DEPARTMENT OF STATE REVENUE

Revenue Ruling #2017-08ST
December 7, 2017

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the department's official position concerning a specific issue.

ISSUES

Sales and Use Tax - Taxability of Advertising Spaces and Equipment

Authority: IC 6-2.5-1-21; IC 6-2.5-2-1; IC 6-2.5-3-2; IC 6-2.5-4-10; IC 6-2.5-5-8; 45 IAC 2.2-1-1; 45 IAC 2.2-4-2; 45 IAC 2.2-4-27; Sales Tax Information Bulletin #59 (December 2002).

A company ("Company") is seeking a determination as to the following:

1. Whether the charges made by Company to its advertiser clients are subject to Indiana sales tax.
2. Whether Company would be required to pay Indiana use tax on the equipment brought from out of state.

STATEMENT OF FACTS

Company is a Delaware corporation that operates as a concessionaire. Beginning in 2017, Company will provide display advertising services at hospitals in this State. Company plans to sell advertising space to local businesses for display in the hospitals by means of internal billboard frames and liquid crystal displays (LCDs) (the "cases").

Company will capitalize the cost of the cases and depreciate them over the term of the contract. The cases remain the property of Company, and Company will be responsible for maintaining and installing the actual advertising display. The cases are permanently affixed to a wall, beam, floor, or ground throughout a hospital's campus. The advertiser does not own the interior of the case or panel.

Company's contracts with the hospitals will be for periods of five or ten years. Regarding the ability to select advertisers, it is Company that contracts with the advertiser, not the hospitals. However, hospitals are given a percentage of revenue that ranges from 6% - 25%.

DISCUSSION

The Department's position on the taxability of advertising signs and billboards is found in Sales Tax Information Bulletin #59 (December 2002), which summarizes the legal analysis of such a situation as follows:

> The taxability of billboards and advertising signs for sales tax purposes requires a determination of whether the rental of the advertising space is the rental of tangible personal property or the sale of a service. If the rental of the advertising space is the rental of personal property, then the rental is subject to tax. If the transaction of allowing someone to use a billboard or other advertising space is the sale of a service, then the transaction is not subject to tax.

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 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). 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).

Except for certain enumerated services, sales of services generally are not retail transactions and are not subject to sales or use tax. 45 IAC 2.2-4-2 clarifies the taxability of services as follows:

> (a) 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%) 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.

(b) Services performed or work done in respect to property and performed prior to delivery to be sold by a retail merchant must however, be included in taxable gross receipts of the retail merchant.

(c) Persons engaging in repair services are servicemen with respect to the services which they render and retail merchants at retail with respect to repair or replacement parts sold.

(d) A serviceman occupationally engaged in rendering professional, personal or other services will be presumed to be a retail merchant selling at retail with respect to any tangible personal property sold by him, whether or not the tangible personal property is sold in the course of rendering such services. If, however, the transaction satisfies the four (4) requirements set forth in [subsection (a)], the gross retail tax shall not apply to such transaction.

A unitary transaction is clarified in 45 IAC 2.2-1-1(a) as follows:

> Unitary Transaction. For purposes of the state gross retail tax and use tax, such taxes shall apply and be computed in respect to each retail unitary transaction. A unitary transaction shall include all items of property and/or services for which a total combined charge or selling price is computed for payment irrespective of the fact that services which would not otherwise be taxable are included in the charge or selling price.

Pursuant to IC 6-2.5-4-10(a), "[a] person, other than a public utility, is a retail merchant making a retail transaction when he rents or leases tangible personal property to another person other than for subrent or sublease." IC 6-2.5-4-10(b) continues: "[a] person is a retail merchant making a retail transaction when the person sells any tangible personal property which has been rented or leased in the regular course of the person's rental or leasing business." Indiana's regulations at 45 IAC 2.2-4-27(b) further states that:

> Every person engaged in the business of the rental or leasing of tangible personal property, other than a public utility, shall be deemed to be a retail merchant in respect thereto and such rental or leasing transaction shall constitute a retail transaction subject to the state gross retail tax on the amount of the actual receipts from such rental or leasing.

