DEPARTMENT OF STATE REVENUE

Letter of Findings Number: 04-20150603
Sales and Use Tax
For Tax Years 2012-14

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 This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

ISSUES

I. Sales Tax–Exempt Sales.

Authority: IC § 6-8.1-5-1; IC § 6-8.1-5-4; 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).

Taxpayer protests proposed assessments for additional sales tax.

II. Tax Administration–Penalties and Interest.

Authority: IC § 6-8.1-5-4; IC § 6-8.1-10-1; IC § 6-8.1-10-2.1; 45 IAC 15-11-2.

Taxpayer protests the imposition of penalties and interest.

STATEMENT OF FACTS

Taxpayer is a retail business which was incorporated in 2012 and which operated multiple locations with gasoline sales with attached convenience stores. Taxpayer filed monthly sales tax returns, including fuel sales and inside convenience store sales. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had underreported taxable sales for the tax years 2012, 2013, and 2014 at one particular location. As explained in the audit report for that location, the Department first contacted Taxpayer in August 2014, to schedule the first meeting of the audit process. One of Taxpayer's shareholders ("Shareholder One") responded to the Department's letter and agreed to meet with the first auditor involved in the audit ("Auditor One") during the first week of August 2014. On the day of the scheduled meeting, no one representing Taxpayer showed up for the scheduled meeting. On September 23, 2014, Auditor One received a call from Shareholder One's business partner/former spouse ("Business Partner") requesting a detailed list of records required for the audit. Business Partner is not a shareholder in Taxpayer. Later that same day, Shareholder One called to request information about the audit of the store. Auditor One and Shareholder One agreed to reschedule the meeting for October 10, 2014. On that day, Auditor One was unable to meet with Shareholder One and arrangements were made for Auditor One's supervisor to meet with Shareholder One and to accept the requested records. The supervisor was also unable to meet with Shareholder One due to unforeseen circumstances. Shareholder One arrived at the Department's District Office and left a message for Auditor One to call him. Shareholder One did not leave any records with the Department at that time.

Later, Shareholder One emailed Auditor One to reschedule the meeting for October 27, 2014. Auditor One agreed and requested that Shareholder One bring records to that meeting. On October 27, 2014 Shareholder One and another person arrived at the Department's District Office, but did not bring any records. Shareholder One explained that his partner did not believe that Taxpayer was being audited and so Shareholder One requested a written statement from the Department explaining that an audit was underway. Auditor One complied with this request despite the fact that several written documents discussing the audit had already been sent to Shareholder One. The Department also gave Taxpayer until October 31, 2014 to provide the requested documents. The

Department explained that without those documents the audit would proceed based on the best information available to it.

On October 31, 2014, Shareholder One had an employee call Auditor One to request additional time to provide records. Auditor One explained that October 31, 2014 was the deadline and that it would not be extended. Auditor One retired before the audit was finished, and on February 20, 2015 the file was assigned to another auditor ("Auditor Two"). On March 3, 2015, Auditor Two sent an email to Shareholder One to advise him that she would be completing the audit. Auditor Two also requested that Shareholder One contact her to discuss the audit and to let him know that he could bring additional records at the time of the meeting. On March 4, 2015, Auditor Two called Shareholder One, but there was no answer and no voicemail option. On March 6, 2015, Auditor Two called again with similar results. Auditor Two sent Shareholder One an email with a complete list of records required to complete the audit and setting a deadline of March 11, 2015 to contact Auditor Two to avoid having the audit completed using the best information available to it. On March 11, 2015, Shareholder One called Auditor Two to set a meeting on March 18, 2015. On March 12, 2015, Auditor Two sent a confirmation email to Shareholder One regarding the new meeting date and repeating the list of required documents.

