

## DEPARTMENT OF STATE REVENUE

04-20140566.LOF

**Letter of Findings Number: 04-20140566**  
**Sales Tax**  
**For Tax Years 2011-12**

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 This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Retail business did not prove that the Department's calculations of sales tax which should have been collected were incorrect. Therefore, the Department's proposed assessments for sales tax were proper.

**ISSUE****I. Sales Tax—Exempt Sales.**

**Authority:** IC § 6-8.1-5-1; IC § 6-8.1-5-4; IC § 6-2.5-2-1; IC § 6-2.5-5-33; IC § 6-2.5-5-34; 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).

Taxpayer protests proposed assessments for additional sales tax.

**STATEMENT OF FACTS**

Taxpayer is an Indiana retail business operating a gasoline station with a convenience store. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not collected and remitted the correct amount of sales tax for the tax years 2011 and 2012. The Department therefore issued proposed assessments for sales tax, penalty, and interest for those years. Taxpayer protests that the Department's adjustments are not accurate. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

**I. Sales Tax—Exempt Sales.****DISCUSSION**

Taxpayer protests the Department's proposed assessments for additional sales tax for the years 2011 and 2012. The Department based its proposed assessments on the documentation available during the audit, which it found to be both incomplete and inaccurate. Specifically, the Department found that Taxpayer's claims for exempt convenience store sales of 39.4 percent in 2011 and 30.36 percent in 2012 to be outside the parameters of two to fifteen percent exempt sales based on audits of similar businesses. Because Taxpayer had inadequate documentation to establish its actual taxable and exempt sales for these years, the Department used the best information available to it to determine Taxpayer's taxable and exempt sales. The Department allowed six percent of total sales as exempt sales, based on statewide averages for this type of business. These calculations resulted in additional taxable sales for both years. Taxpayer protests that the Department's calculations are not accurate.

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.

Next, the Department refers to IC § 6-8.1-5-1(b), which states:

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.

(Emphasis added).

Also, the Department refers to IC § 6-8.1-5-4(a), which states:

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.

(Emphasis added).

Therefore, all taxpayers subject to a listed tax must keep books and records such as, but not limited to, invoices, register tapes, receipts, and cancelled checks, as provided by IC § 6-8.1-5-4(a). 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, as provided by IC § 6-8.1-5-1(b). In the instant case, the Department had insufficient records to review and so used the best information available in reaching its conclusion that Taxpayer did not report the proper amount of tax due.

Taxpayer states that it provided monthly Z tape summaries from its register as well as monthly purchase order summaries. Also, Taxpayer states that when the monthly summaries were not available it pieced together daily reports from daily Z tapes. Taxpayer explains that, in prior audits, the Department would use purchases from vendor receipts to substantiate exempt sales, and that it has provided similar documentation for the years at issue in the instant protest. This is the method which Taxpayer believes the Department should follow in the instant protest. Additionally, Taxpayer believes that the Department's determination that six percent of total sales should be considered exempt sales is too low. Taxpayer states that it is located in a unique business area which results in higher sales of exempt items like bread, dairy, and other grocery items. The exempt sales percentage, Taxpayer argues, should therefore be higher than determined in the audit.

The Department is not convinced by Taxpayer's arguments. First, the Department is authorized to use the best information available to it in order to review a taxpayer's tax compliance and to determine any assessments for unpaid taxes, as provided by IC § 6-8.1-5-1(b). In this case, Taxpayer did not have sufficient documentation, both in quality and quantity, to review its actual sales history and to verify its compliance with its sales tax collection and remittance duties. Second, monthly summary Z tapes are not themselves detailed enough to show which items were sold as taxable and which were sold as exempt. Daily Z tapes list each sale and how it was treated for sales tax purposes. Therefore, it is the daily Z tapes which are required for the Department to review and verify a taxpayer's compliance with its sales tax duties as a retail merchant. Taxpayer's purchase documents do not establish what Taxpayer sold.

Next, Taxpayer protests that the Department did not include lottery sales and electronic benefits transfer ("EBT" or "food stamps") sales in the exempt sales category. Under IC § 6-2.5-5-33, purchases made with food stamps are exempt from Indiana sales tax. Under IC § 6-2.5-5-34, lottery ticket sales are not subject to Indiana sales tax. Taxpayer provided totals of EBT sales and for lottery tickets sold in both 2011 and 2012, but did not provide documentation verifying those totals. Therefore, since these categories of sales are exempt, and since there is no verifying documentation in the protest file, Taxpayer will be allowed thirty (30) days after the date this Letter of Findings is issued to submit verifying documentation regarding its lottery and EBT sales for 2011 and 2012. After thirty days, the Department will conduct a supplemental audit and will reduce Taxpayer's taxable sales for 2011 and 2012 by the amounts of documented lottery and EBT sales for those years. If no verifying documentation is received when the thirty day deadline passes, no adjustments will be made.

In conclusion, Taxpayer has not provided documentation establishing its sales for the years 2011 and 2012. Therefore, Taxpayer has not proved the Department's adjustments to Taxpayer's exempt sales percentages wrong, as required by IC § 6-8.1-5-1(c). Taxpayer will have thirty days to submit verifying documentation regarding its lottery and EBT sales for 2011 and 2012. The Department will then conduct a supplemental audit to reduce taxable sales for those years in the amounts of any documented lottery and EBT sales.

### **FINDING**

Taxpayer's protest is denied in part and sustained subject to verification in part, as described above.

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