

**Letter of Findings: 08-0574P**  
**Withholding Tax**  
**For the Tax Period Ending March 31, 2008**

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**ISSUE**

**I. Withholding Tax—Penalty.**

**Authority:** IC § 6-3-4-13; IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer seeks abatement of a ten percent negligence penalty.

**STATEMENT OF FACTS**

Taxpayer is an S-Corporation. Taxpayer filed its Form WH-1 and payment of the withholding tax due for the period ending March 31, 2008, two months late and was assessed a ten percent negligence penalty for the late filing and payment.

**I. Withholding Tax—Penalty.**

**DISCUSSION**

Taxpayer protests the assessment of a ten percent penalty that was imposed because it filed its Form WH-1 and paid its withholding tax after the due date. 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\(c\)](#), in pertinent part, 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.

Taxpayer asserts that the penalty should be abated because its payment was actually made early. Taxpayer maintains that it incorrectly filed the Form WH-1 and should have filed a Form DB020W-NR, which is not due until March of 2009.

IC § 6-3-4-13 provides the withholding requirements of S-Corporations, as follows:

(a) Every corporation which is exempt from tax under [IC 6-3](#) pursuant to [IC 6-3-2-2.8\(2\)](#) shall, at the time that it pays or credits amounts to any of its nonresident shareholders as dividends or as their share of the corporation's undistributed taxable income, withhold the amount prescribed by the department. Such corporation so paying or crediting any nonresident shareholder:

- (1) shall be liable to the state of Indiana for the payment of the tax required to be withheld under this section and shall not be liable to such shareholder for the amount withheld and paid over in compliance or intended compliance with this section; and
- (2) when the aggregate amount due under [IC 6-3](#) and [IC 6-3.5](#) exceeds one hundred fifty dollars (\$150) per quarter, then such corporation shall make return and payment to the department quarterly, on such dates and in such manner as the department shall prescribe, of the amount of tax which, under [IC 6-3](#) and [IC 6-3.5](#), it is required to withhold.

(b) Every corporation shall, at the time of each payment made by it to the department pursuant to this section, deliver to the department a return upon such form as shall be prescribed by the department showing the total amounts paid or credited to its nonresident shareholders, the amount withheld in accordance with the provisions of this section, and such other information as the department may require. Every corporation withholding as provided in this section shall furnish to its nonresident shareholders annually, but not later than the fifteenth day of the third month after the end of its taxable year, a record of the amount of tax withheld on behalf of such shareholders on forms to be prescribed by the department.

...  
(d) The provisions of [IC 6-8.1](#) relating to additions to tax in case of delinquency and penalties shall apply to corporations subject to the provisions of this section, and for these purposes any amount withheld, or required to be withheld and remitted to the department under this section, shall be considered to be the tax of the corporation, and with respect to such amount it shall be considered the taxpayer.  
...

(g) Instead of the reporting periods required under subsection (a), the department may permit a corporation to file one (1) return and payment each year if the corporation pays or credits amounts to its nonresident shareholders only one (1) time each year. The withholding return and payment are due on or before the fifteenth day of the third month after the end of the taxable year of the corporation.  
...

(Emphasis Added.)

Accordingly, an S-Corporation must make withholdings whenever it pays or credits amounts to any of its nonresident shareholders. If the taxpayer's withholdings are more than \$150 per quarter, then the taxpayer must remit its withholdings quarterly. While IC § 6-3-4-13(g) provides for the Department's option to allow certain taxpayer to file and pay only once a year, this has been limited to those taxpayers that only pay or credit amounts to its nonresident shareholders once a year and have not set up a separate nonresident withholding account.

The Form DB020W-NR to which taxpayer refers is used by those taxpayers who have not yet established a separate nonresident withholding account and have paid or credited the amounts to its nonresident shareholders only once during the year. However, as Taxpayer already has a withholding account with the state and has made four credits or distributions to its nonresident shareholders during this tax year, this form and its requirements do not apply to them. In fact, the instructions for the Form DBO202W-NR state that taxpayers that have "already registered as a nonresident withholding agent, [must] use the designated form WH-1."

Taxpayer has also argued for a penalty waiver asserting a history of timely tax payments. However, a review of Taxpayer's payment history and compliance record does not support this assertion. Moreover, the Department finds that Taxpayer, in filing and paying two months late, did not act with reasonable care and was inattentive to its tax duties. Inattention is negligence and negligence is subject to penalty. Accordingly, Taxpayer has not provided sufficient grounds in its protest to justify the Department's waiver of penalty.

#### **FINDING**

Taxpayer's protest is respectfully denied.

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