

DEPARTMENT OF STATE REVENUE

04-20140395.LOF

Letter of Findings Number: 04-20140395
Sales/Use Tax
For Tax Years 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Retail store was required to maintain adequate records documenting that it properly collected and remitted Indiana sales tax accurately when it sold prepaid wireless services, equipment, and/or accessories.

ISSUE**I. Sales Tax - Imposition.**

Authority: IC § 6-2.5-1-2; IC § 6-2.5-1-27; IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-2.5-4-13; IC § 6-2.5-9-3; 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); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); 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).

Taxpayer protests the Department's proposed assessments on certain sales, claiming some of the retail transactions were not subject to Indiana sales tax.

STATEMENT OF FACTS

Taxpayer is a retail store and a sub-dealer, which sells prepaid wireless services and products (including equipment and accessories), to customers in Indiana. In late 2013, the Indiana Department of Revenue ("Department") conducted a sales/use tax audit of Taxpayer's business records for 2011 and 2012 tax years. The Department found that Taxpayer's records were inadequate to substantiate that it correctly collected and remitted the sales tax. The Department also found that Taxpayer purchased tangible personal property to be used in the course of its business activities without paying sales tax or self-assessing use tax. Taxpayer was permitted additional time to obtain verifiable documents so the audit could determine the proper amount of the tax due. The audit noted that the only verifiable documentation provided to the Department was Taxpayer's bank statements. Pursuant to the audit, the Department imposed additional sales tax, use tax, penalty, and interest for the tax years at issue based on the best information available at the time of the audit.

Taxpayer protested the imposition of additional sales tax, arguing that the Department's assessments were overstated. An administrative hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales 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); see also Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012).

The audit concluded that Taxpayer underreported the sales tax because Taxpayer failed to maintain adequate records. The Department thus imposed additional sales tax. Taxpayer, to the contrary, asserted that some transactions within the audit assessments were not subject to Indiana sales tax; that it was not required to collect and remit the sales tax; and that it was not liable for the additional sales tax. The issue presented in this case is whether Taxpayer's documentation sufficiently demonstrated that it was not liable for the additional sales tax because certain transactions were not subject to sales tax.

After reviewing the additional documentation provided by Taxpayer, this Letter of Findings finds that Taxpayer's supporting documentation failed to demonstrate that the transactions were nontaxable. As explained in detail below, this Letter of Findings addresses the issue as follows:

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 (namely, a 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.* A "[r]etail transaction" defined under IC § 6-2.5-1-2(a) is "a transaction of a retail merchant that constitutes selling at retail as described in IC [§] 6-2.5-4-1 . . . or that is described in any other section of IC [§] 6-2.5-4." One of the enumerated retail transactions is outlined in IC § 6-2.5-4-13, in relevant part, states "[a] person is a retail merchant making a retail transaction when a person sells: (1) a prepaid calling service or prepaid wireless calling service at retail; [or] (2) a prepaid calling service authorization number or prepaid wireless calling service authorization number at retail"

IC § 6-2.5-4-1 (as in effect for tax years at issue), in relevant part, explains:

- (a) A person is a retail merchant making a retail transaction when he engages in selling at retail.
- (b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:
 - (1) acquires tangible personal property for the purpose of resale; and
 - (2) transfers that property to another person for consideration.

"Tangible personal property" is "personal property that . . . can be seen, weighed, measured . . . or . . . is in any other manner perceptible to the senses" IC § 6-2.5-1-27.

Additionally, IC § 6-2.5-4-1(f) explains that "[t]he gross retail income received from selling at retail is only taxable . . . to the extent that the income represents . . . the price of the property transferred, without the rendition of any service; and . . . any bona fide charges which are made for . . . other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records." Thus, to accurately determine a taxpayer's tax liability (i.e., taxability or non-taxability of a retail transaction), the taxpayer is required to keep books and records. IC § 6-8.1-5-4(a). "The records included all source documents necessary to determine the tax, including invoices, register tapes, receipts and canceled checks." *Id.*

