

**Letter of Findings: 70-20120231**  
**Other Tobacco Products Tax**  
**For Tax Periods December 1, 2009, through December 31, 2011**

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**ISSUES**

**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; [45 IAC 15-3-2](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Revenue Ruling 2009-07ST (Oct. 25, 2009).

Taxpayer protests the assessments of other tobacco products tax.

**II. Tax Administration – Interest.**

**Authority:** IC § 6-8.1-10-1.

Taxpayer protests the imposition of statutory interest.

**III. 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, an Indiana company, is in the business of tobacco distribution. Taxpayer purchases tobacco products other than cigarettes ("OTP") from various manufacturers or suppliers, which include companies that are located outside of Indiana and are licensed by Indiana to sell the OTP in Indiana. Taxpayer then sells the OTP it purchased to other distributors, merchants, or retailers within and without the state of Indiana.

The Indiana Department of Revenue ("Department") conducted an audit of Taxpayer's records concerning the OTP tax. Pursuant to the audit, the Department determined that Taxpayer is responsible for remitting the OTP tax on the OTP which it purchased from December 1, 2009 through December 31, 2011.

Taxpayer protested the Department's proposed assessments. Specifically, Taxpayer disputed that it was not liable for the OTP tax on its OTP purchases from one of its out-of-state suppliers ("Supplier"). An administrative hearing was conducted during which the representative of Taxpayer explained the basis for the protest. This Letter of Findings results. Further facts will be supplied as required.

**I. Other Tobacco Products Tax – Imposition.**

**DISCUSSION**

The Department assessed the OTP tax on the OTP which Taxpayer purchased from the Supplier because Taxpayer failed to remit the OTP tax to the Department.

Taxpayer, to the contrary, claimed that it was not responsible for the OTP tax on the OTP it purchased from the Supplier. Taxpayer first contended that it "was not a distributor in its transactions" with the Supplier; rather, taxpayer claimed that it was a purchaser. Taxpayer stated that the OTP it purchased from the Supplier were delivered "Free on Board" and all costs were covered by the Supplier. Taxpayer also maintained that the Supplier "would technically be the first" wholesaler that brought or caused tobacco products to be brought into Indiana for distribution. Taxpayer thus argued that the Supplier was liable for the OTP tax. Taxpayer also asserted that it relied on electronic mail ("e-mail") advice from one of the Department's employees and thus should not be held liable for the OTP tax.

As a threshold issue, all tax assessments are prima facie evidence that the Department's assessment of tax is presumed correct. "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." 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); Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012).

The OTP tax is imposed on the distribution of OTP in Indiana. IC § 6-7-2-7, in relevant part, states:

(a) **A tax is imposed on the distribution of tobacco products in Indiana** at the rate of:

- (1) twenty-four percent (24 [percent]) of the wholesale price of tobacco products other than moist snuff; or
- (2) for moist snuff, forty cents (\$0.40) per ounce, and a proportionate tax at the same rate on all fractional parts of an ounce. If the tax calculated for a fractional part of an ounce carried to the third decimal place results in the numeral in the third decimal place being greater than four (4), the amount of the tax shall be rounded to the next additional cent.

(b) **The distributor of the tobacco products is liable for the tax** imposed under subsection (a). **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).**

"Distributor" is defined in IC § 6-7-2-2, which states:

**As used in this chapter, "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. (Emphasis added).**

IC § 6-7-2-5 also provides:

As used in this chapter, "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, including moist snuff.**

Accordingly, Indiana imposes the OTP tax on the distribution of OTP in Indiana at a rate of 24 percent. A distributor becomes liable for the OTP tax at the time the distributor engages in certain specific acts, which include "bring[ing] or caus[ing] tobacco products to be brought into Indiana for distribution."