On March 18, 2015, two managers for the stores arrived at the Department's District Office, explaining that Shareholder One was ill and would not be attending. The two managers did not bring any records with them. They explained that Shareholder One and Taxpayer's other shareholder ("Shareholder Two") were estranged and were not communicating directly with each other. This lack of communication, according to the two managers, caused Shareholder Two to decide not to cooperate with the audit process even though he held most of the relevant records. Also, the two managers stated that they sent a package to the Department through FedEx. Auditor Two informed the managers that no package was received by the Department and requested that they either obtain and send in proof of delivery through FedEx or that they send the records again. During this meeting, the two managers provided the hours of operation for all of the stores operated by Taxpayer.

On March 27, 2015, Auditor Two sent an email to Shareholder One to recap the meeting on March 18 and to advise him that, unless additional records were provided, the audit would be completed using the best information available. No records were provided. The Department therefore issued proposed assessments for sales tax, penalties, and interest for those years, based on the best information available. Taxpayer protested a portion of the assessments.

On March 1, 2016, the Hearing Officer sent Taxpayer's representative a letter which scheduled the administrative hearing for March 17, 2016. The representative called the Hearing Officer requesting that the hearing be rescheduled to a date in late April 2016. The Hearing Officer explained that the hearing could be moved, but that a six week delay was not possible. The hearing was rescheduled for April 5, 2016. On April 4, 2016, the representative called the Hearing Officer to state that Shareholder One would be unavailable for the April 5 hearing due to a funeral. The representative again requested that the hearing be rescheduled for late April. The Hearing Officer informed the representative that, because the hearing had already been rescheduled once and because Shareholder One's presence was not required since representative was authorized to represent Taxpayer, the hearing would not be rescheduled a second time. The administrative hearing was held on April 5, 2016 and this Letter of Findings results. Further facts will be supplied as needed.

I. Sales Tax–Exempt Sales.

DISCUSSION

Taxpayer protests a portion of the Department's proposed assessments of sales tax for the tax years 2012 through 2014. The Department based its determinations on the best information available to it. In this case, in the absence of any documentation from Taxpayer, the Department referenced CSPnet.com (operated by Convenience Store and Fuel News) which explained that a State of the Industry Summit sponsored by the National Association of Convenience Stores ("NACS") announced that motor fuel sales accounted for 71.4 percent of total sales at convenience stores nationwide. The Department then obtained Taxpayer's fuel purchase records from Taxpayer's fuel supplier, which was the only verifiable information available to the Department. The reported gallons sold and the reported price charged for gallons sold were both found to be reasonable.

The Department therefore calculated inside store sales based on the figure of fuel sales as 71.4 percent of total sales nationwide, as reported by the NACS. Total sales as reported on the monthly sales tax returns were found to be reasonable, but the percent of exempt sales was found to be excessive. The Department adjusted the exempt sales percentage to five percent in order to reflect that some exempt sales must have occurred. The Department recalculated taxable sales at ninety-five percent of total sales and then calculated the amount of

sales tax that should have been reported on that amount. The Department then added in the amount of sales tax already reported and remitted by Taxpayer and issued proposed assessments for the remaining amount that should have been collected and remitted.

Taxpayer protests that the exempt sales percentage used by the Department was too low and resulted in overstated taxable sales. Taxpayer believes that a different exempt sales percentage is more accurate and its use in the Department's calculations would result in a more accurate calculation of sales tax due. Also, Taxpayer states that the initial auditor, who retired prior to completing this audit, was given its cash register Z tapes for the tax years and that the Department must have lost those tapes before completing the audit with a second auditor. Taxpayer believes that it provided the relevant records to the Department and that it therefore fulfilled its record-keeping duties. The proposed assessments are therefore, Taxpayer asserts, incorrect since they are not based on the documentation it provided to the Department.

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 no 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.

