

Letters of Findings: 10-0043; 10-0044
Sales/Use Tax and County Innkeepers Tax
For the Years 2006, 2007, 2008

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales Tax and County Innkeepers Tax – Imposition.

Authority: IC § 6-8.1-5-1; IC § 6-2.5-2-1; IC § 6-2.5-4-4; IC § 6-9-8-2; [45 IAC 2.2-4-8](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Sales Tax Information Bulletin 41 (December 2002); Sales Tax Information Bulletin 10 (June 2008).

Taxpayer protests the imposition of sales tax and county innkeepers' tax on certain items.

II. Tax Administration – Negligence Penalty.

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

Taxpayer protests the assessment of negligence penalty.

STATEMENT OF FACTS

Taxpayer operates a motel in Indiana. The Indiana Department of Revenue ("Department") conducted a compliance audit for Marion County Innkeepers Tax ("CIT") for calendar years 2006, 2007, and 2008. The Department's audit determined that Taxpayer had not collected and remitted sales tax ("RST") and county innkeepers tax ("CIT") on certain charges for lodging. The Department therefore issued proposed assessments for RST and for CIT, ten percent negligence penalties, and interest for the tax years 2006, 2007, and 2008. Taxpayer protests that the assessments on several grounds as well as the imposition of negligence penalties. Prior to the hearing, the Department's auditor reviewed the protested items in light of additional documentation provided by Taxpayer and agreed to some of the protested items (as will be delineated below). An administrative hearing was conducted and this Letter of Findings results. Further facts will be supplied as required.

I. Sales Tax and County Innkeepers Tax – Imposition.

DISCUSSION

The Department's audit determined that Taxpayer had not collected and remitted sales tax ("RST") and county innkeepers tax ("CIT") on certain charges for lodging. Taxpayer protested the assessments on several grounds. Prior to the hearing, the Department's auditor reviewed the protested items in light of additional documentation provided by Taxpayer and agreed to some of the protested items.

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.

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.

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.

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.

The Department notes that all tax assessments are presumed to be accurate and 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 Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

(A) Agreed Issues

This Letter of Findings will first address the issues protested by Taxpayer and subsequently agreed to by the Department's audit prior to hearing:

(1) Gross Receipts Number

Taxpayer had protested that the "gross receipts" number the Department's audit used to calculate tax due already included CIT and RST. Taxpayer provided additional documentation in support of its protest, and the Department's audit agreed with Taxpayer's contention.

Taxpayer is sustained on this issue.

(2) Movie Rental Charges

Taxpayer protested that the Department's audit incorrectly assessed RST and CIT on movie rental charges. Taxpayer explained that it acted merely as an agent for the movie provider that placed machines in Taxpayer's rooms. Taxpayer provided documentation showing that RST and CIT was collected by Taxpayer on behalf of the movie provider and forwarded to the movie provider. Taxpayer simply retained its 20 percent commission on the movie rentals. Taxpayer provided additional documentation in support of its protest. The Department's audit agreed with Taxpayer's contention.

Taxpayer is sustained on this issue.

(3) \$30,000 Miscellaneous Charge

The Department's audit mistakenly included a December 2008 miscellaneous charge in its assessment of tax. Taxpayer provided documentation showing that the \$30,000 was a capital contribution from its owners. The Department's audit agreed with Taxpayer prior to hearing.

Taxpayer is sustained on this issue.

(B) Remaining Protested Issues

(1) Charges for Long-Term Stays

Taxpayer protests that some of the room rentals on which it was assessed sales tax were for stays longer

than 30 days. Taxpayer states that it billed these residents monthly -charging sales tax on the first 30 days, but not on subsequent, consecutive monthly billings. Taxpayer provided additional documentation subsequent to the hearing in support of its protest.

According to IC § 6-2.5-4-4(a) a person is a retail merchant making a retail transaction when the person rents or furnishes rooms, lodgings, or other accommodations for periods of less than thirty (30) days.

Sales Tax Information Bulletin 41 (December 2002) (replaces Information Bulletin #41, dated October 2000) states in relevant part:

II. Imposition of Tax

The tax is imposed on the gross receipts received by the retail merchant and 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 room or accommodation. Such amounts are subject to tax even if they are separately itemized on the statement or invoice. This includes telephone access charges. It also includes food or drinks provided by the retail merchant to the customer, if it is included in the room charge. If there is a membership fee charged to the customer, it is included in gross receipts.

