

**Letter of Findings Number: 09-0968
Innkeepers Tax
For Tax Years 2006-08**

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ISSUES

I. Innkeepers Tax—Imposition.

Authority: Greensburg Motel Associates, LP v. Indiana Dep't of State Revenue, 629 N.E.2d 1302 (Ind. Tax 1994); IC § 6-2.5-2-1; IC § 6-2.5-4-4; IC § 6-8.1-5-1; IC § 6-9-8-2; [45 IAC 2.2-4-8](#).

Taxpayer protests the imposition of county innkeepers tax on telephone and movie rental charges.

II. Tax Administration—Negligence Penalty.

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

Taxpayer protests the imposition of a ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer operates an Indiana hotel. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not collected and remitted county innkeepers tax ("CIT") on charges for telephones and movie rentals to its guests. The Department therefore issued proposed assessments for CIT, ten percent negligence penalties, and interest for the tax years 2006, 2007, and 2008. Taxpayer protests that these are not categories subject to CIT. Taxpayer therefore protests the imposition of CIT and negligence penalties. An administrative hearing was conducted and this Letter of Findings results. Further facts will be supplied as required.

I. Innkeepers Tax—Imposition.

DISCUSSION

Taxpayer protests the imposition of CIT for the tax years 2006-08. Taxpayer states that the charges upon which the Department imposed CIT are not subject to CIT and should be dismissed. 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).

The first relevant statute is IC § 6-9-8-2, which states:

- (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).

Next, IC § 6-2.5-4-4 states:

- (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. (Emphasis added.)

Also, IC § 6-2.5-2-1 states:

(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.

(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

(Emphasis added).

Next, [45 IAC 2.2-4-8](#) states:

(a) For the purpose of the state gross retail tax and use tax: Every person engaged in the business of renting or furnishing for periods of less than thirty (30) days any accommodation including booths, display spaces and banquet facilities, in any place where accommodations are regularly furnished for a consideration is a retail merchant making retail transactions in respect thereto and the gross income received therefrom shall constitute gross retail income from retail unitary transactions.

(b) In general, the gross receipts from renting or furnishing accommodations are taxable. An accommodation which is rented for a period of thirty (30) days or more is not subject to the gross retail tax.

(c) There is no exemption for purchases made by persons who are engaged in renting or furnishing accommodations. Such persons are deemed to purchase or otherwise acquire tangible personal property for use or consumption in the regular course of their business.

(d) The renting or furnishing of an accommodation for less than thirty (30) days constitutes a retail merchant making a retail transaction. Every person so engaged must collect the gross retail tax on the gross receipts from such transactions. The tax is borne by the person or organization who uses the accommodation.

(e) 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.

(f) The tax is imposed on the gross receipts from accommodations which are furnished for periods of less than thirty (30) days.

(Emphasis added).

Taxpayer believes that a telephone, while customary in a room, would not necessarily be "essential" to the furnishing of the accommodation in the same manner as providing a bed, heat, electricity or water. Similarly, Taxpayer states that many other hotels, including some which it operates, do not even offer movie rentals and that such rentals should not be classified as "essential" to the furnishing of the accommodation.

The Department refers to the second sentence of [45 IAC 2.2-4-8\(e\)](#), which states, "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." (Emphasis added). The provision of telephone services and movie rentals clearly falls within the definition of services which are regularly provided in furnishing the accommodation of a hotel room.

As explained in IC § 6-9-8-2(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](#)." IC § 6-9-8-2(b) also provides that the county innkeeper tax is, "... collected in exactly the same manner as the state gross retail tax is imposed, paid, and collected under [IC 6-2.5](#)." Therefore, telephone charges and movie rental charges were properly subject to sales tax and CIT.

Taxpayer also protests that the telephones and movie rentals are provided by separate providers and that Taxpayer should not be expected to collect tax on those items. The Department refers to *Greensburg Motel Associates, LP v. Indiana Dep't of State Revenue*, 629 N.E.2d 1302 (Ind. Tax 1994), in which the Indiana Tax Court discussed a motel operator's claim that items such as consumable items, non-consumable items, and utilities were exempt from sales tax under the resale exemption. In that case the court stated:

In *Indiana Bell Telephone Co. v. Indiana Department of State Revenue* (1994), Ind.Tax, 627 N.E.2d 1386, the court, quoting *USAir v. Indiana Department of State Revenue* (1989), Ind.Tax, 542 N.E.2d 1033, aff'd (1992), Ind., 582 N.E.2d 777, stated "[t]o subdivide the cost of [an airline] ticket into percentages to cover the various services rendered by the airline... strain[s] the meaning of the term 'resale.' When a passenger buys a ticket he buys many services." Id., 627 N.E.2d at 1389. Likewise, when a guest rents a room from Lees Inns, the guest buys the benefits of many services, including consumable items, non-consumable items, and utilities. Accordingly, it is an artificial conclusion to divide the cost of Lees Inns' room rental into resales and leases. Id. at 1305.

While the court in that case was discussing the resale exemption, it is clear that the court considers a room

rental to encompass all services to be included in the transaction between the hotel operator and the guest. In the instant case, that means that the hotel guest is involved in a transaction with Taxpayer and not with the telephone and movie rental providers. As such, it is Taxpayer's duty to collect CIT.

In conclusion, the CIT is administered in the same way as the sales tax, as provided by IC § 6-9-8-2. The telephone and movie rental charges are the type of services which are regularly provided in furnishing accommodations and are therefore subject to CIT, as provided by [45 IAC 2.2-4-8](#). The individual guests buy all services from Taxpayer and not with the telephone and movie rental services, as provided by Greensburg Motel Associates. Taxpayer has not met the burden imposed by IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is denied.

II. Tax Administration–Negligence Penalty.

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty for the tax years in question. Taxpayer protests the imposition of penalty. The Department refers to IC § 6-8.1-10-2.1(a), which states in relevant part:

If a person:

...

(3) incurs, upon examination by the department, a deficiency that is due to negligence;

...

the person is subject to a penalty.

The Department refers to [45 IAC 15-11-2\(b\)](#), which 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.

[45 IAC 15-11-2\(c\)](#) provides in pertinent part:

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.

In this case, the Department determined tax liabilities were incurred due to negligence under [45 IAC 15-11-2\(b\)](#), and so Taxpayer was subject to a penalty under IC § 6-8.1-10-2.1(a). Taxpayer has affirmatively established that it had reasonable cause for its actions. Taxpayer therefore has established that it exercised ordinary business care, as required by [45 IAC 15-11-2\(c\)](#). The negligence penalty will be waived.

FINDING

Taxpayer's protest is sustained.

CONCLUSION

Taxpayer is denied on Issue I regarding the imposition of county innkeepers tax. Taxpayer is sustained on Issue II regarding the imposition of penalty.

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