

Letter of Findings: 03-20130033; 02-20130034; 04-20130035
Gross Retail, Withholding, and Income Tax
For the Years 2007 through 2011

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ISSUES

I. Gross Retail Tax.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-2-1(b); IC § 6-2.5-3-2; IC § 6-2.5-3-2(a); IC § 6-2.5-9-3; IC § 6-8.1-5-1(c); IC § 6-8.1-5-1(b); IC § 6-8.1-5-4(a); IC § 6-8.1-5-4(c).

Taxpayer argues that it was not required to collect or remit sales tax.

II. Withholding Tax.

Authority: IC § 6-3-4-8(a); IC § 6-3-4-8(g); IC § 6-8.1-5-1(c).

Taxpayer argues that it was not required to withhold income tax on behalf of employees because the business did not hire or pay any employees during the five audit years.

III. Corporate Income Tax.

Authority: IC § 6-8.1-5-1(c).

Taxpayer argues that it is not subject to additional corporate income tax.

STATEMENT OF FACTS

Taxpayer is an Indiana business which operates a combination convenience store and gas station. The Department of Revenue ("Department") conducted an audit review of Taxpayer's business. The audit found that Taxpayer's facility sold gas from eight different pumps, had two employees working in the convenience store, sold cigarettes, sold lottery tickets, and sold various convenience store items such as food, household goods, and the like.

The Department initially contacted Taxpayer's representative March 20, 2012, to make arrangements to conduct the audit.

The audit sent a series of twelve emails and registered letters attempting to schedule the audit but was unable to do so. As a result, the Department proceeded with a "desk audit" based upon the "best information available."

The audit resulted in the assessment of sales, withholding, and corporate income tax. Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's putative representative argued that she was no longer involved in the business, that her ex-husband was responsible for operation of the business, that she had not been properly notified of the audit, and that she had not been involved with the business for the last three years.

Taxpayer offered to provide additional documentation which would establish that the audit results were incorrect. Certain additional documents were provided subsequent to the hearing. This Letter of Findings results.

I. Gross Retail Tax.

DISCUSSION

Taxpayer argues that it was not required to collect sales tax during certain years and that all of the sales tax assessments are "wrong."

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-3-2(a). A complementary excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. IC § 6-2.5-3-2.

In the case of a retail merchant – such as Taxpayer – the merchant is required to "collect the tax as agent for the state." IC § 6-2.5-2-1(b). The retail merchant "holds those taxes in trust for the state and is personally liable for the payment of those taxes" IC § 6-2.5-9-3.

The audit found that Taxpayer had filed sales tax returns for a portion of the time (January to June 2009) it was in business. However, the Taxpayer reported that it had no gasoline or convenience store sales during two of the years under audit.

For one of the periods during which the Taxpayer did file returns, the Taxpayer reported that 41 percent of its convenience store sales were exempt. However, when the audit sought records substantiating that claim, Taxpayer was unable to provide any documentation.

The audit proceeded to determine an estimated amount of taxable sales for the business. In estimating the

amount of taxable sales, the audit determined that 15 percent of the convenience store sales were exempt.

In determining the amount of estimated sales, the audit reviewed the documents which it had previously submitted to the Department. For example, Taxpayer filed forms ST-103MP which are used to account for the sale of gasoline. However, the forms indicated that Taxpayer had "zero total sales and zero exempt sales" over a period of two years. The audit estimated the sales tax due on the sale of gasoline by extrapolating the amount of sales reported for a later year.

It should be pointed out that, "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 tax by reviewing those books and records." IC § 6-8.1-5-4(c). In addition, IC § 6-8.1-5-4(c) provides that, "A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times." When Taxpayer repeatedly failed to provide any documentation, the audit issued "proposed assessments" based upon the scanty information available.

The Department's authority to determine an estimated amount of taxable sales and assess additional sales tax is based upon IC § 6-8.1-5-1(b) which states that, "If 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."

Taxpayer has the burden of demonstrating that the proposed assessment of sales tax was incorrect. IC § 6-8.1-5-1(c) in part states that, "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 produced copies of forms ST-103MP but failed to explain the relevancy of the documents, whether any of the forms were considered by the audit, and – most significantly – why some of the form showed zero sales during a period in which Taxpayer's facility was open for business and presumably selling gasoline from eight different pumps. In addition, Taxpayer suggests that the store was actually being operated by other unknown persons during a portion of the audit period. However, none of the information provided or explanations offered are sufficient to overcome the audit's conclusion that the gas station/convenience store was open, was conducting taxable retail transactions, and that Taxpayer should have been collecting and remitting sales tax during all of the periods at issue.

FINDING

Taxpayer's protest is denied.

II. Withholding Tax.

DISCUSSION

The Department issued proposed assessments of withholding tax. Taxpayer was not registered for a withholding account during 2007 through 2011. Taxpayer did not withhold state or county income taxes from its employees.

During a site visit to Taxpayer's convenience store/gas station, the audit found that two employees were working at the facility. The audit report states:

It sta[nd]s to reason that the current [T]axpayer being audited would also need employees to operate the business during the audit period. The [T]axpayer needs employees to operate its business and should have withheld state and county income taxes from its employees. Since the [T]axpayer did not withhold state and county income taxes and no records were provided by the [T]axpayer, an alternative audit technique was used to estimate taxable wages.

Every Indiana business – which is required under federal law to withhold, collect, and remit withholding taxes to the Internal Revenue Service on wages paid employees – must also withhold Indiana withholding tax on those same wages. IC § 6-3-4-8(a). If the Indiana employer fails to withhold the state tax from its employees' wages, the employer itself becomes liable for the tax. IC § 6-3-4-8(g).

Taxpayer states that it did not have any employees during the five years under audit but provides no documentation establishing that the business operated without hiring or paying any employees.

As with any assessment, the law provides that the assessment is presumed correct unless the affected Taxpayer demonstrates that the assessment is "wrong." IC § 6-8.1-5-1(c). Because Taxpayer has presented no documentation which establishes that Taxpayer had no employees and has not met its burden of establishing that the withholding assessments were wrong.

FINDING

Taxpayer's protest is denied.

III. Corporate Income Tax.

DISCUSSION

The Department conducted an income tax review of Taxpayer's business seeking income tax returns, sales tax returns, sales invoices, cash register receipts, and purchase invoices.

Taxpayer declined to provide any of the requested documents despite repeated email, certified letter, and phone requests.

In the absence of any of the requested documents, Taxpayer resorted to an alternative method of

determining Taxpayer's income tax liability. For example, the audit consulted "Bizstates.com" to determine sales, net profit, net income, expenses, and taxable income.

As noted above, the authority to estimate the liability is found at IC § 6-8.1-5-1(b).

Taxpayer states that it was never properly notified of the audit and that the assessments are "false." However, Taxpayer has provided nothing which addresses much less refutes the income tax assessments.

Other than claiming that the assessments are wrong, Taxpayer has no issues of either law or fact and has done nothing to establish that the audit erred in making the assessments it did.

FINDING

Taxpayer's protest is denied.

SUMMARY

In all respects, Taxpayer's protest is denied.

Posted: 08/28/2013 by Legislative Services Agency

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