

Letter of Findings: 04-20200097
Sales 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 Indiana Department of Revenue's (the "Department") 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Business protested the assessment of sales tax on environmental fees and reward rooms after an audit. The Department determined that Business did not establish that the environmental fee was voluntary and therefore exempt from sales tax. Business could not provide sufficient documentation showing sales tax was paid on the reward rooms.

ISSUE

I. Sales Tax - Taxable Transactions.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-4-4; IC § 6-8.1-5-1; *Indiana Dept. of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Indiana Dept. of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454 (Ind. Ct. App. 1988); *General Motors Corp. v. Indiana Dept. of State Revenue*, 578 N.E.2d 399 (Ind. Tax Ct. 1991); [45 IAC 2.2-2-1](#); [45 IAC 2.2-4-8](#); Sales Tax Information Bulletin 41 (January 2014).

Taxpayer protests the Department's assessment of additional sales tax after an audit.

STATEMENT OF FACTS

Taxpayer operates numerous hotels. In 2019, the Indiana Department of Revenue ("Department") conducted an audit related to one of Taxpayer's hotels located in Indiana. As a result of the audit, the Department assessed Taxpayer additional sales and use tax related to several different items. Taxpayer protests the portion of the assessment related to sales tax on environmental fees and reward rooms.

An administrative hearing was held. This Letter of Findings results. Additional facts will be provided as necessary.

I. Sales Tax - Taxable Transactions.

DISCUSSION

Taxpayer protests two of the Department's audit adjustments. Taxpayer charged guests a \$2.99 "environmental fee" for a "greener" room; however, guests could opt out of the charge and receive the same room. Taxpayer protests the imposition of sales tax on the environmental fee, claiming the fee was voluntary and thus not subject to tax. Taxpayer was also assessed additional sales tax on reward rooms redeemed by guests. Taxpayer protests the imposition of sales tax on the reward rooms claiming that because reward rooms were included in total sales, sales tax was already paid on those hotel stays.

During the audit, the Department determined the environmental fee charged by Taxpayer was related to items used to furnish a room and was a markup on the amount charged for the room. Thus, the environmental fee was subject to sales tax. Additionally, the Department could not determine whether reward rooms, which Taxpayer was reimbursed for from its Franchiser, were included in the hotel's gross receipts. Items included in the gross receipts, including any reward rooms, were considered as subject to sales tax, which Taxpayer should have collected and remitted as a retail merchant. Taxpayer was unable to provide additional information at the time of the audit, so the Department assessed sales tax on reward rooms. Taxpayer protests the assessment of additional sales tax on both the environmental fee and the reward rooms.

IC § 6-8.1-5-1(c) states that "[t]he 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). An assessment, including Taxpayer's penalty assessment, is therefore presumed valid. A taxpayer must provide documentation explaining and supporting that the Department's position is wrong. Additionally, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing. . . [courts] defer to the agency's reasonable interpretation of 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).

An excise tax called "the state gross retail tax" or "sales tax" is imposed on retail transactions made in Indiana unless a valid exemption exists. IC § 6-2.5-2-1(a); [45 IAC 2.2-2-1](#). The person who acquires property in a retail transaction is responsible for the sales tax, and the merchant collects the tax as an agent for the state. IC § 6-2.5-2-1(b).

"Tax exemptions are strictly construed in favor of the taxation and against the exemption." *Indiana Dept. of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988). A taxpayer claiming the exemption has the burden of showing the terms of the exemption are met. *General Motors Corp. v. Indiana Dept. of State Revenue*, 578 N.E.2d 399, 404 (Ind. Tax Ct. 1991).

IC § 6-2.5-4-4 (effective until June 30, 2019) provides:

- (a) A person is a retail merchant making a retail transaction when the person rents or furnishes rooms, lodgings, or other accommodations, such as booths, display spaces, banquet facilities, and cubicles or spaces used for adult relaxation, massage, modeling, dancing, or other entertainment to another person:
 - (1) if those rooms, lodgings, or accommodations are rented or furnished for periods of less than thirty (30) days; and
 - (2) the rooms, lodgings, and accommodations are located in a hotel, motel, inn, tourist camp, tourist cabin, gymnasium, hall, coliseum, or other place, where rooms, lodgings, or accommodations are furnished for consideration;

...

