DEPARTMENT OF STATE REVENUE

04-20140025.SLOF

Supplemental Letter of Findings: 04-20140025
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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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 - Imposition.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-7-3; IC § 6-2.5-8-8; IC § 6-2.5-9-3; IC § 6-8.1-5-1; Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Indiana Dep't of State Rev. v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); 45 IAC 2.2-8-12; Letter of Findings 04-20140025 (May 29, 2014).

Taxpayer protests the assessments of additional sales tax on sales of diesel fuel.

II. Tax Administration - Fraud Penalty.

Authority: IC § 6-8.1-5-1; IC § 6-8.1-10-4; Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Miller Brewing v. Indiana Dept. of State Revenue, 903 N.E.2d 64 (Ind. 2009); 45 IAC 15-5-7; 45 IAC 15-11-4; Letter of Findings 04-20140025 (May 29, 2014).

Taxpayer challenges the imposition of a 100 percent fraud penalty.

STATEMENT OF FACTS

Taxpayer operates a 24/7 truck stop in Indiana. In addition to a full service restaurant, Taxpayer sells tangible personal property, such as groceries, truck supplies, snacks, drinks, gasoline, and diesel fuel (i.e., special fuel).

In late 2013, the Indiana Department of Revenue ("Department") conducted a sales/use tax audit of Taxpayer's business records for the tax years 2010, 2011, and 2012 ("Tax Years at Issue"). Due to the volume of Taxpayer's business records, both Taxpayer and the Department agreed to use a block sample to determine the sales tax liability of Taxpayer's sales on the diesel fuel. The Department found that Taxpayer neither collected sales tax nor obtained valid exemption certificates on various sales of the diesel fuel. The Department allowed Taxpayer additional time to obtain valid exemption certificates during the audit. Taxpayer subsequently submitted various exemption certificates, ST-135 forms (hereinafter "Exemption Certificates at Issue"; it also should be noted that the ST-135 form has been superseded), to support its claim that the sales of the diesel fuel were exempt from the sales tax. After reviewing the Exemption Certificates at Issue, the auditor accepted some of the Exemption Certificates at Issue, but rejected the remainders. The Exemption Certificates at Issue were rejected due to:

- Missing address information - almost none of the certificates contained the complete address information for the customer seeking exemption.
- Missing signatures - several [certificates] contained no signature.
- Invalid signatures
    - Famous/fictitious names - these included certificates signed by Barack Obama, Barbara Bush and Elmer Fudd among others.
    - Repeated signatures - a single individual signed the same name to a number of certificates purportedly from several different companies across the United States.
- Illegible certificates - certificates with information that was impossible to read.

As a result, the Department assessed additional sales tax, interest, and the fraud penalty for the Tax Years at

Issue.

Taxpayer protested the assessments. An administrative hearing was held and the Letter of Findings 04-20140025 (May 29, 2014), 20140730 Ind. Reg. 045140272NRA ("LOF"), denied Taxpayer's protest in its entirety because Taxpayer's arguments and documentation failed to support its protest. Taxpayer requested a rehearing. The rehearing was granted to address the issue of the blanket exemption certificates. This Supplemental Letter of Findings ("SLOF") ensues. Also, this SLOF incorporates by reference the applicable statement of facts and laws established in the LOF. Additional facts will be provided as necessary.

I. Gross Retail Tax - Imposition.

DISCUSSION

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012). Thus, the taxpayer is required to provide documentation explaining and supporting its challenge that the Department's assessment is wrong. Poorly developed and non-cogent arguments are subject to waiver. Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012).

In this instance, the Department's audit assessed additional sales tax for the Tax Years at Issue because Taxpayer failed to collect sales tax or obtain valid exemption certificates on various sales of diesel fuel - taxable retail transactions - at the time of the sales. Throughout the rehearing, Taxpayer argued that the assessments were overstated because (1) the Department erroneously rejected some of the Exemption Certificates at Issue and (2) the "audit failed to account for blanket exemption certificates." Taxpayer also reiterated its claim that the Department violates its constitutional due process right.

