

DEPARTMENT OF STATE REVENUE

04-20170912.LOF

Letter of Findings Number: 04-20170912
Sales Tax
For Tax Years 2014-16

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 This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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 establish that some of transactions initially considered to be subject to tax were actually exempt. Therefore, Business met the burden of proving a portion of the protested assessments wrong. The remaining portion of the assessments remain properly assessed.

ISSUE**I. Sales Tax–Taxable Sales.**

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-7; IC § 6-2.5-4-2; IC § 6-2.5-8-8; 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); Sales Tax Information Bulletin 52 (January 2012).

Taxpayer protests the imposition of sales tax.

STATEMENT OF FACTS

Taxpayer is an Indiana restaurant with dine-in, carry-out, catering services, and wholesale sales. As the result of an audit for the tax years 2014, 2015, and 2016 ("Tax Years"), the Indiana Department of Revenue ("Department") determined that Taxpayer had not collected and remitted the proper amount of sales tax on sales to its customers. Therefore, the Department issued proposed assessments for sales tax, interest, and penalty for the tax years. Taxpayer protested a portion of the proposed assessments. An administrative hearing was held and additional time allowed for the submission of supporting documentation and analysis. This Letter of Findings results. Further facts will be supplied as required.

I. Sales Tax–Taxable Sales.**DISCUSSION**

Taxpayer protests the imposition of sales tax on a portion of the transactions which the Department determined were subject to tax, but upon which sales tax was not collected and remitted. The Department based its determination on several factors. Taxpayer states that the Department did not give it the proper amount of credit for sales to exempt customers and that the Department overstated total sales. Taxpayer provided documentation in support of its position.

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.*

(Emphasis added).

Therefore, retail merchants are required to collect sales tax on retail transactions, unless the transaction is exempt from sales tax.

Next, IC § 6-2.5-3-7 provides:

- (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.

Also, IC § 6-2.5-8-8 states in relevant part:

- (a) A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.
 - (b) The following are the only persons authorized to issue exemption certificates:
 - (1) Retail merchants, wholesalers, and manufacturers, who are registered with the department under this chapter.
 - (2) Organizations which are exempt from the state gross retail tax under [IC 6-2.5-5-21](#), [IC 6-2.5-5-25](#), or [IC 6-2.5-5-26](#) and which are registered with the department under this chapter.
 - (3) Persons who are exempt from the state gross retail tax under [IC 6-2.5-4-5](#) and who receive an exemption certificate from the department.
 - (4) Other persons who are exempt from the state gross retail tax with respect to any part of their purchases.
 - (c) The department may also allow a person to issue a blanket exemption certificate to cover exempt purchases over a stated period of time. The department may impose conditions on the use of the blanket exemption certificate and restrictions on the kind or category of purchases that are exempt.
 - (d) A seller that accepts an incomplete exemption certificate under subsection (a) is not relieved of the duty to collect gross retail or use tax on the sale unless the seller obtains:
 - (1) a fully completed exemption certificate; or
 - (2) the relevant data to complete the exemption certificate; within ninety (90) days after the sale.
 - (e) If a seller has accepted an incomplete exemption certificate under subsection (a) and the department requests that the seller substantiate the exemption, within one hundred twenty (120) days after the department makes the request the seller shall:
 - (1) obtain a fully completed exemption certificate; or
 - (2) prove by other means that the transaction was not subject to state gross retail or use tax.
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Taxpayer protests that the Department included sales it made to an exempt customer in its calculations of transactions upon which sales should have been collected but was not. The customer in question was a large, state-sponsored university with many departments. The Department noted that Taxpayer had an exemption certificate from the university, with an effective date of January 1, 2016. The Department therefore agreed that any sales to the university dated January 1, 2016 or after were exempt from sales tax. Regarding any sales to the university dated earlier than January 1, 2016, the Department noted that, as required by IC § 6-2.5-3-7 and IC § 6-2.5-8-8, Taxpayer had not received a valid exemption certificate for those sales and so was liable for the sales tax itself.

