DEPARTMENT OF STATE REVENUE

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Letter of Findings Number: 03-20130027
Withholding Tax
For Tax Years 2009-11

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ISSUE

I. Withholding Tax–Imposition.

Authority: IC § 6-8.1-5-1; 45 IAC 3.1-1-97; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the imposition of additional withholding tax.

STATEMENT OF FACTS

Taxpayer is an Indiana business filing as an S corporation. Taxpayer has two shareholders. Taxpayer operates a gas station that is also a convenience store. As the result of an audit, the Indiana Department of Revenue ("Department") issued proposed assessments for the additional withholding taxes, interest, and penalties for 2009, 2010, and 2011 tax years. The Department determined that Taxpayer had not reported the correct amount of withholding tax. Taxpayer protested. An administrative hearing was held, and this Letters of Findings results. Further facts will be supplied as required.

I. Withholding Tax–Imposition.

DISCUSSION

All tax assessments are prima facie evidence that the Department's claim for the tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Taxpayer protests the imposition of additional withholding tax. The Department based its assessment on the following:

> [Taxpayer] did not withhold state and county income taxes relative to sales and hours of operation found by the sales tax audit. Taxpayer reported to the Department one W-2 withholding form in 2009 and presented for review one W-2 withholding form in 2010 and 2011. It is unreasonable to assume taxpayer employs [only one of the shareholders] to attend the gas station from early morning to late night. The auditor visited [Taxpayer's] location in the beginning of the sales tax audit field work and found a third employee besides the two shareholders that were present. As a result, an audit adjustment is being made to assess [Taxpayer] the state and county income taxes which were not withheld appropriately.

The Department refers to 45 IAC 3.1-1-97, which states in relevant part:

> Employers who make payments of wages subject to the Adjusted Gross Income Tax Act, and who are required to withhold Federal taxes pursuant to the Internal Revenue Code (U.S.C. Title 26), are required to withhold from employees' wages Adjusted Gross and County Adjusted Gross Income Tax.

Accordingly, employers such as Taxpayer are required to withhold adjusted gross and county adjusted gross income tax from payments of wages made to its employees.

The Department consulted "Bizstats.com" and found that the average cost of wages for a business of this type was 3.5 percent of the business's sales. The Department used the Bizstats.com number to derive the cost of wages amount for Taxpayer and then calculated the audited withholding tax due on the derived cost of wages. The Department gave Taxpayer credit for the amounts Taxpayer withheld on its shareholder's wages. The Department made a withholding tax assessment for the difference between the audited withholding tax due and the amount withheld.

Taxpayer maintains that, due to lack of profits from its newly acquired business, no other employees worked at the gas station prior to February 2012 when it hired the employee that was present at the time of the audit. During the protest, Taxpayer presented documentation demonstrating that its sole non-owner employee was hired in February of 2012.

Based on the information presented, Taxpayer has provided sufficient information to conclude that the additional withholding tax assessed is not correct. Therefore, based on the information available to the Department, Taxpayer has met the burden imposed by IC§ 6-8.1-5-1(c) of proving the proposed assessments wrong.

FINDING

Taxpayer's protest is sustained.

Posted: 07/31/2013 by Legislative Services Agency

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