

Letter of Findings Number: 06-0117
Food and Beverage Tax
June-November 2005

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ISSUE

I. Food and Beverage Tax - Imposition

Authority: IC § 6-8.1-5-1(b).

The taxpayer protests the imposition of food and beverage tax.

II. Tax Administration – Imposition of Negligence Penalty

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2\(b\)\(c\)](#).

The taxpayer protests the imposition of the negligence penalty.

III. Tax Administration – Imposition of Interest

Authority: IC § 6-8.1-10-1(e).

The taxpayer protests the imposition of interest.

STATEMENT OF FACTS

The taxpayer is a limited liability corporation that owns a restaurant. The Indiana Department of Revenue, hereinafter referred to as the "Department," assessed county food and beverage tax, interest, and penalty for the tax period June – November, 2005. The Taxpayer protested the assessment. A hearing was held and this Letter of Findings results.

I. Food and Beverage Tax -Imposition

DISCUSSION

All tax assessments are presumed to be accurate and the Taxpayer bears the burden of proving that any assessment is incorrect. [IC 6-8.1-5-1\(b\)](#).

The county where the Taxpayer's restaurant is located imposed a tax on all food and beverages served by restaurants in the county. IC § 6-9-26-3(a). The Taxpayer failed to remit this tax to the Department from the time of the restaurant's opening in June, 2005 through November, 2005.

The Taxpayer stated that it had consulted with the Department concerning its responsibilities to collect and remit taxes to the state prior to opening the restaurant. The Taxpayer alleges that they were not informed of the requirement to collect and remit food and beverage tax on its sales. As soon as the Department informed the Taxpayer of its duty to collect and remit food and beverage taxes, the Taxpayer complied. The Taxpayer argued that since it was not aware of the requirement to collect and remit food and beverage tax, the Taxpayer should not have to pay the taxes imposed for the tax period June through November 2005.

Oral advice offered by the Department's employees does not bind the Department. [45 IAC 15-3-29\(e\)](#). The Department has no authority to waive a Taxpayer's food and beverage tax liability because the Taxpayer relied on oral advice from a Department employee. The Taxpayer was unable to sustain its burden of proving that the food and beverage tax was incorrectly imposed.

FINDING

The Taxpayer's protest to the imposition of food and beverage tax is denied.

II. Tax Administration – Imposition of Negligence Penalty

DISCUSSION

The Taxpayer protests the imposition of the ten percent (10 percent) negligence penalty pursuant to IC § 6-8.1-10-2.1. 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. 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 given at [45 IAC 15-11-2\(c\)](#) 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. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

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

The Taxpayer provided substantial documentation indicating that its failure to pay the assessed use tax was due to reasonable cause rather than negligence.

FINDING

The Taxpayer's protest is sustained.

III. Tax Administration – Imposition of Interest

DISCUSSION

The Taxpayer protested the imposition of interest on the assessment of food and beverage tax. The Indiana Department of Revenue does not have the authority to waive interest. IC § 6-8.1-10-1(e).

FINDING

The Taxpayer's protest is denied.

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