**DEPARTMENT OF STATE REVENUE**

03-20180725.LOF; 04-20180719.LOF
04-20180720.LOF; 04-20180721.LOF
10-20180722.LOF; 10-20180723.LOF
10-20180724.LOF

**Letter of Findings: 03-20180725; 04-20180719; 04-20180720; 04-20180721; 10-20180722; 10-20180723; 10-20180724**
**Withholding Tax, Sales Tax, and Food and Beverage Tax**
**For Tax 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. 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. This document is effective as of its date of publication and remains in effect until the date it is superseded by the publication of another document in the Indiana Register.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

Retail business did not prove that the Department's calculations of sales, food and beverage, and withholding tax were incorrect. Therefore, the Department's proposed assessments for sales, food and beverage, and withholding tax were proper.

## ISSUES

### I. Proposed Assessments–Gross Retail and Food & Beverage Taxes.

**Authority:** IC § 6-8.1-5-1; IC § 6-8.1-5-4; IC § 6-2.5-2-1; IC § 6-9-20-4; IC § 6-9-12-7; *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); *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); *Indiana Dep't of State Rev. v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014).

Taxpayer protests the assessment of additional gross retail and food and beverage tax.

### II. Withholding Tax - Imposition.

**Authority:** IC § 6-3-4-8; IC § 6-8.1-5-1; 45 IAC 3.1-1-97.

Taxpayer protests the imposition of Indiana withholding tax.

## STATEMENT OF FACTS

Taxpayer is an Indiana S-Corp which operates combination gas station and convenience stores in three locations (herein referred to as Location S, Location M, and Location B). Taxpayer was subject to several Indiana Department of Revenue ("Department") audits for tax years 2014 to 2016 including a withholding tax audit, sales tax audit, food and beverage audit, corporate income tax audit and individual income tax audit for Taxpayer's sole shareholder ("Shareholder").

Each audit report detailed the difficulty the Department had in obtaining Taxpayer's records. According to the reports, the Department's initial audit letter and records request was mailed to Shareholder on March 17, 2017 with a due date for the records request of April 17, 2017. Shareholder requested that the deadline for records be moved to July of 2017 and the Department complied, giving Shareholder a deadline of July 10, 2017. The Department sent Shareholder several reminders regarding the records deadline and informed Shareholder that if the records were not received by July 10, 2017, a "best information available" audit would be conducted. On June 30, 2017, Shareholder responded that he was "gathering all info and send you soon." On July 9, 2017, Shareholder requested an additional four weeks to gather information. The Department granted Shareholder two additional weeks, with the caveat that the records that had been compiled be delivered to the Department by July 14, 2017. On July 14th, Shareholder delivered records for Location B. On July 24, 2017, Shareholder delivered records for Location M and requested two additional weeks to provide documentation for Location S, which was granted. Records for Location S were never delivered. The Department completed its audits on August 17, 2017.

Each audit resulted in proposed tax assessments. Taxpayer filed a timely protest for the sales tax, food and beverage, and withholding tax audits and included a Protest Submission Form indicating that they wished to have an administrative hearing to discuss their protest. That administrative hearing was held and this Letter of Findings, addressing protests with docket numbers 03-20180725, 04-20180719, 04-20180720, 04-20180721, 10-20180722, 10-20180723, and 10-20180724, results. Additional facts will be provided as necessary.

**I. Proposed Assessments–Gross Retail and Food & Beverage Taxes.**

**DISCUSSION**

The Department assessed Taxpayer additional sales tax at each of its locations. Taxpayers protested the assessments. As a threshold issue it is important to note that all tax assessments are prima facie evidence that the Department's claim for the 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); *see also Wendt LLP v. Indiana Dep't of State Revenue,* 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012). When an agency is charged with enforcing a statute, the jurisprudence defers to the agency's reasonable interpretation of that statute "over an equally reasonable interpretation by another party." *Indiana Dep't of State Rev. v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014).

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. Additionally, the county where the Taxpayer's stores are located imposed a tax on food and beverages sold by the stores in the county. IC § 6-9-20-4. This tax, called the Food and Beverage ("FAB") tax, is imposed, paid, and collected in the same manner as state gross retail tax. IC § 6-9-12-7.

