

Letter of Findings 04-20160659
Gross Retail Tax
For the Years 2009 through 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Despite the fact that Out-of-State business declined to provide records requested during the course of the original sales tax audit, the Department - following the administrative protest - agreed to review additional records of out-of-state sales to Indiana customers and to adjust the assessment as justified by that review

ISSUE

I. Gross Retail Tax - Calculation.

Authority: 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).

Taxpayer argues that the Department's assessment of additional sale/use tax is overstated.

STATEMENT OF FACTS

Taxpayer is an out-of-state company in the business of cultivating, distributing, and installing grasses (sod) for its commercial customers and its homeowner customers. Taxpayer sells its products both within its home state and within Indiana.

The Indiana Department of Revenue {"Department"} conducted a sales and use tax audit of Taxpayer's business records. The audit noted that Taxpayer was not registered as an Indiana retail merchant.

At the outset, the Department found one instance in which Taxpayer had transported and sold its lawn grass to an Indiana customer. The audit determined that "the delivery of turf-sod is considered to take place in Indiana for sales and use tax purposes"

Taxpayer advised the auditor that it sold and delivered sod to other Indiana customers. Taxpayer's employee further advised the auditor that there were 34 other Indiana customers for which Taxpayer had transported and sold.

Taxpayer repeatedly declined to provide the Department's audit with further documentation. In the face of Taxpayer's decision not to present the requested information, the Department concluded the audit and issued the audit report..

Subsequently, Taxpayer decided to supply some of the requested documents related to the 34 Indiana transactions; Taxpayer supplied 15 of the requested 34 documents. The audit incorporated information from the 15 documents. The audit decided to issue an audit report based on the 15 invoices on hand and estimated the value of the missing invoices. As explained in the audit report:

Auditor has made an inference that [T]axpayer's business was a growing business, and therefore, the amount of taxable Indiana sales would decrease as auditor projected the taxable sales back to 2009. With this information, auditor determined a percentage change between 2013 and 2014 as the base year. This was accomplished by using the change in sales amount as the numerator and the 2014 taxable sales as the

denominator. Then by deducting the percentage change from 100[percent], auditor determined that the taxable Indiana sales are estimated to be 94.57[percent] of the preceding years taxable sales as the work paper indicates

The audit's examination resulted in an assessment of additional sales tax. Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted by telephone during which Taxpayer's representative explained the basis for the protest. This Letter of Findings results.

I. Gross Retail Tax - Calculation.

DISCUSSION

Taxpayer maintains that the Department erred in determining the amount of additional sales tax it owes. The issue is whether Taxpayer has provided sufficient documentation to justify a modification of the audit assessment.

The proposed audit 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).

Taxpayer does not disagree that it should have been collecting seven-percent sales tax from its Indiana customers. Instead, Taxpayer criticizes the audit's method of arriving at the amount of sales tax now due. The Department finds this criticism wholly unwarranted in light of the Taxpayer's decision to withhold more than one-half of the documents requested at the time of the audit. The "methodology" employed during the audit was the only reasonable alternative available to the auditor.

Indiana law specifically requires that, "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 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."

If there is any criticism to be had, it is more properly directed to Taxpayer for failing to provide the documents requested. That failure resulted in the expenditure of additional time and work on the part of the auditor and additional time and work in an attempt at this late date to reconstruct the record and revisit issues and documents which were more properly - and efficiently - addressed at the time of the audit.

Nonetheless, Taxpayer has provided a "schedule" of its Indiana transactions along with numerous invoices. Although the Department is not prepared to agree that Taxpayer has met its statutory burden under IC § 6-8.1-5-1(c) of establishing that the original assessment was "wrong," the Department does agree that the documentation warrants consideration by the Department's Audit Division. Following that review, the Audit Division is requested to make whatever adjustment to the assessment that may be warranted.

FINDING

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