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DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 99-0033
Sales and Use Tax
For Tax Years 1994 through 1996

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superceded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales and Use Tax—Miscellaneous Asset Purchases

Authority: IC 6-2.5-3-4(a)(1)

Taxpayer protests assessment of use tax on miscellaneous asset purchases for the years 1994 and 1995.

II. Sales and Use Tax—X-ray Machine

Authority: IC 6-2.5-3-2

Taxpayer protests assessment of use tax on an x-ray machine.

III. Sales and Use Tax—Medical Exemption

Authority: 45 IAC 2.2-5-28; 45 IAC 2.2-5-36

Taxpayer protests assessment of use tax on the purchase of items it claims qualify for medical exemption.

IV. Sales and Use Tax—Maintenance Agreement

Authority: IC 6-2.5-3-2; Information Bulletin #2

Taxpayer protests assessment of use tax on purchases of maintenance agreement.

V. Sales and Use Tax—Miscellaneous Expense Purchases

Authority: IC 6-2.5-3-4(a)(1)

Taxpayer protests assessment of use tax on items it claims are duplicated.

VI. Tax Administration—Negligence Penalty

Authority: IC 6-8.1-5-4; IC 6-8.1-10-2

Taxpayer protests imposition of a ten percent (10%) negligence penalty.

STATEMENT OF FACTS

Taxpayer is a healthcare facility specializing in the treatment of female patients. The Department of Revenue ("Department") conducted an audit for the years 1994 through 1996. Several items were assessed use tax. Further information will be supplied as necessary.

I. Sales and Use Tax—Miscellaneous Asset Purchases

DISCUSSION

Taxpayer protests assessment of use tax on items on which it claims sales or use tax has already been paid. The audit report mentions that some information was unavailable for review at the time of the audit. Taxpayer has submitted further information as part of this protest. If this new information shows that a tax has already been paid on an item, the same tax should not be paid again. IC 6-2.5-3-4. The auditor will need to review this information.

FINDING

Taxpayer's protest is sustained, subject to verification by the auditor.

II. Sales and Use Tax—X-ray Machine

DISCUSSION

Taxpayer protests the assessment of use tax on an x-ray machine it claims it did not purchase. The auditor, pursuant to IC 6-2.5-3-2, assessed use tax on the machine since it was included and then removed from taxpayer's depreciation schedule and there was no continuous audit trail to account for the machine. Taxpayer has since provided adequate documentation to explain that it did not purchase the machine. Since the listing on the depreciation schedule was in error, and taxpayer never purchased or received the x-ray machine, there should have been no assessment made.

FINDING

Taxpayer's protest is sustained.

III. Sales and Use Tax—Medical Exemption

DISCUSSION

Taxpayer protests assessment of use tax on purchases of follicle aspiration sets. The auditor disallowed the sets pursuant to 45 IAC 2.2-5-36(a)(3), which states:

> (a) The gross retail tax shall apply to the following purchase transactions made by licensed practitioners:
>
> . . .
>
> (3) Surgical instruments, equipment and supplies.

Taxpayer raises 45 IAC 2.2-5-28(g), which states:

> The sale to the user of medical equipment, supplies, or devices prescribed by one licensed to issue such a prescription are exempt from sales and use tax.

Also of relevance is 45 IAC 2.2-5-28(h), which states:

> The term "medical equipment, supplies or devices", as used in this paragraph, are those items, the use of which is directly required to correct or alleviate injury to malfunction of, or removal of a portion of the purchaser's body.

Taxpayer explains that follicle aspiration sets are long, needle-like devices used in invitro fertilization. The equipment is used to extract live egg cells which are later fertilized and implanted into the body. Taxpayer believes that, since the sets are used to correct a malfunction of the body and are prescribed by one licensed to issue such a prescription, the sets should be exempt under 45 IAC 2.2-5-28(g).

