

Letter of Findings: 09-0369
Sales and Use Tax
For the Years 2005, 2006, and 2007

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ISSUES

I. Sales and Use Tax – Exemptions.

Authority: IC § 6-2.5-1-1 et seq.; IC § 6-2.5-3-4; IC § 6-2.5-5-3; IC § 6-2.5-5-5.1; IC § 6-8.1-5-1; [45 IAC 2.2-4-2](#); [45 IAC 2.2-5-8](#); [45 IAC 2.2-5-11](#); [45 IAC 2.2-5-12](#); [45 IAC 2.2-5-16](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974); Indiana Dep't of Revenue v. Cave Stone, Inc., 457 N.E. 2d 520 (Ind. 1983).

Taxpayer protests the assessment of tax on purchases of tangible personal property and rentals of equipment.

II. Tax Administration – Negligence 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 is in the business of producing refrigerated, ready-to-bake, dough products in Indiana. Pursuant to an audit, the Indiana Department of Revenue ("Department") assessed Taxpayer additional use tax, interest, and penalty on certain purchases during the tax years 2005, 2006, and 2007, because Taxpayer did not pay sales tax at the time of the transactions nor did it self-assess and remit use tax to the Department.

Taxpayer timely protested the assessments. To support its protest, Taxpayer submitted pertinent documentation and directed the Department's attention to an itemized list. Prior to an administrative hearing, the Department agreed that the assessment of several items on Taxpayer's protest list (II, III, VI, IX, X, and XI) should be removed from the original assessment because Taxpayer provided sufficient documentation prior to an administrative hearing. Taxpayer, however, continued to protest the remaining items on its protest list. A hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales and Use Tax – Exemptions.

DISCUSSION

The Department's audit assessed Taxpayer use tax on purchases of tangible personal property and rentals of equipment. Taxpayer first claimed that it was entitled to the manufacturing exemptions on several purchases of tangible personal property. Taxpayer also claimed that it either paid the sales tax or self-assessed and remitted to the Department the use tax due on several transactions. Additionally, Taxpayer argued that it contracted with several vendors based on either "lump sum" or "time and material" contracts. Thus, Taxpayer maintained that it was not responsible for sales and/or use tax on the lump sum contracts. Finally, referring to Indiana laws, Taxpayer claimed that payments for services rendered were not subject to sales and/or use tax, including the labor charges on the "time and material" contracts.

As a threshold issue, 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 and a complementary use tax on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-1-1 et seq. Generally, all purchases of tangible personal property by persons engaged in the direct production, manufacture, fabrication, assembly or finishing of tangible personal property are taxable. [45 IAC 2.2-5-8\(a\)](#). An exemption from use tax is granted for transactions where the gross retail tax ("sales tax") was paid at the time of purchase pursuant to IC § 6-2.5-3-4. There are also additional exemptions from sales tax and use tax. A statute which provides a tax exemption, however, is strictly construed against the taxpayer. Indiana Dep't of State Revenue v. RCA Corp., 310 N.E.2d 96, 97 (Ind. Ct. App. 1974).

A. Manufacturing Exemptions

The Department's audit assessed Taxpayer use tax on its purchases of liquid Carbon Dioxide (CO₂), liquid Polypropylene Glycol (PPG), a can capper and a can seamer, as well as a conveyor system, because Taxpayer failed to pay sales tax or self-assess and remit to the Department the use tax due. Taxpayer, to the contrary, claimed that it was entitled to the manufacturing exemptions.

IC § 6-2.5-5-3(b) states:

Transactions involving manufacturing machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for direct use in the direct production, manufacture,

fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property. IC § 6-2.5-5.1(b) provides:

Transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for direct consumption as a material to be consumed in the direct production of other tangible personal property in the person's business of manufacturing, processing, refining, repairing, mining, agriculture, horticulture, floriculture, or arboriculture.

