

DEPARTMENT OF STATE REVENUE

04-20130509.LOF

Letter of Findings Number: 04-20130509
Sales and Use Tax
For Tax Years 2010 and 2011

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 This document is effective as of its date of publication and remains in effect until the date it is superseded by the publication of another document in the Indiana Register.

ISSUE**I. Sales and Use Tax - Liability.**

Authority: IC § 6-8.1-5-1; IC § 6-8.1-5-4; Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Wendt LLP v. Ind. Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012).

Taxpayer protests the imposition of additional sales tax after a determination that Taxpayer's books and records were inadequate to determine the tax liability.

STATEMENT OF FACTS

Taxpayer is a restaurant. The Indiana Department of Revenue ("Department") conducted an audit and issued proposed assessments of additional sales and use tax plus interest. The outcome of the sales and use tax audit resulted in the adjustment of Taxpayer's reported income, and the Department also proposed assessments of additional adjusted gross income tax plus interest. Taxpayer protests the Department's proposed assessments of base income, sales, and use taxes. An administrative hearing was held. This Letter of Findings addresses Taxpayer's protest of the Department's proposed assessment of additional sales and use tax. Letter of Findings 02-20130510 addresses Taxpayer's protest of the Department's proposed assessment of additional income tax. Additional facts will be supplied as necessary.

I. Sales and Use Tax - Liability.**DISCUSSION**

During the audit, the Department found that Taxpayer's records were inadequate to support a determination of Taxpayer's sales and use tax liability. Because it could not rely on the Taxpayer's records, the Department determined Taxpayer's tax liability based on the best information available. Taxpayer disagrees with the Department's determination and protests the proposed assessment of additional tax. All tax assessments are prima facie evidence that the Department's claim for the tax is valid, and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012). The issue before the Department is whether Taxpayer met its burden to prove the proposed assessment is incorrect.

"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). Such records include "all source documents necessary to determine the tax" Id. If the Department cannot determine a taxpayer's liability and the Department reasonably believes that the taxpayer has not reported the proper amount of tax due, the Department will propose an assessment of unpaid tax based on the best information available to the Department. IC § 6-8.1-5-1(b).

Taxpayer is subject to a listed tax and is therefore required to keep records and books which would allow the Department to determine its tax liability. Taxpayer presented its books and records for the Department's review. The records at issue here are daily guest checks which were wrapped with a cash register tape ("Records"). The audit report confirms that the auditor reviewed the Records, stating "the auditor reviewed the supposedly cash register tape which was wrapped around the daily guest check tickets for the day."

During the audit, the Department found the Records to be inadequate source documentation to verify Taxpayer's income because: (1) "[t]here were a lot of missing guest checks from the numeric sequence which could indicate not all sales were accounted for;" (2) "[T]axpayer did not have any cash register Z tapes to review;" and (3)

"[n]ormally a restaurant will have cash deposits of 25 percent or greater," but "Taxpayer had cash deposits of 15.31[percent] for 2010 and 5.15[percent] for 2011."

During the protest process, Taxpayer provided (1) an affidavit of Taxpayer's certified public accountant; (2) a sample of original Records; (3) pictures of Records and pictures of boxes Taxpayer states are full of Records; (4) a sales journal created by Taxpayer's CPA firm covering the audit period; (5) a comparison made by Taxpayer's CPA of Taxpayer's cost of goods sold to sales percentage to other clients of Taxpayer's CPA; (6) a comparison made by Taxpayer's CPA of Taxpayer's credit card sales to total sales percentage to other clients of Taxpayer's CPA; (7) copies of email communications between Taxpayer's CPA and the Department's auditor during the audit; (8) a copy of an RMA (Robert Morris Agency) income statement percentages by decile for full service restaurants; and (9) copies of Taxpayer's federal income tax form 1120 and Indiana IT-20 for tax years 2010, 2011, 2012, and 2013.

First, Taxpayer states that it "does not use the control feature of the numbering system on the guest checks," and "the guest checks purchased by the [T]axpayer just happen to be pre-numbered." Taxpayer has not provided documentation to support this assertion.

Second, Taxpayer asserts that the Records are Z tapes, stating that "[e]ach daily Z tape was wrapped around all guest tickets for the day." However, the auditor reviewed the Records and determined that the Records were not Z tapes. The audit report explains that cash register Z tapes show "the totals for the day," "are sequentially numbered," and "verify that all sales were recorded." The auditor determined that the Records did not meet these criteria and were not Z tapes. In the protest process, Taxpayer has not affirmatively demonstrated that the Records are Z tapes.

Third, Taxpayer's CPA made a "comparison with other unrelated Mexican restaurants regarding the amount of cash sales versus credit card sales" which revealed that Taxpayer "has a similar ratio as the other Mexican restaurants" in the CPA's comparison. Taxpayer argues that "[t]his comparison reflects [that Taxpayer's] sales are being properly recorded" and that it shows the adjustment made by the Department to Taxpayer's gross sales "makes [Taxpayer's] net income exceptional and unreasonable." The Taxpayer's CPA cannot reveal the identities of the other Mexican restaurants used in this comparison, and without that information, the Department cannot verify the data used, the methods employed, or the accuracy of the calculations. The Department cannot rely on this comparison as evidence that the Taxpayer's Records are sufficient source documentation to verify Taxpayer's income.

Taxpayer has not provided source documentation which demonstrates that the Department's determination that the Records are inadequate to determine Taxpayer's tax liability is incorrect. Taxpayer did not provide any additional source documentation to verify Taxpayer's income in order to determine Taxpayer's tax liability. Therefore, the Department's reliance on the best information available to estimate Taxpayer's tax liability is proper.

In its protest letter, Taxpayer states that the Department's audit of Taxpayer may have been the result of "discriminatory practices based upon race, national origin and/or ethnicity." Taxpayer did not develop this argument at the administrative hearing or in the supplemental documentation it provided to the Department during the protest process. A taxpayer's unsupported and undeveloped argument, like this one, is waived. *Wendt LLP v. Ind. Dept. of State Rev.*, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012).

Taxpayer has not met its burden to show that the Department's assessment is incorrect, and its protest is denied.

FINDING

Taxpayer's protest is respectfully denied.

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