DEPARTMENT OF STATE REVENUE

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Letter of Findings Numbers: 03-20140222; 03-20140388
Withholding Tax
For Tax Years 2010-2012

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 This document is effective as of its date of publication and remains in effect until the date it is superseded by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the conveniences of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Federal law was controlling regarding the withholding tax requirements for employees that drove routes within Indiana but were residents of another state.

ISSUE

I. Withholding Tax–Nonresidents.

Authority: U.S. Const. art. VI, cl. 2; IC § 6-8.1-5-1; IC § 6-3-2-1; IC § 6-3-4-8; IC § 8-2.1-24-18; 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); Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); 49 U.S.C. § 14503; 49 U.S.C. § 31132; 49 C.F.R. 390.21; 45 IAC 3.1-1-97.

Taxpayer protests the assessment of withholding taxes.

STATEMENT OF FACTS

Taxpayer is a corporation that operates manufacturing and distribution centers in Indiana and other states. The Indiana Department of Revenue ("Department") audited Taxpayer for withholding taxes for the years 2010 through 2012; as a result of that audit the Department issued proposed assessments against Taxpayer for withholding taxes. Taxpayer protested the proposed assessments. An administrative hearing was conducted and this Letter of Findings results.

I. Withholding Tax–Nonresidents.

DISCUSSION

As a threshold issue, it is 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, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing. . . [courts] defer to the 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, 583 (Ind. 2014).

A. Nonresident Employee Drivers

The Department's audit report states the following:

> The taxpayer did not collect and remit Indiana State taxes on several employees (primarily delivery personnel) who reside in Illinois, but are based out of the [northern] Indiana distribution center. Illinois does not have a reciprocal agreement with Indiana; therefore, wages of Illinois residents working in Indiana are subject to the Indiana State adjusted gross income tax per IC 6-3-2-1.

The audit report further states that "[w]ithholding agents, registered with the State of Indiana, are required to collect and remit Indiana adjusted gross income tax . . . pursuant to 45 IAC 3.1-1-97." That regulation, 45 IAC 3.1-1-97, states in relevant part that "[e]mployers who make payments of wages subject to the Adjusted Gross Income Tax Act, and who are required to withhold Federal taxes pursuant to the Internal Revenue Code (USC Title 26), are required to withhold from employees' wages Adjusted Gross and County Adjusted Gross Income Tax." It should also be noted that IC § 6-3-4-8(a) states in relevant part that "every employer making payments of wages subject to tax under this article, regardless of the place where such payment is made, who is required under the provisions of the Internal Revenue Code to withhold, collect, and pay over income tax on wages paid by such employer to such employee, shall . . . deduct and retain therefrom the amount prescribed in withholding instructions issued by the department."

Taxpayer describes itself, in part, as a company that employs "Illinois resident truck drivers" who "operate a fleet of delivery vehicles located at the [northern Indiana distribution center]." Taxpayer states that the "straight trucks and route trucks have a gross vehicle weight of over 10,001 pounds" and that the "trucks depart the [northern Indiana distribution center] each day loaded with [food] products and make multiple customer deliveries primarily in Illinois along set routes before returning to the [northern Indiana distribution center]." Taxpayer further states that the "Illinois Drivers were residents of Illinois" and that Taxpayer "withheld Illinois tax on wage payments to the Illinois Drivers." Thus Taxpayer's position is that it correctly withheld Illinois tax on the "Illinois Drivers," and that there is a "federal statute that mandates single-state withholding in Illinois, the Illinois Drivers state of residence."

The federal law relied upon by Taxpayer is 49 U.S.C. § 14503. That law states:

> (a) Single State tax withholding.--
> (1) In general.--No part of the compensation paid by a motor carrier providing transportation subject to jurisdiction under subchapter I of chapter 135 or by a motor private carrier to an employee who performs regularly assigned duties in 2 or more States as such an employee with respect to a motor vehicle shall be subject to the income tax laws of any State or subdivision of that State, other than the State or subdivision thereof of the employee's residence.
> (2) Employee defined.--In this subsection, the term "employee" has the meaning given such term in section 31132.
> (b) Special rules.--
> (1) Calculation of earnings.--In this subsection, an employee is deemed to have earned more than 50 percent of pay in a State or subdivision of that State in which the time worked by the employee in the State or subdivision is more than 50 percent of the total time worked by the employee while employed during the calendar year.
> (2) Water carriers.--A water carrier providing transportation subject to jurisdiction under subchapter II of chapter 135 shall file income tax information returns and other reports only with--
> (A) the State and subdivision of residence of the employee (as shown on the employment records of the carrier); and
> (B) the State and subdivision in which the employee earned more than 50 percent of the pay received by the employee from the carrier during the preceding calendar year.
> (3) Applicability to sailors.--This subsection applies to pay of a master, officer, or sailor who is a member of the crew on a vessel engaged in foreign, coastwise, intercoastal, or noncontiguous trade or in the fisheries of the United States.
> (c) Filing of information.--A motor and motor private carrier withholding pay from an employee under subsection (a) of this section shall file income tax information returns and other reports only with the State and subdivision of residence of the employee.
> (Emphasis added).

