

**Letter of Findings Number: 09-0871P
Sales and Use Tax
For the Periods 2006-2008**

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ISSUES

I. Use Tax—Imposition.

Authority: IC § 6-8.1-5-1.

Taxpayer protests the imposition of use tax on certain invoices.

II. Use Tax—Construction Contracts.

Authority: IC § 6-8.1-5-1.

Taxpayer protests the imposition of sales tax imposed on a lump-sum contract Taxpayer performed for a third party.

III. Tax Administration—Negligence Penalty.

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

Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is a company doing business in Indiana. The Indiana Department of Revenue ("Department") audited Taxpayer for sales and use tax for the years 2006 to 2008. As a result of the Department's audit, the Department issued proposed assessments of sales and use tax, interest, and penalties. Taxpayer protested a portion of the tax assessment and the penalties. The Department conducted an administrative hearing and this Letter of Findings results.

I. Use Tax—Imposition.

DISCUSSION

Taxpayer protests the imposition of use tax on the full value of eight invoices with a fire protection company. Taxpayer asserts that the original invoice reflects an overall total—even though the contract was a time and materials construction contract—and that the breakdown of time and materials was only provided after the audit was completed. The Department has verified that the contract was a time and materials contract (i.e., labor and materials are separately stated) rather than a lump-sum contract (i.e., the contract is for one price without a breakout of labor and materials).

Under IC § 6-8.1-5-1, the taxpayer has the burden to demonstrate that a proposed assessment is incorrect. Taxpayer has provided revised invoices which substantiate the labor and materials portion of each original invoice. Taxpayer has met its statutory burden; therefore, to the extent the invoices reflect labor, Taxpayer's protest is sustained.

FINDING

Taxpayer's protest is sustained to the extent Taxpayer provided invoices setting forth labor charges on its construction contracts from the fire protection company.

II. Use Tax—Construction Contracts.

DISCUSSION

Taxpayer protests the imposition of use tax on the value of materials transferred to one third party pursuant to various construction contracts. The auditor stated that the contracts in question were lump sum contracts and thus Taxpayer was required to self-assess use tax on the materials it purchased to satisfy those contracts.

Under IC § 6-8.1-5-1, the taxpayer has the burden to demonstrate that a proposed assessment is incorrect. Taxpayer has provided information to conclude that the use tax due on the materials has been paid and therefore Taxpayer is sustained.

FINDING

Taxpayer's protest is sustained.

III. Tax Administration—Negligence Penalty.

DISCUSSION

Taxpayer protests the imposition of the ten percent negligence penalty on the tax imposed as a result of the Department's audit.

Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. IC § 6-8.1-10-2.1. The Indiana Administrative Code, [45 IAC 15-11-2](#) further provides:

(b) "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.

(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.

Taxpayer states that its failure to pay sales tax or to self-assess use tax were "honest mistakes by hard working and well intentioned people" and further noted the complexity of sales and use tax compliance in the construction business. However, while Taxpayer has been partially sustained on a portion of the protest, Taxpayer has not provided legal or factual grounds explaining why the balance of the Department's proposed assessment was the result of "ordinary business care."

FINDING

Taxpayer's protest is denied.

CONCLUSION

Taxpayer's protest is partially sustained on the invoices for materials sold to Taxpayer by a third party for fire protection services. Taxpayer is sustained with regard use tax imposed on materials supplied to one third-party contractor pursuant to a construction contract. Taxpayer's protest of the penalty is denied.

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