**DEPARTMENT OF STATE REVENUE**

04-20190009.LOF

**Letter of Findings: 04-20190009**
**Gross Retail Tax**
**For the Years 2015, 2016, and 2017**

**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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Combination Convenience Store/Gas Station failed to meet its statutory burden of establishing it was not subject to an assessment of additional sales tax attributable to the retail sale of diesel fuel; Convenience Store/Gas Station failed to obtain exemption certificates from all of its customers, failed to properly document the sales of exempt diesel fuel, and failed to establish that the fuel sold was used in an exempt manner.

## ISSUES

### I. Gross Retail Tax - Exempt Diesel Fuel Sales.

**Authority:** IC § 6-2.5-2-1; IC § 6-2.5-7-3(b); IC § 6-2.5-8-8(a); IC § 6-2.5-8-8(d); IC § 6-2.5-9-3; IC § 6-8.1-5-1(c); *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480 (Ind. Tax Ct. 2012); *Scopelite v. Indiana Dep't of Local Gov't Fin.,* 939 N.E.2d 1138 (Ind. Tax Ct. 2010); *Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); 45 IAC 2.2-8-12; 45 IAC 2.2-8-12(d); 45 IAC § 2.2-8-12(f).

Taxpayer argues that the Department's audit assessment of additional sales tax is erroneous because it can establish that all its diesel fuel customers were exempt from tax.

### II. Tax Administration - Ten Percent Negligence Penalty.

**Authority:** IC § 6-8.1-5-1(c); IC § 6-8.1-10-2.1(a)(2); IC § 6-8.1-10-2.1(a)(3); IC § 6-8.1-10-2.1(d); 45 IAC 15-11-2(b); 45 IAC 15-11-2(c).

Taxpayer asks that the Department exercise its authority to abate the ten-percent negligence penalty.

## STATEMENT OF FACTS

Taxpayer is an Indiana combination gas station/convenience store. Taxpayer sells gasoline, diesel fuel, soft drinks, cigarettes, snacks, prepared and unprepared food, and other such items. Taxpayer also sells lottery tickets and money orders.

The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's financial records and tax returns. Although the Department found that Taxpayer accurately reported its convenience store sales, the audit found that Taxpayer had not determined the correct amount of sales tax attributable to diesel fuel sales. The audit report stated that "[T]axpayer could not provide exemption certificates and supporting documentation for the exempt diesel fuel sales made during the audit report."

The audit report explained that Taxpayer "made transactions with Indiana customers claiming exemption from the gross retail tax on purchases of diesel fuel." However, Taxpayer failed to "obtain exemption certificates or keep logs to support the exempt diesel fuel sales."

On request of the audit, Taxpayer was able to provide forms ST-105 ("Indiana General Sales Tax Exemption Certificate") from a limited number of its February 2015 diesel customers. Accordingly, the audit reduced the amount of "unsupported exempt diesel by the amount of gallons sold to these exempt customers."

Based upon the best information available, the Department calculated and then assessed Taxpayer additional

sales tax.

Taxpayer disagreed with the 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. Gross Retail Tax - Exempt Diesel Fuel Sales.**

**DISCUSSION**

The issue is whether Taxpayer is able to establish that the Department's assessment of additional sales tax attributable to the sale of diesel fuel is wrong.

The Department notes that all tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Thus, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position 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); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012).

Indiana imposes sales tax under 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*).

Most relevant in this case, is that in the absence of valid exemption certificates, 45 IAC 2.2-8-12(d) makes it clear that Taxpayer bears the burden of proving that sales tax was remitted to the state or that Taxpayer's customers did indeed use the diesel fuel for exempt purpose.

> Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important to the seller to obtain an exemption certificate in order to avoid the necessity for such proof. The mere filing of a Registered Retail Merchant Certificate number is not sufficient to relieve the seller of the responsibility to collect the sales tax or prove exempt use by the buyer.

The audit relied on IC § 6-2.5-8-8(d) which provides:

> A seller that accepts an incomplete exemption certificate under subsection (a) is not relieved of the duty to collect gross retail or use tax on the sale unless the seller obtains:
> (1) a fully completed exemption certificate; or
> (2) the relevant data to complete the exemption certificate; within ninety (90) days after the sale.

