DEPARTMENT OF STATE REVENUE

03-20070209P.LOF

Letter of Findings: 07-0209P
Withholding Tax
For the Tax Year Ending December 31, 2003

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Withholding Tax - Twenty Percent Penalty

Authority: IC § 2-5-3-1; IC § 6-3-2-2.8; IC § 6-3-4-13; IC § 6-8.1-5-1; IC § 6-8.1-10-2.1; 45 IAC 15-11-2

Taxpayer seeks abatement of the twenty percent penalty for failure to file Form WH-1 and remit withholding tax on non-resident shareholders.

II. Tax Administration - Duties, Powers, Responsibilities – Reliance on Oral Advice.

Authority: 45 IAC 15-3-2(e); *Indiana Dep't of Envtl. Management v. Conrad*, 614 N.E.2d 916 (Ind. 1993); *Cablevision of Chicago v. Colby Cable Corp.*, 417 N.E.2d 348 (Ind. Ct. App. 1981)

Taxpayer states that it relied on oral advice received from an Indiana Department of Revenue official relating to this matter.

STATEMENT OF FACTS

The taxpayer is an S-Corporation. Non-resident shareholders made quarterly estimated payments to the Department. However, the taxpayer failed to file Form WH-1s and withhold tax on its non-resident shareholders for the year ending December 31, 2003. The taxpayer was assessed a twenty percent penalty pursuant to IC § 6-8.1-10-2.1(h).

I. Withholding Tax - Twenty Percent Penalty

DISCUSSION

Taxpayer is requesting abatement of the twenty percent penalty for failure to file Form WH-1 and remit withholding tax on its non-resident shareholders. Taxpayer asks for consideration that the tax owed was satisfied through the quarterly estimates paid by the non-resident shareholders.

Pursuant to IC § 6-3-2-2.8:

Notwithstanding any provision of IC 6-3-1 through IC 6-3-7, there shall be no tax on the adjusted gross income of the following:

(1) Any organization described in Section 501(a) of the Internal Revenue Code, except that any income of such organization which is subject to income tax under the Internal Revenue Code shall be subject to the tax under IC 6-3-1 through IC 6-3-7.

(2) Any corporation which is exempt from income tax under Section 1363 of the Internal Revenue Code and which complies with the requirements of IC 6-3-4-13. However, income of a corporation described under this subdivision that is subject to income tax under the Internal Revenue Code is subject to the tax under IC 6-3-1 through IC 6-3-7. A corporation will not lose its exemption under this section because it fails to comply with IC 6-3-4-13 but it will be subject to the penalties provided by IC 6-8.1-10.

(3) Banks and trust companies, national banking associations, savings banks, building and loan associations, and savings and loan associations.

(4) Insurance companies subject to tax under IC 27-1-18-2, including a domestic insurance company that elects to be taxed under IC 27-1-18-2.

(5) International banking facilities (as defined in Regulation D of the Board of Governors of the Federal Reserve System (12 CFR 204)). (**Emphasis added**).

According to IC § 6-3-4-13:

(a) Every corporation which is exempt from tax under IC 6-3 pursuant to IC 6-3-2-2.8(2) shall, at the time that it pays or credits amounts to any of its nonresident shareholders as dividends or as their share of the corporation's undistributed taxable income, withhold the amount prescribed by the department. Such corporation so paying or crediting any nonresident shareholder:

(1) shall be liable to the state of Indiana for the payment of the tax required to be withheld under this section and shall not be liable to such shareholder for the amount withheld and paid over in compliance or intended compliance with this section; and

(2) when the aggregate amount due under IC 6-3 and IC 6-3.5 exceeds one hundred fifty dollars ($150) per quarter, then such corporation shall make return and payment to the department quarterly, on such dates and in such manner as the department shall prescribe, of the amount of tax which, under IC 6-3 and IC 6-3.5, it is required to withhold.

(b) Every corporation shall, at the time of each payment made by it to the department pursuant to this

