DEPARTMENT OF STATE REVENUE

04-20140419.LOF

Letter of Findings: 04-20140419
Gross Retail Tax
For the Years 2012 and 2013

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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Authority: IC § 6-2.5-8-10 (repealed 2007); IC § 6-8.1-5-1(b); IC § 6-8.1-5-1(c).

Taxpayer argues it does not have nexus with Indiana such that it was required to collect gross retail (sales) tax from its Indiana customers.

II. Gross Retail Tax - Negligence Penalty.

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 objects to the imposition of a ten-percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is an out-of-state company which sells medical supplies to customers in Indiana and outside Indiana.

Taxpayer registered with the Indiana Department of Revenue ("Department") to collect and remit sales tax from its Indiana customers. For certain periods, Taxpayer collected the tax from its Indiana customers and remitted those amounts. The Department assessed additional tax in the form of "Best Information Available" ("BIA") proposed assessments.

Taxpayer disagreed with the assessments and submitted a protest to that effect. Taxpayer waived the right to participate in an administrative hearing. After reviewing the available documentation including the information supplied by Taxpayer, this Letter of Findings results.

I. Gross Retail Tax - Nexus.

DISCUSSION

Taxpayer objects to the assessments on the ground that it does not have nexus with Indiana for sales tax purposes. Taxpayer admits that it registered to collect sales tax from its Indiana customers at the behest of the Department, but argues "it is not clear how the revenue department has established [Taxpayer] has sufficient nexus with the state in order to be a retail merchant of the state . . . ."

Taxpayer points to a Departmental letter issued March 1, 2014. In that letter, the Department cites to IC § 6-2.5-8-10 and states that Indiana law:

> [R]equires a person that makes retail transactions from outside Indiana to a destination inside Indiana, does not maintain a place of business in Indiana, and enters into a contract to provide property or services to a state agency (including a state educational institution) shall apply for a registered retail merchant's certificate with the Department of Revenue.

Taxpayer's own records establish that it conducts retail transactions with Indiana state educational institutions.

The provision of the law relied upon by the Department is IC § 6-2.5-8-10(a) which requires in part as follows:

A person that:
(1) makes retail transactions from outside Indiana to a destination in Indiana:
(2) does not maintain a place of business in Indiana; and
(3) either:
(A) engages in the regular or systematic soliciting of retail transactions from potential customers in Indiana;
(B) enters into a contract to provide property or services to an agency (as defined in IC 4-13-2-1) or a state educational institution (as defined in IC 20-12-0.5-1); or
(C) agrees to sell property or services to an agency (as defined in IC 4-13-2-1) or a state educational institution (as defined in IC 20-12-0.5-1); or
(D) is closely related to another person that maintains a place of business in Indiana or is described in clause (A), (B), or (C);
shall file an application for a retail merchant's certificate under this chapter and collect and remit tax as provided in this article.

Although Taxpayer does conduct retail transactions with state educational institutions, the March 1, 2014, letter is fatally flawed because IC § 6-2.5-8-10 was repealed May 10, 2007, some seven years prior to the date of the 2014 letter. The Department's reliance on IC § 6-2.5-8-10(a) requiring Taxpayer to register for and collect sales tax was incorrect.

Taxpayer maintains that the only reason it registered to collect sales tax from Indiana customers was the Department's 2014 letter. Nonetheless, Taxpayer is now registered to collect and remit sales tax and the nexus issue is irrelevant. In the absence of sales tax returns during the years at issue, the Department issued eight proposed BIA assessments. IC § 6-8.1-5-1(b) states in part that:

> 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 department.

The Department acted within the law issuing the eight assessments, and Taxpayer has failed to demonstrate otherwise. 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."

In this case, Taxpayer's remedy is straightforward. It can file the missing sales tax returns, report any taxable sales, and remit that amount - if any - to the Department.

FINDING

Taxpayer's protest is respectfully denied.

II. Gross Retail Tax - Negligence Penalty.

DISCUSSION

Accompanying the proposed assessment was a ten-percent negligence penalty. Taxpayer objects and asks that the penalty be abated.

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.

Taxpayer was required to file sales tax returns for the periods and the proposed BIA assessments were the natural result of that failure. However, especially given Department's contributory error in requiring Taxpayer to register to collect and remit sales tax in the first place, the penalty should be abated.

FINDING

Taxpayer's protest is sustained.

SUMMARY

Taxpayer has failed to establish that the proposed assessments of sales tax were incorrect; the ten-percent underpayment penalty should be abated.

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An html version of this document.