

**Letter of Findings: 10-0417**  
**Withholding Tax**  
**For the Tax Year Ending December 31, 2008**

**NOTICE:** Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

**ISSUES**

**I. Withholding Tax – Tax.**

**Authority:** IC § 6-3-2-2.8; IC § 6-3-4-13.

The taxpayer seeks abatement of the withholding tax on its nonresident shareholders.

**II. Withholding Tax – Interest.**

**Authority:** IC § 6-3-4-13; IC § 6-8.1-8-1.5; IC § 6-8.1-10-1.

The taxpayer seeks abatement of interest imposed on the withholding tax of its nonresident shareholders.

**III. Withholding Tax – Ten-Percent Penalty.**

**Authority:** IC § 6-3-4-13; IC § 6-8.1-5-1; IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

The taxpayer seeks abatement of penalty imposed on the withholding tax of its nonresident shareholders.

**STATEMENT OF FACTS**

The taxpayer is an S corporation. During 2008, the taxpayer did not withhold Indiana income tax on its nonresident shareholders. The Indiana Department of Revenue ("Department") assessed tax, interest, and a ten-percent penalty on the tax the taxpayer should have withheld. The taxpayer protested the assessment. The Department conducted an administrative hearing and this Letter of Findings results.

**I. Withholding Tax – Tax.**

**DISCUSSION**

The taxpayer argues that it is entitled to abatement of the tax liability imposed on its nonresident shareholders. In particular, the taxpayer argues that the nonresident shareholders paid the resulting Indiana income tax on their tax return.

In relevant part, IC § 6-3-2-2.8 states:

Notwithstanding any provision of [IC 6-3-1](#) through [IC 6-3-7](#), there shall be no tax on the adjusted gross income of the following:

- (2) Any corporation which is exempt from income tax under Section 1363 of the Internal Revenue Code and which complies with the requirements of [IC 6-3-4-13](#). However, income of a corporation described under this subdivision that is subject to income tax under the Internal Revenue Code is subject to the tax under [IC 6-3-1](#) through [IC 6-3-7](#). A corporation will not lose its exemption under this section because it fails to comply with [IC 6-3-4-13](#) but it will be subject to the penalties provided by [IC 6-8.1-10](#).

According to IC § 6-3-4-13:

(a) Every corporation which is exempt from tax under [IC 6-3](#) pursuant to [IC 6-3-2-2.8](#)(2) shall, at the time that it pays or credits amounts to any of its nonresident shareholders as dividends or as their share of the corporation's undistributed taxable income, withhold the amount prescribed by the department. Such corporation so paying or crediting any nonresident shareholder:

- (1) shall be liable to the state of Indiana for the payment of the tax required to be withheld under this section and shall not be liable to such shareholder for the amount withheld and paid over in compliance or intended compliance with this section; and
- (2) when the aggregate amount due under [IC 6-3](#) and [IC 6-3.5](#) exceeds one hundred fifty dollars (\$150) per quarter, then such corporation shall make return and payment to the department quarterly, on such dates and in such manner as the department shall prescribe, of the amount of tax which, under [IC 6-3](#) and [IC 6-3.5](#), it is required to withhold.

...

(d) The provisions of [IC 6-8.1](#) relating to additions to tax in case of delinquency and penalties shall apply to corporations subject to the provisions of this section, and for these purposes any amount withheld, or required to be withheld and remitted to the department under this section, shall be considered to be the tax of the corporation, and with respect to such amount it shall be considered the taxpayer.

...

(i) If a corporation fails to withhold and pay any amount of tax required to be withheld under this section and thereafter the tax is paid by the shareholders, such amount of tax as paid by the shareholders shall not be collected from the corporation but it shall not be relieved from liability for interest or penalty otherwise due in respect to such failure to withhold under [IC 6-8.1-10](#).

...

In this case, the taxpayer has established that its shareholders paid the appropriate tax based on the shareholders' income derived from the taxpayer. Thus, the portion of the assessment relating to the taxpayer's base tax assessment is sustained.

**FINDING**

The taxpayer's protest is sustained.

**II. Withholding Tax – Interest.**

**DISCUSSION**

The taxpayer argues that it is entitled to abatement of interest imposed on the tax liability that should have been withheld on behalf of its nonresident shareholders.

According to IC § 6-3-4-13:

(a) Every corporation which is exempt from tax under [IC 6-3](#) pursuant to [IC 6-3-2-2.8\(2\)](#) shall, at the time that it pays or credits amounts to any of its nonresident shareholders as dividends or as their share of the corporation's undistributed taxable income, withhold the amount prescribed by the department. Such corporation so paying or crediting any nonresident shareholder:

(1) shall be liable to the state of Indiana for the payment of the tax required to be withheld under this section and shall not be liable to such shareholder for the amount withheld and paid over in compliance or intended compliance with this section; and

(2) when the aggregate amount due under [IC 6-3](#) and [IC 6-3.5](#) exceeds one hundred fifty dollars (\$150) per quarter, then such corporation shall make return and payment to the department quarterly, on such dates and in such manner as the department shall prescribe, of the amount of tax which, under [IC 6-3](#) and [IC 6-3.5](#), it is required to withhold.

