

Letter of Findings Number: 04-20120053
Sales and Use Tax
For Tax Years 2008, 2009, 2010

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ISSUE

I. Sales and Use Tax—Imposition.

Authority: IC § 6-2.5-1-5; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-5-3; IC § 6-8.1-5-1; [45 IAC 2.2-3-4](#); Sales Tax Information Bulletin 28S (February 2008); Sales Tax Information Bulletin 28S (December 2009).

Taxpayer protests the imposition of use tax on certain transactions.

STATEMENT OF FACTS

Taxpayer is an Indiana S Corporation. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not properly collected and remitted sales tax as a retail merchant on some transactions and had not properly remitted use tax as a consumer on certain transactions for the 2008, 2009, and 2010 tax years. The Department therefore issued proposed assessments for sales tax, use tax, and interest for those years. Taxpayer protests portions of the proposed assessments. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Sales and Use Tax—Imposition.

DISCUSSION

Taxpayer protests the Department's proposed assessments for sales and use taxes for the tax years 2008, 2009, and 2010. The Department determined that Taxpayer had not paid sales tax on some items which were subject to sales and use taxes during those years. Taxpayer disagrees with some of the Department's adjustments. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

Sales tax is imposed by 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.

(Emphasis added).

Use tax is imposed under IC § 6-2.5-3-2(a), which states:

An excise tax, known as the 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.

[45 IAC 2.2-3-4](#) further explains:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Therefore, when tangible personal property is used, stored, or consumed in Indiana, use tax is due unless sales tax was paid at the time of the transaction.

The first category of protest is in regard to shop supplies which Taxpayer used in providing its auto body services. In its audit report, the Department explained that, in accordance with Sales Tax Information Bulletin 28S (February 2008) 20080130 Ind. Reg. 045080050NRA and Sales Tax Information Bulletin 28S (December 2009) 20100127 Ind. Reg. 045100029NRA, consumable supplies used by a dealer such as masking paper and tape, oil dry, sandpaper, buffing pads, rags and cleaning and detailing supplies used to repair and service motor vehicles are not exempt purchases by the dealer, and that Taxpayer should have paid sales tax at the time of purchase of such supplies or paid use tax after its purchase of such supplies.

Taxpayer argues that the shop supplies should not be assessed use tax because Sales Tax Information Bulletin 28S does not apply to it because Taxpayer is not a car dealer. Rather, Taxpayer states that it considered itself to be a manufacturing business and elected to operate using the rules for manufacturing businesses in its sales and use tax compliance procedures. Taxpayer believes that its fabrication, assembly, and finishing work constitute manufacturing activities.

The Department does not agree with this conclusion. IC § 6-2.5-5-3 states:

- (a) For purposes of this section:

- (1) the retreading of tires shall be treated as the processing of tangible personal property; and

(2) commercial printing shall be treated as the production and manufacture of tangible personal property.

(b) Except as provided in subsection (c), transactions involving manufacturing machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property.

(c) The exemption provided in subsection (b) does not apply to transactions involving distribution equipment or transmission equipment acquired by a public utility engaged in generating electricity.

(Emphasis added).

In the instant case, Taxpayer provides the services of an auto body shop. Taxpayer does not produce new items of tangible personal property through a manufacturing process.

While it is true that Taxpayer is not a car dealer, Sales Tax Information Bulletin 28S (as stated in its disclaimer) is not the law and is to be used generally by taxpayers for guidance. The essence of Sales Tax Information Bulletin 28S is applicable as guidance to any auto body repair shop whether or not they are associated with a car dealership. IC § 6-2.5-3-2(a) and [45 IAC 2.2-3-4](#) apply equally to car dealers and auto body shops and manufacturing businesses. Taxpayer did not pay sales tax at the time Taxpayer purchased the shop supplies, but Taxpayer used the shop supplies in Indiana. Therefore use tax is due by Taxpayer.

The second category under protest is in regard to the amount of Taxpayer's invoices to its customers which the Department used in its sales and use tax calculations. Taxpayer argues that the insurance estimate software it uses applies sales tax to all materials regardless of the taxability of the material. Taxpayer states that this is double taxation because it is paying use tax and its customers are paying sales tax on some of the same materials. Taxpayer is incorrect.