While Taxpayer states that it sent a package of records to the Department, Taxpayer has not provided

documentation confirming that any package was sent and delivered to the Department, let alone establishing what such a package might have contained. The Department therefore has no verification that such a package was sent and delivered. Beyond Taxpayer's assertion, though, is the fact that the Department provided numerous opportunities and reminders to Taxpayer to provide copies of the required records. At no point did Taxpayer provide those records. The Department therefore decided to use the best information available to determine taxable sales. Those calculations resulted in the determination that Taxpayer had additional taxable sales for the tax years at issue, which in turn resulted in additional sales tax which Taxpayer should have collected and remitted, as provided by IC § 6-2.5-2-1(b).

Next, Taxpayer protests that the Department incorrectly calculated the taxable sales that took place at its stores. As explained above, the Department used the best information available to reach its conclusions. Taxpayer states that the Department did not use the best information available. Specifically, Taxpayer states that the Department did not use accurate information in its determinations. While Taxpayer claimed exempt sales of 32.71 percent for 2012, 26.70 percent for 2013, and 16.39 percent for 2014, the Department considered these percentages excessive and reduced exempt sales for all three years to five percent.

Taxpayer states that five percent is too low a percentage to accurately reflect its exempt sales. In fact, Taxpayer reiterates its position that Shareholder One did provide register Z tapes to Auditor One and that the Department lost the Z tapes subsequent to Auditor One's retirement. By providing those Z tapes, Taxpayer insists, it has met its statutory duty under IC § 6-8.1-5-4(a) and so it owes no additional sales tax at all. Even if the Department did not have those records, Taxpayer states, the Department did not use the best information available in arriving at its determinations. Rather, Taxpayer states that it should at least be entitled to use the same ten percent exempt sales rate discussed in a Letter of Findings which addressed exempt and taxable sales for the years 2010-12 and which was issued to an unrelated third party in 2014. The Department notes that each taxpayer is differently situated and the taxpayer which was the subject of the referenced Letter of Findings had different factors than Taxpayer had for the Department to consider in reaching its determination of what exempt sales percentage to use in its calculations. The Department, therefore, does not agree with Taxpayer's assertion that it is entitled to the same exempt sales percentage as the unrelated third party discussed in the referenced Letter of Findings.

Taxpayer believes that a more accurate method of estimating exempt sales is to refer to BizStats.com to find an exempt sales percentage. Taxpayer refers to a subcategory of BizStats data which Taxpayer states is the closest to its own situation. Specifically, Taxpayer states that BizStats personnel told Taxpayer that the best BizStats category to use is 447110, which concerns Gasoline Stations with Convenience Stores. Taxpayer states that the category 445120, which concerns Convenience Stores is incorrect.

The Department does not agree with this conclusion. First, as previously explained, the Department separately calculated gasoline store sales. No adjustments were made to gasoline sales. The only estimates made under IC § 6-8.1-5-1(b) from the best information available were in connection with the convenience store sales. Also, gasoline has a very high cost of goods sold while convenience store items have a much lower cost of goods sold. The BizStats categories therefore have significantly different percentages of profitability depending on whether or not gasoline sales are incorporated into the BizStats calculations. Again, the Department made no adjustments to Taxpayer's gasoline calculations. Therefore, gasoline sales should not be included in the exempt sales percentage applied to the convenience store sales calculations. In short, Taxpayer's reliance on alternate BizStats percentages for alternate estimations is misplaced.

More significantly, Taxpayer's reliance on alternate estimations would not be necessary at all if it had actual records for the Department to review. While Taxpayer states that it provided Z tapes to Auditor One, there is no record of such an event. Taxpayer has not provided any evidence substantiating its claim. Taxpayer has not provided any documentation substantiating its claim that its managers sent a package to the Department via FedEx. Also, the Department provided many opportunities both during the audit process and during the protest process to provide copies of the relevant records. Taxpayer did not do so. Moreover, Taxpayer states that it did provide monthly Z tapes for the months of January through May of 2014 and that those Z tapes should be the basis of the Department's calculations. The Department takes this opportunity to clarify that monthly summary Z tapes are only summaries. They are not the daily Z tapes which every register prints at the end of each day and which list each sale which occurred that day. It is the daily Z tapes that list which items are being sold as taxable and which are being sold as non-taxable. It is the daily Z tapes which are required for the Department's review to verify that taxable items are being taxed and that exempt items are not being taxed. The monthly summaries only list general categories and have no details of what items are being taxed when sold. In this case, it was the Department's determination that the monthly summaries only summarized a month's worth of errors and the incorrect application of taxable and exempt standards. Taxpayer has provided nothing but its own unsubstantiated estimations to disprove the Department's determination. Taxpayer's reliance on the monthly summary Z tapes is

misplaced.

