

**Letter of Findings: 04-20231466**  
**Sales and Use Tax**  
**For the Tax 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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 Letter of Findings.

### HOLDING

Business failed to document that it correctly reported its sales of cigarettes and other tobacco products. As such, Business was responsible for sales tax attributable to the additional sales of cigarettes and other tobacco products.

### ISSUE

#### I. Sales and Use Tax - Imposition.

**Authority:** [IC 6-2.5-1-2](#); [IC 6-2.5-1-5](#); [IC 6-2.5-2-1](#); [IC 6-2.5-4-1](#); [IC 6-8.1-5-1](#); [IC 6-8.1-5-4](#); [IC 6-2.5-9-3](#); *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138 (Ind. Tax Ct. 2010); [45 IAC 2.2-8-12](#).

Taxpayer protests the sales tax assessment concerning additional sales of cigarettes and other tobacco products.

### STATEMENT OF FACTS

Taxpayer is an Indiana limited liability company operating a gas station which has a convenience store. Taxpayer sells food and nonfood products, including but not limited to gasoline, groceries, fountain drinks, ice, newspapers, dairy products, snacks, health and beauty products, automotive supplies, cigarettes, and tobacco products.

Taxpayer has elected to be taxed as an S Corporation and files Indiana S Corporate Income Tax returns. Taxpayer's income flows through to its sole shareholder ("Shareholder"), who in turn files Indiana income tax returns, reporting the flow-through income on his Indiana individual income tax returns.

In 2022, the Indiana Department of Revenue ("Department") audited Taxpayer's tax returns and business records. Pursuant to the audit, the Department found that Taxpayer underreported its sales of cigarettes and tobacco products. In addition, the audit found that Taxpayer employed individuals working in the store but underreported withholding tax on wages paid to those individuals, as statutorily required. Taxpayer was assessed additional sales and use tax, withholding tax, penalty, and interest as a result. Ultimately, the additional sales also resulted in additional income to Taxpayer, which, in turn, passed through to its Shareholder. As such, the Department assessed Shareholder additional income tax.

Taxpayer and Shareholder protested the assessments, requesting that the Department make the final determinations without a hearing. This Letter of Findings ensues and addresses Taxpayer's protest of the sales and use tax assessment. Letter of Findings 03-20231355 (July 2023) addresses Taxpayer's protest of the withholding tax assessment. Shareholder's protest of his income tax assessment is addressed in Letter of Findings 01-20231467 (July 2023).

#### I. Sales and Use Tax - Imposition.

### DISCUSSION

Pursuant to the audit, the Department determined that Taxpayer underreported its cigarette and other tobacco product sales because "not all the purchase records from CY Wholesale were provided" for review during the audit. The Department assessed additional sales tax based on the best information available during the audit as a result.

Taxpayer, to the contrary, argued that the audit findings overstated Taxpayer's cigarette and other tobacco product sales, which, in turn, erroneously increased Taxpayer's sales tax liability. Thus, the issue is whether Taxpayer provided sufficiently verifiable documents to substantiate that it correctly reported and remitted the sales tax on cigarette and other tobacco product sales and that it was not responsible for additional tax on sales of cigarettes and other tobacco products.

#### A. The Law.

[IC 6-8.1-5-4](#)(a) requires that "[e]very person subject to a listed tax must keep books and records so that the [D]epartment can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records [] include **all source documents** necessary to determine the tax, including **invoices, register tapes, receipts, and canceled checks.**" (**Emphasis added**). The person also "must allow inspection of the books and records and returns by the [D]epartment or its authorized agents at all reasonable times." [IC 6-8.1-5-4](#)(c).

When the person subject to the listed tax fails to keep books and records, under [IC 6-8.1-5-1](#)(b), the Department "shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the [D]epartment," if the Department "reasonably believes that a person has not reported the proper amount of tax due."

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); *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012). The taxpayer is required to provide documentation explaining and supporting its challenge that the 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).

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). A "[r]etail transaction" is "a transaction of a retail merchant that constitutes selling at retail as described in IC [§] 6-2.5-4-1 [or] . . . in any other section of [IC 6-2.5-4](#)." [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). "[G]ross retail income" generally is "the total amount of consideration, including cash, credit, property, and services, for which tangible personal property is sold[.]" [IC 6-2.5-1-5](#)(a).

[IC 6-2.5-2-1](#)(b) further provides that "The person who acquires property in a retail transaction is liable for the tax on the transaction and [] shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction." If the retail merchant fails to collect the sales tax, the retail merchant "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](#); [45 IAC 2.2-8-12](#).

#### B. The Audit.

The Department audited Taxpayer's records and determined that Taxpayer underreported its cigarette and other tobacco product sales because Taxpayer failed to maintain verifiable sales records, such as register tapes. The audit report noted the following:

In order to determine if the cigarette and other tobacco product sales were correctly reported, the available cigarette and other tobacco product purchase records were reviewed[.]

During the review of the purchase records, it was determined that not all of the purchase records from CY Wholesale were provided. [Taxpayer] was given additional time to provide the missing invoices but was unable to do so. Therefore, the auditor calculated the average invoice amount for each calendar year and then multiplied it by number of missing invoices to determine the purchase amount for missing invoices for each year. . . .

