

**Letter of Findings Number: 05-0068; 05-0066; 05-0067
Income Tax; Withholding Tax; Sales/Use Tax
For Tax Years 1992-2001**

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I. Tax Imposition—Burden of Proof

Authority: [IC 6-8.1-5-1\(b\)](#); [45 IAC 15-5-3\(b\)](#); [IC 6-8.1-5-1\(a\)](#); [IC 6-8.1-5-4\(a\)](#)

Taxpayer protests the imposition of income taxes, withholding taxes, and sales/use taxes.

II. Tax Administration—Penalty and Interest

Authority: [IC 6-8.1-10-1](#); [45 IAC 15-11-2](#); [IC 6-8.1-10-3\(b\)](#); [IC 6-8.1-5-1\(b\)](#)

Taxpayer protests the imposition of penalty and interest.

STATEMENT OF FACTS

Taxpayer owns a vehicle repair garage. The repair garage does business under a "d/b/a" ("doing business as" name). The Department attempted to notify the taxpayer of the administrative hearing date via certified mail at multiple taxpayer mailing addresses. The letters came back as returned mail. The Department was able to eventually contact the taxpayer (by telephone) prior to the hearing date in order to notify the taxpayer of the hearing. A telephone hearing was later conducted, during which taxpayer stated that he would provide the Department with documentation to support his protest. The Department agreed to allow the taxpayer until March 13, 2006, to submit supporting documentation. A certified letter was mailed (taxpayer provided another mailing address) confirming this, with the letter stating supporting documentation had to be "received by the Department no later than Monday, March 13, 2006." That documentation was never received by the Department. It should be noted that the periods protested by the taxpayer are the following: (1) income tax: 1996-2001; (2) sales/use tax: 1992-2001; and (3) withholding tax: 1996-2001. Further facts will be supplied as required.

I. Tax Imposition—Burden of Proof

DISCUSSION

Before examining the taxpayer's protest, it should be noted that the *taxpayer* bears the burden of proof. [IC 6-8.1-5-1\(b\)](#) states in pertinent part:

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.

The Indiana Administrative Code also states "[t]he burden of proving that a proposed assessment is incorrect rests with the taxpayer. . . ." [45 IAC 15-5-3\(b\)](#).

The Department's investigation report notes the following:

Taxpayer is not incorporated and has not filed returns with the State of Indiana since 1998; registered with the Department to collect and remit sales tax on March 1, 1999 and closed his registered retail merchant's certificate number on September 30, 2002. The only sales tax remitted was a small payment He was not and has never been registered for withholding tax. He has now been registered for withholding tax in the [] District.

The report further states that the "taxpayer filed income tax returns (Form IT40) for the years 1997 and 1998 and declared a small amount of income. No other returns have been filed since 1998 nor could any records be found that shows that the taxpayer filed a return for 1996."

And:

The taxpayer was contacted to bring all records into the [] District Office so that the investigation could be performed. The taxpayer came into the office in early January and it was explained to him what records were needed to perform the investigation. He stated that he may have the most recent year's records but he did not have prior year's records. He agreed to bring the records into the office the following Monday. As of this date no records have been available for examination.

As noted in the Statement of Facts, the taxpayer also stated during the telephone hearing that he would mail in supporting documentation. That documentation was not received.

The Department refers to [IC 6-8.1-5-1\(a\)](#), which states (*Emphasis added*):

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. The

department shall send the person a notice of the proposed assessment through the United States mail.

And the Department also refers to [IC 6-8.1-5-4\(a\)](#), which requires the taxpayer 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."

The Department made proposed assessments based on the best information available to it, as provided by [IC 6-8.1-5-1\(a\)](#). Regarding "best information available" the report states that for calculations "The Almanac of Business and Industrial Financial Ratios" was used, along with "businesses similar" in the area. Again quoting at length from the report:

The taxpayer is not and has never been registered to collect withholding tax. Information received from outside sources, and verified by said Auditor, confirmed that the taxpayer did have employees. This was verified by outside sources that had automobiles repaired by the taxpayer and by the auditor visiting the taxpayer's business location. Furthermore, outside sources stated that the taxpayer paid employees with both cash and/or checks and required his employees to cash paychecks at his business location.

Regarding sales/use taxes, the report states again that "no records were available" and thus The Almanac of Business and Industrial Financial Ratios was used.

Finally, with regards to the income tax the report notes "The taxpayer failed to provide source documents to verify both gross income and expenses therefore this investigation is being performed on Best Information Available. . . ."

Taxpayer, in his protest letter, states that he protests for the following reasons:

"1. I was not in business most of the times that they claim I owe taxes.

2. Did not get no deductions of any kind.

3. I didn't go into the business until 1999.

4. Tax withholding's 1999-2000. I worked by myself.

5. Any employees were subcontractors I didn't control what time they worked.

6. They worked at a flat rate they furnished there own tools, all I did was furnished a building."

At hearing taxpayer indicated that in the 1990's he worked at other jobs (e.g., painter's apprentice) and was not in the vehicle repair business. Taxpayer provided no documentation to substantiate that assertion (nor any of the claims in 1 through 6 above).

In conclusion, the burden of proving the assessment wrong rests with the taxpayer, as provided in [IC 6-8.1-5-1\(b\)](#). Taxpayer has not met this burden.

FINDING

Taxpayer's protest is denied.

II. Tax Administration—Penalty and Interest

DISCUSSION

Taxpayer protests the imposition of penalty and interest. With regard to interest, the Department refers to [IC 6-8.1-10-1](#), which states in relevant part (*Emphasis added*):

(a) If a person fails to file a return for any of the listed taxes, fails to pay the full amount of tax shown on his return by the due date for the return or the payment, or incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment.

...

(e) The department *may not* waive the interest imposed under this section.

With regard to the ten percent penalty, the Department refers to [45 IAC 15-11-2\(b\)](#), which states: Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

[45 IAC 15-11-2\(c\)](#) provides in pertinent part:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.

It should be noted that some of the proposed assessments had a twenty percent penalty imposed under [IC 6-8.1-10-3\(b\)](#).

The taxpayer incurred a deficiency which the Department determined was due to negligence under [45 IAC 15-11-2\(b\)](#), and so was subject to a penalty. Taxpayer has not affirmatively established "reasonable cause," as required by [45 IAC 15-11-2\(c\)](#). The Department also imposed a twenty percent penalty on some of the proposed assessments since the Department had to "prepare" the taxpayer's returns (See [IC 6-8.1-10-3\(b\)](#)). The taxpayer

has failed to meet his burden of proof as outlined in [IC 6-8.1-5-1\(b\)](#).

FINDING

Taxpayer's protest is denied.

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