Taxpayer protests that it had received an exemption certificate for prior years, but that it was unable to locate the certificate. Also, Taxpayer protests that the university was an exempt organization prior to January 1, 2016 and that any sales to the university during the audit years 2014 and 2015 were also exempt. In the course of the protest process, Taxpayer was able to provide documentation and analysis supporting its position. After review of these additional materials, the Department agrees that the university was an exempt organization for the entire audit period. Therefore, any sales for which Taxpayer has provided an invoice showing a sale to the university will be reclassified as exempt in the Department's calculations of sales tax due.

Another point of protest regarding sales to the university is the Department's determination that only sales listing the name of the university would be considered exempt. For instance, if the order was in the name of "Biology Department" rather than the university, the Department did not consider the sale to be exempt. Similarly, if the order was in the name of an individual rather than in the name of the university, the Department did not consider the sales to be exempt. Taxpayer protests that the particular orders were placed by people who worked at the university and that those individuals would often use their name as a matter of convenience. That convenience, Taxpayer argues, did not change the fact that the sales were for exempt purposes to the university.

After review of the documentation supplied in the protest process, the Department agrees that sales to divisions of the university qualify as sales to a customer who has provided an exemption certificate. The university has many departments, each with its own budget and spending authority. The departments are also clearly part of the exempt organization. Therefore, if the invoice lists a name similar to "Philosophy Department" and has an on-campus delivery address, those sales will be reclassified as exempt in the Department's calculations of sales tax due. In the case of invoices which list individuals, the Department does not agree that those sales qualify as sales to a customer who has provided an exemption certificate. For instance, if the invoice lists an individual's name, such as "John Doe", there is not enough information to establish that the individual was ordering the delivery for the university's purposes. It is possible that the individual was ordering the delivery for his or her own purposes. Therefore, sales with invoices which list an individual's name do not qualify as sales to a customer who has provided an exemption certificate and will remain listed as taxable in the Department's calculations of sales tax due.

The next point of protest regarding the amount of sales tax assessed by the Department is in regards to the Department's determination of total sales at the restaurant. The Department based its calculations on discrepancies it found between the monthly and nightly sales reports ("reports") and the monthly sales tax returns ("returns") which Taxpayer filed with the Department. The monthly and nightly sales reports were in the form of Z tapes printed from Taxpayer's cash register. The monthly sales tax returns were the ST-103 monthly sales tax returns filed by every retail merchant. The Department found that the returns and reports for 2014 were materially correct and therefore made no adjustments for 2014. However, for 2015 and 2016, the Department found that the reports listed more sales than the returns and so made adjustments to its calculations of sales tax due to reconcile these amounts.

Taxpayer protests that the reports had a higher amount of sales because it hired many inexperienced wait staff who would incorrectly enter sales which had to be removed later by a manager. This, Taxpayer argues, resulted in the reports listing sales which did not actually happen. After the incorrect sales were eliminated, Taxpayer would arrive at the true number of sales. This is the amount which Taxpayer listed on the returns. Therefore, no adjustment is necessary, according to Taxpayer. Taxpayer further points out that it installed a new system which reduced such errors by the wait staff and so resulted in smaller adjustments between the reports and the returns. Further, Taxpayer states that its system required credit card sales to be entered twice in order to be properly processed by the credit card system.

Of relevance is IC § 6-8.1-5-4, which states:

(a) 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.

(b) A person must retain the books and records described in subsection (a), and any state or federal tax return that the person has filed:

(1) for an unlimited period, if the person fails to file a return or receives notice from the department that the person has filed a suspected fraudulent return, or an unsigned or substantially blank return; or

(2) in all other cases, for a period of at least three (3) years after the date the final payment of the particular tax liability was due, unless after an audit, the department consents to earlier destruction.

