

**Letter of Findings: 04-20181335**  
**Sales Tax**  
**For The Tax Periods November 1, 2015, through December 31, 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 This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Business provided sufficient documentation to support its position that it had a lower amount of sales during the audit period. Therefore, the Department's assessment will be recalculated.

### ISSUES

#### I. Sales Tax—Best Information Available.

**Authority:** IC § 6-2.5-2-1; IC § 6-8.1-5-1; IC § 6-8.1-5-4; *Indiana Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014); *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*, 897 N.E.2d 289, 292 (Ind. Tax Ct. 2007); [45 IAC 2.2-6-8](#).

Taxpayer protests a portion the Department's proposed assessment of sales tax.

#### II. Tax Administration—Penalty.

**Authority:** IC § 6-8.1-5-4; IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the negligence penalty.

### STATEMENT OF FACTS

Taxpayer is an Indiana LLC operating as a restaurant in Indiana. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not reported all taxable sales for the tax periods November 1, 2015, through December 31, 2015, and January 1, 2016, through December 31, 2016 ("Tax Periods"). The Department therefore issued proposed assessments for sales tax, penalty, and interest for the Tax Periods. Taxpayer protested a portion of the proposed assessments. Taxpayer opted for the Department to make its written decision based on the materials it sent in with its protest. Therefore, no administrative hearing was held. This Letter of Findings is written based on the materials in the protest file. Further facts will be supplied as required.

#### I. Sales Tax—Best Information Available.

### DISCUSSION

Taxpayer protests the imposition of a portion of the Department's proposed assessments for sales tax for the Tax Periods. The Department determined that Taxpayer had not kept sufficient sales documentation, such as z tapes from the restaurant's register, to verify actual total sales. The Department therefore based its determination on the best information available to it. Taxpayer protests that the Department's calculations result in inaccurate sales totals. Taxpayer offers alternate calculations which it believes are more accurate.

As a threshold issue, it is the Taxpayers' 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 [D]epartment'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*, 897 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.

While conducting the audit, the Department determined that Taxpayer underreported its total sales. IC § 6-8.1-5-1(b) provides that:

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.

Further, Taxpayer must provide documentation establishing that the Department's calculations were incorrect. IC § 6-8.1-5-4 states that:

- (a) *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.*
  - (b) A person must retain the books and records described in subsection (a), and any state or federal tax return that the person has filed:
    - (1) for an unlimited period, if the person fails to file a return or receives notice from the department that the person has filed a suspected fraudulent return, or an unsigned or substantially blank return; or
    - (2) in all other cases, for a period of at least three (3) years after the date the final payment of the particular tax liability was due, unless after an audit, the department consents to earlier destruction.
- In addition, if the limitation on assessments provided in section 2 of this chapter is extended beyond three (3) years for a particular tax liability, the person must retain the books and records until the assessment period is over.
- (c) A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times.
  - (d) A person must, on request by the department, furnish a copy of any federal returns that he has filed. *(Emphasis added).*

In the course of the audit, the Department determined that Taxpayer underreported its sales for November and December 2015. Taxpayer provided 183 days of z tapes for 2015. The Department determined that Taxpayer was open for 313 days in 2015, reflecting that the restaurant was not open on Sundays. The Department used the available documentation to calculate average daily sales for 2015 and applied that amount to the total working days in November and December 2015. The Department then subtracted the amount of sales tax which Taxpayer had already reported for those months. The remaining amounts constituted the amounts of base sales tax in the proposed assessments. This process was repeated for the entire year of 2016, but with 217 days of z tapes provided by Taxpayer.

Taxpayer protests that the Department overstated the number of days the restaurant was open. In the course of the protest process, Taxpayer provided a calendar which lists the days Taxpayer states the restaurant was open. Also, Taxpayer provided a daily sales ledger which lists the total sales for each day the restaurant was open. Taxpayer states that the days with sales entries were days which the restaurant was open, while days with no entries were days which the restaurant was closed. This ledger, Taxpayer argues, provides a much more accurate record of which days the restaurant was open and which days it was closed. Taking the daily average as

calculated by the Department times the working days reflected in the sales ledger results in a lower amount of sales tax due.

After review of the material sent in during the protest process, the Department agrees with Taxpayer's position. When read together with the available z tapes, the calendar and sales ledger satisfy the requirements of IC § 6-8.1-5-1(c). In this case, without daily z tapes, the Department is unable to verify the actual amount of daily sales. Therefore, the Department was correct to calculate an average daily sales amount, as provided by § 6-8.1-5-1(b). However, Taxpayer was able to establish, through other documentation, a lower number of working days for the restaurant. Thus, the Department will use the daily sales amount as determined in the audit and the number of working days as established by Taxpayer in the course of the protest process to recalculate the amount of unreported sales.

### FINDING

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

## II. Tax Administration—Penalty.

### DISCUSSION

Taxpayer requested that the Department abate the negligence penalty. Pursuant to IC § 6-8.1-10-2.1(a), the Department may assess a negligence penalty if the taxpayer:

- (1) fails to file a return for any of the listed taxes;
  - (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
  - (3) *incurs, upon examination by the department, a deficiency that is due to negligence;*
  - (4) fails to timely remit any tax held in trust for the state; or
  - (5) is required to make a payment by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department.
- (Emphasis added).*

[45 IAC 15-11-2](#)(b) further states:

"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.

The Department may waive a negligence penalty when a taxpayer establishes that its failure to pay a tax was due to reasonable cause and not due to negligence. [45 IAC 15-11-2](#)(c). The taxpayer must demonstrate that it exercised ordinary business care in carrying out or failing to carry out a duty giving rise to the penalty. Reasonable cause is fact sensitive and will vary based on the facts of each individual case.

In this instance, Taxpayer has not demonstrated that its actions were reasonable as described in [45 IAC 15-11-2](#)(c). Taxpayer has a statutory duty under IC § 6-8.1-5-4(a) to keep proper books and records for the Department to review at its request. Failing to keep proper books and records demonstrates that Taxpayer did not exercise ordinary business care. Taxpayer admits that it did not keep an accurate book of records for the Department to review. This statement supports the Department's determination of negligence on behalf of Taxpayer. However, since the base tax will be reduced, as provided in Issue I above, penalty will be recalculated to reflect that reduced amount of sales tax due.

### FINDING

Taxpayer's protest of the negligence penalty is denied.

### SUMMARY

Taxpayer is sustained in part and denied in part on Issue I regarding the imposition of sales tax. Taxpayer is denied on Issue II regarding the imposition of penalty.

July 31, 2018

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