A. Legal Authority

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 person who acquires property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). "The retail merchant shall collect the tax as agent for the state." Id.

The Indiana Code also expressly states that a retail merchant who sells special (diesel) fuel in Indiana is required to collect sales tax at the time of the sale pursuant to IC § 6-2.5-7-3(b) (as in effect for the Tax Years at Issue), which provides specific requirements:

> With respect to the **sale of special fuel** or kerosene which is dispensed from a metered pump, **unless the purchaser provides an exemption certificate in accordance with IC [§] 6-2.5-8-8, a retail merchant shall collect, for each unit of special fuel** or kerosene **sold**, **state gross retail tax** in an amount equal to the product, rounded to the nearest one-tenth of one cent ($0.001), of:
> . . .
> **Unless the exemption certificate is provided, the retail merchant shall collect the state gross retail tax prescribed in this section even if the transaction is exempt from taxation under IC 6-2.5-5**. (**Emphasis added**).

Accordingly, Indiana retail merchants, who sell special (diesel) fuel in Indiana, must collect the sales tax unless an exemption certificate is provided in accordance with IC § 6-2.5-8-8. Moreover, retail merchants must collect the exemption certificate even when the transaction is exempt from taxation under IC 6-2.5-5. In other words, on the sale of special fuel, a valid and complete exemption certificate must be obtained by the retail merchant under all circumstances.

The exemption certificate, referenced in IC § 6-2.5-7-3, is governed by IC § 6-2.5-8-8 which provides the general rules for exemption certificates, explaining in relevant part:

> (a) A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. **The person shall issue the certificate on forms and in the manner prescribed by the department**. A

seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.

. . .

(c) The department may also allow a person to issue a blanket exemption certificate to cover exempt purchases over a stated period of time. The department may impose conditions on the use of the blanket exemption certificate and restrictions on the kind or category of purchases that are exempt.

(d) A seller that accepts an incomplete exemption certificate under subsection (a) is not relieved of the duty to collect gross retail or use tax on the sale unless the seller obtains:

(1) a fully completed exemption certificate; or

(2) the relevant data to complete the exemption certificate;

within ninety (90) days after the sale.

(e) If a seller has accepted an incomplete exemption certificate under subsection (a) and the department requests that the seller substantiate the exemption, within one hundred twenty (120) days after the department makes the request the seller shall:

(1) obtain a fully completed exemption certificate; or

(2) prove by other means that the transaction was not subject to state gross retail or use tax.

(**Emphasis added**).

45 IAC 2.2-8-12 (f) further reiterates the basic requirements of the exemption statute, explaining "[a]n exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed."

Taxpayer in this case operates a truck stop in Indiana, selling special fuel to customers. The retail transactions (namely, sales of diesel fuel) occur in Indiana, are completed in Indiana, and are subject to Indiana sales/use tax. IC § 6-2.5-2-1(a). Thus, Taxpayer, an Indiana retail merchant, is required to collect and remit the sales tax on the sales of diesel fuel at the time of the transactions under IC § 6-2.5-7-3(b). Further, Taxpayer is required to obtain the properly executed exemption certificates from its customers at the time of the transactions if Taxpayer does not intend to collect sales tax from the sale of the fuel. Id.; See also IC § 6-2.5-8-8(a).

B. Rehearing

During the course of the rehearing, Taxpayer contended that the Department should have accepted certain Exemption Certificates at Issue provided by Taxpayer for each separate sale (or sales) of the special fuel even when those Exemption Certificates at Issue were incomplete. Additionally, Taxpayer submitted three "blanket" Exemption Certificates at Issue and various diesel sales tickets, claiming that "[t]he audit failed to account for blanket exemption certificates." Taxpayer argued that it "was not required to collect an exemption certificate each and every time a return customer purchased exempt diesel fuel." Further, Taxpayer asserted that "[i]f a blanket exemption certificate existed and the customer data which would have otherwise been recorded on [the Exemption Certificates at Issue] was in the taxpayer's database, the taxpayer was not required to collect an exemption certificate for every transaction with the customer." Taxpayer maintained that one blanket exemption certificate for each "return customer" together with its "database" should suffice and it was not required to obtain additional exemption certificate(s) from the "return customer" for the subsequent sale(s) of the special fuel.

