

DEPARTMENT OF STATE REVENUE

04-20200389.MOD; 04-20200424.MOD

Memorandum of Decision Numbers: 04-20200389 and 04-20200424

Sales/Use Tax and Collection Costs

For the Tax Periods September 2018, October 2018, November 2018, December 2018,
January 2019, and February 2019

NOTICE: IC § 4-22-7-7 permits the publication of this document in the Indiana Register. The publication of this document provides the general public with information about the Indiana Department of Revenue's official position concerning a specific set of facts and issues. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this final determination.

HOLDING

Out-of-state business was responsible for the collection costs because it failed to timely respond to notices of proposed assessments as required by the Indiana statute. Out-of-state business must file a zero return for the September 2018 tax period to properly claim a refund of sales tax overpayment.

ISSUE**I. Sales/Use Tax - Refund.**

Authority: IC § 6-8.1-5-1; IC § 6-8.1-5-2; IC § 6-8.1-8-2; IC § 6-8.1-8-4; IC § 6-8.1-8-8; IC § 6-8.1-9-2; *Dep't of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Ind. Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Wendt LLP v. Ind. Dep't of State Revenue*, 977 N.E.2d 480 (Ind. Tax Ct. 2012); *Scopelite v. Ind. Dep't of Local Gov't Fin.*, 939 N.E.2d 1138 (Ind. Tax Ct. 2010); *Lafayette Sq. Amoco, Inc. v. Ind. Dep't of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the refund denial, claiming it is entitled to the full refund of \$106,274.18.

STATEMENT OF FACTS

Taxpayer is an out-of-state company, which operates various retail locations in Indiana and outside of Indiana. Taxpayer files monthly returns for withholding tax. In addition, Taxpayer files monthly returns for sales tax on a consolidated basis.

In fall 2018, Taxpayer filed, and subsequently amended, its withholding tax return (Form WH-1) for the tax period September 2018. Because of a calculation error, Taxpayer's filing resulted in a proposed assessment of tax deficiency in early March 2019 ("WH-1 assessment"). In May 2019, the Indiana Department of Revenue ("Department") determined that Taxpayer did not file the required sales tax returns for one Indiana location and issued various proposed assessments for sales tax concerning tax periods September 2018, October 2018, November 2018, December 2018, January 2019, and February 2019 based on the best information available at that time ("BIA assessments"). In addition, in July 2019, due to a discrepancy found in Taxpayer's WH-3 annual withholding tax report for 2018, the Department issued a separate proposed assessment ("WH-3 assessment").

Each of the WH-1 assessment, WH-3 assessment, and BIA assessments (collectively referred to as "Assessments at Issue") required that Taxpayer must act *immediately* on these assessments. Taxpayer did not respond. The Department again sent demand notices to Taxpayer. Taxpayer also did not respond to those notices. Eventually, the Assessments at Issue advanced to warrant collection stage, and a third-party collection agency levied Taxpayer's bank account collecting the unpaid tax on behalf of the Department in December 2019.

On or about December 23, 2019, Taxpayer filed electronic sales tax returns concerning tax periods October 2018, November 2018, December 2018, January 2019, and February 2019, reporting zero dollars due for those tax periods after its bank account was levied. Taxpayer however did not file the required zero return for the tax period September 2018.

On January 17, 2020, Taxpayer filed two separate GA-110L refund forms - Claim Number 2058697 for a total amount of \$54,555.13 and Claim Number 2058717 for a total amount of \$106,274.18 - requesting that the Department refund Taxpayer the overpayment which was attributable to the BIA assessments for September 2018, October 2018, November 2018, December 2018, January 2019, and February 2019. The Department reviewed both refund claims, granting Taxpayer a partial refund, in the amount of \$27,272.26 and denying the

Taxpayer timely protested the partial refund. On its "Protest Submission Forms," Taxpayer's representative asked that the Department make the "Final determination without a hearing." The Department contacted Taxpayer by phone and email requesting additional documentation. Taxpayer however simply referred to its protest package without providing any additional information. This final determination results based on verifiable information initially submitted under protest and the Department's records. Further facts will be supplied, as necessary.

I. Sales/Use Tax - Refund.

DISCUSSION

The Department, upon reviewing Taxpayer's request, refunded Taxpayer some but not all the amount requested. The Department in its July letters explained that some of "the payments are not reflected in the Department's system" at the time when Taxpayer filed its refund claims.

Taxpayer, to the contrary, claimed that it was entitled to the full refund because Taxpayer has been filing its sales tax returns on a consolidated basis; as such, the BIA assessments and the subsequent tax levy were erroneous.

In this instance, Taxpayer's refund claim stemmed from the Department's proposed assessments. Thus, as a threshold issue, 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). Thus, the taxpayer is required to provide documentation explaining and supporting its challenge that 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). In reviewing a taxpayer's argument, the Indiana Supreme Court has held that when it examines a statute that an agency is "charged with enforcing . . . we defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party." *Dep't of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014).

IC § 6-8.1-5-1(b) 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.

IC § 6-8.1-5-1(d) outlines the taxpayer's right to protest and request a hearing within a statutory due date. IC § 6-8.1-5-1(j) and (k) further detail that the department shall demand payment after certain statutory requirements are met. See also IC § 6-8.1-8-2.

IC § 6-8.1-5-2(f) provides:

If a person files a fraudulent, unsigned, or substantially blank return, or if a person **does not file a return**, there is no time limit within which the department must issue its proposed assessment. (**Emphasis added**).