49 U.S.C. § 31132, in turn, states:

> In this subchapter--
> (1) "commercial motor vehicle" means a self-propelled or towed vehicle used on the highways in interstate commerce to transport passengers or property, if the vehicle--
> (A) has a gross vehicle weight rating or gross vehicle weight of at least 10,001 pounds, whichever is greater;
> (B) is designed or used to transport more than 8 passengers (including the driver) for compensation;
> (C) is designed or used to transport more than 15 passengers, including the driver, and is not used to transport passengers for compensation; or
> (D) is used in transporting material found by the Secretary of Transportation to be hazardous under section 5103 of this title and transported in a quantity requiring placarding under regulations prescribed

by the Secretary under section 5103.
(2) "employee" means an operator of a commercial motor vehicle (including an independent contractor when operating a commercial motor vehicle), a mechanic, a freight handler, or an individual not an employer, who--
(A) directly affects commercial motor vehicle safety in the course of employment; and
(B) is not an employee of the United States Government, a State, or a political subdivision of a State acting in the course of the employment by the Government, a State, or a political subdivision of a State.
(3) "employer"--
(A) means a person engaged in a business affecting interstate commerce that owns or leases a commercial motor vehicle in connection with that business, or assigns an employee to operate it; but
(B) does not include the Government, a State, or a political subdivision of a State.
(4) "interstate commerce" means trade, traffic, or transportation in the United States between a place in a State and--
(A) a place outside that State (including a place outside the United States); or
(B) another place in the same State through another State or through a place outside the United States.
(5) "intrastate commerce" means trade, traffic, or transportation in a State that is not interstate commerce.
(6) "medical examiner" means an individual licensed, certified, or registered in accordance with regulations issued by the Federal Motor Carrier Safety Administration as a medical examiner.
(7) "regulation" includes a standard or order.
(8) "State" means a State of the United States, the District of Columbia, and, in sections 31136 and 31140-31142 of this title, a political subdivision of a State.
(9) "State law" includes a law enacted by a political subdivision of a State.
(10) "State regulation" includes a regulation prescribed by a political subdivision of a State.
(11) "United States" means the States of the United States and the District of Columbia.

Taxpayer states that it is "a private motor carrier under federal law." Taxpayer states that "as the auditor assessed Indiana withholding tax on wage payments to the Illinois Drivers, there is no dispute [Taxpayer] employs the Illinois Drivers under Indiana law." Taxpayer argues that the drivers in question meet the criteria found in 49 U.S.C. § 31132 (referred to by Taxpayer as "the Amtrak Act"). Citing to § 31132(2), Taxpayer states:

> That definition contemplates that an eligible employee may be categorized into one of four categories of individuals: (1) an operator of a commercial motor vehicle; (2) a mechanic; (3) a freight handler; or (4) an individual not an employer. The Illinois Drivers qualify as employees of [Taxpayer] who operate a commercial motor vehicle and directly affect commercial motor vehicle safety in the course of employment under federal law.

Taxpayer further notes that the "Illinois Drivers operate straight trucks and route trucks filled with [] products, which are commercial motor vehicles under federal law." Citing to § 31132(1), Taxpayer states "heavy straight trucks and route trucks" meet the federal requirements as "commercial motor vehicle[s]."

Taxpayer does not own the trucks that are used. However, Taxpayer states that "[b]oth federal and state laws authorize" Taxpayer "to have its employee drivers operate commercial motor vehicles placarded with a USDOT number issued to another entity." In support of its argument, Taxpayer states:

> This is specifically authorized when the motor carrier obtains the commercial motor vehicle under a rental of 30 days or less, which is the manner in which [Taxpayer] obtained use of the Hammond, Indiana based trucks (as well as other vehicles located outside Indiana) from its affiliate, [distribution company]. Thus, it is clear federal law authorizes this use. As Ind. Code § 8-2.1-24-18(a) specifically incorporates 49 C.F.R. § 390.21(e) into Indiana law, it is clear Indiana law also authorizes this use.

