

Letter of Findings: 04-20221074
Gross Retail Tax and Penalty
for the Years 2020 and 2021

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 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Utility Service Provider could not retain any portion of the sales tax it collected from its customers because Utility Service Provider was statutorily precluded from taking advantage of Indiana's sales tax allowance; however, the Department found that Service Provider acted with reasonable care in originally claiming the allowance thereby entitling Service Provider to abatement of any assessed penalties.

ISSUE

I. Gross Retail Tax - Collection Allowance and Penalties.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-4-5; IC § 6-2.5-4-6; IC § 6-2.5-6-10; IC § 6-8.1-5-1; IC § 6-8.1-10-1; IC § 6-8.1-10-2.1; *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); [45 IAC 15-11-2](#); Indiana Tax Handbook for New and Small Business Owners, <https://www.in.gov/dor/files/new-small-business-handbook.pdf>.

STATEMENT OF FACTS

Taxpayer is in the business of providing telecommunication services. Taxpayer provides customers various communication services such as institutional and business phone services. Taxpayer provides these services to customers both inside and outside Indiana.

Taxpayer routinely files and pays various Indiana taxes. For example, Taxpayer collects and pays Indiana's gross retail ("sales") tax. Taxpayer also pays Indiana's Utility Receipts Tax ("URT").

The Indiana Department of Revenue assessed Taxpayer additional sales tax, penalty, and interest for the years 2020 and 2021.

The Indiana Department of Revenue ("Department") found that Taxpayer was claiming a "collection allowance" when it filed and remitted sales tax received from its customers. Thereafter, the Department determined that because Taxpayer was a utility provider, it was not entitled to claim the collection allowance when reporting Indiana's sales tax.

Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representative explained the basis for the protest. This Letter of Findings results.

I. Gross Retail Tax - Collection Allowance and Penalties.

DISCUSSION

The issue is whether Taxpayer has established that it is entitled to abatement of the sales tax and penalty assessments.

A. Burden of Proof.

As with any assessment of Indiana listed taxes, it is Taxpayer's responsibility to establish that the proposed

assessments of tax, interest, and penalty are incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the [D]epartment'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 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).

B. Collection Allowance.

Indiana permits retailers to claim a collection allowance each time they report and remit Indiana sales tax. The Department instructs retailers as follows:

You can deduct and keep a collection allowance from the amount of the taxes collected. To qualify for this collection allowance, you must collect and remit all taxes on time. The amount you can keep is based on your tax liability for the 12-month period ending on June 30 of the previous year. Indiana Tax Handbook for New and Small Business Owners, <https://www.in.gov/dor/files/new-small-business-handbook.pdf> (Last visited June 6, 2022).

The statutory authority underlying the collection allowance is found at IC § 6-2.5-6-10 which provides in part:

(a) In order to compensate retail merchants and those required to remit gasoline use tax for collecting and timely remitting the state gross retail tax, the state use tax, and the gasoline use tax, every retail merchant or person required to remit the gasoline use tax, except as provided in subsection (c), is entitled to deduct and retain from the amount of those taxes otherwise required to be remitted under [IC 6-2.5-3.5](#) or under this chapter, if timely remitted, a retail merchant's collection allowance.

(b) The allowance equals a percentage of the retail merchant's state gross retail and use tax or the person's gasoline use tax liability accrued during a calendar year

The amount of the allowance is predicated on the amount of sales tax collected the previous fiscal year by each particular retailer. Small businesses are permitted a larger percentage, while large retailers are permitted a smaller percentage.

The allowance has certain limitations as described in IC § 6-2.5-6-10(c).

A retail merchant described in [IC 6-2.5-4-5](#) or [IC 6-2.5-4-6](#) **is not entitled to the allowance** provided by this section. A retail merchant is not entitled to the allowance provided by this section with respect to gasoline use taxes imposed by [IC 6-2.5-3.5](#). (**Emphasis added**).

C. Utility Companies.

The IC § 6-2.5-4-5 reference in IC § 6-2.5-6-10(c) applies to utility companies which "furnish or sell electrical energy, natural or artificial gas, water, steam, or steam heat and which produces power exclusively for the use of those public utilities."

The IC § 6-2.5-4-6(b) reference in IC § 6-2.5-6-10(c) applies to retail merchants which "furnishes or sells telecommunication services to another person" consisting of "prepaid calling services or prepaid wireless calling" or consisting of "intrastate mobile telecommunications service."

Utility providers and telecommunication service providers are not permitted the sales tax collection allowance.

D. Taxpayer's Arguments.

Taxpayer objects to the assessments on various grounds:

- [Taxpayer] has been filing the Indiana sales tax return for numerous years and has taken the merchant's collection allowance without any notification from the state that it was not entitled to do so.
- Every year [Taxpayer] receives a letter from the DOR informing [Taxpayer] that DOR has examined their sales collection activity from the prior fiscal year and, based on the amount of sales tax your business collected in the previous fiscal year, your new collection allowance rate is 0.00XX.
- Every month since the establishment of Indiana's online filing portals, when [Taxpayer] or [its] agent files the IN ST-103, the portal automatically calculates the collection allowance rate and deducts it from the tax collected and reported by [Taxpayer]. (According to Taxpayer's representative, the collection allowance

provided could not be overridden.)

- [The Department] issued Department Notice 27 (which replaced the previous notice issued May 2008) in August 2014. In that notice there is no mention the utility providers are not entitled to a collection allowance.

Taxpayer summarizes its objections as follow:

If the DOR has changed policy or decided to put into effect a previously unenforced policy or rule, they should provide [Taxpayer] adequate and timely notice for the [Taxpayer] to comply with the DOR's directive. Through years of filings and lack of notification otherwise, [Taxpayer] effectively followed rules and guidance received from the Department.

E. Analysis and Conclusions.

Under Indiana law, Taxpayer is plainly acting as a retail merchant when it furnishes its customers various forms of telecommunication services. Similarly, the law provides that Taxpayer acts as a utility provider when it offers its customers telecom services. As a result, Taxpayer is statutorily precluded from taking advantage of the collection allowance when remitting its customers' sales tax. In addition, Taxpayer is not entitled to retain any portion of the sales tax collected from its customers. Whether the mistake was in good faith or in reliance on the Department's vague instructions, no portion of the sales tax held in trust for the state was Taxpayer's to keep.

IC § 6-2.5-2-1 provides:

(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.

(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. ***The retail merchant shall collect the tax as agent for the state. (Emphasis added).***

Although IC § 6-2.5-6-10(c) plainly precludes utility providers from claiming the allowance the Department finds that any portion of the assessment attributable to "penalties" warrants reconsideration. 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 . . . pay the full amount of tax shown on the person's return . . . or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall wave 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 the negligence penalty - is presumptively valid.

Taxpayer has been timely filing and paying various Indiana taxes for a number of years and this is apparently the first time the Department has raised the collection allowance issue. Considering the circumstances, the Department finds no "willful neglect" on Taxpayer's part and agrees that, despite the collection allowance issue, Taxpayer consistently "exercised ordinary business care and prudence" Based on a "case-by-case" analysis and after reviewing "the facts and circumstances of [this] taxpayer" the Department agrees that the penalties should be abated.

Under IC § 6-8.1-10-1(e), the Department is without authority to abate any of the associated interest charges.

FINDING

Taxpayer may not retain any portion of the sales tax collected from its utility customers. However, the Department will abate any penalties which have accrued.

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