DEPARTMENT OF STATE REVENUE

04-20181710.LOF

Letter of Findings: 04-20181710
Gross Retail and Use Tax
For the Years 2012, 2013, and 2014

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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Indiana Construction Contractor failed to meet its burden of establishing that it was not responsible for collecting sales tax on a series of transactions which involved the provision and delivery of construction dirt.

ISSUE

I. Gross Retail and Use Tax - Delivery Charges.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1(a); IC § 6-2.5-2-1(b); IC § 6-2.5-4-1(a); IC § 6-2.5-4-1(b); IC § 6-2.5-9-3; IC § 6-8.1-5-1(c); *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); *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); 45 IAC 2.2-1-1(a); 45 IAC 2.2-4-2; 45 IAC 2.2-4-2(a).

Taxpayer argues it was not required to collect sales tax on the price it charged its customer for delivering dirt from a construction site to the customer's property.

STATEMENT OF FACTS

Taxpayer is an Indiana company in the business of constructing and installing underground utilities, asphalt roads and driveways, excavation projects, sanitary and storm sewers, bridges, and wastewater treatment facilities. To that end, Taxpayer operates multiple Indiana asphalt and concrete plants. In addition, Taxpayer sells its customers stone, straw, gravel, and other tangible personal property.

The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's business records and sales transactions. Taxpayer agreed that the Department would conduct a "statistical sample" of Taxpayer's transactions to determine any tax liability. The audit resulted in an assessment of additional sales/use tax. Taxpayer disagreed with a portion of 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. Gross Retail and Use Tax - Delivery Charges.

DISCUSSION

Taxpayer argues that the Department erred in assessing it sales/use tax on a series of transactions which involved the delivery of dirt on the ground that its customer was paying for exempt delivery services only. Taxpayer acquired the dirt at a construction site on which it had previously provided unrelated construction services.

The Department's audit report described the transaction as follows:

> [A] retail transaction took place in which [Taxpayer] sold dirt to [customer], delivered the dirt to a site chosen by [customer], and then performed earthwork to situate said dirt at customer's chosen site. The transaction was invoiced as [invoice number] to [Customer] for 1,880 loads of dirt priced at $65 per load totaling $122,200. The invoice did not provide a breakdown of the charges for the dirt, any labor charges, hauling, earthwork, or any other charges. As such, the amount was invoiced as a single price inclusive of all charges

to get said dirt to [customer].

The Department's audit concluded that the customer was paying for both the dirt and for the delivery of the dirt. The audit report explains its rationale:

• Tangible personal property was transferred to [customer] for consideration;
• [Taxpayer] was not charged by anyone, for the dirt that was later sold to [customer];
• Per the [T]axpayer, the excess dirt at the [original construction] site was considered excess soil and needed to be moved off of the site;
• The only invoice between any of the entities . . . was between [Taxpayer] and [customer];
• The invoice provided to [customer] from [Taxpayer] was billed as a taxable retail unitary transaction inclusive of all charges for the dirt materials and the hauling;
• The true nature of the transaction between [customer] and [Taxpayer] was for [customer] to obtain dirt that he wished to be used at a site of his choosing rather than paying for hauling fees.

The Department's audit concluded that Taxpayer acquired the dirt from the original construction site and that the dirt was sold to Taxpayer's customer "as a single unitary price that constituted that of a unitary retail transaction under 45 IAC 2.2-1-1(a) and no sales tax was charged to [Customer] on the total amount invoiced to-date."

> In the end, tangible personal property was, without question, transferred between two parties for consideration. The invoice from [Taxpayer] illustrates this plainly. As a result, the exact, unwavering realty of the transaction was the [customer] was looking to obtain dirt, he obtained this dirt from [Taxpayer] in a taxable, retail transaction that occurred in Indiana, and because no tax was collected upon the sale of this dirt, the invoice is correctly being included in the taxable adjustments being proposed with this examination.