IC § 6-8.1-8-4 provides:

(a) When the department collects a judgment arising from a tax warrant, it may proceed in the same manner that any debt due the state is collected, except as provided in this chapter. The department may employ special counsel or contract with a collection agency for the collection of a delinquent tax plus interest, penalties, collection fees, sheriff's costs, clerk's costs, and reasonable fees established under subsection (b) if:

- (1) an unsatisfied warrant has been issued by the department; or
- (2) the department received a tax payment by check or other instrument drawn upon a financial institution, and the check or other instrument was not honored by that institution.

(b) The commissioner and the budget agency shall set the fee that the special counsel or collection agency will receive and payment of the fee shall be made after a claim for that fee has been approved by the

department.

(c) The fees become due and owing by the taxpayer upon the filing of an amended warrant with the circuit court clerk adding the fee authorized by subsection (b) to the amount of the judgment lien under section 2 of this chapter.

IC § 6-8.1-8-8(1) further permits the Department to "levy upon the property of the taxpayer held by a financial institution" which does business within the State of Indiana.

In this instance, Taxpayer stated the following to support that it was entitled to the full refund.

The assessed/levied money was already filed and paid under Taxpayer's consolidated account [], so the assessment/levy was erroneous. All such money levied and applied that hasn't already been refunded needs to [be] refunded. The amounts relative to the 2 refund denial protests filed were denied for refund merely because Indiana could not reconcile where all the erroneously levied money was applied at the time the refund claims were filed. Tracking where this money was levied is obviously beyond Taxpayer's ability to provide additional information on (only Indiana is privy to this information).

Taxpayer ultimately filed 0 returns for the new account [] that was arbitrarily set up by Indiana for the new location, and subsequently filed refund claims as well in response to the assessment and subsequent levies .

...

Upon review, however, the Department is not able to agree. The Notice of Levy specifically includes outstanding tax liabilities concerning both withholding tax and sales tax, namely the Assessments at Issue. Taxpayer did not dispute that it owed and was responsible for the WH-1 assessment and WH-3 assessment.

A review of the Department's records further showed that in late May 2018, Taxpayer filed a Form BT-1 (Business Tax Application), attempting to register a new sales/use tax account for a new Indiana location. Taxpayer elected to report "sales tax on a consolidated basis." But Taxpayer's registration was not completed until September 2018 and the Department created a new account for the new location, 024, as a result. Because Taxpayer did not report any sales under the 024 location, the Department relied on the best information available then began sending the BIA assessments to Taxpayer in May 2019 urging Taxpayer to act *immediately*. Similarly, Taxpayer received notices concerning WH-1 assessment in March 2019 and WH-3 assessment in July 2019.

Taxpayer did not respond to the above Assessments at Issue within 60 days as stated on the proposed assessments (AR-80s) and also as required by statute. Because Taxpayer did not timely respond to the assessments, subsequent notices were sent to Taxpayer to demand payment. The demand notices allowed Taxpayer 20 days to make the payment. The above-mentioned notices were sent to Taxpayer's address via the US Mail and were not returned to the Department. The Department therefore fulfilled its statutory obligation regarding provision of notice to Taxpayer.

Since Taxpayer did not respond to those notices, eventually in fall 2019, those notices advanced to warrants and the matter was turned over to a third-party collection agency. Pursuant to IC § 6-8.1-8-8(1), the Department is permitted to "levy upon the property of the taxpayer held by a financial institution." Thus, Taxpayer had sufficient notice and the levy was proper. In other words, Taxpayer was responsible for the levy and thus the associated costs.

Subsequently, in January 2020, the collection agency forwarded the payment - excluding the collection costs - to the Department. In addition to the outstanding sales tax liability, the payment was also applied to Taxpayer's outstanding withholding tax liability then pursuant to IC § 6-8.1-9-2(a). As such, some of the payment from the levy was subsequently applied to Taxpayer's withholding tax liability. Because Taxpayer did not file any refund claim concerning withholding tax, it is beyond the scope of this protest.

In this instance, only after the tax levy occurred, on or about December 23, 2019, did Taxpayer file the required zero returns for the tax periods October 2018, November 2018, December 2018, January 2019, and February 2019. After an initial review of the relevant information to support Taxpayer's refund claims, the Department thus correctly granted a partial refund of sales tax pursuant to those zero returns.

It should be noted that, in late January 2020, the collection agency forwarded the payment to be applied to the tax period September 2018. But the Department was not able to determine the appropriate refund amount for September 2018 because Taxpayer did not file the required return for September 2018. Since Taxpayer demonstrated that it has been filing its sales tax returns on a consolidated basis, Taxpayer must file the required

zero return for September 2018 to properly claim that refund, excluding the collection costs. Without the required zero return, Taxpayer is not entitled to additional refund because the Department is not able to determine the amount due.

In short, Taxpayer must file the required zero return for September 2018 to support its refund of overpayment for that tax period. Taxpayer did not timely respond to the Assessments at Issue, resulting in the subsequent levy. The Department properly notified Taxpayer within the specified due dates stated in the notices of proposed assessment and subsequent demand for payment to resolve the issues. The Department followed statutory procedures each step of the way. While the collection agency retained a portion of the money as a result of completing its collection effort, the Department had refunded Taxpayer the overpayment pursuant to the zero returns filed by Taxpayer accordingly. The collection costs were not retained by the Department and, therefore, in the absence of Department error, the Department is not able to refund the collection costs.

FINDING

Taxpayer's protest is sustained in part and respectfully denied in part. Within 30 days from the issuance of this determination, Taxpayer must file the zero return for September 2018 to support its refund of overpayment for that tax period; otherwise, its protest is denied in full. Taxpayer is responsible for the collection costs.

January 12, 2021

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