- (b) Each rental or furnishing by a retail merchant under subsection (a) is a separate unitary transaction regardless of whether consideration is paid to an independent contractor or directly to the retail merchant. . .

[45 IAC 2.2-4-8](#) further explains:

- (a) For the purpose of the state gross retail tax and use tax: Every person engaged in the business of renting or furnishing for periods of less than thirty (30) days any accommodation including booths, display spaces and banquet facilities, in any place where accommodations are regularly furnished for a consideration is a retail merchant making retail transactions in respect thereto and the gross income received therefrom shall constitute gross retail income from retail unitary transactions.
- (b) In general, the gross receipts from renting or furnishing accommodations are taxable. An accommodation which is rented for a period of thirty (30) days or more is not subject to the gross retail tax.
- (c) There is no exemption for purchases made by persons who are engaged in renting or furnishing accommodations. Such persons are deemed to purchase or otherwise acquire tangible personal property for use or consumption in the regular course of their business.
- (d) The renting or furnishing of an accommodation for less than thirty (30) days constitutes a retail merchant making a retail transaction. Every person so engaged must collect the gross retail tax on the gross receipts from such transactions. The tax is borne by the person or organization who uses the accommodation.
- (e) The tax is imposed on the gross receipts from "furnishing" an accommodation. The gross receipts subject to tax include the amount which represents consideration for the rendition of those services which are essential to the furnishing of the accommodation, and those services which are regularly provided in furnishing the accommodation. Such amounts are subject to tax even when they are separately itemized on the statement or invoice.
- (f) The tax is imposed on the gross receipts from accommodations which are furnished for periods of less than thirty (30) days.

Sales Tax Information Bulletin 41 (January 2014) 20140129 Ind. Reg. 045140014NRA provides additional guidance on Indiana sales tax related to the rental of rooms, lodging, and other accommodations for less than thirty days. Specifically, miscellaneous fees are addressed, including "resort fees." Resort fees are defined as a "per-diem charge for a number of **additional amenities provided by the resort**, such as beach chairs, bottled water in the hotel rooms, access to the hotel fitness center, newspaper delivery, shuttle service, etc." (**Emphasis added.**)

Taxpayer states the environmental fee is "voluntary and guest[s] can request not to pay as part of their stay. The fee is used to offset costs related to the Hotel to be qualified as becoming (Green) environmentally friendly." Taxpayer compares the "voluntary environmental fee" to a voluntary resort fee, as described in Sales Tax Information Bulletin 41. Taxpayer argues that because voluntary resort fees are tax exempt, its voluntary environmental fee should also be tax exempt.

Taxpayer charges the \$2.99 environmental fee on each of its rooms. In exchange for paying the fee, guests are provided a room that is "green" with items such as a more biodegradable type of toilet tissue and energy efficient light bulbs. Taxpayer explained that guests are given the choice at registration whether to pay the fee. If a guest chooses not to pay the fee, he/she receives the same room as if he/she paid the fee. If a guest asks about the purpose of the fee, he/she is provided an information card with further details. If a guest requests at check out for the fee to be removed from a bill, Taxpayer removes the fee and adjusts the total amount due.

The registration form includes the following paragraph:

"Owned and Operated by [Taxpayer]. Please be advised that if you use your Debit or Check Card as a form of Payment at "Check-In", your bank will automatically [sic] place a HOLD on your account for 7 to 10 business days.

*A voluntary environmental fee of \$2.99 will be charged per night, per room.

I understand that any theft or damage caused by myself or an accompany [sic] guest will be my responsibility. I understand that my card will be charged to cover these damages up to \$2,500, not including room rate, taxes, smoking fee of \$350, or incidentals.