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 limited 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 argues that the proposed assessments of sales and FAB tax are incorrect and overstate Taxpayer's liability, and also asserts that the auditor's reliance on extraneous evidence to support the adjustments was improper. The audit report states that Taxpayer did not properly report the prepaid sales tax on fuel and that the prepaid sales tax collected did not reconcile to the Taxpayer's claimed prepaid credits on form ST-103MP for May and June 2014. With respect to in-store sales, due to lack of documentation, the audit relied upon The Association for Convenience & Fuel Retailing industry sales percentage data to determine Taxpayer's taxable sales.

During the protest, Taxpayer provided additional documentation which it purports to show a more accurate calculation of taxable sales. These documents included "shift close" reports for one location, Location M, which is a store sales summary report showing daily fuel sales. These reports were provided only for the month of February 2018, which is not even within the time period under audit. Taxpayer also provided a spreadsheet it had prepared purporting to show alternative calculations for taxable and exempt non-fuel sales. However, the spreadsheet was prepared by Taxpayer and there is no supporting documentation to support these calculations. Additionally, the calculations provided on the spreadsheet were for the months of December 2017, January 2018, and February 2018 for Location M, not the tax years under audit. No documentation was provided for the other two locations. Taxpayer did not provide any documentation from the audit period at issue that would support an alternative calculation of taxable sales for the purpose of determining gross retail tax or FAB tax.

Due entirely to Taxpayer's failure to comply with the requirements of IC § 6-8.1-5-4(a), the Department was left with no other option but to use the best information available to it to reach its conclusions and the amount of the proposed assessments, as provided by IC § 6-8.1-5-1(b). The Department's calculations were entirely reasonable given the lack of records in this case. Taxpayer's alternate estimations do not rise to the level of record-keeping and do not satisfy the statutory requirements placed on it as a retail merchant. Neither do Taxpayer's alternate estimates prove the proposed assessments wrong, as required by IC § 6-8.1-5-1(c). Therefore, the Department was statutorily justified in relying upon the best information available to calculate the proposed assessments of gross retail and FAB tax.

**FINDING**

Taxpayer's protest is respectfully denied.

**II. Withholding Tax - Imposition.**

**DISCUSSION**

Pursuant to the audit, the Department determined that Taxpayer failed to provide adequate documentation "to determine if the wages reported on the W-2's were sufficient to operate the stores." Therefore, the audit assessed additional state and county withholding taxes. Taxpayer disagrees with the audit, claiming that it "maintained adequate books and records during the tax years in question . . ." and believes that the "[Department's] reliance on extraneous evidence to support [their] adjustments was improper."

The Department's withholding tax audit included all three of Taxpayer's locations. In 2015 Taxpayer operated only Location S and Location M. Each location filed their withholding tax separately. In 2016, Taxpayer operated Locations S, M, and B, but filed zero withholding tax returns for Location M and B. The 2015 audit adjustment pertains to Location S only. The 2016 audit adjustment pertains to all three locations.

Every employer is required to withhold state income tax on payments of wages it pays to its employees pursuant to IC § 6-3-4-8(a), which, for the audit years, states in part:

> 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 rates of any income taxes that the taxpayer is subject to under IC 6-3.5, 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) . . . 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 6-3.5 the employer is required to withhold.
> (**Emphasis added**).

45 IAC 3.1-1-97 further explains:

> Employers who make payments of wages subject to the Adjusted Gross Income Tax Act, and who are required to withhold Federal taxes pursuant to the Internal Revenue Code (USC Title 26), **are required to withhold from employees' wages Adjusted Gross and County Adjusted Gross Income Tax**. (**Emphasis added**).

Employers are "withholding agents [who] . . . shall make return of and payment to the Department . . . tax due, for either County and State." *Id*. "All amounts deducted and withheld by an employer shall immediately upon deduction become the money of the State." *Id*. The regulation further states, "In the case of delinquency or nonpayment of withholding tax, the employer is liable for such tax, penalties, and interest." *Id*.

