DEPARTMENT OF STATE REVENUE

04-20160163.LOF

Letter of Findings Number: 04-20160163
Sales Tax
For Tax Years 2012-2014

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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Dealership relied on Department advice when calculating its sales tax bad debt deduction; thus, the Department's assessment relying on Dealerships accounting method is incorrect. Dealership however, could not show that the returned vehicles were not repossessed vehicles and therefore the assessment regarding repossessed vehicles is denied.

ISSUES

I. Sales Tax–Imposition.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-7; IC § 6-2.5-4-1; IC § 6-2.5-6-2; IC § 6-8.1-5-1; IC § 6-2.5-6-9; Indiana Dep't of State Rev. v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); 45 IAC 15-3-2.

Taxpayer protests the calculation of sales tax liability.

II. Tax Administration–Penalty.

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

Taxpayer protests the imposition of the negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana business. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer improperly calculated its sales tax for the tax years 2012 through 2014. The Department therefore issued proposed assessments for sales tax, penalty, and interest for those years. Taxpayer protests that the Department's assessment was incorrect. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Sales Tax–Imposition.

DISCUSSION

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012). Thus, the taxpayer is required to provide documentation explaining and supporting its challenge that the Department's assessment is wrong. Poorly developed and non-cogent arguments are subject to waiver. Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); see also Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012). Also, "all statutes are presumptively constitutional." Indiana Dep't of State Rev. v. Caterpillar, Inc., 15 N.E.3d 579, 587 (Ind. 2014) (citing UACC Midwest, Inc. v. Indiana Dep't of State Rev. 629 N.E.2d 1295, 1299 (Ind. Tax Ct. 1994)). When an agency is charged with enforcing a statute, the jurisprudence defers the agency's reasonable interpretation of that statute "over an equally reasonable interpretation by another

party." Caterpillar, Inc., 15 N.E.3d at 583.

Taxpayer protests the Department's calculations of sales tax due for the tax years 2012, 2013, and 2014. The Department based its calculations on Taxpayer's records.

The 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).

The Department also refers to IC § 6-2.5-4-1, which states in relevant part:

> (a) A person is a retail merchant making a retail transaction when he engages in selling at retail.
> (b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:
> (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.
> . . . .

Taxpayer took a bad debt deduction on its sales tax return based on sales where some of its customers defaulted on their payments. Taxpayer based its "bad debt" deduction on IC § 6-2.5-6-9. The Indiana sales tax "bad debt" deduction is found under IC § 6-2.5-6-9, which provides in relevant part:

> (a) In determining the amount of state gross retail and use taxes which a retail merchant must remit under section 7 of this chapter, the retail merchant shall, subject to subsections (c) and (d), deduct from the retail merchant's gross retail income from retail transactions made during a particular reporting period, an amount equal to the retail merchant's receivables which:
> (1) resulted from retail transactions in which the retail merchant did not collect the state gross retail or use tax from the purchaser;
> (2) resulted from retail transactions on which the retail merchant has previously paid the state gross retail or use tax liability to the department; and
> (3) were written off as an uncollectible debt for federal tax purposes under Section 166 of the Internal Revenue Code during the particular reporting period.
> . . .
> (d) The following provisions apply to a deduction for a receivable treated as uncollectible debt under subsection (a):
> (1) The deduction does not include interest.
> (2) The amount of the deduction shall be determined in the manner provided by Section 166 of the Internal Revenue Code for bad debts but shall be adjusted to exclude:
> (A) financing charges or interest;
> (B) sales or use taxes charged on the purchase price;
> (C) uncollectible amounts on property that remain in the possession of the seller until the full purchase price is paid;
> (D) expenses incurred in attempting to collect any debt; and
> (E) repossessed property.
> . . .

(Emphasis added).

Next, Taxpayer states that it operated on an accrual basis and that it reported its Federal and Indiana income tax on an accrual basis. Taxpayer protests that the Department's calculations of sales tax due from Taxpayer as a retail merchant were based on the assumption that Taxpayer reported on a cash basis. IC § 6-2.5-6-2 states:

> A retail merchant may, without prior departmental approval, report and pay his state gross retail and use

> taxes on an accrual basis, if he uses the accrual basis to pay and report the adjusted gross income tax or the tax imposed on him in place of the adjusted gross income tax. The department may, at any time, require the retail merchant to stop using the accrual basis.

Taxpayer however, argues that during a previous audit the Department advised Taxpayer that it qualified for the bad debt deduction and provided Taxpayer with a worksheet to show how to calculate the deduction.

45 IAC 15-3-2(e) provides that, "oral opinions or advice will not be binding upon the department." In the previous audit, the Department not only told Taxpayer he qualified for the bad debt deduction on its sales tax, but showed Taxpayer how to calculate the bad debt. Thus, Taxpayer properly relied on the Department's advice no matter how erroneous it was. Thus, in this instance only, any adjustment made pursuant to the "bad debt" sales tax deduction based on Taxpayer's accounting method only is sustained. Taxpayer is on notice that going forward both sales tax and income tax returns must be based on the same method of accounting.

The Department also assessed sales tax on transactions included in Taxpayer's "bad debt" deduction, but which were for repossessed vehicles. As stated above, any repossessed vehicles will not qualify for the sales tax bad debt deduction. IC § 6-2.5-6-9(d). Repossessed vehicles do not qualify for the "bad debt" deduction because when a dealership gets the vehicle back, there is no loss to receive a bad debt; in other words when the dealership gets the vehicle back, it is made whole. Taxpayer explained that he did not repossess the vehicles. Taxpayer allows its customer to return the vehicles without the detriment that repossession causes the customers. Taxpayer however does not return any portion of the price or sales tax to its customers. Taxpayer's actions, while beneficial to the customer are not a true return. They are a "voluntary repossession." Therefore based on IC § 6-2.5-6-9(d), Taxpayer cannot deduct sales tax paid on the "voluntary repossessed" vehicles.

FINDING

Taxpayer's protest is sustained regarding the sales tax bad debt deduction adjustments based on its accounting methodology. Taxpayer's protest regarding repossessed vehicles is denied.

II. Tax Administration–Penalty.

Taxpayer requested that the Department abate the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1(a), the Department may assess a negligence penalty if the taxpayer:

> (1) fails to file a return for any of the listed taxes;
> (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
> (3) incurs, upon examination by the department, a deficiency that is due to negligence;
> (4) fails to timely remit any tax held in trust for the state; or
> (5) is required to make a payment by electronic funds transfer (as defined in IC 4-8.1-2-7), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department.

45 IAC 15-11-2(b) further 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.

The Department may waive a negligence penalty when "the taxpayer affirmatively establishes that the failure . . . was due to reasonable cause and not due to negligence." 45 IAC 15-11-2(c). 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." Id. The Department is mindful that "[r]easonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case." Id.

In this instance, Taxpayer has demonstrated that its actions were reasonable as described in 45 IAC 15-11-2(c).

Thus, Taxpayer's request for penalty abatement is sustained.

FINDING

Taxpayer's protest of the negligence penalty is sustained.

SUMMARY

Taxpayer's protest regarding the bad debt deduction is sustained in part and denied in part. Taxpayer's protest regarding negligence penalty is sustained.

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An html version of this document.