DEPARTMENT OF STATE REVENUE

04-20191385.LOF
10-20191386.LOF

Letter of Findings: 04-20191385; 10-20191386
Gross Retail and Food & Beverage Tax
For the Years 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Indiana Food Delivery Business met its burden of establishing that - in part - the Department assessed excess sales and food & beverage tax; Food Delivery Business established that certain of its delivery customers were exempt from tax and that it had paid tax when Food Delivery Business purchased meals from its restaurant vendors.

ISSUES

I. Gross Retail Tax and Food & Beverage Tax - Exempt Transactions.

Authority: IC § 6-2.5-1-5(a); IC § 6-2.5-1-27; IC § 6-2.5-2-1(a); IC § 6-2.5-2-1(b); IC § 6-2.5-3-1(a); IC § 6-2.5-3-2(a); IC § 6-2.5-8-8(a); IC § 6-8.1-5-1(c); IC § 6-9-21-1 et seq.; IC § 6-9-31-3(a); IC § 6-9-33-1 et seq.; IC § 6-9-33-4; IC § 6-9-33-6; *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *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 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); *Rhoade v. Ind. Dep't of State Revenue*, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); 45 IAC 2.2-5-10(a); Sales Tax Information Bulletin 91 (December 2019).

Taxpayer argues that the Department erred in assessing sales and food and beverage tax on exempt transactions.

II. Gross Retail Tax and Food & Beverage Tax - Ten-Percent 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 maintains that it is entitled to abatement of the ten-percent penalty.

STATEMENT OF FACTS

Taxpayer is an S-Corporation in the business of selling and delivering food. Customers can purchase meals prepared by Taxpayer or access Taxpayer's website to order meals prepared by local restaurants and then delivered by Taxpayer. Some of the local restaurants provide Taxpayer a discount and some do not. Some of the restaurants charge Taxpayer sales and food & beverage tax and some do not.

Taxpayer charges its customers for the cost of the restaurant meals along with a delivery charge. The delivery charge is a fixed fee which increases incrementally depending on the distance from the restaurant providing the food to the customer's address. Depending on the distance from the source restaurant to the customer's front door, Taxpayer presently charges its customers a minimum delivery fee of $5.99 up to $20.00. Upon receiving the food, the customer may decide to include a gratuity for the delivery person. The amount of the gratuity - if any - is entirely discretionary with the customer. Customers may decide to pay the delivery person in cash or may use a credit card.

In an audit review of Taxpayer's tax returns and business records, the Department determined that Taxpayer had not remitted to the Department the total amount of sales tax collected from its customers. In addition, the

Department determined that Taxpayer purchased capital assets (art work, desk, and computer) during the period under audit but failed to pay sales tax at the time of purchase and had failed to self-assess use tax on the assets.

The audit also found that Taxpayer failed to collect sales tax on delivery charges when it delivered food directly to its customers. In addition, the audit found that Taxpayer sold its delivery-persons reusable food delivery bags without collecting sales tax.

At the same time the Department reviewed Taxpayer's sales and use tax liabilities, the Department also reviewed Taxpayer's Food & Beverage ("FAB") compliance to "determine whether the [T]axpayer was properly collecting and remitting the food and beverage tax." The audit concluded that "unreported taxable sales were also not reported on the food and beverage tax returns."

The audit resulted in an assessment of additional sales, use, and FAB tax. Taxpayer disagreed with the additional assessments of sales and FAB tax. Taxpayer submitted a protest to that effect, and this Letter of Findings results.

I. Gross Retail and Food & Beverage Tax - Exempt Transactions.

DISCUSSION

The issue is whether Taxpayer has provided sufficient information to establish that the Department's assessments of sales and FAB are overstated based on erroneous information originally provided during the audit.

A. Taxpayer's Responsibility.

As a threshold issue, it is Taxpayer's responsibility to establish that the assessment of additional tax 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). 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, fn. 9 (Ind. Tax Ct. 2012).

In considering Taxpayer's argument, the Department bears in mind that "when [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 are entitled to deference.

B. Indiana's Gross Retail (Sales) Tax.

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A person who acquires property in a retail transaction (a "retail purchaser") is liable for the tax on the transaction. IC § 6-2.5-2-1(b).

In general, purchases of tangible personal property are subject to sales tax. 45 IAC 2.2-5-10(a). Tangible personal property means personal property that: (1) can be seen, weighed, measured, felt, or touched; or (2) is in any other manner perceptible to the senses. IC § 6-2.5-1-27. Tangible personal property includes electricity, water, gas, steam, and prewritten computer software. *Id*.

Indiana also imposes a complementary excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). Use means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a).

In effect and practice, the use tax is functionally equivalent to the sales tax. See *Rhoade v. Ind. Dep't of State Revenue*, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002). However, the Department notes that the Taxpayer has not protested the use tax assessments on the purchase of the capital assets.

(1) Delivery Charges.

Indiana law also imposes the sales tax on delivery charges because the charges are a component of the gross receipts received in any retail transaction. IC § 6-2.5-1-5(a) provides in relevant part:

> Except as provided in subsection (b), "gross retail income" means the total amount of consideration, including cash, credit, property, and services, for which tangible personal property is sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for:
> (1) the seller's cost of the property sold;
> (2) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller;
> (3) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges;
> (4) *delivery charges*[.]

