DEPARTMENT OF STATE REVENUE

03-20050333P.LOF

Letter of Findings: 05-0333P
Indiana Withholding Tax
For Tax Periods Ending 01/31/2005-06/30/2005

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ISSUE

I. Tax Administration - Penalty

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2.

Taxpayer protests the imposition of penalties associated with its failure to timely file the Indiana Forms WH-1s for the periods ending 1/31/2005 through 06/30/2005.

STATEMENT OF FACTS

Taxpayer had filed its Forms WH-1 (Monthly Withholding Tax Returns) for the periods ending 01/31/2005 through 06/30/2005 after the due date and was assessed late penalties in accordance with IC § 6-8.1-10-2.1.

For the tax periods at issue, the taxpayer was an "early filer" for purposes of its Indiana monthly withholding tax remittances.

DISCUSSION

I. Tax Administration - Penalty

The taxpayer received a letter from the Indiana Department of Revenue, dated January 5, 2005, concerning the filing status of its Indiana retail sales tax account. This letter was sent to advise the taxpayer that its Indiana sales tax returns filing frequency was changed to a monthly filer. Immediately prior to this time, the taxpayer was an early filer for its Indiana retail sales tax filings. A monthly filer has a due date of the 30th day of the month following the taxable month, whereas an early filer has a due date of the 20th day of the month following the taxable month.

Upon receipt of this letter, the Taxpayer inadvertently changed the filing status of its Indiana withholding tax from an early filer to a monthly filer within its tax system. When the taxpayer changed the due date of the Indiana withholding tax, they only changed the due date of the State withholding taxes and not the county withholding taxes due. Consequently, the taxpayer began filing two withholding tax returns each month. One was for the State withholding taxes due and was remitted after the 20th day, but before the 31st day of the month following the taxable month. The other was for the county withholding taxes due and was remitted by the 20th day of the month following the taxable month. As a result, the taxpayer was assessed penalties and interest on the late filing of the State withholding tax payments, but not the county withholding tax payments.

Indiana Code § 6-3-4-8.1 outlines the requirements to be an early filer. Under this statute, any entity which had an average monthly remittance due in the preceding year which was greater than $1,000 is required to make payment of the tax no later than twenty days after the end of the month for which the remittance is due. For the 2004 tax year the taxpayer's monthly remittances for Indiana withholding taxes ranged from approximately $31,000 to $1,000,000.

The taxpayer protests the imposition of the 10 percent negligence penalty assessed pursuant to IC § 6-8.1-10-2.1.

The taxpayer first protests stating that the letter of notification from the Department concerning the filing status change was sent to the wrong location. The taxpayer states that all withholding tax correspondence was to be mailed to one location and all sales tax correspondence was to be mailed to another location in a different city and state. The taxpayer provided a copy of its Indiana BT-1 (Indiana Business Tax Application) which was completed in 1995. On this application the taxpayer indicated the sales/use tax mailing address should be a [xxxx] address and all other mailings should be to an Indiana address. The taxpayer's argument is that they read the letter quickly, not realizing that the letter concerned sales tax, since it was sent to the address used for withholding taxes.

In searching the Department's Returns Processing System, it was determined that effective April, 5, 2002, the taxpayer mailing address for both sales and withholding taxes was changed in the Department's system to a [xxxx] address. It is not clear what transpired to initiate this change of address. However, since that time, the primary correspondences regarding both withholding and sales taxes as well as corporate income taxes were sent by the Department to the taxpayer's [xxxx] address. These included resolution letters, withholding tax vouchers, sales tax vouchers, sales tax change in filing frequency letters, ACH credit transaction letters, requirement to remit EFT for corporate tax letters, etc. . .

Concerning the sales tax filing frequency letters, it is noted that this has changed numerous times since the taxpayer first registered in 1995. A letter was issued, dated January 3, 2002, (before the address change) to the [xxxx] address. Since that time, there were three additional filing frequency letters concerning sales taxes. The

first letter was dated January 2, 2003, the second letter dated January 5, 2005, (which gave rise to the issue at hand), and the third letter recently issued on January 5, 2006. All three of these letters were sent to the [xxxx] address. The January 5, 2005, letter is the only one which has caused problems for the taxpayer in inadvertently changing the filing due dates for the wrong tax.

The very first sentence in the Department's filing frequency letter reads as follows:

"This letter is to advise you of a change in your filing frequency for the Retail Sales tax type".