Taxpayer, however, is mistaken. There is no dispute that Taxpayer is an Indiana retail merchant engaged in retail transactions (selling special fuel to customers) in Indiana, which requires that Taxpayer **must** collect and remit the sales tax to Indiana in regards to these fuel sales unless a valid exemption certificate is presented. IC § 6-2.5-7-3(b); IC § 6-2.5-8-8(c). As IC § 6-2.5-7-3(b) cautions, "unless the purchaser provides an exemption certificate in accordance with IC [§] 6-2.5-8-8, a retail merchant **shall** collect, for each unit of special fuel or kerosene sold, [the] state gross retail tax . . . ." Therefore, it is very important to the seller selling special fuel to obtain a valid exemption certificate. In the absence of the properly signed and executed exemption certificates, the Department's audit properly assessed sales tax on the otherwise taxable sales. Without the valid exemption certificates, Taxpayer is liable for the sales tax. IC § 6-2.5-9-3.

In this instance, after the additional time permitted, Taxpayer provided the Exemption Certificates at Issue and the Department reviewed them to determine Taxpayer's tax liability. The audit noted that after the Department reviewed the Exemption Certificates at Issue, as presented, it determined a number of the Exemption Certificates at Issue were invalid for various reasons, including "Missing address information," "Missing signatures," "Invalid signatures," and/or "Illegible certificates." As explained above, the exemption certificates, including "blanket certificates," are not valid unless the exemption certificate "is executed in the prescribed and approved form and unless all information requested on such form is completed." IC § 6-2.5-8-8(a); 45 IAC 2.2-8-12(f). The audit, after review, rejected various invalid Exemption Certificates at Issue. The Department subsequently, in the LOF, addressed the validity of Taxpayer's Exemption Certificates at Issue and affirmed the audit determination. This SLOF thus must decline Taxpayer's invitation to address the same issue in the absence of additional supporting documentation.

Nonetheless, upon further review, Taxpayer's documentation for rehearing here - namely, the three blanket exemption certificates - are just as invalid as the Exemption Certificates at Issue that were considered during the first hearing. While each of Taxpayer's three "blanket exemption certificates" was filled in by different persons with different handwriting, presumably at different times and/or dates, those "blanket exemption certificates" contained invalid signatures, incomplete information, and/or information which the Department could not verify when comparing it to information on file. The blanket exemption certificates provided by Taxpayer thus fail to meet the statutory requirements and do not relieve Taxpayer's duty to collect tax.

Taxpayer further erred in asserting that it was not required to collect additional valid exemption certificate from each "return customer" at the subsequent sale(s) if its customer had previously provided the blanket exemption certificate(s) because its "database" would have contained the information of the return customers. In other words, Taxpayer believes that its "database" is a substitution for the valid exemption certificates prescribed by the Department pursuant to the above mentioned statutes and regulation. However, Taxpayer's "database" is not a valid exemption certificate because that "database" is not in the form or manner prescribed by the Department, as required under IC § 6-2.5-7-3(b), IC § 6-2.5-8-8, and 45 IAC 2.2-8-12. The plain language of the relevant legal authorities does not permit a taxpayer to create substitutions of the exemption certificates. Indiana Dep't of State Revenue v. Caterpillar, Inc., 15 N.E.2d 579, 583 (Ind. 2014) (explaining that when a court "examine[s] a statute that an agency is 'charged with enforcing . . . [the courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party") (internal citations omitted). Thus, whether the "database" would have contained all the information of Taxpayer's customers is irrelevant. Pursuant to the Department's interpretation of the above referenced statutes and regulation, Taxpayer must obtain valid exemption certificates (including valid blanket exemption certificates) if the sales tax is not collected at the time of the sales of special fuel.

