DEPARTMENT OF STATE REVENUE

04-20140037.LOF

Letter of Findings: 04-20140037
Gross Retail Tax
For the Years 2010, 2011, and 2012

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.

ISSUES

I. Gross Retail Tax – Exempt Sales.

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); IC § 6-8.1-5-4(c); 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).

Taxpayer argues that the Department of Revenue's audit overstated the amount of non-exempt sales transactions.

II. Negligence Penalty – Tax Administration.

Authority: IC § 6-8.1-5-1(c); IC § 6-8.1-10-2.1(a)(3); IC § 6-8.1-10-2.1(a)(2); IC § 6-8.1-10-2.1(d); 45 IAC 15-11-2(b); 45 IAC 15-11-2(c).

Taxpayer maintains that the Department of Revenue should exercise its discretion to abate the ten-percent "negligence" penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana combination gas station and convenience store. Taxpayer sells gasoline and diesel fuel. As a convenience store, Taxpayer sells cigarettes, candy, snack foods, dairy products, automobile parts, and the like.

The Department of Revenue ("Department") conducted an audit review of Taxpayer's business records and tax returns. The audit resulted in the assessment of additional sales/use tax. 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.

I. Gross Retail Tax – Exempt Sales.

DISCUSSION

The Department reviewed Taxpayer's 2010, 2011, and 2012 business records including ST-103MP ("Monthly Trust Tax Return") forms, fuel invoices, cash register "z tapes" and vendor invoices.

For the years 2011 and 2012, the audit determined that the amount of exempt sales reported on the ST-103MP forms conflicted with the amount of exempt sales reported on Taxpayer's "z tapes." The audit report explained the method by which the Department determined an amount of additional tax due.

To determine the amount of the overstated exempt sales, the following approach was taken:

Exempt Categories from cash register z tapes were totaled by month.
Z tape exempt sales were subtracted from the reported exempt sales.
The difference between the cash register z tape totals and the exempt sales reported on the ST-103 MP sales tax returns will be the proposed additional taxable sales adjustment.

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." See also 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 believes that its own computer/record keeping system was faulty and resulted in exempt transactions being incorrectly categorized as non-exempt. When Taxpayer installed its new computer software, Taxpayer believes that the underlying software miss-categorized certain specific transaction classifications. Taxpayer speculates that one category of purchases, which would ordinarily be exempt, was mistakenly included in a category of purchases which are subject to sales tax. In particular, Taxpayer points to what it perceives as a sharp increase in cigarette sales between 2010 and following years. Since the audit reviewed 2010, 2011, and 2012 records and the assessment is entirely attributable to 2011 and 2012, Taxpayer believes its explanation has merit because the new computer software was installed at the start of 2011.

Without entirely discounting Taxpayer's explanation, it is relevant to point 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(a). 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." IC § 6-8.1-5-4(c). In other words, it is Taxpayer's responsibility to assure that its books and records correctly reflect the nature of its business transactions.

Taxpayer has provided what it believes is a rational explanation for the apparent discrepancies, but the Department is unable to agree that Taxpayer has met its statutory responsibility of proving that the assessment is wrong. The Department agrees with the audit's conclusion that "the [T]axpayer was unable to produce any documentation to substantiate [its] claim."

FINDING

Taxpayer's protest is respectfully denied.

II. Negligence Penalty – Tax Administration.

DISCUSSION

Taxpayer believes that it is entitled to abatement of the ten-percent negligence penalty because "there was no change in 2010 only an issue with 2011 & 2012 [at] which time a new register system was put in use that did not group sales categories correctly. The situation has since been corrected."

IC § 6-8.1-10-2.1(a)(3) requires that a ten-percent penalty be imposed if the tax deficiency results from the taxpayer's negligence. IC § 6-8.1-10-2.1(a)(2) requires a ten-percent penalty if the taxpayer "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."

IC § 6-8.1-10-2.1(d) states that, "If a person subject to the penalty imposed under this section can show that the failure to . . . pay the full amount of tax shown on the person's return . . . or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall wave the penalty."

Departmental regulation 45 IAC 15-11-2(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." Id.

Departmental regulation 45 IAC 15-11-2(c) requires that 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 IC § 6-8.1-5-1(c), "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." An assessment – including the negligence penalty – is presumptively valid. Id.

The Department believes that Taxpayer has not proven the sales and use tax assessment was wrong. However, there is insufficient information to establish that Taxpayer's actions were so egregious as to constitute negligence. Based on a "case-by-case" analysis and after reviewing "the facts and circumstances of each taxpayer" the Department agrees that the ten-percent negligence penalty should be abated.

FINDING

Taxpayer's protest is sustained.

SUMMARY

Taxpayer has failed to meet its burden of demonstrating that the proposed assessment of additional sales/use tax was "wrong." The Department agrees that the ten-percent negligence penalty should be waived.

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