(*Emphasis added*).

As explained in current Sales Tax Information Bulletin 91 (December 2019) (*Formerly* Commissioner's Directive 23 (July 2013)), 20130828 Ind. Reg. 045130394NRA. "'Gross retail income,' is the total amount of consideration received by a retail merchant in a retail transaction upon which a retail merchant must charge Indiana sales tax." Information Bulletin 91 provides a specific example relevant here. "A pizza parlor imposes a $3 charge to deliver pizzas to a customer's residence. The $3 delivery charge is subject to sales tax."

C. Indiana's Food and Beverage Tax.

IC § 6-9-33-4 in part provides:

> (a) Except as provided in subsection (c), a tax imposed under section 3 of this chapter applies to any transaction in which food or beverage is furnished, prepared, or served:
> (1) for consumption at a location, or on equipment, provided by a retail merchant;
> (2) in the county in which the tax is imposed; and
> (3) by a retail merchant for consideration.
> (b) Transactions described in subsection (a)(1) include transactions in which food or beverage is:
> (1) served by a retail merchant off the merchant's premises[.]

IC § 6-9-33-6 states that the food and beverage tax is imposed, paid, and collected in the same manner and to the same extent as the state's gross retail tax. "The tax that may be imposed under this chapter shall be imposed, paid, and collected in the same manner that the state gross retail tax is imposed, paid, and collected under IC 6-2.5."

The Department noted that Taxpayer conducted food sales subject to the food and beverage tax, was located in an Indiana county, and was subject to that county's one percent food and beverage tax. IC § 6-9-31-3(a); IC § 6-9-33-1 et seq.

D. Taxpayer's Arguments.

Taxpayer explains that the audit overstated the amount of sales and FAB tax assessed.

(1) Exemption Certificates.

Taxpayer explains that a number of its food customers are exempt from sales and FAB tax and to that end it has provided a number of those customers' ST-105 exemption certificates. Pursuant to IC § 6-2.5-8-8(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*).

(2) Delivery Charges.

Taxpayer states that the Department miscalculated sales tax due on delivery charges. According to Taxpayer, the Department based the assessment on the then current delivery charge of $5.99. However the delivery fee during 2017 and 2018 was $5.39. To that end, Taxpayer provided an invoice dated 2017 which lists the delivery charge as $5.39.

(3) Driver's Reusable Bag Charges.

Taxpayer argues that the audit mischaracterized the $3.00 fee charged each driver as "reusable bags sold." Taxpayer states the $3.00 fee does not represent the sale of tangible personal property but is a flat fee charged to each driver each day "to be eligible and listed as a driver for a given day."

(4) Sales Tax Paid to Restaurants.

Taxpayer states that in some cases it purchases the meals from restaurants without paying sales tax. In other cases, a particular restaurant does not agree to sell the meals without charging the tax. Taxpayer explains that it should not now be required to pay sales tax on those meals purchased from restaurants that did not allow an exemption because the Department is engaged in "tax pyramiding." To that end along with its protest Taxpayer submitted copies of GA-110L refund requests documenting the extent to which it paid sales and FAB to its restaurant vendors.

To the extent outlined in part (1) through (4) outlined above, the Department agrees that Taxpayer has sustained in meeting its burden of establishing that the Department overstated the sales and FAB assessment warranting an adjustment consistent with those findings. Therefore Taxpayer's correct delivery charge is $5.39, the $3.00 fee was not a taxable charge, sales to customers whom exemption certificates have been provided are not subject to sales tax, and food purchases upon which Taxpayer paid sales tax directly are not subject to additional sales tax. Accordingly, the Department's Audit Division is requested to review and adjust both the sales and FAB assessment.

FINDING

Subject to the Audit Division's specific adjustment to the pending assessments, Taxpayer's protest is sustained.

II. Gross Retail and Food & Beverage Tax - Ten-Percent Penalty.

DISCUSSION

The issue is whether Taxpayer has provided sufficient grounds which would justify the Department abating the ten-percent negligence penalty.

Taxpayer believes that it is entitled to abatement of the ten-percent negligence because the penalty was "illegal and contrary to law," because Taxpayer consistently exercised the care and diligence expected of any ordinary taxpayer, and because the Department has not met its own burden of "substantiat[ing] the imposition of penalties."

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 file a return, pay the full amount of tax shown on the person's return, timely remit tax held in trust, or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive 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 any negligence penalty - is presumptively valid.

Since a portion of sales tax and food beverage tax assessment remains and because Taxpayer did not protest the use tax assessment, the penalty is applicable to the amount - if any - that remains upon completion of the supplemental audit called for in Part I above.

FINDING

Taxpayer's protest is respectfully denied.

SUMMARY

To the extent set out in Part I above, the Department agrees that Taxpayer was not subject to sales and FAB tax to the extent originally assessed. The Department did not agree that Taxpayer was entitled to abatement of the ten-percent negligence penalty.

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