Finally, at the rehearing, Taxpayer reiterated its constitutional challenge asserting that its due process right was violated. Taxpayer invites the Department to address it in this SLOF. However, the Department must respectfully decline Taxpayer's invitation. The administrative rehearing is not a proper forum to address constitutional challenges because "all statutes are presumptively constitutional." Indiana Dep't of State Rev. v. Caterpillar, Inc., 15 N.E.3d 579, 587 (Ind. 2014) (citing UACC Midwest, Inc. v. Indiana Dep't of State Rev. 629 N.E.2d 1295, 1299 (Ind. Tax Ct. 1994)). Notwithstanding that an administrative hearing is not a proper forum to address the constitutional challenge, Taxpayer simply restates its previous contentions; it fails to present additional evidence to support its constitutional challenge at the rehearing. The LOF properly addressed Taxpayer's concerns.

In short, Taxpayer's arguments and supporting documentation fail to support its protest. Given the totality of the circumstances, in the absence of other supporting documentation, Taxpayer has not demonstrated that the Department's proposed assessment is wrong. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc., 867 N.E.2d at 292; Rent-A-Center East, Inc., 963 N.E.2d at 466.

FINDING

Taxpayer's protest is denied.

II. Tax Administration - Fraud Penalty.

DISCUSSION

Throughout the rehearing, Taxpayer maintains that the Department erroneously imposed the fraud penalty.

Again, as a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012). Thus, the taxpayer is required to provide documentation explaining and supporting its challenge that the Department's assessment is wrong. Poorly developed and non-cogent arguments are subject to waiver. Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012).

The fraud penalty is found at IC § 6-8.1-10-4, which states:

> (a) If a person fails to file a return or to make a full tax payment with that return with the fraudulent intent of evading the tax, the person is subject to a penalty.
> (b) The amount of the penalty imposed for a fraudulent failure described in subsection (a) is one hundred percent (100[percent]) multiplied by:
> (1) the full amount of the tax, if the person failed to file a return; or
> (2) the amount of the tax that is not paid, if the person failed to pay the full amount of the tax.
> (c) In addition to the civil penalty imposed under this section, a person who knowingly fails to file a return with the department or fails to pay the tax due under IC [§] 6-6-5, IC [§] 6-6-5.1, or IC [§] 6-6-5.5 commits a Class A misdemeanor.
> (d) The penalty imposed under this section is imposed in place of and not in addition to the penalty imposed under section 2.1 of this chapter.

45 IAC 15-11-4 further illustrates:

> The penalty for failure to file a return or to make full payment with that return with the fraudulent intent of evading the tax is one hundred percent (100[percent]) of the tax owing. Fraudulent intent encompasses the making of a misrepresentation of a material fact (See 45 IAC 15-5-7(f)(3)) which is known (See 45 IAC 15-5-7(f)(3)(B)) to be false, or believed not to be true, in order to evade taxes. Negligence, whether slight or great, is not equivalent to the intent required. An act is fraudulent if it is an actual, intentional wrongdoing, and the intent required is the specific purpose of evading tax believed to be owing.

Additionally, 45 IAC 15-5-7(f)(3) states:

> **A person who files a return which makes a false representation(s) with knowledge or reckless ignorance of the falsity will be deemed to have filed a fraudulent return.** There are five elements to fraud.
>
> (A) Misrepresentation of a material fact: A person must truthfully and correctly report all information required by the Indiana Code and the department's regulations. Any failure to correctly report such information is a misrepresentation of a material fact. Failure to file a return may be a misrepresentation.
> (B) Scienter: This is a legal term meaning guilty knowledge or previous knowledge of a state of facts, such as evasion of tax, which it was a person's duty to guard against. A person must have actual knowledge of the responsibility of reporting the information under contention. However, the reckless making of statements without regard to their truth or falsity may serve as an imputation of scienter for purpose of proving fraud.
> (C) Deception: Deception operates on the mind of the victim of the fraud. If a person's actions or failure to act causes the department to believe a given set of facts which are not true, the person has deceived the department.
> (D) Reliance: Reliance also concerns the state of mind of the victim and is generally considered along with deception. If the person's actions, failure to act, or misrepresentations cause the department to rely on these acts to the detriment or injury of the department, the reliance requirement of fraud will be met.
> (E) Injury: The fraud instituted upon the department must cause an injury. This can be satisfied simply by the fact that the misrepresentation(s) caused the department not to have collected the money which properly belongs to the state of Indiana.
>
> In order to demonstrate fraud, the department is required to prove all of the above elements are present. This must be shown by clear and convincing evidence.