IC § 8-2.1-24-18(a) states in relevant part:

> 49 CFR Parts 40, 375, 380, 382 through 387, 390 through 393, and 395 through 398 are incorporated into Indiana law by reference, and, except as provided in subsections (d), (e), (f), (g), (j), (k), and (l), must be complied with by an interstate and intrastate motor carrier of persons or property throughout Indiana. Intrastate motor carriers subject to compliance reviews under 49 CFR 385 shall be selected according to criteria determined by the superintendent which must include but are not limited to factors such as previous history of violations found in roadside compliance checks and other recorded violations.

And 49 C.F.R. 390.21 states:

(e) Rented CMVs. A motor carrier operating a self-propelled CMV under a rental agreement having a term not in excess of 30 calendar days meets the requirements of this section if:

(1) The CMV is marked in accordance with the provisions of paragraphs (b) through (d) of this section; or

(2) The CMV is marked as set forth in paragraph (e)(2)(i) through (iv) of this section:

(i) The legal name or a single trade name of the lessor is displayed in accordance with paragraphs (c) and (d) of this section.

(ii) The lessor's identification number preceded by the letters "USDOT" is displayed in accordance with paragraphs (c) and (d) of this section; and

(iii) The rental agreement entered into by the lessor and the renting motor carrier conspicuously contains the following information:

(A) The name and complete physical address of the principal place of business of the renting motor carrier;

(B) The identification number issued the renting motor carrier by the FMCSA, preceded by the letters "USDOT," if the motor carrier has been issued such a number. In lieu of the identification number required in this paragraph, the following may be shown in the rental agreement:

(1) Information which indicates whether the motor carrier is engaged in "interstate" or "intrastate" commerce; and

(2) Information which indicates whether the renting motor carrier is transporting hazardous materials in the rented CMV;

(C) The sentence: "This lessor cooperates with all Federal, State, and local law enforcement officials nationwide to provide the identity of customers who operate this rental CMV"; and

(iv) The rental agreement entered into by the lessor and the renting motor carrier is carried on the rental CMV during the full term of the rental agreement. See the leasing regulations at 49 CFR part 376 for information that should be included in all leasing documents.

Regarding Taxpayer's protest, under federal preemption the federal law is controlling (see Article VI of the United States Constitution for the Supremacy Clause). Thus Taxpayer is sustained, subject to Audit verification of the information provided by Taxpayer (e.g., the routes driven, payroll reports, mileage reports, that Taxpayer's rental agreements meet the requirements of 49 C.F.R. 390.21, etc.).

B. Remaining Protested Items

Taxpayer states that "[i]n reviewing the audit adjustments involving other Illinois resident employees, [Taxpayer] determined certain adjustments are necessary in a couple of audit years[.]" The three adjustments, per Taxpayer, are the following:

- For 2010, an employee who "is an Indiana resident and Indiana tax was withheld on his wage payments per IRS Form W-2" and that "the audit adjustment of $49,801.22 for additional wages subject to Indiana tax should be eliminated."
- For 2011, Taxpayer states that an employee's "wage amount is $6,296.84 and Indiana tax was withheld" on an employee's "wage payments per IRS Form W-2" and that "the audit adjustment of $18,049.25 for additional wages subject to Indiana tax should be eliminated."
- And for another employee involving 2011, Taxpayer states that the "wage amount is $60,926.14 and Illinois tax was withheld on his wage payments per the IRS Form W-2" and that Taxpayer "contend[s] none of the wages are subject to Indiana tax withholding pursuant to the Amtrak Act, if for some reason the Department disagrees the audit adjustment of $84,919.70 for additional wages subject to Indiana tax should be reduced to $60,926.14

The Audit Division is requested to review the documentation provided by Taxpayer regarding these three issues, and make adjustments where warranted.

Lastly, Taxpayer states it reviewed its payroll records and found that for some employees "Illinois tax was incorrectly withheld on a few Illinois residents performing non-driving duties" and that Taxpayer "agrees certain Illinois residents located at the [Indiana] DC and listed in the audit report with additional wages subject to Indiana state tax are non-residents subject to Indiana withholding tax." In other words, Taxpayer concedes that these Illinois residents were employees that were non-drivers and performing work in Indiana, and thus should have had Indiana withholding tax withheld. The Audit Division is requested to make that adjustment as well.

FINDING

Taxpayer's protest is sustained subject to Audit verification and review of the information provided by Taxpayer

(e.g., the routes driven, payroll reports, mileage reports, that Taxpayer's rental agreements meet the requirements of 49 C.F.R. 390.21, etc.); the Audit Division will also make adjustments on the issue conceded by Taxpayer.

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