

**Letter of Findings: 03-20171248**  
**Withholding Tax**  
**For the Years 2014, 2015, and 2016**

**NOTICE:** IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. The 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Following an assessment of additional withholding tax based on the "best information available" to the Department, Indiana Convenience Store failed to establish that the Department's assessment of additional tax was erroneous.

### ISSUE

#### I. Withholding Tax - Imposition.

**Authority:** IC § 6-3-4-8; IC § 6-3-4-8(g); IC § 6-8.1-5-1(b); IC § 6-8.1-5-1(c); *Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer argues that it is not responsible for paying an assessment of additional withholding tax.

### STATEMENT OF FACTS

Taxpayer is an Indiana business which operates a gas station and convenience store. The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's business records and tax returns. The audit resulted in an assessment of additional withholding tax.

Taxpayer disagreed with the withholding tax assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representative explained the basis for the protest. This Letter of Findings results.

#### I. Withholding Tax - Imposition.

### DISCUSSION

The issue is whether Taxpayer has provided sufficient evidence necessary to establish that the proposed assessment of additional withholding tax was wrong.

The Department determined that Taxpayer had underpaid its withholding tax requirement. According to the Department's audit report, the "amount of payroll is far below the industry standard for payroll. Either employees are not being paid the minimum wage for the number of hours worked or the number of hours worked are not all being documented." For example, in 2014 Taxpayer reported approximately \$500 in withholding tax. In both 2015 and 2016, Taxpayer reported approximately \$1,000 in withholding tax for each of the two years.

The Department assessed additional withholding tax based on "total receipts" as follows:

The total receipts were multiplied by the combined percentage for officer compensation and wages & salaries per BizStats.com to determine the estimated payroll . . . Next, the state and county tax rates were applied to determine the additional state and county withholding taxes due.

Taxpayer disagrees and argues that the proposed assessment overstates the amount of withholding tax due.

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*

IC § 6-3-4-8 states:

(a) Except as provided in subsection (d), **every employer making payments of wages subject to tax under this article**, regardless of the place where such payment is made, **who is required under the provisions of the Internal Revenue Code to withhold, collect, and pay over income tax on wages paid by such employer to such employee, shall, at the time of payment of such wages, deduct and retain therefrom the amount prescribed in withholding instructions issued by the department.** The department shall base its withholding instructions on the adjusted gross income tax rate for persons, on the total local income tax rates that the taxpayer is subject to under [IC 6-3-6](#), and on the total amount of exclusions the taxpayer is entitled to under [IC 6-3-1-3.5\(a\)\(3\)](#) and [IC 6-3-1-3.5\(a\)\(4\)](#). However, the withholding instructions on the adjusted gross income of a nonresident alien (as defined in Section 7701 of the Internal Revenue Code) are to be based on applying not more than one (1) withholding exclusion, regardless of the total number of exclusions that [IC 6-3-1-3.5\(a\)\(3\)](#) and [IC 6-3-1-3.5\(a\)\(4\)](#) permit the taxpayer to apply on the taxpayer's final return for the taxable year. Such employer making payments of any wages:

- (1) shall be liable to the state of Indiana for the payment of the tax required to be deducted and withheld under this section and shall not be liable to any individual for the amount deducted from the individual's wages and paid over in compliance or intended compliance with this section; and
- (2) shall make return of and payment to the department monthly of the amount of tax which under this article and [IC 6-3-6](#) the employer is required to withhold. (**Emphasis added**).

IC § 6-3-4-8(g) also provides:

The provisions of [IC 6-8.1](#) relating to additions to tax in case of delinquency and penalties shall apply to employers subject to the provisions of this section, and for these purposes any amount deducted or required to be deducted and remitted to the department under this section shall be considered to be the tax of the employer, and with respect to such amount the employer shall be considered the taxpayer. In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest.

Accordingly, an employer is required to withhold Indiana state and county income taxes pursuant to the above mentioned statute, which piggybacks the requirement to withhold for federal tax purposes. That is, when an employer is required to withhold federal income tax for an individual because that individual is an employee of the employer - defined either by common law or by statute - the employer is also required to withhold Indiana state and county income taxes for that individual as well (provided that the wages are subject to Indiana income tax).

In Taxpayer's case, the Department determined that the \$2,500 of originally reported three-year withholding amount was incorrect and assessed additional tax based on the "best information available" to the Department.

IC § 6-8.1-5-1(b), in pertinent part, states "[i]f 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. The amount of the assessment is considered a tax payment not made by the due date and is subject to IC § 6-8.1-10 concerning the imposition of penalties and interest."

Other than arguing that the pending assessment is excessive, Taxpayer has provided no substantive information which establishes that the assessment is "wrong."

#### FINDING

Taxpayer's protest is respectfully denied.

March 16, 2018

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