An exemption applies to manufacturing machinery, tools, and equipment directly used by the purchaser in direct production. [45 IAC 2.2-5-8\(a\)](#). Machinery, tools, and equipment are directly used in the production process if they have an immediate effect on the article being produced. [45 IAC 2.2-5-8\(c\)](#). A machine, tool, or piece of equipment has an immediate effect on the product being produced if it is an essential and integral part of an integrated process that produces the product. Id. An integrated process is one where the total production process is comprised of activities or steps that are functionally interrelated and where there is a flow of "work-in-process." [45 IAC 2.2-5-8\(c\)](#), Example 1.

[45 IAC 2.2-5-8\(k\)](#) describes direct production as the performance of an integrated series of operations which transforms the matter into a form, composition or character different from that in which it was acquired, and that the change must be substantial resulting in a transformation of the property into a different and distinct product.

The exemption for direct use in production is further explained at [45 IAC 2.2-5-11](#), in part, as follows:

(a) The state gross retail tax shall not apply to sales of tangible personal property to be directly used by the purchaser in the direct production or manufacture of any manufacturing or agricultural machinery, tools, and equipment described in [IC 6-2.5-5-2](#) or 6-2.5-5-3 [[IC 6-2.5-5-3](#)].

(b) The exemption provided in this regulation [[45 IAC 2.2](#)] extends only to tangible personal property directly used in the direct production of manufacturing or agricultural machinery, tools, and equipment to be used by such manufacturer or producer.

(c) The state gross retail tax shall not apply to purchases of tangible personal property to be directly used by the purchaser in the production or manufacturing process of any manufacturing or agricultural machinery, tools, or equipment, provided that the machinery, tools, and equipment are directly used in the production process; i.e., they have an immediate effect upon the article being produced or manufactured. The property has an immediate effect on the article being produced if it is an essential and integral part of an integrated process which produces tangible personal property.

(d) For the application of the rules [subsections] above, refer to Regs. 6-2.5-5-3 [[45 IAC 2.2-5-8](#) through [45 IAC 2.2-5-10](#)] with respect to tangible personal property used directly in the following activities: pre-production and post-production activities; storage; transportation; tangible personal property which has an immediate effect upon the article produced; maintenance and replacement; testing and inspection; and managerial, sales, and other nonoperational activities.

The exemption for direct consumption in production is further explained at [45 IAC 2.2-5-12](#), in part, as follows:

(a) The state gross retail tax shall not apply to sales of any tangible personal property consumed in direct production by the purchaser in the business of producing tangible personal property by manufacturing, processing, refining, or mining.

(b) The exemption provided by this regulation [[45 IAC 2.2](#)] applies only to tangible personal property to be directly consumed in direct production by manufacturing, processing, refining, or mining. It does not apply to machinery, tools, and equipment used in direct production or to materials incorporated into the tangible personal property produced.

(c) The state gross retail tax does not apply to purchases of materials to be directly consumed in the production process or in mining, provided that such materials are directly used in the production process; i.e., they have an immediate effect on the article being produced. The property has an immediate effect on the article being produced if it is an essential and integral part of an integrated process which produces tangible personal property.

[45 IAC 2.2-5-8\(d\)](#) states:

Pre-production and post-production activities. "Direct use in the production process" begins at the point of the first operation or activity constituting part of the integrated production process and ends at the point that the production has altered the item to its completed form, including packaging, if required.

[45 IAC 2.2-5-8\(f\)](#) provides:

(1) Tangible personal property used for moving raw materials to the plant prior to their entrance into the production process is taxable.

(2) Tangible personal property used for moving finished goods from the plant after manufacture is subject to tax.

(3) Transportation equipment used to transport work-in-process or semi-finished materials to or from storage is not subject to tax if the transportation is within the production process.

(4) Transportation equipment used to transport work-in-process, semi-finished, or finished goods between plants is taxable, if the plants are not part of the same integrated production process.

