

**Letter of Findings: 09-0558
Financial Institutions Tax
For 1997 to 2004 Tax Years**

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ISSUES

I. Financial Institutions Tax—Trust Income.

Authority: IC § 6-5.5-2-1; IC § 6-5.5-2-4; IC § 6-8.1-5-1.

Taxpayer protests the imposition of tax from the "excess distributable income" adjustments.

II. Tax Administration—Penalties.

Authority: IC § 6-5.5-6-3; IC § 6-5.5-7-1; IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer argues that it is entitled to abatement of both the ten-percent negligence penalty and underpayment penalty.

STATEMENT OF FACTS

Taxpayer is a limited purpose credit card bank. For the tax years in question, Taxpayer filed Financial Institutions Tax ("FIT") returns on a combined basis with its sister corporation. Pursuant to an audit, the Indiana Department of Revenue ("Department") assessed additional FIT and interest for the 1997 to 2004 tax years. The Department determined that Taxpayer failed to include one of its sister corporations that was subject to FIT in Indiana in its combined returns. The Department also determined that Taxpayer's returns had not included the trusts income and made an adjustment entitled "excess distributable income." The Department also made adjustments to the Taxpayer's calculation and application of its net operating losses. Taxpayer protested the imposition of FIT resulting from the "excess distributable income" adjustments and the imposition of penalties. An administrative hearing was held, and this Letter of Findings results.

I. Financial Institutions Tax—Trust Income.

FINDING

The Department notes that all tax assessments are presumed to be accurate, and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c).

Indiana imposes a Financial Institutions Tax at IC § 6-5.5-2-1(a) as follows:

There is imposed on each taxpayer a franchise tax measured by the taxpayer's apportioned income for the privilege of exercising its franchise or the corporate privilege of transacting the business of a financial institution in Indiana. (Emphasis added).

"Taxpayer's apportioned income," is defined at IC § 6-5.5-2-4 as follows:

For a taxpayer filing a combined return for its unitary group, the group's apportioned income for a taxable year consists of: (1) the aggregate adjusted gross income, from whatever source derived, of the members of the unitary group; multiplied by (2) the quotient of: (A) all the receipts of the taxpayer members of the unitary group that are attributable to transacting business in Indiana; divided by (B) the receipts of all the members of the unitary group from transacting business in all taxing jurisdictions.

The Department determined that Taxpayer's returns had not included the income from its trusts and increased Taxpayer's "aggregate adjusted gross income" with an adjustment entitled "excess distributable income." Based on this determination, the Department made adjustments to Taxpayer's "receipts" used to derive Taxpayer's "apportioned income."

Taxpayer maintains that these adjustments for "excess distributable income" are unwarranted because all of the trust income has been reported by Taxpayer. Taxpayer argues that its trusts were disregarded entities for tax purposes and all of the trust income is reported by one of Taxpayer's divisions. During the hearing, Taxpayer provided federal income tax returns, income statements, the trusts' SEC filings, portions of its general ledger, and other documentation from its books and records.

Taxpayer has provided sufficient information to demonstrate that the trust income had been reported, and, therefore, it did not have "excess distributable income" to report.

FINDING

Taxpayer's protest on the imposition of tax from the "excess distributable income" adjustments is sustained. The Department will reverse the "excess distributable income" adjustments and will review the associated net operating loss adjustments.

II. Tax Administration—Penalties.

DISCUSSION

Taxpayer argues that the imposition of penalties was improper because there is no basis in fact or law to impose them on Taxpayer.

A. Negligence Penalty.

Taxpayer asks that the Department abate the ten-percent penalty negligence penalty.

IC § 6-8.1-10-2.1 requires that a ten-percent penalty be imposed if the tax deficiency results from the taxpayer's negligence. 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.... "

While Taxpayer has demonstrated that it likely will not owe some of the proposed tax assessments, as discussed in Issue I, Taxpayer has not 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\(c\)](#). Therefore, the penalty assessed pursuant to IC § 6-8.1-10-2.1 shall not be abated.

B. Underpayment Penalty.

Taxpayer asks that the Department abate the ten-percent penalty which was assessed because taxpayer underpaid its estimated taxes.

IC § 6-5.5-6-3 requires taxpayers subject to the FIT to make an estimated tax payment. "Each taxpayer subject to taxation under this article shall report and pay quarterly an estimated tax equal to twenty-five percent (25 [percent]) of the taxpayer's total estimated tax liability imposed by this article for the taxable year." IC § 6-5.5-6-3(a). IC § 6-5.5-7-1(a) prescribes the penalty for failing to pay the correct amount of estimated tax. "The penalty prescribed by [IC 6-8.1-10-2.1\(b\)](#) shall be assessed by the department on a taxpayer who fails to make payments as required in [IC 6-5.5-6](#)." IC § 6-8.1-10-2.1(b) sets the amount of penalty as ten percent.

Taxpayer was assessed a penalty because it underpaid its estimated taxes. Taxpayer does not challenge the manner in which the amount of penalty was calculated. Taxpayer asks the Department to exercise a discretionary authority it does not have. The Department has no authority to abate the underpayment penalty. Thus, a penalty assessed pursuant to IC § 6-5.5-7-1(a) shall not be abated. However, since Taxpayer's tax liability will likely be redetermined pursuant to the supplemental audit as Taxpayer was sustained, as discussed in Issue I, the issue is moot at this point. After Taxpayer's tax liability has been redetermined, the Department will apply the statutory calculation at which time a new determination will be made of whether the penalty is applicable to Taxpayer's situation.

FINDING

Taxpayer's protest of the underpayment and negligence penalties is denied.

CONCLUSION

Taxpayer's protest on the imposition of tax from the "excess distributable income" adjustments is sustained. Taxpayer's request for abatement of the "negligence" and "underpayment" penalties is denied.

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