

**Letter of Findings: 10-0449P**  
**Withholding Tax**  
**For the Tax Year Ending December 31, 2009**

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**ISSUE**

**I. Withholding Tax – Late Payment Penalty.**

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

The taxpayer seeks abatement of the penalty for late payment of nonresident partner withholding tax.

**STATEMENT OF FACTS**

The taxpayer is a limited partnership. The taxpayer remitted nonresident partner withholding tax after the statutory deadline for that payment. The Indiana Department of Revenue ("Department") issued a ten-percent penalty, which the taxpayer protested.

**I. Withholding Tax – Late Payment Penalty.**

**DISCUSSION**

The taxpayer argues that it is entitled to abatement of the penalty for late payment of withholding tax on behalf of its nonresident partners.

IC § 6-8.1-10-2.1 states in relevant part:

(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.

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...."

In this particular case, the taxpayer asserted that it submitted a \$5,000 withholding tax payment prior to the statutory deadline. It then submitted the \$8,500 that resulted in the penalty. However, the taxpayer owned another company which withheld \$8,029 on its behalf. The ultimate result was that the taxpayer paid \$13,029 timely and \$8,500 late. The taxpayer's ultimately-determined liability was \$15,223, which meant that only \$2,194 (\$15,223 liability minus \$13,029 previously paid) actually constituted a late payment.

The taxpayer has provided information to conclude that it attempted to withhold the proper amount of tax for 2009 prior to the statutory deadline for remitting tax. The taxpayer's estimate of tax due was reasonable based on the information it had available to it prior to the statutory deadline. The taxpayer's efforts to timely withhold tax demonstrated reasonable cause with regard to its tax withholding duties.

**FINDING**

The taxpayer's protest is sustained.

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