

Letter of Findings Number: 04-20130143
Sales Tax
For Tax Years 2010 & 2011

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ISSUE

I. Sales Tax—Responsible Officer.

Authority: IC § 6-8.1-5-1(c); IC § 6-2.5-2-1; IC § 6-2.5-9-3; Indiana Dep't of State Revenue v. Safayan, 654 N.E.2d 270 (Ind. 1995).

Taxpayer protests that he is not liable for taxes owed as a responsible officer.

STATEMENT OF FACTS

Taxpayer is an Indiana business and retail merchant. The Indiana Department of Revenue ("Department") determined that Taxpayer had not collected and remitted the proper amount of sales tax during the years 2010 and 2011. The Department issued proposed assessments for sales tax, penalty, and interest. Taxpayer, via the owner and president of the company, filed a protest with the Department. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as necessary.

I. Sales Tax—Responsible Officer.

DISCUSSION

The Department received a protest from the individual who is the owner and president of the company (hereinafter referred to as "Company President" for convenience). The Company President is not protesting or disputing the amount of the Department's proposed assessment; instead, Company President is arguing that he is not responsible for the payment of the proposed assessment. Company President argues that another person (hereinafter referred to as "Person S") is responsible for the sales taxes owed. Company President argues this because his company "was being run by" Person S.

To that end, Company President argues that "[h]e lives in northern Indiana and had no involvement in the day to day operations of the store." After learning of "illegal activities occurring" at the business, Company President "immediately took control over the store." Company President further states:

[Company President] operated the [store] during June, July, August and September, 2012, then closed the store for good on September 30, 2012. During these four months of operation, there were no issues with the reported sales or sales tax paid. It was not until the recent audit, during which [Company President] cooperated fully and provided much of the documentation that has resulted in this Proposed Assessment, that [Company President] learned of the extent of [Person S]'s theft and fraud.

At the hearing, Company President made it clear that it was not the proposed assessment amounts that were being protested, but rather that the Company President did not believe that he was liable for the taxes. Instead, he believes that Person S is liable for the taxes. Company President's argument to that effect is that he did not participate in the day-to-day operation of the store, and that the company assigned the lease to Person S.

Turning to the relevant law, the Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

The Department first notes that sales tax is imposed by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state. (Emphasis added).

Also of import is IC § 6-2.5-9-3 regarding the duty to remit sales/use taxes:

An individual who:

- (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and
- (2) has a duty to remit state gross retail or use taxes (as described in [IC 6-2.5-3-2](#)) to the department; holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state. If the individual knowingly fails to collect or remit those taxes to the state, he commits a Class D felony.

The Department next refers to Indiana Dep't of State Revenue v. Safayan, 654 N.E.2d 270, 273 (Ind. 1995). The Indiana Supreme Court described the facts in Safayan thusly:

In 1985, appellee Zinat Safayan and her husband, Dr. Esfandiar Safayan, decided to start a restaurant with Dennis and Teresa Grubb. The Safayans and Grubbs incorporated their venture as G.D.G.F., Inc. and

opened Gib & Denzil's Restaurant in Bloomington. The Safayans contributed the funds for the project, some \$43,000, and received 51[percent] of the corporation's stock. The Grubbs contributed their expertise in the restaurant business and received 49[percent] of the stock. The four were also the directors and officers of the corporation. They decided that Mrs. Safayan would be president, while Dr. Safayan and Mr. Grubb were vice-presidents, and Mrs. Grubb was the treasurer and secretary.

Id. at 271. (Footnote in the original removed). The Indiana Supreme Court further noted, "The Grubbs managed the day-to-day operations of the restaurant while Dr. Safayan and Mrs. Safayan, a registered nurse, tended their medical practice in Terre Haute." Id. The Indiana Supreme Court then analyzed whether or not Safayan was liable for the trust taxes. The court stated:

In this case, Mrs. Safayan was both the highest ranking official in G.D.G.F. and a member of its board of directors, and a major shareholder. Together, she and her husband controlled more than half of the shares. Given her position of power within the corporation, we presume that she had the authority to see that the State received its money.

Safayan attempts to rebut this presumption with evidence that the responsibility for paying the taxes fell on the Grubbs, not on her. She contends she delegated responsibility to pay the taxes to the Grubbs, and cites G.D.G.F.'s bylaws, which provided that the secretary and treasurer (Mrs. Grubb) was to oversee the corporation's finances. She points to Mr. Grubb's employment contract, which required him to manage the day-to-day operations of the restaurant.

Id. at 273. The Indiana Supreme Court further stated that, "The Department is not required, however, to prove that Safayan was the only responsible person." Id. at 274. The Indiana Tax Court further stated in Safayan: "It strains credulity to imagine that Safayan lacked the authority to see that G.D.G.F.'s taxes were paid. Individuals in such positions may not look the other way with impunity while their business partners dispose of taxpayer money." Id. at 275.

Company President incorporated the company, and was the registered agent of the company. He was also the owner of the company. And even if, for the sake of argument, Person S was also responsible, that would not preclude the Department from finding Company President responsible for the taxes too. The Department finds Company President to be liable under IC § 6-2.5-9-3 as a responsible officer for the taxes owed.

FINDING

Taxpayer's protest is denied.

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