

Letter of Findings Number: 04-20120443
Sales Tax
For The Tax Years 2007-09

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ISSUES

I. Sales Tax - Imposition.

Authority: IC § 6-8.1-3-1; IC § 6-8.1-3-2.2; IC § 6-8.1-5-1; IC § 6-8.1-5-4.

Taxpayer protests the Department's imposition of sales tax.

II. Tax Administration–Negligence Penalty.

Authority: IC § 6-8.1-10-1; IC § 6-8.1-10-2; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of a ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana resident. The Indiana Department of Revenue ("Department") determined that Taxpayer had not remitted the proper amount of sales tax for the tax years 2007, 2008, and 2009. The Department issued proposed assessments for sales tax, interest, and ten percent negligence penalty for each of these years. This Letter of Findings addresses those proposed assessments. Taxpayer protested the Department's calculations of sales and the resulting sales tax which should have been remitted as well as the imposition of negligence penalty for these years. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Sales Tax - Imposition.

DISCUSSION

Taxpayer protests the Department's calculations of additional sales tax for the tax years 2007, 2008, and 2009. In the course of an investigation of Taxpayer's compliance with sales tax with regards to sales of dogs and puppies during the tax years, the Department determined that Taxpayer had unreported sales upon which Taxpayer should have collected and remitted sales tax. The Department based its calculations on the best information available to it at the time. Taxpayer argues that the Department over-stated the volume and value of the sales. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

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).

Another relevant statute is IC § 6-8.1-5-1(b), which provides:

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).

Next, IC § 6-8.1-5-4 states:

(a) 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.

(b) A person must retain the books and records described in subsection (a), and any state or federal tax return that the person has filed:

- (1) for an unlimited period, if the person fails to file a return or receives notice from the department that the person has filed a suspected fraudulent return, or an unsigned or substantially blank return; or
- (2) in all other cases, for a period of at least three (3) years after the date the final payment of the particular tax liability was due, unless after an audit, the department consents to earlier destruction.

In addition, if the limitation on assessments provided in section 2 of this chapter is extended beyond three (3) years for a particular tax liability, the person must retain the books and records until the assessment period is over.

Therefore, IC § 6-8.1-3-2.2 explains that the Department may conduct an investigation if it is reasonably related to the administration of a listed tax. In this case, the Department conducted an investigation which was reasonably related to the administration of sales tax, which in turn resulted in the sales tax assessments at issue in this protest.

The Department determined that Taxpayer was acting as a retail merchant by selling tangible personal property in the form of dogs and puppies. Therefore, Taxpayer was responsible for collecting and remitting sales tax as a retail merchant under IC § 6-2.5-2-1(b). Taxpayer did not remit any sales tax on the sales in question during the tax years. Since Taxpayer did not keep books and records available for the Department to review, as required by IC § 6-8.1-5-4, the Department based the proposed assessments on the best information available to it at the time it issued the liabilities in question, as provided by IC § 6-8.1-5-1(b).

In the course of the protest and hearing process, Taxpayer provided documentation previously unavailable to the Department in support of its position that the number and value of dogs and puppies sold was lower than the Department's original calculations. This documentation lists the number of dogs and puppies sold and the amount charged for each sale. The Department's audit division will use this documentation to conduct a supplemental calculation of sales tax due for the tax years at issue. Therefore, some sales tax will still be due. Taxpayer has met the burden imposed by IC § 6-8.1-5-1(c), subject to the results of the supplemental audit.

FINDING

Taxpayer's protest is sustained to the extent of the pending recalculation of sales tax due.

II. Tax Administration—Negligence Penalty.

DISCUSSION

The Department imposed ten percent negligence penalties and interest for each tax year at issue. Under IC § 6-8.1-10-2(e), the Department may not waive interest. Taxpayer protests the imposition of a ten percent negligence penalty on the original amount of base tax determined by the Department to be due. Taxpayer argues that, while sales tax is due on the income from the dog/puppy sales, the failure to report the income from these sales was not intentional.

The negligence penalty is imposed under IC § 6-8.1-10-2.1(a), which states in relevant part:

If a person:

...

(3) incurs, upon examination by the department, a deficiency that is due to negligence;

...
the person is subject to a penalty.

The Department refers to [45 IAC 15-11-2\(b\)](#), which states:

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.

A review of the documentation in the file shows that Taxpayer clearly demonstrated carelessness, thoughtlessness, disregard or inattention to duties placed upon Taxpayer by the Indiana Code or Departmental regulations. This is negligence as defined by [45 IAC 15-11-2\(b\)](#). Taxpayer does not dispute this, and in fact argues that it is subject to this penalty for each of the tax years at issue, albeit on the revised amount of base tax. Therefore, Taxpayer will be subject to the ten percent negligence penalty. That penalty will be ten percent of the base tax after recalculation as discussed in Issue I above.

FINDING

Taxpayer's protest of the negligence penalty is denied.

CONCLUSION

Taxpayer is sustained on Issue I to the extent that a supplemental audit based on documentation supplied by Taxpayer during the protest process recalculates Taxpayer's sales and the resulting sales tax liabilities for the tax years 2007, 2008, and 2009. Taxpayer is denied on Issue II regarding the imposition of the ten percent negligence penalty.

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