

Letter of Findings: 04-20232323
Gross Retail Income
For the Years 2014, 2015, and 2016

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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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 had underreported its taxable sales and income during the three years at issue.

STATEMENT OF FACTS

Taxpayer operates two Indiana convenience stores and gas stations. Taxpayer is organized as an S Corporation with the income from those locations "flowing through" to its single owner/shareholder.

The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's tax returns and business records. The audit took four years and seven months to complete. The audit concluded that Taxpayer failed to either maintain or provide documents sufficient to determine the amount of its taxable sales.

Based on the best information available to the Department during the audit, the Department found that Taxpayer had underreported taxable sales by approximately five million dollars, requiring an assessment of additional sales tax.

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 Taxpayer's protest of the sales tax assessment resulted from the adjustments made to its income statements. A separate Letter of Findings, docketed as 01- 20232322, will address the shareholder income tax assessment.

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. Burden of Proof.

In considering both the audit result and Taxpayer's contention, 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. 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.

B. 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](#).

C. 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*).

D. Audit Results.

The Department's audit commenced September 2016, and was completed April 2021. During the course of the four-year seven-month audit and on different occasions, Taxpayer was represented by two spokespersons.

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

Due to the facts discovered by the auditor, and the failure of the [T]axpayer's representative to answer the questions posed during the audit, the auditor determined that [T]axpayer's records were unreliable.

....

Due to the [T]axpayer's failure to demonstrate it kept accurate or reliable records, the auditor determined that it was necessary to complete the audit based on the best information available.

The audit was confronted with a series of issues which, according to the audit report, led to the conclusion that Taxpayer's books and records were incomplete. Listed below are some - not all - of the issues the audit found insufficient and/or unreliable.

1. Bank Accounts.

According to Taxpayer, it maintained three different bank accounts. However, Taxpayer eventually provided information for only two of these accounts. During the course of the four- year seven-month audit, Taxpayer declined to provide information concerning the third bank account.

2. MoneyGrams.

The audit determined that Taxpayer was selling approximately \$30,000 to \$40,000 in MoneyGrams each month. Taxpayer was purchasing "a substantial portion of [] MoneyGram orders on its own behalf." Taxpayer explained that it used these money orders to pay its bills and vendors.

As explained in the audit report:

Substantially all of the MoneyGram money orders sold during the audit period were purchased by the [T]axpayer. However, upon comparison of the cash revenue [per] the register tapes, the ATM deposit receipts, and the bank record information, the auditor discovered that the records were not reflecting what had actually occurred.

Additionally, the audit report noted that Taxpayer reported the sale of MoneyGrams "as if the [T]axpayer had been receiving cash for those purchases....."

3. ATM Transactions.

Initially, Taxpayer indicated it operated one ATM machine. Later information established it operated two. Taxpayer failed to provide information concerning transactions conducted at this second ATM.

Taxpayer made deposits of cash into its ATM machine received from each day's sales. The amount of those deposits "exceeded the amount of cash the Taxpayer claimed to have actually received on its cash register tapes."

The ATM deposit receipts did not reflect deposit amounts "remotely similar" to cash withdrawals Taxpayer made from its bank accounts.

The audit report summarized its concerns stemming from the ATM records as follows:

Almost double the amount of cash was circulating through the bank accounts and ATM tha[n] could be accounted for.

The audit's conclusions were as follows:

Taxpayer did not reliably track its cash deposits into the ATM, nor did it reliably track the amount of cash available to be deposited into [the] ATM from the register or safe. Therefore, the auditor used the [T]axpayer's bank account statements and ATM servicer statements to track how much money flowed through the ATM. Further, the auditor discovered instances in which the [T]axpayer deposited more money into the ATM than was available to be deposited based on its sales records. While the [T]axpayer claimed this was done using funds withdrawn from its bank accounts . . . it was unable to verify this practice. Additionally, the ATM deposit records indicated that the representative's explanation for the additional deposits into the ATM was inaccurate because the auditor was not able to identify a single instance in which the ATM was filled with the amount of cash withdrawn [from Taxpayer's bank accounts].

4. Additional "Anomalies."

The audit report pointed out certain record keeping anomalies.

- Taxpayer reported more fuel sales transactions than fuel sale customers.

- The audit noted "[e]xtremely low average sales value for each cash customer."
- The audit pointed out that there were "extremely low sales on non-taxable items." The audit report explained that average sale of non-taxable items was less than \$1.50.
- The audit found that the cash registers recorded more payment transactions than the number of its customers.
- Taxpayer reported "higher credit card and debit sales" on its 1099K than were documented in Taxpayer's cash register tapes.
- Although Taxpayer operated six fuel pumps, on occasion, Taxpayer reported credit card sales for only one of those pumps.

5. Cash Register Tape Irregularities.

The Department audit reported what it concluded were irregularities in Taxpayer's cash register tapes.

During the audit period, the [T]axpayer's register receipts failed to accurately report the register's internal transaction processing statistics.

. . . .

During the audit period, the majority of the [T]axpayer's daily register tape summaries included internal transaction timing irregularities. These irregularities included reporting the average transaction time in negative hundreds and thousands of seconds, as well as positive hundreds and thousands of seconds.

Neither Taxpayer nor its representative elected to respond to the auditor's inquiries regarding the register tape irregularities.

