DEPARTMENT OF STATE REVENUE

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Letter of Findings Number: 04-20170968
Use 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 This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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 establish that portions of its purchases were either not subject to Indiana use tax at all because they were either exempt or had sales and/or use tax already paid, or were only partially subject to Indiana use tax because out-of-state sales tax had already been paid. The remaining portions remained subject to Indiana tax as originally determined because Business did not prove the Department's position wrong, as required by statute.

ISSUE

I. Use Tax–Additional Purchases.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-2-3; IC § 6-2.5-3-2; IC § 6-2.5-3-7; IC § 6-2.5-3-8; IC § 6-2.5-4-9; IC § 6-2.5-5-3; IC § 6-2.5-8-8; IC § 6-2.5-8-9; 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; 45 IAC 2.2-3-12; 45 IAC 2.2-4-8.

Taxpayer protests a portion of the Department's proposed assessments for additional use tax.

STATEMENT OF FACTS

Taxpayer is an out-of-state business with some operations in Indiana. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer failed to collect and remit Indiana sales tax as a retail merchant and did not pay Indiana sales or use tax as a consumer on some taxable transactions in 2013, 2014, and 2015. Due to the large number of invoices at issue, the Department and Taxpayer agreed to use a sample and projection method to determine Taxpayer's compliance rate for those years. The Department then applied that compliance rate to Taxpayer's total purchases for those years. The Department therefore issued proposed assessments for use tax, penalties, and interest for those years. Taxpayer protested a portion of the proposed assessments. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Use Tax–Additional Purchases.

DISCUSSION

Taxpayer protests a portion of the proposed assessments for use tax for the tax years 2013, 2014, and 2015. The Department based its proposed assessments on the results of a sample and projection method which it used to determine Taxpayer's compliance percentage. That compliance percentage was applied to Taxpayer's total purchases of tangible personal property ("TPP") to determine the difference, if any, between that compliance percentage and what Taxpayer actually paid in sales taxes and use taxes for the tax years. Taxpayer protests that some of the items listed in the sample and projection calculations as taxable but with no tax paid were either not taxable purchases or were only partially taxable purchases. This difference, Taxpayer asserts, would increase the compliance percentage and therefore the difference between that compliance percentage and what was actually paid would be smaller. Thus, Taxpayer states, the proposed assessments would be correspondingly reduced. Taxpayer's protest lists nine protest categories. Eight of these categories are related to the protest of the expense projection established by the Department. The ninth category is in regard to use tax imposition on capital transactions not included in the projection method.

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 as a complementary excise tax under 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.

45 IAC 2.2-3-4 further explains:

> 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.

Also of relevance is IC § 6-2.5-3-5, which states:

> A person is entitled to a credit against the use tax imposed on the use, storage, or consumption of a particular item of tangible personal property equal to the amount, if any, of sales tax, purchase tax, or use tax paid to another state, territory, or possession of the United States for the acquisition of that property.

Use tax is due on the use, consumption or storage of TPP in Indiana unless Taxpayer is eligible for a credit.

The first protest category lists purchases of TPP shipped to Taxpayer's out-of-state headquarters. Taxpayer argues that the TPP was shipped directly to its out-of-state headquarters where it accepted delivery. Taxpayer argues that these transactions were not subject to Indiana use tax. The Department based its determination on the grounds that Taxpayer had operations in Indiana and Taxpayer did not provide invoices or other documentation establishing the place of TPP use. The Department assumed that any TPP was used in Indiana, making the TPP subject to Indiana use tax.

Taxpayer 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. However, the person or a retail merchant can produce evidence to rebut that presumption.
> . . . .

Taxpayer listed twenty-seven protested transactions for the first protest category and provided documentation supporting its position that these twenty-seven transactions were shipped to its out-of-state headquarters and that under IC § 6-2.5-3-2(a), TPP was not stored, used, or consumed in Indiana. In the course of the protest process, and as confirmed by the Department audit report, the TPP at issue in protest category one was delivered to its out-of-state headquarters. Taxpayer also provided sufficient documentation and analysis to establish that the TPP was not used, stored or consumed in Indiana, as required by IC § 6-2.5-3-4. Therefore, these twenty-seven transactions will be reclassified as non-taxable.

Under the second protest category, Taxpayer claims that the expense projection did not give proper credit for out-of-state sales tax paid on TPP delivered to its out-of-state headquarters and subsequently used in Indiana. Taxpayer listed four such transactions in the expense projection and provided documentation supporting its position that it was entitled to a credit equal to the amount of sales tax paid to another state for the TPP purchased as provided by IC § 6-2.5-3-5. However, Taxpayer only provided documentation for three out of four transactions at issue. Therefore, the Department will reclassify the three transactions for which invoices were provided as subject only to the remaining one percent of Indiana use tax after allowing credit for the six percent sales tax already paid to Taxpayer's home state. Taxpayer has met its burden of proof regarding the three transactions for which supporting documentation was supplied, as provided by IC § 6-8.1-5-1(c). Taxpayer has not met the burden imposed under IC § 6-8.1-5-1(c) regarding the fourth transaction for which documentation was not provided.

