

Letter of Findings Number: 40-20100253
Utility Receipts Tax
For Tax Years 2006, 2007, and 2008

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ISSUES

I. Utility Receipts Tax – Imposition.

Authority: IC § 6-2.3-1-4; IC § 6-2.3-1-14; IC § 6-2.3-2-1; IC § 6-2.3-3-2; IC § 6-2.3-3-10; IC § 6-8.1-5-1; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the imposition of utility receipts tax on certain receipts.

II. Tax Administration – Negligence Penalty.

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

Taxpayer protests the imposition of the negligence penalty.

STATEMENT OF FACTS

Taxpayer, a municipal agency, provides water and sewage services to its customers.

Pursuant to an audit, the Indiana Department of Revenue ("Department") discovered that Taxpayer failed to file its 2006 – 2008 Utility Receipts Tax ("URT") Return. The Department's audit, however, found that Taxpayer "had made Quarterly Payments (via Forms URT-Q) for the audit periods as required per [IC 6-2.3-6-1](#)." In addition to imposing negligence penalty and interest, the Department's audit assessed Taxpayer URT on Taxpayer's receipts recorded under accounts designated as: "Retail Sales," "Tap-on Fees," "Fire Protection," "Reconnect Fees," and "Non-Sufficient Funds (NSF) Fees." The Department's audit also gave Taxpayer credits on its quarterly estimated payments and offset the assessments accordingly.

Taxpayer protests the Department's assessments relating to "Fire Protection," "Reconnect Fees," and "NSF Fees" accounts. Taxpayer also protests the imposition of penalty. A hearing was held. This Letter of Finding ensues. Additional information will be provided as necessary. Please refer to Letter of Findings 04-20100254 for additional information and issues raised related to Taxpayer's sales and use tax protest.

I. Utility Receipts Tax – Imposition.

DISCUSSION

The Department's audit determined that Taxpayer failed to remit URT on the receipts recorded under the "Fire Protection" account because the account included charges for sprinkler systems, which were considered providing utility service. The Department's audit also determined that Taxpayer failed to remit URT on its receipts of reconnection fees and NSF fees.

Taxpayer, to the contrary, claimed that the charges under the "Fire Protection" account were charges relating to fire hydrants. Thus, Taxpayer argued that the receipts, which recorded under the "Fire Protection" account, are for the maintenance of the town's hydrants and are not for water provided to its customers for consumption. Taxpayer further claimed that reconnection fees and NSF fees were not subject to URT for the same reason.

As a threshold issue, all tax assessments are prima facie evidence that the Department's assessment of tax is presumed correct; 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).

The URT is imposed by IC § 6-2.3-2-1, as follows:

An income tax, known as the utility receipts tax, is imposed upon the receipt of:

- (1) the entire taxable gross receipts of a taxpayer that is a resident or a domiciliary of Indiana; and
- (2) the taxable gross receipts derived from activities or businesses or any other sources within Indiana by a taxpayer that is not a resident or a domiciliary of Indiana.

IC § 6-2.3-1-14 states:

"Utility service" means furnishing any of the following:

- (1) Electrical energy.
- (2) Natural gas, either mixed with another substance or pure, used for heat, light, cooling, or power.
- (3) Water.
- (4) Steam.
- (5) Sewage (as defined in [IC 13-11-2-200](#)).
- (6) Telecommunication services.

IC § 6-2.3-1-4 states:

"Gross receipts" refers to anything of value, including cash or other tangible or intangible property that a taxpayer receives in consideration for the retail sale of utility services for consumption before deducting any costs incurred in providing the utility services.

