

DEPARTMENT OF STATE REVENUE

03-20182373.LOF

Letter of Findings Number: 03-20182373
Withholding Tax
For Tax Years 2014-16

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 This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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 did not provide enough information to establish that some of the Indiana county withholding tax at issue had been paid by its employees on their individual income tax returns. Therefore, the Department's assessments for Indiana county withholding tax will not be adjusted.

ISSUE

I. Withholding Tax—Calculations.

Authority: IC § 6-3-4-8; IC § 6-3.5-1.1-1; IC § 6-3.5-1.1-16; IC § 6-8.1-5-1; *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); [45 IAC 3.1-1-97](#).

Taxpayer protests proposed assessments for additional withholding tax.

STATEMENT OF FACTS

Taxpayer is a service provider doing business in Indiana. As an employer, Taxpayer filed state and county income tax withholding returns. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer did not accurately withhold state and county withholding tax for all employees for tax years 2014, 2015, and 2016 ("Tax Years"). The Department therefore issued proposed assessments for state and county withholding tax for those years. Taxpayer protested a portion of the proposed assessments for county tax. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Withholding Tax—Calculations.

DISCUSSION

Taxpayer protests the calculation of the Department's proposed assessments of county withholding tax for the Tax Years. The Department based its determinations on the best information available to it. Taxpayer states that it had technical difficulties with its new payroll system that resulted in no Indiana state and/or county withholding for some of its employees. Taxpayer argues, however, that at least some of the employees in question paid the income tax on their individual returns. Also, Taxpayer argues that the Department calculated county tax for one individual using the incorrect county resident tax rate. The correct non-resident rate would reduce the amount which Taxpayer should have withheld and, in turn, would reduce the assessment against Taxpayer.

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.

First, the Department refers to IC § 6-3-4-8(a), which provides:

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\(a\)\(4\)](#). However, the withholding instructions on the adjusted gross income of a nonresident alien (as defined in Section 7701 of the Internal Revenue Code) are to be based on applying not more than one (1) withholding exclusion, regardless of the total number of exclusions that [IC 6-3-1-3.5\(a\)\(3\)](#) and [IC 6-3-1-3.5\(a\)\(4\)](#) permit the taxpayer to apply on the taxpayer's final return for the taxable year. 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).

The relevant regulation is [45 IAC 3.1-1-97](#), which states in part:

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.

Therefore, employers such as Taxpayer are required to withhold state and county adjusted gross income tax from payments of wages made to its Indiana employees.

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).

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. Moreover, the Department's assessments are *prima facie* correct until proven otherwise, under IC § 6-8.1-5-1(c). IC § 6-3-4-8(a)(1) states employers "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." The withholding tax is collected by the employer from the employee's wages. In accordance with IC § 6-3-4-8(a)(1), Taxpayer is liable to the Department for the outstanding balance for unpaid withholding tax.

Also, IC § 6-3.5-1.1-1 stated during the tax years:

As used in this chapter:

"Adjusted gross income" has the same definition that the term is given in [IC 6-3-1-3.5\(a\)](#), except that in the case of a county taxpayer who is not a resident of a county that has imposed the county adjusted gross income tax, the term includes only adjusted gross income derived from the taxpayer's principal place of business or employment.

...

"County taxpayer" as it relates to a county for a year means any individual:

- (1) who resides in that county on the date specified in section 16 of this chapter; or
- (2) who maintains the taxpayer's principal place of business or employment in that county on the date

specified in section 16 of this chapter and who does not on that same date reside in another county in which the county adjusted gross income tax, the county option income tax, or the county economic development income tax is in effect.

...

"Nonresident county taxpayer" as it relates to a county for a year means any county taxpayer for that county for that year who is not a resident county taxpayer of that county for that year.

....

Next, IC § 6-3.5-1.1-16 stated during the tax years:

(a) *For purposes of this chapter, an individual shall be treated as a resident of the county in which he:*

(1) maintains a home if the individual maintains only one (1) in Indiana;

(2) if subdivision (1) does not apply, is registered to vote;

(3) if neither subdivision (1) or (2) applies, registers his personal automobile; or

(4) if neither subdivision (1), (2), or (3) applies, spends the majority of his time spent in Indiana during the taxable year in question.

(b) *The residence or principal place of business or employment of an individual is to be determined on January 1 of the calendar year in which the individual's taxable year commences. If an individual changes the location of his residence or principal place of employment or business to another county in Indiana during a calendar year, his liability for county adjusted gross income tax is not affected.*

(c) Notwithstanding subsection (b), if an individual becomes a county taxpayer for purposes of [IC 36-7-27](#) during a calendar year because the individual:

(1) changes the location of the individual's residence to a county in which the individual begins employment or business at a qualified economic development tax project (as defined in [IC 36-7-27-9](#)); or

(2) changes the location of the individual's principal place of employment or business to a qualified economic development tax project and does not reside in another county in which the county adjusted gross income tax is in effect;

the individual's adjusted gross income attributable to employment or business at the qualified economic development tax project is taxable only by the county containing the qualified economic development tax project.

In support of its protest, Taxpayer provided documentation in the form of affidavits from some employees for whom Taxpayer did not withhold state and county tax, stating that those employees had either paid Indiana county income tax on their individual returns or that they were not subject to Indiana county withholding tax for the year at issue. The documentation does not directly verify the individual filings. The documentation did include each participating employee's identifying information so that the Department could review that employee's filing records with the Department for verification purposes. Taxpayer states that, according to the information contained in these employee-supplied documents, it is not liable for the county tax paid by those employees for those years.

After review, the Department does not agree with Taxpayer's conclusion. The affidavits do not constitute verifiable supporting documentation. The affidavits only contain partial and incomplete information about the individuals' filings. Further, after review, the Department found inconsistencies with the statements on many of the affidavits and the Department's records regarding those individuals' tax returns.

In conclusion, IC § 6-3-4-8(a)(1) and [45 IAC 3.1-1-97](#) place state and county income tax withholding duties on Taxpayer as an employer. It is Taxpayer's burden to prove the proposed assessments wrong, as established by IC § 6-8.1-5-1(c). Taxpayer has not provided sufficient documentation to prove the proposed assessments wrong. Therefore, the Department cannot agree with Taxpayer's position.

FINDING

Taxpayer's protest is denied.

September 16, 2019

Posted: 11/27/2019 by Legislative Services Agency

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