

Letter of Findings: 04-20221218
Gross Retail and Use Tax
For the Years 2019, 2020, and 2021

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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

The Department agreed to review additional exemption certificates provided by Indiana On-line Auction service; the Department accepted certificates which were complete, were legible, signed by the purchaser, and exhibited the name of the entity or person who made the original purchase.

ISSUE

I. Gross Retail Tax - Exempt Sales Transactions.

Authority: [IC 6-2.5-2-1](#); [IC 6-2.5-3-1](#); [IC 6-2.5-3-2](#); [IC 6-2.5-8-8](#); [IC 6-2.5-9-3](#); [IC 6-8.1-5-1](#); *Indiana Dept. of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *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); *Rhoads v. Ind. Dep't of State Revenue*, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); [45 IAC 2.2-8-12](#).

Taxpayer argues that the Department's assessment of additional sales and/or use tax is overstated because Taxpayer can now supply ST-105 and AD-70 exemption certificates received from certain of its retail customers.

STATEMENT OF FACTS

Taxpayer is an Indiana company in the business of providing on-line auction services. On its website, customers are invited to bid on the purchase of various items of tangible property such as furniture, air conditioners, and power tools.

The Indiana Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer's business records and tax returns.

According to the resulting audit report, Taxpayer entered into sales transactions for which no sales tax was collected. As explained in the audit report:

A review of the sales records revealed sales of tangible personal property to customers where sales tax was not charged and the [T]axpayer did not have a valid exemption certificate on file. The [T]axpayer was issued an AD-14 Notice of Noncompliance allowing the [T]axpayer 21 days to obtain special exemption form AD-70's or other proof of exemption from these customers.

. . . .

[However], the [T]axpayer was unable to provide exemption certificates or other documentation supporting the exemption for the listed customers.

As a result, the Department determined that Taxpayer was "liable for the listed tax regardless of the amount that is collected from the customer" and assessed Taxpayer the additional sales/use tax.

Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted by telephone during which Taxpayer's representative explained the basis for the protest. This Letter of Findings results.

I. Gross Retail Tax - Exempt Sales Transactions.

DISCUSSION

The issue is whether Taxpayer has supplied additional documentation - including customer exemption certificates - sufficient to warrant additional review and reconsideration of the Taxpayer's proposed tax assessments.

In its protest submission, Taxpayer's representative explained the ins and outs of its business.

[Taxpayer] is an online auction service. Customers create an online account to bid on items. At the close of the auction, the highest bidder is issued an invoice for the items won. Once a customer creates an account, [Taxpayer] has no control to change the name on the invoice.

At times customers will create an account with their personal name and information but the items purchased are actually for a tax-exempt entity/or purposes. In those instances, an invoice is issued without retail sales tax assessed based on information provided by the customer.

Taxpayer believes it did everything required of it and that the Department's audit personnel erred when it declined to accept AD-70s in which the name on the exemption certificate did not match the name of purchaser.

As with any assessment of Indiana listed taxes, it is Taxpayer's responsibility here to establish that the proposed assessments of tax, interest, and penalty are incorrect. As stated in [IC 6-8.1-5-1\(c\)](#) and Indiana case law, "The notice of proposed assessment is prima facie evidence that the [D]epartment's claim for the unpaid tax is valid, including during an action appealed to the tax court under this chapter. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." See also *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*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

In order to meet the statutory burden, a taxpayer challenging an assessment 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).

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\(b\)](#). "The retail merchant shall collect the tax as agent for the state." *Id.* As an agent for the State of Indiana, the seller "holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state." [IC 6-2.5-9-3\(a\)\(2\)](#)(2019).

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, the use tax is functionally equivalent to the sales tax. See *Rhoads v. Ind. Dep't of State Revenue*, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002).

In its audit report, the Department cited to [45 IAC 2.2-8-12\(c\)](#) as specific authority for imposing the tax. The regulation provides:

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. (Emphasis added).*

The regulation imposes on Taxpayer - as the retailer - the burden of providing the exemption certificates or overcoming the presumption that all its sales are subject to tax.

Most relevant in this case is that, in the absence of valid exemption certificates, [45 IAC 2.2-8-12\(d\)](#) makes it clear that Taxpayer bears the burden of proving that sales tax was remitted to the state. The provision requires in part:

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.

As authority for rejecting certain of the certificates, the audit cited to [45 IAC 2.2-8-12\(f\)](#) which states:

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.

In addition, the audit cited to [IC 6-2.5-8-8\(e\)](#) which provides:

A seller that accepts an incomplete exemption certificate under subsection (a) is not relieved of the duty to collect gross retail or use tax on the sale unless the seller obtains:

- (1) a fully completed exemption certificate; or
- (2) the relevant data to complete the exemption certificate; within ninety (90) days after the sale.

The Department's audit relied on the above authorities determining at follows:

To be valid, an exemption certificate must:

- (1) Have all sections completed;
- (2) Be signed by the purchaser;
- (3) Retained in the seller's record[s]
- (4) The name on the exemption certificate must match the name on the sales invoice.

The audit report noted that some of certificates provided did not meet the requirements explaining as follows:

There were exemption certificates that were invalid. There were exemption certificates that did not complete all sections. There were sales invoices for purchases that were not in the name of the business that the exemption certificates were issued for.

Taxpayer is apparently well aware of its responsibilities as an Indiana merchant conducting transactions which are completed in this state. As its own website instructs:

All bidders will be subject to applicable sales tax for the state in with the auction is held. If you are tax exempt, provide our office with the documentation required for exemption.

....

All bidders will be subject to applicable sales tax for the state in which the auction is held. If you are tax exempt, provide our office with the documentation required for exemption. [Taxpayer] will be available during Inspection Days to assist with paperwork. Please give us a call with any questions[.]

The law on this issue is straightforward; retail transactions are presumed to be subject to sales tax, and the merchant is responsible for the tax unless the merchant proves otherwise or collects a properly completed exemption certificate from the customer. To the extent that Taxpayer has provided valid exemption certificates, Taxpayer is entitled to a review of that documentation. To the extent that Taxpayer has provided valid exemption certificates for the transactions at issue, Taxpayer's protest is sustained.

However, the Department here notes that it will only accept exemption certificates in which "all information requested on such form is completed." [45 IAC § 2.2-8-12\(f\)](#). The name on certificate must match the name of the entity or person who made the initial purchase; the certificate must be legible; the certificate must be complete; and the certificate must be signed. To the extent that the exemption certificates supplied in the protest process meet these requirements, Taxpayer has met the burden of proving the proposed assessments wrong, as required by [IC 6-8.1-5-1\(c\)](#).

FINDING

Taxpayer's protest is sustained subject to review and verification by the Department's Audit Division.

December 9, 2022

