

**Letter of Findings: 02-20160556
Income Tax
For the Years 2011 and 2012**

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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Given its shareholder/owners' decision to plead guilty to underreporting the Restaurant's business income, the Department rejected Indiana Restaurant's argument that the assessment of additional corporate income tax was unjustified; given the pervasive underreporting of income, the Department rejected the Restaurant's argument that the assessment was barred by the three-year statute of limitations.

ISSUES

I. Income Tax - Unreported Income.

Authority: IC § 6-3-4-13; IC § 6-8.1-5-1(b); IC § 6-8.1-5-1(c); Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); [45 IAC 3.1-1-8](#).

Taxpayer argues that the Department failed to establish by clear and convincing evidence that Taxpayer's original tax returns did not correctly report the amount of actual sales which occurred at its business location.

II. Income Tax - Statute of Limitations.

Authority: IC § 6-8.1-5-1(c); IC § 6-8.1-5-2(a); IC § 6-8.1-5-2(f); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Leehaug v. State Bd. of Tax Comm'rs, 583 N.E.2d 211 (Ind. Tax Ct. 1991).

Taxpayer maintains that the assessment of additional income tax is barred by the three-year statute of limitations.

STATEMENT OF FACTS

Taxpayer is an Indiana restaurant and tavern which operates as an S Corporation. The Indiana Department of Revenue ("Department") initiated an investigation of Taxpayer's business practices and its available records. The Department's "Special Investigation Division" and "Enforcement Division" executed search warrants of Taxpayer's various business locations.

As a result of that investigation, members of those Divisions reviewed the records obtained during the search along with Taxpayer's bank account information. As a result of the Department's review of that information, the Department determined that Taxpayer had under-reported the amount of Taxpayer's restaurant sales and thereby underreported its income and income tax which the S Corporation is responsible for withholding and remitting on behalf of its non-resident shareholders.

The Department assessed additional income tax which Taxpayer, as an S Corporation is responsible for withholding and remit on behalf of its shareholders. The Department also assessed penalty. Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted and this Letter of Findings results.

I. Income Tax - Unreported Income.

DISCUSSION

Taxpayer argues that the Department has failed to establish "by clear and convincing evidence" that the amount of its income - as originally reported on its 2011 and 2012 returns - was incorrect. According to Taxpayer, the "proposed assessments for tax years 2011 and 2012 are invalid."

The Department's audit report relied on [45 IAC 3.1-1-8](#) as the basis for determining Taxpayer's "adjusted gross income." As explained in the audit report:

S Corporations are pass through entities; the income/loss will be passed through to the shareholders' return unless the shareholder is an out-of-state resident. In the case of out of state shareholder(s) the S Corporation is required to file composite returns on behalf of the shareholder(s) and tax is due from S Corporation on behalf of the out of state shareholder. See IC § 6-3-4-14.

Bearing in mind that Taxpayer's shareholder/owners were charged with and subsequently pled guilty to criminal charges of underreporting their business income, the Department exercised its authority - and responsibility - under 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.

(Emphasis added).

Nonetheless, the Department takes note of the Taxpayer's objections to this assessment and in particular to Taxpayer's argument the Department failed to prove that the assessment was correct. However, this assessment of income tax, as with any Department assessment which is reasonably based on the best information available, is presumed to be correct and it is the Taxpayer - and not the Department - which has the responsibility of establishing that the assessment is wrong. 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 Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Thus, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position 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); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012). In reviewing a taxpayer's argument, the Indiana Supreme Court has held, that when it examines a statute that an agency is "charged with enforcing . . . we 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).

Taxpayer has made generalized arguments that the assessment is based on speculation and that it "has difficulties in determining how and why the Department has chosen to believe that [Taxpayer] uses a 3.5 multiplier of its costs of goods sold in fashioning its menu pricing." However, Taxpayer has not supplied a cogent, specific, documented argument which would reasonably be substituted for the Department's calculated assessment.

FINDING

Taxpayer's protest is denied.

II. Income Tax - Statute of Limitations.**DISCUSSION**

The Department issued proposed assessments of additional corporate income tax for the years 2011 and 2012. However, Taxpayer states that the criminal tax charges were "not even filed until May of 2015." Therefore, Taxpayer concludes that the assessments are barred by the three-year statute of limitations.

As a threshold issue, it remains Taxpayer's responsibility to establish that the existing tax assessment is incorrect because it is barred by the statute of limitations. 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 Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Taxpayer argues that the assessments are barred by the three-year statute of limitations set out at IC § 6-8.1-5-2(a). The statute provides in part as follows:

Except as otherwise provided in this section, the department may not issue a proposed assessment under section 1 of this chapter more than three (3) years after the latest of the date the return is filed, or either of the following: (1) The due date of the return.

However, IC § 6-8.1-5-2(f) provides:

If a person files a fraudulent, unsigned, or substantially blank return, or if a person does not file a return, there is no time limit within which the department must issue its proposed assessment.

The issue of whether the assessments are barred arises under IC § 6-8.1-5-2(a) because the Taxpayer calculates that the assessments were made outside the three-year limitations. Even accepting Taxpayer's calculations, the assessments are not barred because Taxpayer filed fraudulent returns as plainly evidenced by the owner's decision to plead guilty of stealing sales tax collected from Taxpayer's customers or failing to collect sales tax from those customers. In addition, the reports issued by the Department's Special Investigation Division provide stark and detailed evidence that Taxpayer failed in its obligation to collect, properly account for, report, and remit Indiana sales tax.

The Department concludes that IC § 6-8.1-5-2(f) says what it means and means what it says. As the Tax Court has explained, statutory construction starts with the "plain and ordinary meaning of the language used." *Leehaug v. State Bd. of Tax Comm'rs*, 583 N.E.2d 211, 212 (Ind. Tax Ct. 1991). IC § 6-8.1-5-2(f) provides in "plain and ordinary" language if a person files a "fraudulent" return, "there is no time limit within which the department must issue its proposed assessment."

FINDING

Taxpayer's protest is denied.

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