IC § 6-2.5-7-3(b) (*effective July 1, 2014 to June 30, 2017*) specifically requires retail merchants who sell special fuel from metered pumps - such as Taxpayer and other diesel fuel vendors - to collect and retain exemption certificates from customers when those customers make exempt purchases. In the absence of a properly executed exemption certificates, the sales are deemed taxable:

> With respect to the sale of special fuel or kerosene which is dispensed from a metered pump, unless the purchaser provides an exemption certificate in accordance with IC 6-2.5-8-8, a retail merchant shall collect, for each unit of special fuel or kerosene sold, state gross retail tax in an amount equal to the product, rounded to the nearest one-tenth of one cent ($0.001), of:
> (1) the price per unit before the addition of state and federal taxes; multiplied by
> (2) seven percent (7[percent]).
> Unless the exemption certificate is provided, the retail merchant *shall collect the state gross retail tax* prescribed in this section even if the transaction is exempt from taxation under IC 6-2.5-5.

(*Emphasis added*).

The language of IC § 6-2.5-7-3 is unequivocal in its requirement that Taxpayer collect exemption certificates for its exempt sales of special fuels such as diesel fuel.

IC § 6-2.5-8-8(a) contains provisions governing exempt transactions and the vendor's responsibility to collect or pay the tax:

> (a) A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue the certificate on forms and in the manner prescribed by the department. *A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase*.

(*Emphasis added*).

45 IAC 2.2-8-12 sets out one of the requirements for exemption certificates:

> (a) Exemption certificates may be issed [sic.] only by purchasers authorized to issue such certificates by the Department of Revenue. Retail merchants, manufacturers, wholesalers and others who must register with the Department of Revenue and who qualify to purchase exempt from tax under this Act [IC 6-2.5] may issue exemption certificates with respect to exempt transactions. All persons or entities not required to register with the Department as retail merchants, manufacturers, or wholesalers, and who are exempt under this Act [IC 6-2.5] with respect to all or a portion of their purchases are authorized to issue exemption certificates with respect to exempt transaction provided an exemption number has been assigned by the Department of Revenue, or provided that the Department of Revenue has specifically provided a form and manner for issuing exemption certificates without the need for assigning an exemption number.
> (b) *Retail merchants are required to collect the sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used by the purchaser for an exempt purpose*.
> (c) All retail sales of tangible personal property for delivery in the state of Indiana shall be presumed to be subject to sales or use tax until the contrary is established. The burden of proof is on the buyer and also on the seller unless the seller receives an exemption certificate.
> (d) *Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important to the seller to obtain an exemption certificate in order to avoid the necessity for such proof. The mere filing of a Registered Retail Merchant Certificate number is not sufficient to relieve the seller of the responsibility to collect the sales tax or prove exempt use by the buyer*.
> (e) *No exemption certificates are required for sales in interstate commerce, however, proper records must be maintained to substantiate such sales.*
> (f) *An exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed*.
> (g) An exemption certificate or other evidence supporting an exempt sale must be maintained by the seller for at least three (3) years after the due date of the tax return upon which such exempt transaction is reported.
> (h) Exemption certificates may be reproduced provided no change is made in the wording or content.

(*Emphasis added*).

Under IC § 6-2.5-8-8(a), a seller accepting a valid exemption certificate has no duty to collect or remit the state gross retail or use tax on a purchase. As provided by 45 IAC 2.2-8-12(f), an exemption certificate issued by a purchaser is not valid unless it is executed in the prescribed and approved form and unless all information requested on the form is completed.

IC § 6-2.5-9-3 imposes individual personal financial responsibility and criminal liability on persons who failed to collect or remit sales tax.

> An individual who:
> (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and
> (2) has a duty to remit state gross retail or use taxes (as described in IC 6-2.5-3-2) to the department;

holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state. If the individual knowingly fails to collect or remit those taxes to the state, he commits a Class D felony.

Nonetheless, Taxpayer argues that its sales procedures and record keeping are sufficient to establish that exempt diesel fuel was only sold to exempt customers.

