

**Letter of Findings: 04-20170800**  
**Use 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

With the exception of one fully documented sales transaction, the Department was unable to agree with Indiana Swimming Pool Company that it met its burden of establishing that it paid sales tax on purchases of items made during the audit period and that Indiana Swimming Pool Company was not required to now pay use tax on the purchases.

### ISSUE

#### **I. Use Tax - Sales Tax Paid at Time of Purchase.**

**Authority:** IC § 6-2.5-2-1(a); IC § 6-2.5-2-1(b); IC § 6-2.5-3-2(a); IC § 6-8.1-5-1(c); IC § 6-8.1-5-4(a); *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480 (Ind. Tax Ct. 2012); *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); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); *Rhoads v. Indiana Dep't of State Revenue*, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); [45 IAC 2.2-3-4](#).

Taxpayer argues that it is not required to pay use tax on the purchase of certain items used in its swimming pool business because sales tax was paid on the items at the time they were originally purchased.

### STATEMENT OF FACTS

Taxpayer is an Indiana company in the business of selling swimming pools, pool supplies, hot tubs and the like. Taxpayer also provides pool cleaning and pool maintenance services.

The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's sales and purchase invoices, journals, exemption certificates, and sales tax returns. The audit found that Taxpayer had purchased items without paying sales tax. That finding resulted in an assessment of use tax.

Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representative explained the basis for the protest. This Letter of Findings results.

#### **I. Use Tax - Sales Tax Paid at Time of Purchase.**

### DISCUSSION

The Department's audit report states that "the [T]axpayer purchased items and no sales tax was paid at the time of the purchase and no use tax was remitted to the Indiana Department of Revenue for these items." Moreover, the audit report states that "[T]axpayer could not provide documentation for the purchases."

Taxpayer disagrees arguing that the particular purchase transactions could not have been completed without paying sales tax given the nature of the purchases and the nature of the retailers from whom the purchases were made.

As a threshold issue, it is the Taxpayer's responsibility to establish that the assessment of use tax 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 Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Thus, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position 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, fn. 9 (Ind. Tax Ct. 2012). 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, interpretations of Indiana tax law contained within this decision, as well as the preceding audit investigation, are entitled to deference.

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). A taxable "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 . . . ." *Rhoads v. Indiana Dep't of State Revenue*, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002).

In particular, the audit cited to [45 IAC 2.2-3-4](#) as authority for its position that Taxpayer is required to pay use tax. The regulation 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*).

Taxpayer argues that given the nature of the items purchased and the vendors from whom those items were purchased, that sales tax must have been collected at the time of the original purchases. For example, Taxpayer points out that it purchases items from vendor Amazon and that this particular vendor routinely charges Indiana sales tax. Taxpayer also argues that some of the items were purchased from "brick and mortar" outlets and that these vendors also routinely charge Indiana sales tax. For example, Taxpayer explains that it purchased items from a local greeting card outlet and that it could not have purchased the items without paying sales tax.

In another instance, Taxpayer points out that it purchased "test strips" and that - given the nature of its swimming pool business - it must have purchased the test strips for resale in the ordinary course of its business.

As a result, Taxpayer asks that the Department accept its assertions and abate the use tax assessment. The Department is unable to agree because Taxpayer's assertions are not sufficiently documented. Although Taxpayer makes a facially logical argument, it is equally plausible that some or most of the purchases were made without paying Indiana sales tax. For example, Amazon does routinely charge sales tax, but not on all of its sales. Amazon does *not* charge tax on items for which it acts simply as a pass-through facilitator for third-party vendors. Without challenging Taxpayer's truthfulness in any way, it is also possible that the items were purchased based on an exemption certificate presented to the vendor. Although the test-strips may have been purchased for resale, it is equally plausible that the test-strips were consumed by Taxpayer in the ordinary course of its business.

There is one exception to this determination. Taxpayer provided a copy of one particular Amazon invoice for the purchase of a "Bluetooth radio adaptor" which clearly states that tax was charged. The Department is prepared to make this exception because this particular transaction is fully documented. It should be pointed out that, "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 tax by reviewing those books and records." IC § 6-8.1-5-4(a).

In large part, Taxpayer's protest is denied because it has not met its statutory burden of demonstrating that the entire use tax assessment is wrong. IC § 6-8.1-5-1(c). With the single exception of the Amazon purchase of the radio adaptor, Taxpayer's protest is respectfully denied.

## FINDING

The Department's Audit Division is requested to adjust the use tax assessment to exclude the purchase of the radio adaptor from Amazon. In all other respects, Taxpayer's protest is respectfully denied.

*Posted: 01/31/2018 by Legislative Services Agency*

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