

Letter of Findings: 04-20182407
Use Tax
For the Tax Year 2016

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 This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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 provided sufficient documentation to support its position that it had already paid sales tax on a portion of its purchases during the audit period. Therefore, the Department's use tax assessment will be recalculated. Also, penalties will be waived.

ISSUES

I. Use Tax—Partial Payment.

Authority: IC § 6-2.5-1-1; IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-4-1; IC § 6-8.1-5-1; *Indiana Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (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*, 897 N.E.2d 289 (Ind. Tax Ct. 2007); *The Frame Station, Inc. v. Indiana Dept. of State Revenue*, 771 N.E.2d 129 (Ind. Tax 2001); [45 IAC 2.2-3-4](#).

Taxpayer protests a portion of the Department's proposed assessment.

II. Tax Administration—Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the negligence penalties.

STATEMENT OF FACTS

Taxpayer is an Indiana business. In the course of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not paid sales or use taxes on all taxable purchases it had made during the audit years 2015 and 2016. The Department therefore issued proposed assessments for sales tax, use tax, penalties, and interest. Taxpayer paid the assessments but protested that it had already paid sales tax on a portion of a catering charge it incurred regarding a holiday party it had in 2016. Taxpayer also protested the imposition of penalties. At the time it filed its protest, Taxpayer initially opted for audit review of its protest prior to holding an administrative hearing. After review of the protest file, the Department's Legal Appeals section called Taxpayer and explained that the normal protest process could result in a faster decision. Taxpayer agreed to proceed with a written decision option for the protest. This Letter of Findings results. Further facts will be supplied as required.

I. Use Tax—Partial Payment.

DISCUSSION

Taxpayer protests the imposition of use tax on a portion of one transaction in 2016. The Department based its decision to impose use tax on Taxpayer's payment for catering a holiday party it hosted in 2016 on the basis that the amount charged constituted a unitary transaction and that the entire amount was therefore taxable. Taxpayer protests that it paid sales tax to the caterer on the food and beverage portion of the bill at the time of the transaction and that it should now only pay use tax on the service portion of the bill. The caterer was paid in two payments listed as "Party Deposit" and "Party Balance" in the Department's audit report. The service charge was \$11.88 per person. Fifty-six people attended the party, for a total service charge of \$665.28.

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 [D]epartment'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*, 897 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 by 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.

Also, [45 IAC 2.2-3-4](#) provides:

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.

Therefore, when tangible personal property is used, stored, or consumed in Indiana, use tax is due unless sales tax was paid at the time of the transaction or unless the transaction is exempt from taxation in some manner.

Also of relevance, IC § 6-2.5-1-1 provides:

- (a) Except as provided in subsection (b), "unitary transaction" includes all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated.
- (b) "Unitary transaction" as it applies to the furnishing of public utility commodities or services means the public utility commodities and services which are invoiced in a single bill or statement for payment by the consumer.

Next, IC § 6-2.5-1-2 states:

- (a) "Retail transaction" means a transaction of a retail merchant that constitutes selling at retail as described in [IC 6-2.5-4-1](#), that constitutes making a wholesale sale as described in [IC 6-2.5-4-2](#), or that is described in any other section of [IC 6-2.5-4](#).
- (b) "Retail unitary transaction" means a unitary transaction that is also a retail transaction.

Finally, IC § 6-2.5-4-1 provides in relevant part:

- (a) A person is a retail merchant making a retail transaction when the person engages in selling at retail.
- (b) A person is engaged in selling at retail when, in the ordinary course of the person's regularly conducted trade or business, the person:
 - (1) acquires tangible personal property for the purpose of resale; and
 - (2) transfers that property to another person for consideration.
- (c) For purposes of determining what constitutes selling at retail, it does not matter whether:
 - (1) the property is transferred in the same form as when it was acquired;
 - (2) the property is transferred alone or in conjunction with other property or services; or
 - (3) the property is transferred conditionally or otherwise.

(d) Notwithstanding subsection (b), a person is not selling at retail if the person is making a wholesale sale as described in section 2 of this chapter. However, in the case of sales of gasoline (as defined in [IC 6-6-1.1-103](#)), a person shall collect the gasoline use tax as provided in [IC 6-2.5-3.5](#).

(e) *The gross retail income received from selling at retail is only taxable 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) *except as provided in subsection (g), 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.*

For purposes of this subsection, a transfer is considered to have occurred after delivery of the property to the purchaser.

....

(Emphasis added).

