

Letter of Findings Number: 05-20110064; 05-20110284; 05-20110285
Other Tobacco Products Tax
For the Tax Periods January 1, 2008, through May 31, 2010

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ISSUE

I. Other Tobacco Products Tax – Imposition.

Authority: IC § 6-7-2-2; IC § 6-7-2-5; IC § 6-7-2-7; IC § 6-8.1-5-1; IC § 6-8.1-5-2; IC § 6-8.1-5-4; IC § 23-18-3-1 et seq.; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayers protest the imposition of the Other Tobacco Products Tax on purchases of other tobacco products.

STATEMENT OF FACTS

An individual ("Owner") operates several convenience stores/gas stations in Indiana. Each convenience store/gas station was registered as a different company which was incorporated separately. The Indiana Department of Revenue ("Department") conducted an investigation on the other tobacco products ("OTP") tax. Pursuant to the investigation, the Department determined that three (3) of Owner's stores (Store1, Store 2, and Store 3, collectively, "Taxpayers"), which were not licensed to sell OTP, purchased the OTP from two out-of-state vendors without paying the Indiana OTP tax on those purchases. The Department concluded that Taxpayers did not maintain adequate records. As a result, the Department assessed the OTP tax, interest, and penalty based on the best information available at the time of the investigation.

Taxpayers requested an initial review by the Department's Special Tax Appeal Section. Upon the initial review, the proposed assessments remain unchanged. Subsequently, Taxpayers protested the proposed assessments. An administrative hearing was conducted during which Owner and his representative explained the basis for the protest. This Letter of Findings results. Additional information will be provided as necessary.

I. Other Tobacco Products Tax – Imposition.

DISCUSSION

The Department assessed Taxpayers the OTP tax based on the best information available at the time of the investigation. Taxpayers argued that they were not responsible for the Department's proposed assessments because they did not make those purchases.

As a threshold issue, 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).

IC § 6-7-2-2 defines that a "distributor" means a person who:

- (1) manufactures, sells, barter, exchanges, or distributes tobacco products in Indiana to retail dealers for the purpose of resale;
- (2) purchases tobacco products directly from a manufacturer of tobacco products; or
- (3) **purchases for resale tobacco products from a wholesaler, jobber, or distributor outside of Indiana who is not a distributor holding a license issued under this chapter.**

Pursuant to IC § 6-7-2-5, "tobacco product" means:

- (1) any product made from tobacco, other than a cigarette (as defined in [IC 6-7-1-2](#)), that is made for smoking, chewing, or both; or
- (2) snuff.

IC § 6-7-2-7 further provides that:

A tax is imposed on the distribution of tobacco products in Indiana at the rate of twenty-four percent (24 percent) of the wholesale price of the tobacco products. The distributor of the tobacco products is liable for the tax. The tax is imposed at the time the distributor:

- (1) **brings or causes tobacco products to be brought into Indiana for distribution;**
- (2) manufactures tobacco products in Indiana for distribution; or
- (3) transports tobacco products to retail dealers in Indiana for resale by those retail dealers. **(Emphasis added).**

IC § 6-8.1-5-1(b), in pertinent part, states "[i]f 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. The amount of the assessment is considered a tax payment not made by the due date and is subject to IC § 6-8.1-10 concerning the imposition of

penalties and interest."

IC § 6-8.1-5-2, in relevant part, provides:

Except as otherwise provided in this section, the department may not issue a proposed assessment under section 1 of this chapter more than three (3) years after the latest of the date the return is filed, or either of the following:

(1) The due date of the return.

(2) In the case of a return filed for the state gross retail or use tax, the gasoline tax, the special fuel tax, the motor carrier fuel tax, the oil inspection fee, or the petroleum severance tax, the end of the calendar year which contains the taxable period for which the return is filed.

...

(f) If a person files a fraudulent, unsigned, or substantially blank return, or if a person does not file a return, there is no time limit within which the department must issue its proposed assessment.

IC § 6-8.1-5-4 further provides:

(a) Every 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. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.

(b) A person must retain the books and records described in subsection (a), and any state or federal tax return that the person has filed:

(1) For an unlimited period, if the person fails to file a return or receives notice from the department that the person has filed a suspected fraudulent return, or an unsigned or substantially blank return.

(2) In all other cases, for a period of at least three (3) years after the date the final payment of the particular tax liability was due, unless after an audit, the department consents to earlier destruction.

In addition, if the limitation on assessments provided in section 2 [IC 6-8.1-5-2] of this chapter is extended beyond three (3) years for a particular tax liability, the person must retain the books and records until the assessment period is over.

(c) A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times.

(d) A person must, on request by the department, furnish a copy of any federal returns that he has filed.

In this instance, Owner asserted that, during the years at issue, he either was too ill to manage his stores or frequently traveled outside of the United States to attend to his business overseas. Specifically, for Store 1, Owner maintained that the former manager was responsible for the OTP tax. For Store 2 and Store 3, Owner claimed that he leased those stores to an unrelated company and, thus, his tenant-company was responsible for the OTP tax.

To support his protest, Owner submitted a statement by the former Store 1 manager. The former manager stated that he purchased the OTP for his own "side business" and was responsible for the OTP tax. Owner also submitted copies of Owner's passport and some invoices from a different vendor. Additionally, Owner produced copies of leases for Store 2 and Store 3 to support his assertion that the tenant-company was responsible for the OTP tax for those stores.

Upon reviewing Taxpayers' documentation, first the former Store 1 manager's statement clearly contradicts the records obtained from the common carrier who delivered the OTP to Store 1. The common carrier's records showed that each OTP at issue was delivered to and accepted by the managers (other than the former manager) or the employees at the front desk or the office of Store 1. Additionally, the former store manager's statement cannot be verified because he has left the United States and returned to his country indefinitely. Pursuant to Indiana law, a manager of a company is an agent to the company for the purpose of its business or affairs. IC § 23-18-3-1 et seq. As a result, the company is ultimately responsible for the manager's decisions. In this case, the former store manager was hired to manage Store 1. Taxpayer/Owner who hired the former manager was ultimately responsible for the results attributed to the former manager's decisions. Moreover, copies of the invoices from a different vendor alone can only demonstrate that Taxpayer/Owner purchased certain products from that vendor and nothing more.

For Store 2 and Store 3, referring to the leases, Owner argued that his tenant-company was responsible for the OTP tax. However, copies of leases alone are not sufficient to show that Taxpayers were not responsible for the OTP tax and whether a landlord-tenant relationship exists is beyond the scope of the protest. In this case, the Department's investigation found that the tenant-company did not register with the Indiana Secretary of State to do business in Indiana. Nor did the tenant-company register with the Department for filing returns and remitting tax purposes. In fact, after Owner allegedly leased Store 2 and Store 3 to his tenant-company, Owner continued his business operations at the same Store 2 and Store 3, where the tenant-company allegedly operated the stores under the same Taxpayers' business licenses. Owner did not separate his business operations from his tenant-company's business operations. Rather, according to Owner's explanation at the hearing, the business records were comingled [*sic*]—they filed the sales tax returns and reported taxes together under Taxpayers' business licenses and registrations.

Thus, given the totality of circumstances, in the absence of other documentation, the Department is not able to agree with Taxpayers that they have met the burden demonstrating the Department's proposed assessments are wrong, as required by IC § 6-8.1-5-1(c).

FINDING

Taxpayers' protest of the imposition of the OTP tax is respectfully denied.

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