The third protest category concerns purchases of TPP which Taxpayer states were for jobs it completed for exempt customers. Taxpayer argues that its own purchase of the materials used in those jobs was also exempt. IC § 6-2.5-8-8(a) states that:

> 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.

Next, IC § 6-2.5-4-9 provides:

> (a) A person is a retail merchant making a retail transaction when the person sells tangible personal property which:
> (1) is to be added to a structure or facility by the purchaser; and
> (2) after its addition to the structure or facility, would become a part of the real estate on which the structure or facility is located.
> (b) A contractor is a retail merchant making a retail transaction when the contractor:
> (1) disposes of tangible personal property; or
> (2) converts tangible personal property into real property;
> under a time and material contract. As such a retail merchant, a contractor described in this subsection shall collect, as an agent of the state, the state gross retail tax on the resale of the construction material and remit the state gross retail tax as provided in this article.
> (c) *Notwithstanding subsections (a) and (b), a transaction described in subsection (a) or (b) is not a retail transaction, if the ultimate purchaser or recipient of the property to be added to a structure or facility would be exempt from the state gross retail and use taxes if that purchaser or recipient had directly purchased the property from the supplier for addition to the structure or facility*.
> (*Emphasis added*).

P.L.181-2016, Sec.21 (effective retroactively to Jan. 1, 2010) reworded portions of subsection (c) to reflect that subsections (a) and (b) were now in place. The relevant portion of IC § 6-2.5-4-9 was present in both the retroactive version and the version which existed during the tax years 2014 and 2015. A transaction is not a retail transaction if the ultimate purchaser or recipient of the property to be added to a structure or facility would be exempt from the state gross retail and use taxes if that purchaser or recipient had directly purchased the property from the supplier for addition to the structure or facility.

In its protest, Taxpayer provided three exemption certificates of its customers regarding improvements to realty via lump-sum contracts. As provided by IC § 6-2.5-4-9, transactions with these three customers will be excluded from Department's calculations of use tax due.

Also, according to IC § 6-2.5-8-9(b):

> A person who possesses a direct payment permit may, at the time of a retail transactions, issue a direct payment certificate to a retail merchant instead of paying the state gross retail or use tax to the merchant. The person must then pay the tax on the purchase directly to the department. A retail merchant who receives a direct payment certificate has no duty to collect or remit the state gross retail or use tax on that transaction.

Taxpayer provided a direct pay permit from one of its customers. As provided by IC § 6-2.5-8-9, Taxpayer is not

responsible for the payment of sales or use tax on transactions with that customer. Taxpayer has met the burden imposed under IC § 6-8.1-5-1(c) regarding the four transactions listed under protest category three.

Regarding protest category four, Taxpayer protests transactions in the expense projection as purchases of TPP used out of state through direct shipment to the out-of-state headquarters of Taxpayer. Taxpayer provided three invoices establishing the out-of-state location of the transactions in question. Since these three transactions took place wholly outside Indiana's borders, they are not subject to either Indiana sales or use taxes. Taxpayer has met burden imposed under IC §6-8.1-5-1(c) regarding these three transactions.

Regarding protest category five, Taxpayer argues that the expense projection included purchases from contractors for lump-sum real estate improvements. In support of its argument, Taxpayer attached a letter from one of those contractor's Chief Financial Officer ("CFO") on payment of use tax on seven transactions and purchase orders showing that all elements of cost were bid and invoiced as one lump sum. Taxpayer refers to IC § 6-2.5-3-2(b), which states:

> The use tax is imposed on a contractor's conversion of construction material into real property if that construction material was purchased by the contractor. However, the use tax does not apply to conversions of construction material described in this subsection, if:
>
> (1) The state gross retail or use has been previously imposed on the contractor's acquisition or use of that construction material;
>
> (2) The person for whom the construction material is being converted could have purchased the material exempt from the state gross retail and use taxes, as evidenced by a properly issued exemption certificate, if that person had directly purchased the construction material from a retail merchant on a retail transaction; or
>
> (3) The conversion of the construction material into real property is governed by a time and material contract.

The Department agrees with Taxpayer on its protest regarding transactions with this contractor.

