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Commissioner's Directive #2
February 17, 1976
Subject: TAXATION OF INDIANA DESTINATION SALES UNDER THE GROSS INCOME TAX ACT

Introduction: The purpose of this directive is to outline the Department's position on the treatment of Indiana destination sales under the Gross Income Tax Act. Central to this position is the Department's interpretation and application of the existing state and federal cases on this subject.

Case Law: The two recent Indiana cases dealing with this subject are Gross Income Tax Division v. Owens-Corning Fiberglass, 251 N.E.2d 818 (1969) and Mueller Brass Co. v. Gross Income Tax Division, 265 N.E.2d 704 (1971). Both these cases dealt with sales initiated, negotiated and serviced by out-of-state home office personnel of the taxpayer and home office personnel of the Indiana customer. The court recognized that these sales would be non-taxable if the contact by the Indiana personnel of the taxpayer was either non-existent or insignificant. The Mueller Brass case also discussed the taxability of sales when the State is divided into territories. Sales made to customers in northern Indiana by Mueller Brass were viewed as non-taxable because: 1) the orders were initiated by out-of-state personnel; 2) the goods were shipped into Indiana from another state; 3) the orders were mailed to out-of-state offices where acceptance was made and payments received, and 4) the contact with the taxpayer's office in the southern territory was incidental to the sales. The court, however, noted that sales generated in the southern territory by the Indianapolis office were taxable even though the orders were sent out-of-state for acceptance. The activities of the Indianapolis salesmen consisted of furnishing information on new products, assistance with engineering applications, product installation lessons, follow-up assistance on orders and providing a source of communication with the manufacturer.

In the General Motors case, the court upheld Washington's taxation of General Motor's un-apportioned gross receipts from wholesale sales to its Washington dealers of motor vehicles, parts and accessories manufactured outside the state. The court felt that the presence of warehouses and 40 employees within the state constituted a "bundle of corporate activities." In the Standard Pressed Steel case, the court found that the activities of the taxpayer's employee, Martinson, in Washington lead to the realization and continuation of "valuable and lasting contractual relations" between the taxpayer and its customer, Boeing, which gave rise to sales subject to taxation. The employee, who did not solicit orders, used his technical expertise and goodwill to promote his company's products. The orders, for aerospace fasteners, were negotiated between Boeing and the taxpayer's home office personnel in Pennsylvania.

In applying the above cases, the Department also looks to the principles enunciated in Norton Company v. Department of Revenue of Illinois, 340 U.S. 534, 71 Sup. Ct. 377 (1951). Norton was a Massachusetts manufacturer with a branch office and sales outlet in Chicago. The home office, in Massachusetts, received orders from Illinois customers by direct mail and through the Chicago branch. Some orders received by direct mail were filled by shipment direct to customers from Massachusetts and some were filled by shipping to the Chicago branch from which they were delivered to the customers. The court ruled that receipts were taxable if the business was channeled through the Chicago branch either in obtaining the orders or in making deliveries although the goods were shipped from Massachusetts.

Discussion: Each of the above discussed cases enunciated broad principles dealing with the subject of taxation of destination sales. Each case also has limited scope: 1) In Mueller Brass and Owens-Corning, the non-taxability of "house accounts" was upheld due to a lack of any substantial Indiana contact with the sales. Thus, these cases cannot be read as affording a blanket exemption to house accounts. As the Standard Pressed Steel case points out, the substantial activity by Martinson was enough to tax what was clearly a house account between the taxpayer and Boeing. 2) The decision of exempting sales made into northern Indiana by Mueller Brass was again upheld because the southern territory operations only had incidental contact with these sales. The court did not address itself to whether the sales would be taxable if the Indianapolis office salesmen performed activities in northern Indiana as they did in southern Indiana. 3) In General Motors, the car, parts and accessory sales were taxed because the taxpayer's divisions generating those sales had a "bundle of activity" in Washington. Sales by other divisions whose activity was incidental in comparison to the motor vehicle division's bundle of activity were not considered taxable. The Department has adhered to this distinction when dealing with a large corporation having many operations (such as divisions or product lines) with varying levels of Indiana activity. 4) In Standard Pressed Steel, the state did not tax sales made to other customers in Washington where there was an absence of "valuable and lasting contractual relations" by its employees. The Department recognizes the validity of this distinction and has applied this case only in situations where one or more employees of the taxpayer, in their
Indiana activity, is directly responsible for "valuable and lasting contractual relations" between the taxpayer and its Indiana customer or where a taxpayer also has a bundle of activity in its Indiana operations.

It is also important to note that the Department is not applying adjusted gross income tax standards on taxing Indiana destination sales for gross income tax purposes. Under the adjusted gross income tax, all destination sales must be reflected in the numerator of a taxpayer's sales factor if his activities within the state are beyond mere solicitation as defined in Public Law 86-272, 73 Stat. 555, 15 U.S.C. Sec. 381 (1959).

The Department feels that decisions on the taxability of Indiana destination sales can only be determined on a case by case analysis of all relevant factors. A pending matter may have aspects of all the above discussed cases and the Department's aim is to use the decisions to separate the taxable and non-taxable income. What must be emphasized is that the Department will be consistent in the application of these cases a will be consistent in the application of these cases and will use the case or cases which best exemplify the operations of the particular taxpayer being examined.