The Indiana Tax Court explained unitary transactions in *The Frame Station, Inc. v. Indiana Dept. of State Revenue*, 771 N.E.2d 129, 130 (Ind. Tax 2001), when it wrote:

The sole issue is whether Framemakers' custom-framing transactions constitute retail unitary transactions. A unitary transaction "includes all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated." Ind.Code § 6-2.5-1-1(a) (1998). However, as defined, a unitary transaction provides no basis for taxation. See *id*; see also *Indiana Dep't of State Revenue v. Martin Marietta Corp.*, 398 N.E.2d 1309, 1312 (Ind.Ct.App.1979) (citing Op. Att'y Gen. No. 5, 10-12 (1972)). Rather, the legislature imposes sales tax on any unitary transaction that is a retail transaction, i.e., a "retail unitary transaction." Ind.Code §§ 6-2.5-1-2(b); 6-2.5-4-1(e) (1998). A retail unitary transaction is taxable to the extent that income from the transaction represents

- (1) the price of the property transferred ... and (2) ... 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.

Ind.Code § 6-2.5-4-1(e) (emphasis added). In other words, Indiana Code Section 6-2.5-4-1(e) permits the imposition of sales tax on otherwise non-taxable services when the services are performed with respect to property prior to the transfer of the property to the transferee. *Cowden & Sons Trucking, Inc. v. Indiana Dep't of State Revenue*, 575 N.E.2d 718, 722 (Ind. Tax Ct.1991) (holding that a retail unitary transaction exists when the transfer of the property and rendition of services are "inextricable and indivisible"); *Martin Marietta*, 398 N.E.2d at 1311.

In the instant case, Taxpayer arranged for a holiday party in 2016. In the course of the audit, the Department saw two entries for payments to the caterer and determined that the amount paid for the event was a unitary transaction and so was a taxable purchase. The Department therefore imposed use tax on the entire amount which Taxpayer paid to the caterer.

Taxpayer protests that it did pay sales tax on a portion of the cost of the party. Specifically, in the course of the protest process, Taxpayer provided a copy of the caterer's event proposal which listed the cost per person for catering the event. That proposal listed a price for food and drinks plus sales tax on that amount, then listed a price for service without sales tax listed. These amounts were totaled for a price per person which included food, drinks, sales tax on the food and drinks, and service charge.

After review of this document, the Department agrees that Taxpayer has already paid a portion of the tax due on the catering for the 2016 holiday party. While the Department's audit was correct that the catering billing constituted a unitary transaction, as provided by IC § 6-2.5-1-1 and *Frame Station*, and that sales or use tax would be due on the entire amount of the transaction, if part of it has been paid then tax would only be due on the remaining untaxed portion. Taxpayer has met the burden imposed under IC § 6-8.1-5-1(c) of proving this portion of the proposed assessment wrong. Use tax is only due on the \$665.28 representing service charges included in the unitary transaction, since sales tax was paid on the other amounts paid to the caterer. Therefore, the Department will recalculate the amount of use tax due and, since Taxpayer has already paid the entire amount of the assessments for the audit period, will refund the portion which was paid as sales tax to the caterer on the food and drink portion of the catering bill for the 2016 holiday party.

FINDING

Taxpayer's protest is sustained.

II. Tax Administration—Penalty.

DISCUSSION

Taxpayer also protests the imposition of penalties pursuant to IC § 6-8.1-10-2.1. Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. [45 IAC 15-11-2\(b\)](#) clarifies the standard for the imposition of the negligence penalty as follows:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at [45 IAC 15-11-2\(c\)](#) as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer states that the underpayment of sales tax and use tax was not intentional. Also, Taxpayer states that they have a use tax accrual and remittance system in place. After review of the documentation and analysis provided in the protest process, the Department agrees with Taxpayer's position. Therefore, waiver of penalties is warranted under [45 IAC 15-11-2\(c\)](#). The Department notes that, since Taxpayer has now had penalties waived once, waiver may not be appropriate on any future assessments. As explained above, Taxpayer has already paid the assessments and so the amounts representing penalties will be refunded.

FINDING

Taxpayer's protest to the imposition of penalties is sustained.

SUMMARY

Taxpayer is sustained in Issue I regarding the imposition of use tax on the food and drink portion of the catering for its 2016 holiday party. Taxpayer is sustained in Issue II regarding the imposition of penalties. The Department will recalculate the amount due after taking these findings into account and will refund the overpaid amount to Taxpayer.

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