

**Letter of Findings Number: 08-0512P
Withholding Tax-Penalty
For the Period 2007**

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ISSUE

I. Tax Administration–Penalty.

Authority: IC § 6-8.1-10-1; IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is a limited liability company doing business in Indiana. Taxpayer did not file withholding tax returns and pay nonresident partnership income withholding tax ("withholding tax") on behalf of its members prior to the statutory deadline. Taxpayer protested the resulting interest and 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 and interest on Taxpayer's failure to timely remit withholding tax on behalf of its nonresident partners.

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 that it cannot know the amounts the nonresident members' respective liabilities subject to withholding until it prepares and files its partnership tax return. However, Taxpayer could have made an estimated payment of the tax due prior to the deadline. Furthermore, Taxpayer had a penalty abatement for the exact issue during a previous year. Based on the lack of estimated payment prior to deadline and prior notice of the issue that resulted in the late payment in question, Taxpayer's protest is denied.

Taxpayer further protested the imposition of interest. Under IC § 6-8.1-10-1(e), interest cannot be waived by the Department.

FINDING

Taxpayer's protest is denied.

CONCLUSION

Taxpayer's protest is denied on all issues.

Posted: 11/26/2008 by Legislative Services Agency
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