

**Letter of Findings: 04-20231013**  
**Gross Retail and Use Tax**  
**For the Years 2018, 2019, and 2020**

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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

### HOLDING

Combination Gas Station/Convenience Store was unable to meet its burden of establishing that the Department's proposed assessment of additional sales tax was wrong; the Department found that Convenience Store's alternative calculation did not meet the statutory burden of establishing that the audit's calculation was wrong, and the alternative calculation was correct.

### ISSUE

#### I. Gross Retail and Use Tax - Convenience Store Sales.

**Authority:** [IC 6-2.5-1-2](#); [IC 6-2.5-2-1](#); [IC 6-2.5-4-1](#); [IC 6-2.5-5](#) et seq.; [IC 6-2.5-9-3](#); [IC 6-8.1-5-1](#); [IC 6-8.1-5-4](#); *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *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); [45 IAC 15-5-1](#).

Taxpayer argues that the Department's assessment of additional sales tax is overstated because Taxpayer now has sufficient documentation to fully account for its taxable sales during the three years under audit.

### STATEMENT OF FACTS

Taxpayer is an Indiana convenience store which sells cigarettes, tobacco products, lottery tickets, auto supplies, health items, beauty items, groceries, fountain drinks, ice, newspapers, dairy products, snack foods, and various other "nonfood items."

The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's business records and tax returns. In particular, the Department reviewed Taxpayer's ST-103 sales tax returns, financial statements, bank records, withholding records, and "purchase invoices for the tax year 2020 with partial invoices from 2018 and 2019."

The Department's audit report concluded that Taxpayer's "[r]eported sales were deemed unreliable since the combined purchases for grocery and cigarette[s] were higher than reported sales for 2018, 2019, and 2020."

As a result, the audit reverted to reliance on guidelines published by the "National Association of Convenience Stores" The audit did so on the ground that the Association compiled and published reference data. The Association's report included "convenience store sales, profits, top-in-store categories, profits of categories, etc."

The audit concluded that, based on the "best information available," Taxpayer owed additional sales tax on otherwise unreported in-store sales.

Given the perceived discrepancy between the amount of vendor purchases, the amount of sales reported by Taxpayer, and the statistical information available, the Department assessed Taxpayer approximately \$250,000 in additional sales tax.

Taxpayer disagreed with the assessment and submitted a protest to that effect. In its protest request, Taxpayer asked for a "Final Determination Without a Hearing." However, Taxpayer's representatives subsequently decided to take advantage of an in-person hearing which was conducted at the Department's office in the Indiana Government Center North.

## I. Gross Retail and Use Tax - Convenience Store Sales.

### DISCUSSION

The issue is whether Taxpayer has met its burden of proof and established that the assessment of additional sales and use tax was either wholly incorrect or simply overstated.

As a threshold issue, it is Taxpayer's responsibility to establish that the tax assessment is incorrect. As stated in [IC 6-8.1-5-1\(c\)](#), "The notice of proposed assessment is prima facie evidence that the department'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 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). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong.

In assessing the audit report, the relevant Indiana law, and Taxpayer's argument, the Department bears in mind that "when [courts] examine a statute that an agency is 'charged with enforcing . . . [courts] defer to the agency's reasonable interpretation of [the] 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). Thus, interpretations of Indiana tax law contained within this decision, as well as the original audit, are entitled to deference.

Pursuant to [IC 6-2.5-2-1](#), a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. [IC 6-2.5-5](#) et seq. Retail transactions involve the transfer of tangible personal property. [IC 6-2.5-1-2](#); [IC 6-2.5-4-1](#).

A retail merchant - such as Taxpayer - is required to "collect the tax as agent for the state." [IC 6-2.5-2-1\(b\)](#). The retail merchant "holds those taxes in trust for the state and is personally liable for the payment of those taxes . . . ." [IC 6-2.5-9-3](#).

It should be pointed out that, "Every person subject to a listed tax must keep books and records 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\(a\)](#). In addition, [IC 6-8.1-5-4\(c\)](#) provides that, "A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times." *Id.*

The Department's audit report noted that "[t]he [T]axpayer did not provide any cash register receipts, cash paid outs, or any supporting records to verify the total sales."

