DEPARTMENT OF STATE REVENUE

10-20150692.LOF

Letter of Findings Number: 10-20150692
Food and Beverage 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 This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Business was not responsible for collecting food and beverage tax on service charges for food service. Food and beverage tax was therefore not due on those amounts during the audit years. The imposition of penalty was warranted.

ISSUES

I. Food and Beverage Tax–Food and Beverage Service Charges.

Authority: IC § 6-2.5-1-5; IC § 6-9-12-2; IC § 6-9-12-3; IC § 6-9-12-4; IC § 6-9-12-7; IC § 6-2.5-4-1; IC § 6-8.1-5-1; 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); 45 IAC 2.2-4-8; Sales Tax Information Bulletin 7 (August 2011); Sales Tax Information Bulletin 41 (September 2010); Sales Tax Information Bulletin 41 (January 2014).

Taxpayer protests the imposition of food and beverage tax on certain food and beverage service charges.

II. Tax Administration–Penalties.

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

Taxpayer protests the imposition of penalties.

STATEMENT OF FACTS

Taxpayer operates a hotel in Indiana with meeting rooms available for rent. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not collected and remitted the proper amount of county food and beverage tax on certain taxable transactions and had not remitted the proper amount of use tax due during the 2012, 2103, and 2014 tax years. The Department therefore issued proposed assessments for additional food and beverage tax, penalties, and interest for those years. Taxpayer protested portions of the proposed assessments, stating that it was not required to collect and remit food and beverage tax on some of the transactions at issue, as well as protesting the imposition of penalties. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Food and Beverage Tax–Food and Beverage Service Charges.

DISCUSSION

Taxpayer protests the imposition of county food and beverage tax on amounts it charged its customers when the customers rented meeting rooms in Taxpayer's hotel and also paid Taxpayer to provide food and beverages for the meeting. The Department considered the charge associated with the provision of food to be a mandatory gratuity and therefore part of the overall amount subject to sales tax on the transaction. Taxpayer disagrees with the Department's determination of what the charges were actually for and states that the charges were not subject to food and beverage tax.

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.

The county food and beverage tax is imposed by IC § 6-9-12-2, which states:

> (a) After January 1 but before June 1 of any year, the city-county council of a county that contains a consolidated city may adopt an ordinance to impose an excise tax, known as the county food and beverage tax, on those transactions described in section 3 of this chapter.
> (b) If a city-county council adopts an ordinance under subsection (a), it shall immediately send a certified copy of the ordinance to the commissioner of the department of state revenue.
> (c) If a city-county council adopts an ordinance under subsection (a), the county food and beverage tax applies to transactions that occur after June 30 of the year in which the ordinance is adopted.

Next, IC § 6-9-12-3 states:

> (a) Subject to section 4 of this chapter, the tax imposed under this chapter applies to any transaction in which food or beverage is furnished, prepared, or served:
> (1) for consumption at a location, or on equipment, provided by a retail merchant;
> (2) in a county in which a consolidated first class city is located; and
> (3) by a retail merchant for a consideration.
> (b) Transactions described in subsection (a)(1) include, but are not limited to transactions in which food or beverage is:
> (1) served by a retail merchant off his premises;
> (2) food sold in a heated state or heated by a retail merchant;
> (3) two (2) or more food ingredients mixed or combined by a retail merchant for sale as a single item (other than food that is only cut, repackaged, or pasteurized by the seller, and eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer as recommended by the federal Food and Drug Administration in chapter 3, subpart 3-401.11 of its Food Code so as to prevent food borne illnesses); or
> (4) food sold with eating utensils provided by a retail merchant, including plates, knives, forks, spoons, glasses, cups, napkins, or straws (for purposes of this subdivision, a plate does not include a container or packaging used to transport the food).

Next, IC § 6-9-12-4 states:

> The county food and beverage tax does not apply to the furnishing, preparing, or serving of any food or beverage in a transaction that is exempt, or to the extent exempt, from the state gross retail tax imposed by IC 6-2.5.

Next, IC § 6-9-12-7 states:

> The county food and beverage tax shall be imposed, paid, and collected in the same manner that the state gross retail tax is imposed, paid, and collected under IC 6-2.5. However, the return to be filed for the payment of the county food and beverage tax may be either a separate return or may be combined with the return filed for the payment of the state gross retail tax, as prescribed by the department of state revenue. (Emphasis added).

Therefore, the food and beverage tax is imposed in the same manner as sales tax as provided under the provisions of IC § 6-2.5.

