

**Letter of Findings: 04-20160663**  
**Sales Tax**  
**For Tax Years 2013, 2014, & 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 Indiana Department of Revenue'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 This document is effective as of its date of publication and remains in effect until the date it is superseded by the publication of another document in the Indiana Register.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

Indiana Restaurant was properly assessed gross retail tax on pizza delivery charges. Restaurant was entitled to abatement of negligence penalty because it demonstrated that its failure to collect and remit sales tax was not due to willful neglect.

### ISSUES

#### I. Gross Retail Tax - Delivery Charges.

**Authority:** IC § 6-2.5-1-1; IC § 6-2.5-2-1; IC § 6-2.5-1-5; IC § 6-2.5-9-3; IC § 6-8.1-5-1; Dep't 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); 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](#); Commissioner's Directive 23 (July 2013).

Taxpayer protests the Department's imposition of gross retail tax on delivery charges.

#### II. Tax Administration - Penalty.

**Authority:** IC § 6-8.1-10-1; IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of negligence penalties.

### STATEMENT OF FACTS

Taxpayer is an Indiana pizza restaurant franchisee that provides delivery services for the food it sells. The Indiana Department of Revenue ("Department") conducted a sales/use tax audit of Taxpayer for the 2013, 2014, and 2015 tax years and issued proposed assessments for additional amounts of sales tax, penalties and interest. Among the sales tax adjustments, the Department determined that Taxpayer failed to collect and remit retail sales tax on delivery charges.

Taxpayer protested the audit's assessment of additional retail sales tax on these delivery charges. An administrative hearing was held and this Letter of Findings results. Additional facts will be provided as necessary.

#### I. Gross Retail Tax - Delivery Charges.

### DISCUSSION

Taxpayer disputes the imposition of retail sales tax on delivery fees charged to customers for delivery of prepared food.

As an initial matter, the Department notes that all tax assessments are prima facie evidence that the Department's claim for the tax is valid, and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Sq. Amoco, Inc. v. Ind. Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Ind. 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. 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." Dep't of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579, 583 (Ind. 2014).

Taxpayer, as a registered retail merchant, is responsible for collecting and remitting sales tax on retail transactions. "The retail merchant is required to collect the tax [due on the retail transaction] as [an] agent for the state." IC § 6-2.5-2-1(b). The retail merchant "has a duty to remit Indiana [sales] or use taxes . . . to the department, [to] hold those taxes in trust for the state, and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state." IC § 6-2.5-9-3(2). Thus, when a retail merchant fails to collect and hold the taxes in trust for the state, the retail merchant is personally liable for the sales tax, interest, and penalties due to the state for those sales.

Indiana imposes a sales tax on retail transactions and a complementary use tax on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-1-1 et seq.

IC § 6-2.5-2-1 provides:

- (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.

[45 IAC 2.2-4-1](#) further illustrates:

(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.

**(3) No deduction from gross receipts is permitted for services performed or work done on behalf of the seller prior to transfer of such property at retail.**

IC § 6-2.5-1-5, in pertinent part, provides:

(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, handling, crating, and packing. **(Emphasis added)**.

Commissioner's Directive 23 (July 2013), 20130828 Ind. Reg. 045130394NRA, which replaces Commissioner's Directive 23 (April 2004), specifically addresses the issue concerning taxability of food delivery charges. Commissioner's Directive 23, in relevant part, states:

#### STATUTORY CHANGES

P.L. 257-2003 amended [IC 6-2.5-1-5](#) concerning the definition of "gross retail income." **That amendment included delivery and installation in the definition of gross retail income, the amount in a transaction subject to Indiana sales tax.** HEA 1365-2004 removed installation from the definition of gross retail income and amended [IC 6-2.5-4-1](#) to state that the transfer of tangible personal property in a retail transaction does not take place until after delivery.

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#### DELIVERY CHARGES

Delivery charges consist of transportation, shipping, crating, handling, packing, and postage charges that are not separately stated on the invoice, bill of sale, or similar document. SEA 0608-2013 removed from the definition of delivery charges "postage charges that are separately stated on the invoice, bill of sale, or similar document." Accordingly, separately stated postage charges do not constitute gross retail income and are not subject to sales tax.

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**Other items of note include the application of sales tax to delivery charges for prepared food** and tangible personal property incorporated into real property, as well as registration requirements for certain transportation companies.

When separately stated, sales tax does not apply to charges for serving or delivering food and food ingredients furnished, prepared, or served for consumption at a location or on equipment provided by a retail merchant. **However, charges for delivery of prepared food beyond the seller's location and not served on the seller's equipment are subject to sales tax.**

**Example #6 - A pizza parlor imposes a \$3 charge to deliver pizzas to a customer's residence. The \$3 delivery charge is subject to sales tax.**

Example #7 - A merchant caters an event at a location leased by the caterer. As a separate charge on the customer's invoice, the caterer charges the customer \$100 for delivering and serving the food. The \$100 is not subject to sales tax.

Example #8 - A merchant caters an event at a location provided by the customer. As a separate charge on the customer's invoice, the caterer charges the customer \$100 for delivering and serving the food. The \$100 is subject to sales tax. **(Emphasis added)**.

It is well-established under Indiana law, including IC § 6-2.5-1-5(a)(4), that delivery fees are subject to Indiana gross retail tax. Taxpayer argues that it should not be held responsible for the sales tax assessed during the audit because other similar taxpayers have not been assessed sales tax for food delivery charges by the Department. However, IC § 6-2.5-2-1 places an affirmative obligation on retail merchants to collect sales tax as agents for the state, and other taxpayers' failure to comply with this statutory duty does not excuse Taxpayer from the same duty. Taxpayer has not met its burden under IC § 6-8.1-5-1(c) of showing that the Department's assessment of sales tax on delivery charges during the audit period is incorrect.

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**FINDING**

Taxpayer's protest is respectfully denied.

**II. Tax Administration - Penalty.****DISCUSSION**

Taxpayer protests the imposition of penalties pursuant to IC § 6-8.1-10-2.1. The Department notes that waiver of interest is not permitted under IC § 6-8.1-10-1(e). 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 provided documentation showing that another restaurant within the same pizza restaurant franchise was previously audited by the Department for tax years 2008 through 2010 and that the Department determined the taxpayer was in "substantial compliance" with Indiana sales tax regulations governing the reporting and remitting of the gross retail tax; no additional sales tax was assessed on that taxpayer's delivery fees. Taxpayer and the previously audited restaurant, as part of the same franchise, share the same accountant. Taxpayer's accountant stated that as soon as the Department notified Taxpayer that they had improperly failed to collect sales tax on delivery fees, Taxpayer immediately corrected its point-of-sale software to start collecting the tax, and Taxpayer's accountant also made the same correction for other franchisees she represented.

While taxpayers generally may not rely upon the audits of unrelated entities, Taxpayer's reliance upon the Department's conclusion that a franchisee within the same franchise, represented by the same accounting firm, was in substantial compliance with Indiana law does not amount to willful neglect. Therefore, the Department concludes that Taxpayer is entitled to abatement of the negligence penalty. However, Taxpayer is on notice that, going forward, failure to collect sales tax on delivery fees would amount to negligence.

**FINDING**

Taxpayer's protest of the negligence penalties is sustained.

**SUMMARY**

Taxpayer's Issue I protest regarding the imposition of sales tax on food delivery charges is denied. Taxpayer's Issue II protest regarding abatement of the negligence penalty is sustained.

*Posted: 04/26/2017 by Legislative Services Agency*

An [html](#) version of this document.