section, deliver to the department a return upon such form as shall be prescribed by the department showing the total amounts paid or credited to its nonresident shareholders, the amount withheld in accordance with the provisions of this section, and such other information as the department may require. Every corporation withholding as provided in this section shall furnish to its nonresident shareholders annually, but not later than the fifteenth day of the third month after the end of its taxable year, a record of the amount of tax withheld on behalf of such shareholders on forms to be prescribed by the department.
(c) All money withheld by a corporation, pursuant to this section, shall immediately upon being withheld be the money of the state of Indiana and every corporation which withholds any amount of money under the provisions of this section shall hold the same in trust for the state of Indiana and for payment thereof to the department in the manner and at the times provided in IC 6-3. Any corporation may be required to post a surety bond in such sum as the department shall determine to be appropriate to protect the state of Indiana with respect to money withheld pursuant to this section.
(d) The provisions of IC 6-8.1 relating to additions to tax in case of delinquency and penalties shall apply to corporations subject to the provisions of this section, and for these purposes any amount withheld, or required to be withheld and remitted to the department under this section, shall be considered to be the tax of the corporation, and with respect to such amount it shall be considered the taxpayer.
(e) Amounts withheld from payments or credits to a nonresident shareholder during any taxable year of the corporation in accordance with the provisions of this section shall be considered to be a part payment of the tax imposed on such nonresident shareholder for his taxable year within or with which the corporation's taxable year ends. A return made by the corporation under subsection (b) shall be accepted by the department as evidence in favor of the nonresident shareholder of the amount so withheld from the shareholder's distributive share.
(f) This section shall in no way relieve any nonresident shareholder from the shareholder's obligation of filing a return or returns at the time required under IC 6-3 or IC 6-3.5, and any unpaid tax shall be paid at the time prescribed by section 5 of this chapter.
(g) Instead of the reporting periods required under subsection (a), the department may permit a corporation to file one (1) return and payment each year if the corporation pays or credits amounts to its nonresident shareholders only one (1) time each year. The withholding return and payment are due on or before the fifteenth day of the third month after the end of the taxable year of the corporation.
(h) If a distribution will be made with property other than money or a gain is realized without the payment of money, the corporation shall not release the property or credit the gain until it has funds sufficient to enable it to pay the tax required to be withheld under this section. If necessary, the corporation shall obtain such funds from the shareholders.
(i) If a corporation fails to withhold and pay any amount of tax required to be withheld under this section and thereafter the tax is paid by the shareholders, such amount of tax as paid by the shareholders shall not be collected from the corporation but it shall not be relieved from liability for interest or penalty otherwise due in respect to such failure to withhold under IC 6-8.1-10.
(j) A corporation described in subsection (a) may file a composite adjusted gross income tax return on behalf of some or all nonresident shareholders if it complies with the requirements prescribed by the department for filing a composite return. (**Emphasis added**).
IC § 6-8.1-10-2.1 states:
(a) If a person:
(1) fails to file a return for any of the listed taxes;
(2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
(3) incurs, upon examination by the department, a deficiency that is due to negligence;
(4) fails to timely remit any tax held in trust for the state; or
(5) is required to make a payment by electronic funds transfer (as defined in IC 4-8.1-2-7), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department;
the person is subject to a penalty.
(b) Except as provided in subsection (g), the penalty described in subsection (a) is ten percent (10 [percent]) of:
(1) the full amount of the tax due if the person failed to file the return;
(2) the amount of the tax not paid, if the person filed the return but failed to pay the full amount of the tax shown on the return;
(3) the amount of the tax held in trust that is not timely remitted;
(4) the amount of deficiency as finally determined by the department; or
(5) the amount of tax due if a person failed to make payment by electronic funds transfer, overnight courier, or personal delivery by the due date.

(c) For purposes of this section, the filing of a substantially blank or unsigned return does not constitute a return.

(d) If a person subject to the penalty imposed under this section can show that the failure to file a return, pay the full amount of tax shown on the person's return, timely remit tax held in trust, or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty.

(e) **A person who wishes to avoid the penalty imposed under this section must make an affirmative showing of all facts alleged as a reasonable cause for the person's failure to file the return, pay the amount of tax shown on the person's return, pay the deficiency, or timely remit tax held in trust, in a written statement containing a declaration that the statement is made under penalty of perjury. The statement must be filed with the return or payment within the time prescribed for protesting departmental assessments. A taxpayer may also avoid the penalty imposed under this section by obtaining a ruling from the department before the end of a particular tax period on the amount of tax due for that tax period**.

(f) The department shall adopt rules under IC 4-22-2 to prescribe the circumstances that constitute reasonable cause and negligence for purposes of this section.

(g) A person who fails to file a return for a listed tax that shows no tax liability for a taxable year, other than an information return (as defined in section 6 of this chapter), on or before the due date of the return shall pay a penalty of ten dollars ($10) for each day that the return is past due, up to a maximum of two hundred fifty dollars ($250).

(h) A corporation which otherwise qualifies under IC 6-3-2-2.8(2) but fails to withhold and pay any amount of tax required to be withheld under IC 6-3-4-13 shall pay a penalty equal to twenty percent (20 [percent]) of the amount of tax required to be withheld under IC 6-3-4-13. This penalty shall be in addition to any penalty imposed by section 6 of this chapter.

(i) Subsections (a) through (c) do not apply to a motor carrier fuel tax return. (**Emphasis added**).