In order to determine the Total Cigarette and Other Tobacco sales, the purchases for each calendar year were multiplied by the average profit margin per NACS (National Association of Convenience Stores).

The auditor "computed the average gross margin percentage by averaging the top and bottom quartile percentages" separately for each year. Based on these calculations, the audit arrived at the average profit margins each year for cigarette and Other Tobacco Product sales, which, in turn, was used to determine Taxpayer's Total Cigarette and Other Tobacco sales. The audit concluded that Taxpayer failed to correctly report its Cigarette and Other Tobacco sales, had additional sales, and assessed sales tax on the additional sales as a result.

### C. Taxpayer's Protest.

Taxpayer protested the audit adjustments concerning additional sales of cigarette and other tobacco products. Taxpayer claimed that the audit erred in (1) including "the additional purchases from CY Wholesale" and (2) determining "the gross profit margin [] applied on the actual sales in addition to the rebate commission." Taxpayer maintained that the audit wrongly applied an industry average to determine Taxpayer's gross taxable sales of tobacco products because "[t]he profit margin is not the same for all tobacco products." Taxpayer thus contended that the audit methodology overstated its sales of "cigarette and other tobacco products," which, in turn, erroneously increased its sales tax liability. Taxpayer generally stated, in part:

During the three-year period from 2018 through 2020 as per the audit a total of 161 invoices were generated for tobacco products purchased from [CY Wholesale]. Of those only 12 invoices were missing; which equated to 7.45[percent] of the overall number of invoices during a three-year period. But it is important to bring to your attention those purchases have already been recorded as part of the vendor payments. The auditor was provided with all bank statements and general ledger which showed all payments made to vendors. By using this audit methodology to propose additional sales based on missing physical copies of invoices is doubling up the purchases of tobacco products which are already part of the cost of good[s] sold[.]

To support its protest, Taxpayer offered an excerpt of its general ledger concerning rebate income deposits and sample monthly Department Sales Report ("Report") from its point-of-sale system.

### D. Analysis and Conclusion.

Taxpayer is a retail merchant selling tangible personal property in Indiana. Taxpayer in this case purchased tangible personal property, such as cigarette and tobacco products, for resale. These sales were retail transactions subject to Indiana sales tax. Taxpayer thus was required to collect the Indiana sales tax on these sales as "a separate added amount to the consideration in the transaction." [IC 6-2.5-2-1](#). Taxpayer, as a seller and agent for the state, must collect sales tax based on "the total amount of consideration . . . for which tangible personal property is sold [] without any deduction for the seller's cost of the property sold[.]" [IC 6-2.5-1-5\(a\)](#).

Taxpayer was required, but failed, to maintain verifiable documents, such as invoices, register tapes, and receipts, to substantiate those sales. The Department thus was not able to determine the amount of sales tax during the audit. The audit provided step-by-step calculations based on the best information available during the audit. The method was reasonable. As such, there is a rebuttable presumption.

Taxpayer argued that "this audit methodology is doubling up the purchases of tobacco products which are already part of the cost of good[s] sold[.]" Taxpayer is mistaken. As mentioned earlier, sales tax is a separate added amount to the consideration in the retail transactions without any deduction for Taxpayer's cost of the goods sold. Taxpayer here should have maintained the register tapes to substantiate its sales and sales tax, but it did not do so. In addition, Taxpayer could have obtained all purchase invoices, including these missing invoices from its vendor, but it chose not to do so. In the absence of verifiable supporting documents, Taxpayer's purchase invoices thus were the best information available as the starting point.

Taxpayer also contended that "[t]he gross profit margins of 15[] to 16[percent] has] been applied on the actual sales in addition to the rebate commission." Taxpayer seemingly suggested that it included the "Rebate Income" it received in its sales reporting and remitted sales tax accordingly. Manufacturers may offer retail merchants rebates as financial incentives to promote their sales of cigarettes and tobacco products. However, Taxpayer's supporting documents cannot be verified and failed to support its protest of the sales tax assessment.

In addition, Taxpayer's Report simply provided its gross sales by category with no details of the transactions. For example, the Report provided:

Dept. Name	Gross Sales \$	Item Count	Net Count	Net Sales \$
Taxable	\$6,031.96	1973	1973	\$6,031.96

Indiana Register

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Non-Taxable	\$2,463.00	846	846	\$2,463.00
Soda	\$6,253.72	3951	3951	\$6,253.72
Candy	\$1,372.08	829	829	\$1,372.08
Chew	\$3,517.87	738	738	\$3,517.87
Cigarette	\$38,703.30	6845	6845	\$38,703.30

Without register tapes to substantiate Taxpayer's gross sales, the Report could not be verified and failed to substantiate Taxpayer's claim. Taxpayer's reliance on its documents is misplaced.

To conclude, given the totality of the circumstances and the absence of other verifiable supporting documents, the Department is not able to agree that Taxpayer met its burden of proof, as required under [IC 6-8.1-5-1](#), demonstrating that the audit assessment was incorrect.

**FINDING**

Taxpayer's protest is denied.

July 27, 2023

*Finding Replaces: New*

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