

Letter of Findings: 04-20170091
Sales and Use 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Indiana Company operated a gas station and convenience store failed to demonstrate that it was not responsible for sales tax. Company was liable for the sales tax on some sales inside its convenience store determined by the audit because it failed to maintain adequate records.

ISSUE

I. Sales & Use Tax - Imposition.

Authority: IC § 6-2.5-1-1 *et seq.*; IC § 6-2.5-1-2; IC § 6-2.5-1-27; IC § 6-2.5-2-1; IC § 6-2.5-3-4; IC § 6-2.5-5-1 *et seq.*; IC § 6-2.5-9-3; IC § 6-8.1-5-1; IC § 6-8.1-5-4; *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96 (Ind. Ct. App. 1974); *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480 (Ind. Tax Ct. 2012); [45 IAC 2.2-3-14](#); [45 IAC 2.2-8-12](#).

Taxpayer protests the assessment of sales tax, claiming that the assessment is overstated.

STATEMENT OF FACTS

Taxpayer was an Indiana Limited Liability Company that elected to file as an S Corporation. Taxpayer operated a combination gas station and convenience store in Indiana and ceased its business operation May 15, 2015. Taxpayer sold gasoline at its gas station; it also sold tangible personal property, which included grocery items (taxable or otherwise) and non-grocery items ("In-store Sales").

In early 2016, the Indiana Department of Revenue ("Department") audited Taxpayer's business records for the 2013, 2014, and 2015 tax years ("Tax Years at Issue"). Pursuant to the audit, the Department found that Taxpayer did not maintain adequate sales records and source documents, such as cash register tapes ("Z tapes"), purchase invoices, bank statements and supporting documents to support the exempt sales, as statutorily required.

As a result, the Department's audit resorted to making adjustments based on Taxpayer's federal and state returns pertaining to the tax periods and publicly available industry financial reports as the best information available to determine the proper amount of sales tax Taxpayer should have collected for the Tax Years at Issue. The Department determined that Taxpayer had underreported its sales and made adjustments for additional taxable sales. Based on the best information available during the audit, the Department imposed additional sales tax, negligence penalty, and interest.

Taxpayer protested the assessment. A hearing was held. This Letter of Findings results. Additional facts will be provided as necessary.

I. Sales & Use Tax - Imposition.

DISCUSSION

The Department's audit imposed additional sales tax on the ground that Taxpayer failed to remit the proper amount of sales tax it collected. Taxpayer, to the contrary, argued that the Department's assessment is

overstated.

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 Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); *Indiana 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. 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). IC § 6-8.1-5-4(a) further provides:

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 that tax by reviewing those books and records. **The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks. (Emphasis added).**

The taxpayer "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). "If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department." IC § 6-8.1-5-1(b). Thus, the issue is whether Taxpayer provided sufficient supporting documentation to demonstrate that the Department's proposed assessment – additional sales tax – is not correct.

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.* "Retail transaction" is "a transaction of a retail merchant that constitutes selling at retail as described in IC [§] 6-2.5-4-1 . . . or . . . in any other section of [IC 6-2.5-4](#)." IC § 6-2.5-1-2(a). A person who acquires property in a retail transaction (a "purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). "Tangible personal property," as defined in IC § 6-2.5-1-27, "means personal property that: (1) can be seen, weighed, measured, felt, or touched; or (2) is in any other manner perceptible to the senses," including "electricity, water, gas, steam, and prewritten computer software." The purchaser in general "shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction." IC § 6-2.5-2-1(b). "The retail merchant shall collect the tax as agent for the state." *Id.* Thus, unless the purchaser presents a valid exemption certificate at the time of the transaction, when the retail merchant fails to collect the sales tax, the retail merchant "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; [45 IAC 2.2-8-12](#).

In addition to the statutory mandate of record-keeping, Taxpayer in this instance is a retail merchant selling tangible personal property in Indiana and is responsible for collecting and remitting the sales tax on its In-store Sales unless the customers have provided fully completed exemption certificates to Taxpayer or Taxpayer can provide information to substantiate that the transactions are exempt transactions.

IC § 6-2.5-5-1 *et seq.* outlines specific retail transactions which are exempt from sales or use tax. See also IC § 6-2.5-3-4(a); [45 IAC 2.2-3-14](#). A statute which provides a tax exemption, however, is strictly construed against the taxpayer. *Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." *Id.* at 101 (citing *Conklin v. Town of Cambridge City* (1877), 58 Ind. 130, 133.).

In this instance, the Department's audit found that Taxpayer failed to maintain adequate records as required. The audit noted that Taxpayer "did not keep any z-tapes/receipts, purchase invoices, bank statements or supporting documents" to substantiate the sales, exempt or otherwise. The audit further noted that although Taxpayer contacted its vendors, it was only able to obtain one document in an Excel Worksheet from one vendor (H.T. Hackney Co.). Taxpayer eventually "advised [the Department] that there are no additional records available" during the audit. As a result, the audit resorted to rely on other information, including "the cost of goods sold from the federal tax returns, some information from the ST-103MP [monthly sales tax returns], information from [www.bizstats.com](#), information from [www.eia.gov](#), and information from [www.nacsonline.com](#) as the best information available for determining the additional sales tax due."

During the protest, Taxpayer provided a 33-page distributor's invoice that summarized Taxpayer's gas purchases (including prepay tax credit) from March 15, 2013, through December 26, 2014, to support its protest. Taxpayer however did not explain how its supporting documents will demonstrate that the audit's assessment is wrong.

Upon review, Taxpayer's reliance on its supporting documentation is misplaced. The Excel Worksheet from H.T. Hackney Co. summarized Taxpayer's purchases of items, including candy bars, gum, potato chips, and cigarettes, which presumably it sold inside its store. The Worksheet however is not the required source documentation and it failed to substantiate Taxpayer's sales. IC § 6-8.1-5-4(a). While the 33-page distributor's invoice arguably could be considered as the source document to support what Taxpayer purchased from that petroleum distributor, Taxpayer did not provide any explanation and legal arguments to illustrate how this piece of information showed that the audit assessment was wrong. As mentioned earlier, poorly developed and non-cogent arguments are subject to waiver. *Scopelite*, 939 N.E.2d at 1145 (Ind. Tax Ct. 2010).

In short, given the totality of the circumstance, in the absence of other supporting documents, Taxpayer failed to demonstrate that the assessment was wrong.

FINDING

For the reasons discussed above, Taxpayer's protest of the Department's proposed assessment of additional sales tax is respectfully denied.

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