

**Letter of Findings Number: 06-0248P**  
**Penalty**  
**For the Period: 2003 through 2005**

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**ISSUE**

**I. Tax Administration – Penalty**

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

The taxpayer protests the proposed assessment of a penalty.

**STATEMENT OF FACTS**

The taxpayer is a building materials supplier. The taxpayer was audited, and as a result of the audit a proposed penalty was assessed. The taxpayer protested the proposed penalty assessment. An administrative hearing was held for the taxpayer. This Letter of Finding results from the hearing and the information the taxpayer supplied. More facts will be provided as needed below.

**I. Tax Administration – Penalty**

**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 Audit Report notes that, "Adjustments are being made to assess use tax on purchases of tangible personal property that fall outside any exemption within the Indiana Code." At issue was the "purchase of diesel fuel by the taxpayer to deliver their own goods to their customer's job sites."

The taxpayer protests the imposition of a negligence penalty. The taxpayer states in correspondence:

We are in agreement with paying the tax liability and interest payment. However, we disagree with the penalty portion of the amount due. We feel we should not be charged a penalty because the sellers should have charged the tax at the time of purchase. We did not give them any exemption certificates for sales tax and had no way of knowing the tax was not being charged. We in no way attempted to avoid the tax.

Taxpayer argues that the fuel pumps were not properly marked, and that taxpayer's employees did not know tax was not charged.

[45 IAC 15-11-2\(b\)](#) 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\(c\)](#) is also of import, and states that the Department "shall waive the negligence penalty . . . if the taxpayer affirmatively establishes that the failure . . . was due to reasonable cause and not due to negligence." [45 IAC 15-11-2\(c\)](#) notes:

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. . . .

The proposed negligence penalty is assessed for the taxpayer's negligence. As the Audit Report noted, "Use tax should be self assessed and remitted by the purchaser directly to the Department if such consumable supplies were purchased exempt from sales tax." Taxpayer has not met its burden of proof and has thus failed to establish "reasonable cause" to waive the penalty.

**FINDING**

The taxpayer's penalty protest is denied.

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