The letter is clear and unambiguous. The letter stated the tax type being addressed, and the purpose of the letter. There were no mistakes in the letter concerning the tax type or the action required. The taxpayer's only argument is that it was sent to the wrong location and was therefore presumed to be for State withholding taxes. The January 5, 2005, letter however was sent to the same address that has been used by the Department for almost the past three years concerning this exact same type of correspondence. The taxpayer argument is that the Department is partially responsible for the errors made by its (taxpayer's) employees in misreading the letter. The taxpayer bases this argument on its position that the letter was mailed to the wrong location, and that the taxpayer was using reasonable care in its assumption that if it went to that location it must be for withholding tax. The taxpayer's arguments are not persuasive in this matter. In order for the taxpayer to ascertain that the letter was changing its filing status from early to monthly filing, it would need to read further into the body of the letter. As the first sentence clearly stated the letter was concerning sales tax; it is not a valid argument that the taxpayer would not have known it was for sales/use tax. Not only did the taxpayer make the mistake of assuming the letter was for withholding taxes, they further assumed the letter addressed only State withholding taxes and not county withholding taxes. Clearly the taxpayer has not demonstrated that adequate controls were in place to prevent such an obvious error from being made.

As a second argument, the taxpayer states that the letter was even more likely to cause confusion since they were always a "monthly filer" for Indiana sales tax purposes, and therefore, there was in fact no reason for the Department to send the letter in the first place.

In searching the Department's records concerning the taxpayer's filing frequency, it is noted that the taxpayer's sales tax filing frequency has changed no less than six times leading up to this event. In 1996 the taxpayer was an annual filer. From 1997 through 2000, the taxpayer was a monthly filer. For 2001 the taxpayer was an early filer. For 2002 the taxpayer was a monthly filer and for 2003 through 2004 the taxpayer was an early filer. Therefore, the letter changing 2005 sales tax to a monthly filer, based on the prior year's activity, was in fact necessary.

As an additional argument in support of establishing reasonable cause, the taxpayer states that in January of each year, they receive upward of one-hundred notices from different taxing jurisdictions related to changes in filing frequency and rate changes. And the letter sent to the [xxxx] location arrived during its busiest month. Its employees were working on year end payroll processing, W-2s, annual and quarterly reports, and year end closings. Given this increase in activity the taxpayer believes it was reasonable for its personnel to believe the change of filing frequency applied to the State withholding taxes. Pointing again to the letter at issue, it is not possible to read the body of the letter without first reading the first sentence which clearly states the letter applies to Retail Sales tax. Again, the taxpayer's argument on this issue is not persuasive. The taxpayer is a large, multi-state, sophisticated taxpayer. In the exercise of ordinary and reasonable care, close attention must be paid to the filing due dates of all types of taxes for all types of jurisdictions. As the taxpayer acknowledges, it receives upward of one-hundred notices of this nature each year. The taxpayer should be aware of the importance of these letters and realize that any mistakes concerning the due dates of the tax returns could and would have costly consequences.

As a final argument, the taxpayer states that the returns in questions were late only by ten days. The total assessed penalties are fifty-one times the assessed total of the interest. The taxpayer argues that this is truly unreasonable, unduly harsh, and should be waived.

Indiana Code § 6-8.1-10-2.1(a) and (b) clearly define the Indiana penalty statutes applicable to this taxpayer's situation. If the tax payment is not paid by the due date of the payment, the penalty is established at 10 percent. The penalty has no relationship to the interest amount due. The penalty is "fixed" at the rate established by law, whether the return is one day late, ten days late or even several years late. The argument that the penalty should be waived as it is unreasonable in comparison to the interest assessment is therefore without a statutory basis.

Indiana Regulation 45 IAC 15-11-2(b) clarifies the standard for the imposition of the negligence penalty as follows:

> *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 [emphasis added].*** *Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.*

The standard for waiving the negligence penalty is found in 45 IAC 15-11-2(c). This reads in part as follows:

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... Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

In the established facts of this case, it is evident that the taxpayer has failed to exercise the ordinary and reasonable care that would be expected on a tax matter of this nature. The statutes clearly point out that "failure to read and follow instructions" is treated as negligence. The taxpayer has failed to establish a persuasive argument that the Department was contributory to the taxpayer's negligence in this matter.

FINDING

Taxpayer's protest is denied.

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