IC § 6-2.5-1-5(a) provides:

Except as provided in subsection (b), "gross retail income" means the total amount of consideration, including cash, credit, property, and services, for which tangible personal property is sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for:

- (1) the seller's cost of the property sold;
- (2) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller;
- (3) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges;
- (4) delivery charges; or
- (5) consideration received by the seller from a third party if:
 - (A) the seller actually receives consideration from a party other than the purchaser and the consideration is directly related to a price reduction or discount on the sale;
 - (B) the seller has an obligation to pass the price reduction or discount through to the purchaser;
 - (C) the amount of the consideration attributable to the sale is fixed and determinable by the seller at the time of the sale of the item to the purchaser; and
 - (D) the price reduction or discount is identified as a third party price reduction or discount on the invoice received by the purchaser or on a coupon, certificate, or other documentation presented by the purchaser.

For purposes of subdivision (4), delivery charges are charges by the seller for preparation and delivery of the property to a location designated by the purchaser of property, including but not limited to transportation, shipping, postage, handling, crating, and packing.

(Emphasis added).

Taxpayer uses shop supplies in the course of providing its auto body shop services. As a consumer, Taxpayer should pay sales tax when it purchases those supplies or should pay use tax if sales tax was not paid at the time of purchase. Taxpayer also sells some items of tangible personal property (fenders, bumpers, etc., for example). Under IC § 6-2.5-2-1, as a retail merchant, Taxpayer is required to collect sales tax on those items of tangible personal property which it sells to its customers.

Taxpayer argues that the software it uses imposes sales tax on everything it sells to its customers. While it has not been established that Taxpayer separately charges its customers for shop supplies, IC § 6-2.5-1-5(a) plainly states that the gross retail income it receives from its customers includes the cost of materials used and all taxes imposed on the seller. Taxpayer also argues that it should receive a refund of sales tax since the software it uses includes all items for which it charges its customers. Again, it has not been established that Taxpayer separately charges its customers for shop supplies, but even if Taxpayer had collected sales tax incorrectly it would not be eligible for a refund of those sales taxes since it did not pay the sales tax. Taxpayer only collected sales tax from its customers as an agent for the State. If refunds were available, Taxpayer's customers would be the proper parties to file such claims since the customers were the ones who paid the sales tax in the first place.

The third category under protest is in regard to purchases Taxpayer made without paying sales tax at the time of the transaction. The Department imposed use tax on these purchases. Taxpayer protests the imposition of use tax on certain purchases because these transactions were paid for with a personal credit card and should not

have been included in an audit of the corporation.

Taxpayer is an S corporation with two shareholders (husband and wife). The shareholders used the same personal credit cards to make business and personal purchases. It was proper for the auditor to look at the shareholder's personal credit card statements because the credit cards were used for some business purchases and belonged to the shareholders.

Taxpayer argues that many of the purchases listed on the audit report were not business purchases. Many purchases were for personal items and should not be included. On a copy of the items listed as subject to sales and use taxes in the audit report, Taxpayer wrote "personal item" next to certain purchases it believed were not business purchases. There was no further description and no receipts given that showed what was purchased. Therefore, these items will be treated as business expenses since Taxpayer failed to provide any evidence that these were personal expenses.

However, through the Department's own research, the Department is convinced that some of the purchases marked "personal item" were not business purchases for an auto body shop. The following purchases will be removed from the auditor's list of business purchases: Creature Comforts (\$223.50); GPRX Health (\$117.97); Oakley (\$108.91); Coldwater Creek (\$147.59, \$85.53); Reading Bridal Outlet (\$200.00); Coldwater Creek (\$63.67); Collections Etc. (\$32.23); HGC Harriet Carter (\$25.42); Justice (\$403.82); LandsEnd (\$22.41); Yakima Bait (\$213.37, \$50.84); CBD Catalogs (\$44.97); Coldwater Creek (\$56.62, \$77.43); Collections Etc. (\$28.23); Dixie Marine (\$212.50); Just My Size (\$93.06); Kitchen Collection (\$43.67); Kylea Health (\$193.15, \$193.15, \$193.15, \$272.15, \$175.15); Cami Secret (\$89.93); QVC (\$30.93, \$27.79, \$49.66, \$46.19); Vision Forum (\$102.33); Vitalicious (\$143.74). These items will be removed and the tax owed will be recalculated. All other items at issue will be treated as business expenses.

In conclusion, Taxpayer should have been paying sales tax on its purchases of shop supplies and use tax was properly imposed. Sales tax was properly collected on the amounts which Taxpayer charged its customers. If refund claims were to be filed, Taxpayer's customers would be the proper parties to do so. The specific items listed in the specific amounts listed will be removed from the Department's use tax calculations in a supplemental audit. The Department will issue revised assessments following the supplemental audit.

FINDING

Taxpayer's protest is sustained in part and denied in part.

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