

**Letter of Findings Number: 07-0297P
Sales and Use Tax-Penalty
For the Periods 2003-2005**

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ISSUE

I. Tax Administration–Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 2-2-5-33](#); [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer was audited by the Department for sales and use tax. As a result of the audit, the Department assessed Taxpayer for sales and use tax along with a ten percent penalty. Taxpayer protested the penalty.

The Department sent a letter to Taxpayer stating that Taxpayer could request a hearing by replying to the letter within twenty (20) days of the letter. Taxpayer did not reply to the Department's letter. Due to Taxpayer's failure to reply, this Letter of Findings is written based on the information in Taxpayer's protest file and other Department records relating to Taxpayer.

I. Tax Administration–Penalty.

DISCUSSION

Taxpayer protests the imposition of the ten percent negligence penalty on Taxpayer's failure to collect sales tax on certain vitamin sales and to self-assess and remit use tax on several items.

Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. IC § 6-8.1-10-2.1. The Indiana Administrative Code, [45 IAC 15-11-2](#) further provides:

(b) "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.

(c) 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.

Taxpayer argues first for penalty waiver with respect to vitamin sales for ocular health. Taxpayer argues that the vitamin sales were part of a prescribed treatment though the vitamins themselves did not require prescriptions. Department regulation [45 IAC 2.2-5-33](#) explicitly limits the exemption to only those drugs that *require* a prescription. By not following this regulation, Taxpayer has not shown reasonable cause for its failure to collect and remit sales tax.

With respect to the use tax portion of the liability, Taxpayer has not presented sufficient information to justify penalty waiver.

FINDING

Taxpayer's protest is denied.

