

**Letter of Findings: 04-20130693
Gross Retail Tax
For the Years 2010, 2011, and 2012**

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 requires the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.

ISSUE

I. Gross Retail Tax – Audit Calculations.

Authority: IC § 6-2.5-2-1(a); IC § 6-2.5-2-1(b); IC § 6-2.5-9-3; IC § 6-8.1-5-1(c); IC § 6-8.1-5-4(a); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); [45 IAC 15-5-1](#).

Taxpayer argues that the Department erroneously assessed it additional sales tax.

STATEMENT OF FACTS

Taxpayer is an Indiana business which operates a combination gas station, convenience store, and fast-food restaurant.

Taxpayer entered into an agreement with a national petroleum company to sell gasoline at its location. Taxpayer receives 50 percent of the gross profits received from gasoline sales.

Taxpayer operates a nationally branded fast-food restaurant at its business location.

Taxpayer's convenience store sells tobacco products, groceries, snack foods, beverages, coffee, and general merchandise. The convenience store also sells lottery tickets, money orders along with accepting payments for utility bills.

The Indiana Department of Revenue ("Department") conducted an audit of Taxpayer's business records and tax returns. The audit resulted in the assessment of additional sales, withholding, individual income, and wireless prepaid card tax.

The Department's audit began in February 2013. Taxpayer was informed on February 22, 2013, that the audit would require an opportunity to review Taxpayer's books and records.

On February 26, 2013, Taxpayer was again notified that the audit needed to review Taxpayer's records. During the course of the eight month audit, Taxpayer was repeatedly asked to produce business records and missing tax returns. During the four-hour September 5, 2013, "closing conference" with Taxpayer's representative and one of Taxpayer's owners, the Taxpayer was asked to produce the missing documentation no later than September 6, 2013.

In the absence of the requested records, the Department issued proposed assessments based on whatever information was available. Taxpayer disagreed with 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. This Letter of Findings results.

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DISCUSSION

Taxpayer disagrees with the assessment of additional sales and use tax on the ground that – after a one-year delay – it can now produce records which establish that it collected the correct amount of sales and use tax.

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." Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A retail merchant – such as Taxpayer – 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.

Taxpayer's representative maintains it recently discovered sales tax records which establish that Taxpayer owes less sales and use tax than originally assessed. To that end, Taxpayer has provided a limited number of summaries in the form of monthly z-tapes but admits that it has no records of sales which occurred at its restaurant.

As a business conducting retail transactions and collecting sales tax on behalf of the state, Taxpayer was required to maintain accurate financial records. "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 that tax by reviewing those

books and records." IC § 6-8.1-5-4(a). "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 [D]epartment." IC § 6-8.1-5-1(b). See also [45 IAC 15-5-1](#).

Based on the documentation available at the time of the audit, it is not possible to agree that Taxpayer established that the audit assessment was "wrong" as required under IC § 6-8.1-5-1(c). The Department's audit requested repeatedly for records sufficient to establish the amount of sales which occurred at its business location. As stated by the audit, "[Taxpayer] did not provide any accounting records for audit and claims it does not keep records and books . . ." In addition, the audit noted that "[Taxpayer's] shareholders were informed in a prior audit of a different entity to retain all source documents and [Taxpayer] did not do so. [Taxpayer] did not retain z-tapes and could not present any sales source documents for audit." In addition, "[Taxpayer] did not present a material portion of purchase records, stating that it did not retain invoices/receipts."

Although Taxpayer has belatedly provided z-tape monthly summaries approximately one year after the original audit began, Taxpayer freely admits that it did not retain and preserve the original source documentation sufficient to verify the information provided is correct. Given the fact that Taxpayer failed to retain or preserve source documentation of its day-to-day transactions, it is not possible to conclude that Taxpayer has met its burden of demonstrating that the audit's conclusions were wrong as required under IC § 6-8.1-5-1(c). However, the Department agrees that the Audit Division should revisit the original audit, review Taxpayer's newly discovered z-tapes and to make whatever adjustments to the original assessment as may be warranted.

FINDING

Taxpayer's protest is sustained subject to the result of the supplemental audit review of the newly submitted z-tapes.

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