

Letter of Findings Number: 09-0969 and 09-0970
Sales Tax
For Tax Years 2006-2008

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ISSUES

I. Sales Tax—Imposition.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-4-4; IC § 6-2.5-9-3; IC § 6-8.1-3-3; IC § 6-8.1-5-1; [45 IAC 15-3-2](#); 3551 Lafayette Road Corporation v. Indiana Dept. of State Revenue, 644 N.E.2d 199 (Ind. Tax Ct. 1994); Black's Law Dictionary (8th Ed.); Webster's Third New Int'l Dictionary.

Taxpayer protests the assessment of sales tax on the amounts Taxpayer charges to its customers as "guaranteed no show revenues."

II. Innkeepers Tax—Imposition.

Authority: IC § 6-9-8-2.

Taxpayer protests the assessment of innkeeper's tax on the amounts Taxpayer charges to its customers as "guaranteed no show revenues."

III. Tax Administration—Negligence Penalty.

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

Taxpayer requests that the Department exercise its discretion to abate the ten-percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is a leasing entity operating a hotel in Indiana. After an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer owed additional sales, use, and county innkeeper's tax, and assessed tax, interest, and negligence penalties for the 2006, 2007, and 2008 tax years. The Department found that Taxpayer had purchased a variety of materials without paying sales tax at the time of purchase or remitting use tax to the Department. The Department also found that Taxpayer had made sales to Indiana customers without collecting sales tax and determined that Taxpayer should have collected sales tax on those sales. The Department also found that Taxpayer had made sales to Indiana customers without collecting county innkeeper's sales tax and determined that Taxpayer should have collected county innkeeper's tax on those sales. Taxpayer protests the imposition of sales tax and county innkeepers' tax on the amounts that Taxpayer charges to its customers as "guaranteed no show revenue." An administrative hearing was conducted, and this Letter of Findings results. Further facts will be supplied as required.

I. Sales Tax—Imposition.

DISCUSSION

The Department found that Taxpayer had made a number of sales to Indiana customers without collecting sales tax or obtaining exemption certificates, and assessed sales tax on the sales transactions. Taxpayer maintains that sales tax should not be assessed on certain of the sales transactions. Taxpayer protests the imposition of sales tax on amounts it charges its customers who reserved Indiana hotel rooms, did not cancel the reservation, but failed to check into the Indiana hotel. Since the customer did not cancel the reservation, Taxpayer charges its customer the amount of the rental room rate for the reserved room. Taxpayer refers to these charges as "guaranteed no show revenues." The Department determined that Taxpayer should have collected sales tax on these sales.

The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. IC § 6-2.5-1-2(a) defines a "retail transaction" stating that: "Retail Transaction" means a transaction of a retail merchant that constitutes selling at retail as described in [IC 6-2.5-4-1](#) that constitutes making a wholesale sale as described in [IC 6-2.5-4-2](#), or that is described in any other section of [IC 6-2.5-4](#).

IC § 6-2.5-4-4 provides:

(a) A person is a retail merchant making a retail transaction when the person rents or furnishes rooms, lodgings, or other accommodations, such as booths, display spaces, banquet facilities, and cubicles or spaces used for adult relaxation, massage, modeling, dancing, or other entertainment to another person:

(1) if those rooms, lodgings, or accommodations are rented or furnished for periods of less than thirty (30) days; and

(2) if the rooms, lodgings, and accommodations are located in a hotel, motel, inn, tourist camp, tourist

cabin, gymnasium, hall, coliseum, or other place, where rooms, lodgings, or accommodations are regularly furnished for consideration.

(b) Each rental or furnishing by a retail merchant under subsection (a) is a separate unitary transaction regardless of whether consideration is paid to an independent contractor or directly to the retail merchant. IC § 6-2.5-9-3(2) sets out the responsibilities of a retail merchant:

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 (as described in [IC 6-2.5-3-2](#)) 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.

Taxpayer cites to *3551 Lafayette Road Corporation v. Indiana Dept. of State Revenue*, 644 N.E.2d 199 (Ind. Tax Ct. 1994) and dictionary definitions of rents or furnish for the general proposition that in order for the hotel charges to be subject to sales tax, the customers must actually use the hotel rooms. Taxpayer argues that the statute lacks the additional language necessary to tax these transactions because "rents or furnishes" require actions that were not taken when the customers do not show up to use the room. Taxpayer equates these charges to forfeiture fees from a breach of contract.

"Rent" is defined in Black's Law Dictionary 1322 (8th Ed. 2004) as follows:

Consideration paid, usu. periodically, for the use or occupation of property.

"Rent" is defined in Webster's Third New Int'l Dictionary, in relevant parts, as follows:

n. 1. Payment, usu. of an amount set by contract, made by a tenant at designed intervals in return for the right to occupy or use another's property.... v. 1. To obtain occupancy or use of (another's property) in return for periodic payments.

While Taxpayer is correct that the Indiana Tax Court discussed the application of IC § 6-2.5-4-4 in *Lafayette Road*, this case is not directly relevant to the case at hand. In *Lafayette Road*, the court addressed the issue of whether any consideration was given for the right to use the VIP Lounges where the table dancing occurs. *3551 Lafayette Road Corporation v. Indiana Dept. of State Revenue*, 644 N.E.2d 199, 201 (Ind. Tax Ct. 1994). The Tax Court explained that since the "patrons were in no way obligated to spend any tokens in the VIP lounges,... the tokens do not constitute consideration for use of the VIP Lounges and, therefore, are not subject to sales and use tax under [IC 6-2.5-4-4](#)." *Id.* at 201-02.

