

**Letter of Findings: 08-0103P**  
**Withholding Tax**  
**For the Tax Years Ending December 31, 2004, 2005, and 2006**

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**ISSUE**

**I. Withholding Tax - Twenty-Percent Penalty.**

**Authority:** IC § 6-3-4-13.

The 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**

The taxpayer is an S-Corporation. The taxpayer failed to file Form WH-1s and withhold tax on its non-resident shareholders for the years ending December 31, 2004, 2005, and 2006. The taxpayer was assessed a twenty-percent penalty pursuant to IC § 6-8.1-10-2.1(h). The taxpayer had previously settled its withholding tax penalty liabilities for 2003.

**I. Withholding Tax - Twenty-Percent Penalty.**

**DISCUSSION**

The taxpayer argues 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.

The taxpayer previously entered into a settlement agreement with respect to the penalties at issue. The taxpayer argues that it did not enter into the agreement until it had reached an oral understanding that the three years not specifically settled by the agreement would be resolved. However, that understanding was never reduced to writing, either as part of the agreement or as a written modification to the agreement. As stated in paragraph 8 of the settlement agreement:

This Agreement constitutes the entire integrated agreement between Taxpayer and the Department and cannot be amended, modified, or supplemented in any respect except by written agreement by all parties. Furthermore, the settlement agreement itself stated, in recital B:

The Department reviewed Taxpayer's nonresident shareholder withholding and determined that Taxpayer did not withhold and remit tax on behalf of its nonresident shareholders for the year ending December 31, 2003. The Department assessed a penalty of [assessment] for the year for failure to withhold on behalf of Taxpayer's nonresident shareholders ("Assessment").

The penalty itself was for 2003. Agreement paragraph 1 stated:

Within thirty (30) days of the execution of this Agreement, Taxpayer agrees to pay the Department [payment] in full satisfaction of the Assessment.

The settlement agreement settled the Assessment (i.e., the 2003 year). If the settlement agreement had been intended to settle years beyond 2003, it would have indicated language that would have explicitly settled 2004, 2005, and 2006.

Paragraph 3 of the settlement agreement provided:

The Department agrees that upon timely payment of the [payment] amount listed in Paragraph 1, no further collection action shall be pursued for nonresident shareholder withholding taxes previously reported or penalties previously assessed for the 2003 tax year against any of the following:

Taxpayer

Taxpayer's shareholders

Any creditor or transferee of Taxpayer or Taxpayer's assets

Any other corporation or business entity affiliated with Taxpayer

If the agreement had been intended to settle years beyond 2003, the language would have referenced 2004, 2005, and 2006. Instead, the language only referenced 2003.

Furthermore, paragraph 4 of the settlement agreement provided:

The Department agrees that the 2003 tax year is closed for any assessment of additional nonresident withholding tax and/or penalties except in the event of (and only to the extent of) any federal audit adjustments regarding Taxpayer's income for 2003.

The agreement would have limited the ability to assess beyond 2003. Instead, the language only limited the Indiana Department of Revenue's rights to assess for 2003.

However, as part of the agreement, the taxpayer agreed to comply with the withholding requirements for 2007 and going forward. The taxpayer has provided sufficient information to conclude that it has complied with the withholding requirements of IC § 6-3-4-13 for tax year 2007, and has thus shown reasonable cause to justify

penalty waiver.

Taxpayer's protest is sustained.

**FINDING**

Taxpayer's protest is sustained.

**CONCLUSION**

*Posted: 07/02/2008 by Legislative Services Agency*

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