

DEPARTMENT OF STATE REVENUE

04-20191555.LOF

Letter of Findings Number: 04-20191555
Sales and Use Tax
For Tax Years 2016, 2017, and 2018

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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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 Business was responsible for the additional sales tax because it failed to timely provide the supporting documents requested.

ISSUE**I. Sales Tax - Imposition: Exempt Sales.**

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-8.1-5-1; *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); *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480 (Ind. Tax Ct. 2012); [45 IAC 2.2-8-12](#).

Taxpayer protests the Department's proposed assessments on certain sales, claiming some of its customers were exempt from sales tax.

STATEMENT OF FACTS

Taxpayer is a company doing business in Indiana. In addition to grocery, Taxpayer sells tangible personal property, including tobacco products, to customers. The Indiana Department of Revenue ("Department") conducted a sales/use tax audit for 2016, 2017, and 2018 tax years. Pursuant to the audit, the Department determined that Taxpayer did not collect and remit sales tax on various retail transactions, nor did it provide the Department properly executed exemption certificates at the time of the audit. The Department's audit also determined that Taxpayer did not pay sales tax or self assess and remit use tax on certain purchases of tangible personal property, which Taxpayer used for its business. The Department thus imposed additional sales tax and use tax for the tax years at issue.

Taxpayer protested the sales tax assessment, asserting that its customers were exempt from the sales tax. Taxpayer however asked that the Department make the final determination - based on additional ST-105 Forms submitted - without a hearing. Therefore, the Department contacted Taxpayer and, again, granted Taxpayer additional time to provide properly signed special exemption certificates (AD-70 Forms) as requested by the Department's auditor. Nonetheless, Taxpayer did not respond to the Department's request of providing the signed AD-70 Forms by the end of February 2020 to support its protest. This Letter of Findings ensues and addresses the issue whether Taxpayer is not liable for the sales tax on various transactions because its customers were exempt. Additional facts will be provided as necessary.

I. Sales Tax - Imposition: Exempt Sales.**DISCUSSION**

The Department's audit determined that Taxpayer failed to collect sales tax on various retail transactions. Taxpayer argues that it was not responsible for collecting sales tax on sales to customers because they were exempt transactions. Thus, Taxpayer believes that the Department's assessments were overstated.

As a threshold issue, all tax assessments are *prima facie* evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any 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); *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012). Thus, the taxpayer is required to provide documentation explaining and supporting its challenge that the Department's assessment 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 sales tax on the transaction and "shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction." IC § 6-2.5-2-1(b). "The retail merchant shall collect the tax as agent for the state." *Id.*

A "[r]etail transaction" is "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](#)." IC § 6-2.5-1-2(a). IC § 6-2.5-4-1 (as in effect for tax years at issue), in relevant part, provides:

- (a) A person is a retail merchant making a retail transaction when he engages in selling at retail.
- (b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:
 - (1) acquires tangible personal property for the purpose of resale; and
 - (2) transfers that property to another person for consideration.
- ...
- (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.

Additionally, [45 IAC 2.2-8-12](#), in relevant part, provides:

- (b) Retail merchants are required to collect the sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used by the purchaser for an exempt purpose.
- (c) All retail sales of tangible personal property for delivery in the state of Indiana shall be presumed to be subject to sales or use tax until the contrary is established. The burden of proof is on the buyer and also on the seller unless the seller receives an exemption certificate.
- (d) Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important to the seller to obtain an exemption certificate in order to avoid the necessity for such proof. The mere filing of a Registered Retail Merchant Certificate number is not sufficient to relieve the seller of the responsibility to collect the sales tax or prove exempt use by the buyer.
- (e) No exemption certificates are required for sales in interstate commerce, however, proper records must be maintained to substantiate such sales.
- (f) An exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed.
- (g) An exemption certificate or other evidence supporting an exempt sale must be maintained by the seller for at least three (3) years after the due date of the tax return upon which such exempt transaction is reported.
- (h) Exemption certificates may be reproduced provided no change is made in the wording or content.

In this instance, the Department's audit noted that Taxpayer sells tangible personal property to customers. Taxpayer thus is a retail merchant and should have collected and remitted the sales tax on its sales. Taxpayer did not do so. Nor did Taxpayer provide the properly executed exemption certificates, which it should have collected from its customers, to the Department's auditor during the audit. The auditor was therefore unable to verify whether certain sales were exempt from the sales tax.

Pursuant to [45 IAC 2.2-8-12](#)(b), "Retail merchants are required to collect sales and use tax on each sale which

constitutes a retail transaction unless the merchant can establish that the item purchased will be used for an exempt purpose." [45 IAC 2.2-8-12](#)(d) also cautions that, "Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important for the seller to obtain an exemption certificate in order to avoid the necessity for such proof." In the absence of the properly signed and executed exemption certificates, the Department's audit properly assessed sales tax on the otherwise taxable sales.

There is no question that Taxpayer entered into retail transactions for which - absent an exemption - Taxpayer was required to collect sales tax. Taxpayer is reminded that sales tax becomes due at the time of the transaction; either the purchaser is exempt at the time of the transaction or it is not exempt. If the purchaser claims an exemption, the exemption certificate should be obtained *at the time the transaction occurs* otherwise the burden of proving the transaction was exempt becomes measurably more difficult.

In short, Taxpayer was allowed additional time to obtain special exemption certificates (AD-70 Forms) from its customers to support that Taxpayer is not responsible for the additional sale tax because its customers were exempt from sales tax. However, Taxpayer failed to do so. Thus, Taxpayer has failed to meet the burden imposed under IC § 6-8.1-5-1(c) of proving the proposed assessment wrong.

FINDING

Taxpayer's protest is denied.

May 19, 2020

Posted: 07/29/2020 by Legislative Services Agency
An [html](#) version of this document.