

Supplemental Letter of Findings: 05-20120252; 99-20120340
Cigarette Tax
For Tax Periods July, August, and September 2011
Other Tobacco Products Tax
For Tax Periods January 1 through September 30, 2011

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ISSUE

I. Cigarette and Other Tobacco Products Tax – Imposition.

Authority: IC § 6-8.1-5-1; IC § 6-8.1-10-9; 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).

Taxpayer's shareholders/officers protest the assessment of cigarette and tobacco products taxes.

STATEMENT OF FACTS

Taxpayer is an Indiana domestic for-profit corporation (also referred to as "Company"), which purchased and distributed cigarettes and other tobacco products ("OTP") in Indiana. Taxpayer has two shareholders who are also the officers of Taxpayer; one is the chief operating officer ("CEO") and the other is the president (collectively, "Officers"). Each of the Officers owns fifty (50) percent interest of Taxpayer.

Taxpayer ceased its business operation in late 2011. On April 25, 2012, Officers filed an Indiana Business Tax Closure Request, BC-100 form, with the Indiana Department of Revenue ("Department") informing the Department that Taxpayer has been "out of business" as of "August 15, 2011."

The Department's audit, in addition to finding that Taxpayer is out of business, determined that Taxpayer failed to remit the taxes on cigarettes which it purchased during July, August, and September 2011. The Department also determined that Taxpayer failed to remit the taxes on OTP which it purchased and distributed during January 1 through September 30, 2011. As a result, the Department assessed Taxpayer additional cigarette tax, other tobacco product tax, interest, and penalty (the "Liabilities").

Taxpayer and Officers protested. An administrative hearing was conducted. In both March 21, 2012 and May 23, 2012, protest letters, Taxpayer and Officers stated that Taxpayer "admits the [L]iabilities" and "there is no defense." The Letters of Findings Numbers 05-20120252 and 99-20120340 ("LOFs") found that since Taxpayer admits its Liabilities and that Taxpayer is no longer doing business in Indiana, Officers remain personally responsible for the Liabilities pursuant to IC § 6-8.1-10-9.

Taxpayer and Officers subsequently requested a rehearing, claiming that IC § 6-8.1-10-9 is not applicable in this instance because Taxpayer is "still listed as active with the Indiana Secretary of State [(Secretary of State)]." Rehearing was granted to address the issue of Taxpayer's status in the context of IC § 6-8.1-10-9. The Department's audit and LOFs found Taxpayer "out of business." Taxpayer and Officers challenge this, arguing that Taxpayer is still an active company and therefore IC § 6-8.1-10-9 is not applicable. Further facts will be supplied as required.

I. Cigarette and Other Tobacco Products Tax – Imposition.

DISCUSSION

Both Taxpayer and Officers admitted that Taxpayer is liable for the Liabilities, but Taxpayer and Officers argued that IC § 6-8.1-10-9 is not applicable to them personally as officers of Taxpayer. Taxpayer and Officers argued that Taxpayer has not been dissolved and is "active" according to the website of the Secretary of State.

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).

IC § 6-8.1-10-9 further provides, in relevant part, that:

(a) As used in this section:

(1) "Dissolution" refers to dissolution of a corporation under [IC 23-1-45](#) through [IC 23-1-48](#), [IC 23-17-23](#), or [IC 23-17-24](#).

(2) "Liquidation" means the operation or act of winding up a corporation's affairs, when normal business activities have ceased, by settling its debts and realizing upon and distributing its assets.

(3) "Withdrawal" refers to the withdrawal of a foreign corporation from Indiana under [IC 23-1-50](#) or [IC 23-17-26](#).

(b) **The officers and directors of a corporation effecting dissolution, liquidation, or withdrawal shall do the following:**

- (1) **File all necessary tax returns** in a timely manner as required by this title.
- (2) **Make all tax payments due or determined due to the department** or a county treasurer **in a timely manner as required by this title.**

(3) **File with the department a form of notification** within thirty (30) days of the issuance of a certificate of dissolution, decree of dissolution, the adoption of a resolution or plan, or the filing of a statement of withdrawal. **The form of notification shall be prescribed by the department and may require information concerning:**

- (A) the corporation's assets;
- (B) the corporation's liabilities;
- (C) details of the plan or resolution;
- (D) the names and addresses of corporate officers, directors, and shareholders;
- (E) a copy of the minutes of the shareholders' meeting at which the plan or resolution was formally adopted; and

(F) **such other information as the department may require.**

The department may accept, in lieu of its own form of notification, a copy of Form 966 that the corporation filed with the Internal Revenue Service.