[45 IAC 2.2-5-8\(g\)](#) further states:

"Have an immediate effect upon the article being produced": Machinery, tools, and equipment which are used during the production process and which have an immediate effect upon the article being produced are exempt from tax. Component parts of a unit of machinery or equipment, which unit has an immediate effect on the article being produced, are exempt if such components are an integral part of such manufacturing unit. The fact that particular property may be considered essential to the conduct of the business of manufacturing because its use is required either by law or by practical necessity does not itself mean that the property "has an immediate effect upon the article being produced". Instead, in addition to being essential for one of the above reasons, the property must also be an integral part of an integrated process which produces tangible personal property.

To support its protest, Taxpayer submitted photos to illustrate its applications of CO₂, PPG, the can capper, and the can seamer during its production process. Taxpayer also provided the Department with a sample can and lid, which Taxpayer used to contain its ready-to-bake dough products, and upon which the can capper and can seamer operated.

In briefly describing its production process, Taxpayer directed the Department's attention to the following purchases of the tangible personal property and believed that manufacturing exemptions applied.

1. Liquid Carbon Dioxide (CO₂) (Taxpayer's Protest Item I)

The Department assessed Taxpayer use tax on its purchase of liquid CO₂. Taxpayer, however, claimed that it was entitled to the manufacturing exemption pursuant to IC § 6-2.5-5-1(b) and [45 IAC 2.2-5-12](#).

Taxpayer stated that it used the liquid CO₂, also known as dry ice, to cool the dry ingredient mixture prior to adding liquid ingredients, such as lard, or baking powder to form and create an environment allowing the dough to rise. Taxpayer explained that it needed the CO₂ to cool the dry ingredient mixture prior to adding the warm liquid ingredients so the disparity of temperature could produce proper "proofing" (usually referring to as the final dough-rise step before baking). Additionally, Taxpayer stated that it applied the CO₂ to freeze toppings, which were placed on some of the dough sheets. Taxpayer further explained that the toppings became sticky at room temperature. Taxpayer, thus, applied the CO₂ to freeze the toppings on the top of the dough sheets so the toppings could go through the scrolling machine without sticking to and clogging the machine during production process.

Taxpayer's documentation demonstrated that the CO₂ was applied after the dry ingredients were mixed in a mixing bowl and prior to adding the liquid ingredients, or was used to freeze the toppings before the ready-to-bake dough sheets were cut. The application of the CO₂ had an immediate impact on the mixture and functionally interrelated to form the ready-to-bake dough.

Thus, Taxpayer has provided sufficient documentation to support its claim. The Department will recalculate the assessment in a supplemental audit.

2. Liquid Polypropylene Glycol (PPG) (Taxpayer's Protest Item IV)

The Department's audit assessed Taxpayer use tax on its purchases of PPG. Taxpayer stated that it purchased liquid PPG, a coolant, and directly applied the PPG to cool the dough mixing bowl during the mixing process. Taxpayer further illustrated that during the mixing process, the physical motion of the machine created friction, which would increase the temperature inside the bowl, which would make the dough rise prematurely. Thus, Taxpayer stated that, during the mixing process, it applied the PPG to cool the mixing bowl and reduce the temperature in order to maintain the controlled rise and quality of dough. Taxpayer, thus, claimed that it was entitled to the manufacturing exemption pursuant to IC § 6-2.5-5-1(b) and [45 IAC 2.2-5-12](#).

Taxpayer's documentation showed that the PPG was applied during the mixing process. Although Taxpayer's documentation showed that the liquid PPG circulated through the jacket on the outside of the mixing bowl, which contained the mixed ingredients, the PPG decreased the temperature causing the physical motion of the machine to reduce the temperature inside the bowl mixer. Similar to the application of the CO₂ discussed above, the PPG had an immediate impact on the mixing process, which produced the ready-to-bake dough.

Taxpayer has provided sufficient documentation to support its claim. The Department will recalculate the assessment in a supplemental audit.

3. Can Capper and Can Seamer (Taxpayer's Protest Item V)

The Department's audit assessed use tax on Taxpayer's purchases of a can capper and a can seamer. Taxpayer, to the contrary, claimed that it directly used the can capper and the can seamer in direct production.

