DEPARTMENT OF STATE REVENUE

03-20070362P.LOF

Letter of Findings: 07-0362P
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 It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register.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.

ISSUE

I. Withholding Tax – Imposition of Twenty-Percent Penalty.

Authority: IC § 6-3-4-13; IC § 6-8.1-5-1; IC § 6-8.1-10-2.1; 45 IAC 15-11-2; 45 IAC 15-3-2(e); *Cablevision of Chicago v. Colby Cable Corp.*, 417 N.E.2d 348 (Ind. Ct. App. 1981).

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

STATEMENT OF FACTS

Taxpayer is an S-Corporation. Taxpayer failed to file Form WH-1s and withhold tax on its non-resident shareholder for the year ending December 31, 2003. Taxpayer was assessed a twenty-percent penalty pursuant to IC § 6-8.1-10-2.1(h).

I. Withholding Tax – Imposition of Twenty-Percent Penalty.

DISCUSSION

Taxpayer believes that it is entitled to abatement of the twenty-percent penalty for failure to file Form WH-1 and remit withholding tax on its non-resident shareholder. Taxpayer argues that in 2003 the non-resident shareholder paid the tax through its estimated tax payments. Furthermore, Taxpayer argues that it relied on the advice of a Department of Revenue employee that it was not necessary to file the WH-1 as long as the non-resident shareholders were making estimated payments. Taxpayer claims that it subsequently inactivated the withholding account in reliance on this advice.

Under IC § 6-8.1-5-1(c), "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 penalty – is presumptively valid.

Taxpayer was required to withhold tax on the income of its non-resident shareholders per IC § 6-8.1-10-2.1(h), which clearly states:

> 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%) 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. (*Emphasis added*).

According to IC § 6-3-4-13(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. (*Emphasis added*).

The Department is simply enforcing the non-resident shareholder withholding requirement. The statute clearly states that the penalty is assessed against the corporation for failure to withhold, not for the shareholders' failure to remit taxes due. IC § 6-3-4-13(i) clearly states that even if the shareholders pay the taxes due, the corporation *shall not* be relieved from liability for interest or penalty otherwise due for the failure to withhold.

Thus, even though Taxpayer's non-resident shareholder did indeed pay tax through estimated income tax payments, nonetheless, Taxpayer, according to the clear statement of the law, shall not be relieved from liability for interest or penalty.

Taxpayer argues it acted reasonably because it relied on the representations of a Department employee made to Taxpayer in 2003.

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(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."

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...."

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.

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.

45 IAC 15-3-2(e) language is clear. 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. This rule is supported by Indiana case law and strong public policy. Taxpayer did not request official advisories.

Furthermore, 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.

Therefore, Taxpayer cannot establish reasonable cause in its reliance on the advice of a Department employee.

However, Taxpayer argues that in reliance on the Department employee's oral advice it inactivated its withholding account. In other words, Taxpayer argues that its reliance on the Department's advice caused a change in position that caused it harm. As evidence, Taxpayer provided a copy of a page from a tax form document with unidentified hand-written notes on it dated to March 14, 2003 that refer to advice to inactivate a withholding account in 2001. However, there is no further evidence of this account being inactivated. In order to establish a reliance interest, Taxpayer must show that but-for this act, Taxpayer would not have changed its position. Taxpayer had not been withholding properly even prior to 2003. Taxpayer did not change its position in reliance on the Department employee's oral advice presumably given in 2003.

Taxpayer has not shown any factual or legal reason why the penalty should not apply.

FINDING

Taxpayer's protest is respectfully denied.

Posted: 12/05/2007 by Legislative Services Agency
An html version of this document.