In the instant case, Taxpayer's customers are obligated to pay the amount of one night's room rate regardless of whether the customers show up at the hotel. In effect, Taxpayer's policy is after a certain amount of time the reservation turns into an un-cancellable transaction for the rental of the room for one night. In fact, if the customer shows up before the expiration of that night's rental time, they are provided with a room. Thus, the customers have a right to use or occupy a room for that period of time for which they have been charged. The customer pays for the right to use or occupy a hotel room for a specific period of time, and, regardless of whether or not the customer shows up to check-in, that time naturally elapses and is used up. As such, these charges that are paid by the customer to the hotel are subject to sales tax under IC § 6-2.5-4-4.

Alternatively, Taxpayer maintains that if the Department concludes that the "guaranteed no show revenue" charges are subject to gross retail tax, such a determination should be applied on a prospective basis. Taxpayer sets out a general equitable argument – unsupported by citations to statutory or regulatory authority – that the Department, having found that the damage waiver charges are subject to the sales tax, should impose that tax liability on a prospective basis only.

IC § 6-8.1-3-3(b) states that "[n]o change in the department's interpretation of a listed tax may take effect before the date the change is: (1) adopted in a rule under this section; or (2) published in the Indiana Register... if the change would increase a taxpayer's liability for a listed tax." Under IC § 6-8.1-3-3, the Department is without authority to reinterpret a taxpayer's tax liability without promulgating and publishing a regulation giving Taxpayer notice of that reinterpretation. Absent any indication that the Department has changed its interpretation of the gross retail tax, IC § 6-8.1-3-3 does not require the Department to give effect to Taxpayer's sales tax liabilities only on a prospective basis. Absent any requirement to do otherwise, the Department has no independent authority whatsoever to grant Taxpayer's equitable request for prospective treatment of its sales tax liabilities.

Taxpayer claims to have received oral advice from a Department employee that these charges are not subject to sales tax. Presumably, Taxpayer argues that this employee's oral advice is an interpretation and the Department's assessment would amount to a change in an interpretation of a listed tax as found in IC § 6-8.1-3-3(b). However, even if Taxpayer's claims are taken at face value, pursuant to [45 IAC 15-3-2\(e\)](#) "oral opinions will not be binding on the Department. Even when a taxpayer orally receives technical assistance from the Department, the advice is advisory only and is not binding." This rule is supported by Indiana case law and compelling public policy.

Therefore, Taxpayer has not met its burden of proof providing sufficient justification warranting prospective treatment.

FINDING

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

II. Innkeepers Tax—Imposition.

DISCUSSION

The Department found that Taxpayer had made a number of sales to Indiana customers without collecting county innkeeper's tax, and assessed innkeeper's tax on the sales transactions. Taxpayer maintains that innkeeper's tax should not be assessed on certain of the sales transactions. Taxpayer protests the imposition of innkeeper's tax on amounts it charges its customers who reserved Indiana hotel rooms, did not cancel the reservation, but failed to check into the Indiana hotel. Since the customer did not cancel the reservation, Taxpayer charges its customer the amount of the rental room rate for the reserved room. Taxpayer refers to these charges as "guaranteed no show revenues." The Department determined that Taxpayer should have collected innkeeper's tax on these sales.

The innkeeper's tax, in question, is imposed by IC § 6-9-8-2, which provides:

- (a) 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.
- (b) This tax shall be in addition to the state gross retail tax and use tax imposed on such persons by [IC 6-2.5](#). The county fiscal body may adopt an ordinance to require that the tax be reported on forms approved by the county treasurer and that the tax shall be paid monthly to the county treasurer. If such an ordinance is adopted, the tax shall be paid to the county treasurer not more than twenty (20) days after the end of the month the tax is collected. If such an ordinance is not adopted, the 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](#).
- (c) All of the provisions of [IC 6-2.5](#) relating to rights, duties, liabilities, procedures, penalties, definitions, exemptions, and administration shall be applicable to the imposition and administration of the tax imposed by this section except to the extent such provisions are in conflict or inconsistent with the specific provisions of this chapter or the requirements of the county treasurer. Specifically, and not in limitation of the foregoing sentence, the terms "person" and "gross income" shall have the same meaning in this section as they have in [IC 6-2.5](#).
- (d) If the tax is paid to the department of state revenue, the returns to be filed for the payment of the tax under this section may be either a separate return or may be combined with the return filed for the payment of the state gross retail tax as the department of state revenue may determine by rule.
- (e) If the tax is paid to the department of state revenue, the amounts received from this tax shall be paid monthly by the treasurer of state to the treasurer of the capital improvement board of managers of the county upon warrants issued by the auditor of state.
(Emphasis added).

As provided above, the statutes for imposition of sales tax apply to the imposition of innkeeper's tax. Therefore, as discussed above in Issue I, these charges were properly subject to sales tax and, thus, are also properly subject to innkeeper's tax.

FINDING

Taxpayer's protest to the imposition of county innkeeper's tax is respectfully denied.

III. Tax Administration—Negligence Penalty.

DISCUSSION

Taxpayer protests 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 standard for waiving the negligence penalty is given at [45 IAC 15-11-2](#)(c) 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.

Taxpayer has provided sufficient information to establish that its failure to pay the deficiency in this instance was not due to Taxpayer's negligence, but was due to reasonable cause as required by [45 IAC 15-11-2](#)(c). While Taxpayer's current circumstances show that Taxpayer acted with reasonable cause, Taxpayer should be on notice that should these circumstances arise again, penalty waiver may not be warranted.

FINDING

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

CONCLUSION

Taxpayer's protest to the imposition of sales tax is respectfully denied, as discussed in Issue I. Taxpayer's protest to the imposition of county innkeeper's tax is respectfully denied, as discussed in Issue II. Taxpayer's protest to the imposition of penalty is sustained, as discussed in Issue III.

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