

**Letter of Findings Numbers: 03-20200278; 04-20200279
Withholding Tax and Sales/Use Tax
For the Years 2016, 2017, and 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Indiana Business was liable for the additional withholding tax and sales/use tax because it failed to demonstrate that it did not have additional employees and did not underreport its sales.

ISSUE

I. Withholding Tax and Sales/Use Tax - Burden of proof.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-2.5-8-8; IC § 6-2.5-9-3; IC § 6-3-4-8; 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); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); *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); *Miller Brewing Co. v. Indiana Dep't of State Revenue*, 903 N.E.2d 64 (Ind. 2009); *Indiana Dep't of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96 (Ind. Ct. App. 1974); *Indiana Dep't of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454 (Ind. Ct. App. 1988); [45 IAC 2.2-2-1](#); [45 IAC 3.1-1-97](#).

Taxpayer protests, claiming that the Department erroneously assessed additional tax.

STATEMENT OF FACTS

Taxpayer is an Indiana grocery and convenience store. The Indiana Department of Revenue ("Department") audited Taxpayer's business records and tax returns for the tax years 2016, 2017, and 2018 ("Tax Years at Issue"). The Department determined that Taxpayer had additional employees and had underreported its Indiana sales and that additional withholding tax and sales tax were due. The audit assessed additional withholding tax, sales tax, interest, and penalty.

Taxpayer protested the audit assessment. An administrative hearing was held. This Letter of Findings results. Further facts will be provided, as necessary.

I. Withholding Tax and Sales/Use Tax - Burden of proof.

DISCUSSION

Pursuant to the audit, the Department assessed additional withholding tax and sales/use tax for the Tax Years at Issue. Taxpayer disagreed with the audit's determination, claiming that the Department's assessment is overstated.

Indiana mandates that every person who is subject to a listed Indiana tax must keep books and records, including all source documents, "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). "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." IC § 6-8.1-5-1(a). All tax assessments are *prima facie* evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); *Indiana Dep't of State Revenue v.*

Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012). "Each assessment and each tax year stands alone." *Miller Brewing Co. v. Indiana Dep't of State Revenue*, 903 N.E.2d 64, 69 (Ind. 2009). Thus, the taxpayer is required to provide documentation explaining and supporting its challenge to the Department's assessment 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). Also, "all statutes are presumptively constitutional." *Indiana Dep't of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 587 (Ind. 2014) (citing *UACC Midwest, Inc. v. Indiana Dep't of State Rev.* 629 N.E.2d 1295, 1299 (Ind. Tax Ct. 1994)). When an agency is charged with enforcing a statute, the jurisprudence defers to the agency's reasonable interpretation of that statute "over an equally reasonable interpretation by another party." *Caterpillar, Inc.*, 15 N.E.3d at 583.

IC § 6-3-4-8(a) requires an employer to "withhold, collect, and pay over income tax on wages paid by such employer to such employee . . . [in] the amount prescribed in withholding instructions issued by the department." Similarly, [45 IAC 3.1-1-97](#) requires the employer to withhold from employees' wages Adjusted Gross and County Adjusted Gross Income Tax. The employer is liable for the amount that it was required to withhold.

Additionally, 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); [45 IAC 2.2-2-1](#). A retail transaction is a transaction made by a retail merchant that constitutes "selling at retail." IC § 6-2.5-1-2(a). Selling at retail occurs when a person "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration." IC § 6-2.5-4-1(b). A person who acquires tangible personal property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). The purchaser in general "shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction." *Id.* The retail merchant shall collect the tax as agent for the state.

When a purchaser claims the purchase "is exempt from the state gross retail [] tax[], [the purchaser] may issue an exemption certificate to the seller instead of paying the tax." IC § 6-2.5-8-8(a). The "seller accepting a proper exemption certificate under [IC § 6-2.5-8-8] has no duty to collect or remit the state gross retail [] tax on that purchase." *Id.* Otherwise, as an agent for the State of Indiana, the seller "holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state." IC § 6-2.5-9-3.

Additionally, a statute which provides a tax exemption is strictly construed against the taxpayer. *Indiana Dep't. of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." *Id.* at 101 (internal citations omitted). In applying any tax exemption, "[t]he general rule is that tax exemptions are strictly construed in favor of taxation and against the exemption." *Indiana Dep't of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988).

In this instance, Taxpayer asserted that it was "operated almost exclusively by owner" and only employed one part time employee working sporadically in 2017. Taxpayer also stated that it hired contractors, such as janitorial services, as needed and issued 1099s in 2018. Additionally, Taxpayer asserted that it was "of the position that the majority of their sales are exempt from sales tax" and it reported the amount "on their ST-103 filings which were [compiled] with business records that were kept during the regular course of business." Taxpayer further argued that the audit findings were speculative without rational basis. However, Taxpayer did not provide any verifiable source documents or records to support its position. Therefore, the Department is not able to agree that Taxpayer met its burden.

In short, given the totality of the circumstances, in the absence of other verifiable supporting documentation, Taxpayer's statements in its April 13, 2020 and May 6, 2020 letters alone were not sufficient to demonstrate that the Department's assessment is wrong.

FINDING

Taxpayer's protest of withholding tax and sales/use tax is respectfully denied.

November 24, 2020

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