

**Letters of Findings Number: 04-20100617P
Sales and Use Tax – Negligence Penalty
For the Periods 2007 and 2008**

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ISSUE

I. Tax Administration–Negligence Penalty.

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

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

STATEMENT OF FACTS

Taxpayer is a contractor that designs and installs lawn sprinkling systems for residential and commercial properties. Taxpayer also sells play systems and invisible fencing. The Indiana Department of Revenue ("Department") audited Taxpayer for tax years 2007 and 2008. As a result of the Department's audit, the Department issued proposed assessments of sales and use tax and interest. The proposed assessments included a ten-percent penalty for each year. Taxpayer protested only the penalties.

The Department sent a letter to Taxpayer stating that if Taxpayer "desire[d] a hearing in order to personally present additional evidence" to contact the Department "within twenty (20) days of the date of the letter." Taxpayer did not reply to the Department's letter, therefore this Letter of Findings is written based on the information in Taxpayer's protest file and other Department records relating to Taxpayer.

I. Tax Administration–Negligence Penalty.

DISCUSSION

Taxpayer protests the imposition of the ten-percent negligence penalty on the sales and use tax imposed as a result of the Department's audit.

Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. IC § 6-8.1-10-2.1. The Indiana Administrative Code, [45 IAC 15-11-2](#) further provides:

(b) "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.

(c) 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.

Taxpayer in its protest letter states that it "has always been in full compliance with the income tax, sales and use tax and income tax withholding rules and regulations of the Indiana Department of Revenue." Taxpayer also asserts that it "cooperated fully with the auditor" during the audit. Taxpayer also makes arguments that are not germane to the issue of the penalty—i.e., that the auditor was a little over an hour late for a scheduled appointment and that the auditor raised issues relating to withholding tax which Taxpayer deemed "far-fetched." The sales and use tax Audit Report shows that Taxpayer "failed to collect sales tax on some of their sales to Indiana customers" and also that "[t]he review of the taxpayer's sales journals, sales tax returns, and sales invoices indicated that sales of tangible personal property were made in which no sales tax was remitted." Also, the Audit Report states:

The review of the purchase invoices indicated that the tools, auto parts, office supplies, consumable supplies, general supplies, computer supplies and other tangible personal property were purchased by the taxpayer. No sales tax was paid at the point of purchase and no use tax remitted.

In addition to Taxpayer's failure to collect sales tax on items, and Taxpayer's failure to remit use tax on items, the Department also notes that a review of Taxpayer's sales and use tax payment history shows several late payments. Thus the Department finds that Taxpayer has failed to establish reasonable cause under [45 IAC 15-11-2\(c\)](#).

FINDING

Taxpayer's protest is denied.

Posted: 04/27/2011 by Legislative Services Agency

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