Commissioner’s Directive #4
Revised November, 2000
(replaces Directive #4 dated August 16, 1983)

Disclaimer: Commissioner’s directives are intended to provide non-technical assistance to the general public. Every attempt is made to provide information that is consistent with the appropriate statutes, rules, and court decisions. Any information that is inconsistent is not binding on either the Department or the taxpayer. Therefore, the information provided in this directive should serve only as a foundation for further investigation and study of the current law and procedures covered here.

Subject: COLLECTION OF TAX FROM TRANSIENT MERCHANTS

References: IC 6-2.1-2; IC 6-2.1-5; IC 6-2.5-2; IC 6-2.8-8; IC 6-3-4; IC 6-3-5; IC 6-8-1; IC 6-8.1-5; IC 25-37-1

Introduction: The purpose of this directive is to outline the Department’s position on the collection of sales tax, gross income tax, and adjusted gross income tax, from transient merchants.

Sales Tax: Under IC 6-2.5-2-2, a 5% sales tax is imposed on retail merchants’ transactions which constitute selling at retail. Generally, before selling at retail in Indiana, a merchant is required to obtain a Registered Retail Merchant Certificate under IC 6-2.5-8. Retail merchants which have no certificate (or an invalid one) are subject to imprisonment and a fine (Class B misdemeanor). Finally, failure to remit any taxes collected by any retail merchant may also subject the merchant to a longer prison term and a higher fine (Class D felony). These criminal penalties are in addition to the civil sanctions and procedures described below.

However, in lieu of a Registered Retail Merchant Certificate, a “transient merchant” (defined in IC 25-37-1 as someone who engages in temporary business in Indiana) must obtain a transient merchant license from the county auditor of the county in which the merchant intends to do business. Ten days before applying to the auditor for a license, the merchant must send a written notice to the Department. The notice in general must contain the following:
(1) The period of time and the location from which the merchant intends to transact business;
(2) The approximate value of the items to be offered for sale;
(3) Any other information requested by the Department or required by Departmental rule.

If the transient merchant does not hold a valid certificate or license, any tax collected by the merchant is to be paid to a Department representative on request. If the merchant fails to remit the tax collected based on his sales, a notice of tax due will be issued, based on the best information available.

Failure to pay the tax due will result in the issuance of a warrant, to be served on the transient merchant the next time the merchant is in the state.

Refusal to pay the warrant can result in levy and execution on the merchant’s property. These civil sanctions and procedures are in addition to the criminal penalties described above.

Gross Income Tax: Under IC 6-2.1-2-2, a tax is imposed on the taxable gross income of nonresident corporations derived from
activities within Indiana. The rate of the gross income tax is three-tenths of one percent (.003%).

Under IC 6-2.1-5-1.1, a taxpayer is required to file a quarterly gross income tax return if his estimated liability exceeds $1,000 in any year.

However, IC 6-8.12-5-3 allows the Department to make an immediate assessment of tax, interest, and penalties if it is determined that a taxpayer intends to: depart the state, remove his property, conceal his person or property, or to do any thing to jeopardize, prejudice, or render ineffective, proceedings to collect the tax. If the tax is not paid upon demand, a warrant will be issued. This warrant will be served on the taxpayer the next time the taxpayer is in the state. Refusal to pay the warrant can result in levy and execution on the taxpayer’s property.

Any tax paid under the above-cited law which is found to be in excess of the amount due may be claimed as a refund under IC 6-8-1-9.1

Individual Income Tax: Under IC 6-3-2-1, a tax is imposed on nonresidents’ adjusted gross income derived from sources within Indiana.

While IC 6-3-5-1 provides that nonresidents from states having reciprocal agreements with Indiana are not subject to Indiana adjusted gross income tax, such reciprocal agreements only apply to salaries, wages, tips and commissions. Therefore, this Indiana Code section is not applicable to proceeds from transient merchant sales.

Under IC 6-3-4-4.1, a taxpayer is required to make a declaration of estimated tax if the taxpayer expects to owe $400 or more income tax on the income from which tax is not withheld under IC 6-3-4-8. IC 6-8.1-5-3, however, allows the Department to make an immediate assessment of tax, interest and penalties for the same reasons outlined under “Gross Income Tax”, above. The warrant procedure will be used if the tax is not paid on demand.

Any taxes paid under preceding statutory provisions which are found to be in excess of the amount due may be claimed as refunds under IC 6-8.1-9-1.

Commissioner’s Directive #7
November 17, 1978
Subject: CONFIDENTIALITY PROVISIONS

The purpose of this directive is to reaffirm the Department’s position regarding the strict confidentiality restraints imposed on any and all federal tax information sent to this Department by taxpayers, their legal representatives or received through other means.

In addition to the various federal income tax forms which are confidential by virtue of state statutory penalties, such other forms as the federal estate tax forms (i.e. Form 706, Form 712) are likewise confidential. The information contained on those forms is received for tax determination and collection purposes only. The department, its counsel, agents, clerks or any other person shall not divulge the gross estate, assets, the amount of estate tax paid or any other information disclosed by any federal report filed with the Department except to agents or employees of the Department or to the Attorney General or any other legal representative of the state in an action in respect to the amount of state tax due.

The penalty for violation of this Directive shall be immediate dismissal of the offending employee from state employment. This Directive is in addition to all other confidentiality requirements of the Department with respect to other kinds of federal and state tax returns.