(c) Unless a clearance is issued under subsection (g), for a period of one (1) year following the filing of the form of notification with the department, or the filing of all necessary tax returns as required by this title, including the final tax return, whichever is later, the corporate officers and directors remain personally liable, subject to [IC 23-1-35-1\(e\)](#) or [IC 23-17](#), for any acts or omissions that result in the distribution of corporate assets in violation of the interests of the state or a political subdivision (as defined in [IC 36-1-2-13](#)). An officer or director held liable for an unlawful distribution under this subsection is entitled to contribution:

(1) from every other director who voted for or assented to the distribution, subject to [IC 23-1-35-1\(e\)](#) or [IC 23-17](#); and

(2) from each shareholder for the amount the shareholder accepted.

(d) **The corporation's officers' and directors' personal liability includes all taxes, penalties, interest, and fees associated with the collection of the liability due the department or the county.** In addition to the penalties provided elsewhere in this title, a penalty of up to thirty percent (30 [percent]) of the unpaid tax may be imposed on the corporate officers and directors for failure to take reasonable steps to set aside corporate assets to meet the liability due the department or the county.

(e) If the department or the county treasurer fails to begin a collection action against a corporate officer or director within the period prescribed by subsection (c), the personal liability of the corporate officer or director expires. The filing of a substantially blank form of notification or a form containing misrepresentation of material facts does not constitute filing a form of notification for the purpose of determining the period of personal liability of the officers and directors of the corporation.

(f) In addition to the remedies contained in this section, the department or county treasurer is entitled to pursue corporate assets that have been distributed to shareholders in violation of the interests of the state or political subdivision. The election to pursue one (1) remedy does not foreclose the state's or the county's option to pursue other legal remedies.

(g) The department may issue a clearance to a corporation effecting dissolution, liquidation, or withdrawal if:

- (1) the officers and directors of the corporation have met the requirements of subsections (b) through (c); and
- (2) request for the clearance is made in writing by the officers and directors of the corporation within thirty (30) days after the filing of the form of notification with the department.

(h) The issuance of a clearance by the department under subsection (g) releases the officers and directors from personal liability under this section.

(i) **This section does not limit the liability of a responsible corporate officer for withheld income taxes or collected gross retail taxes.**

(Emphasis added).

In both protest letters, and also at the hearing and the rehearing, Taxpayer and Officers admitted that Taxpayer is liable for, and the Department correctly assessed, taxes on the cigarettes and OTP at issue.

Taxpayer and Officers, however, objected to the conclusion of LOFs that Officers are currently personally responsible for Taxpayer's Liabilities pursuant to IC § 6-8.1-10-9. The Department's LOFs found that Taxpayer was "out of business" and therefore Officers were personally liable pursuant to IC § 6-8.1-10-9. The LOFs relied on the audit's findings and on the BC-100 form signed by both Officers and filed with the Department on April 25, 2012, stating that Taxpayer was closed.

Taxpayer and Officers asserted that IC § 6-8.1-10-9 is not currently applicable because Taxpayer is "still listed as active with the Indiana Secretary of State" and has not initiated any liquidation or dissolution of Taxpayer. Taxpayer and Officers asserted that they "provided none of the documents referenced on the [BC-100] form

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(minutes of final board meeting, articles of dissolution, etc.), because [Taxpayer] has not been dissolved, as the Secretary of State's office has confirmed, and the form was not signed under seal." (March 6, 2013 e-mail from the attorney representing Taxpayer and Officers).

Upon review, the BC-100 form at issue filed with the Department was signed by both Officers. Officers certified that Taxpayer has "been out of business or no longer required to be registered for the indicated tax type" as of "8-15-11." Additionally, both Officers certified that they "may also be responsible for all liabilities or unfiled returns proven to be due and owed at a later date." However, Officers stated that they "provided none of the documents referenced on the [BC-100] form (minutes of final board meeting, articles of dissolution, etc.) and the form was not signed under seal." Taxpayer's 2011 Indiana S Corporation Income Tax Return, which was timely filed in April 2012, also did not state that Taxpayer filed its "final return." Given the totality of the circumstances, in the absence of other supporting documentation, the Department is prepared to agree that Taxpayer has not been technically "dissolved" or been "liquidated" as required under IC § 6-8.1-10-9. While Taxpayer and Officers admit that Taxpayer is responsible for the Liabilities, since Taxpayer has not been technically "dissolved" or "liquidated," IC § 6-8.1-10-9 is not applicable at this time.

FINDING

Taxpayer has not been dissolved or liquidated, IC § 6-8.1-10-9 is not applicable at this time.

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