

Letter of Findings Number: 10-0035P
Negligence Penalty
For the Years 2007 and 2008

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ISSUE

I. 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, an Indiana corporation, was assessed a negligence penalty pursuant to adjustments made by a sales and use tax audit by the Indiana Department of Revenue ("Department") of the years 2007 and 2008.

The Department sent correspondence dated January 12, 2010, to Taxpayer offering Taxpayer the option to have a hearing on its protest; otherwise the Department would make its determination on documentation in Taxpayer's protest file. Taxpayer did not reply to the Department's letter. Due to Taxpayer's failure to reply, this Letter of Findings is written based on the information in Taxpayer's protest file and other Department records relating to Taxpayer.

I. Tax Administration – Negligence Penalty.

DISCUSSION

The Department's audit made no adjustments for sales tax. The Department's audit did, however, find that Taxpayer's accrual system failed to capture use tax on purchase invoices of some companies, on fixed assets that were given to Indiana customers to display Taxpayer's products, on purchases of soft drinks, tools, racks, and license agreements, etc. - all items on which sales tax had not been paid nor use tax remitted.

Taxpayer does not dispute the assessment of use tax, just the assessment of penalty. Taxpayer argues that the majority of the use tax assessment relates to one transaction for charges for a software license that its non-resident parent purchased exempt from sales tax.

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.

The fact that Taxpayer's parent purchased the software tax-exempt, does not explain why Taxpayer believed it had reasonable cause not to remit use tax on its use of the software. Taxpayer also had multiple other items on which it was assessed use tax for which Taxpayer offers no "reasonable cause" explanation. Lastly, Taxpayer has a history of late payment of taxes. Taxpayer has not shown reasonable cause for its failure to exercise reasonable care in its reporting and payment of use tax.

FINDING

Taxpayer's protest is respectfully denied.

Posted: 07/28/2010 by Legislative Services Agency
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