

Letter of Findings: 09-0937P
Sales and Use Tax
For the Tax Years 2006, 2007, and 2008

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ISSUE

I. Tax Administration–Negligence Penalty.

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

Taxpayer requests abatement of a negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana corporation that buys and sells used semi-tractors. Taxpayer also operates a service department, performing maintenance, modifications and repairs on trucks and semi-tractors. During the subject tax years, taxpayer made sales upon which taxpayer failed to collect and remit sales tax. Taxpayer also failed to pay use tax on items used and consumed during taxpayer's normal business operations.

The Department issued proposed assessments, including the ten percent negligence penalty for each of the tax years in question. Taxpayer asks the Department to waive the penalty.

I. Tax Administration–Negligence Penalty.

DISCUSSION

The Department refers to IC § 6-8.1-10-2.1(a)(3), which provides "if a person... incurs, upon examination by the department, a deficiency that is due to negligence... the person is subject to a penalty."

The Department also 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.

The Department may waive the negligence penalty as provided in [45 IAC 15-11-2\(c\)](#):

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.

In this case, Taxpayer incurred deficiencies which the Department determined were due to negligence under [45 IAC 15-11-2\(b\)](#), and were subject to a penalty under IC § 6-8.1-10-2.1(a). Within its request, Taxpayer asserts that its failure to collect sales tax on sales, and failure to pay use tax on items used and consumed, was due to a good faith judgment of the law. The Department's review of taxpayer's history, however, indicates that taxpayer failed to timely file returns and remit sales and use tax on multiple occasions. Taxpayer's history also shows that taxpayer made calculation errors in reporting sales and use tax in prior tax years.

Under IC § 6-8.1-5-1(c), "[t]he burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Taxpayer, in business since 1995, has not affirmatively established that its failure to collect and remit sales tax, and to remit use tax, was due to reasonable cause and not due to negligence, as required by [45 IAC 15-11-2\(c\)](#).

FINDING

Taxpayer's protest is respectfully denied.

Posted: 05/26/2010 by Legislative Services Agency
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