IC § 6-2.5-2-1(a) imposes sales tax on retail transactions made in Indiana. IC § 6-2.5-1-2 defines a retail transaction as "a transaction of a retail merchant that constitutes selling at retail as described in IC § 6-2.5-4-1 . . . or that is described in any other section of IC § 6-2.5-4." IC § 6-2.5-4-1(a) provides that "[a] person is a retail merchant making a retail transaction when he engages in selling at retail." IC § 6-2.5-4-1(b) further explains that a person sells at retail when he "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration."

A retail merchant - such as Taxpayer - is required to "collect the tax as agent for the state." IC § 6-2.5-2-1(b). The retail merchant "holds those taxes in trust for the state and is personally liable for the payment of those taxes . . . ." IC § 6-2.5-9-3.

Taxpayer asserts that it did not transfer "tangible personal property" and that there was no "retail transaction" between itself and the company which received the dirt. As such, Taxpayer necessarily relies on 45 IAC 2.2-4-2 which contains a provision exempting the purchase of services from sales tax. Specifically, 45 IAC 2.2-4-2(a) states:

> 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.

However, the regulation also provides, "Where, in conjunction with rendering professional services . . . the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail . . . ." *Id*.

The regulation provides four exemptions from the taxability provision. A transfer of tangible personal property constitutes "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[percent]) 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. *Id.*

However, Taxpayer makes no mention of the regulatory exceptions.

Tax assessments are *prima facie* evidence that the Department's assessment of tax is presumed correct; the taxpayer bears the burden of proving that the assessment is incorrect. IC § 6-8.1-5-1(c); *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 n.9 (Ind. Tax Ct. 2012). 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, interpretations of Indiana tax law contained within this decision, as well as the preceding audit, are entitled to deference.

Taxpayer performed work at a construction site. The owner of the construction site gave permission or required Taxpayer to remove excess dirt. Taxpayer entered into an arrangement to provide the dirt to an unrelated customer. The customer paid Taxpayer consideration for providing and delivering the dirt.

The issue is whether Taxpayer was providing dirt delivered to its customer's location or whether Taxpayer was simply providing exempt delivery services.

In support of its argument, Taxpayer provided various documents. For example, Taxpayer provided a copy of a "right of entry agreement." The agreement granted Taxpayer permission for Taxpayer to enter upon customer's property; the agreement was between Taxpayer and customer.

Taxpayer provided copies of internal emails including one by Taxpayer's controller stating that Taxpayer did not supply customer with the dirt. "It was the contractor's [] responsibility to have [the dirt] removed. They found [customer] who paid [Taxpayer] to haul it to his property."

Taxpayer also provided a copy of the invoice Taxpayer sent its customer. The invoice described the transaction as one for "1880 LOADS OF DIRT." The listed quantity was for 1,880.00 billed per "LOAD" for a "gross billing" of $122,000.

Nonetheless, Taxpayer has provided no documentation establishing that customer in any way acquired the dirt from the owner of the construction site. Instead, the available documentation indicates that customer acquired - and paid for - 1,880 loads of dirt delivered to customer's location. The Department does not discount the possibility that Taxpayer acquired the dirt at no cost to itself or even that the construction site owner wanted or required Taxpayer to remove the dirt from the construction site. However, that does not affect the nature of the essential transaction between Taxpayer and customer. As its own invoice demonstrated; the transaction is memorialized in wiring as one for "1880 LOADS" of dirt, for a unit price of $65.00, for a total price of $122,000.

Taxpayer has failed to meet its burden under IC § 6-8.1-5-1(c) of establishing that the audit's conclusion was "wrong." As between the two interpretations of the same facts - Taxpayer delivered dirt the customer acquired from the construction site and paid Taxpayer to deliver it or Taxpayer provided its customer dirt and delivery services by means of a single "unitary transaction" pursuant to 45 IAC 2.2-4-2(a) - the Department finds that the audit arrived at the best and most well documented conclusion.

FINDING

Taxpayer's protest is respectfully denied.

September 28, 2018

Posted: 11/28/2018 by Legislative Services Agency
An html version of this document.