

**Letter of Findings: 09-0601**  
**Gross Retail Tax**  
**For the Years 2006 through 2008**

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**ISSUES**

**I. Water Heater Rental – Gross Retail Tax.**

**Authority:** IC § 6-8.1-5-1(c); Letter of Findings 04-20060390 (March 30, 2007).

Taxpayer challenges the Department of Revenue's decision that money it received from the purported rental of water heaters to Indiana customers is subject to Indiana Gross Retail Tax.

**II. Ten-Percent Negligence Penalty.**

**Authority:** IC § 6-8.1-5-1(c); IC § 6-8.1-10-2.1(a)(3); IC § 6-8.1-10-2.1(a)(4); IC § 6-8.1-10-2.1(d); [45 IAC 15-11-2\(b\)](#); [45 IAC 15-11-2\(c\)](#); Letter of Findings 04-20060390 (March 30, 2007).

Taxpayer maintains that the imposition of a ten-percent negligence penalty is inappropriate.

**STATEMENT OF FACTS**

Taxpayer is a registered Indiana retail merchant in the business of providing water heaters to Indiana individuals and businesses. Taxpayer contracts with its customers to provide a water heater, install the unit, and provide necessary maintenance. In return, the customers make monthly payments to Taxpayer.

The Indiana Department of Revenue (Department) conducted an audit review of Taxpayer's 2006 through 2007 business records and concluded that Taxpayer should have been collecting sales tax on the income received from what the Department determined was the "rental" of water heaters. Taxpayer disagreed and submitted a protest. Taxpayer's representative indicated that an administrative hearing was not necessary but that the Letter of Findings should be written based upon the information contained within the file.

**I. Water Heater Rental – Gross Retail Tax.**

**DISCUSSION**

The Department's audit determined that Taxpayer was "in the business of renting and leasing water heaters and other appliances... considered tangible personal property." Because Taxpayer was a "retail merchant," the audit concluded it was "required to collect and remit... Indiana gross retail tax on these retail transactions."

Taxpayer disagreed on the ground that the water heaters were improvements to its customers' realty, that Taxpayer was "providing a water heating service," and the Department was precluded from issuing an assessment on the ground that the audit's determination constituted a "change in position by the Department" entitling Taxpayer to prospective treatment of that determination.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

The Taxpayer has raised the identical issues addressed in Letter of Findings 04-20060390 issued March 30, 2007. That Letter of Findings concluded that, "The Taxpayer is in the business of renting water heaters for consideration. The water heaters are not incorporated into the customer's real property. The money received from those rental arrangements is subject to sales tax." In addition, the March 30 LOF found that The Department's assessment of sales tax does not represent a change in its interpretation of a listed tax. Taxpayer is not entitled to prospective treatment of that determination."

The Department's position on the issue is clear and Taxpayer has raised no objections which would merit revisiting the substantive issue.

**FINDING**

Taxpayer's protest is respectfully denied.

**II. Ten-Percent Negligence Penalty.**

**DISCUSSION**

Taxpayer states that the imposition of the negligence penalty is inappropriate because Taxpayer "exercised the level of reasonable care, caution and diligence expected of an ordinary reasonable Taxpayer." In addition, Taxpayer maintains that the underlying sales tax assessments are "inherently arbitrary and capricious, and contrary to law."

IC § 6-8.1-10-2.1(a)(3) requires that a ten-percent penalty be imposed if the tax deficiency results from the Taxpayer's negligence. IC § 6-8.1-10-2.1(a)(4) requires a ten-percent penalty if the Taxpayer "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."

IC § 6-8.1-10-2.1(d) states that, "If a person subject to the penalty imposed under this section can show that

the failure to... pay the full amount of tax shown on the person's return... or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall wave the penalty."

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...."

Under IC § 6-8.1-5-1(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 negligence penalty – is presumptively valid.

The issue of whether or not Taxpayer was subject to the negligence penalty was addressed in Letter of Findings 04-20060390 issued March 30, 2007. At that time, the Department found that "The Department is unable to agree that the evidence provided supports the contention that, in failing to collect sales tax, Taxpayer acted as 'an ordinary reasonable Taxpayer.'" The Department is unable to agree it now – as it did previously – that Taxpayer is entitled to waiver of the penalty.

#### **FINDING**

Taxpayer's protest is respectfully denied.

*Posted: 10/28/2009 by Legislative Services Agency*  
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