DEPARTMENT OF STATE REVENUE

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Letter of Findings: 03-20160325; 03-20160327; 04-20160324; 04-20160326
Sales and Withholding Tax
For the Years 2012, 2013, and 2014

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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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 Gas Station and Convenience Store failed to establish that the Department's assessment of additional sales and withholding tax was incorrect; the Department noted that in the face of the Store's repeated refusals to provide documents and records requested during the audit, that the Store was potentially subject to both criminal and contempt charges.

ISSUES

I. Sales Tax - Gasoline and Convenience Store Sales.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-2-1(a); IC § 6-2.5-2-1(b); IC § 6-2.5-4-1; IC §§ 6-2.5-5 et seq.; IC § 6-2.5-9-8; IC § 6-8.1-3-12; IC § 6-8.1-5-1(b); IC § 6-8.1-5-1(c); IC § 6-8.1-5-4(a); IC § 6-8.1-5-4(c); 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); 45 IAC 15-5-1.

Taxpayer argues that the Department's audit overstated the amount of convenience store and gasoline sales conducted at its two Indiana business locations.

II. Withholding Tax - Gasoline and Convenience Store Wages.

Authority: IC § 6-3-4-8(a); IC § 6-3-6-10; IC § 6-8.1-5-1(b); IC § 6-8.1-5-4(a); IC § 6-8.1-5-4(c).

Taxpayer states that the Department's audit overstates the amount of withholding tax owed.

STATEMENT OF FACTS

Taxpayer is an Indiana S Corporation which operates two combination gas station/convenience stores in Indiana. Taxpayer is owned by two shareholders.

In late 2015, Indiana Department of Revenue ("Department") conducted a sales tax and withholding tax audit of the two stores. The Department's audit report indicates that Taxpayer's owners were contacted "multiple times spanning from July 2014 through March 2015" but "failed to provide records after numerous requests."

As further explained in the audit report:

> The [T]axpayer agreed to an appointment [but] was not present for the appointment. The [shareholder] was contacted after the scheduled appointment date and made no attempt to contact the auditor. At that point a subpoena was issued and the taxpayer still did not make contact with the auditor and did not provide any records.

In the absence of the requested business and tax records, the Department issued [tax] assessments based on the "best information available."

Taxpayer disagreed with the assessments and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representative attempted to explain the basis for the protest. This Letter of Findings results from that hearing and addresses the sales tax assessments for the two separate retail locations and also withholding tax assessments for those same locations.

The Department notes that Taxpayer's convenience stores and gas stations have previously undergone audits for different years.

I. Sales Tax - Gasoline and Convenience Store Sales.

DISCUSSION

Taxpayer argues that the assessment of sales tax is overstated because the Department's assessment is "arbitrary and capricious" and that the audit underestimated the amount of exempt sales. Taxpayer maintains, in making its assessment the audit misclassified Taxpayer's business as "grocery stores" and not as "convenience stores."

As a threshold issue, it is the 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. Further, "[W]hen [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.'" Dep't. 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 preceding 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.

A complementary excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. IC § 6-2.5-3-2.

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 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." IC § 6-8.1-5-4(c). In the absence of contemporaneous records, the Department is required by law to issue an assessment based upon whatever alternative means may be available. 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.

In the face of Taxpayer's repeated refusals to provide copies of its business records and tax returns, the audit relied on the "best information available" including - but not limited to - the ST-103MP ("Indiana Metered Pump Sales and Use Tax Return") forms Taxpayer filed with the Department, "departmental historical data and industry data," information from Taxpayer's gasoline supplier, and information from the "National Association of Convenience Stores."

Taxpayer has failed to provide any documentation buttressing its generalized disagreement with the Department's sales tax assessment and has done nothing to prove that this assessment was wrong. Taxpayer has failed to meet its statutory burden under IC § 6-8.1-5-1(c) of "proving that the proposed assessment is wrong . . . ."