At the hearing, Taxpayer referred to the Department's Revenue Ruling 2009-07ST (Oct. 25, 2009), 20091125 Ind. Reg. 045090901NRA. In Revenue Ruling 2009-07ST, the taxpayer/distributor of the OTP, which was located in Indiana, serviced its customers/retail stores within and without Indiana. The taxpayer/distributor purchased "untaxed" OTP directly from various suppliers, including the out-of-state suppliers, which were licensed to sell and distribute the OTP in Indiana. Thus, the taxpayer/distributor brought or caused the OTP to be brought into Indiana for distribution. However, the taxpayer/distributor subsequently distributed some of the OTP to its out-of-state customers. As a result, the taxpayer/distributor's distributions to out-of-state customers would not be subject to the Indiana OTP tax. Thus, the Department determined that the taxpayer/distributor was liable for the OTP tax because the taxpayer/distributor possessed the information as to which OTP it purchased and subsequently distributed were exempt from the Indiana OTP tax on the basis that they were distributed to out-of-state customers/retail stores and thus qualified as exempt sales.

In this instance, Taxpayer contended that it "was not a distributor in its transactions" with the Supplier. Taxpayer believes that it was a purchaser in the transactions with the Supplier. Taxpayer stated that the OTP it purchased from the Supplier were delivered "Free on Board" and all costs were covered by the Supplier. Taxpayer thus claimed that it was not liable for the OTP tax on the OTP it purchased from the Supplier because the Supplier "would technically be the first" wholesaler that brought the OTP into Indiana for distribution.

Taxpayer is mistaken. IC § 6-7-2-2 provides a definition of a "distributor," which applies throughout the chapter of IC § 6-7-2. The plain language of IC § 6-7-2-2 does not impose a condition on the definition of "distributor" for the purpose of the OTP tax on a transaction by transaction basis. IC § 6-7-2-2 states that a "distributor" includes a person who "sells" or "distributes tobacco products in Indiana to retail dealers for the purpose of resale." Taxpayer here stated that it "is in the business of tobacco distribution, purchasing tobacco products from various manufacturers or suppliers from within and without the State of Indiana and selling that tobacco product to other distributors, merchants, or retailers within and without the State of Indiana." Thus, Taxpayer falls squarely within the definition of "distributor" because it sells and distributes the OTP in Indiana to retail dealers for the purpose of resale. Thus, Taxpayer is an OTP distributor and could be liable for the Indiana OTP tax when one of the statutory circumstances outlined in IC § 6-7-2-7(b) is met.

Taxpayer claimed that the Supplier was liable for the tax because the Supplier "first" brought or caused the OTP to be brought into Indiana for distribution. The Department does not agree. As mentioned above, Indiana imposes the OTP tax on the distribution of OTP in Indiana. IC § 6-7-2-7(a). One of the instances when the OTP tax is imposed is at the time the distributor "brings or causes tobacco products to be brought into Indiana for distribution." IC § 6-7-2-7(b)(1). By using the word "or" in the same clause, IC § 6-7-2-7(b)(1) clearly applies to the circumstance when a distributor does not bring in, but rather "causes tobacco products to be brought into Indiana for distribution." The statute does not impose the OTP tax liability based on who is the first nor does the statute concern the agreement between the supplier and the purchaser. Thus, Taxpayer's arguments that the Supplier was the first wholesaler which brought the OTP into Indiana or the OTP were sold "Free on Board" are irrelevant.

In this instance, Taxpayer's supporting documentation demonstrated that Taxpayer, as an Indiana licensed distributor, "prepaid" the Supplier for the OTP delivered to Taxpayer's Indiana facility. Taxpayer's purchase orders/payments certainly caused the OTP "to be brought into Indiana for distribution." Without Taxpayer's orders/payments of the OTP, Supplier would have no reasons to deliver the OTP to Taxpayer's facility in Indiana. In short, Taxpayer caused the OTP to be brought into Indiana for distribution and it was liable for the OTP tax pursuant to IC § 6-7-2-2 and IC § 6-7-2-7.

Additionally, Taxpayer claimed that it is not like the taxpayer/distributor in Revenue Ruling 2000-07ST. Taxpayer, however, is an OTP distributor which purchased the "untaxed" OTP directly from the out-of-state

Supplier. Taxpayer distributed the OTP within and without Indiana. Since Taxpayer purchased the "untaxed" OTP and subsequently distributed some of the OTP to out-state-customers, Taxpayer actually possessed the necessary information as to the exempt interstate sales. Thus, Taxpayer was in a better position than the Supplier to accurately remit the OTP tax.