III. Exemptions from the Tax

An accommodation that is rented for thirty (30) days or more is not subject to the sales tax. The customer is required to pay the tax for the first thirty (30) days if the customer is billed on less than a monthly basis.

EXAMPLE:

A business rents accommodations for its employees and signs a lease for four months, payable monthly, the first thirty (30) days would not be subject to tax.

Same situation as above; however the business pays the rental on a weekly basis. The business is required to pay sales tax on the first thirty (30) days of rental.

If an entity rents the rooms for employees, the entity is renting the rooms and not the person who stays in the room. The contract would not have to be for a specific room as long as the continuous stay portion of the contract remains in effect.

EXAMPLE:

An innkeeper moves two occupants of rooms rented on an extended stay to make a contiguous area available for a convention that wants all of their rooms together. Moving the people in the extended stay contract does not void the contract.

(Emphasis added).

Taxpayer's protest is correct on principle based on the statutory and agency authority cited to above; however, the validity of Taxpayer's documentation must be evaluated in a supplemental audit. Taxpayer may be contacted by the Department's audit division for additional documentation to support this point of its protest. If requested, Taxpayer is directed to provide this documentation promptly.

Taxpayer is sustained on this point conditionally, pending supplemental review by audit.

(2) Exemption Certificates from Not-for-Profits

The Department found that in some instances Taxpayer was issued exemption certificates from not-for-profit entities when actually the rooms were paid for by individuals and not the not-for-profit entities. The Department's audit assessed tax on these transactions citing to Sales Tax Information Bulletin 10 (June 2008) (replaces July 2004) stating that "purchases for the private benefit of any member or the organization of for individuals, such as meal and lodgings, are not eligible for exemption."

Taxpayer stated that it was unaware of this requirement and has revised its business practices to require payment from the not-for-profit organization if indeed that is appropriate.

The Department's audit stands on this issue since Taxpayer no longer contests this issue.

(3) Other Various Charges

The Department's audit also found that Taxpayer did not charge sales tax on various charges connected to the rental of the rooms and considered to be part of the retail income - for example, microwave fees, long distance phone charges, rollaway fees, and pet fees. The audit cited to [45 IAC 2.2-4-8](#) and [45 IAC 2.2-4-9](#), stating that "the gross receipts from renting or furnishing accommodations are taxable."

Taxpayer explained that it had relied on the automated accounting system it inherited from the prior owners which apparently did not flag these items for sales tax. Taxpayer states that it has corrected the designations and will properly collect sales tax going forward. Taxpayer no longer contests this issue.

The Department's audit stands on this issue since Taxpayer no longer contests this issue.

FINDING

Under Subpart A:

Taxpayer is sustained on its protest that CIT and RST were already included in the "gross receipts"; that it had already collected tax on the movie rental charges; and that the \$30,000 miscellaneous charge is actually a capital contribution and therefore non-taxable.

Under Subpart B:

Taxpayer is conditionally sustained on its protest that it is not required to collect sales tax on long-term stays,

pending supplemental review by audit.

The Department's assessment of additional tax on rentals to individuals who presented exemption certificates from not-for-profits, and on other miscellaneous room charges such as microwave fees, long distance phone charges, rollaway fees, and pet fees stands.

II. Tax Administration – Negligence Penalty.

DISCUSSION

Taxpayer also 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 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. 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's protest has been sustained on several issues; however, Taxpayer has not affirmatively established, as required by [45 IAC 15-11-2](#)(c), that its failure to pay sales tax on its remaining assessment was due to reasonable cause and not due to negligence. Ignorance of the law is defined as negligence.

FINDING

Taxpayer's protest is respectfully denied.

CONCLUSION

Under Issue I, Subpart A:

Taxpayer is sustained on its protest that CIT and RST were already included in the "gross receipts"; that it had already collected tax on the movie rental charges; and that the \$30,000 miscellaneous charge is actually a capital contribution and therefore not subject to RST and CIT.

Under Issue I, Subpart B:

Taxpayer is conditionally sustained on its protest that it is not required to collect sales tax on long-term stays, pending supplemental review by audit.

The Department's assessment of additional tax on rentals to individuals who presented exemption certificates from not-for-profits, and on other miscellaneous room charges such as microwave fees, long distance phone charges, rollaway fees, and pet fees stands.

Under Issue II, Taxpayer's protest of the remaining negligence penalty is denied.

Posted: 10/27/2010 by Legislative Services Agency

An [html](#) version of this document.