

Letter of Findings Numbers: 04-20200405
Sales/Use Tax
For the Years 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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 provided additional documents to demonstrate that it was not responsible for sales and use tax concerning several transactions.

ISSUE

I. Sales/Use Tax - Burden of proof.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-4-1; IC § 6-8.1-5-1; IC § 6-8.1-5-4; *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); *Rhoades v. Indiana Dep't of State Revenue*, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); [45 IAC 2.2-2-1](#).

Taxpayer protests, claiming that the assessment was overstated.

STATEMENT OF FACTS

Taxpayer is an Indiana company that provides both residential and commercial construction and remodeling services as well as heating and cooling repairs, landscaping, mowing and snow removal.

The Indiana Department of Revenue ("Department") audited Taxpayer's business records and tax returns for the tax years 2017 and 2018 ("Tax Years at Issue"). Pursuant to the audit, the Department found that Taxpayer failed to collect sales tax on retail transactions. The Department also determined that Taxpayer purchased tangible personal property to conduct its business without paying sales tax or use tax on the purchases. The audit assessed additional sales and use tax as a result.

Taxpayer disagreed with the assessment and filed a protest to that effect. Taxpayer requested that the Department review additional information submitted and make the final determination without a hearing. This Letter of Findings result is based on the documents submitted, the correspondence with Taxpayer's representative, and the information within the file. Additional facts will be provided, as necessary.

I. Sales/Use Tax - Burden of proof.

DISCUSSION

During the audit, the Department repeatedly requested that Taxpayer provide its business records for review, so the Department could determine the correct amount of tax due for the Tax Years at Issue. Taxpayer failed to do so. As a result, the Department assessed additional sales and use tax.

Taxpayer disagreed, submitting additional document, claiming that the Department's assessment is overstated.

Indiana mandates that every person who is subject to a listed Indiana tax must keep books and records, including all source documents, "so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records." IC § 6-8.1-5-4(a). "If the [D]epartment reasonably believes that a person has not reported the proper amount of tax due, the [D]epartment shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the [D]epartment." IC § 6-8.1-5-1(b). 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). 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); [45 IAC 2.2-2-1](#). A retail transaction is a transaction made by a retail merchant that constitutes "selling at retail." IC § 6-2.5-1-2(a). Selling at retail occurs when a person "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration." IC § 6-2.5-4-1(b). A person who acquires tangible personal property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). The purchaser in general "shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction." *Id.* The retail merchant "shall collect the tax as agent for the state." *Id.*

In addition, the Indiana 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." 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). The use tax is generally functionally equivalent to the sales tax. See *Rhoades v. Indiana Dep't of State Revenue*, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002). IC § 6-2.5-3-2(c), in relevant part, further provides:

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 tax 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 in a retail transaction; or
- (3) the conversion of the construction material into real property is governed by a time and material contract as described in IC [§] 6-2.5-4-9(b).

In this instance, Taxpayer provided additional documentation, requesting that the Department's Audit Division review the documentation submitted to support its protest without a hearing.

Upon review, the Department's auditor accepted the documentation, in part, and rejected, in part, because some of the information provided cannot be verified. Therefore, based on the information submitted, this final determination addresses them accordingly, as follows:

A. Sales Tax.

The Department is prepared to accept documents concerning the following transactions:

Date	Reference #	Item Description	Taxable Amount
03/15/18	Missing Invoices	Deposit - Snow Removal	695.00
11/15/18	1-11142018	Time and Material[]	6,712.25
07/17/18	Missing Invoices	Deposit - Checking	775.00
09/13/17	Missing Invoices	Deposit - Checking	20,442.50
03/21/17	032117-2	Time and Material[]	125.00
12/28/18	12282018-1	New defrost board	97.67
12/20/17	Missing Invoices	Deposit - Snow Removal	360.00
02/22/17	Missing Invoices	Deposit - Snow Removal	25.00
02/28/17	Missing Invoices	Deposit - Snow Removal	650.00
01/29/18	Missing Invoices	Deposit - Snow Removal	350.00
03/05/18	Missing Invoices	Deposit - Snow Removal	1,000.00
03/05/18	Missing Invoices	Deposit - Snow Removal	1,025.00
03/20/18	Missing Invoices	Deposit - Snow Removal	520.00

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04/14/18	Missing Invoices	Deposit - Snow Removal	1,650.00
02/01/18	Missing Invoices	Deposit - Snow Removal	225.00
04/06/18	Missing Invoices	Deposit - Snow Removal	150.00
03/21/18	3212018	Time and Material[]	2,800.00
02/14/17	Missing Invoices	Deposit - Snow Removal	1,250.00

Therefore, the Department will remove the above transactions from the audit assessment in a supplemental audit. Taxpayer is responsible for the remainder of sales tax assessed.

B. Use Tax.

The Department is prepared to accept documents concerning the following purchases, which tax was paid. Taxpayer will receive a credit determined by the supplement audit.

Date	Reference #	Taxable Amount
01/19/17	364662-00	-17.99
04/04/17	367228-00	-10.56
04/04/17	367239-00	-138.12
07/21/17	371365-00	-30.56
11/08/18	390930-00	-16.77
11/09/18	390948-00	-248.70
11/09/18	391007-00	-2.86
10/24/18	R513318	-2,004.00
10/24/18	R489710	-3,708.00

Finally, the Department is prepared to accept a \$10,458.05 invoice submitted by Taxpayer to support that the transaction was a nontaxable service and it was paid by means of a Discover card.

In short, the Department's Audit Division will conduct a supplemental review and adjust the assessment, to the extent supported by the documentation supplied by Taxpayer in the protest process. Taxpayer has met the burden imposed by IC § 6-8.1-5-1(c) of proving the proposed assessment wrong, to the extent described above.

FINDING

Pending the Department's supplemental audit review, Taxpayer's protest is sustained, in part, and denied, in part. Taxpayer is responsible for the remainder of assessment.

March 2, 2021

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