Guest Initials _____ "

The above paragraph is located below the room rate information in fine print. Below the guest initial line is space for a guest signature. There is no separate acknowledgement for a guest to opt out of the environmental fee other than a verbal request.

Taxpayer is a retail merchant under IC § 6-2.5-4-4 and must collect sales tax on room rentals. This requirement would include collecting sales tax on any environmental fees paid by guests - if the fee was mandatory. The question is whether the environmental fee is a mandatory or voluntary fee.

Taxpayer argues the environmental fee is voluntary because guests can opt out of paying it; however, all indications are that unless a guest specifically opts out and requests the fee be removed from the bill, the environmental fee is mandatory. Factors indicating the fee is mandatory include that (1) the fee appears on the registration card automatically, (2) the fee is listed in fine print, and (3) the fee does not require a separate initial, signature, or other acknowledgement by the guest. Additionally, Taxpayer indicates the only requirement for opting out of the fee is an oral request from a guest. Therefore, Taxpayer was unable to provide documentation establishing that any guest requested to, or was charged less to, opt out of the environmental fee.

Further, as discussed in Sales Tax Information Bulletin 41, guests usually receive additional amenities provided by the hotel or resort in exchange for paying a resort fee. By Taxpayer's own admission, guests who opt out of the environmental fee do not receive a different room or different amenities, and items upgraded in a "green" room are items that are normally included with a room rental such as toilet tissue and light bulbs. Despite Taxpayer's arguments, Taxpayer has failed to provide sufficient evidence showing that the fee is voluntary. Information presented to the Department suggests the environmental fee is mandatory, and thus subject to tax.

Related to the reward rooms, Taxpayer provided an explanation of the reservation and reimbursement process between the guest, Taxpayer, and Franchiser and numerous account documents.

If a guest belongs to Taxpayer's rewards program, then he/she accrues points for hotel stays. Points accumulate on a guest's account and can later be redeemed for free hotel stays. In order to reserve a room using reward points, guests book the stay and indicate they are using points to "pay" for the stay. Points are then deducted from a guest's account upon completion of the stay. Guests are not charged a monetary amount by Taxpayer.

Taxpayer believes a refund is warranted because it has already paid sales tax on the reward rooms and included the sales tax in the hotel's gross receipts. After a guest's rewards room stay, Taxpayer's system shows a reward stay paid at a reduced rate, including the calculation of sales tax. Taxpayer tracked the reward stays and allocated them to a specific accounts receivable account. On a monthly basis, Taxpayer received a "franchise payment" from the Franchiser. The monies received in the franchise payment served as a reimbursement to

Taxpayer for the reward rooms "paid" for by guests with their points. In essence, Taxpayer was reimbursed in the amount of the reduced rate for hotel stays where guests redeemed points to "pay" for the room. When Taxpayer "charged" the reduced rate to the accounts receivable account, it "charged" sales tax on the reduced rate. As stated previously, Taxpayer argues that since sales tax was charged on reduced room rate, Taxpayer has already paid sales tax on the reward rooms and should not be assessed sales tax for a "second" time as a result of the audit.

It is clear from a review of some of the receipts provided by Taxpayer that Taxpayer charged a reduced rate (approximately \$30) and calculated appropriate sales tax on those receipts. However, Taxpayer was unable to provide documentation showing the sales tax collected was reimbursed by Franchiser in the monthly franchise checks. The Department notes that Taxpayer's records for tax years related to this protest were most likely destroyed in a fire at a storage facility; however, without additional documentation showing that sales tax was paid by Taxpayer and reimbursed by Franchiser, the Department is unable to agree with Taxpayer's position.

In conclusion, Taxpayer has not established that the environmental fee is voluntary. Also, Taxpayer has not provided sufficient documentation to establish that sales tax was paid by Taxpayer and reimbursed by Franchiser on the reward rooms. Therefore, Taxpayer has failed to meet the burden imposed under IC § 6-8.1-5-1(c) of proving the assessment is wrong.

FINDING

Taxpayer's protest is denied.

June 14, 2022

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