

**Letter of Findings Number: 08-0453**  
**Sales and Use Tax**  
**For the Tax Years 2005-2007**

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**ISSUES**

**I. Sales and Use Tax—Imposition.**

**Authority:** IC § 6-2.5-2-1; IC § 6-2.5-9-3; IC § 6-8.1-5-1.

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 (10) percent negligence penalty.

**STATEMENT OF FACTS**

Taxpayer is an S-Corporation that operates convenience stores with gasoline pumps at two locations in Indiana. After an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer owed additional sales and use tax and assessed a negligence penalty for the tax years 2005, 2006, and 2007. The Department found Taxpayer had made sales for which it failed to report and remit sales tax to the Department. Taxpayer protested the imposition of the tax and penalty. An administrative hearing was held, and this Letter of Findings results. Further facts will be supplied as required.

**I. Sales and Use Tax—Imposition.**

**DISCUSSION**

Pursuant to IC § 6-8.1-5-1(c), all tax assessments are presumed accurate, and the taxpayer bears the burden of proving that an assessment is incorrect.

The Department found Taxpayer had made sales for which it failed to report and remit sales tax to the Department, and assessed sales tax for those sales.

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.

Additionally, IC § 6-2.5-9-3(2) in relevant part, provides that an individual:

[H]as a duty to remit Indiana gross retail ("sales") or use taxes (as described in [IC 6-2.5-3-2](#)) to the department; hold 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.

Taxpayer asserts that the amount of additional sales is overstated because the Department's assessment failed to take into account certain "void" sales transactions. Taxpayer maintains that these "void" sales transactions account for ten percent of the additional sales. Taxpayer claims that the "void" sales transactions result because the register employees did not have the authority to make "void" sales transactions through the register. Thus, the employees would keep copies of the receipts for those transactions that need to be voided and put the receipts in a folder for the manager to reconcile the "void" sales transactions to that day's total sales in a manager's report that was completed at the end of the day.

During the course of the protest, Taxpayer was asked, but failed to provide at least one complete set of cash register receipts with these types of "void" sales for one day, the daily summary cash register tape for that same day, that daily manager's report, the daily summary cash register tapes for the month, and the manager's report for the month. Taxpayer suggested that the decision be based upon the information that Taxpayer had previously submitted, which included four random cash register receipts with hand written notations "mistake" or "void" on them and two daily summary cash register tapes. However, this information is insufficient to establish that the assessment was overstated. In fact, one of the receipts submitted shows a "void" transaction as entered through the register and one of the daily summary tapes has a "void" sales total of all the "void" transactions entered through the register for the day.

Based upon the evidence presented, the Department is unable to conclude that Taxpayer assessment of sales tax was overstated. Therefore, Taxpayer has not met the burden imposed by IC § 6-8.1-5-1(c).

**FINDING**

Taxpayer's protest is respectfully denied.

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

**DISCUSSION**

The Department issued proposed assessments and ten (10) percent negligence penalties for the tax years in question. Taxpayer protests the imposition of the penalties. 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 a 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.

In this case, Taxpayer incurred an assessment which the Department determined was due to negligence under [45 IAC 15-11-2\(b\)](#), and so was subject to a penalty under IC § 6-8.1-10-2.1(a). Taxpayer argues for penalty wavier by making a general statement of penalty protest. However, Taxpayer has not presented any evidence that Taxpayer has acted with reasonable cause. Therefore, Taxpayer has not provided sufficient grounds to justify the Department's waiver of penalty.

**FINDING**

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

**CONCLUSION**

In summary, Taxpayer's protests of the sales tax and penalty assessments are denied.

*Posted: 05/27/2009 by Legislative Services Agency*

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