

**Letter of Findings: 04-20200313P  
Gross Retail Tax Fraud Penalty  
For the Years 2014 through 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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**

The Department found that Indiana Heating Ventilation and Air Conditioning Company was subject to the 100 percent "fraud penalty" because HVAC Company engaged in retail sales, collected sales tax from its customers, but failed to remit the tax to the Department over a period of six years.

### **ISSUE**

#### **I. Gross Retail Tax - Fraud Penalty.**

**Authority:** IC § 6-2.5-9-3; IC § 6-8.1-5-1(c); IC § 6-8.1-10-4; *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); *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 State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); [45 IAC 15-5-7](#).

Taxpayer argues that it is entitled to an abatement of the one-hundred percent fraud penalty.

### **STATEMENT OF FACTS**

Taxpayer is an Indiana HVAC company in the business selling and installing HVAC equipment, water heaters, appliances, plumbing hardware and the like. Taxpayer was incorporated in 1997 and elected to be taxed as an S Corporation. The S Corporation has two shareholders - husband and wife owners. Taxpayer was administratively dissolved in 2013 and its Indiana state tax accounts "closed."

The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's tax returns and business records. According to the resulting audit report, Taxpayer continued to conduct its HVAC and plumbing business after it was administratively dissolved. In doing so, it conducted retail sales of tangible personal property, charged its customers Indiana sales tax, but failed to remit the collected tax to the state of Indiana.

The Department's audit found that Taxpayer owed sales tax for the years 2014, 2015, 2016, 2017, and 2018. Taxpayer owed a total amount of approximately \$854,000 in previously unremitted sales tax and interest.

During the course of the audit examination, Taxpayer arranged to file the missing 2014 through 2018 sales tax returns and paid the tax charges. The audit report notes, "[A]s a result, there is zero tax due and the Department will not be assessing any tax due for these filing periods."

However, the Department assessed Taxpayer a 100 percent "fraud" penalty explaining that "[Taxpayer] had a sales tax account, closed it, stopped filing sales tax returns but still collected sales tax." The penalty amount was issued in the form of "proposed assessments." Taxpayer disagreed with the assessments and submitted a protest to that effect. In its protest submission, Taxpayer asked for a "[f]inal determination without a hearing." The matter was assigned to the Hearing Officer, the audit report and Taxpayer's written protest were reviewed, and this Letter of Findings results.

#### **I. Gross Retail Tax - Fraud Penalty.**

### **DISCUSSION**

The issue is whether Taxpayer has provided the documentation and explanations necessary to establish that it is

entitled to abatement of the fraud penalty.

Taxpayer argues its failure to remit sales tax was unintentional. According to Taxpayer, Husband became ill and wife assumed responsibility for the business's paperwork including responsibility for filing tax returns. Taxpayer points out that all the sales tax and interest has been paid. Taxpayer's representative also points out that husband and wife did not spend the tax "lavishly or attempted to hide assets" and that they were not "taking lengthy vacations or going to exotic places." Taxpayer also asks the Department to take into consideration the fact that it had filed and paid sales tax for 16 years prior to 2014.

Taxpayer explains that it has since engaged an attorney "to file their corporate and individual tax returns for the future so as to insure they are in compliance of all laws regarding the collecting and remitting of sales tax as well as income taxes." Finally, Taxpayer states the business has been severely impacted by the COVID-19 virus which "will force them into bankruptcy."

As with any other assessment, the assessment of the penalty constitutes evidence that the Department's claim for the unpaid tax is valid, and each 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).

A 100 percent penalty was assessed because of the substantial disparity between the amount of taxes Taxpayer received from its customers and the amount of taxes which were forwarded to the Department.

IC § 6-8.1-10-4 in relevant part provides:

- (a) If a person fails to file a return or to make a full tax payment with that return with the fraudulent intent of evading the tax, the person is subject to a penalty.
- (b) The amount of the penalty imposed for a fraudulent failure described in subsection (a) is one hundred percent (100 [percent]) multiplied by: (1) the full amount of the tax, if the person failed to file a return; or (2) the amount of the tax that is not paid, if the person failed to pay the full amount of tax.

The pertinent Indiana regulation, [45 IAC 15-5-7\(f\)\(3\)](#), states:

A person who files a return which makes a false representation(s) with knowledge or reckless ignorance of the falsity will be deemed to have filed a fraudulent return. There are five elements to fraud.

(A) Misrepresentation of a material fact: A person must truthfully and correctly report all information required by the Indiana Code and the department's regulations. Any failure to correctly report such information is a misrepresentation of a material fact. Failure to file a return may be a misrepresentation.

(B) Scienter: This is a legal term meaning guilty knowledge or previous knowledge of a state of facts, such as evasion of tax, which it was a person's duty to guard against. A person must have actual knowledge of the responsibility of reporting the information under contention. However, the reckless making of statements without regard to their truth or falsity may serve as an imputation of scienter for purpose of proving fraud.

(C) Deception: Deception operates on the mind of the victim of the fraud. If a person's actions or failure to act causes the department to believe a given set of facts which are not true, the person has deceived the department.

(D) Reliance: Reliance also concerns the state of mind of the victim and is generally considered along with deception. If the person's actions, failure to act, or misrepresentations cause the department to rely on these acts to the detriment or injury of the department, the reliance requirement of fraud will be met.

(E) Injury: The fraud instituted upon the department must cause an injury. This can be satisfied simply by the fact that the misrepresentation(s) caused the department not to have collected the money which properly belongs to the state of Indiana.

In order to demonstrate fraud, the Department is required to prove from the record each of the above elements set out in [45 IAC 15-5-7\(f\)\(3\)](#). Based upon the disparity between the amount of tax Taxpayer collected from its customer and the amount of taxable sales reported to the Department the Department was entitled to conclude Taxpayer committed a "misrepresentation of material fact," pursuant to [45 IAC 15-5-7\(f\)\(3\)\(A\)](#).

Bearing in mind that Taxpayer is a business conducting numerous transactions including the collection of sales tax, the Department was entitled to conclude that Taxpayer - and Taxpayer's responsible officers answerable for the preparation of the sales tax returns and the remittance of any sales tax which Taxpayer collected - had actual knowledge of the repeated misrepresentations or that, in the alternative, Taxpayer exhibited a reckless disregard for the truth. As a result, the Department reasonably concluded that Taxpayer exhibited the "scienter" element required under [45 IAC 15-5-7\(f\)\(3\)\(B\)](#).

The Department accepted and relied upon Taxpayer's representation that it chose to administratively close their business and tax accounts and relied upon Taxpayer's representation that it did owe sales tax for six consecutive years. In deciding to impose the 100 percent fraud penalty, the Department was justified in concluding that Taxpayer acted with intent to deceive, that the Department had mistakenly relied upon Taxpayer's representations, and that the Department was "injured" by failing to collect the amount of sales tax to which it - and by implication the state of Indiana - was entitled. Therefore, the three elements of fraud set out in [45 IAC 15-5-7\(f\)\(3\)\(C\), \(D\), and \(E\)](#) are met.

The Department declines the Taxpayer's invitation to abate the fraud penalty and reminds Taxpayer that "[i]f an individual knowingly fails to collect or remit those taxes to the state, the individual commits a Level 6 felony." IC § 6-2.5-9-3.

### FINDING

Taxpayer's protest is denied.

August 3, 2020

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