(**Emphasis added**).

In this instance, Taxpayer claims that since the Department previously abated the negligence penalty, which was imposed in a previous audit for the same issue for the tax years 2007 and 2008 ("Previous Audit"), a fraud penalty is not justified for this subsequent audit. Taxpayer asserts that the imposition of the fraud penalty is erroneous and unreasonable. To support its protest, Taxpayer submitted a copy of the Department's previous decision, which abated the negligence penalty imposed in the Previous Audit.

Upon review, Taxpayer's reliance on the Department's previous decision alone is, however, misplaced. The Department is authorized to abate the negligence penalty on a case by case basis. The Department found a reasonable cause in that case to abate the negligence penalty. The standard for abatement of the negligence penalty is, however, very different from the standard for abatement of the fraud penalty. Further, all tax years, and any related audit results, stand alone. Miller Brewing v. Indiana Dept. of State Revenue, 903 N.E. 2d 64, 69 (Ind. 2009). Thus, the Department's prior decision of the negligence penalty abatement regarding 2007 and 2008 tax years is not dispositive at this case.

Since Taxpayer was audited previously, Taxpayer was on notice and is deemed to know its duty to comply with the statutory and regulatory requirements. Years later, the Department, through the audit for the Tax Years at Issue, again found that Taxpayer has failed to properly collect, report, and remit trust taxes. At the conclusion of the audit, the Department imposed the fraud penalty, noting that Taxpayer "at first claimed that [it] had no exemption certificates." The Department further noted that Taxpayer subsequently provided "additional certificates which were almost all incomplete" and that "[s]everal of these certificates had obviously been signed by the same person." The Letter of Findings 04-20140025 ("LOF") further found that:

> (1) Taxpayer misrepresented a "material fact" because it "did not truthfully and correctly report all information required by the Indiana Code and the department's regulations." (2) Taxpayer possessed the requisite "scienter" because it had the necessary "knowledge or previous knowledge of a state of facts." The pending audit assessment is now the second audit during which Taxpayer failed to collect sales tax on the sale of diesel fuel. This first audit was issued February 2010 and a supplemental audit was issued October 2011. This is now the second time in which Taxpayer's protest was heard and addressed after Taxpayer was specifically cautioned that it was required to either collect sales tax on the sale of diesel fuel or to obtain properly completed exemption certificates. (3) Taxpayer practiced deception when it represented as exempt those sales of diesel fuel which were clearly not exempt. For example, the blind acceptance of [incomplete exemption certificates or] an exemption certificate purportedly signed by President Obama [is] a clear misrepresentation of a material fact. (4) The Department relied on Taxpayer's good faith and reasonable business practices in collecting sales tax on the sale of millions of dollars of diesel fuel. (5) The Department of Revenue - and more importantly, the citizens of this state - were "injured" because Taxpayer's multiple errors and omissions "caused the department not to have collected the money which properly belongs to the state of Indiana."

The LOF examined and concluded that the facts surrounding Taxpayer's second failure warrants the imposition of the fraud penalty. Given the totality of the circumstances, in the absence of other supporting documentation, the Department is not able to agree that the fraud penalty should be abated.

FINDING

Taxpayer's protest of the fraud penalty is denied.

SUMMARY

Taxpayer's protest of the imposition of additional sales tax is respectfully denied. Taxpayer's protest of the imposition of the fraud penalty is also respectfully denied.

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