IC 6-2.5-1-21(a) defines leases, in pertinent part, to include "any transfer of possession or control of tangible personal property for a fixed or indeterminate term for consideration and may include future options to purchase or extend." Pursuant to the same statute, a lease does not include "a transfer of possession or control of property under an agreement that requires the transfer of title upon completion of required payments and payment of an option price that does not exceed the greater of one hundred dollars ($100) or one percent (1%) of the total required payments[.]"

45 IAC 2.2-4-27(c) provides:

> In general, the gross receipts from renting or leasing tangible personal property are subject to tax. The rental or leasing of tangible personal property constitutes a retail transaction, and every lessor is a retail merchant with respect to such transactions. The lessor must collect and remit the gross retail tax or use tax on the amount of actual receipts as agent for the state of Indiana. The tax is borne by the lessee, except when the lessee is otherwise exempt from taxation.

The term "actual receipts" is defined at 45 IAC 2.2-4-27(d):

> The rental or leasing of tangible personal property, by whatever means effected and irrespective of the terms employed by the parties to describe such transaction, is taxable.
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> (1) Amount of actual receipts. The amount of actual receipts means the gross receipts from the rental or leasing of tangible personal property without any deduction whatever for expenses or costs incidental to the conduct of the business. The gross receipts include any consideration received from the exercise of an option contained in the rental [or] lease agreement; royalties paid, or agreed to be paid, either on a lump sum or other production basis, for use of tangible personal property; and any receipts held by the lessor

which may at the time of their receipt or some future time be applied by the lessor as rentals.

Pursuant to 45 IAC 2.2-4-27(d)(2), sales tax is due on the lease payments:

> Rental or lease period. For purposes of the imposition of the gross retail tax or use tax on rental or leasing transactions, each period for which a rental is payable shall be considered a complete transaction. In the case of a weekly rate, each week shall be considered a complete transaction. In the case of a continuing lease or contract, with or without a definite expiration date, where rental payments are to be made monthly or on some other periodic basis, each payment period shall be considered a completed transaction.

If the lease requires the transfer of title upon completion of required periodic payments and payment of an option price that is less than or equal to one hundred dollars ($100) or one percent (1%) of the total required payments, whichever is greater, then sales tax is due at the beginning of the lease. Otherwise, sales tax is due on each lease payment. IC 6-2.5-1-21(a)(2).

The question in the present matter is whether the provision of an advertising space is a service or a rental of tangible personal property. Taxpayer maintains that there is no transfer of tangible personal property from Company to its clients. Turning back to Sales Tax Information Bulletin #59 (December 2002), the Department's analysis for determining whether a transaction for advertising space is a rental or service is as follows:

> The key element in determining whether the transaction is a rental or a service is who controls the property. If the person paying for the use of the advertising space controls the space, the transaction is a rental of the space and is taxable. If the person using the property does not control the property then the transaction is a service.
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> The person paying for the use of the space has control when that person can determine the location of the advertising space or has the right to direct how the advertising space will be used. The person using the space must have exclusive use of the space. Other factors indicating control are whether the customer provides upkeep and maintenance of the space, and whether the customer pays for the posting of the advertising material.

In this case, Company owns the interior of the billboard frames and LCDs during the rental term and is responsible for installing and maintaining them. Company does not solely direct where the billboard frames or LCDs are installed, but works in conjunction with the hospitals in order to determine the space. In any event, the advertiser does not determine where the billboard frames or LCDs are located. Further, in the case of the LCDs, multiple advertisers are featured in the space at the same time. All of this evidences that the advertiser does not control the property, which would mean that Company is charging for a service. Therefore, the charges made by Company to its clients are not subject to Indiana sales tax.

Regarding the second question, if Company did not pay sales tax on the purchase of the billboard frames and LCDs, then it would be required to pay use tax on them. Company is not leasing the billboard frames and LCDs, and therefore would not be eligible for the "sale for resale" exemption under IC 6-2.5-5-8.

RULING

The monthly fee charged by Company to its advertiser clients is not subject to Indiana sales and use tax, as it is a fee charged for a service. Company would therefore be subject to use tax on the billboard frames or LCDs used in Indiana if sales tax had not previously been paid on them.

CAVEAT

This ruling is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances as stated herein are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. However, other taxpayers with substantially identical factual situations may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material respect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this ruling a change in statute, regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection.

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