

**Letter of Findings Number: 43-20100580P**  
**Underground Storage Tank Fees**  
**For the Tax Years 2004-2007**

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**ISSUE**

**I. Underground Storage Tank Environmental Penalties – Imposition.**

**Authority:** IC § 6-8.1-1-1; IC § 6-8.1-5-1; IC § 13-11-2-150; IC § 13-23-8; IC § 13-23-12-1; IC § 13-23-12-4; IC § 13-23-12-6; IC § 13-23-12-7; [328 IAC 1-3-3](#).

Taxpayer protests the imposition of registration fees and environmental penalties for unpaid underground storage tank fees.

**II. Tax Administration - Ten Percent Negligence Penalty.**

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

The Taxpayer protests the imposition of the ten percent negligence penalty.

**III. Tax Administration – Interest.**

**Authority:** IC § 6-8.1-10-1.

Taxpayer protests the imposition of interest on the unpaid registration fees.

**STATEMENT OF FACTS**

Taxpayer owns a convenience store and gas station. This facility was purchased at a sheriff's sale in 2008. There are five underground storage tanks (USTs) at the facility. In August 2010, the Department billed Taxpayer for registration fees for the five USTs for each year from 2004 to 2007. The Department also assessed a 10 percent negligence penalty and interest on each fee. Finally, the Indiana Department of Environmental Management (IDEM) requested that the Department also assessed a total of \$15,000 in "environmental penalties." These environmental penalties consisted of: \$5,000 for 2004; \$5,000 for 2005; and \$5,000 for 2006. Taxpayer protests the assessment of the environmental penalties, and penalty and interest on the fees.

**I. Underground Storage Tank Environmental Penalties – Imposition.**

**DISCUSSION**

IC § 13-23-12-1 imposes a fee on underground storage tanks. Although the IDEM regulates underground storage tanks for the State, IC § 13-23-12-4 mandates that the Department of Revenue collect and deposit the underground storage tank fees. IC § 6-8.1-1-1 defines "listed tax" to include "the underground storage tank fee ([IC 13-23](#))." The laws and regulations concerning the Department's collection of listed taxes apply to the Department's collection of the underground storage tank fees. All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c).

The fee on USTs is imposed at IC § 13-23-12-1 as follows:

(a) Each year the owner of an underground storage tank that has not been closed before July 1 of any year under:

(1) rules adopted under [IC 13-23-1-2](#); or

(2) a requirement imposed by the commissioner before the adoption of rules under [IC 13-23-1-2](#);

shall pay to the department of state revenue an annual registration fee.

The amount of the registration fee is found in subsection (b) of IC § 13-23-12-1 as follows:

(b) The annual registration fee required by this section is as follows:

(1) Ninety dollars (\$90) for each underground petroleum storage tank.

(2) Two hundred forty-five dollars (\$245) for each underground storage tank containing regulated substances other than petroleum.

If an owner of an UST does not pay their annual registration fees described in IC § 13-23-12-1, the owner "shall be assessed a penalty of not more than two thousand dollars (\$2,000) per underground storage tank for each year that passes after the fee becomes due and before the fee is paid." IC § 13-23-12-7(a). This penalty is referred to as the "environmental penalty." The Indiana Administrative Code clarifies this penalty, stating that:

For sites with tanks that are registered but not all fees have been completely paid, the penalty will be calculated at one thousand dollars (\$1,000) per petroleum underground storage tank for each missed fee payment. If a quarterly fee payment is missed, the penalty is applied at one-fourth (¼) the amount listed in the table.

[328 IAC 1-3-3](#)(f)(2)(B).

Because annual registration fees were paid in part on five USTs, the Department assessed environmental penalties in the amount of: \$5,000 for 2004; \$5,000 for 2005; and \$5,000 for 2006.

Taxpayer maintains that it purchased the facility in April 2008, which means that it did not own the USTs prior

to that time, and therefore it does not owe the environmental penalties for the years 2004, 2005, and 2006. Taxpayer argues that it is not liable for the environmental penalties associated with the USTs owed during the period prior to its ownership.

IC § 13-11-2-150(a)(1)(A) describes an "owner" of a UST to mean "a person who owns the underground storage tank." In support of Taxpayer's contention that it was not the owner of the USTs prior to 2009, Taxpayer submitted a copy of the sheriff's deed and various other documents, showing it purchased the property in April 2008.

Taxpayer has clearly demonstrated that it was not the owner of the USTs prior to 2008. Therefore, the taxpayer is not responsible for the payment of the environmental penalties. However, Taxpayer is admonished that if the environmental penalties are not paid in full, Taxpayer or any future owner will not be eligible for full payments from the Excess Liability Trust Fund (ELTF) in the event that there is a gasoline spill or other environmental problem resulting from Taxpayer's underground storage tanks.

IC § 13-23-8 details the process for claiming monies from the ELTF. Further guidance is found in [328 IAC 1-3](#). With regards to the whether an UST owner (or operator) may make a claim for reimbursement, [328 IAC 1-3-3\(a\)](#) provides in pertinent part that:

A person listed in section 1 of this rule shall comply with the following for a claim for reimbursable costs or a third party liability claim to be considered for reimbursement from the fund by the administrator:

...

(3) Pay all past and currently due fees under [IC 13-23-12-1](#) and all interest **and penalties that are due under subsections (e) and (f)**.

(4) For a person who acquires ownership in accordance with subsection (d), make timely payment of all past due tank fees, interest, and penalties in accordance with subsection (f) to make a claim for reimbursable costs for any site characterization or corrective action related to a release that is first suspected, discovered, or confirmed after the payment of all past and currently due fees, interest, and penalties. (**Emphasis added**).

This is meant to include environmental penalties, regardless of whether the current owner was the owner of the USTs during the time period that the environmental penalty was assessed. Therefore, if this environmental penalty is not paid, neither Taxpayer nor any future owner will be eligible for full payments from the ELTF.

#### FINDING

Taxpayer's protest is sustained.

## II. Tax Administration – Ten Percent Negligence Penalty.

### DISCUSSION

The Department assessed a ten percent negligence penalty on each of the unpaid annual registration fees. Taxpayer protests the imposition of penalty, requesting that it be waived.

Taxpayer protests the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1. Indiana Regulation [45 IAC 15-11-2\(b\)](#) clarifies the standard for the imposition of the negligence penalty as follows:

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.

[45 IAC 15-11-2\(c\)](#) provides that:

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 case, Taxpayer incurred a deficiency which the Department determined was due to negligence under [45 IAC 15-11-2\(b\)](#), and so was subject to a penalty under IC § 6-8.1-10-2.1(a).

Taxpayer has sufficiently established that it was not at fault for the failure to pay the annual registration fee,

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since Taxpayer did not owe the USTs at the time that the registration fees were due. As such, Taxpayer could not have been negligent, and the penalty should therefore not be assessed.

**FINDING**

Taxpayer's protest is sustained.

**III. Tax Administration – Interest.**

**DISCUSSION**

The Department assessed interest for the unpaid UST registration fees in question. Taxpayer protests this imposition of interest.

IC § 6-8.1-10-1(a) provides, as follows:

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.

Pursuant to IC § 6-8.1-10-1(e), the Department does not have the authority to waive the interest. Therefore, Taxpayer's protest is denied.

**FINDING**

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

**SUMMARY**

For the reasons discussed above, Taxpayer's protest on the imposition of environmental penalties and negligence penalty is sustained. Taxpayer's protest on the imposition of interest is respectfully denied.

*Posted: 03/23/2011 by Legislative Services Agency*

An [html](#) version of this document.