

Letter of Findings Number: 09-0941
Withholding Tax
For Tax Year 2008

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Withholding Tax—Imposition.

Authority: IC § 6-8.1-5-1; [45 IAC 3.1-1-97](#); Departmental Notice #1.

Taxpayer protests the imposition of withholding tax regarding two employees.

II. 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 the parent company of an Indiana subsidiary and assumed all payroll responsibility for the Indiana subsidiary. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not withheld Indiana county income taxes on six employees for the tax year 2008. The Department issued proposed assessments for county income tax, negligence penalty, and interest. Taxpayer protests the imposition of withholding tax on two employees and the imposition of penalty. 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 county withholding tax on two employees in 2008. Taxpayer states that the two employees were hired after January 1, 2008, and that the withholding instructions listed in Departmental Notice #1 state that an individual's county of residence is determined on January 1 of the calendar year in which the individual's taxable year commences. Taxpayer believes that, since these two employees did not start work until after January 1, 2008, then their counties of residence could not be determined for 2008. Taxpayer could not collect 2008 county withholding tax if the county of residence could not be determined. 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 Department refers to [45 IAC 3.1-1-97](#), which states in relevant part:

Employers who make payments of wages subject to the Adjusted Gross Income Tax Act, and who are required to withhold Federal taxes pursuant to the Internal Revenue Code (USC Title 26), are required to withhold from employees' wages Adjusted Gross and County Adjusted Gross Income Tax.

Also, [45 IAC 3.1-1-102](#) states:

The Employee's Withholding Exemption and County Residence Certificate (Form WH-4) must be refiled with the employer to show any change in residence or number of exemptions.

Change of Residence

All employees who change their county of residence or their county of principal work activity are required to file a new state Form WH-4 by January 1 of the following year.

Change in Exemptions

You may file a new WH-4 at any time if the number of your exemptions increase. You must file a new WH-4 within 10 days if the number of exemptions previously claimed by you decreases for any of the following reasons:

- (a) Your wife (or husband) for whom you have been claiming an exemption is divorced or legally separated, or claims her (or his) own exemption on a separate certificate.
- (b) The support of a dependent for whom you claim an exemption is taken over by someone else, so that you no longer expect to furnish more than half the support for the year.
- (c) You find that a dependent for whom you claim an exemption will receive \$750.00 or more of income of his own during the year.

Other decreases in exemptions such as the death of a spouse or a dependent, do not affect your withholding until the next year, but require the filing of a new WH-4 by December 1 of the year in which they occur.

Also, the instructions included with Form WH-4 explain:

Enter your Indiana county of residence and county of principal employment as of January 1 of the current year. If you did not live of [sic] work in Indiana on January 1 of the current year, enter "not applicable" on the line(s). If you move to (or work in) another county after January 1, your county status will not change until the next calendar year.

Form WH-4 has lines to enter both the county of residence and the county of employment. While a new employee could potentially change the county of employment throughout the year, any individual's county of residence is established on January 1 of the relevant year and is applicable throughout that year regardless of changes in residence or employment. The fact that those employees commenced employment with Taxpayer after January 1, 2008, would have had no impact on determining the two employees' counties of residence for 2008. Therefore, the employees should have filled in their WH-4s and entered their county of residence as of January 1, 2008, and Taxpayer should have collected county withholding from the two employees in 2008, as provided by [45 IAC 3.1-1-97](#).

FINDING

Taxpayer's protest is denied.

II. 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 incurred a deficiency which the Department determined was due to negligence under [45 IAC 15-11-2\(b\)](#), and so was subject to a penalty under IC § 6-8.1-10-2.1(a). While Taxpayer was denied on its protest in Issue I it has affirmatively established that its failure to pay the remaining deficiency 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.

FINDING

Taxpayer's protest is sustained.

CONCLUSION

Taxpayer's protest is denied on Issue I regarding imposition of county withholding tax, as described in Issue I. Taxpayer's protest is sustained on Issue II regarding imposition of negligence penalties.

Posted: 05/26/2010 by Legislative Services Agency
An [html](#) version of this document.