

**Letter of Findings Number: 07-0440**  
**Sales and Use Tax**  
**For Tax Years 1999-2002**

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**ISSUES**

**I. Sales and Use Tax—Imposition.**

**Authority:** IC § 6-8.1-5-1; IC § 6-2.5-2-1; IC § 6-2.5-9-3; [45 IAC 2.2-4-22](#).

Taxpayer protests the assessment of sales tax.

**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 percent negligence penalty.

**STATEMENT OF FACTS**

Taxpayer is an Indiana S Corporation performing excavating and contracting services. Taxpayer bills its customers on a time and material contract basis. After an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer owed additional sales tax and assessed a negligence penalty for the tax years 1999 through 2002. Taxpayer protested the imposition of sales tax and penalty. An administrative hearing was held, and this Letter of Findings results.

**I. Sales and Use Tax—Imposition.**

**DISCUSSION**

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.

The Department found that Taxpayer had made sales under time and material contracts without remitting sales tax on the separately stated sales of construction materials and assessed sales tax.

IC § 6-2.5-2-1 provides, as follows:

(a) An excise tax, known as the state gross retail tax ("sales tax"), is imposed on retail transactions made in Indiana.

(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided by law, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant is required to collect the tax as agent for the state.

The Department refers to [45 IAC 2.2-4-22](#) (d)(2), which provides the responsibilities of a time and material contractor, as follows:

Disposition subject to the state gross retail tax. A contractor-retail merchant has the responsibility to collect the state gross retail tax and to remit such tax to the Department of Revenue whenever he disposes of any construction material in the following manner:

(1) Time and material contract. He converts the construction material into realty on land he does not own and states separately the cost for the construction materials and the cost for the labor and other charges (only the gross proceeds from the sale of the construction material are subject to tax).

Accordingly, a time and material contractor has a duty to collect and remit sales tax on the separately stated cost of construction materials. Thus, the contractor that "has a duty to remit state gross retail or use taxes... holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state." IC § 6-2.5-9-3.

Taxpayer asserts that it has already paid all of the taxes the Department said it owed under the Amnesty program, and should not be required to pay any more. The Amnesty Program ran from September 15, 2005 to November 15, 2005. However, what the Taxpayer agreed to pay under the Amnesty program was the amount of tax that the Department knew the Taxpayer owed at that time. Therefore, when the audit was completed in January of 2007, the Department had new amounts which it believed Taxpayer owed. The Department's assessment did not include any tax assessment amounts for which Taxpayer had made payments under amnesty.

**FINDING**

Taxpayer's protest is denied.

**II. Tax Administration—Negligence Penalty.**

**DISCUSSION**

The Department issued proposed assessments and the ten percent negligence penalty for the tax years in question. Taxpayer protests the imposition of penalty. 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 the 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. 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 has provided sufficient information to establish that its failure to pay the deficiency was not due to Taxpayer's negligence, but was due to reasonable cause as required by [45 IAC 15-11-2\(c\)](#).

#### **FINDING**

Taxpayer's protest to the imposition of the penalty is sustained.

#### **CONCLUSION**

In summary, Taxpayer's protest to the assessment of tax is denied, and Taxpayer's protest to the imposition of penalty is sustained.

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

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