Taxpayer stated that its ready-to-bake dough continued to rise and enlarge even after the dough was filled into cans and before the lids were attached, capped, and tightly sealed the cans. To control the result of proofing and to ensure the products can be palletized for distribution, Taxpayer claimed that it was required and necessary to use the can capper and the can seamer to enclose and package the dough before the ready-to-bake products were palletized. Taxpayer, thus, argued that its production ended when the can seamer sealed the cans—the finished products. Taxpayer, thus, claimed that it was entitled to the exemption pursuant to IC § 6-2.5-5-3 and [45 IAC 2.2-5-8](#).

Taxpayer demonstrated that it was necessary to use the can and lid to contain its ready-to-bake dough prior to palletization. Taxpayer's documentation also showed that the ready-to-bake dough was infused into the cans.

The cans, which contained the dough, then went through a capper machine where the lids were attached to the cans. After that, the seamer machine sealed the cans and lids together.

Taxpayer has provided sufficient documentation to support its claim. The Department will recalculate the assessment in a supplemental audit.

4. Conveyor System (Taxpayer's Protest Item XII)

The Department's audit assessed Taxpayer use tax on its purchase of a conveyor system. Taxpayer, to the contrary, claimed that it directly used the conveyor system in direct production. Taxpayer stated that a vendor, which manufactures cans for Taxpayer, is located next to Taxpayer's facility and is only separated by a wall. Taxpayer installed the conveyor system, which the manufacturer-vendor used to deliver the empty cans (the vendor's finished products) to Taxpayer. Upon receiving the cans via the conveyor system, Taxpayer then moved the cans to the dough filling machine and filled the ready-to-bake dough into the cans, applied the lids, capped and sealed the cans. Thus, Taxpayer argued that the conveyor is an essential and integral part of an integrated process which produces tangible personal property, and, therefore, the exemption applied pursuant to IC § 6-2.5-5-3 and Indiana Dep't of Revenue v. Cave Stone, Inc., 457 N.E. 2d 520 (Ind. 1983).

Taxpayer is mistaken. In Cave Stone, the taxpayers manufactured and sold sized aggregate stone removed from their respective quarries. The taxpayers in Cave Stone did not engage a third-party vendor to manufacture the products and deliver to the taxpayers' facilities by using the taxpayers' equipment. Therefore, Taxpayer's reliance on Cave Stone was misplaced.

In this instance, Taxpayer's documentation did not show that the conveyor system was used by Taxpayer to move its work-in-process materials. Instead, according to the audit, the conveyor system was used by Taxpayer's manufacturer-vendor to deliver the manufacturer-vendor's finished products—the cans. Only when the cans were delivered to Taxpayer's facility, did Taxpayer become the owner of the cans. Taxpayer then moved the cans to the dough filling machine and the machine filled the dough into the cans. Although the manufacturer-vendor was located next to Taxpayer's facility, the manufacturer-vendor was independent and unrelated manufacturer. Unlike the taxpayers in Cave Stone, Taxpayer's use of the conveyor system was not "an essential and integral part of an integrated process which produces tangible personal property" outlined in Cave Stone. Taxpayer, thus, did not directly use the conveyor system in direct production and was not entitled to the manufacturing exemption.

Since Taxpayer did not pay sales tax at the time of the purchase, use tax was properly imposed.

B. Non-returnable Containers and Packaging Materials (Taxpayer's Protest Item II)

The Department's audit assessed use tax on Taxpayer's purchase of an adhesive. Taxpayer stated that the adhesive, similar to a stretch wrap, was applied to the top of each product carton when they were palletized. Taxpayer, thus, claimed that its purchase was exempt.

[45 IAC 2.2-5-16](#), in pertinent part, states:

(a) The state gross retail tax shall not apply to sales of nonreturnable wrapping materials and empty containers to be used by the purchaser as enclosures or containers for selling contents to be added, and returnable containers containing contents sold in a sale constituting selling at retail and returnable containers sold empty for refilling.

