

Letter of Findings: 09-0730
Use Tax
For the Year 2005, 2006, and 2007

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ISSUE

I. Tax Administration – Negligence Penalty.

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

Taxpayer requests an abatement of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is a multinational food provider operating several manufacturing facilities in Indiana. Pursuant to an audit, the Department of Revenue ("Department") assessed Taxpayer use tax, interest, and penalty, because Taxpayer failed to pay sales tax at the time of its purchases or to self-assess use tax concerning certain purchases of tangible personal property.

Taxpayer timely protested the assessments and negligence penalty. To support its protest, Taxpayer submitted pertinent documentation. Prior to an administrative hearing, upon a supplemental audit review, the Department agreed that the assessment of certain purchases, in the amount of \$823,907, on Taxpayer's protest list ("Use Tax Final List" file) should be removed from the original assessment because Taxpayer provided sufficient documentation. Taxpayer, however, continued to protest the imposition of the negligence penalty and tax on one of its purchases, a guard rail.

A hearing was held. At the hearing, Taxpayer withdrew its protest on the issue concerning its purchase of the guard rail. This Letter of Findings ensues and addresses the remaining issue, the negligence penalty. Additional facts will be provided as necessary.

I. Tax Administration – Negligence Penalty.

DISCUSSION

The Department assessed Taxpayer negligence penalty because Taxpayer failed to self-assess use tax on certain purchases of tangible personal property. Taxpayer, to the contrary, believed that it is entitled to an abatement of the ten percent negligence penalty.

Pursuant to IC § 6-8.1-10-2.1(b), the Department may assess a ten (10) percent negligence penalty if the taxpayer:

- (1) fails to file a tax return;
- (2) fails to pay the full amount of tax shown on the tax return;
- (3) fails to remit in a timely manner the tax held in trust for Indiana (e.g., a sales tax); or
- (4) fails to pay a tax deficiency determined by the Department to be owed by a taxpayer.

[45 IAC 15-11-2](#)(b) further 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.

The Department may waive a negligence penalty as provided in [45 IAC 15-11-2](#)(c), in part, as follows:

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.

In this instance, Taxpayer pointed to the audit which states that Taxpayer "has an extensive use tax accrual system in place." Taxpayer thus claimed that it made reasonable effort to be in compliance. Additionally, Taxpayer maintained that "the sales/use tax error ratio on the capital asset purchases was less than ten (10) percent of the total fixed assets purchased during the audit period." Thus, Taxpayer argued that it was not negligent and is entitled to the penalty waiver.

Although the audit stated that Taxpayer "has an extensive use tax accrual system in place, [t]he audit consists of an examination of the asset purchases only." Specifically, the audit found that during the three audit years, Taxpayer "accrued a total \$551,010 use tax" but it was found "underpaid its use tax liability by \$109,213 which is an equivalent of 19.8 percent error or underpayment of tax based on the total use tax accrued."

In the absence of other supporting documentation from Taxpayer, the Department is not able to agree with Taxpayer that its failure was due to reasonable cause and not due to negligence. Thus, Taxpayer's protest on the imposition of negligence penalty is respectfully denied.

FINDING

Taxpayer's protest on the imposition of negligence penalty is respectfully denied.

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