Next, IC § 6-2.5-4-1 provides:

> (a) A person is a retail merchant making a retail transaction when the person engages in selling at retail.
> (b) A person is engaged in selling at retail when, in the ordinary course of the person's regularly conducted

trade or business, the person:
(1) acquires tangible personal property for the purpose of resale; and
(2) transfers that property to another person for consideration.
(c) For purposes of determining what constitutes selling at retail, it does not matter whether:
(1) the property is transferred in the same form as when it was acquired;
(2) the property is transferred alone or in conjunction with other property or services; or
(3) the property is transferred conditionally or otherwise.
(d) Notwithstanding subsection (b), a person is not selling at retail if the person is making a wholesale sale as described in section 2 of this chapter. However, in the case of sales of gasoline (as defined in IC 6-6-1.1-103), a person shall collect the gasoline use tax as provided in IC 6-2.5-3.5.
(e) The gross retail income received from selling at retail is only taxable under this article to the extent that the income represents:
(1) the price of the property transferred, without the rendition of any service; and
(2) except as provided in subsection (g), any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records. For purposes of this subsection, a transfer is considered to have occurred after delivery of the property to the purchaser.
(f) Notwithstanding subsection (e):
(1) in the case of retail sales of special fuel (as defined in IC 6-6-2.5-22), the gross retail income received from selling at retail is the total sales price of the special fuel minus the part of that price attributable to tax imposed under IC 6-6-2.5 or Section 4041(a) or Section 4081 of the Internal Revenue Code; and
(2) in the case of retail sales of cigarettes (as defined in IC 6-7-1-2), the gross retail income received from selling at retail is the total sales price of the cigarettes including the tax imposed under IC 6-7-1.
(g) Gross retail income does not include income that represents charges for serving or delivering food and food ingredients furnished, prepared, or served for consumption at a location, or on equipment, provided by the retail merchant. However, the exclusion under this subsection only applies if the charges for the serving or delivery are stated separately from the price of the food and food ingredients when the purchaser pays the charges.
(Emphasis added).

The Department's audit report referred to IC § 6-2.5-1-5(a), which states:

(a) Except as provided in subsection (b), "gross retail income" means the total amount of consideration, including cash, credit, property, and services, for which tangible personal property is sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for:
(1) the seller's cost of the property sold;
(2) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller;
(3) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges;
(4) delivery charges; or
(5) consideration received by the seller from a third party if:
(A) the seller actually receives consideration from a party other than the purchaser and the consideration is directly related to a price reduction or discount on the sale;
(B) the seller has an obligation to pass the price reduction or discount through to the purchaser;
(C) the amount of the consideration attributable to the sale is fixed and determinable by the seller at the time of the sale of the item to the purchaser; and
(D) the price reduction or discount is identified as a third party price reduction or discount on the invoice received by the purchaser or on a coupon, certificate, or other documentation presented by the purchaser.
For purposes of subdivision (4), delivery charges are charges by the seller for preparation and delivery of the property to a location designated by the purchaser of property, including but not limited to transportation, shipping, postage charges that are not separately stated on the invoice, bill of sale, or similar document, handling, crating, and packing. Delivery charges do not include postage charges that are separately stated on the invoice, bill of sale, or similar document.
(Emphasis added).

Also, in the audit report the Department referred to 45 IAC 2.2-4-8(e), which provides:

The tax is imposed on the gross receipts from "furnishing" an accommodation. The gross receipts subject to

> tax include the amount which represents consideration for the rendition of those services which are essential to the furnishing of the accommodation, and those services which are regularly provided in furnishing the accommodation. Such amounts are subject to tax even when they are separately itemized on the statement or invoice.

Additionally, the Department's audit report referred to Sales Tax Information Bulletin 7 (August 2011), 20110928 Ind. Reg. 045110516NRA ("Information Bulletin 7"), which provides in relevant part:

> Gratuities are not taxable when they result from an unsolicited, affirmative action on the part of the customer to reward good service. Charges for serving food or beverages furnished, prepared, or served for consumption at a location, or on equipment provided by the retail merchant are not subject to sales tax. However, this exclusion only applies if the charges for the serving are stated separately from the price of the food and/or beverages when the purchaser pays the charge. Charges for delivery of prepared food, whether segregated or not, are subject to sales tax. (Emphasis added).