Alternatively, Taxpayer asserted that the statute is ambiguous, and that it relied on e-mail advice from the Department's auditor, which stated that Taxpayer is not liable for the OTP tax on the OTP it purchased from the Supplier.

[45 IAC 15-3-2](#) outlines a procedure for a taxpayer to obtain a ruling from the Department and addressed the implications of oral opinions or advice rendered by Department agents. Pursuant to [45 IAC 15-3-2](#) (d)(1), a taxpayer could apply for a ruling by submitting a written request for ruling to a division administrator which explains the specific facts of a situation and rulings will only be issued based upon written requests. [45 IAC 15-3-2](#)(e), in relevant part, states:

Oral opinions or advice will not be binding upon the department. However, taxpayers may inquire as to whether or not the department will make a ruling or determination based on the facts presented by the taxpayer. If the taxpayer wishes a ruling by the department, the formal request must be in writing. A taxpayer may also orally receive technical assistance from the department in preparation of returns. However this advice is advisory only and is not binding in the latter examination of returns.

**Based upon general inquiries and correspondence, the department often issues written letters of advice. Such letters are advisory in nature only and merely technical assistance tools for the taxpayer. Strictly informational type letters are not to be considered rulings by the department and will not be binding. (Emphasis added).**

Under [45 IAC 15-3-2](#)(d)(i), Taxpayer had a forum to seek a binding Department ruling, but it never sought a ruling. Rather, Taxpayer's accountant sent an e-mail to one of the Department's auditors inquiring whether an out-of-state licensed wholesaler was responsible to "file" the Indiana OTP tax return, TP-906 form. An auditor's e-mail responses, similar to written letters of advice, are "merely technical assistance tools" for Taxpayer and "are not to be considered rulings by the department and will not be binding" pursuant to the above mentioned regulation.

In short, Taxpayer is a distributor under IC § 6-7-2-2. Pursuant to IC § 6-7-2-7(b)(1), the OTP tax is imposed at the time the distributor "brings or causes tobacco products to be brought in to Indiana for distribution." IC § 6-7-2-7(b)(1) does not impose the OTP tax on the distributor on a transaction by transaction basis nor does it impose the tax on the distributor which first brings the OTP into Indiana for distribution. Rather, IC § 6-7-2-7(b)(1), by using "or," clearly imposes the OTP tax on the distributor which causes the OTP to be brought into Indiana for distribution. Taxpayer's documentation demonstrated that it is an OTP distributor that caused the OTP to be brought into Indiana for distribution. Therefore, Taxpayer is liable for the OTP tax.

#### FINDING

Taxpayer's protest is respectfully denied.

### II. Tax Administration – Interest.

#### DISCUSSION

The Department assessed interest on the tax liabilities. Taxpayer protested the imposition of interest.

IC § 6-8.1-10-1(a) provides, as follows:

If a person fails to file a return for any of the listed taxes, fails to pay the full amount of tax shown on the person's return by the due date for the return or the payment, or incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment.

Pursuant to IC § 6-8.1-10-1(e), the Department does not have the authority to waive the interest.

#### FINDING

Taxpayer's protest regarding the imposition of interest is respectfully denied.

### III. Tax Administration – Negligence Penalty.

#### DISCUSSION

The Department's audit imposed a ten percent negligence penalty for the tax years in question. Taxpayer protests the imposition of 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.

In this instance, Taxpayer has demonstrated reasonable cause and therefore the Department will waive the penalty. Taxpayer's protest of the imposition of negligence penalty is sustained.

#### **FINDING**

Taxpayer's protest of negligence penalty is sustained.

#### **SUMMARY**

For the reasons discussed above, Taxpayer's protest of the imposition of the OTP tax is denied. Taxpayer's protest of the imposition of interest is also respectfully denied. Taxpayer's protest of the imposition of the negligence penalty is sustained.

*Posted: 02/27/2013 by Legislative Services Agency*

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