

**Letter of Findings: 08-0534**  
**Sales and Use Tax**  
**For the Year 2005, 2006, and 2007**

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**ISSUES**

**I. Sales and Use Tax – Imposition.**

**Authority:** IC § 6-2.5-2-1; IC § 6-8.1-5-1; IC § 6-8.1-5-4; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the additional assessment of sales tax on sales of tangible personal property.

**II. Tax Administration – Interest.**

**Authority:** IC § 6-8.1-10-1.

Taxpayer protests the imposition of interest.

**III. Tax Administration – Penalty.**

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

Taxpayer protests the imposition of the ten percent negligence penalty.

**STATEMENT OF FACTS**

Taxpayer is a convenience store incorporated in Indiana. In 2008, pursuant to an audit, the Department of Revenue (the "Department") proposed additional sales tax assessments for sales in 2005, 2006, and 2007. Taxpayer protests the proposed assessments. A hearing was held. The Letter of Findings ensues. Additional facts will be provided as necessary.

**I. Sales and Use Tax – Imposition.**

**DISCUSSION**

The Department assessed additional sales tax on items that are considered to be taxable sales based on Taxpayer's own sales journals. During the audit, the Department determined all Taxpayer's sales were taxable unless Taxpayer proved otherwise because Taxpayer failed to maintain cash register tapes or cash register tape summaries. Taxpayer argued that it had mistakenly included exempt sales in the taxable categories in its sales journals. Additionally, Taxpayer stated that it mistakenly recorded certain taxable sales into more than one taxable category in its sales journals, resulting in double assessments on the same transactions. Taxpayer also argued that it mistakenly collected sales tax on the sales of ice when the ice was exempt from sales tax. Finally, Taxpayer claimed that it purchased some items for resale purpose but it mistakenly paid sales tax to its vendors when those items were exempt from sales tax.

**A. Calculation of Nontaxable Sales**

All tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes a sales tax on retail transactions. IC § 6-2.5-2-1 states,

(a) The person who acquires tangible personal property in a retail transaction is liable for the tax on the transaction and shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction.

(b) The retail merchant shall collect the tax as agent for the state.

Taxpayer is a retail merchant and, therefore, is responsible for collecting and remitting the sales tax.

IC § 6-8.1-5-1(b) states,

If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department.

Taxpayer's sales journals were the only available records during the Department's audit. In its sales journals, in addition to fuel sales, Taxpayer classified sales into eight categories, including (1) inside sales, (2) cigarettes, (3) drinks, (4) freezes, (5) lottery, (6) lotto, (7) cash over/short, and (8) over-rings. The Department determined, in the absence of evidence of nontaxable sales, all sales were considered to be taxable, unless Taxpayer could prove otherwise.

IC § 6-8.1-5-4 (a), in part, requires "[e]very 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."

After the audit, and in preparation for the hearing, Taxpayer discovered three days' worth of cash register tape summaries ("Summaries"). Taxpayer argued that, among those categories, some sales were exempt from

sales tax. Taxpayer agreed that its sales records were insufficient, however, Taxpayer nonetheless argued that the Department had over-assessed sales tax in the "inside sales" category and offered a method for analyzing sales in that category. Taxpayer reviewed the provided Summaries and divided the inside sales category into two sub-categories, taxable and nontaxable sales. Taxpayer pointed to sales of, including but not limited to, hostess, bakery, dairy, ice cream, cookies, ice, juice, lunch meats, eggs, newspapers and stamps as nontaxable. To establish what those items would have cost in the absence of register tapes, Taxpayer used lists of its inventory and costs of goods and applied percentage of mark-ups of those items to demonstrate what the total of those nontaxable sales would have been. Next, Taxpayer proposed to add those nontaxable sales under its "inside sales" category along with other categories which were exempt from sales tax, such as gift cards, lottery, and lotto, to arrive at the total nontaxable sales. Since Taxpayer agreed with the Department that the total amount of sales for 2005, 2006, and 2007, in its sales journals were correct, Taxpayer then proposed to subtract the amount of nontaxable sales each year from the total sales in its sales journals to arrive at the total of taxable sales for those years in question. Taxpayer has provided sufficient documents showing that some sales included in the "inside sales" were exempt from the sales tax. The Department will determine a reasonable method to calculate taxable sales during those years in question in a supplemental audit.