The Department reviewed Taxpayer's accounts and concluded that Taxpayer added a taxable service charge to the amount charged for the catering it provided its customers. This, the Department determined, meant that the charges were representative of the cost of Taxpayer's labor or service cost and so were included in gross retail income under IC § 6-2.5-1-5(a)(2) and/or IC § 6-2.5-1-5(a)(3). Further, the Department considered that the service charges were consideration for the rendition of those services which are essential to the furnishing of the accommodation, and those services which are regularly provided in furnishing the accommodation, which would make the service charges subject to sales tax under 45 IAC 2.2-4-8(e). Finally, the Department considered that its position was verified by Information Bulletin 7, in which the Department explained that charges for delivery of prepared food, whether segregated or not, were subject to sales tax and ergo they were subject to food and beverage tax under IC § 6-9-12-7.

While IC § 6-2.5-1-5(a) does contain the language cited by the Department, it is a general definitional statute while a more specific statutory exclusion is provided by the Indiana Code. IC § 6-2.5-4-1(g) provides that gross retail income does not include income that represents separately stated charges for serving or delivering food and food ingredients furnished, prepared, or served for consumption at a location, or on equipment, provided by the retail merchant. In this case, the service charges were directly associated with the cost of serving food furnished, prepared or served for consumption at a location and on equipment provided by the retail merchant.

Regarding the Department's reference to Information Bulletin 7, while the information bulletin does contain the sentence referring to delivery charges it also plainly states, "Charges for serving food or beverages furnished, prepared, or served for consumption at a location, or on equipment provided by the retail merchant are not subject to sales tax.", thereby echoing the language of IC § 6-2.5-4-1(g). Also, Sales Tax Information Bulletin 41 (January 2014), 20140129 Ind. Reg. 045140014NRA ("Information Bulletin 41") (preceded by Sales Tax Information Bulletin 41 (September 2010), 20100929 Ind. Reg. 045100600NRA, which was in effect during the first two years of the protest) provides a detailed matrix which explains the Department's position regarding the application of sales tax to various aspects of furnishing accommodations, including service charges associated with serving food and beverages. That matrix states that separately stated service charges for serving food and beverages are not subject to sales tax. While this iteration of Information Bulletin 41 was not in effect until the last year of the audit period, it does not reflect a change in the Department's interpretation of the relevant statutes. Rather it is a clarification and confirmation of the Department's position for all three years of the audit period.

Therefore, the matrix in Information Bulletin 41 is applicable to all three audit years in the instant case. Consequently, both Information Bulletin 7 and Information Bulletin 41 (January 2014) confirm that the Department did not consider separately stated charges for serving or delivering food and food ingredients furnished, prepared, or served for consumption at a location, or on equipment, provided by the retail merchant to constitute gross retail income subject to sales tax as described by 45 IAC 2.2-4-8(e). Instead, the Department considered those charges to fall under the provisions of IC § 6-2.5-4-1(g).

In conclusion, Taxpayer has established that the service charges it charged its customers for food and beverage services were separately stated on the invoices. IC § 6-2.5-4-1(g) plainly states that sales tax does not apply to income that represents separately stated charges for serving or delivering food and food ingredients furnished, prepared, or served for consumption at a location, or on equipment, provided by the retail merchant. Moreover, the Department has established its position, via the matrix in Information Bulletin 41, that in the context of providing accommodations separately stated service charges for serving food and beverages are not subject to sales tax. Since the Department has determined that the service charges are not subject to sales tax, under IC § 6-9-12-7 the service charges are not subject to the county food and beverage tax either. Taxpayer has met the

burden imposed under IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is sustained.

II. Tax Administration–Penalties.

DISCUSSION

Taxpayer protests the imposition of penalties pursuant to IC § 6-8.1-10-2.1. Penalty waiver is permitted if the taxpayer shows 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. Taxpayer states that the proposed assessments of penalties are illegal and contrary to law for the reasons that it at all times exercised the level of reasonable care, caution, and diligence expected of an ordinary taxpayer. After review of the documentation and analysis provided in the protest process, the Department does not agree with Taxpayer's position. While Taxpayer has been sustained on the imposition of sales tax on the service charges as described in Issue I above, it is also true that there were other instances reported in the audit report where food and beverage tax should have been collected and remitted. Therefore, waiver of penalties is not warranted under 45 IAC 15-11-2(c). However, penalties will be recalculated to reflect the reduced amount of food and beverage tax due after the Department performs a supplemental audit to implement the determinations in this Letter of Findings.

FINDING

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

SUMMARY

Taxpayer's Issue I protest regarding the imposition of food and beverage tax on food service charges is sustained. Taxpayer's Issue II protest regarding the imposition of penalties is denied, but the penalties will be recalculated to reflect the above-referenced findings.

Posted: 10/26/2016 by Legislative Services Agency
An html version of this document.