E. Best Information Available.

Due to the [T]axpayer's failure to establish that it kept accurate or reliable records, the auditor determined that it was necessary to complete the audit based on the best information available.

As a result, the audit determined that the best information available consisted of documents not kept by the taxpayer, but rather the documents kept by third party transaction processors and banks.

The audit concluded that all deposits into [T]axpayer's bank accounts were representative of gross retail income. Further, the auditor determined that payments received in the form of cash winning tickets were also income. Lastly, the auditor combined these amounts with the sum of the income verified by means of third party 1099-K returns to calculate total gross retail income.

F. Taxpayer's Protest and Arguments.

In general, Taxpayer criticizes the Department's reliance on "estimates" and that these estimates "are unreasonable and unacceptable, as well as being beyond industry standards." As explained by Taxpayer, "It is very unlikely for a typical gas station to make the kind of profits that the [audit] assessed." Taxpayer argues that it "provided all of the required documents." Essentially, Taxpayer argues that if the Department had relied solely on the documentation provided during the course of the audit, the sales tax adjustments would not have been made.

Taxpayer raises a number of points which, according to Taxpayer, support its contention that the Department should abate the assessment "since all of the records were promptly provided [and] that the [T]axpayer has always been in good standing & filing & paying all his taxes & doing businesses in Indiana for at least the past 15-20 years."

Taxpayer points out that the two convenience stores were operated remotely by its owner/shareholder who relied on store personnel to effectively operate the stores and "to maintain all the records of daily transactions."

Taxpayer believes that "Almost/All monthly Z-reports were provided along with bank statements, check images, Fuel invoices, vendor invoices, ATM, Credit card & Money order reports were also provided."

Taxpayer provided the auditor all "monthly Z reports & sales tax calculation sheet[s] to show how monthly sales were reported" and asks the Department, based on this information, to reconsider the original assessment.

Taxpayer also maintains that the Department's audit personnel (auditor and audit supervisor) were unfamiliar with the operation of gas station/convenience stores and that a more experienced auditor would have better understood the operation and finances of its two stores.

Taxpayer indicates that the audit results were incorrectly based on "total cash coming in & being deposited as revenue" but that "total cash" should not include money received as "Lottery, Money Order & ATM transactions."

Finally, Taxpayer indicates its "fuel supplier keeps all the credit card transactions from sale of gas & inside store & credits against fuel purchased from them on weekly basis & such credit card transaction reports were also provided directly from the fuel company."

G. Analysis and Conclusion.

As mentioned, the audit took approximately four years and seven months to complete, beginning in September 2016 and concluding in April 2021. The documentation accompanying the audit report is replete with requests for additional documentation. Those requests were made either in writing, emails, or phone conversations with Taxpayer's representatives. On at least one occasion, the Department's representative met face-to-face with Taxpayer's representatives. In some instances, the record establishes that some of the documents were provided while in other instances, Taxpayer was either unwilling or unable to provide the documents. In one instance, Taxpayer's representative indicated that it was "inappropriate" to request income documentation. On another occasion, the representative simply indicated that "no additional documents would be forthcoming."

Taxpayer did make some records available at the representative's offices. The Department's records indicate as follows.

[The auditor] reviewed our recent past communications and document requests and then traveled to the representative's office to pick up the documentation and take it back to the [district office]. I did not take possession of all documents available, only those which related to our recent request, as there were numerous large boxes and storage tubs full of receipts, invoices, and reports, all of which had not yet been made available over the past two years of the audit.

In at least one point, the Department agrees with Taxpayer. Gross receipts of a business are not necessarily equivalent to a retailer's taxable sales. However, this argument somewhat misses the point. The audit's objective was to do exactly that. The audit's aim was to determine Taxpayer's taxable sales which became a task made difficult by Taxpayer's incomplete records or incomprehensible business practices.

While not addressing all the unanswered questions posed directly in the audit report or Taxpayer's protest, the Department points out the substantial questions raised in accounting for the deposits related to one (perhaps two) ATMs, Taxpayer's failure to account for transactions related to its sale of MoneyGrams, and Taxpayer's failure to provide documentation related to its third bank account.

The Department here will not address Taxpayer's contention that it relied on the diligence of its on-site employees and that any shortcomings were the responsibility of those employees. That is an issue between Taxpayer and the employees purportedly responsible for accounting for its taxable sales. However, the Department points out that it is Taxpayer's responsibility - not its employees - 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\(a\)](#).

Taxpayer has not provided a shred of evidence that a more experienced Department representative would have resulted in an audit conclusion different than the results here in dispute. In any event, the protest process that resulted in this Letter of Findings is the opportunity to establish that the Department's conclusions were incorrect for any reason. Taxpayer has not met the burden of proving that the Department was wrong, as required by [IC 6-8.1-5-1\(c\)](#).

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 Department abate the liability or - at a minimum - abate a portion of the assessment based on a second-hand review of the Taxpayer's records and consideration of Taxpayer's arguments. The Department must decline Taxpayer's invitation to do so because Taxpayer has not met its statutory burden under [IC 6-8.1-5-1](#)(c) of establishing that the assessment was wrong. That conclusion is amply reinforced by pointing out a single conclusion in the audit report. "Almost double the amount of cash was circulating through the bank accounts and ATM than could be accounted for," which Taxpayer did not prove incorrect or adequately explain.

FINDING

Taxpayer's protest is denied.

January 5, 2024

Replaces Finding Document at: New

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