Also regarding the subject of lump-sum contracts for improvements to realty, Taxpayer was also able to provide documentation via Purchase Order #149548 and Invoice #5209R-1 dated January 13, 2015 for an amount of $14,000. Since this was a lump-sum contract for improvement to realty, and since 45 IAC 2.2-3-9 provides that the contractor is responsible for tax on TPP used in such transactions, use tax is not due on this transaction. Taxpayer met the burden imposed under IC § 6-8.1-5-1(c).

Regarding protest category six, Taxpayer argues that the expense projection includes financial accounting transactions that were not purchases of property or services or erroneous payments. The first transaction is described by Taxpayer as an offset of an erroneous payment. The second transaction is described by Taxpayer as a voided check and not a payment. Regarding the offset transaction, after review, the Department agrees that this was the case for this transaction. Regarding the voided check, Taxpayer states that the transaction is listed as negative but that the Department treated it as positive. After review, the transaction is listed in the audit report's sample projection as positive. Therefore, Taxpayer has met the burden imposed under IC § 6-8.1-5-1(c) in relation to the offset transaction. However, Taxpayer has not met the burden of proving the assessment wrong regarding the second transaction.

Taxpayer claims in protest category seven that the expense projection includes a transaction with self-assessed Indiana use tax at the time of purchase. After review of the supporting documentation supplied during the protest process, the Department agrees with Taxpayer on the basis of IC § 6-2.5-3-8(b), which states:

> (b) If the Department assesses the use tax against a person for a person's storage, use, or consumption of tangible personal property in Indiana, and if the person has already paid the use tax in relation to that property to a retail merchant, to the Department, then the person may avoid paying the use tax to the Department if he can produce a receipt or other written evidence that he has made the use tax payment.

Taxpayer has provided sufficient documentation to establish that use tax on this transaction was self-assessed and no use tax is due.

Regarding protest category eight, Taxpayer states that the expense projection includes rental payment for the

property located in Indiana. Taxpayer claims that property occupied for more than thirty days is not subject to tax. 45 IAC 2.2-4-8(b) states:

> In general, the gross receipts from renting or furnishing accommodations are taxable. An accommodation which is rented for a period of thirty (30) days or more is not subject to the gross retail tax.

However, Taxpayer did not provide documentation verifying the nature of the transaction. Taxpayer did not meet the burden imposed under IC § 6-8.1-5-1(c).

Regarding protest category nine, Taxpayer protests assessment of use tax on motor vehicles not registered in Indiana. The Department reviewed these purchases on a transaction-by-transaction basis. They were not part of the sample and projection methodology previously discussed. In the course of reviewing Taxpayer's capital asset depreciation schedules, and purchase invoices, the Department found that Taxpayer had purchased the vehicles for its employees to use in Indiana. The Department then determined that one percent Indiana use tax was due, as provided by IC § 6-2.5-3-5.

Also of relevance is IC § 6-2.5-2-3, which states:

> (a) As used in this section, "motor vehicle" means a vehicle that would be subject to the vehicle excise tax imposed under IC 6-6-5 if the vehicle were to be used in Indiana.
> (b) *Notwithstanding section 2 of this chapter, the state gross retail tax rate on a motor vehicle that a purchaser intends to:*
> *(1) transport to a destination outside Indiana within thirty (30) days after delivery; and*
> *(2) title or register for use in another state or country;*
> *is the rate of that state or country (excluding any locally imposed tax rates) as certified by the seller and purchaser in an affidavit satisfying the requirements of subsection (c)*.
> (c) The department of state revenue shall prescribe the form of the affidavit required by subsection (b). In addition to the certification required by subsection (b), the affidavit must include the following:
> (1) The name of the state or country in which the motor vehicle will be titled or registered.
> (2) An affirmation by the purchaser under the penalties for perjury that the information contained in the affidavit is true.
> (3) Any other information required by the department of state revenue for the purpose of verifying the information contained in the affidavit.
> (d) The department may audit affidavits submitted under this section and make a proposed assessment of the amount of unpaid tax due with respect to any incorrect information submitted in an affidavit required by this section.

Taxpayer states that all vehicles listed in the Department's audit report as subject to Indiana use tax were registered and plated in its home state, thus no Indiana use tax is due. After review of the supplied documentation, the Department is satisfied that Taxpayer has addressed the Department's concerns regarding the nature of the use of the vehicles in Indiana. Therefore, Taxpayer has met the burden imposed under IC § 6-8.1-5-1(c).

In conclusion, Taxpayer is sustained on some of its protest. Taxpayer is sustained in whole on protest categories one, three, four, five, seven, and nine. Taxpayer is denied in whole on protest category eight. Taxpayer is partially sustained and partially denied on protest categories two and six. The Department will recalculate the amount of use tax due after taking these findings into account and will issued new, reduced use tax assessments for the tax years.

FINDING

The Taxpayer's protest in relation to use tax is sustained in part and denied in part, as provided above.

May 31, 2018

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An html version of this document.