...

(d) The provisions of [IC 6-8.1](#) relating to additions to tax in case of delinquency and penalties shall apply to corporations subject to the provisions of this section, and for these purposes any amount withheld, or required to be withheld and remitted to the department under this section, shall be considered to be the tax of the corporation, and with respect to such amount it shall be considered the taxpayer.

...

(g) Instead of the reporting periods required under subsection (a), the department may permit a corporation to file one (1) return and payment each year if the corporation pays or credits amounts to its nonresident shareholders only one (1) time each year. The withholding return and payment are due on or before the fifteenth day of the third month after the end of the taxable year of the corporation.

...

(i) If a corporation fails to withhold and pay any amount of tax required to be withheld under this section and thereafter the tax is paid by the shareholders, such amount of tax as paid by the shareholders shall not be collected from the corporation but it shall not be relieved from liability for interest or penalty otherwise due in respect to such failure to withhold under [IC 6-8.1-10](#).

...

IC § 6-8.1-10-1 provides in relevant part:

(a) If a person fails to file a return for any of the listed taxes, fails to pay the full amount of tax shown on the person's return by the due date for the return or the payment, or incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment.

(b) The interest for a failure described in subsection (a) is the adjusted rate established by the commissioner under subsection (c), from the due date for payment. The interest applies to:

(1) the full amount of the unpaid tax due if the person failed to file the return;

(2) the amount of the tax that is not paid, if the person filed the return but failed to pay the full amount of tax shown on the return; or

(3) the amount of the deficiency.

The taxpayer has provided sufficient information to conclude that the tax due was paid prior to the statutory due date; therefore, interest is sustained.

**FINDING**

The taxpayer's protest is sustained.

**III. Withholding Tax – Ten-Percent Penalty.**

**DISCUSSION**

The taxpayer argues that it is entitled to abatement of the ten-percent penalty on the tax liability that should have been withheld on behalf of its nonresident shareholders. Even though the base tax was paid by the shareholders, the penalty imposed for failure to withhold is still permitted under IC § 6-3-4-13(i).

IC § 6-8.1-10-2.1 states:

(a) If a person:

(1) fails to file a return for any of the listed taxes;

(2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;

- (3) incurs, upon examination by the department, a deficiency that is due to negligence;
- (4) fails to timely remit any tax held in trust for the state; or
- (5) is required to make a payment by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department;

the person is subject to a penalty.

(b) Except as provided in subsection (g), the penalty described in subsection (a) is ten percent (10 [percent]) of:

- (1) the full amount of the tax due if the person failed to file the return;
- (2) the amount of the tax not paid, if the person filed the return but failed to pay the full amount of the tax shown on the return;
- (3) the amount of the tax held in trust that is not timely remitted;
- (4) the amount of deficiency as finally determined by the department; or
- (5) the amount of tax due if a person failed to make payment by electronic funds transfer, overnight courier, or personal delivery by the due date.

...

(d) If a person subject to the penalty imposed under this section can show that the failure to file a return, pay the full amount of tax shown on the person's return, timely remit tax held in trust, or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty.

(e) A person who wishes to avoid the penalty imposed under this section must make an affirmative showing of all facts alleged as a reasonable cause for the person's failure to file the return, pay the amount of tax shown on the person's return, pay the deficiency, or timely remit tax held in trust, in a written statement containing a declaration that the statement is made under penalty of perjury. The statement must be filed with the return or payment within the time prescribed for protesting departmental assessments. A taxpayer may also avoid the penalty imposed under this section by obtaining a ruling from the department before the end of a particular tax period on the amount of tax due for that tax period.

...

Under IC § 6-8.1-5-1(c), "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." An assessment – including the negligence penalty – is presumptively valid.

Departmental regulation [45 IAC 15-11-2](#)(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." Id.

IC § 6-8.1-10-2.1(d) allows the Department to waive the penalty upon a showing that the failure to pay the deficiency was based on "reasonable cause and not due to willful neglect." Departmental regulation [45 IAC 15-11-2](#)(c) requires that 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...."

The taxpayer has affirmatively demonstrated that it acted with reasonable cause when it did not pay the nonresident shareholder withholding tax in a timely manner; therefore, the taxpayer's penalty protest is sustained.

#### **FINDING**

The taxpayer's protest is sustained.

#### **CONCLUSION**

The taxpayer's protest of tax, penalty, and interest is sustained.

*Posted: 10/27/2010 by Legislative Services Agency*

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