- Taxpayer states that the audit was wrong in assessing tax because it accurately correctly, reported, and paid sales tax on all sales of diesel fuel;

- Taxpayer maintains it is not a traditional highway "truck stop" but is located in a farming community and near a number of recreational vehicle manufacturers; and

- Taxpayer states that it maintains a list of motor carriers who have supplied it with exemption certificates;

- Taxpayer explains that its exempt diesel fuel pumps are always locked and that the pumps are only unlocked when one of its three employees recognize that the purchaser is entitled to the exemption. As stated by Taxpayer, its "employees have personal knowledge that all sales of sales tax exempt diesel fuel are made to either farmers or interstate carriers that are entitled to use the sales tax-exempt diesel fuel pump.

The Department is unable to agree that Taxpayer has met its statutory duty under IC § 6-8.1-5-1(c) of establishing that the proposed assessment of additional sales tax "is wrong." The Department notes that 45 IAC 2.2-8-12(d) makes it clear that it is Taxpayer who bears the burden of proving that sales tax was remitted to the State or that Taxpayer's customers did indeed use the diesel fuel for exempt purposes.

The Department's audit report seems to disagree with Taxpayer's representation on one important part. The audit report states plainly that "taxpayer did not obtain exemption certificates or keep logs to support the exempt diesel fuel sales" while Taxpayer seems to indicate that it obtained exemption certificates from all of its exempt customers and that it maintained a log of all exempt sales.

Although there is a substantive disagreement between the audit report and Taxpayer's protest as to whether Taxpayer did or did not obtain exemption certificates from each of its exempt fuel customers, Taxpayer has failed to provide copies of those certificates. Even with a complete set of exemption certificates, there it would seem not possible to "tick and tie" each of the exempt customers with individual fuel transactions.

The assessment of additional tax was justified because Indiana law, IC § 6-2.5-7-3(b), specifically and unequivocally requires retail merchants who sell special fuel from metered pumps to collect exemption certificates from its customers when they make exempt sales. In the absence of exemption certificates, the sales are deemed taxable. Although Taxpayer states that it is a small company which knows its exempt customers and know its customers' drivers, it is not possible to sustain Taxpayer on these grounds in the absence of the exemption certificates and documentation of each individual exempt transaction.

**FINDING**

Taxpayer's protest is respectfully denied.

**II. Tax Administration - Ten Percent Negligence Penalty.**

**DISCUSSION**

Taxpayer asks that the Department abate the negligence penalty on that ground that it "believes any failure to collect sales tax on sales of diesel fuel to interstate carriers was not due to negligence or willful neglect." Taxpayer states that, given the nature of its business and its customers, it had appropriate procedures in place to limit access to the exempt pumps and that it "exercised ordinary business prudence by using the same safeguards that have been in place since the start of the business."

IC § 6-8.1-10-2.1(a)(3) requires that a ten-percent penalty be imposed if the tax deficiency results from the taxpayer's negligence. IC § 6-8.1-10-2.1(a)(2) requires a ten-percent penalty if the taxpayer "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."

IC § 6-8.1-10-2.1(d) states that, "If a person subject to the penalty imposed under this section can show that the

failure to . . . pay the full amount of tax shown on the person's return . . . or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall wave the penalty."

Departmental regulation 45 IAC 15-11-2(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." *Id*.

Departmental regulation 45 IAC 15-11-2(c) requires that in order to establish "reasonable cause," the taxpayer must demonstrate that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed . . . ."

Under IC § 6-8.1-5-1(c), "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." An assessment - including the negligence penalty - is presumptively valid.

The Department believes that Taxpayer erred in determining its sales and tax liability and failed to have in place procedures that would properly document its sales of diesel fuel were or were not exempt. However, the Department agrees that Taxpayer established that its position was not so egregious as to constitute "willful neglect." Based on a "case-by-case" analysis and after reviewing "the facts and circumstances of each taxpayer" the Department agrees that the ten-percent negligence penalty should be abated.

**FINDING**

Taxpayer's protest is sustained.

May 28, 2019

*Posted: 07/31/2019 by Legislative Services Agency*
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