

Letter of Findings: 04-20232296
Gross Retail Income For the Years 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Combination Convenience Store/Gas Station did not meet its burden of establishing that the Department's audit assessment of sales tax should be abated or that the Department's audit overstated the amount of its taxable sales.

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](#); *Dep't. 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).

Taxpayer argues that the Department made a mistake when it found that Taxpayer underreported its taxable sales and income during the two years at issue.

STATEMENT OF FACTS

Taxpayer is an Indiana convenience store and gas station. Taxpayer sells gasoline, groceries, cigarettes, lottery tickets, and the like.

Taxpayer is organized as an S Corporation with the income from the convenience store location "flowing through" to its single owner/Shareholder.

The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's sales returns, income tax returns, and business records. Simultaneously, the Department audited the income tax returns of Taxpayer S Corporation's Shareholder.

The audit began in October 2021 and was completed April 2023.

The audit concluded that Taxpayer failed to maintain or provide all the necessary documents sufficient to determine the amount of its total sales, exempt sales, or taxable sales. As a result, to calculate the amount of Taxpayer's exempt sales, the audit "relied on historical data to arrive at 5[percent]." That "historical data" was used to calculate the amount of taxable sales.

The audit found that Taxpayer had underreported taxable sales by approximately eight hundred and thirty thousand dollars requiring an assessment of additional sales tax. The audit also determined that Taxpayer purchased tangible personal property to be used to conduct its business without paying sales tax or use tax. The sales and use tax assessment was approximately \$105,000.

Taxpayer disagreed with the Department's findings and submitted a protest to that effect. An administrative hearing was conducted by telephone during which Taxpayer and Shareholder's representative explained the basis for the protest.

This Letter of Findings addresses the adjustments made to Taxpayer's income statements and sales tax returns. In order to address both of Shareholder's protests for income tax resulting from the audit of S Corporation, a separate Letter of Findings, to address both of Shareholder's protests for income tax resulting from the audit of S

Corporation, a separate Letter of Findings for the Shareholder income tax assessment will be issued, docketed as 01-20232295 and 01- 20232297.

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

DISCUSSION

The issue is whether Taxpayer has established that the Department's adjustments to its income statements and tax returns were wrong.

A. Summary of Taxpayer's Argument.

In general, Taxpayer concedes that it "[did] not have all the required documents" and that Department's audit relied on "estimates." Taxpayer here argues that the Department's reliance on these "estimates" was "unreasonable and unacceptable".

B. Burden of Proof.

In reviewing both the audit result and Taxpayer's contentions, the Department points out that it is Taxpayer's responsibility to establish that the sales 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, including during an action appealed to the tax court under this chapter. 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 conclusion, the relevant Indiana law, and Taxpayer's arguments, 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.

C. Indiana's Sales Tax.

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](#).

D. Record Keeping Responsibility.

Indiana law requires that "[e]very 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.*

In the absence of the required "books and records," [IC 6-8.1-5-4\(e\)](#) provides:

The failure of a person to keep books and records in the ordinary course of business shall be considered for purposes of determining the weight of the evidence as it relates to the person's liability for a listed tax, and not for purposes of the admissibility of the evidence.

[IC 6-8.1-5-1\(b\)](#) requires of the Department as follows:

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. *(Emphasis added).*

E. Audit Results.

The Department's audit concluded that Taxpayer failed in its responsibility to maintain and/or provide all requested books and records and that the documentation that was provided was unreliable. As explained in the audit report:

The [T]axpayer did not keep ledgers during the audit period. The [T]axpayer's sales recap worksheets given to [Taxpayer's] representative in order to file their monthly sales tax returns were provided, but only in photo or PDF format.

In addition, the audit informed Taxpayer that "certain columns in the file had bad formats" with the result "that only the taxable sales and tax collected amounts were valid [but] not the total sales column."

Further, the audit report indicates that Taxpayer "was unable to provide Z-Tapes or any information from their . . . Point of Sale system." Taxpayer was also unable to provide invoices detailing purchases from its vendors or copies of the checks used to pay these vendors.

