

**Letter of Findings: 03-20100684P**  
**Withholding Tax**  
**For the Tax Year Ending December 31, 2009**

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**ISSUE**

**I. Withholding Tax –Penalty.**

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

The taxpayer seeks abatement of the penalty for late payment of nonresident partner withholding tax and for late filing of information returns.

**STATEMENT OF FACTS**

The taxpayer is a limited liability company. 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 and a penalty for late filing of information returns, which the taxpayer protested.

**I. Withholding Tax –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 stated that it had made an error in determining the due date for its tax payment. In this case, the taxpayer had previously been assessed a penalty for the 2008 tax year. The 2008 penalty assessment was issued in November 2009. The 2008 penalty assessment indicated a March 16, 2009 due date for the 2008 tax payment (March 15, 2009 was a Sunday). Thus, the taxpayer was aware of the due date and its explanation—that the late payment was the result of a clerical error—does not establish "reasonable care" necessary to avoid penalty waiver.

The taxpayer also asserts that the penalty should be based on a lower final tax amount as opposed to its

original estimated tax. To the extent that the taxpayer can provide documentation establishing the lower final tax amount within thirty (30) days of the issuance of the Letter of Findings, the penalty shall be reduced to reflect amount based on the reduced tax.

Finally, the taxpayer raises an issue regarding a second liability for the tax period. The penalty was for the taxpayer's late submission of forms WH-3 and WH-18 and is \$10 per late information return, as provided under IC § 6-8.1-10-6. Taxpayer has not provided sufficient information to justify penalty waiver.

**FINDING**

The taxpayer's protest of whether the ten-percent penalty should be imposed is denied. The taxpayer's protest of the late informational return penalty is denied. The taxpayer's protest of the penalty amount is sustained subject to the taxpayer's submission of additional documentation substantiating that a lower tax figure should be used in lieu of the taxpayer's original payment amount.

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