The transaction in question is not a sale to the user, but rather a sale to the practitioner. The "user" is the patient. The "practitioner" is the taxpayer, a healthcare provider. If the follicle aspiration sets were being sold to the user, as prescribed to correct a malfunction of the purchaser's body, then 45 IAC 2.2-5-28(g) would apply. Here, the sale is to the practitioner, therefore 45 IAC 2.2-5-36(a)(3) applies.

FINDING

Taxpayer's protest is denied.

IV. Sales and Use Tax—Maintenance Agreement

DISCUSSION

Taxpayer protests Audit's assessment of use tax, pursuant to IC 6-2.5-3-2, on an optional maintenance agreement taxpayer entered into with a software supplier. Taxpayer points to Example 5 from Information Bulletin #2 to support its position that the agreement is exempt from use tax. Example 5 builds on facts presented in Example 4, which states:

> A computer software company sells a taxable software package to a customer for $2000. The customer also purchases a maintenance agreement from the company. The customer did not have to buy the maintenance agreement. The agreement entitles the customer to up to twenty hours of programmer help to deal with any problems the customer might have in using the software package. The maintenance agreement is an optional maintenance agreement and is not subject to sales tax.

Example 5 then states:

> Same facts as in Example 4, but the maintenance agreement also entitles the customer to four program updates per year. The program updates are available to all of the company's customers who purchased the software package. The maintenance is subject to sales tax because it is a certainty that tangible personal property, the updates, will be given to the customer under the terms of the maintenance agreement.

Taxpayer believes that, since the agreement it entered into did not make it a certainty that its supplier would provide updates, the agreement is not subject to use tax. The relevant clause in the maintenance agreement between taxpayer and the software supplier (name deleted) states:

> _____ is not obligated to make any enhancements to the SOFTWARE, but if it does so, _____ will provide all enhancements made to the SOFTWARE, and any related materials, to the CUSTOMER, during the term of this Agreement and any renewals thereof at no additional charge.

The agreement does not compel the software supplier to provide any updates, but rather only to provide them if they become available. If the supplier produced no updates during the term of the agreement, no tangible personal property would be transferred. Therefore the maintenance agreement in this case, unlike Example 5 of Information Bulletin #2, is not subject to sales tax as there is no certainty that tangible personal property will be transferred to the customer.

FINDING

Taxpayer's protest is sustained.

V. Sales and Use Tax—Miscellaneous Expense Purchases

DISCUSSION

Taxpayer protests the assessment of use tax on items it claims are duplicated on the list of 1995 and 1996 Taxable Expenses. The audit report explained that documentation was not available to establish that tax had been paid on all items. As part of this protest, taxpayer provided additional documentation to support its position. If tax has already been paid on an item, the same tax should not be paid again. IC 6-2.5-3-4(a)(1).

FINDING

Taxpayer's protest is sustained subject to verification by the auditor.

VI. Tax Administration—Negligence Penalty

DISCUSSION

Taxpayer protests imposition of a ten percent (10%) negligence penalty. Taxpayer raises IC 6-8.1-10-2(d) which states:

> If a person subject to the penalty imposed under this section can show that the failure to file a return, pay the full amount of tax shown on his return, timely remit tax held in trust, or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty.

Taxpayer claims that it has made a good faith attempt to self-assess use tax, and that a large majority of the assessment was based on unavailable asset records. The Department agrees that much of the assessment resulted from unavailability of records. The Department refers to IC 6-8.1-5-4(a), which states:

> Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records.

While taxpayer did eventually provide documentation in support of its protest, the information was not available when the audit itself was ongoing. Failure to keep these records available for review by the Department is sufficient reason to assess a negligence penalty. If this information had been available while the audit was being conducted, most of the time and effort involved for all parties in this matter could have been saved. Additionally, the Department's records show that many of the issues in this audit were addressed in a prior audit, and taxpayer should have known the taxable status of the items in question.

FINDING

Taxpayer's protest is denied.