

Letters of Findings: 05-20190732; 05-20191193; 05-20191194
Cigarette Tax
For Tax Periods January 2016 through June 2018

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 This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

ISSUE

I. Cigarette Tax - Imposition.

Authority: IC § 6-8.1-5-1; IC § 6-8.1-5-4; *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Elmer v. Indiana Dep't of State Revenue*, 42 N.E.3d 185 (Ind. Tax Ct. 2015); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayers protest the assessment of cigarette taxes.

STATEMENT OF FACTS

Taxpayers are related Indiana companies which purchase and distribute cigarettes in Indiana. These companies operate multiple warehouses where untaxed cigarettes are stamped and stored before being shipped to customers. As part of an audit, the Indiana Department of Revenue ("Department") made several adjustments to the Taxpayers' inventory and tax credits, which resulted in a net liability due for the tax period January 2016 through June 2018 ("Tax Years"). As a result, the Department issued proposed assessments to the Taxpayers for additional cigarette tax, interest, and penalty. Taxpayers protested the Department's proposed assessments and an administrative hearing was held. This Letter of Findings results. Further facts will be supplied as necessary.

I. Cigarette Tax - Imposition.

Discussion

Although the Department made several adjustments in the course of the audit, Taxpayers are only protesting two of the changes. Taxpayers believe the Department incorrectly calculated inventory by (1) counting beginning and ending inventory twice and by (2) failing to account for inventory that was found in Taxpayers' warehouses after having been previously lost.

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 must provide documentation explaining and supporting his or her challenge that the Department's position is wrong.

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 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." Without these records, the Department must rely on the best information available to determine tax liability. *Elmer v. Indiana Dep't of State Revenue*, 42 N.E.3d 185, 194 n.12 (Ind. Tax Ct. 2015).

Taxpayers claim that they were not given proper credit for "non-inventory sales" in the Department's inventory count. Taxpayers define a non-inventory sale as one where a customer reports missing cigarettes from an order,

which were stamped but not received. In this situation, Taxpayers cannot locate the missing cigarettes but give credit to the customer as a matter of good customer relations. If those cigarettes are found, Taxpayers make a positive inventory adjustment for the found cigarettes. In this case, Taxpayers claim that the auditor failed to reduce his calculation of net cigarette sales by the non-inventory sales, but he included a positive adjustment for cigarettes later found, therefore counting these cigarettes twice.

Inventory in the Taxpayers' warehouses is determined with a manual stick count. But Taxpayers are unable to show whether or not cigarettes found in their warehouses were previously part of a non-inventory sale. Without any documentation, Taxpayer cannot distinguish between newly found, untaxed inventory and re-discovered inventory that was taxed as part of a non-inventory sale. It is possible that some of the inventory from non-inventory sales was rediscovered in the warehouses and resold to another customer, but there is no evidence showing that any such discoveries actually occurred. Furthermore, contrary to Taxpayers' claim, the audit report shows that non-inventory sales were removed from the auditor's calculation of net cigarette sales. Therefore, Taxpayers failed to support their position with evidence and their claim is denied.

The Taxpayers' second claim is that beginning and ending inventory for certain audit periods were double counted. Taxpayers' Stamped Cigarette Recap reports include sections for "Day 1 Sales" and "Day 1 Sales Next Month". These sales occurred between two of the audited entities and represented purchases that had been placed in the computer by one entity but that had not yet left possession of the other entity. Only one of these entities should have these purchases in their inventory for a given tax period, but the auditor included these sales in the inventory of both entities. This means the cigarettes were counted twice. The Department will recalculate these inventories to include the cigarettes in the inventory of only one audited entity.

Finding

Taxpayers' protest is partially sustained and partially denied.

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