Taxpayer did provide 1099-Ks (Payment Card and Third-Party Network Transactions) reflecting transactions with Taxpayer's vendors and suppliers. However, the audit indicated that Taxpayer was unable to explain differences between Taxpayer's purchases and the amounts deposited into Taxpayer's four bank accounts. Taxpayer's ST-103s (Indiana Sales and Use Tax Voucher) indicated total sales during the audit period of approximately \$1,300,000 while Taxpayer's deposits into its bank accounts totaled approximately \$2,400,000, representing an approximately 54 percent discrepancy.

These purported discrepancies were the basis for the resulting audit adjustments which, in turn, were the basis for Department's determination that five percent of Taxpayer's total sales were exempt.

In effect, the Department's audit concluded that Taxpayer failed to report the correct amount of total sales and that the incomplete documents required the Department to calculate (or estimate) that 95 percent of its sales were subject to sales tax and the remaining five percent were exempt.

F. Taxpayer Protest and Arguments.

Taxpayer raises a number of points which, according to Taxpayer, support its contention that the Department should either abate the assessment or recalculate the assessment based on the records that were provided.

These are the reasons Taxpayer relies in support of its protest.

- The combination gas station/convenience store was sold in April 2020.
- The Department's audit personnel did not allow Taxpayer "enough time to gather all the information."
- Taxpayer was unable to provide the requested Z Tapes or the point of sale (cash register) reports because the Shareholder had closed the business.
- The Department "refused to consider all the missing vendor invoices" with the result that the cost of goods sold amount was not correctly calculated.
- The Department's reliance on bank account deposits was unwarranted because the amount of bank deposits included amounts for "Lottery, ATM & money orders and [Taxpayer] only make[s] a small commission out of [these sales]."

G. Analysis and Conclusion.

Taxpayer's argument that the Department did not provide sufficient time in which to provide all the documents requested does not survive scrutiny. The record indicates that the audit took place over approximately 18 months. That record also documents approximately thirty instances in which the Department requested documentation or reminded Taxpayer that previously requested documents had not yet been provided. In some instances,

Taxpayer responded that the documents requested were unavailable or that the Department should obtain the documents from the convenience store's new owner. The audit notes are replete with instances in which the Department indicated that it had "no response from the POA," that the POA was "having trouble getting ahold of their client," that the POA had "gotten busy and still hasn't gotten in touch with his client," that the POA's client "did not recognize the bank accounts" referred to by the Department, and informing the representative that the information provided was for a different convenience store than the one here under consideration.

Based on the information provided, it is not possible to determine whether money deposited into the four bank accounts represented exempt transactions such as lottery sales. If so, Taxpayer has not explained why these amounts were not accounted for in Taxpayer's ST-103s.

The Department here recognizes that the convenience store was sold to its new owners but also points out that the audit was only conducted for the period in which the original Shareholder owned and operated the store.

Finally, there is nothing to indicate that the Department's audit refused to consider any of the documentation provided by Taxpayer.

While not addressing all the issues and questions raised directly in the Taxpayer's protest, the Department points to the substantial amounts of money which flowed through or into Taxpayer's bank accounts and reminds Taxpayer that a good portion of those amounts remains unaccounted for.

In addition, in the admitted absence of the documents required, Taxpayer has done nothing to refute the audit's conclusions as to the exact amount of taxable sales and the exact amount of exempt sales.

The Department points out that it is Taxpayer's responsibility - not its successor store owner - to "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\(a\)](#).

Faced with these record-keeping issues, [IC 6-8.1-5-4\(e\)](#) directs the Department to consider the shortcomings as follows:

The failure of a person to keep books and records in the ordinary course of business shall be considered for purposes of determining the weight of the evidence as it relates to the person's liability for a listed tax, and not for purposes of the admissibility of the evidence. (Emphasis added).

Taxpayer here asks that the Department abate the liability or - at a minimum abate a portion of the assessment - based on a second-hand review of Taxpayer's limited records, the audit findings, and with due consideration of Taxpayer's arguments. The Department must decline Taxpayer's invitation because Taxpayer has not met its statutory burden under [IC 6-8.1-5-1\(c\)](#) of establishing that the assessment was wrong but merely suggests that the audit results could have been different.

FINDING

Taxpayer's protest is denied.

January 10, 2024

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