DEPARTMENT OF STATE REVENUE

03-20090258P.SLOF

Supplemental Letter of Findings Number: 09-0258P
Withholding Tax
For the Tax Year Ending December 31, 2005

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ISSUE

I. Withholding Tax - Twenty-Percent Penalty.

Authority: IC § 6-3-4-13; IC § 6-8.1-5-1; IC § 6-8.1-10-2.1; 45 IAC 15-3-2; 45 IAC 15-5-5; 45 IAC 15-11-2; Indiana Dep't of Envtl. Management v. Conrad, 614 N.E.2d 916 (Ind. 1993); Cablevision of Chicago v. Colby Cable Corp., 417 N.E.2d 348 (Ind. Ct. App. 1981).

Taxpayer seeks abatement of the twenty-percent penalty for failure to file a Form WH-1 and remit withholding tax on its non-resident shareholders.

STATEMENT OF FACTS

The taxpayer is an S corporation. The taxpayer failed to file a Form WH-1 and withhold tax on its non-resident shareholders for the year ending December 31, 2005. The taxpayer was assessed a twenty-percent penalty pursuant to IC § 6-8.1-10-2.1(h). Taxpayer challenged the assessment of the penalty, an administrative hearing was conducted during which taxpayer explained the basis for its protest. A Letter of Findings ("LOF") was issued on April 23, 2009, denying Taxpayer's protest of the assessment of a penalty. Taxpayer requested and was granted a rehearing. This Supplemental Letter of Findings results.

I. Withholding Tax - Twenty-Percent Penalty.

DISCUSSION

Taxpayer argues that it is entitled to abatement of the twenty-percent penalty for failure to file a Form WH-1 and remit withholding tax on its non-resident shareholders for the year ending December 31, 2005. In the LOF, the Department found that Taxpayer had not complied with Indiana laws governing withholding, and was therefore liable for the twenty-percent penalty. In its request for a rehearing, Taxpayer argues, as it had before, that it relied on the advice of a Department of Revenue employee that it was not necessary to file the WH-1 as long as the non-resident shareholders were making estimated payments. Taxpayer claims that it subsequently inactivated the withholding account in reliance on this advice.

Pursuant to IC § 6-8.1-5-1(b) (now (c)), "the burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." An assessment – including the penalty – is presumptively valid. 45 IAC 15-5-5(b), in relevant part, provides that "if a rehearing is granted, the rehearing will not be held de novo...."

Taxpayer was required to withhold tax on the income of its non-resident shareholders per IC § 6-8.1-10-2.1(h), which clearly states:

> A corporation which otherwise qualifies under IC 6-3-2-2.8(2) but fails to withhold and pay any amount of tax required to be withheld under IC 6-3-4-13 shall pay a penalty equal to twenty-percent (20%) of the amount of tax required to be withheld under IC 6-3-4-13. This penalty shall be in addition to any penalty imposed by section 6 of this chapter. (Emphasis added).

According to IC § 6-3-4-13(i):

> If a corporation fails to withhold and pay any amount of tax required to be withheld under this section and thereafter the tax is paid by the shareholders, such amount of tax as paid by the shareholders shall not be collected from the corporation but it shall not be relieved from liability for interest or penalty otherwise due in respect to such failure to withhold under IC § 6-8.1-10. (Emphasis added).

The Department is simply enforcing the non-resident shareholder withholding requirement. The statute clearly states that the penalty is assessed against the corporation for failure to withhold, not for the shareholders' failure to remit taxes due. IC § 6-3-4-13(i) clearly states that even if the shareholders pay the taxes due, the corporation shall not be relieved from liability for interest or penalty otherwise due for the failure to withhold.

Thus, even though Taxpayer's non-resident shareholder did indeed pay tax through estimated income tax payments, nonetheless, Taxpayer, according to the clear statement of the law, shall not be relieved from liability for interest or penalty.

Taxpayer argues it acted reasonably because it relied on the representations of a Department employee made to Taxpayer in 2005.

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(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.

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...."

45 IAC 15-3-2(e) states that:

> 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.
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> Based upon general inquiries and correspondence, the department often issues written letters of advice. Such letters are advisory in nature only and merely technical assistance tools for the taxpayer. Strictly informational type letters are not to be considered rulings by the department and will not be binding. However, some written inquiries have asked for the tax consequences of a particular transaction, based upon the facts presented. In such instances, the department may consider such letters as rulings that may bind the department to the position stated in respect to that taxpayer only. All such rulings issued will be binding provided that all of the facts described in obtaining the ruling are true and accurate. Any misstatement of material fact or information will void the ruling.

Although Taxpayer did not request official advisories, Taxpayer argues that in reliance on the Department employee's oral advice it inactivated its withholding account. 45 IAC 15-3-2(e) language is clear. Oral opinions will not be binding on the Department. Even when a taxpayer orally receives technical assistance from the Department, the advice is advisory only and is not binding. This rule is supported by Indiana case law and strong public policy.

Furthermore, in Indiana Dep't of Envtl. Management v. Conrad, 614 N.E.2d 916 (Ind. 1993) the Indiana Supreme Court stated:

> As a general rule, equitable estoppel will not be applied against government authorities. The state will not be estopped in the absence of clear evidence that its agents made representations upon which the party asserting estoppel relied. The party claiming estoppel has the burden to establish all facts necessary to constitute it. To make out a claim of estoppel, one must show: (1) a representation or concealment of material fact; (2) made by a person with knowledge of the fact and with the intention that the other party should act upon it; (3) to a party ignorant of the matter; and (4) which induced the other party to act upon it to his detriment. Id. at 921 (citations omitted).

There are strong public policy reasons why the Department cannot be estopped from collecting taxes or imposing related penalties. Indeed, estoppels against the public are disfavored because "if laches, waiver or estoppel did apply against the public, a dishonest, incompetent or negligent public official could wreck the interests of the public." Cablevision of Chicago v. Colby Cable Corp., 417 N.E.2d 348, 354 (Ind. Ct. App. 1981) (internal quotation marks omitted). "Our courts have been particularly unsolicitous of estoppel and laches arguments in cases where the unauthorized acts of public officials somehow implicate government spending powers." Id. Estoppel is disapproved in cases of government spending or in case involving revenue laws because estoppel would destroy the effect of such laws. Id. at 355.

Taxpayer has not shown sufficient factual or legal reason why the penalty should not apply.

FINDING

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

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