

Letter of Findings: 08-0686P**Sales Tax****For the Periods Ending May 31, 2008, through August 31, 2008**

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ISSUE**I. Tax Administration – Penalty for Failure to Make Payments by Electronic Funds Transfer.****Authority:** IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

The taxpayer seeks abatement of the ten-percent penalty for failure to make payments by electronic funds transfer.

STATEMENT OF FACTS

The taxpayer is a corporation. During the periods in question, the taxpayer was required to remit its sales tax via electronic funds transfer. The taxpayer submitted its payments via check. The Department imposed a ten-percent penalty based on the taxpayer's failure to comply with electronic funds transfer requirements. The taxpayer protested the penalties.

I. Tax Administration – Penalty for Failure to Make Payments by Electronic Funds Transfer.**DISCUSSION**

The taxpayer argues that the ten-percent penalty for failure to remit taxes via electronic funds transfer be waived.

IC § 6-8.1-10-2.1 states in relevant part:

(a) If a person:

- (1) fails to file a return for any of the listed taxes;
- (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
- (3) incurs, upon examination by the department, a deficiency that is due to negligence;
- (4) fails to timely remit any tax held in trust for the state; or
- (5) is required to make a payment by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department;**

the person is subject to a penalty.

(b) Except as provided in subsection (g), the penalty described in subsection (a) is ten percent (10%) of:

- (1) the full amount of the tax due if the person failed to file the return;
- (2) the amount of the tax not paid, if the person filed the return but failed to pay the full amount of the tax shown on the return;
- (3) the amount of the tax held in trust that is not timely remitted;
- (4) the amount of deficiency as finally determined by the department; or
- (5) the amount of tax due if a person failed to make payment by electronic funds transfer, overnight courier, or personal delivery by the due date.**

...

(d) If a person subject to the penalty imposed under this section can show that the failure to file a return, pay the full amount of tax shown on the person's return, timely remit tax held in trust, or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty.

(e) A person who wishes to avoid the penalty imposed under this section must make an affirmative showing of all facts alleged as a reasonable cause for the person's failure to file the return, pay the amount of tax shown on the person's return, pay the deficiency, or timely remit tax held in trust, in a written statement containing a declaration that the statement is made under penalty of perjury. The statement must be filed with the return or payment within the time prescribed for protesting departmental assessments. A taxpayer may also avoid the penalty imposed under this section by obtaining a ruling from the department before the end of a particular tax period on the amount of tax due for that tax period.

(Emphasis added).

Thus, a person who is required to make a payment by electronic funds transfer but fails to do so prior to the due date of payment is potentially subject to a ten-percent penalty for failure to comply with this requirement. This penalty is applicable even if the proper amount of tax is paid by alternative means (e.g., paper check) on or before the due date of the particular tax.

Departmental regulation [45 IAC 15-11-2](#)(b) defines negligence as "the failure to use such reasonable care,

caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." Id.

IC § 6-8.1-10-2.1(d) allows the Department to waive the penalty upon a showing that the failure to pay the deficiency was based on "reasonable cause and not due to willful neglect." Departmental regulation [45 IAC 15-11-2\(c\)](#) requires that 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...."

The taxpayer argues that it did not receive notice of the requirement to file via electronic funds transfer. However, according to Department records, the Department notified the taxpayer of the requirement on December 3, 2007, and on March 17, 2008. The address used by the Department was the same address as the taxpayer's mailing address for the prior eighteen years. Thus, given the Department's prior notice to the taxpayer and the taxpayer's noncompliance with the statute for tax periods five to eight months after the relevant statute went into effect, the taxpayer has not provided sufficient information to establish reasonable cause necessary to permit penalty waiver.

FINDING

The taxpayer's protest is denied.

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