

**Letter of Findings: 10-0143P**  
**Withholding Tax**  
**For the Tax Year Ending December 31, 2008**

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**ISSUES**

**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 penalty for late payment of nonresident shareholder withholding tax.

**II. Withholding Tax – Interest.**

**Authority:** IC § 6-8.1-10-1.

The taxpayer seeks abatement of the interest for late payment of nonresident shareholder withholding tax.

**III. Withholding Tax – Fees.**

**Authority:** IC § 6-8.1-8-2; IC § 6-8.1-8-4.

The taxpayer seeks a refund of fees paid for collecting on a tax warrant.

**STATEMENT OF FACTS**

The taxpayer is an S corporation. The taxpayer paid \$10,000 of withholding tax on April 13, 2009. The Indiana Department of Revenue ("Department") issued a ten-percent penalty and interest on the late payment (the "Assessment"). The Assessment was not protested and eventually became a tax warrant.

On or about September 10, 2009, Taxpayer filed its IT-20S. Taxpayer reported a tax liability of \$6,336 and reported further that \$7,172 had been paid on its behalf by a partnership partly owned by Taxpayer. The Department confirmed that the \$7,172 had been paid on Taxpayer's behalf. The net result, according to Taxpayer, was an overpayment of \$10,836 (\$10,000 plus \$7,172 minus \$6,336).

After reviewing Taxpayer's returns, the Department issued a refund in the amount claimed by Taxpayer less the penalty, interest, and collection fees retained by the Department with regard to the Assessment. Taxpayer protested the refund offset.

**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 was deemed to have remitted its nonresident shareholder withholding tax prior to the March 16, 2009, due date for payment. Thus, the taxpayer's protest of penalty is sustained.

**FINDING**

The taxpayer's protest is sustained.

**II. Withholding Tax – Interest**

**DISCUSSION**

Under IC § 6-8.1-10-1, the Department shall impose interest on a tax payment made after the due date for such payment. As stated above, the taxpayer has demonstrated that it paid all its 2008 withholding taxes prior to the statutory deadline; therefore, the taxpayer's protest of interest is sustained.

**FINDING**

The taxpayer's protest is sustained.

**III. Withholding Tax – Fees.**

The taxpayer protests the imposition of fees. Under IC § 6-8.1-8-2(b), a ten-percent fee is added to an unpaid tax liability when the Department issues a tax warrant. Under IC § 6-8.1-8-4(c), a collection agency acting on behalf of the Department can collect fees based on collection of a tax warrant.

In this particular case, the offset occurred on or about October 6, 2009. The information necessary to substantiate that the Assessment was in error (i.e., Taxpayer had already paid the appropriate taxes) was received by the Department on or about September 10, 2009. Based on this information, the warrant should have been recalled; therefore, no fees were owed upon the attempted collection on the Assessment. Thus, the fees should not have been assessed.

**FINDING**

The taxpayer's protest is sustained.

**CONCLUSION**

The taxpayer's protest is sustained on all issues.

*Posted: 05/26/2010 by Legislative Services Agency*

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