

DEPARTMENT OF STATE REVENUE

04-20170126.LOF

Letter of Findings Number: 04-20170126
Sales/Use Tax
For Tax Years 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 Department'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 This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Sole proprietor of a catering business received exemption certificates from nonprofits that were for nonexempt sales. Thus exemption certificates were facially invalid and sole proprietor was correctly assessed tax by the Department.

ISSUES

I. Sales/Use Tax—Exemption Certificates.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-2.5-8-8; IC § 6-2.5-9-3; IC § 6-8.1-5-1; Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Indiana Dept. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); [45 IAC 2.2-8-12](#); [45 IAC 2.2-5-55](#).

Taxpayer protests the imposition of sales tax.

II. Tax Administration—Penalty and Interest.

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

Taxpayer protests the imposition of penalty and interest.

STATEMENT OF FACTS

Taxpayer is an individual that operates a catering business. Taxpayer was audited for sales and use tax for the years at issue. As a result of the audit, the Indiana Department of Revenue ("Department") issued a proposed assessment of tax. Taxpayer, in turn, filed a protest with the Department's Legal Division. An administrative hearing was held, and this Letter of Findings ("LOF") results. Additional facts will be provided below.

I. Sales/Use Tax—Exemption Certificates.

DISCUSSION

The Department's audit report states that there were two types of sales tax errors—one "was the under-reporting of taxable sales" and that the other type "was the sale of meals to members of nonprofit organizations." Additionally there was use tax assessed, and the proposed assessment also included penalty and interest. Taxpayer's protest is regarding the sale of meals to members of nonprofit organizations.

As a threshold issue, it is Taxpayer's responsibility to establish that the existing tax assessment is incorrect. 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 Dept. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing. . . [courts] 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). Thus, all interpretations of Indiana tax law contained within this decision, as well as the preceding audit, shall be entitled to deference.

Taxpayer states in an e-mail to the Department that she is protesting the portion of the assessment relating to four specific organizations (hereinafter referred to as organizations M, W, C, and L). Taxpayer states she did catering for these organizations, and then specifically states:

My protest for [organization W] (not fundraisers) is that they were part of their [c]ampaigns that do, indeed, raise their funds for the year. These meals were not for the [m]embers of [organization W], but people in the [c]ommunity who get involved as part of their attempt to raise funds for the year.

My protest for [organization L] is that these are [w]orkshops where attendees, who are not members or staff of [organization L], paid fees to attend.

Taxpayer's argument is that these organizations are not-for-profits. The Department's audit report states that "Taxpayer is a registered retail merchant with the state of Indiana" For some sales, the audit report notes that "Taxpayer had valid exemption certificates on file" for government entities. For other sales, however, the audit report states:

The taxpayer failed to collect sales tax on numerous sales of meals to nonprofit organizations. The meals were served to its members. The taxpayer had erroneously accepted exemption certificates from these nonprofit organization instead of collecting sales tax.

Turning to the applicable law, 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 states in part:

- (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. (Emphasis added).

. . . .

The Department also refers to IC § 6-2.5-4-1, which states in relevant part:

- (a) A person is a retail merchant making a retail transaction when the person engages in selling at retail.
- (b) A person is engaged in selling at retail when, in the ordinary course of the person's regularly conducted trade or business, the person:
 - (1) acquires tangible personal property for the purpose of resale; and
 - (2) transfers that property to another person for consideration.
- (c) For purposes of determining what constitutes selling at retail, it does not matter whether:
 - (1) the property is transferred in the same form as when it was acquired;
 - (2) the property is transferred alone or in conjunction with other property or services; or
 - (3) the property is transferred conditionally or otherwise.

. . . .

Next, IC § 6-2.5-9-3 provides:

An individual who:

- (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and
- (2) has a duty to remit state gross retail or use taxes (as described in [IC 6-2.5-3-2](#)) to the department; holds 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. If the individual knowingly fails to collect or remit those taxes to the state, he commits a Level 6 felony. (Emphasis added).

Therefore, when a retail merchant does not collect and remit the proper amount of sales tax on its sales to its customers, the retail merchant is liable for that sales tax.

Regarding exempt sales and exemption certificates, IC § 6-2.5-8-8(a) states:

A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase. (Emphasis added).

Exercising its statutory authority, the Department created Form ST-105, the "Indiana General Sales Tax Exemption Certificate." Pertinently, Form ST-105 requires the issuer to provide the following information: name, address, date, account number, description of the property being purchased, basis for exemption, and a signature certifying that the property will be used for an exempt purpose.

The auditor reviewed the exemption certificates at issue and found:

Taxpayer provided meals to members of various nonprofit organizations during the audit period. The nonprofit organizations issued, and the taxpayer accepted, exemption certificates in error. However, according to [45 IAC 2.2-5-55](#), sales of meals at meetings are taxable because the meals are provided for the convenience of the organization and its members. Such sales are taxable even when served in conjunction with a meeting which is furthering their not-for-profit purpose.

Regarding Taxpayer's argument, without citing to the IAC her argument nonetheless seemingly relies upon [45 IAC 2.2-8-12\(c\)](#), which states:

All retail sales of tangible personal property for delivery in the state of Indiana shall be presumed to be subject to sales or use tax until the contrary is established. The burden of proof is on the buyer and also on the seller unless the seller receives an exemption certificate.
(Emphasis added)

However, as noted above, IC § 6-2.5-8-8(a) states in pertinent part that the "person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase." Of importance in that statute is that it has to be a "proper exemption certificate." As [45 IAC 2.2-8-12\(f\)](#) also states, "An exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed." In the case at hand the exemption certificates were not proper pursuant to IC § 6-2.5-8-8(a). The Department's "General Sales Tax Exemption Certificate" (Form ST-105) states in part:

Sales to **nonprofit organizations** claiming exemption pursuant to Sales Tax Information Bulletin #10. (May not be used for personal hotel rooms and meals.)

At issue here were sales of catered meals to nonprofits (as Taxpayer's protest correspondence put it regarding Organization W, "people in the Community who get involved as part of their attempt to raise funds for the year."). Whether the meals were for members or volunteers for the organizations, the fact remains that the auditor was correct to state that "the meals [were] provided for the convenience of the organization and its members." As the example found at [45 IAC 2.2-5-55\(d\)\(4\)](#) states: "Sales of meals at medical society meetings are taxable because the meals are provided for the convenience of the organization and its members. Such sales are taxable even when served in conjunction with a meeting which is furthering their not-for-profit purpose." And as previously noted, the Department's exemption form specifically states that the form "[m]ay not be used for personal hotel rooms and meals." Therefore, Taxpayer's protest does not meet the burden of proof as provided by IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is denied.

II. Tax Administration—Penalty and Interest.

DISCUSSION

Taxpayer was also assessed a negligence penalty and interest. Regarding the latter, interest cannot be waived pursuant to IC § 6-8.1-10-1(e). The Department notes that 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. IC § 6-8.1-10-2.1. The Indiana Administrative Code, [45 IAC 15-11-2](#) further provides in relevant part:

(b) "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.

(c) 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.

The largest part of Taxpayer's assessment resulted from her failure to collect sales tax from nonprofits discussed in Section I. The Department finds that Taxpayer's misunderstanding of the exemption certificate forms that were issued to her was reasonable in light of the facts and circumstances. Therefore, Taxpayer is sustained regarding the penalty.

FINDING

Taxpayer's protest of the penalty is sustained; her protest regarding interest is denied.

SUMMARY

Taxpayer's protest is denied in part and sustained in part. She is denied regarding her protest of exemption certificates and she is also denied regarding interest assessed. Her protest of the penalty is sustained.

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