

**Letter of Findings: 70-20170873
Other Tobacco Products Tax
For the Years 2013-2016**

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 This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Company was responsible for the tax imposed on the distribution of tobacco products since the company purchased tobacco products for resale from an unlicensed distributor outside of Indiana.

ISSUE

I. Other Tobacco Products Tax—Imposition.

Authority: IC § 6-8.1-5-1; IC § 6-7-2-2; IC § 6-7-2-7; IC § 6-8.1-10-2.1; IC § 6-8.1-10-1; *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 15-11-2](#).

Taxpayer protests the Department's proposed assessment of tax.

STATEMENT OF FACTS

Taxpayer is a company that purchased tobacco products (Other Tobacco Products--OTP) from an unlicensed out-of-state distributor. As a result of this, the Indiana Department of Revenue ("Department") issued to Taxpayer proposed assessments for OTP taxes, penalties, and interest for the years 2013-2016. Taxpayer protested the Department's proposed assessments. An administrative telephone hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Other Tobacco Products Tax—Imposition.

DISCUSSION

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.

The Department conducted an investigation/audit of Taxpayer for the years 2013 through 2016. The Department found that Taxpayer did not have an Indiana OTP license and that Taxpayer did not complete OTP tax returns. The Department found that Taxpayer was purchasing OTP from unlicensed out-of-state distributors. Taxpayer, in its protest letter, states that the Department's basis for the assessment was that Taxpayer purchased from suppliers that "were not registered with [the] State of Indiana. Your department is telling [Taxpayer] that it is the job of retailer to check who is registered with [the] State of Indiana and who is not." Taxpayer states that "[i]t is unfair on the part of State of Indiana to transfer their job to retailers. It should be the job of State of Indiana who has the power to take legal action against them." Taxpayer's protest letter concludes by noting that Taxpayer has

"informed all the suppliers that they must get registered with [the] State of Indiana and give [Taxpayer] proof of registration." Taxpayer provided copies of the letters that it subsequently sent to the distributors.

Turning to the applicable law which was added by the legislature in 1987, IC § 6-7-2-2 states:

As used in this chapter, "distributor" means a person who:

- (1) manufactures, sells, barter, exchanges, or distributes tobacco products in Indiana to retail dealers for the purpose of resale;
- (2) purchases tobacco products directly from a manufacturer of tobacco products; or
- (3) purchases for resale tobacco products from a wholesaler, jobber, or distributor outside of Indiana who is not a distributor holding a license issued under this chapter.**
(Emphasis added)

Since Taxpayer purchased tobacco products for resale from distributors outside of Indiana that did not have a distributor license, then Taxpayer is deemed by statute to be a distributor. Further, IC § 6-7-2-7 states:

(a) A tax is imposed on the distribution of tobacco products in Indiana at the rate of:

- (1) twenty-four percent (24[percent]) of the wholesale price of tobacco products other than moist snuff; or
- (2) for moist snuff, forty cents (\$0.40) per ounce, and a proportionate tax at the same rate on all fractional parts of an ounce. If the tax calculated for a fractional part of an ounce carried to the third decimal place results in the numeral in the third decimal place being greater than four (4), the amount of the tax shall be rounded to the next additional cent.

(b) The distributor of the tobacco products, including a person that sells tobacco products through an Internet web site, is liable for the tax imposed under subsection (a). The tax is imposed at the time the distributor:

- (1) brings or causes tobacco products to be brought into Indiana for distribution;
 - (2) manufactures tobacco products in Indiana for distribution; or
 - (3) transports tobacco products to retail dealers in Indiana for resale by those retail dealers.
- (c) The Indiana general assembly finds that the tax rate on smokeless tobacco should reflect the relative risk between such products and cigarettes.
(Emphasis added).

In applying the above statutes to Taxpayer's case, the following conclusions are reached: Taxpayer purchased tobacco products for resale from an unlicensed distributor from outside of Indiana. By statute Taxpayer is deemed a distributor. Next, under Indiana law, a distributor is liable for the tax imposed on the distribution of tobacco products in Indiana. Thus Taxpayer is responsible for the tax. Regarding Taxpayer's statements that "[y]our department is telling [Taxpayer] that it is the job of the retailer to check who is registered" the Department notes the following. It is the law that creates the legal requirements, not the Department. And that law, in the case at hand, requires Taxpayer to pay the taxes pursuant to the governing statutes. The Department further notes that taxpayers are required to be aware of the applicable laws that govern them—hence the reason that [45 IAC 15-11-2](#) states "Ignorance of the listed tax laws, rules and/or regulations is treated as negligence." Additionally, when protesting a proposed tax assessment, IC § 6-8.1-5-1(c) states that taxpayers bear the burden of proof. In the case at hand, Taxpayer has failed to meet its burden of proof under IC § 6-8.1-5-1(c). Taxpayer's protest is denied.

Similarly, Taxpayer's representative at the hearing stated that the penalty was being protested. The penalty statute can be found at IC § 6-8.1-10-2.1. Again, Taxpayer did not develop any argument regarding the penalty. Taxpayer's protest of the penalty is also denied. Lastly, the Department notes that interest, pursuant to [IC 6-8.1-10-1\(e\)](#), cannot be waived.

FINDING

Taxpayer's protest is denied.

February 28, 2018

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