In other words, unless specifically exempted by statute, an employer is required to withhold state and county income tax from payments it makes to individual employees who reside and/or work in Indiana, including adopting or non-adopting county. The employer is responsible for the tax when it fails to do so as required by the above mentioned Indiana law.

Further, under IC § 6-8.1-5-1(b):

> **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**).

Thus, if the Department reasonably believes that a Taxpayer has not paid the proper amount of tax, the Department shall make an assessment of the unpaid tax on the basis of the best information available.

According to the audit report, Taxpayer provided the 2016 W-2s for Location B, 2015 and 2016 W-2s for Location M, 2015 W-3 for Location M, Location M's WH-1s for all of 2015 and for January through August of 2016. The audit reviewed these documents, but found that "taxpayer did not supply work schedules or detailed records for the audit to determine if the wages reported on the W-2s were sufficient to operate the stores." Because Taxpayer did not supply this documentation or any other additional payroll records, the audit consulted Bizstats.com to "determine a reasonable estimate of wages." Bizstats.com reported that wages for gasoline stations were 3.10 percent of sales and wages for food and beverage stores were 9.74 percent of sales.

The 2015 and 2016 wages for fuel sales for Location S were determined by multiplying the total gallons of gasoline purchased per taxpayer's fuel supplier by the average price per gallon from the US Department of Energy for the Midwest region. The audit used the same methodology to determine the 2016 wages from fuel sales for Location M. The 2016 wages for fuel sales for Location B were calculated by adding the fuel sales as determined by the location's sales and use tax audit for the same year. These total fuel sales were then multiplied by the Bizstats.com rate of 3.10 percent to determine wages for fuel per location per year.

Wages for the convenience store sales were calculated by adding the inside sales as reported by the Taxpayer with the additional inside sales as determined by each location's sales and use tax audits. The total inside sales were then multiplied by the Bizstats.com rate of 9.74 percent to determine convenience store wages. Fuel store wages and convenience store wages were then added together to determine the total wages per the audit. From this number the audit deducted Taxpayer's reported wages per Taxpayer's filed W-2s. The remainder was additional taxable wages per the audit. These additional taxable wages were multiplied by the Indiana State income tax rates and County tax rates to determine the additional tax due.

Taxpayer argues that the "proposed assessments are incorrect and overstates Taxpayer's liability, if any, for tax years 2014 through 2016." Taxpayer further maintains that their books and records were adequate. Finally, Taxpayer disagrees with the audit's "reliance on extraneous evidence to support [its] adjustments . . . ."

To support their assertions, Taxpayer provided the Department with an excel sheet detailing the fuel sales for the months of December 2017, January 2018, and February 2018 for Location M. Taxpayer used this data to extrapolate sales and calculate tax due. Taxpayer also provided "Shift Close" reports for Location M for the month of February, 2018. These reports show the store's daily total fuel sales, fuel discounts, non-fuel sales, other discounts, taxes collected and total sales. The reports cannot be tied back to the excel sheet and even if they could, neither the reports nor the excel sheet provide any additional payroll information. Further, Taxpayer only provided information for Location M, not Locations S or R. Taxpayer has not met its burden to overcome the Department's assessment in this regard.

Finally, Taxpayer makes the general argument that the "[Department's] reliance on extraneous evidence to support [their] adjustments was improper." Because Taxpayer had inadequate documentation to establish its actual withholding tax, the audit used the best information available to it to determine Taxpayer's withholding tax. Specifically, the Department used Bizstats.com to determine wages as a percentage of sales for Taxpayer's industries. From those numbers, the audit extrapolated out the withholding tax that should have been paid. The Department has the authority to do this under IC § 6-8.1-5-1(b), which allows the Department to use the best information available to it when a taxpayer has not reported the proper amount of tax due. Taxpayer failed to provide any documentation to support their reported withholding tax, thus the Department's use of Bizstats.com was appropriate. Taxpayer's protest is denied.

**FINDING**

Taxpayer's protest is respectfully denied.

**SUMMARY**

Taxpayer's protest on Issue I and Issue II are denied due to Taxpayer's failure to provide adequate documentation.

December 17, 2018

*Posted: 02/27/2019 by Legislative Services Agency*
An html version of this document.