

Letter of Findings Number: 04-20100362
Sales and Use Tax
For Tax Years 2007 and 2008

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ISSUE

I. Sales Tax—Imposition.

Authority: IC § 6-2.5-1-1; IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-8.1-5-1; [45 IAC 2.2-1-1](#); [45 IAC 2.2-3-7](#); [45 IAC 2.2-4-1](#); [45 IAC 2.2-4-21](#); [45 IAC 2.2-4-26](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Sales Tax Information Bulletin 60 (July 2006).

Taxpayer protests the assessment of sales tax.

STATEMENT OF FACTS

Taxpayer, an Indiana company, is in the business of selling, installing, and providing servicing alarms (burglar and fire), security/surveillance systems, and access control systems. (Collectively, "integrated security/surveillance/access systems"). The access control systems provide its clients/customers "with an access recognition ability that allows them to control when and who enters" a room, a building or designated places, "such as turnstiles, elevators, or gates." Taxpayer's sales and installations of the integrated security/surveillance/access systems contain tangible personal property, including, but not limited to, access cards/devices and security equipment, such as closed circuit televisions (CCTVs), DVRs, VCRs, computers, computer software, video cameras, machines producing identity badges, and motion detectors. Taxpayer's customers could also purchase security/surveillance or access systems separately. Additionally, Taxpayer sells accessories and offers repair services on equipment and systems.

The Indiana Department of Revenue ("Department") conducted a sales/use tax audit. The audit utilized two different approaches in examining Taxpayer's accounts and records. First, both Taxpayer and the Department agreed to utilize a statistical sample drawn from selected 2007 and 2008 monthly invoices to determine Taxpayer's sales tax liabilities. Additionally, due to the nature of the sales and installations concerning two (2) integrated security/surveillance/access systems, the Department reviewed those records individually and made the adjustment separate from the sampling result.

Pursuant to the audit, the Department determined that Taxpayer failed to collect and remit sales tax due on some transactions. The Department's audit also assessed use tax because Taxpayer did not pay sales tax or self-assess and remit the use tax for those purchases of tangible personal property.

Taxpayer timely protested the assessment concerning the two (2) integrated security/surveillance/access systems as well as three (3) sales and installations of security equipment, such as cameras, which were included in the sampling result. A hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales Tax—Imposition.

DISCUSSION

Taxpayer sold and installed the integrated security/surveillance/access systems or security equipment, i.e. cameras, at its customers' locations, but Taxpayer did not distinguish charges for materials and labor. The Department's audit determined that those retail transactions were unitary transactions and Taxpayer had failed to collect sales tax; rather, Taxpayer paid the sales/use tax for the tangible personal property it purchased to perform those installation contracts. Since Taxpayer provided the auditor break-downs of its charges on materials and labor, and demonstrated that it had paid sales/use tax on the materials, the audit assessed sales tax only on the mark-ups which were included in Taxpayer's charges to its customers. The audit also granted Taxpayer credits for a portion of those installation contracts which were determined to be materials used pursuant to "improvement to realty" and not subject to the sales tax.

Taxpayer, to the contrary, claimed that it was not responsible for collecting sales tax on the unitary sales as a whole. Taxpayer asserted that those sales and installations qualified as "improvement to realty" and it charged its customers on a "lump sum" basis. Taxpayer argued that since it had paid the sales/use tax on the materials it purchased to perform those lump sum contracts, it was not responsible for collecting sales tax on the entire transactions, and, thus, it maintained that the audit erroneously assessed sales tax on the mark-ups.

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 imposes a sales tax on retail transactions and a complementary use tax on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-1-1 et seq.

IC § 6-2.5-1-1(a), in pertinent part, defines:

"unitary transaction" includes all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated.

[45 IAC 2.2-1-1\(a\)](#) explains:

Unitary Transaction. For purposes of the state gross retail tax and use tax, such taxes shall apply and be computed in respect to each retail unitary transaction. A unitary transaction shall include all items of property and/or services for which a total combined charge or selling price is computed for payment irrespective of the fact that services which would not otherwise be taxable are included in the charge or selling price.

IC § 6-2.5-2-1 provides:

- (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.

IC § 6-2.5-4-1, in relevant part, states:

- (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.
- (c) For purposes of determining what constitutes selling at retail, it does not matter whether:
 - (1) the property is transferred in the same form as when it was acquired;
 - (2) the property is transferred alone or in conjunction with other property or services; or
 - (3) the property is transferred conditionally or otherwise.

[45 IAC 2.2-4-1](#) explains:

(a) Where ownership of tangible personal property is transferred for a consideration, it will be considered a transaction of a retail merchant constituting selling at retail unless the seller is not acting as a "retail merchant".

(b) All elements of consideration are included in gross retail income subject to tax. Elements of consideration include, but are not limited to:

- (1) The price arrived at between purchaser and seller.
- (2) Any additional bona fide charges added to or included in such price for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other services performed in respect to or labor charges for work done with respect to such property prior to transfer.
- (3) No deduction from gross receipts is permitted for services performed or work done on behalf of the seller prior to transfer of such property at retail.

Also of relevance is [45 IAC 2.2-4-21](#), which states:

(a) In general, all sales of tangible personal property are taxable, and all sales of real property are not taxable. The conversion of tangible personal property into realty does not relieve a liability for any owing and unpaid state gross retail tax or use tax with respect to such tangible personal property.