In the absence of contemporaneous and complete records, the Department was required by law to issue an assessment based upon whatever alternative and reliable means available to the Department. In particular, [IC 6-8.1-5-1\(b\)](#) provides that "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." (*Emphasis added*). See also [45 IAC 15-5-1](#).

The Department concluded that the National Association of Convenience Stores' reports and press releases provided, in part, the "best information available." In addition, the audit also relied on records of cigarette and other purchases from Taxpayer's cigarette and other vendors.

Taxpayer argues that the Department's audit assessment was overstated because the third-party guidance relied upon by the Department was unreasonable, unacceptable, and beyond industry standards. As explained in the audit's written report, this is how the Department applied the now challenged standards.

The auditor utilized the National Association of Convenience Stores (NACS) which annually compiles the NACS State of the Industry Report and issues press released based on this data to determine the audited cigarette sales. The industry reports and/or press released including the convenience stores sales, profits, top in-store categories, profits of categories, etc.

Taxpayer provided what it purports to be additional documentation sufficient to meet the statutory burden of proof. That documentation consists of multiple "Store Sales Summary Report[s]" which lists monthly fuel sales, credit card transactions, coupon sales, lottery sales, and lottery payouts.

In addition, Taxpayer explained why the initial audit review concluded that Taxpayer failed to report all taxable sales. Taxpayer operates two cash registers at its store. One of the registers is wired into its accounting software; the second register is not. In other words, Taxpayer indicates that none of the sales from that second register were accounted for in its accounting records. However, Taxpayer indicates that it can now account for any otherwise apparent discrepancy. Taxpayer routinely gathers all store proceeds and deposits those proceeds into its bank account. By subtracting the amount of money recorded by its first register from the amount deposited in the bank account, the sales which went through the second register can be determined. For example, if Taxpayer made a \$1,000 bank deposit on June 1, and if the first register recorded \$250 in sales during that preceding period, then the second register must account for the \$750 apparent discrepancy.

Taxpayer made the cumulative calculation as indicated above and concludes that this calculated differential establishes that it originally reported and remitted sales and use tax correctly.

The Department here acknowledges Taxpayer's efforts to buttress its argument, but the Department here also recognizes certain weaknesses in that argument. Taxpayer's calculation accounts only for cash transactions and does not necessarily account for credit card and other non-cash customer purchases. The argument accounts for cash sales but does not differentiate between taxable sales (candy, auto parts) and transactions such as exempt food items. Although the Department does not necessarily challenge otherwise apparently good-faith efforts on Taxpayer's part, the argument necessarily assumes that the amount Taxpayer deposited in the bank is identical to the amount of cash sales which occurred during the corresponding period.

In addition, Taxpayer's argument does not completely address two issues noted in the audit report. There is a substantial discrepancy between the amount of purchases Taxpayer paid its vendors and the amount of reported customer sales. There is a discrepancy between the amount of cigarettes and other items it bought from its vendors and Taxpayer's reported cigarette and other sales. As explained in the audit report, "Reported sales were deemed unreliable since the combined purchases for grocery and cigarette[s] were higher than reported sales for 2018, 2019, and 2020." The differential is substantial. Taxpayer paid approximately \$2,077,000 to its vendors during 2018, 2019, and 2020 while it reported approximately \$1,421,000 in store sales during that same period.

In addition, it bears repeating here Taxpayer's failure to provide "cash register tapes, cash paid outs, or any supporting documentation."

The Department acknowledges Taxpayer's suggestion its sales may be less than calculated by the Department's audit. The suggestion is not beyond the realm of possibility. However, in the absence of verifiable source documentation that Taxpayer should have maintained as required under law, Taxpayer has not met its burden of establishing that the assessment was "wrong" as required by [IC 6-8.1-5-1\(c\)](#). Taxpayer has not established that the Department should not now defer to the original audit findings.

### FINDING

Taxpayer's protest is respectfully denied.

April 3, 2023

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