

LETTER OF FINDINGS: 07-0423
Withholding Tax
For the Tax Years 2004-2006

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ISSUES

I. Withholding Tax—Best Information Available (BIA).

Authority: IC § 6-8.1-5-1; [45 IAC 15-5-1](#).

Taxpayer protests the imposition of withholding tax assessed based upon the best information available to the Department.

II. Tax Administration—Negligence Penalty.

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

Taxpayer protests the imposition of a ten (10) percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is a real estate management company domiciled in Nevada. Taxpayer is a partner in a unitary partnership that is also domiciled outside of Indiana. The partnership controls several LLCs and partnerships that own and manage real estate located across the United States. Taxpayer files consolidated Indiana adjusted gross income tax returns.

Pursuant to an investigation, the Indiana Department of Revenue (Department) assessed withholding tax, penalties, and interest for the 2004-2006 tax years. The Department found that Taxpayer had failed to report, withhold, and remit withholding tax for the 2004-2006 tax years and imposed the assessments based upon the best information available to the Department. Taxpayer protested this imposition of tax and penalties. An administrative hearing was held, and this Letter of Findings results.

I. Withholding Tax—Best Information Available (BIA).

DISCUSSION

The Department found that Taxpayer had failed to report, withhold, and remit withholding tax and assessed withholding tax based upon the best information available to the Department as prescribed by [45 IAC 15-5-1](#).

During the course of the protest, Taxpayer submitted corporate tax returns for the tax periods 2004-2006 to demonstrate that withholding tax amounts were reported to replace the best information available withholding tax assessments. Also, Taxpayer submitted several WH-18s to demonstrate that amounts were withheld and remitted to the Department.

Taxpayer has provided sufficient information to demonstrate that withholding tax was reported, withheld, and remitted for the 2005 and 2006 tax years. However, while the information that Taxpayer provided for the 2004 tax year was sufficient to prove that withholding tax was reported, the information provided was insufficient to prove that Taxpayer had withheld and remitted the tax for the 2004 tax year. Pursuant to IC § 6-8.1-5-1(c), all tax assessments are presumed to be accurate, and the taxpayer bears the burden of proving that an assessment is incorrect. Since Taxpayer provided insufficient information to demonstrate that withholding tax was withheld and remitted for the 2004 tax year, Taxpayer has failed to meet its burden. Therefore, Taxpayer's protest, as it relates to the amount withheld and remitted for 2004, is denied.

In summary, Taxpayer's protest pertaining to the BIA withholding tax amounts assessed for 2004-2006 tax years and Taxpayer's protest pertaining to the amounts withheld and remitted for the 2005 and 2006 tax years are sustained. However, Taxpayer's protest pertaining to the amount withheld and remitted for the 2004 tax year is denied.

FINDING

Taxpayer's protest is sustained in part and denied in part.

II. Tax Administration—Negligence Penalty.

DISCUSSION

The Department issued proposed assessments and ten (10) percent negligence penalties for the tax years in question. Taxpayer protests the imposition of the penalties. The Department refers to IC § 6-8.1-10-2.1(a)(3), which provides "if a person... incurs, upon examination by the department, a deficiency that is due to negligence... the person is subject to a penalty."

The Department refers to [45 IAC 15-11-2\(b\)](#), which states:

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 Department may waive a negligence penalty as provided in [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.

In this case, Taxpayer incurred a deficiency which the Department determined was due to negligence under [45 IAC 15-11-2\(b\)](#), and so was subject to a penalty under IC § 6-8.1-10-2.1(a). Taxpayer asserts that its failure to withhold and remit the amounts for the 2004 tax year related to the Department's refunding an overpayment from a previous tax year instead of applying the overpayment to the 2004 tax year. However, since Taxpayer received the entire overpayment in a refund before the tax return for the 2004 tax year was due and was on notice of the refund, Taxpayer has not affirmatively established that its failure to remit the tax was due to reasonable cause. While Taxpayer has established that it does not owe some of the proposed assessments, Taxpayer has not affirmatively established that its failure to pay the remaining deficiencies was due to reasonable cause and not due to negligence, as required by [45 IAC 15-11-2\(c\)](#).

FINDING

Taxpayer's protest of the imposition of the penalty is respectfully denied.

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