the tangible personal property did not originally acquire that property for resale.

Under IC § 6-2.5-4-12(a), a business is a retail merchant making a retail transaction when it sells tangible personal property at auction. The Department considered that Taxpayer was a retail merchant making retail transactions when it sold the TPP at auction and thus considered that Taxpayer needed to collect and remit sales tax on those transactions as provided by IC § 6-2.5-2-1(b).

Taxpayer states that it did not think it was required to register as a retail merchant and collect and remit sales tax. Taxpayer states that it received a "no change" result in a prior audit by the Department. The Department notes that Taxpayer has not provided a copy of the prior audit to verify its position. Also, even if a prior audit had no changes listed for Taxpayer's methodology, the Department is not precluded from finding areas where a taxpayer is not in compliance with Indiana's tax statutes and regulations in a subsequent audit.

Next, Taxpayer states that the vehicles sold at auction must be titled by the purchaser and so sales tax was paid at that time. Taxpayer argues that to require it to pay the sales tax as a retail merchant would result in double taxation. The Department notes that Taxpayer has not provided sufficient documentation to establish that any transactions involving vehicles in fact had sales tax paid at any point. In any case, though, Taxpayer was auctioning TPP and under IC § 6-2.5-4-12(a) qualified as a retail merchant. The Department notes that the exception to the auction rule established under IC § 6-2.5-4-12(a) is found under IC § 6-2.5-4-12(b) and that it requires all three listed criteria be met in order for a seller to qualify for the exemption. Taxpayer has not provided sufficient documentation to establish that it met all three criteria listed under IC § 6-2.5-4-12(b). Therefore, under IC § 6-2.5-2-1(b) Taxpayer was required to collect sales tax on sales of TPP, including vehicles, on all auction sales.

Taxpayer also argues that the Department did not review all relevant documentation for all years at issue. Specifically, Taxpayer protests that the Department did not review auction sales documents for 2015. The Department notes that its auditor did make several requests for 2015 auction sales documentation, but that it received none. The Department was therefore compelled to make its assessments for 2015 based on the best information available, as authorized by IC § 6-8.1-5-1(b) which provides:

If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. The amount of the assessment is considered a tax payment not made by the due date and is subject to [IC 6-8.1-10](#) concerning the imposition of penalties and interest. The department shall send the person a notice of the proposed assessment through the United States mail.

In light of the lack of documentation, the Department used the best information available to arrive at its conclusions. For instance, in 2015 Taxpayer conducted two auctions for a customer for whom Taxpayer had conducted an auction in 2013. The Department used the total auction sales from the 2013 amount for the auction totals for the two 2015 auctions. Also, Taxpayer conducted a 2015 auction for a customer who was auctioning similar TPP to that sold in two auctions Taxpayer conducted in 2014. The Department applied the average of the two 2014 auctions to the 2015 auction. Similar procedures were used to complete the audit.

Taxpayer states that the Department did not review the actual auction settlement documents for 2015 and that these documents show a different amount for the sales at issue. Taxpayer also states that the owner was having serious health issues during the audit period and was unable to respond to the Department's document requests as quickly as he would have liked. In the course of the protest process the Department again requested, and Taxpayer sent in, documentation supporting its position.

After review of the documentation, the Department is not convinced that Taxpayer's protest points are valid. As explained above, Taxpayer was not registered as a retail merchant and had no sales tax account with the Department. Most of Taxpayer's documents are "Settlements" that provide summaries of public auctions. These settlements do not list item-by-item sales, nor do they list sales tax collected by Taxpayer. A few of the settlements state that sales tax was paid to the owner of the TPP being auctioned, but offer no other explanation of what was sold and upon which items sales tax was charged.

This is not the correct procedure for a retail merchant conducting sales at auction. As provided by IC § 6-2.5-2-1(b) and IC § 6-2.5-4-12(a), sales tax is paid by the purchaser of TPP to the auctioneer/retail merchant, not by the auctioneer/retail merchant to the owner of the TPP being auctioned. Also, on none of these entries does sales tax charged equal seven (7) percent of total sales. Therefore, sales tax was not being paid on all sales which occurred during the auction.

Another protest point is Taxpayer's opinion that any cars, trucks, or other motor vehicles were sold without collecting sales tax, but that Taxpayer provided Indiana sales tax form ST108 to the purchasers listing sales price and amount of sales tax that should be paid. Taxpayer did not provide any copies of ST108s. Neither did Taxpayer establish that any of the vehicles sold at auction ever had sales tax paid at any point by the purchaser.

Furthermore, a few of the settlements have post-it notes stuck on them which say "on site", presumably stating that the auction was held on the premises of the owner of the TPP being auctioned. While this could potentially satisfy the requirement of IC § 6-2.5-4-12(b)(2), it does not establish that all three elements of IC § 6-2.5-4-12(b) are met. There is no other evidence that the other two elements of IC § 6-2.5-4-12 are satisfied, therefore these settlements do not establish that Taxpayer was not acting as a retail merchant when it conducted these auctions.

Finally, Taxpayer states that some of the customers for whom it auctioned the TPP and some of the purchasers of the TPP at auction were exempt from sales tax. Taxpayer has not provided any exemption certificates to support this position. The Department refers to IC § 6-2.5-3-7, which 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).

Without properly completed exemption certificates, a retail merchant must collect sales tax on a retail transaction. In all, Taxpayer's documentation does not support Taxpayer's protest. The settlements provided are only general overviews of the events at the auctions. They do not establish that Taxpayer accurately collected and remitted sales tax as required by IC § 6-2.5-2-1(b) and IC § 6-2.5-4-12(a).

In conclusion, Taxpayer has not provided sufficient documentation to establish that it was not acting as a retail merchant under IC § 6-2.5-4-12. Taxpayer's documentation does not provide sufficient information to establish the nature of the sales which occurred during the audit period. Taxpayer has not provided exemption certificates to support its position that some of the purchasers of the TPP at auction were exempt from sales tax. Taxpayer has not met the burden of proving the proposed assessments wrong, as required by IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is denied.

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