



Automobile Dealers Association of Indiana, Inc.

BULLETIN

REVERSAL – 2 POINTS FOR DEALERS
Department of Revenue Issues New Directive
in Favor of Dealers
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In wrestling, there are five ways to score points, one of which is by completing a “reversal.” A reversal occurs when “your opponent has you down on the mat and you come from underneath and gain control of your opponent.” (Citation omitted.) Completing a reversal earns you two points. Well...you may have just scored two points by getting a reversal from an Indiana Department of Revenue (the “Department”) position.

The Department issued Directive #41 to be effective on September 1, 2011, which addresses The Taxability of Products Transferred Electronically. If you have been audited by the Department in the last few years, you might be thinking: “Does this have anything to do with CarFax and AuditCheck Reports, credit bureaus, leads, parts catalogs, and all those other items I received electronically for which the Department required me to pay tax?” The answer is “Absolutely!”

Directive #41 provides that “Indiana may no longer impose sales/use tax on a product transferred electronically by basing the product’s taxability on inclusion of the product in the definition of tangible personal property.” Of course, there are exceptions. If the product being transferred is “computer software,” “telecommunication services,” or “ancillary services,” the Department may still impose sales/use tax. Additionally, if the product being transferred is a “specified digital product,” the Department may still impose sales tax. Currently, the only “specified digital products” under Indiana statute are: digital audio works, digital audiovisual works, and digital books.

I would love to take credit for the “reversal” but it just is not so. The Department changed its position as a result of an internal audit for compliance with the Streamlined Sales and Use Tax Agreement (“SSUTA”). The SSUTA has a provision that prohibits member states, which Indiana is a member state, from defining products transferred electronically as “tangible personal property” less the few exceptions noted above. As a result, the Department “reversed” its previous position and set forth its new position in Directive #41.

Going forward, you are not required to pay tax on products that you received electronically. It is likely that you may incur some issues in the near future. Because of the Department’s position, certain vendors have started collecting tax from you at the point of sale. You will need to educate these vendors on the Department’s new position. I will be glad to help if necessary. Likewise, if you undergo an audit and have not paid tax on the electronically transferred products that you received prior to September 1, 2011, the Department may likely seek to collect it from you. In these instances, you should seek the help of a tax attorney to determine whether to pay or challenge the auditor’s findings.

Directive #41 is forward looking meaning it specifically indicates that it does not have retroactive application, and refund requests will be denied if the request is for tax on a transaction that occurred prior to the issuance of the directive. Regardless, there are other ways to argue that you are entitled to a refund. Specifically, Directives are not law but they are interpretations of law and positions taken by the Department based on those interpretations. There has always been a right to fight the Department’s assessment of tax on these items. Nothing in the law has changed but the Department, as of September 1, 2011, simply no longer considers certain products you received electronically as tangible personal property subject to sales tax.

I have had discussions with many dealers about challenging the Department’s previous position over the past two years but no one has pulled the trigger because of the cost. No more! Currently, there are contingent fee arrangements available to pursue a refund, which eliminates the cost issue. In the last two years, if you have paid sales/use tax on CarFax reports, AuditCheck reports, credit bureaus, leads, parts catalogs, or any other product that was transmitted to you electronically, you may qualify for a refund. You may contact me directly at mshanahan@silegal.com or via phone at (317) 396-9521 for more information.

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