

Supplemental Letter of Findings: 04-20190044
Gross Retail and Use Tax
For the Years 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 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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 Supplemental Letter of Findings.

HOLDING

Combination Gas Station/Convenience Store was unable to meet its burden of establishing that the Department's proposed assessment of additional sales tax was wrong; although Gas Station/Convenience Store argued the assessment was overstated because it was located in a small, rural area and faced significant competition from nearby convenience stores, it failed to establish the audit assessment was "wrong."

ISSUE

I. Gross Retail Tax - Convenience Store Sales.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-2-1(b); IC § 6-2.5-4-1; IC § 6-2.5-5 et seq.; IC § 6-2.5-9-3; IC § 6-8.1-5-1(b); IC § 6-8.1-5-1(c); IC § 6-8.1-5-4(a); IC § 6-8.1-5-4(c); *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *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); [45 IAC 15-5-1](#).

Taxpayer argues that the Department's assessment of additional sales tax is overstated because Taxpayer operates its business in a rural area and has nearby, competing businesses.

STATEMENT OF FACTS

Taxpayer is an Indiana convenience store which sells gasoline, diesel fuel, kerosene, beverages, candy, snack foods, cigarettes, and lottery tickets.

The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's business records and tax returns. In conducting the audit, the Department reviewed sales tax returns, income statements, monthly register tapes, and records of fuel sales. The Department's audit report found that Taxpayer reported retail "cost of goods" sold of approximately 99 percent for 2015 and approximately 98 percent for 2016. Taxpayer reported that its retail profit was approximately 1 percent in 2015 and 2 percent in 2016. Taxpayer was unable to provide daily cash register tapes.

The Department's audit resorted to statistics from the "National Association of Convenience Stores" establishing the average convenience store profit as approximately 34 percent for both 2015 and 2016. Given the perceived discrepancy between the profit margin reported by Taxpayer and the statistical information available, the Department assessed Taxpayer approximately \$20,000 in additional sales tax.

Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was scheduled in order to provide Taxpayer an opportunity to explain the basis for its protest. Neither Taxpayer nor Taxpayer's representative took part in the scheduled hearing and the protest was administratively closed.

Taxpayer's representative requested a rehearing explaining that the representative was unaware of the originally scheduled hearing. The request was granted, a second hearing was conducted, and this Supplemental Letter of Findings results.

I. Gross Retail Tax - Convenience Store Sales.

DISCUSSION

The issue is whether Taxpayer has met its burden of proof and established that the assessment of additional sales tax was incorrect.

As a threshold issue, it is Taxpayer's responsibility to establish that the 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 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). 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, interpretations of Indiana tax law contained within this decision, as well as the preceding audit, are entitled to deference.

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. IC § 6-2.5-5 et seq. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-1-2; IC § 6-2.5-4-1.

A retail merchant - such as Taxpayer - is required to "collect the tax as agent for the state." IC § 6-2.5-2-1(b). The retail merchant "holds those taxes in trust for the state and is personally liable for the payment of those taxes" IC § 6-2.5-9-3.

It should be pointed out that, "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." IC § 6-8.1-5-4(a). In addition, IC § 6-8.1-5-4(c) provides that, "A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times." *Id.* In the absence of contemporaneous records, the Department is required by law to issue an assessment based upon whatever alternative means may be available. In particular, IC § 6-8.1-5-1(b) provides that "If the [D]epartment reasonably believes that a person has not reported the proper amount of tax due, the [D]epartment *shall* make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the [D]epartment." (*Emphasis added*). See also [45 IAC 15-5-1](#).

Taxpayer argues that the Department's audit assessment was overstated because the national statistics relied upon by the Department are irrelevant. Taxpayer explains that it operates its business "in a very small, rural town" and it is faced with vigorous competition by five nearby convenience stores. To that end, Taxpayer prepared a document reporting the "cost of goods sold" by the nearby stores as ranging between 92 and 85 percent compared to its own 98/99 percent cost of goods sold.

The Department does not disagree with Taxpayer's suggestion that its sales may be less than calculated by the Department's audit. However, in the absence of verifiable source documentation that Taxpayer should have maintained as required under law, Taxpayer has not met its burden of establishing that the assessment was "wrong" as required by IC § 6-8.1-5-1(c). Taxpayer has not established that the Department should not now defer to the original audit findings.

FINDING

Taxpayer's protest is respectfully denied.

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