

**Letter of Findings Number: 09-1031**  
**Sales Tax**  
**For Tax Years 2006-08**

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**ISSUES**

**I. Sales Tax—Imposition.**

**Authority:** IC § 6-2.5-2-1; IC § 6-2.5-4-13; IC § 6-8.1-5-1.

Taxpayer protests the imposition of sales tax on its sales of prepaid phone cards.

**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 is a retailer in Indiana. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not collected sales tax on its sales of prepaid phone cards. The Department therefore issued proposed assessments for sales tax, ten percent negligence penalties, and interest for the tax years 2006, 2007, and 2008. Taxpayer protested the assessment of sales tax and penalty, arguing that it did not know that the prepaid phone cards were subject to sales tax. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

**I. Sales Tax—Imposition.**

**DISCUSSION**

Taxpayer protests the imposition of sales tax on its sales related to prepaid phone cards. Taxpayer states that it inquired with other retailers in its area regarding sales tax and the prepaid phone cards. Those retailers were of the opinion that the cards were not subject to sales tax. 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 § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

(Emphasis added).

The Department refers to IC § 6-2.5-4-13, which states:

A person is a retail merchant making a retail transaction when a person sells:

- (1) a prepaid telephone calling card at retail;
- (2) a prepaid telephone authorization number at retail;
- (3) the reauthorization of a prepaid telephone calling card; or
- (4) the reauthorization of a prepaid telephone authorization number.

(Emphasis added).

Therefore, the prepaid phone cards are clearly taxable under IC § 6-2.5-4-13. Taxpayer was a retail merchant responsible for collecting the sales tax on the sale of the phone cards under IC § 6-2.5-2-1. Taxpayer has not met the burden of proving the proposed assessments wrong, as required by IC § 6-8.1-5-1(c).

**FINDING**

Taxpayer's protest is denied.

**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 denied on Issue I regarding the imposition of sales tax on prepaid phone cards. Taxpayer's protest is sustained on Issue II regarding imposition of negligence penalties.

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