

Letter of Findings Number: 09-0946
Use Tax
For Tax Years 2005-06

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ISSUES

I. Use Tax—Imposition.

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

Taxpayer protests the imposition of use tax assessments it believes were made beyond the statute of limitations.

II. Tax Administration—Negligence Penalty.

Authority: IC § 6-8.1-10-1; 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 operates an Indiana business. In 2005, Taxpayer purchased an existing Indiana business and filed its sales and use tax returns including an identifier of the company it purchased. The Indiana Department of Revenue ("Department") conducted an audit for the tax years 2005 and 2006 and determined that Taxpayer owed additional use tax for those years. The Department also determined that Taxpayer had filed its returns with a single identifier belonging to the business it purchased, which tolled the statute of limitations. The Department therefore issued proposed assessments for use tax, ten percent negligence penalties, and interest. Taxpayer protests the assessments in their entirety, claiming that the Department did not issue the proposed assessments until after the statute of limitations for issuing those assessments had run out. An administrative hearing was conducted and this Letter of Findings results. Further facts will be supplied as required.

I. Use Tax—Imposition.

DISCUSSION

Taxpayer protests that the Department did not issue its proposed assessments until after the running of the statute of limitations. The Department considers that Taxpayer did not file returns since the returns it did file had an identifier of a predecessor taxpayer, thereby nullifying the statute of limitations. 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 first relevant statute is IC § 6-8.1-5-2, which states:

(a) Except as otherwise provided in this section, the department may not issue a proposed assessment under section 1 of this chapter more than three (3) years after the latest of the date the return is filed, or either of the following:

(1) The due date of the return.

(2) In the case of a return filed for the state gross retail or use tax, the gasoline tax, the special fuel tax, the motor carrier fuel tax, the oil inspection fee, or the petroleum severance tax, the end of the calendar year which contains the taxable period for which the return is filed.

(b) If a person files a utility receipts tax return ([IC 6-2-3](#)), an adjusted gross income tax ([IC 6-3](#)), supplemental net income tax ([IC 6-3-8](#)) (repealed), county adjusted gross income tax ([IC 6-3.5-1.1](#)), county option income tax ([IC 6-3.5-6](#)), or financial institutions tax ([IC 6-5.5](#)) return that understates the person's income, as that term is defined in the particular income tax law, by at least twenty-five percent (25[percent]), the proposed assessment limitation is six (6) years instead of the three (3) years provided in subsection (a).

(c) In the case of the motor vehicle excise tax ([IC 6-6-5](#)), the tax shall be assessed as provided in [IC 6-6-5-5](#) and [IC 6-6-5-6](#) and shall include the penalties and interest due on all listed taxes not paid by the due date. A person that fails to properly register a vehicle as required by [IC 9-18](#) and pay the tax due under [IC 6-6-5](#) is considered to have failed to file a return for purposes of this article.

(d) In the case of the commercial vehicle excise tax imposed under [IC 6-6-5.5](#), the tax shall be assessed as provided in [IC 6-6-5.5](#) and shall include the penalties and interest due on all listed taxes not paid by the due date. A person that fails to properly register a commercial vehicle as required by [IC 9-18](#) and pay the tax due under [IC 6-6-5.5](#) is considered to have failed to file a return for purposes of this article.

(e) In the case of the excise tax imposed on recreational vehicles and truck campers under [IC 6-6-5.1](#), the tax shall be assessed as provided in [IC 6-6-5.1](#) and must include the penalties and interest due on all listed taxes not paid by the due date. A person who fails to properly register a recreational vehicle as required by [IC 9-18](#) and pay the tax due under [IC 6-6-5.1](#) is considered to have failed to file a return for purposes of this article. A person who fails to pay the tax due under [IC 6-6-5.1](#) on a truck camper is considered to have failed to file a

return for purposes of this article.

(f) If a person files a fraudulent, unsigned, or substantially blank return, or if a person does not file a return, there is no time limit within which the department must issue its proposed assessment.

(g) If any part of a listed tax has been erroneously refunded by the department, the erroneous refund may be recovered through the assessment procedures established in this chapter. An assessment issued for an erroneous refund must be issued:

(1) within two (2) years after making the refund; or

(2) within five (5) years after making the refund if the refund was induced by fraud or misrepresentation.

(h) If, before the end of the time within which the department may make an assessment, the department and the person agree to extend that assessment time period, the period may be extended according to the terms of a written agreement signed by both the department and the person. The agreement must contain:

(1) the date to which the extension is made; and

(2) a statement that the person agrees to preserve the person's records until the extension terminates.

The department and a person may agree to more than one (1) extension under this subsection.

(i) If a taxpayer's federal income tax liability for a taxable year is modified due to the assessment of a federal deficiency or the filing of an amended federal income tax return, then the date by which the department must issue a proposed assessment under section 1 of this chapter for tax imposed under [IC 6-3](#) is extended to six (6) months after the date on which the notice of modification is filed with the department by the taxpayer.

(Emphasis added).

After review, the returns in question were not fraudulent, unsigned, or substantially blank, as required by IC § 6-8.1-5-2(f) in order to negate the statute of limitations. While the identifier in question on those returns was for the business Taxpayer purchased, all other identification was correct for Taxpayer. Taxpayer filed its returns in a timely manner and remitted sales tax in a timely manner. Taxpayer has since updated its returns to include its own identifier in the correct place on its returns. Taxpayer has met the burden imposed by IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is sustained.

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). Taxpayer has affirmatively established that its failure to pay the deficiency was due to reasonable cause and not due to negligence, as required by [45 IAC 15-11-2\(c\)](#).

FINDING

Taxpayer's protest is sustained.

CONCLUSION

Taxpayer's protest is sustained on Issue I regarding the imposition of sales and use tax. Taxpayer's protest is sustained on Issue II regarding imposition of negligence penalties.

