

DEPARTMENT OF STATE REVENUE

04-20140610.LOF

Letter of Findings Number: 04-20140610
Sales and 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 This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Restaurant did not provide enough documentation to affirmatively establish that its bank deposits were from anything other than sales. Therefore, the Department's proposed assessments for sales tax were proper.

ISSUE

I. Sales Tax—Additional Sales.

Authority: IC § 6-8.1-5-1; IC § 6-2.5-2-1; Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Indiana Dept. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Sales Tax Information Bulletin 7 (August 2011).

Taxpayer protests proposed assessments for additional sales tax.

STATEMENT OF FACTS

Taxpayer is an Indiana restaurant organized as an S Corporation. The Indiana Department of Revenue ("Department") audited Taxpayer for sales and use tax, corporate income tax, and individual income tax. Taxpayer protested the results of all of these audits. This Letter of Findings addresses Taxpayer's protest of proposed sales tax assessments. As the result of the audit, the Department determined that Taxpayer had underreported its sales for the tax years 2011, 2012, and 2013. The Department therefore issued proposed assessments for sales tax on the additional sales for years 2011, 2012, and 2013. Taxpayer protested the proposed assessments. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Sales Tax—Additional Sales.

DISCUSSION

Taxpayer protests the Department's proposed assessments for additional sales tax. The Department examined Taxpayer's sales tax returns and bank statements, which showed that Taxpayer's cash and credit card deposits totaled more than the amount of gross sales reported on its returns. Taxpayer claims that it could not have had sales as high as the Department adjusted for. Taxpayer calculated the average bill for tables and bar seats, and then multiplied that amount by the number of tables and bar seats in the restaurant and by the number of days the restaurant was open. Taxpayer claims that the result of this calculation is the restaurant's total possible sales. The Department notes that this calculation assumes that there is no turnover on any of the tables or bar seats in a regular business day. Taxpayer claims its total bank deposits were higher than its reported sales for two reasons. First, Taxpayer states that it paid more in tips than the employee W-2s denoted. Second, Taxpayer explains that it wrote checks for petty cash, and then later re-deposited the same cash.

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 Dept. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dept. 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). Thus, all interpretations of Indiana tax law contained within this decision, as well as the preceding audit, shall be entitled to deference.

Sales tax is imposed by IC § 6-2.5-2-1, which states:

- (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.

(Emphasis added).

Therefore, retail merchants are required to collect sales tax on retail transactions, unless the transaction is exempt from sales tax.

Taxpayer refers to Sales Tax Information Bulletin 7 (August 2011), 20110928 Ind. Reg. 045110516NRA, which states, "Gratuities are not taxable when they result from an unsolicited, affirmative action of the part of the customer to rewarded good service." Taxpayer believes its total sales were less than the Department adjusted for because it had remitted more tip income to its employees than what was denoted on its employees' W-2s. Taxpayer claims that this tip income was exempt from sales tax pursuant to Sales Tax Information Bulletin 7, and therefore the Department's adjustments were incorrect. To substantiate its claim, Taxpayer provided monthly financial statements, which included the amount it had received in tips. In the companion Letter of Findings (02-20140609) addressing the assessment of Taxpayer's adjusted gross income tax, the Department concluded that Taxpayer's financial statements do not establish how much Taxpayer actually remitted to its employees. Taxpayer did not provide any documentation to show that its employees' W-2s were inaccurate. Therefore, Taxpayer has not met the burden of proving the proposed assessments wrong, as required by IC § 6-8.1-5-1(c).

Taxpayer also claims that the Department's adjustments are overstated because Taxpayer regularly withdrew petty cash from its account and then later re-deposited the cash. Taxpayer provided documentation in the form of photocopies of the checks for petty cash to confirm its claim. Taxpayer did not provide receipts of deposits or any other documentation to verify that it ever re-deposited any of the cash that it withdrew. Therefore, Taxpayer has not met the burden of proving the proposed assessments wrong, as required by IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is respectfully denied.

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