Under IC § 6-8.1-5-1(b), "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." An assessment – including the negligence penalty – is presumptively valid.

Departmental regulation 45 IAC 15-11-2(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." *Id*.

IC § 6-8.1-10-2.1(d) allows the Department to waive the penalty upon a showing that the failure to pay the deficiency was based on "reasonable cause and not due to willful neglect." Departmental regulation 45 IAC 15-11-2(c) requires that 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...."

Pursuant to IC § 2-5-3-1:

It is hereby declared to be the policy of the general assembly of the state of Indiana to promote a revenue raising structure in Indiana that will provide adequate revenues to carry on the efficient operation of the state, county, and city governments and at the same time will assure that its burdens will be shared equitably by all taxpayers. It is further declared to be the policy of the general assembly of the state of Indiana to encourage and bring about the accomplishment of enforcement policies and administrative practices that will result in maximum return from existing taxes to the state of Indiana at a minimum cost to the taxpayers.

In imposing the twenty percent penalty for failure to file Form WH-1 and remit withholding tax on non-resident shareholders the Department is enforcing a provision of the Indiana Code in order to ensure the continued compliance with Indiana law. The requirement of filing a Form WH-1 and the withholding on taxpayer's non-resident shareholders is the state's way of ensuring that the Department is provided with information it needs to carry out its objectives in the most efficient manner. The withholding requirements imposed upon the taxpayer in this instance are more efficient than the unreasonably burdensome method of the Department trying to match non-resident shareholders to their respective S-Corporations in order to ensure that voluntary compliance with the Indiana tax laws has occurred.

Taxpayer has not provided substantive evidence in support of its protest.

FINDING

Taxpayer's protest is denied.

II. Tax Administration - Duties, Powers, Responsibilities – Reliance on Oral Advice.

DISCUSSION

Taxpayer states it relied on information received from an Indiana Department of Revenue "official" who told them the tax could be paid by shareholder estimate.

45 IAC 15-3-2(e) states:

Oral opinions or advice will not be binding upon the department. However, taxpayers may inquire as to whether or not the department will make a ruling or determination based on the facts presented by the

> taxpayer. If the taxpayer wishes a ruling by the department, the formal request must be in writing. A taxpayer may also orally receive technical assistance from the department in preparation of returns. However this advice is advisory only and is not binding in the latter examination of returns.
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> Based upon general inquiries and correspondence, the department often issues written letters of advice. Such letters are advisory in nature only and merely technical assistance tools for the taxpayer. Strictly informational type letters are not to be considered rulings by the department and will not be binding. However, some written inquiries have asked for the tax consequences of a particular transaction, based upon the facts presented. In such instances, the department may consider such letters as rulings that may bind the department to the position stated in respect to that taxpayer only. All such rulings issued will be binding provided that all of the facts described in obtaining the ruling are true and accurate. Any misstatement of material fact or information will void the ruling.

The plain language of the rule clearly states that oral opinions will not be binding on the Department. Even when a taxpayer orally receives technical assistance from the Department, the advice is advisory only and is not binding on further examination of returns, such as the audit in this case.

Furthermore, in *Indiana Dep't of Envtl. Management v. Conrad*, 614 N.E.2d 916 (Ind. 1993) the Indiana Supreme Court stated:

> As a general rule, equitable estoppel will not be applied against government authorities. The state will not be estopped in the absence of clear evidence that its agents made representations upon which the party asserting estoppel relied. The party claiming estoppel has the burden to establish all facts necessary to constitute it. To make out a claim of estoppel, one must show:
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> (1) a representation or concealment of material fact;
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> (2) made by a person with knowledge of the fact and with the intention that the other party should act upon it;
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> (3) to a party ignorant of the matter; and
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> (4) which induced the other party to act upon it to his detriment. *Id.* at 921 (citations omitted).

In spite of alleged oral representations made by a Department official, there are strong public policy reasons why the Department cannot be estopped from collecting taxes or imposing related penalties. Indeed, estoppels against the public are disfavored because "if laches, waiver or estoppel did apply against the public, a dishonest, incompetent or negligent public official could wreck the interests of the public." *Cablevision of Chicago v. Colby Cable Corp.*, 417 N.E.2d 348, 354 (Ind. Ct. App. 1981) (internal quotation marks omitted). "Our courts have been particularly unsolicitous of estoppel and laches arguments in cases where the unauthorized acts of public officials somehow implicate government spending powers." *Id*. Estoppel is disapproved in cases of government spending or in case involving revenue laws because estoppel would destroy the effect of such laws. *Id*. at 355.

The Taxpayer has not shown any factual or legal reason why the Department's rule should not apply.

FINDING

Taxpayer protest is denied.

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