**B. Double Assessments of "Freezes" Category**

Taxpayer documented and verified that items sold under the "freezes" category were taxable. Meanwhile, items in the "freezes" category were also included into the "drinks" category, which were also taxable. As a result, those taxable sales were calculated twice in the Department's proposed assessments. Taxpayer has provided sufficient documents showing that those taxable sales were calculated twice in the Department's proposed assessments. Thus, the Department will recalculate the amount of the taxable sales of these two categories in question in the supplemental audit.

**C. Sales Tax on Sales of Ice**

Taxpayer also argued that it mistakenly collected sales tax on the sales of ice when the ice was exempt from sales tax. Thus, Taxpayer claimed that the Department erroneously included the sales tax on the sales of ice in the Department's proposed assessment. Taxpayer is mistaken. Sales tax is a trust tax. Taxpayer is a retail merchant and is an agent of the State of Indiana. When Taxpayer mistakenly collected the sales tax on behalf of the State, Taxpayer is not entitled to keep those sales taxes. Only the customers who paid the sales taxes on the purchases of ice were entitled to claim refunds of those sales taxes with the Department. Therefore, the Department appropriately included the sales tax on the sales of ice.

**D. Credits Regarding Sales Taxes Taxpayer Paid to Its Vendors**

Taxpayer claimed that it purchased some items for resale purpose but it mistakenly paid sales tax to its vendors when those items were exempt from sales tax. Thus, Taxpayer claimed that it is entitled to credits on the sales taxes it has paid regarding those purchases. However, Taxpayer failed to provide sufficient documents to substantiate its claim. Therefore, Taxpayer's claim is respectfully denied.

In short, Taxpayer must make its records of 2005, 2006, and 2007, available for the Department's supplemental audit within thirty days after Taxpayer receives this Letter of Finding. Taxpayer is not entitled to keep those sales taxes it mistakenly collected on the sales of ice. Without sufficient documents, Taxpayer is not entitled to credits for sales tax Taxpayer had paid to its vendors on its purchases for resale purpose.

**FINDING**

Taxpayer's protest on Subpart A and B are sustained, but is subject to the Department's supplemental audit. Taxpayer's protest on Subpart C and D are respectfully denied.

**II. Tax Administration – Interest.**

**DISCUSSION**

The Department assessed interest on the tax liabilities. Taxpayer protests this imposition of interest.

IC § 6-8.1-10-1(a) provides, as follows:

If a person fails to file a return for any of the listed taxes, fails to pay the full amount of tax shown on the person's return by the due date for the return or the payment, or incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment.

Pursuant to IC § 6-8.1-10-1(e), the Department does not have the authority to waive the interest.

**FINDING**

Taxpayer's protest to the imposition of interest is respectfully denied.

**III. Tax Administration – Penalty.**

**DISCUSSION**

Taxpayer also protests the assessment of the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1, the Department may assess a ten (10) percent negligence penalty if the taxpayer:

- (1) fails to file a tax return;
- (2) fails to pay the full amount of tax shown on the tax return;
- (3) fails to remit in a timely manner the tax held in trust for Indiana (e.g., a sales tax); or
- (4) fails to pay a tax deficiency determined by the Department to be owed by a taxpayer.

[45 IAC 15-11-2\(b\)](#) further states:

"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 Department may waive a negligence penalty as provided in [45 IAC 15-11-2\(c\)](#), in part, as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer provided sufficient documents establishing that its failure to pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. Thus, Taxpayer's protest on the imposition of negligence penalty is sustained.

#### **FINDING**

Taxpayer's protest on the imposition of negligence penalty is sustained.

#### **SUMMARY**

For the reasons discussed above, Taxpayer's protest on Part I. A and B are sustained pending the result of supplemental audit. But, Taxpayer's protest on Part I. C and D are respectfully denied. Taxpayer's protest on imposition of negligence penalty is sustained. Taxpayer's protest on imposition of interest is respectfully denied.

*Posted: 05/27/2009 by Legislative Services Agency*

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