

**Letter of Findings: 04-20140686**  
**Gross Retail Tax**  
**For the Years 2011, 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. 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

Owner of fast-food restaurant failed to establish that an audit assessment of additional sales tax was incorrect. Owner failed to maintain business records.

### ISSUE

#### **I. Gross Retail Tax - Audit Assessment.**

**Authority:** IC § 6-2.5-2-1(a); IC § 6-2.5-2-1(b); IC § 6-2.5-9-3; IC § 6-2.5-9-3(2); IC § 6-8.1-5-1(a); IC § 6-8.1-5-1(c); IC § 6-8.1-5-4(a); Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); 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).

Taxpayer disagrees with an audit assessment of additional sales tax.

### STATEMENT OF FACTS

Taxpayer is an Indiana company in the business of operating a fast-food, franchise restaurant. The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's business records and sales tax returns. The audit resulted in an assessment of additional tax. Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representative explained the basis for the protest. This Letter of Findings results.

#### **I. Gross Retail Tax - Audit Assessment.**

### DISCUSSION

The issue is whether the Department's audit assessment should be reduced or eliminated based on extenuating circumstances surrounding the past operation of Taxpayer's restaurant and the subsequent closing of that restaurant.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. 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." Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "when [courts] examine a statute that an agency is 'charged with enforcing . . . [courts] defer to an agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579, 593 (Ind. 2014). Thus, all interpretations of Indiana tax law contained within this decision, as well as the preceding audit, are entitled to deference.

#### **A. Audit Results.**

The Department's audit compared Taxpayer's gross restaurant sales as reported on its sales and use tax returns with the amount of gross sales reported on its income tax returns. Because Taxpayer failed to file its 2011 and

2012 income tax returns, the audit resorted to reviewing the 2010 income and sales tax returns in order to arrive at an estimate of the tax liability for all the years under review.

According to the audit report, Taxpayer underreported its restaurant sales. As stated in the audit report:

The examination disclosed that the [T]axpayer understated the gross sales reported on its ST-103[s]. No explanation could be given by the [T]axpayer on this difference. A percentage of this understatement was determined and was applied to the sales of the current audit periods as reported by the [T]axpayer on its ST-103.

At the time the audit was conducted, Taxpayer objected on the ground that certain of its restaurant sales were exempt. As stated in the audit report, "The [T]axpayer contends that these exempt sales to the U.S. government through the Supplemental Nutrition Assistance Program . . . [but no] proof of this exemption was presented by the [T]axpayer . . . ."

## **B. Taxpayer's Response.**

Taxpayer argues that the assessment over-estimates the amount of its restaurant sales. Taxpayer states that its restaurant was located near a military base and that it lost business with the deployment of soldiers to Iraq and Afghanistan. In addition, Taxpayer indicates that it was forced to pay "double for products" and was faced with competition from larger, nearby restaurants.

## **C. Hearing Analysis.**

Taxpayer failed to maintain records sufficient to verify the amount of its sales tax liability. In the absence of those records, IC § 6-8.1-5-1(a) authorizes the Department, if it reasonably believes that taxpayer has not reported the correct amount of tax due, to issue a proposed assessment of tax on the basis of the best information available to the Department.

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.

Each taxpayer is required to maintain records sufficient to determine the amount of tax due. IC § 6-8.1-5-4(a) reads as follows:

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.

Taxpayer does not dispute that it was required to collect sales tax from its customers. In this instance, Taxpayer is correct. 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 retail merchant - such as Taxpayer - is required to "collect the tax as agent for the state." IC § 6-2.5-2-1(b). The retail merchant "holds those taxes in trust for the state and is personally "liable for the payment of those taxes . . . ." IC § 6-2.5-9-3.

Taxpayer argues that its restaurant business decreased with the deployment of soldiers stationed at a nearby military base. Taxpayer explains that it was necessary to divert sales tax collected from its customers to fund restaurant operational expenses. Regardless of Taxpayer's operating expenses, Taxpayer was not entitled to spend the sales tax for any purpose because the sales tax amounts were never Taxpayer's money. Taxpayer held the money in trust for the state and Taxpayer's diversion of those funds was a serious violation of Indiana law. IC § 6-2.5-9-3(2) provides that "[i]f the individual knowingly fails to collect or remit those taxes to the state, the individual commits a Level 6 felony."

Taxpayer also argued that the assessment overstates the amount due because certain of its sales were exempt. However, Taxpayer has provided no evidence that any of its sales were exempt. As noted at the outset, it is Taxpayer's responsibility to demonstrate that the assessment was wrong. IC § 6-8.1-5-1(c).

Taxpayer failed to maintain records necessary to verify its sales tax liability, illegally diverted sales tax it collected and held in trust for the state, and failed to establish that the audit assessment overstated its tax liability.

**FINDING**

Taxpayer's protest is respectfully denied.

*Posted: 04/29/2015 by Legislative Services Agency*

An [html](#) version of this document.