

**Letter of Findings: 08-0734  
Sales and Use Tax  
For the Year 2005, 2006, and 2007**

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**ISSUES**

**I. Sales and Use Tax – Imposition.**

**Authority:** IC § 6-2.5-2-1; IC § 6-8.1-5-1; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); [45 IAC 15-3-2](#).

Taxpayer protests the assessment of additional sales tax on the sales of gasoline.

**II. Tax Administration – Penalty.**

**Authority:** 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, an Indiana resident, operates a gasoline filling station and mechanics shop. Pursuant to an audit, the Indiana Department of Revenue ("Department") concluded that Taxpayer overstated the credit for prepaid sales tax in the calculation of sales tax due on metered pump sales. The Department assessed additional sales tax, interest, and penalty for 2005, 2006, and 2007. Taxpayer protested the assessment. A hearing was held. The Letter of Findings ensues. Additional facts will be provided as necessary.

**I. Sales and Use Tax – Imposition.**

**DISCUSSION**

After the audit, the Department determined that Taxpayer had overstated the credit for prepaid sales tax in the calculation of sales tax due on metered pump sales for 2005, 2006, and 2007. The Department assessed Taxpayer additional sales tax. At the hearing, Taxpayer withdrew the protest regarding the 2006 and 2007 assessment. However, Taxpayer continued to protest the 2005 assessment. Taxpayer argued that it should not be held responsible for the additional sales tax because Taxpayer reasonably relied on the Department's responses.

All tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes a sales tax on retail transactions. IC § 6-2.5-2-1 states,

(a) The person who acquires tangible personal property in a retail transaction is liable for the tax on the transaction and shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction.

(b) The retail merchant shall collect the tax as agent for the state.

Taxpayer is a retail merchant and, therefore, is responsible for collecting and remitting the sales tax.

Taxpayer claimed that it initially engaged an accountant to prepare its sales tax filings, but Taxpayer believed that this accountant did not properly prepare the ST-103MPs, Indiana Metered Pump Sales, and Use Tax Returns. Beginning in 2006, Taxpayer contacted the Department for assistance to ensure its compliance. Taxpayer argued that the Department's employee told Taxpayer not to be concerned regarding 2005 tax year. Thus, Taxpayer argued that it is not responsible for the additional sales tax because it relied on the Department's representations and on its professional advisor.

[45 IAC 15-3-2](#)(e) states:

Oral opinions or advice will not be binding upon the department. However, taxpayers may inquire as to whether or not the department will make a ruling or determination based on the facts presented by the taxpayer. If the taxpayer wishes a ruling by the department, the formal request must be in writing. A taxpayer may also orally receive technical assistance from the department in preparation of returns. However this advice is advisory only and is not binding in the latter examination of returns.

Here, Taxpayer did not request official advisories. As for reliance on professional advice, Taxpayer may have done so, but in this case the law is crystal clear. Taxpayer's accountant is the agent employed by Taxpayer to ensure its compliance of the Indiana statutes. Taxpayer is responsible for its agent's compliance failure. Taxpayer's reliance, while understandable, was misplaced.

**FINDING**

Taxpayer's protest is respectfully denied.

**II. Tax Administration – Penalty.**

**DISCUSSION**

Taxpayer also protests the assessment of the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1, the Department may assess a ten (10) percent negligence penalty if the taxpayer:

- (1) fails to file a tax return;
- (2) fails to pay the full amount of tax shown on the tax return;
- (3) fails to remit in a timely manner the tax held in trust for Indiana (e.g., a sales tax); or
- (4) fails to pay a tax deficiency determined by the Department to be owed by a taxpayer.

[45 IAC 15-11-2](#)(b) further 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), in 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. 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 provided sufficient documents establishing that its failure to 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. Thus, Taxpayer's protest on the imposition of negligence penalty is sustained.

#### **FINDING**

Taxpayer's protest on the imposition of negligence penalty is sustained.

#### **SUMMARY**

For the reasons discussed above, Taxpayer's protest on the assessment of additional sales tax is respectfully denied. Taxpayer's protest on imposition of negligence penalty is sustained.

*Posted: 06/24/2009 by Legislative Services Agency*

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