In addition, the Department notes that IC § 6-2.5-9-8 provides that persons who fail to maintain or provide to the

Department records related to their collection of sales tax "commits a Level 6 felony." In addition, in the face of a taxpayer's failure to provide records under administrative subpoena, IC § 6-8.1-3-12 allows the Department to petition a court of competent jurisdiction for an order enforcing that subpoena and if the taxpayer fails to produce the requested documents, that court "may punish the defendant for contempt."

FINDING

Taxpayer's protest is denied.

II. Withholding Tax - Gasoline and Convenience Store Wages.

DISCUSSION

The Department reviewed Taxpayer's WH-3 ("Annual Withholding Tax Form") and WH-1 ("Indiana Withholding Tax Voucher") forms. Taxpayer declined to provide any records substantiating the information contained on these filings.

The audit determined that "there was a significant decrease in the amount of withholding tax reported each year." The audit report noted that "[i]n 2013 and 2014, there was insufficient withholding tax paid to operate a convenience store that was open 24 hours per day 365 days per year."

In the absence of any contemporaneous or other documentation, the Department's audit relied on the best information available including information available at BizStats.com. The audit report notes:

> BizStats.com does not provide statistics for convenience stores. However, it does have statistics for gasoline stations and for food and beverage stores; therefore, both these were reviewed. According to Bizstats.com, wages for gasoline stations are approximately 2.08[percent] of sales; and wages for food and beverages stores are approximately 6.42[percent] of sales.

The audit report recognized that "[t]he amount of wages as a percentage of sales was very different for these two types of businesses." Therefore, "In order to provide the most accurate estimate of wages each business segment was calculated separately."

Employers are required to withhold employee income taxes and remit those taxes to Indiana pursuant to the provisions of IC § 6-3-4-8(a) which provides in pertinent part as follows:

> Except as provided in subsection (d), every employer making payments of wages subject to tax under [IC 6-3] regardless of the place where such payment is made, who is required under the provisions of the Internal Revenue Code to withhold, collect, and pay over income tax on wages paid by such employer to such employee, shall, at the time of payment of such wages, deduct and retain therefrom the amount prescribed in withholding instructions issued by the department . . . . Such employer making payments of any wages:
>
> (1) shall be liable to the state of Indiana for the payment of the tax required to be deducted and withheld . . .
>
> (2) shall make return of and payment to the department monthly of the amount of tax which under [IC 6-3] and IC 6-3.5 the employer is required to withhold.

The audit assessed additional withholding tax on the ground that Taxpayer failed to either maintain or - in the face of the Department's repeated requests - provide documentation confirming that the amount of withholding tax it forwarded to the Department during the years at issue was correct.

IC § 6-8.1-5-4(a) requires that taxpayers maintain and retain records sufficient to determine each taxpayer's liability. "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 tax by reviewing those books and records." 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." IC § 6-8.1-5-4(c).

Taxpayer operates a business with estimated revenue in excess of $4,000,000 each year in fuel sales alone but failed to maintain business records. Under IC § 6-8.1-5-1(b), the Department is required to issue "a proposed assessment of the amount of the unpaid tax on the basis of the best information available . . . ." The affected taxpayer is entitled to quarrel with such an assessment but - in doing so - is required to establish that the proposed assessment is "wrong."

Taxpayer maintains that the Department misclassified the nature of Taxpayer's business and that the Department could have relied on alternative methods of determining what - if any - additional withholding tax it owed. Other than these general, undifferentiated assertions, Taxpayer has failed to establish in what manner or to what degree the withholding tax assessment was wrong.

In addition, the Department points out that IC § 6-3-6-10 provides that persons who fail to maintain or provide to the Department records related to their collection of withholding tax commit a class A misdemeanor.

FINDING

Taxpayer's protest is denied.

Posted: 09/28/2016 by Legislative Services Agency
An html version of this document.