Finally, Taxpayer states that the Department's use of five percent as a figure for exempt sales is "arbitrary and capricious." The Department strongly disagrees with this assertion. Due entirely to Taxpayer's complete failure to comply with the requirements of IC § 6-8.1-5-4(a), the Department was left with no other option but to use the best information available to it to reach its conclusions and the amount of the proposed assessments, as provided by IC § 6-8.1-5-1(b). The Department's calculations were entirely reasonable given the total lack of records in this case. Taxpayer's alternate estimations do not rise to the level of record-keeping and do not satisfy the statutory requirements placed on it as a retail merchant. Neither do Taxpayer's alternate estimations prove the proposed assessments wrong, as required by IC § 6-8.1-5-1(c).

In conclusion, the Department was correct to use the best information available to determine Taxpayer's total and taxable sales for the tax years 2012, 2013, and 2014, as provided by IC § 6-8.1-5-1(b), since Taxpayer failed to keep documents it was required to keep under IC § 6-8.1-5-4(a). Taxpayer's position that the Department should have used a specific BizStats exempt sales percentage in its calculations of Taxpayer's taxable sales is incorrect because the category Taxpayer chose includes gasoline sales in its calculations. Since Taxpayer's fuel supplier was able to provide accurate records regarding Taxpayer's fuel purchases, the Department had the necessary documentation to review and evaluate Taxpayer's reported gasoline sales and the sales tax which should have been collected and remitted on those gasoline sales. Taxpayer was unable to provide any records regarding its convenience store sales, other than a few monthly summaries which do not contain the necessary details to review and evaluate Taxpayer's sales tax compliance. The Department therefore separately reviewed gasoline sales and convenience store sales and made sales tax adjustments only to the convenience store sales. The BizStats category to which Taxpayer refers is not appropriate for solely convenience store sales. The Department is satisfied that it has provided Taxpayer with more than sufficient opportunities to present records to determine Taxpayer's actual sales tax compliance history for the years at issue. Taxpayer's arguments are not supported by any documentation. 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 denied.

II. Tax Administration–Penalties and Interest.

DISCUSSION

Taxpayer protests the imposition of penalties pursuant to IC § 6-8.1-10-2.1 and the imposition of interest pursuant to IC § 6-8.1-10-1. The Department notes that waiver of interest is not permitted under IC § 6-8.1-10-1(e). Penalty waiver is permitted if the taxpayers show that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. 45 IAC 15-11-2(b) clarifies the standard for the imposition of the negligence penalty as follows:

> "Negligence", on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at 45 IAC 15-11-2(c) as follows:

> The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:
> (1) the nature of the tax involved;
> (2) judicial precedents set by Indiana courts;
> (3) judicial precedents established in jurisdictions outside Indiana;

(4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
(5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer protests the Department's assessment of penalties and interest. After review of the documentation and analysis provided in the protest process, the Department may not waive interest, as provided by IC §6-8.1-10-1(e). Taxpayer failed in its duty to keep sales records as required under IC § 6-8.1-5-4(a). Taxpayer has not affirmatively established that it exercised ordinary business care in this case. Therefore, waiver of penalties is not warranted under 45 IAC 15-11-2(c).

FINDING

Taxpayer's protest to the imposition of penalties and interest is denied.

SUMMARY

Taxpayer's Issue I protest regarding the imposition of sales tax is denied. Taxpayer's Issue II protest regarding the imposition of penalties and interest is denied.

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