

**Letter of Findings Number: 09-0628  
Sales and Use Tax  
For Tax Years 2005-07**

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**ISSUES**

**I. Withholding Tax—Imposition.**

**Authority:** IC § 6-3-4-8; IC § 6-8.1-5-1; Income Tax Information Bulletin 52 (August 2008).

Taxpayer protests the imposition of withholding tax.

**II. Use Tax—Imposition.**

**Authority:** IC § 6-2.5-2-1; IC § 6-2.5-3-2; [45 IAC 2.2-3-4](#).

Taxpayer protests the denial of a claim for refund of use tax.

**III. Tax Administration—Negligence Penalty.**

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

Taxpayer protests the imposition of a ten percent negligence penalty.

**STATEMENT OF FACTS**

Taxpayer is a business in Indiana. As a result of two audits, the Indiana Department of Revenue ("Department") determined that Taxpayer had not remitted the correct amount of withholding taxes and use taxes for the tax years 2005, 2006, and 2007. The Department therefore issued proposed assessments for withholding and use taxes, negligence penalties, and interest for the years 2005-07. Taxpayer paid the use tax assessments but not the withholding assessments. Taxpayer then claimed a refund of a portion of the use tax which it had paid. The Department denied the claim for refund of use tax at an initial level. Taxpayer protests the imposition of a portion of the withholding tax, the denial of its claimed use tax refund, and the negligence penalties. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

**I. Withholding Tax—Imposition.**

**DISCUSSION**

Taxpayer protests the imposition of withholding taxes for the years 2005-07. The Department determined that Taxpayer had withheld neither state nor county income taxes on several employees. The Department therefore issued proposed assessments for the taxes which it determined Taxpayer should have withheld as an employer. Taxpayer protests that most of the individuals in question were summer workers who earned less than \$1,000 and, since there is a \$1,000 personal exemption per taxpayer, they would owe no income tax in the first place. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

The relevant statute is IC § 6-3-4-8, which states in relevant parts:

(a) Except as provided in subsection (d) or (l), every employer making payments of wages subject to tax under this article, regardless of the place where such payment is made, who is required under the provisions of the Internal Revenue Code to withhold, collect, and pay over income tax on wages paid by such employer to such employee, shall, at the time of payment of such wages, deduct and retain therefrom the amount prescribed in withholding instructions issued by the department. The department shall base its withholding instructions on the adjusted gross income tax rate for persons, on the total rates of any income taxes that the taxpayer is subject to under [IC 6-3.5](#), and on the total amount of exclusions the taxpayer is entitled to under [IC 6-3-1-3.5\(a\)\(3\)](#) and [IC 6-3-1-3.5\(a\)\(4\)](#). However, the withholding instructions on the adjusted gross income of a nonresident alien (as defined in Section 7701 of the Internal Revenue Code) are to be based on applying not more than one (1) withholding exclusion, regardless of the total number of exclusions that [IC 6-3-1-3.5\(a\)\(3\)](#) and [IC 6-3-1-3.5\(a\)\(4\)](#) permit the taxpayer to apply on the taxpayer's final return for the taxable year. Such employer making payments of any wages:

(1) shall be liable to the state of Indiana for the payment of the tax required to be deducted and withheld under this section and shall not be liable to any individual for the amount deducted from the individual's wages and paid over in compliance or intended compliance with this section; and

(2) shall make return of and payment to the department monthly of the amount of tax which under this article and [IC 6-3.5](#) the employer is required to withhold....

(c) For purposes of determining whether an employee is subject to taxation under [IC 6-3.5](#), an employer is entitled to rely on the statement of an employee as to the employee's county of residence as represented by the statement of address in forms claiming exemptions for purposes of withholding, regardless of when the employee supplied the forms. Every employee shall notify the employee's employer within five (5) days after any change in the employee's county of residence.

(d) A county that makes payments of wages subject to tax under this article:

(1) to a precinct election officer (as defined in [IC 3-5-2-40.1](#)); and

(2) for the performance of the duties of the precinct election officer imposed by [IC 3](#) that are performed on election day;

is not required, at the time of payment of the wages, to deduct and retain from the wages the amount prescribed in withholding instructions issued by the department.

(e) Every employer shall, at the time of each payment made by the employer to the department, deliver to the department a return upon the form prescribed by the department showing:

(1) the total amount of wages paid to the employer's employees;

(2) the amount deducted therefrom in accordance with the provisions of the Internal Revenue Code;

(3) the amount of adjusted gross income tax deducted therefrom in accordance with the provisions of this section;

(4) the amount of income tax, if any, imposed under [IC 6-3.5](#) and deducted therefrom in accordance with this section; and

(5) any other information the department may require.

