DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 03-0425
Sales Tax
Responsible Officer
For the Years 2000-2001

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ISSUES

1. Sales Tax-Responsible Officer Liability

Authority: IC 6-2.5-9-3, IC 6-8.1-5-1(b), Indiana Department of Revenue v. Safayan, 654 N.E.2nd 270 (Ind. 1995).

The taxpayer protests the assessment of responsible officer liability for unpaid corporate sales taxes

STATEMENT OF FACTS

The taxpayer was an employee and Vice-President of a corporation that did not properly remit collected sales taxes to the state during the tax period 2000-2001. The Indiana Department of Revenue, hereinafter referred to as the "department," assessed the additional sales taxes, interest and penalty against the taxpayer as a responsible officer. The taxpayer protested the assessment of tax and penalty. A hearing was held and this Letter of Findings results.

1. Sales Tax-Responsible Officer Liability

Discussion

Indiana Department of Revenue assessments are prima facie evidence that the taxes are owed by the taxpayer who has the burden of proving that the assessment is incorrect. IC 6-8-1-5-1(b).

The proposed sales tax liability was issued under authority of IC 6-2.5-9-3 that provides as follows:

> An individual who:
>
> (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and
> (2) has a duty to remit state gross retail or use taxes to the department;

> holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

Pursuant to Indiana Department of Revenue v. Safayan, 654 N.E. 2nd 270 (Ind. 1995) at page 273: "The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that they are paid." The factors considered to determine whether a person has such authority are the following:

> 1. The person's position within the power structure of the corporation;
>
> 2. The authority of the officer as established by the Articles of Incorporation, By-laws or employment contract; and
>
> 3. Whether the person actually exercised control over the finances of the business including control of the bank account, signing checks and tax returns or determining when and in what order to pay creditors.

The corporation was a closely-held family-owned business. The taxpayer did not possess any ownership, nor was he a stockholder or investor in the company. He was not on the Board of Directors and never attended a Board of Directors' meeting. The taxpayer was hired by the corporation as a bargaining union sheet metal worker to be the coordinator of the industrial construction projects. Due to the success of the newly implemented programs, the taxpayer received a title-only promotion in 1998. The promotion was to Divisional Vice President of the commercial construction projects. His duties consisted of supervising and instructing the estimators and project managers for the commercial group. The taxpayer was required to conduct sales and marketing meetings and weekly project progress meetings. He reviewed the costs, posture and problem solving within the specific commercial group. The taxpayer did not have a corporate credit card, nor was he a signatory on any of the corporation's bank accounts. The taxpayer never ordered checks to be written. He could not and did not sign any checks for the corporation. It was never part of his duties to authorize or make payments of bills or taxes of any type.

The taxpayer provided significant documentation evidencing that he did not have the position within the corporate power structure, authority as an officer and employee, or control over finances that would give him the duty to remit the trust taxes to the state of Indiana. The taxpayer sustained his burden of proving that the department incorrectly assessed the corporation's sales tax liability against him personally.

Finding

The taxpayer's protest is sustained.

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