

## DEPARTMENT OF STATE REVENUE

04-20170750R.ODR

**Final Order Denying Refund: 04-20170750R  
Sales and Use Tax  
For Tax Years 2009, 2010, & 2011**

**NOTICE:** IC § 4-22-7-7 permits the publication of this document in the Indiana Register. The publication of 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. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Final Order Denying Refund.

### HOLDING

Indiana Convenience Store and Gas Station was not entitled to refund of fraud penalty assessed during audit because the Department demonstrated that the taxpayer fraudulently underreported gasoline sales tax.

### ISSUE

#### **I. Tax Administration - Penalty.**

**Authority:** IC § 6-8-1-24; IC § 6-8.1-5-1; IC § 6-8.1-10-4; Lafayette Sq. Amoco. Inc. v. Ind. Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Ind. Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); [45 IAC 15-11-4](#); [45 IAC 15-5-7](#).

Taxpayer protests the imposition of a 100 percent fraud penalty.

### STATEMENT OF FACTS

Taxpayer operated a combination convenience store and gas station in Indiana. As the result of an audit conducted in 2013, the Indiana Department of Revenue ("Department") issued proposed assessments for sales and use tax, plus interest and 100 percent fraud penalties on adjustments to sales tax for tax years 2009, 2010, and 2011. Taxpayer paid the assessment and timely submitted a GA-110L claim for refund form on September 17, 2015. However, due to Department error, Taxpayer never received the refund denial letter. Taxpayer submitted a second GA-110L claim for refund form on October 12, 2016. Taxpayer received a denial letter from the Department for the second refund claim in December 2016, which was denied based on the claim being filed outside of the statute of limitations.

Taxpayer protests the Department's refund denial. An administrative hearing was held and this Final Order Denying Refund results. Further facts will be addressed as necessary.

#### **I. Tax Administration - Penalty.**

### DISCUSSION

Taxpayer protests the imposition of the 100 percent fraud penalty for tax years 2009, 2010, and 2011. Taxpayer does not protest the imposition of the base sales tax or interest. Taxpayer argues that the penalty should be waived or, alternatively, it should only be subject to the 10 percent negligence penalty for those years. Because Taxpayer never received a refund denial letter for its first refund claim, the Department will treat its second refund claim as timely for purposes of the statute of limitations and the instant protest.

Although Taxpayer technically protested the Department's refund denial, it actually protested the audit's assessment of the 100 percent fraud penalty. Thus, 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 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 and that it is entitled to the requested refund.

The fraud penalty is imposed under IC § 6-8.1-10-4, which states:

- (a) If a person fails to file a return or to make a full tax payment with that return with the fraudulent intent of

evading the tax, the person is subject to a penalty.

(b) The amount of the penalty imposed for a fraudulent failure described in subsection (a) is one hundred percent (100 [percent]) multiplied by:

(1) the full amount of the tax, if the person failed to file a return; or

(2) the amount of the tax that is not paid, if the person failed to pay the full amount of the tax.

(c) In addition to the civil penalty imposed under this section, a person who knowingly fails to file a return with the department or fails to pay the tax due under [IC 6-6-5](#), [IC 6-6-5.1](#), or [IC 6-6-5.5](#) commits a Class A misdemeanor.

(d) The penalty imposed under this section is imposed in place of and not in addition to the penalty imposed under section 2.1 of this chapter.

The fraud penalty is further explained in [45 IAC 15-11-4](#), which states:

The penalty for failure to file a return or to make full payment with that return with the fraudulent intent of evading the tax is one hundred percent (100 [percent]) of the tax owing. Fraudulent intent encompasses the making of a misrepresentation of a material fact (See [45 IAC 15-5-7\(f\)\(3\)](#)) which is known (See [45 IAC 15-5-7\(f\)\(3\)\(B\)](#)) to be false, or believed not to be true, in order to evade taxes. Negligence, whether slight or great, is not equivalent to the intent required. An act is fraudulent if it is an actual, intentional wrongdoing, and the intent required is the specific purpose of evading tax believed to be owing.

The elements required for a showing of fraud are found under [45 IAC 15-5-7\(f\)](#), which states, in relevant part:

**(3) A person who files a return which makes a false representation(s) with knowledge or reckless ignorance of the falsity will be deemed to have filed a fraudulent return. There are five elements to fraud.**

(A) **Misrepresentation of a material fact:** A person must truthfully and correctly report all information required by the Indiana Code and the department's regulations. Any failure to correctly report such information is a misrepresentation of a material fact. Failure to file a return may be a misrepresentation.

(B) **Scienter:** This is a legal term meaning guilty knowledge or previous knowledge of a state of facts, such as evasion of tax, which it was a person's duty to guard against. A person must have actual knowledge of the responsibility of reporting the information under contention. However, the reckless making of statements without regard to their truth or falsity may serve as an imputation of scienter for purpose of proving fraud.

(C) **Deception:** Deception operates on the mind of the victim of the fraud. If a person's actions or failure to act causes the department to believe a given set of facts which are not true, the person has deceived the department.

(D) **Reliance:** Reliance also concerns the state of mind of the victim and is generally considered along with deception. If the person's actions, failure to act, or misrepresentations cause the department to rely on these acts to the detriment or injury of the department, the reliance requirement of fraud will be met.