In this instance, the Department's audit noted that Taxpayer, a retail store located in Indiana, "sells cell phones, cell phone plans, and cell phone accessories" to its customers in Indiana. Taxpayer thus is a retail merchant and should have collected and remitted the sales tax on the taxable sales. IC § 6-2.5-2-1(b); IC § 6-2.5-4-1; IC § 6-2.5-4-13. Taxpayer is required to maintain adequate records but it failed to do so. IC § 6-8.1-5-4(a). During the audit, Taxpayer's bank statements were the only available records. Upon examining Taxpayer's records, the Department was not able to conclude that Taxpayer correctly collected and remitted the proper amount of the sales tax. The audit thus properly assessed additional sales tax. IC § 6-8.1-5-4(b)

At the hearing, Taxpayer contended that the audit erred in assessing additional sales tax on certain transactions in which no tangible personal property was sold. Specifically, Taxpayer asserted that it is a sub-dealer for various wireless carriers and is authorized to accept monthly payments from customers who subscribe to the wireless services. Taxpayer claimed that those transactions represented payments it accepted, processed, and subsequently forwarded to the wireless carriers, namely, telecommunication companies. Taxpayer further stated that the transactions were customer services and that, upon concluding those transactions, it retained a fraction of the payments as commission fees. The commission fees it retained are compensations for the services it provides on behalf of the wireless carriers. Taxpayer argued that the audit erred in imposing additional sales tax on those transactions. Taxpayer submitted sample copies of receipts, copies of monthly reports from several third-party processing companies (such as "QPAY"; hereinafter, "Monthly Reports"), its bank statements, and a Sub-Dealer Agreement to support its protest.

Upon review, Taxpayer is mistaken. First, the Indiana sales tax is an excise tax imposed on the retail transactions

in which tangible personal property is sold or taxable regardless by operation of the law under IC § 6-2.5-4. Taxpayer as retail merchant must maintain adequate records documenting that, for each of the retail transactions, it correctly collected and remitted the proper amount of sales tax. Likewise, for transactions which are not subject to sales tax, Taxpayer must do the same. In other words, Taxpayer's records must accurately capture the retail transactions—taxable or otherwise—at the time of the sales. Whether Taxpayer receives commission fees for the services it offered is irrelevant and beyond the scope of this sales tax protest.

Second, Taxpayer did not have a consistent and verifiable method recording its sales—taxable or otherwise. Specifically, Taxpayer used various computer tools to facilitate its business, but it did not maintain a verifiable audit trail. Several sample receipts provided by Taxpayer simply demonstrated confirmation of payments, which only contained the individual's name, phone number, and payment collected using a "QPAY" tool. The receipts (payment confirmation) did not explain the nature of the underlying transactions. The Department is not able to ascertain whether tax was properly collected at the time of the sales. Also, Taxpayer provided two sample receipts, which showed that it sold a product "AT&T- \$50 AT&T - PIN" for a "GoPhone" and a product of "Total Call - \$39.99 Unlimited Talk/Text." The receipts stated that \$50 (and \$39.99) in "Sale Amount," \$0 in "Service Charge," and \$50 (and \$39.99) in "Total Sale." The receipts presented did not contain a separate and additional line to reflect whether the sales tax was collected. These two receipts also failed to explain the nature of the underlining retail transactions.

Third, Taxpayer's Monthly Reports and its bank statements together show (1) that Taxpayer had various deposits each day, cash or electronic transfer, but the sources of these deposits could not be verified; (2) that the daily total in the Monthly Reports did not match any of the deposits stated in its bank statements; (3) that its daily total in the Month Reports contained no details on any specific underlying sale (or sales) of any specific day for the tax years at issue; (4) that it retained its commission ("Dealer Fee") on a daily basis and (5) that the Dealer Fee was subtracted from Taxpayer's daily total stated in the Monthly Reports and the remaining sum was subsequently withdrawn from Taxpayer's bank account. In other words, these documents neither provided details on each of the sales Taxpayer had for the tax years at issue, nor did they capture the nature of the underlining sales. These documents fail to establish the taxability of any of Taxpayer's underlying retail transactions. Without further details, the Department is not able to agree that the audit assessments are wrong.

In short, without the verifiable documentation for each of Taxpayer's sales - the underlining retail transactions - Taxpayer's documentation is inadequate to support its assertion that the assessments are wrong. Taxpayer thus remains liable for the sales tax. IC § 6-2.5-9-3.

FINDING

Taxpayer's protest is respectfully denied.

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