...

(c) The receipt from a sale by a retail merchant of the following types of tangible personal property are exempt from state gross retail tax:

(1) Nonreturnable containers and wrapping materials including steel strap and shipping pallets to be used by the purchaser as enclosures for selling tangible personal property.

Taxpayer has provided sufficient documentation to support its claim. The Department will recalculate the assessment in a supplemental audit.

C. Sales and/or Use Tax Paid on Retail Transactions

The Department's audit assessed Taxpayer use tax on its purchases of tangible personal property and rentals of equipment because Taxpayer did not pay sales tax at the time of the transactions, nor did Taxpayer self-assess and remit to the Department the use tax due. Taxpayer, to the contrary, claimed that it had paid the sales tax at the time of the transactions or had self-assessed and remitted the use tax.

1. Rental Payments for Equipment (Taxpayer's Protest Item III)

Taxpayer claimed that the Department's audit incorrectly assessed use tax on Taxpayer's payments of rental equipment because Taxpayer had paid the sales tax to its vendor at the time of the transactions. Prior to the hearing, the Department, upon reviewing Taxpayer's documentation, agreed with Taxpayer that the sales tax was paid regarding the rentals of the equipment.

Since Taxpayer has provided sufficient documentation to support its claim, the Department will recalculate the assessment in a supplemental audit.

2. Payments to Vendor on Purchases of Tangible Personal Property (Taxpayer's Protest Item VI)

The Department assessed Taxpayer use tax on its purchases of tangible personal property from a vendor, Company C, because the supporting documentation was not available at the time of the audit. Prior to the administrative hearing, Taxpayer submitted copies of its invoices showing that it had paid sales tax on these purchases. Upon reviewing Taxpayer's documentation, the Department agreed with Taxpayer that the sales tax

was paid on these items.

Since Taxpayer has provided sufficient documentation to support its claim, the Department will recalculate the assessment in a supplemental audit.

3. Payments to Company V on the Purchases of Tangible Personal Property (Taxpayer's Protest Item XI)

The Department's audit assessed Taxpayer use tax on some of Taxpayer's purchases of tangible personal property from a vendor, Company V. Taxpayer stated that it had self-assessed and remitted use tax to the Department on the purchases (Document number 1600074074 and 5102294180). Thus, Taxpayer claimed that the Department's audit incorrectly assessed use tax on Taxpayer's purchases.

The Department, upon reviewing Taxpayer's documentation, agreed with Taxpayer that it had self-assessed and remitted to the Department the use tax due. Since Taxpayer has provided sufficient documentation to support its claim, the Department will recalculate the assessment in a supplemental audit.

D. Services

The Department's audit assessed use tax on several transactions, which Taxpayer claimed were services. Taxpayer further maintained that the payments for the services rendered were not subject to tax.

[45 IAC 2.2-4-2](#) states:

(a) Professional services, personal services, and services in respect to property not owned by the person rendering such services are not "transactions of a retail merchant constituting selling at retail", and are not subject to gross retail tax. Where, in conjunction with rendering professional services, personal services, or other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail unless:

- (1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property;
- (2) The tangible personal property purchased is used or consumed as a necessary incident to the service;
- (3) The price charged for tangible personal property is inconsequential (not to exceed 10 [percent]) compared with the service charge; and
- (4) The serviceman pays gross retail tax or use tax upon the tangible personal property at the time of acquisition.

(b) Services performed or work done in respect to property and performed prior to delivery to be sold by a retail merchant must however, be included in taxable gross receipts of the retail merchant.

(c) Persons engaging in repair services are servicemen with respect to the services which they render and retail merchants at retail with respect to repair or replacement parts sold.

(d) A serviceman occupationally engaged in rendering professional, personal or other services will be presumed to be a retail merchant selling at retail with respect to any tangible personal property sold by him, whether or not the tangible personal property is sold in the course of rendering such services. If, however, the transaction satisfies the four (4) requirements set forth in 6-2.5-4-1(c)(010), paragraph (1) [subsection (a) of this section], the gross retail tax shall not apply to such transaction.

