

Letter of Findings: 04-20182408
Gross Retail and Use Tax
For the Years 2015, 2016, and 2017

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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Grocery Store Business failed to establish that the Department's assessment of sales/use tax on separately stated delivery charges was wrong; delivery charges were specifically enumerated as subject to Indiana's sales/use tax.

I. Gross Retail and Use Tax - Delivery Charges.

Authority: IC § 6-2.5-2-1(a); IC § 6-2.5-2-1(b); IC § 6-2.5-3-1(a); IC § 6-2.5-3-2(a); IC § 6-2.5-4-1(e); IC § 6-8.1-5-1(c); *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); *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); *Rhoads v. Ind. Dep't of State Revenue*, 774 N.E.2d 1044 (Ind. Tax Ct. 2002).

Taxpayer argues that the Department's assessment of additional sales and use tax is overstated because the Department erroneously assessed sales tax on delivery charges.

STATEMENT OF FACTS

Taxpayer is a company which operates three Indiana grocery stores. The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's tax returns and business records. The Department's audit found that Taxpayer paid use tax "sporadically throughout the audit period." However, the audit assessed additional use tax on items which were "found to be subject to use tax." The Department assessed use tax on the purchase of items such as office furniture, meat slicers, delivery charges, and "items on which no invoices could be located to prove the tax payment."

Taxpayer disagreed with the assessment in part 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's assessment of additional sales/use tax is overstated because the Department's audit erred in assessing sales tax on separately stated charges for the delivery of refrigeration equipment.

The issue is whether Taxpayer has met its burden of establishing that the Department's assessment of additional sales/use tax is incorrect.

Because the Department's audit resulted in an assessment of additional tax, it is the Taxpayer's responsibility to establish that the pending 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." See also *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 its 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).

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 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). Use means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a).

In effect and practice, this use tax is functionally equivalent to the sales tax. See *Rhoades v. Ind. Dept of State Revenue*, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002).

Taxpayer purchased refrigeration equipment from an Indiana vendor. The refrigerator vendor's invoices included charges for "freight." Taxpayer maintains that these charges are exempt from sales tax; Taxpayer is wrong. The issue is addressed at IC § 6-2.5-4-1(e).

The gross retail income received from selling at retail is only under this article to the extent that the income represents:

- (1) The price of the property transferred without the rendition of any service; and
- (2) [E]xcept as provided in subsection (g) [not applicable], any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, *delivery*, or other service performed in respect to the property transferred before its transfer and *which are separately stated on the transferor's records* is part of the retail transaction and subject to sales tax. (*Emphasis added*).

Although delivery charges represent an intangible "service" and not the transfer of "tangible personal property," Indiana law specifically imposes tax on these separately stated charges. Since there is no basis under which Taxpayer can claim the charges are otherwise exempt, Taxpayer's protest must be denied because Taxpayer has not met its burden of establishing that the Department's assessment was "wrong." IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is respectfully denied.

January 11, 2019

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