

Supplemental Letter of Findings: 04-20181182
Sales and Use Tax
For The Tax Years 2014-16

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 Supplemental Letter of Findings.

HOLDING

Business was able to establish that one aspect of the Department's calculations was incorrect. Business was not able to establish that the Department's calculations were incorrect in any other way.

ISSUE

I. Sales Tax—Calculation.

Authority: IC § 6-2.5-2-1; IC § 6-8.1-5-1; IC § 6-8.1-5-4; *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).

Taxpayer protests the Department's calculation of sales tax due.

STATEMENT OF FACTS

Taxpayer operates a restaurant in Indiana. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had under-collected and under-remitted sales tax for the tax years 2014, 2015, and 2016. The Department therefore issued proposed assessments for sales tax, penalties, and interest for those years. Taxpayer filed a protest of the proposed assessments and an administrative hearing was scheduled. Neither Taxpayer nor its representative appeared or called into the scheduled administrative hearing. Following Departmental policy, the protest was deemed withdrawn and the protest file closed without issuing a written decision on Taxpayer's protest. Subsequently, Taxpayer's representative requested and was granted a rehearing. The rehearing was scheduled via telephone and Taxpayer's representative called in at the appropriate time to present Taxpayer's protest. This Supplemental Letter of Findings results. Further facts will be supplied as required.

I. Sales Tax—Calculation.

DISCUSSION

Taxpayer protests the Department's calculations of sales tax due on sales at Taxpayer's restaurant. The Department based its determinations of sales tax due on the best information available, since Taxpayer did not keep cash register tapes or other sales records. Rather, Taxpayer kept track of sales in journals, which were supplied to the Department. The Department supplemented the information in the journals with information from Taxpayer's income tax returns, sales tax returns, withholding tax returns, employee W-2s, food and beverage tax returns, and various other financial information from Taxpayer. The Department also used information from Total Systems Services, which provides information regarding businesses and the financial averages in various aspects of those businesses. Taxpayer protests that the Total Systems Services information is not the best information to apply to its circumstances and that the Department erred in subtracting reported tips from the restaurant's income as a final step rather than as an initial step.

As a threshold issue, it is the 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.

Sales tax is imposed by IC § 6-2.5-2-1, which states:

- (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).

Therefore, retail merchants are required to collect sales tax on retail transactions, unless the transaction is exempt from sales tax.

Next, the Department refers to IC § 6-8.1-5-1(b), which states:

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. 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. The department shall send the person a notice of the proposed assessment through the United States mail. (Emphasis added).

Also, the Department refers to IC § 6-8.1-5-4(a), which states:

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).

Therefore, all taxpayers subject to a listed tax must keep books and records such as, but not limited to, invoices, register tapes, receipts, and cancelled checks, as provided by IC § 6-8.1-5-4-(a). 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, as provided by IC § 6-8.1-5-1(b). In the instant case, the Department had no records to review and so used the best information available in reaching its conclusion that Taxpayer did not report the proper amount of tax due.

Taxpayer's first point of protest is in regard to the Total Systems Services information which the Department used in calculating Taxpayer's overall sales. Taxpayer protests that credit card sales were under-stated in the Department's calculations which resulted in the Department over-stating the total amount of sales. Taxpayer states that it found another information service similar to Total Systems Services and that the alternate information service lists more reliable information which results in lower calculations of sales tax due.

After review of Taxpayer's information, the Department does not agree with Taxpayer's argument. While the alternate information service's numbers are certainly different from Total Systems Services' information and the resulting calculations are certainly lower, Taxpayer has not established that the alternate information service's numbers are better, more reliable, or more appropriate than the numbers from Total Systems Services. As previously stated, "[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). Therefore, Taxpayer has not met its burden under IC § 6-8.1-5-1(c) of proving this portion of the proposed assessments wrong.

Taxpayer's second point of protest is in regard to the order of the Department's calculations. Taxpayer protests that the Department removed sales taxes and food and beverage taxes from the amount of total sales prior to its calculations of additional sales, but that the Department removed the amount of tips paid to servers after its calculations of additional sales. This order, Taxpayer states, results in a higher amount of total sales in the end calculations even though the Department acknowledged that the tips were not to be included in total sales.

After review of the Department's methodology and of the alternate methodology suggested by Taxpayer, the Department agrees with Taxpayer's position. The Department correctly removed non-sales amounts in the form of sales taxes and food and beverage taxes prior to commencing its calculations of unreported sales. The non-sales amounts of tips should have been removed at the same time the taxes were removed from the total reported sales. The remaining calculations were correct.

In conclusion, Taxpayer has not met its burden of proving the proposed assessments wrong regarding the Department's use of the Total Systems Services percentages in its calculations of additional sales. Taxpayer has established that the Department should have removed the non-sales amounts of tips at the same time it removed the non-sales amounts of taxes when it was calculating additional sales. Therefore, the Department will recalculate the amount of additional sales in accordance with these findings.

FINDING

Taxpayer's protest is sustained in part and denied in part.

May 31, 2018

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