

**Letter of Findings: 04-20160509**  
**Gross Retail Tax**  
**For the Years 2013, 2014, and 2015**

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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Following an assessment of additional sales tax, the Department declined to accept Indiana Grocery Stores' calculation of the stores' exempt sales; however, the Department agreed to review the Grocery Stores' federally audited gross receipts and to adjust the sales tax assessment following a review of that federal audit.

### ISSUE

#### I. Gross Retail Tax - Calculated Liabilities.

**Authority:** IC § 6-2.5-2-1(a); IC § 6-2.5-2-1(b); IC § 6-2.5-9-3; IC § 6-8.1-5-1(c); IC § 6-8.1-5-4(a); IC § 6-8.1-5-4(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 2.2-4-1](#).

Taxpayer argues that the Department's assessment of additional sales tax is incorrect because the assessment is based on an overstatement of Taxpayer's gross retail sales and Taxpayer's non-exempt sales.

### STATEMENT OF FACTS

Taxpayer is an Indiana business which operates two grocery stores. The Indiana Department of Revenue ("Department") conducted an audit of Taxpayer's business records and tax returns.

The audit resulted in an assessment of additional sales tax. Taxpayer disagreed with the assessment and submitted a protest to that effect. Taxpayer's representative chose not to take part in the scheduled administrative hearing but asked that the protested issues be addressed based on the supplemental documentation supplied. This Letter of Findings results from a review of that documentation and the written protest letter.

#### I. Gross Retail Tax - Calculated Liabilities.

### DISCUSSION

The issue is, in the absence of sales records, whether the Department's assessment of additional sales tax was based on insufficient or incorrect information and that the amount of tax actually owed is less than originally assessed.

#### A. Audit Results.

The audit report states that Taxpayer "failed to provide records of the business activity for the audit years 2013, 2014, and 2015" and that the Department had made "multiple requests" for financial records to which Taxpayer failed to respond.

In the absence of source records, the audit reviewed Taxpayer's 2007 federally audited income tax return. The 2007 return was the best information available to the Department during the audit. According to the audit report, the information from the return "was utilized to project the Taxpayer's total sales" by "work[ing] backward to arrive at gross receipts."

The audit referenced Bizstats to determine "the income and expense percentages for a food, beverage, and liquor store . . . ." The audit then referenced the "Bureau of Labor Statistics . . . to determine the rate of inflation for 2008 through 2015" and "determine the inflation adjusted sales for the years 2008 through 2015."

The audit report also noted that Taxpayer in 2008 had expanded from one sales location to two. The audit extrapolated the amount of sales at this second location by comparing the "square footage for each business location . . . ."

The audit concluded that Taxpayer had overstated the amount of its exempt sales. As explained in the audit report:

The percentage of exempt sales that was reported by the Taxpayer was found to be unreasonable due to the fact that the Taxpayer reported an average of 94[percent] exempt sales during the audit period. After conducting [T]axpayer store visits and viewing the amount of floor and shelf space devoted to taxable and tax exempt products and completing an analysis of a similar grocery store in the same area, a better estimate of 74[percent] exempt sales was figured.

In addition, the audit noted that Taxpayer's employees "hand-keyed" sales at the point-of-purchase registers and that each cashier individually determined the taxability of each individual item. For these reasons, "[T]he exempt percentage reported by the [T]axpayer was deemed unacceptable and was adjusted by the auditor."

The auditor cited [45 IAC 2.2-4-1](#) as authority of assessing the additional tax. The regulation provides:

- (a) Where ownership of tangible personal property is transferred for a consideration, it will be considered a transaction of a retail merchant constituting selling at retail unless the seller is not acting as a "retail merchant".
- (b) All elements of consideration are included in gross retail income subject to tax. Elements of consideration include, but are not limited to:
  - (1) The price arrived at between purchaser and seller.
  - (2) Any additional bona fide charges added to or included in such price for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other services performed in respect to or labor charges for work done with respect to such property prior to transfer.

## **B. Taxpayer's Response.**

Taxpayer acknowledged that the audit was forced to rely on estimated total sales which - according to Taxpayer - may "appear[] to be reasonable," but are "in fact ridiculously incorrect."

Taxpayer also disagrees with the audit's calculation of exempt sales. To that end, Taxpayer argues that it is not a "main stream" grocery store and has devoted a large portion of its stores to the "sale of beer, wine and soft drinks." Taxpayer states that a substantial portion of these beverages "expire before selling, and must be destroyed." According to Taxpayer, because its sales of beer, wine, and soft drinks "bring in little income relative" to the stores' floor space, the audit's method of determining exempt sales is "not relevant to [Taxpayer]." Taxpayer provided a spreadsheet which - according to Taxpayer - establishes that its taxable sales "are approximately 5 percent of total sales." In support of its argument, Taxpayer provided a separate federal audit report for the years 2008 through 2011. That audit report was completed in late 2016.

## **C. Hearing Analysis.**

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A retail merchant - such as Taxpayer - is required to "collect the tax as agent for the state." IC § 6-2.5-2-1(b). The retail merchant "holds those taxes in trust for the state and is personally liable for the payment of those taxes . . . ." IC § 6-2.5-9-3.

It is necessary here to point out that "[e]very 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 tax by reviewing those books and records." IC § 6-8.1-5-4(a). In addition, IC § 6-8.1-5-4(c) provides that, "A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times." IC § 6-8.1-5-4(c).

The proposed assessment constitutes evidence that the Department's claim for the unpaid tax is valid, and each taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); 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).

Therefore, under Indiana law, Taxpayer: (1) is acting as a "retail merchant" required to collect tax from its customers, hold those taxes in trust for the state, and is "personally liable" for payment of those taxes; (2) is required to keep adequate "books and records" and make those records available to the "department or its authorized agents . . ."; (3) and is now required to prove that the pending assessment was "incorrect."

#### **D. Conclusion.**

In support of its position that the audit's calculation of its gross receipts was erroneous, Taxpayer has provided copies of a federal audit which documents gross sales for the years 2008, 2009, 2010, and 2011. The Audit Division is requested to review the results of the federal audit and to make whatever adjustments to the pending sales tax assessment which it deems are warranted by that additional information.

However, the Department does not agree that Taxpayer has provided sufficient evidence to establish that ninety-five percent of its sales are exempt. Taxpayer's explanation and calculation are entirely speculative and - in the absence of more reliable and definitive documentation - the audit's calculation of exempt and non-exempt sales stands.

#### **FINDING**

Taxpayer's protest is sustained in part and denied in part. The Department's Audit Division is requested to review the federal audit and to make whatever necessary adjustment to the gross receipts calculation that it deems appropriate. The Department does not accept Taxpayer's calculation of its exempt sales.

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