(b) All construction material purchased by a contractor is taxable either at the time of purchase, or if purchased exempt (or otherwise acquired exempt) upon disposition unless the ultimate recipient could have purchased it exempt (see 6-2.5-5 [\[45 IAC 2.2-5\]](#)). **(Emphasis added).**

[45 IAC 2.2-3-7](#), in relevant part, explains:

(a) Contractors. For purposes of this regulation [\[45 IAC 2.2\]](#) "contractor" means any person engaged in converting construction material into realty. The term "contractor" refers to general or prime contractors, subcontractors, and specialty contractors, including but not limited to persons engaged in building, cement work, carpentry, plumbing, heating, electrical work, roofing, wrecking, excavating, plastering, tile and road construction.

(b) Construction material. For purposes of this regulation [\[45 IAC 2.2\]](#), "construction material" means any tangible personal property to be used for incorporation in or improvement of a facility or structure constituting or becoming part of the land on which such facility or structure is situated.

[45 IAC 2.2-4-26](#) further provides:

(a) 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 purchase price of all material so used.

(b) A person selling tangible personal property to be used as an improvement to real estate may enter into a completely [sic] 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 sales 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.

(c) 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.

The Department's Sales Tax Information Bulletin 60 (July 2006), 20060823 Ind. Reg. 045060287NRA, in pertinent part, further illustrates:

DEFINITIONS

A. "Construction Contractor" means anyone who is obligated under the terms of a contract to furnish the necessary labor or materials, or both, to convert construction material into realty, including a general or prime contractor, a subcontractor, or a special contractor. The term includes a person engaged in the business of building, cement work, carpentry, plumbing, heating and cooling, electrical work, roofing, wrecking, excavating, plastering, tile work, road construction, landscaping, or installing underground sprinkler system.

B. "Construction materials" means any tangible personal property to be used for incorporation in or improvement of a facility or structure constituting or becoming part of realty. A "facility" means any additions to the land.

...

E. "**Improvement to real estate**" means that **personal property has been incorporated into and becomes a permanent part of the real property. To accomplish this, the personal property generally takes on an immovable character. An immovable fixture is characterized by three elements:**

(1) Real or constructive annexation of the article in question to the land.

(2) Adaptation of the personal property as part of the land.

(3) The intention of the party making the annexation to make the personal property a permanent part of the land so that it would pass with the land upon a sale.

Examples of installations that constitute improvements to realty are: doors, garage doors, garage door openers, windows, cabinets, garbage disposals, water heaters, water softeners, **alarms**, furnaces, central air conditioning units, gutters, and carpeting.

Examples of installations that do not constitute improvements to realty are: **personal computers, home stereos, televisions**, refrigerators, stoves, dishwashers, garbage compactors, washers, dryers and window air conditioning units. (**Emphasis added**).

In this instance, Taxpayer, referring to the Department's Sales Tax Information Bulletin 60 ("Information Bulletin 60"), asserted that the integrated security/surveillance/access systems or security equipment it sold and installed were "improvement to realty," i.e., alarms, as provided in the examples, and Taxpayer charged its customers on a "lump sum" basis. Thus, Taxpayer claimed that it was not responsible for collecting sales tax.

However, the Department must respectfully disagree. In order to qualify as an "improvement to realty," as illustrated in the Information Bulletin 60, the personal property must be "incorporated into and become[] a permanent part of the real property." While the Information Bulletin 60 provides examples of what is and/or what is not considered an "improvement to realty," the Bulletin first outlines three requirements in determining whether the use of the personal property is considered an "improvement to realty." The Information Bulletin 60 clearly states that the personal property must be immovable, annexed, adapted, and become "a permanent part of the land so that it would pass with the land upon a sale."

In this instance, the Department's audit recognized that a small portion of Taxpayer's sales and installations of the integrated security/surveillance/access systems were qualified as an "improvement to realty," and Taxpayer acted as a "contractor" making "lump sum improvements to realty." The audit granted Taxpayer credits on that portion and did not assess sales tax. Taxpayer's documentation demonstrates, however, that its sales and installations of the integrated security/surveillance/access systems utilizing sophisticated software programs to connect an alarm system with access cards/devices, cameras, computers, CCTVs, DVRs, VCRs, in monitoring and recording designated places or targeted activities inside and outside of its customers' business establishments. Although the access cards/devices, cameras, computers, CCTVs, DVRs, VCRs may share the electrical wiring or connections with the alarm system, they do not meet the three requirements outlined in the Information Bulletin 60. The access cards/devices, cameras, computers, CCTVs, DVRs, and VCRs were not immovable, annexed, adapted, and became "a permanent part of the land so that it would pass with the land upon a sale." Although, for the sake of argument, the cameras and CCTVs were temporally mounted or annexed to the wall of the buildings, they are not an alarm system and do not function as an alarm. Unlike an alarm system that becomes permanently part of the realty, here, each of items within the integrated security/surveillance/access systems (except alarm system) can be removed and separately sold, disposed of, or removed at the customer/owner's choice and do not become "a permanent part of the land so that it would pass with the land upon a sale."

Therefore, the Department is not able to agree that Taxpayer met its burden demonstrating that the Department's assessment is incorrect.

FINDING

Taxpayer's protest of the imposition of sales tax is respectfully denied.