In addition, if the limitation on assessments provided in section 2 of this chapter is extended beyond three (3) years for a particular tax liability, the person must retain the books and records until the assessment period is over.

After review of the materials provided in the protest process, the Department is unable to agree with Taxpayer. Taxpayer did not provide any documentation in support of its position that credit card sales were duplicated. Therefore, Taxpayer did not meet the burden of proving the proposed assessments wrong regarding this point of protest, as required by IC § 6-8.1-5-1(c).

The final point of protest is in regards to sales which the Department considered subject to sales tax, but which Taxpayer states were wholesale sales and thus exempt from sales tax. The relevant statute is IC § 6-2.5-4-2, which states:

- (a) A person is a retail merchant making a retail transaction when he is making wholesale sales.
- (b) *For purposes of this section, a person is making wholesale sales when he:*
 - (1) *sells tangible personal property, other than capital assets or depreciable property, to a person who purchases the property for the purpose of reselling it without changing its form;*
 - (2) sells tangible personal property to a person who purchases the property for direct consumption as a material in the direct production of other tangible personal property produced by the person in his business of manufacturing, processing, refining, repairing, mining, agriculture, or horticulture;
 - (3) sells tangible personal property to a person who purchases the property for incorporation as a material or integral part of tangible personal property produced by the person in his business of manufacturing, assembling, constructing, refining, or processing;
 - (4) sells drugs, medical or dental preparations, or other similar materials to a person who purchases the materials for direct consumption in professional use by a physician, hospital, embalmer, funeral director, or tontorial parlor;
 - (5) sells tangible personal property to a person who purchases the property for direct consumption in his business of industrial cleaning; or
 - (6) sells tangible personal property to a person who purchases the property for direct consumption in the person's business in the direct rendering of public utility service.
- (c) Notwithstanding any provision of this article, a person is not making a retail transaction when he:
 - (1) acquires tangible personal property owned by another person;
 - (2) provides industrial processing or servicing, including enameling or plating, on the property; and
 - (3) transfers the property back to the owner to be sold by that owner either in the same form or as a part of other tangible personal property produced by that owner in his business of manufacturing, assembling, constructing, refining, or processing.

Taxpayer argues that it was making wholesale sales as defined by IC § 6-2.5-4-2(b) and so was not required to collect sales tax.

The Department has addressed these circumstances before. Sales Tax Information Bulletin 52 (January 2012) 20120125 Ind. Reg. 045120041NRA provides:

A person engaged in making wholesale sales in Indiana may accept a properly executed exemption certificate from a customer in lieu of collecting sales tax, provided the purchase is exempt under Indiana law.

Therefore, anyone engaged in making wholesale sales is required to obtain an exemption certificate from the customer who claims the exemption for resale, as established by IC § 6-2.5-8-8(a) and as explained by Sales Tax Information Bulletin 52. In this case, Taxpayer has not provided any exemption certificates in support of its position that these sales were to exempt customers. Therefore, Taxpayer has not met the burden of proving this portion of the proposed assessments wrong, as required by IC § 6-8.1-5-1(c).

In conclusion, Taxpayer has provided sufficient documentation to establish that the university was an exempt entity for 2014 and 2015. Also, Taxpayer has provided sufficient documentation to establish that sales for which the invoice lists a department of the university and an on-campus address were sales to an exempt customer. Taxpayer has not met the burden of proving the proposed assessments wrong regarding sales which Taxpayer states were to the university but which list only an individual's name on the invoice. Also, Taxpayer has not met the burden of proving the proposed assessments wrong regarding restaurant sales which Taxpayer states were

entered twice for credit card processing purposes. Finally, Taxpayer has not met the burden of proving the proposed assessments wrong regarding sales which Taxpayer states were wholesale sales. The Department will recalculate the amount of sales tax due after taking these findings into account and will issue a revised billing statement.

FINDING

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

May 14, 2018

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