

**Letter of Findings: 04-20110196**  
**Gross Retail Tax**  
**For the Years 2007, 2008, and 2009**

**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 It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register.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.

**ISSUE**

**I. Statistical Sampling – Gross Retail Tax.**

**Authority:** IC § 6-8.1-3-12(b); IC § 6-8.1-5-1(c).

Taxpayer argues that the Department of Revenue, in preparing a statistical sampling of its transactions, failed to give it credit for previous use tax payments.

**STATEMENT OF FACTS**

Taxpayer operates fitness and recreation centers in various states including Indiana. Taxpayer also makes a limited number of retail transactions at these centers. The Indiana Department of Revenue (Department) conducted an audit review of Taxpayer's business records. The audit review resulted in the assessment of additional sales/use tax. Taxpayer disagreed with a portion of the assessment and submitted a protest to that effect. An administrative hearing was conducted by telephone during which Taxpayer's representative explained the basis for the protest.

**I. Statistical Sampling – Gross Retail Tax.**

**DISCUSSION**

According to the audit report, the Department and Taxpayer entered into an agreement which called for a "stratified random sample of invoices for expense items purchased for use in Indiana...." The audit reviewed Taxpayer's accounts for "supplies, expendable equipment, office software, equipment rentals, and tangible personal property used for facility maintenance and repairs." In addition, the audit noted additional taxable transactions for "freight and delivery charges."

The audit resulted in the assessment of approximately \$15,000 in sales/use tax. Taxpayer states that this number is incorrect but that the actual liability is overstated by approximately \$6,300.

At the outset, it is important to note that Taxpayer does not dispute the assessment of sale/use tax on the items included in the audit report. Therefore, it is not necessary to review the statutory basis for the underlying assessment. Taxpayer's dispute stems from what it believes is a calculation error stemming from the purported failure to allow it credit for use tax payments made during the audit period.

It should be noted that the audit acted well within its authority to conduct a "statistical sampling" of Taxpayer's transactions and to propose an assessment based on that sampling. The authority to do so is found at IC § 6-8.1-3-12(b) which states:

The department may audit any returns with respect to the listed taxes using statistical sampling. If the taxpayer and the department agree to a sampling method to be used, the sampling method is binding on the taxpayer and the department in determining the total amount of additional tax due or amounts to be refunded.

However, Taxpayer does not dispute the authority or legitimacy of the sampling methodology. Instead Taxpayer maintains that during the years under audit, it made periodic payments to the Department in the knowledge that it was accruing "use tax" liability but that the audit failed to provide a credit for those periodic payments. Taxpayer asks that this purported error be corrected and that the amount of the proposed assessment be adjusted to reflect that correction.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

Taxpayer has provided its own documentation delineating use tax payments made during this period and has also pointed out that the Department's own audit report on page eight makes note of these payments. However, the audit report makes no mention of ever having given Taxpayer "credit" for the payments. There is an apparent "disconnect" between the periodic amounts paid and the final assessment calculation.

In this case, Taxpayer has met its burden of proof under IC § 6-8.1-5-1(c) necessary to warrant a substantive review of the audit calculation. The Audit Division is requested to review both the original audit report and Taxpayer's documents and to make whatever adjustment is warranted.

**FINDING**

Taxpayer's protest is sustained subject to audit review.

