

Letter of Findings: 03-20100683P**Withholding Tax****For the Tax Years Ending December 31, 2008, and December 31, 2009**

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ISSUES**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.

II. Withholding Tax – Informational Return Penalty.

Authority: [IC 6-8.1-5-1](#); IC § 6-8.1-10-6.

Taxpayer protests the imposition of the penalty for late filing of information returns.

STATEMENT OF FACTS

The taxpayer is a limited partnership. The taxpayer remitted nonresident partner withholding tax after the statutory deadline for that payment for the 2008 tax year. The Indiana Department of Revenue ("Department") issued a ten-percent penalty, which the taxpayer protested.

Separately, Taxpayer filed its WH-3 and WH-18 forms for the 2009 tax year after the statutory due date for those returns. Taxpayer was assessed a \$10 penalty per each WH-3 and WH-18 form filed after the due date. Taxpayer protested the imposition of this penalty.

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...."

The taxpayer has provided information to conclude that it attempted to withhold the proper amount of tax for 2008 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.

II. Withholding Tax – Informational Return Penalty.

DISCUSSION

The taxpayer protests the imposition of the penalty on the taxpayer's failure to timely file forms WH-3 and WH-18 on behalf of its partners. This penalty was imposed pursuant to IC § 6-8.1-10-6, which provides for a ten dollar (\$10) penalty for each information return submitted late. A form WH-3 and a form WH-18 are informational returns within the scope of the statute.

For proposed assessments such as the penalty imposed against Taxpayer—IC § 6-8.1-5-1(c) provides that the assessment is presumed to be correct, and the burden of showing that the assessment was improper is on the taxpayer. The taxpayer's arguments focus on the penalty on the underlying tax rather than the informational returns in question. The Department previously waived any penalties on the underlying tax. However, the taxpayer has not provided sufficient information to establish that the penalty imposition for late filing of the informational returns in question was improper.

FINDING

The taxpayer's protest is denied.

SUMMARY

The taxpayer's request for waiver of the ten-percent penalty for 2008 is sustained. The taxpayer's request for waiver of the late informational return penalties for 2009 is denied.

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