

Letter of Findings Number: 08-0664P
Sales Tax
For Tax Year 2008

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ISSUE

I. Tax Administration–Negligence Penalty.

Authority: IC § 6-2.5-6-1; IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of ten percent negligence penalty on several sales tax payments.

STATEMENT OF FACTS

Taxpayer is a business operating in Indiana. Taxpayer was required to make its 2008 sales tax payments via electronic funds transfer ("EFT"), but instead made several payments via standard paper check. As a result, the Indiana Department of Revenue ("Department") issued proposed assessments for ten percent negligence penalties. When it was informed of the EFT requirement, Taxpayer switched to EFT payments. Taxpayer protests the imposition of penalties. Further facts will be supplied as required.

I. Tax Administration–Negligence Penalty.

DISCUSSION

Taxpayer protests the imposition of penalty on several 2008 sales tax payments. Taxpayer's average monthly sales tax (also known as "gross retail tax") payment in prior years was below ten thousand dollars (\$10,000). Taxpayer was therefore not required to make EFT payments. Taxpayer was unaware of the change in the statute which reduced the level of tax required to be remitted via EFT from ten thousand dollars to five thousand dollars (\$5,000) at the beginning of 2008.

The relevant statute is IC § 6-2.5-6-1(g), which states:

If the department determines that a person's:

- (1) estimated monthly gross retail and use tax liability for the current year; or
 - (2) average monthly gross retail and use tax liability for the preceding year;
- exceeds five thousand dollars (\$5,000), the person shall pay the monthly gross retail and use taxes due by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)) or by delivering in person or by overnight courier a payment by cashier's check, certified check, or money order to the department. The transfer or payment shall be made on or before the date the tax is due.

(Emphasis added.)

In this case, Taxpayer's 2007 average monthly gross retail tax liability was greater than five thousand dollars. For several months in 2008, Taxpayer did not pay its monthly sales taxes due by EFT, by personal delivery or by overnight courier delivering a cashier's check, certified check, or money order.

The Department refers to IC § 6-8.1-10-2.1, which 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 [percent]) 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.

(c) For purposes of this section, the filing of a substantially blank or unsigned return does not constitute a return.

(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).

Next, 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.

(Emphasis added).

Finally, [45 IAC 15-11-2](#)(c) provides in pertinent part:

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.

In this case, Taxpayer was unaware that the dollar level for required EFT payments had dropped from ten thousand to five thousand. Taxpayer states that the Department still received all sales tax due in the form of a paper check rather than EFT. Taxpayer switched to EFT once it was informed of the requirement. Taxpayer believes that these circumstances meet the requirements for waiver of the negligence penalty.

The Department does not agree with this conclusion. The change from ten thousand dollars to five thousand dollars was public knowledge which any taxpayer should have known. Taxpayer's average monthly sales tax liability for 2007 was above five thousand dollars, which qualified for EFT payments in 2008 under the provisions of IC § 6-2.5-6-1(g). Taxpayer's average monthly liability for 2008 was above five thousand dollars, which qualified for EFT payments in 2008 under the provisions of IC § 6-2.5-6-1(g). Either circumstance would require EFT payments. Taxpayer had both circumstances. Therefore, Taxpayer was required to make its sales tax payments via EFT and did not do so. IC § 6-8.1-10-2.1(a)(5) states that this subjects Taxpayer to a ten percent penalty. [45 IAC 15-11-2](#)(b) explains that lack of knowledge of the listed tax laws is considered negligence.

FINDING

Taxpayer's protest is denied.

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