

Letter of Findings: 03-20140148; 04-20140149
Gross Retail and Withholding Taxes
For the Years 2004 through 2010

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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.

I. Gross Retail and Withholding Tax - Responsible Officer Liability.

Authority: IC § 6-2.5 et seq.; IC § 6-2.5-2-1(a), (b); IC § 6-3-4-8(g); IC § 6-2.5-6-1(a); IC § 6-8.1-5-1(c); IC § 6-2.5-9-3; Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Indiana Dept. of Revenue v. Safayan, 654 N.E.2d 270 (Ind. 1995); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer argues that she is not personally responsible for unpaid sales and withholding tax owed by a company for which she was designated as "Vice-President" at the time the company registered to conduct business in Indiana and collect Indiana taxes.

STATEMENT OF FACTS

Taxpayer is an Indiana individual associated with an Indiana business. When the business's president signed and submitted a Form BT-1 (Business Tax Application), Taxpayer was designated as a vice-president.

Taxpayer's business owes sales tax and withholding tax. The tax stemmed from an Indiana Department of Revenue ("Department") audit and from instances in which the business withheld income tax from its employees, filed and reported amounts of withholding tax, but failed to remit the tax which had been withheld.

The Department issued Proposed Assessments in Taxpayer's name on the ground that she was individually responsible for the unpaid tax.

Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer and Taxpayer's representative explained the basis for the protest. This Letter of Findings results.

I. Gross Retail and Withholding Tax - Responsible Officer Liability.

DISCUSSION

Taxpayer argues that she is not personally responsible for the tax owed by the business on the ground that she is not a "responsible officer."

Withholding taxes may be assessed against a responsible officer under the provisions of IC § 6-3-4-8(g) which states that "[i]n the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest."

Similarly, an individual may be held personally liable for unpaid sales taxes. IC § 6-2.5 et seq. describes the manner in which the retail sales tax is assessed, imposed, and collected.

An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana. 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. IC § 6-2.5-2-1(a), (b).

[E]ach person liable for collecting the state gross retail or use tax shall file a return for each calendar month

and pay the state gross retail and use taxes that the person collects during that month . . . IC § 6-2.5-6-1(a).

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 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. . . . IC § 6-2.5-9-3

(Emphasis added).

Pursuant to *Indiana Dept. of Revenue v. Safayan*, 654 N.E.2d 270, 273 (Ind. 1995), the Indiana Supreme Court found three factors are relevant in determining if a taxpayer is a corporate officer who had the authority and responsibility for the payment of taxes held in trust for the state. *Id.* The court stated that it would look to the person's authority within the power structure of the corporation. Where that person is a high-ranking corporate officer within the corporate power structure, that officer is presumed to have had sufficient control over the company's finances to give rise to a duty to remit trust taxes. *Id.* The presumption may be rebutted by a showing the officer did not in fact have that authority. *Id.*

Second, the court stated that it would look to the authority of the officer as established by the articles of incorporation, bylaws, or employment contract. *Id.*

Third, the court would consider whether the person actually exercised control over the finances of the business including whether the person controlled the corporate bank account, signed corporate checks and tax returns, or determined when and in what order to pay creditors. *Id.*

Taxpayer argues that she did not exercise sufficient control over the business or the business's finances necessary to be designated as a "responsible officer."

As a threshold issue, and as with any proposed assessment, it is the Taxpayer's responsibility to establish that the proposed assessments are 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).

Taxpayer maintains that she acted merely as a salesperson for her business, that she was only peripherally involved in the day-to-day operations of the business, that she had limited knowledge of the business's tax liabilities, and that she lacked authority to satisfy those liabilities.

In 2008, the business registered with the Department to collect Indiana taxes and conduct business in Indiana. The BT-1 application was signed by Taxpayer's Husband who is designated on the application as the "Pres." While Taxpayer is designated as "V.P." Husband, as signatory, was required certify that the information provided on the application was correct. The form cautioned that "[f]ailure to remit sales tax due and/or income tax withheld is a felony punishable by imprisonment, a fine of \$10,000 plus a 100-percent fraud penalty." The BT-1 form cautions that "[t]he partners or corporate officers are each personally, jointly and severally liable for the sales and use tax[] collected and the withholding tax withheld. These taxes are trust funds and are not discharged in bankruptcy proceedings." (Emphasis in original).

In 2008, Taxpayer and Husband (President) entered into a "Voluntary Compliance Agreement" with the Department. In that agreement, Husband and Taxpayer agreed to collect Indiana sales and withholding tax in the future and pay taxes owed for prior years.

In 2010, the Department issued a letter addressed to both Taxpayer and Husband reminding them of their obligations under the 2008 Voluntary Compliance Agreement, that they had failed to pay sales tax, failed to pay withholding tax, failed to file or pay Indiana income tax, and that the parties were "past due on many of the 'agreement requirements.'"

In documents filed with Kentucky Secretary of State, Taxpayer is listed as one of "Current Officers" and that the business's 2005 annual report designates Taxpayer as a "Manager(s) or Member(s)."

The business records indicate that the business entered into an "Account Registration and Agreement" with its financial institution. The registration and agreement designated Taxpayer as an "Owner" of the business. The

account's signatory card lists four persons as having access to the business's "Accounts Payable" account. Two of the persons listed were provided access to the account on a limited basis. Both Husband and Taxpayer had access to the account without limitation.

Taxpayer admits that she wrote checks on the business account but that she only signed checks for limited amounts and for limited purposes. However, the records provided establish that Taxpayer wrote checks for amounts greater than the individual withholding liabilities owed by the business.

As noted above, Taxpayer has the statutory burden to establish that the proposed assessments were "wrong" and that she has no individual liability for the amounts owed by the business. In addition, Taxpayer - as the vice-president of the business - "is presumed to have had sufficient control over the company's finances to give rise to a duty to remit trust taxes." *Safayan*, 654 N.E.2d at 273.

The Department is unable to agree that Taxpayer has established that the proposed assessments were "wrong," that she was unaware of the trust tax liabilities which accrued over seven years, that she lacked sufficient control over the business's finances, that she lacked authority to satisfy those liabilities as they accrued, or that - as an officer of the business - she has rebutted the presumption that she "had sufficient control over the company's finances to give rise to a duty to remit trust taxes." *Id.* The available documentary evidence clearly establishes Taxpayer's authority as an officer and manager of the company. Any anecdotal evidence provided by or on behalf of Taxpayer is not substantiated by the record and is not sufficient to rebut the presumption of responsible officer liability.

FINDING

Taxpayer's protest is respectfully denied.

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