

Letter of Findings Number: 05-0181
Marion County Innkeepers' Tax
Tax Period 2001-2003

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ISSUES

I. Marion County Innkeepers' Tax-Imposition

Authority: IC § 6-9-8-3(a); IC § 6-8.1-5-1(b); IC § 6-9-8-2(a)(b); [45 IAC 2.2-4-8\(e\)](#); Information Bulletin #1 Innkeepers' Tax in Allen and Marion County, May 1993; Sales Tax Information Bulletins #41, October 2000 and December 2002.

The taxpayer protests the imposition of county innkeepers' tax on telecommunication charges.

II. Marion County Innkeepers' Tax-Constitutionality

Authority: U.S. Const. art. 1 § 8, cl.3.

The taxpayer alleges that the imposition of Marion County Innkeepers' tax on Interstate and international telephone charges violates the Commerce Clause of the United States Constitution.

III. Tax Administration- Ten Percent Negligence Penalty

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2\(b\)](#).

The taxpayer protests the imposition of the negligence penalty.

STATEMENT OF FACTS

The taxpayer operates a hotel in Marion County. The hotel rents hotel rooms and public assembly rooms with banquet and support services. It also operates a full-service restaurant and gift shop. The Indiana Department of Revenue audited the taxpayer for the tax period 2001-2003. As a result of the audit, the department assessed additional Marion County Innkeepers' Tax, interest, and penalty. The taxpayer protested this assessment. A hearing was held and this Letter of Findings results.

I. Marion County Innkeepers' Tax-Imposition

DISCUSSION

As a part of its hotel operations, the taxpayer purchased telephone services from both a local carrier and a long distance carrier. It passed these services through to the hotel guests. The taxpayer billed the hotel guests a flat fee for the local calls. The taxpayer billed the hotel guests for long distance calls based on the length, destination, and time of the call. The department assessed Marion County Innkeepers' Tax on the receipts from the telecommunication charges. The taxpayer protested this assessment arguing that the receipts received were not from lodging and therefore not subject to the imposition of the Marion County Innkeepers' Tax.

Notices of proposed assessments are prima facie evidence that the department's claim for unpaid taxes is valid. IC § 6-8.1-5-1(b). The taxpayer has the burden of proving that the department incorrectly imposed the assessment. *Id.*

The Marion County Innkeepers' Tax is levied at IC § 6-9-8-2(a) as follows:

Each year a tax shall be levied on every person engaged in the business of renting or furnishing, for periods of less than thirty (30) days, any lodgings in any hotel, motel, inn, tourist camp, tourist cabin, or any other place in which lodgings are regularly furnished for a consideration.

Pursuant to IC § 6-9-8-2(b) the Marion County Innkeepers' Tax "shall be imposed, paid, and collected in exactly the same manner as the state gross retail tax is imposed, paid, and collected under [IC 6-2.5](#)."

The rate of the Marion County Innkeepers' Tax is set at IC § 6-9-8-3(a) as follows:

The tax imposed by section 2 of this chapter shall be at the rate of:

(1) before January 1, 2028, five percent (5%) on the gross income derived **from lodging income only**....(emphasis added)

In 1993, the tax rate provision was amended by inserting the term "lodging income only" in lieu of the words "the tax imposed by section 2 of this chapter."

The taxpayer argued that the department improperly imposed the county innkeepers' tax on telecommunications fees because those fees were not received for the provision of lodging. The taxpayer argued that the term "lodging" as used in the 1993 amendment had to be defined in the common sense. The taxpayer provided several definitions of "lodging." Each of the definitions revolved around the concept that "lodging" was a place for habitation. Since the tax was imposed on lodging for a period of less than thirty days, the term "lodging" meant a place for temporary habitation. The taxpayer argued that communications charges were not included in the common concept of a temporary place for habitation. Therefore, the imposition of Marion County Innkeepers' Tax on telecommunications charges amounted to the department improperly expanding the imposition of a tax statute.

The taxpayer errs in this conclusion. The department's interpretation of the Marion County Innkeepers' tax was first expressed in Information Bulletin #1 Innkeepers' Tax in Allen and Marion County, dated May 1993 as follows:

House Enrolled Act No. 1422 became law on April 27, 1993. The act provides that the innkeepers' tax in Allen and Marion Counties only applies to the rental, for less than thirty (30) days, of lodgings. The tax will no longer be imposed on rental of rooms and other accommodations not used for lodging. This means that banquet facilities and meeting rooms will no longer be subject to the innkeepers' tax in Allen and Marion Counties.

The Information Bulletin indicates that the legislature's purpose in the enactment of the amendment and the department's original interpretation of the amendment had the effect of limiting the imposition of the Marion County Innkeepers' Tax to the money received from renting the hotel rooms and exempting the money received from renting rooms such as banquet facilities, public assembly rooms, and gift shops. The amendment did not affect the method of determining the proper imposition of the tax on hotel rooms. That imposition was governed by the interpretation in the sales tax regulations before and after the 1993 amendment. The department has not expanded on the legislature's imposition of the Marion County Innkeepers' Tax only on receipts from lodging including charges on telecommunications services.

The department's interpretation of the imposition of sales tax on telecommunications charges in hotel rooms is found in the Indiana Sales Tax Regulations at [45 IAC 2.2-4-8\(e\)](#) as follows:

The tax is imposed on the gross receipts from "furnishing" an accommodation. The gross receipts subject to tax include the amount which represents consideration for the rendition of those services which are essential to the furnishing of the accommodation, and those services which are regularly provided in furnishing the accommodation. Such amounts are subject to tax even when they are separately itemized on the statement or invoice.

Telecommunications services clearly are considered essential in the furnishing of hotel rooms. Hotel guests expect telephones with access to both local and long distance service just like they expect a bed and sink. Therefore, telecommunication services are regularly provided as a basic component of a hotel room.

Sales Tax Information Bulletins #41 dated October 2000 and December 2002 both list telephone services as specifically subject to the imposition of sales taxes even if the fees for telecommunication services are listed separately on the bill. Since the law states that the department is to impose the Marion County Innkeepers' Tax in the same manner as the department imposes the sales tax on hotel rooms, the gross receipts from telephone services are subject to the imposition of the Marion County Innkeepers' Tax.

The Indiana Legislature has met several times since 1993. Presumably the Indiana Legislature knows how the department has been interpreting the imposition of the Marion County Innkeepers' Tax on telecommunication charges since 1993. If the department's interpretation of the amendment were incorrect, the Indiana Legislature has had ample opportunity to correct the department's interpretation. The Indiana Legislature has chosen not to make any further amendments to the tax. There is nothing to indicate that the Indiana Legislature approves of the department's interpretation of the proper imposition of the Marion County Innkeepers' Tax.

FINDING

The taxpayer's protest is denied.

II. Marion County Innkeepers' Tax-Constitutionality

DISCUSSION

The taxpayer argued that any imposition of the Marion County Innkeepers' Tax on gross receipts from interstate and international telecommunications violated the Commerce Clause of the United States Constitution as found at U.S. Const. art. 1 § 8, cl.3.

An administrative hearing is not the proper forum to challenge the constitutionality of the state law.

FINDING

The taxpayer's protest is denied.

III. Tax Administration- Ten Percent Negligence Penalty

DISCUSSION

The taxpayer protested the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1. Indiana Regulation [45 IAC 15-11-2\(b\)](#) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The taxpayer failed to follow the department's longstanding directions on the payment of the Marion County Innkeepers' Tax. The taxpayer's failure to do so constituted negligence.

FINDING

The taxpayer's protest to the imposition of the penalty is denied.

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