DEPARTMENT OF STATE REVENUE

04-20050525.LOF

Letter of Findings Number: 05-0525
Sales Tax
For Tax Years 2002-04

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ISSUE

I. Sales Tax–Construction Materials
Authority: IC § 6-2.5-2-1; IC § 6-8.1-5-1; 45 IAC 2.2-3-12

Taxpayer protests the imposition of sales tax on the purchase of construction materials.

II. Tax Administration–Negligence Penalty
Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2

Taxpayer protests the imposition of a ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer operates a small construction company. Taxpayer was not a registered retail merchant. As the result of an audit, the Indiana Department of Revenue ("Department") issued proposed assessments for sales tax. Taxpayer protests some of the items upon which the Department determined sales tax was due. Further facts will be supplied as required.

I. Sales Tax–Construction Materials

DISCUSSION

Taxpayer protests the imposition of sales tax on certain items included in the audit. First, taxpayer protests the imposition of sales tax on items purchased by taxpayer for improvements to a church. Taxpayer states that the church could have purchased the items exempt from sales tax. Taxpayer supplied a copy of the church's exemption certificate.

The Department refers to 45 IAC 2.2-3-12, which states:

(a) Tangible personal property purchased to become a part of an improvement to real estate under a contract with an organization entitled to exemption is eligible for exemption when purchased by the contractor.

(b) *In order to be exempt on such purchases, the contractor must be registered as a retail merchant, must obtain an exemption certificate from the exempt organization, and must issue an exemption certificate to his supplier.*

(c) Utilities, machinery, tools, forms, supplies, equipment, or any other items used or consumed by the contractor and which do not become a part of the improvement to real estate are not exempt regardless of the exempt status of the person for whom the contract is performed.

(d) A person making a contract for the improvement to real estate whereby the material becoming a part of the improvement and the labor are quoted as one price is liable for the payment of sales tax on the purchaser *[sic.]* price of all material so used.

(e) A person selling tangible personal property to be used as an improvement to real estate may enter into a completely separate contract to furnish the labor to install or construct such improvement, in which case the sales tax shall be collected and remitted by such seller on the materials sold for this purpose. Such sale of materials must be identifiable as a separate transaction from the contract for labor. The fact that the seller subsequently furnished information regarding the charges for labor and material used under a flat bid quotation shall not be considered to constitute separate transactions for labor and material.

(emphasis added)

As 45 IAC 2.2-3-12(b) explains, in order to be exempt on purchases of tangible personal property to become part of real estate when the contractor's customer is an exempt entity, the contractor "must be registered as a retail merchant, must obtain an exemption certificate from the exempt organization, and must issue an exemption certificate to his supplier." In this case, taxpayer was not registered as a retail merchant, and therefore does not meet the requirements 45 IAC 2.2-3-12(b), and is therefore ineligible for the exemption.

Next, taxpayer protests the imposition of sales tax on a purchase of $3316.00 worth of materials from a plumbing company. Taxpayer states that sales tax was paid on the materials and that the receipt provided to the Department shows that sales tax was paid. A review of the receipt shows no mention of sales tax due or paid. As explained in IC § 6-8.1-5-1(b), the burden of proving a proposed assessment wrong rests with the person against whom the assessment is made. This document does not warrant dismissal of the sales tax on the materials in question, and does not meet the burden imposed by IC § 6-8.1-5-1(b).

Finally, taxpayer protests the imposition of sales tax on purchases it made from a vendor, but upon which the vendor failed to collect sales tax. Taxpayer protests that it should not be penalized for the vendor's error. The Department refers to 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.

In this case, the amount imposed by the Department is not a penalty. Rather it is simply the amount of sales tax due as it would be upon any purchase of tangible personal property. While the merchant should have collected the sales tax, as IC § 6-2.5-2-1(b) explains, the person who acquires the property in a retail transaction is liable for the tax on the transaction.

In conclusion, taxpayer was not a registered retail merchant and was not eligible to take advantage of the exemption found in 45 IAC 2.2-3-12. Taxpayer's documentation does not show any sales tax paid on the purchase from the plumbing company and does not satisfy the burden of proving the assessment wrong, as required by IC § 6-8.1-5-1(b). Finally, the fact that a vendor failed to collect sales tax does not relieve a purchaser of the liability for that sales tax, as explained in IC § 6-2.5-2-1(b).

FINDING

Taxpayer's protest is denied.

II. Tax Administration–Negligence Penalty

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty for the tax year in question. Taxpayer protests the imposition of penalty. The Department refers to IC § 6-8.1-10-2.1(a), which states in relevant part:

If a person:

. . .

(3) incurs, upon examination by the department, a deficiency that is due to negligence;

. . .

the person is subject to a penalty.

The Department refers to 45 IAC 15-11-2(b), which states:

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.

45 IAC 15-11-2(c) provides in pertinent part:

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.

In this case, taxpayer incurred a deficiency which the Department determined was due to negligence under 45 IAC 15-11-2(b), and so was subject to a penalty under IC § 6-8.1-10-2.1(a). Taxpayer has not affirmatively established that his failure to pay the deficiency was due to reasonable cause and not due to negligence, as required by 45 IAC 15-11-2(c).

FINDING

Taxpayer's protest is denied.

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