Believing that the vendors provided non-taxable services, Taxpayer directed the Department to the following three vendors:

1. Payment to Vendor Providing Engineering Services (Taxpayer's Protest Item VII)

The Department's audit assessed use tax on Taxpayer's payment to a vendor, which provided services, because the invoice contained a statement of "Application Engineering Services for cost of existing two PV operator stations with WW. This also includes replacing existing rail car unloading panel views with Wonderware including additional screen for PD rail car unloading."

Taxpayer claimed that the vendor only provided the engineering services, which was labor to assist with the implementation of a software application. Taxpayer further claimed that the software was purchased independently and separately. Thus, Taxpayer maintained that, as a service, the charge was not subject to sales and/or use tax.

Taxpayer has provided sufficient documentation to support its claim. The Department will recalculate the assessment in a supplemental audit.

2. Payment to Electrical Contractor (Taxpayer's Protest Item IX)

The Department's audit assessed use tax on Taxpayer's payment to an electrical contractor for repair work. Taxpayer maintained that, in addition to the repair service rendered, the repair was to a machine used in production. Thus, Taxpayer claimed the materials used for the repair work were exempt and the charge for the repair service was not subject to sales and/or use tax.

Prior to the administrative hearing, the Department agreed that the repair was to a machine used in production. Since Taxpayer has provided sufficient documentation to support its claim, the Department will recalculate the assessment in a supplemental audit.

3. Payment for Installation of Dock Leveler (Taxpayer's Protest Item X)

The Department's audit assessed use tax on Taxpayer's payment concerning an installation of a dock leveler. Taxpayer claimed that it engaged a contractor to install the dock leveler based on a single quote contract.

According to Taxpayer, it paid a single price (including the sales tax), which was quoted by the contractor, to complete the installation of the dock leveler.

Prior to the administrative hearing, the Department agreed that the payment was for a single quote contract, which the contractor included the sales tax in the quote. Since Taxpayer has provided sufficient documentation to support its claim, the Department will recalculate the assessment in a supplemental audit.

E. Incorrect Material and Labor Allocation (Taxpayer's Protest Item VIII)

The Department's audit assessed used tax on Taxpayer's payments concerning two "time and material" contracts. Taxpayer stated that the payments included labor and materials. Taxpayer maintained that while the materials were subject to sales and/or use tax, labor, as a service, was not subject to sales and/or use tax.

Taxpayer directed the Department's attention to the audit summary, which listed two contracts, as follows:

Sort No.	Doc. Date	RefDocNo	Amount	Adjustment (Taxable Amount)
100	5/10/2006	1600584328	\$8,822.83	\$583.99
149	10/2/2006	1600909294	\$4,317.19	\$1,546.95

Taxpayer has provided sufficient documentation to support its claim. The Department will recalculate the assessment in a supplemental audit.

In conclusion, Taxpayer's protest on its itemized list, I, II, III, IV, V, VI, VII, VIII, IX, X, and XI is sustained. However, Taxpayer's protest on the item XII, purchase of the conveyor system, is respectfully denied. The Department will recalculate the assessment in a supplemental audit.

FINDING

Taxpayer's protest on the purchase of the conveyor system, Part I., A. 4., is respectfully denied. The remainder of Taxpayer's protest (Item I, II, III, IV, V, VI, VII, VIII, IX, X, and XI) on Part I is sustained. The Department will recalculate the assessment in a supplemental audit.

II. Tax Administration – Negligence Penalty.

DISCUSSION

Taxpayer also protests the imposition 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 has provided sufficient documentation establishing that its failure to pay tax or timely remit tax was due to reasonable cause and not due to negligence.

FINDING

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

SUMMARY

For the reasons discussed above, Taxpayer's protest on the purchase of the conveyor system is respectfully denied. The remainder of Taxpayer's protest is sustained. The Department will recalculate the assessment in a supplemental audit.

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