(E) **Injury:** The fraud instituted upon the department must cause an injury. This can be satisfied simply by the fact that the misrepresentation(s) caused the department not to have collected the money which properly belongs to the state of Indiana.

**In order to demonstrate fraud, the department is required to prove all of the above elements are present. This must be shown by clear and convincing evidence. (Emphasis added).**

Taxpayer argues that it believed that its returns were accurate at the time they were filed and should therefore not be subject to the fraud penalty. Further, Taxpayer argues that any errors were due to mistake and not fraudulent intent. However, the auditor relied upon several factual conclusions in making her recommendation that the fraud penalty be imposed on the audit's adjustments to sales tax on gasoline sales. Each element will be addressed in

turn.

### **A. Misrepresentation of Material Fact**

The auditor found that Taxpayer had underreported its gasoline sales subject to sales tax in all but 6 of the 36 month audit period. Taxpayer correctly reported gasoline sales only for January through May 2009, and for March 2011. In addition, total inside sales and exempt sales were proportionally overreported for these same periods. By underreporting the taxable gasoline sales and overreporting the total inside sales and exempt sales, it created the illusion that total sales were accurate when compared to Taxpayer's bank deposit records and total sales for income tax purposes.

Furthermore, the auditor noted the following in the fraud penalty recommendation memo:

[T]he underreported gasoline sales appear to follow a distinct pattern as opposed to occurring relative to the various "clerical" type errors. The underreported gasoline sales were "off" by even amounts such as 13,000, 14,000, 13,700, 22,800, and 22,700. In fact, for the consecutive months of December-2010 and January-2011, the gasoline sales were underreported in both months by the same amount; 22,700. These amounts do not represent typical clerical type errors such as transposition errors or acts of simple duplication or omission where a daily amount may simply be keypunched twice or not at all when adding the monthly totals. Also, no material "errors" were discovered in the reported number of gallons sold. The "errors" were only found to be associated with the gasoline sales dollars figures, with which the sales tax is dependent upon being calculated. Additionally, typical clerical errors would appear to have a reasonable chance or probability of resulting in both favorable and unfavorable outcomes for the taxpayer. Yet, all "errors" resulted in a favorable outcome for the taxpayer, i.e. reduction in tax due.

The auditor concluded that the adjustments to sales tax for the audit period was due to falsified gasoline sales being reported on Taxpayer's monthly sales tax returns ("ST-103MP"), and found that Taxpayer had misrepresented material facts by not only underreporting gasoline sales, but also overreporting inside and exempt sales in the same proportion. The Department finds that Taxpayer made misrepresentations of material facts on its monthly returns, thus the first element of fraud has been satisfied.

### **B. Scienter**

The auditor found that Taxpayer knew of its responsibility of accurately filing its monthly sales tax reports. Taxpayer had accurately reported gasoline sales in the first 5 months of 2009, and thus knew how sales should have been reported on the monthly returns. In addition, the auditor found that Taxpayer had correctly and accurately reported diesel sales during the audit period, which come from the same area of the daily z-tapes and has the same instructional language for the reporting requirements as gasoline sales.

Taxpayer asserted that the reporting errors were due to mistakes made by an employee in noting whether a sale was exempt or non-exempt at the point of sale. However, the auditor noted that the vice-president/chief financial officer was the individual who prepared the monthly returns and/or provided the information to Taxpayer's accountant to prepare the returns. Simple employee error does not account for the nature and pattern of sales tax underreporting discovered during the audit.

As discussed above, Taxpayer had knowledge of how much of its gasoline sales were being underreported, and the pattern of underreporting gas sales and overreporting inside and exempt sales does not show that it was due to clerical mistakes or some other innocent reason. The Department concludes that the scienter element of fraud has been met.

### **C. Deception**

The element of deception has been met because the Department believed that Taxpayer's sales tax had been appropriately and sufficiently remitted, and this belief turned out not to be true. Taxpayer did in fact generate more gasoline sales than originally reported in all but 6 of the 36 month audit period.

### **D. Reliance**

The Department concludes that the element of reliance has been met because the Department relied upon Taxpayer to report its total taxable sales accurately and remit the correct tax due.

### **E. Injury**

The Department - as well as the citizens of this state - were injured by Taxpayer's failure to remit thousands of dollars of tax due because of Taxpayer's material misrepresentations, thus the injury element of fraud has been met.

Based upon the foregoing, the Department concludes that it has met its burden of showing, by clear and convincing evidence, that all of the elements of fraud were present during the audit period. Taxpayer failed to make full payment of sales tax with its returns as originally filed, and the audit findings show that Taxpayer had fraudulent intent to evade tax. Taxpayer has not provided any supporting evidence, aside from self-serving testimony, to contradict the auditor's findings and show that the underreporting of sales tax was due to negligence. The Department was therefore justified in imposing the 100 percent fraud penalty under IC § 6-8.1-10-4. The Department also notes, "A person who makes a false statement, with intent to defraud the state or to evade the payment of the tax imposed under this chapter, commits a Level 6 felony." IC § 6-8-1-24.

### **FINDING**

Taxpayer's protest is respectfully denied.

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