

Letter of Findings: 09-0987P
Withholding Tax
For the Tax Year Ending December 31, 2008

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ISSUE

I. Withholding Tax – Late Payment Penalty.

Authority: IC § 6-8.1-5-1; IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

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

STATEMENT OF FACTS

The taxpayer is an S corporation. The taxpayer filed a corporate income tax return, form IT-20S, prior to March 16, 2009. The taxpayer remitted the appropriate income tax on behalf of the taxpayer's nonresident shareholder. However, the appropriate withholding tax return, form WH-1, was not submitted until after March 16, 2009. The taxpayer was assessed a ten-percent late payment penalty pursuant to IC § 6-8.1-10-2.1(a)(2) by the Indiana Department of Revenue ("Department"), and a separate \$500 penalty under IC § 6-8.1-10-2.1(j) for failure to include all nonresident shareholders in its composite return. Taxpayer protested only the late-payment penalty.

I. Withholding Tax – Late Payment Penalty.

DISCUSSION

The taxpayer argues that it is entitled to abatement of the penalty for late payment of withholding tax on behalf of its nonresident shareholder.

IC § 6-8.1-10-2.1 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.

Under IC § 6-8.1-5-1(b), "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.

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...."

The taxpayer has provided sufficient information to conclude that it remitted its nonresident shareholder withholding tax prior to the March 16, 2009, due date for payment. Thus, the taxpayer's protest is sustained. However, the taxpayer is reminded to remit future nonresident shareholder withholding tax payments on withholding tax returns rather than with corporate income tax returns.

FINDING

The taxpayer's protest is sustained.

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