04980736.LOF

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 98-0736
Sales Tax
Calendar Years 1994, 1995, and 1996

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE(S)

I. **Sales Tax – Assessment:** – Best Information Available (BIA)

Authority: IC 6-2.5-2-1; IC 6-2.5-3-2: IC 6-2.5-3-6(b),(c); IC 6-2.5-4-1(b); IC 6-2.5-6 et seq., IC 6-8.1-5-1(a); IC 6-8.1-5-1(b); IC 6-8.1-5-4(a); 45 IAC 2.2-2-2.

Taxpayer protests the auditor's BIA method of calculating gross retail income and the auditor's BIA determination of the rate of markup used in calculating taxable sales.

STATEMENT OF FACTS

Taxpayers are husband and wife who own and operate one each of two licensed package liquor stores. During the audit, numerous requests were made by the auditor for adequate records to complete an accurate audit. Despite numerous requests, by both the auditor and the hearing officer, only a fraction of records normally examined were made available. The auditor completed a "best information available" audit.

Included among records examined were purchase invoices (cost of goods sold only for 1995 and 1996, bank records (1995 only and incomplete), and income tax returns with supporting schedules, (1994 IT-40 only, no Federal information, 1995, and 1996). Also used in the audit were sales records made available from a liquor distributor and published ratios from the ***Almanac of Business and Industrial Financial Ratios*** authored by Leo Troy, Ph.D., 1997 Edition, Prentice Hall.

The auditor calculated an error factor based upon records from one of the taxpayer's liquor distributors and the taxpayer's records for 1995 and 1996. No records were made available for 1994; therefore, an average of 1995 and 1996 was utilized. (Basis and reasons for the calculation is contained on page 5-6 of the audit report) Taxpayer's records did not coincide with the "reporting distributor's" amounts. Auditor states that the taxpayer insisted that all purchases were made solely at one location, however, the distributor's records indicate otherwise.

It was necessary for audit to extrapolate the information provided by year to determine net income by year and to account for months in which no information was available.

Because the taxpayer had no purchase invoices available for review, the audit proposed an adjustment to cost of goods sold based on items purchased during the audit period by utilizing a vendor's information and calculating the error factor for those purchases with taxpayer's records for that one vendor.

The records would indicate that the auditor employed, in a conscientious and professional manner, the best available records and source materials to produce the BIA assessments. Taxpayer was repeatedly invited to contribute additional substantive information or to rebut the audit's conclusions with concrete information. Taxpayer's CPA, instead states it has reconstructed taxpayer's records.

1. Sales Tax – Best Information Available

DISCUSSION

Taxpayer protests the assessment and states its records were incomplete because it experienced a basement flood in 1995, which destroyed some of the records. At hearing, Taxpayer's CPA stated he can provide additional facts, observations, and conclusions he reached to support the reconstruction of taxpayer's 1994 through 1996 records and provided the hearing officer with a memorandum dated June 20, 2000.

Taxpayer admits that he "may" owe additional taxes. However, taxpayer protests the means by which audit determined the amount of income tax owed. Taxpayer disagrees with audit's determination of the base amount of its gross retail income and error factors. Taxpayer contends that the mark-up in an economically depressed area never generated the quantity of sales estimated by the auditor. Further, taxpayer contends that the calculated error factor determined by audit is a wholly unrealistic estimate of the actual sales of its business.

No detailed information or distributor records were made available at hearing. At hearing, a spreadsheet was provided that showed sales for both taxpayer's locations at $366,182, $445,417, and $525,714 for 1994, 1995, and 1996 respectively. The spreadsheet shows an overpayment of sales tax in 1994 in the amount of $1,175. No proof regarding the overpayment was provided.

In plain straightforward language, IC 6-8.1-5-1(a), authorizes the Department, if it reasonably believes that a taxpayer has not reported the proper amount of tax due, to make a proposed assessment of unpaid tax on the basis of the best information available to the department. Audit's BIA determinations were made necessary by taxpayer's failure to maintain or provide pertinent information, records, or invoices.

Under IC 6-8.1-5-4(a),"Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records." The records referred to "include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and cancelled checks."

The audit was conducted in the absence of taxpayer's sales, purchases and expense records. Minimum business records were supplied to the auditor after numerous attempts.

In attempting to rebut the assessment, taxpayer stated that audit's determination and methods were "grossly misrepresentat [ive]" inaccurate and based upon standards that were inapplicable to this taxpayer. Taxpayer stated that his own investigation found that the markup was highly overstated. Taxpayer provided no information to substantiate the estimate other than a statement that the taxpayer is in an economically depressed area. Taxpayer has failed to provide any evidence that would assist the Department in making an alternative determination of taxpayer's liabilities.

By failing to present any viable or substantive evidence, the taxpayer has failed to meet his burden of proof, imposed under IC 6-8.1-5-1 (b), to rebut the presumptive validity afforded the Department's proposed sales tax assessments. In addition, the Department cannot rely on taxpayer's recalculations.

The Department's proposed assessment, under IC 6-8-1-5-1 (b), is deemed to be "prima facie evidence that the department's claim for the unpaid tax is valid." That same section of the Indiana Code goes on to state that "the burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

FINDING

Taxpayer's protest is denied.

DSW/RAW/MR 011603