Every employer making a declaration of withholding as provided in this section shall furnish the employer's employees annually, but not later than thirty (30) days after the end of the calendar year, a record of the total amount of adjusted gross income tax and the amount of each income tax, if any, imposed under [IC 6-3.5](#), withheld from the employees, on the forms prescribed by the department.

(f) All money deducted and withheld by an employer shall immediately upon such deduction be the money of the state, and every employer who deducts and retains any amount of money under the provisions of this article shall hold the same in trust for the state of Indiana and for payment thereof to the department in the manner and at the times provided in this article. Any employer may be required to post a surety bond in the sum the department determines to be appropriate to protect the state with respect to money withheld pursuant to this section.

(g) The provisions of [IC 6-8.1](#) relating to additions to tax in case of delinquency and penalties shall apply to employers subject to the provisions of this section, and for these purposes any amount deducted or required to be deducted and remitted to the department under this section shall be considered to be the tax of the employer, and with respect to such amount the employer shall be considered the taxpayer. In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest.

...

(i) This section shall in no way relieve any taxpayer from the taxpayer's obligation of filing a return or returns at the time required under this article and [IC 6-3.5](#), and, should the amount withheld under the provisions of this section be insufficient to pay the total tax of such taxpayer, such unpaid tax shall be paid at the time prescribed by section 5 of this chapter.

....

(Emphasis added).

Also, Income Tax Information Bulletin 52 (August 2008) states:

Withholding agents are required to withhold both state income tax and county tax at the applicable rates stated on the rate schedules, from the income of all employees, including part-time, temporary, and seasonal employees. The fact that the employee will not earn in excess of the \$1,000 exemption has no bearing on the withholding by the withholding agent. The Internal Revenue Service, which allows an employee to waive withholding for federal tax purposes when the income is not expected to exceed the federal filing requirements and income allowances, has no bearing on the withholding of taxes from the income of employees for Indiana tax purposes.

(Emphasis added).

Therefore, Taxpayer's reliance on the fact that several employees did not earn over \$1,000 is misplaced. As established under IC § 6-3-4-8 and explained by Income Tax Information Bulletin 52 (August 2008), Taxpayer was required to withhold state and county income taxes on wages it paid to its employees. If any employee was eligible for any exemptions, that employee would be able to file an annual return and claim a refund.

### FINDING

Taxpayer's protest is denied.

## II. Use Tax—Imposition.

### DISCUSSION

Taxpayer protests the Department's initial denial of refund of use tax on certain tangible personal property ("TPP") it purchased in the tax years 2005-07. Taxpayer states that it paid sales tax at the time it purchased the TPP and therefore does not owe use tax. When the Department issued its proposed assessments, Taxpayer paid them and later filed a claim for refund. Taxpayer provided documentation in support of its position.

The sales tax is imposed by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.  
(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

The use tax is imposed under IC § 6-2.5-3-2(a), which states:

- (a) An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Also, [45 IAC 2.2-3-4](#) provides:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Therefore, use tax is imposed when sales tax is due but not paid on the purchase of TPP. Taxpayer has provided sufficient documentation to establish that it paid sales tax on the TPP in question. As a result, the Department will refund a total of \$3,820.01 of use tax for the years 2005-07.

#### **FINDING**

Taxpayer's protest is sustained.

### **III. Tax Administration–Negligence Penalty.**

#### **DISCUSSION**

The Department issued proposed assessments and the ten percent negligence penalty for the tax years in question. Taxpayer protests the imposition of penalty. The Department refers to IC § 6-8.1-10-2.1(a), which states in relevant part:

If a person:

...

- (3) incurs, upon examination by the department, a deficiency that is due to negligence;

...

the person is subject to a penalty.

The Department refers to [45 IAC 15-11-2\(b\)](#), which 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.

[45 IAC 15-11-2\(c\)](#) provides in pertinent part:

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.

In this case, Taxpayer had withholding deficiencies as discussed in Issue I and, while it was partially sustained in Issue II, also had remaining use tax deficiencies as discussed in Issue II. The Department determined the deficiencies were due to negligence under [45 IAC 15-11-2\(b\)](#), and so taxpayer was subject to penalty under IC § 6-8.1-10-2.1(a). Taxpayer has affirmatively established that its failure to pay the remaining deficiencies was due to reasonable cause and not due to negligence, as required by [45 IAC 15-11-2\(c\)](#). The negligence penalty will be waived for Issue I regarding withholding tax. Any amount of penalty paid on the use tax assessments in regards to Issue II will be refunded.

#### **FINDING**

Taxpayer's protest is sustained.

#### **CONCLUSION**

Taxpayer's protest is denied on Issue I regarding imposition of withholding tax. Taxpayer's protest is sustained on Issue II regarding refund of a portion of use tax. Taxpayer's protest is sustained regarding imposition/refund of negligence penalties.

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