

**Letter of Findings Number: 04-20140507
Sales/Use Tax
For Tax Years 2011-13**

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 This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

A retail merchant that provided no documentary evidence with its protest did not meet its statutorily imposed burden of proof.

ISSUE

I. Sales/Use Tax–Audit Methodology.

Authority: IC § 6-2.5-2-1; IC § 6-8.1-5-1; IC § 6-8.1-5-4; *Wendt LLP v. Indiana Dept. of State Revenue*, 977 N.E.2d 480 (Ind. Tax Ct. 2012).

Taxpayer protests the proposed assessment of sales/use tax.

STATEMENT OF FACTS

Taxpayer is a gasoline and convenience store merchant. The Indiana Department of Revenue ("Department") conducted a sales and use tax audit for the years 2011 through 2013. The audit resulted in the proposed assessment of sales tax. Taxpayer protested the proposed assessments. An administrative hearing was conducted and this Letter of Findings results. Further facts will be presented as required.

I. Sales/Use Tax–Audit Methodology.

DISCUSSION

Taxpayer protests the proposed assessment of sales tax for the tax years 2011, 2012, and 2013. Taxpayer's protest letter to the Department states:

We disagree with the calculations used to determine the total sales tax due for the periods 2011, 2012, and 2013. The sales tax proposed assessments were based on incomplete records and an estimate of exempt sales percentage. Additional information is available to recalculate the sales tax for the periods under audit.

At the outset, the Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c). Turning to the applicable statutes, sales tax collection duties of a retail merchant are imposed by IC § 6-2.5-2-1:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) 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.

The audit report states that the Taxpayer's "month end sales tax work papers indicated that the taxpayer's point-of-sale system . . . was not reliable when identifying break-out of taxable versus non-taxable sales." Additionally, the audit report states that "the audit calculated total exempt sales from taxpayer's accounts payable invoices," and that "nontaxable sales were calculated by reviewing invoices from vendors of non-taxable merchandise" The auditor used the "retail prices on the invoices as well as information from the National Association of Convenience Stores" to determine the "mark up" rate. Taxpayer, as noted, takes issue with this methodology.

Since the auditor found that Taxpayer's point-of-sale system was not reliable, IC § 6-8.1-5-1(b) becomes applicable:

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 amount of the assessment is considered a tax payment not made by the due date and is subject to [IC 6-8.1-10](#) concerning the imposition of penalties and interest. The department shall send the person a notice of the proposed assessment through the United States mail.

IC § 6-8.1-5-4(a) imposes record keeping requirements:

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. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.

During the telephone hearing Taxpayer's representative stated that he believed that Taxpayer had documents that supported its position. The Department, after the telephone hearing, gave Taxpayer's representative additional time to provide the Department with any relevant documents. Taxpayer's representative later responded that he has a "receipt from 2015 that shows a typical purchase" from a vendor, but that he was "not able to provide [the Department] with any substantial evidence for [his] client's appeal" The purported receipt from 2015 is outside the audit, and thus would not be germane to the protest.

The Department's contact letter setting the protest hearing explains that it is a taxpayer's responsibility to provide "a complete, well-organized record of any and all documents needed to support [taxpayer's] position." Taxpayer has not presented a sufficiently developed argument for the Department to address. See *Wendt LLP v. Indiana Dept. of State Revenue*, 977 N.E.2d 480, 485 n.9 (Ind. Tax Ct. 2012) (stating in a footnote parenthetical "that poorly developed and non-cogent arguments are subject to waiver" by the Indiana Tax Court) (quoting *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax. Ct. 2010)). Taxpayer has not met its burden of proving the proposed assessments wrong, as required by IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is denied.

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