IC § 6-2.3-3-10 states:

Gross receipts include receipts received for installation, maintenance, repair, equipment, or leasing services provided to a commercial or domestic consumer that are **directly related to the delivery of utility services** to the commercial or domestic consumer or the removal of equipment from a commercial or domestic consumer upon the termination of service. **(Emphasis added).**

IC § 6-2.3-3-2 further provides:

Notwithstanding any other provisions of this article, receipts that would otherwise not be taxable under this article are taxable gross receipts under this article to the extent that the amount of **the nontaxable receipts are not separated from the taxable receipts on the records or returns of the taxpayer.** **(Emphasis added).**

A. Fire Protection

Taxpayer maintains that the receipts, which were recorded under the "Fire Protection" account, are for the maintenance of the town's hydrants and are not for water provided to its customers for consumption. To support its protest, Taxpayer submitted a copy of Ordinance No. 2009-2, as well as a sample copy of the "Customer Bill," "Disconnect Notice," and "Customer Agreement." Taxpayer asserted that the "Customer Bill" demonstrated that it charged its customers a fixed fee for hydrant maintenance and it did not collect any tax. Therefore, the receipts under the "Fire Protection" account are charges for hydrant maintenance and not subject to URT.

Taxpayer is mistaken. Taxpayer's Ordinance No. 2009-2 stated that the "Fire Protection" contains three categories, designated as: (1) private hydrant, (2) public hydrant, and (3) automatic sprinklers. Among those categories, the charges relating to private hydrants and sprinklers systems were considered "the retail sale of utility services for consumption." Although Taxpayer's documentation showed that it charges its customers a fixed fee for hydrant maintenance, Taxpayer's documentation failed to demonstrate that the "Fire Protection" account only represented the receipts for charges of maintaining public hydrants.

Pursuant to the above mentioned statutes, utility "receipts that would otherwise not be taxable under this article are taxable gross receipts under this article to the extent that the amount of the nontaxable receipts are not separated from the taxable receipts on the records or returns of the taxpayer." Given the totality of the circumstances, in the absence of other documentation, the Department is not able to agree that Taxpayer has met its burden of demonstrating that the Department's assessment is incorrect.

B. Reconnect Fees

The Department's audit assessed URT on Taxpayer's "Reconnect Fees" account. Taxpayer, to the contrary, asserted that its reconnection service charges are not the type of charges that are subject to the URT.

Taxpayer is mistaken. The charges are for the connection or reconnection of a customer to the lines for delivery of the water. Thus, these charges "directly relate to the delivery of utility services" pursuant to IC § 6-2.3-3-10. Since these charges directly related to Taxpayer's delivery of the water services to customers, the receipts received from these service charges were subject to the URT.

In short, Taxpayer's protest to the imposition of URT on the "Reconnect Fees" is respectfully denied.

C. NSF Fees

Taxpayer collects NSF fees from its customers who pay with checks that were returned because of insufficient funds in their accounts. Taxpayer thus claimed that the NSF charges are not the type of charges that are subject to the URT.

Taxpayer has provided sufficient information to establish that the receipts are from charges to the customers paying with insufficient funds checks and are not receipts received attributable to the provision of water utility services for consumption.

Therefore, Taxpayer's protest to the imposition of URT on the "NSF charges" is sustained.

FINDING

Taxpayer's protest is sustained in part and denied in part. Taxpayer's protest of Subpart C, NSF Fees, is sustained. However, the remainder of Taxpayer's protest is respectfully denied.

II. Tax Administration – Negligence Penalty.

DISCUSSION

Taxpayer protests the imposition of the negligence penalty.

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

- (1) fails to file a return for any of the listed taxes;
- (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
- (3) incurs, upon examination by the department, a deficiency that is due to negligence;
- (4) fails to timely remit any tax held in trust for the state; or
- (5) is required to make a payment by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department.

[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 did not provide sufficient documentation to demonstrate that the failure to pay tax was not due to negligence.

FINDING

Taxpayer's protest of the negligence penalty is respectfully denied.

SUMMARY

For the reasons discussed above, Taxpayer's protest is sustained in part and denied in part. Taxpayer's protest of Part I. C., NSF fees, is sustained. Taxpayer's remaining protest is respectfully denied. The Department will recalculate Taxpayer's tax liabilities in a supplemental audit.

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