

**Letter of Findings: 07-0413P**  
**Withholding Tax**  
**For the Tax Year Ending December 31, 2003**

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**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 shareholders 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 shareholders. Taxpayer argues that in 2003 the non-resident shareholders paid the tax through its estimated tax payments and that the underlying ten-percent penalty was abated.

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 [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. (*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 shareholders 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. The ten-percent negligence penalty was abated in this case, because Taxpayer's shareholders had paid a tax on their income. The twenty-percent penalty, however, applies to the S-Corp's failure to withhold.

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 respectfully denied.

*Posted: 12/05/2007 by Legislative Services Agency*  
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