

Letter of Findings Number: 07-0064
Sales and Use Tax
For the Tax Period 2003 - 2005

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ISSUES

I. Sales and Use Tax – Imposition.

Authority: IC § 6-8.1-5-1(c); IC § 6-2.5-2-1; IC § 6-2.5-6-7.

The Taxpayer protests the imposition of sales tax on additional sales.

II. 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 ten percent negligence penalty.

STATEMENT OF FACTS

The Taxpayer is an independent bar and restaurant. The Indiana Department of Revenue (Department) audited the Taxpayer for the years 2003-2005. Some of the Taxpayer's records for those years had been destroyed when rain and wind damaged the facility. Therefore, the Department projected sales subject to sales tax based upon the available invoices. This projection resulted in higher gross sales subject to sales tax than reported by the Taxpayer. The Department assessed sales tax, interest, and penalty on the additional unreported gross sales. The Taxpayer protested the assessments of sales tax and penalty contending that the Department's projections were inaccurate. A hearing was held and this Letter of Findings results.

I. Sales and Use Tax – Imposition.

DISCUSSION

Tax assessments are presumed to be valid. IC § 6-8.1-5-1(c). The Taxpayer bears the burden of proving that any assessment is incorrect. *Id.*

Indiana imposes a sales tax on the transfer of tangible personal property in a retail transaction. IC § 6-2.5-2-1. The retail merchants' sales tax due to the state is determined by multiplying the merchant's total gross income from taxable transactions by six percent. IC § 6-2.5-6-7.

The Department projected the Taxpayer's sales during the audit period by starting with the invoices for the beer, wine, liquor, and food purchased by the Taxpayer. For the tax year 2005, there were no invoices for each month of the year. Therefore, the Department used averages for the months with invoices to determine purchases for the months without invoices. The Department applied industry statistics to the purchases to determine how many servings of each type of food and drink were served. The number of the servings was multiplied by the sales price to determine the total sales subject to sales tax.

The Taxpayer protested the Department's methodology of projecting the total sales subject to sales tax. The Taxpayer alleged that during the tax period its bartenders were giving away free drinks, there was significant waste and breakage, bottles of liquor and hams were given away as prizes for raffles and tip boards, its bartenders' serving sizes were particularly generous, meals were sold at cost to entice customer visits, and the Taxpayer undercharged for their catering services. According to the Taxpayer, these conditions rendered the Department's projections significantly too high. The Taxpayer did not, however, produce any documentary evidence to support its contention that the Department's projections were erroneous.

The Taxpayer did not sustain its burden of proving that the assessment was inaccurate.

FINDING

The Taxpayer's protest is respectfully denied.

II. 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 did not provide adequate documentation to support its contention that its failure to pay the assessed tax was due to reasonable cause rather than negligence.

FINDING

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

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