

Letter of Findings: 02-20100199
Corporate Income Tax
For Tax Years 2005, 2006, and 2007

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ISSUES

I. Corporate Income Tax – Business Income.

Authority: IC § 6-3-1-3.5; IC § 6-3-1-20; IC § 6-3-1-21; IC § 6-3-2-2; IC § 6-8.1-5-1; [45 IAC 3.1-1-29](#); [45 IAC 3.1-1-30](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Sherwin-Williams Co. v. Indiana Dep't. of State Revenue, 673 N.E.2d 849 (Ind. Tax Ct. 1996); Hunt Corp v. Indiana Dep't of State Revenue, 709 N.E.2d 766 (Ind. Tax Ct. 1999); Container Corp. v. Franchise Tax Board, 463 U.S. 159 (1983); May Dep't Store v. Indiana Dep't of State Revenue, 749 N.E.2d 651 (Ind. Tax Ct., 2001); Black's Law Dictionary 1511 (8th ed. 2004).

Taxpayer argues that the Indiana Department of Revenue erred in reclassifying its nonbusiness income on its Indiana income tax returns as business income.

II. Corporate Income Tax – Credits of Overpayments – Add-Back County Tax.

Authority: IC § 6-3-1-3.5; IC § 6-8.1-9-1; [45 IAC 3.1-1-8](#); [45 IAC 15-9-2](#); Commissioner's Directive 13 (July 2007); Commissioner's Directive 13 (August 2010).

Taxpayer protests that the Department of Revenue failed to give Taxpayer credits for income tax which it overpaid.

III. Tax Administration – Negligence Penalty.

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

Taxpayer protests the ten-percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is an out-of-state company doing business in Indiana. Taxpayer owns and operates various facilities throughout the United States and internationally.

Taxpayer conducted its business in Indiana through a limited liability company ("Indiana LLC") which initially was treated as a partnership, consisting of two partners. Taxpayer owned a majority of the shares in the Indiana LLC; the other partner, owning a small fraction of interest, was an unrelated third party. Taxpayer subsequently elected to acquire the remaining interest from the other partner. As a single member LLC, the Indiana LLC became a disregarded entity for federal income tax purposes and was treated as a division of Taxpayer. Taxpayer files its own Indiana corporate income tax returns and does not file a consolidated return with any other related entity.

The Indiana Department of Revenue ("Department") conducted a corporate income tax audit of the tax years 2005, 2006, and 2007. Pursuant to the audit, the Department determined that Taxpayer has misclassified certain income as nonbusiness income; the Department considered this as business income. Thus, the Department's audit made several adjustments which also reduced Taxpayer's carryovers of its net operating losses to the audit years. As a result, the Department's audit assessed Taxpayer additional income tax, penalty, and interest.

Taxpayer timely protests the assessments and penalty. A hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Corporate Income Tax – Business Income.

DISCUSSION

The Department's audit determined that Taxpayer has misclassified certain income as nonbusiness income. The Department determined that the income was business income. Taxpayer, to the contrary, claims that the income was properly classified as nonbusiness income and, therefore, was not apportionable to Indiana. The disputed income classification was attributed to the following transactions: (1) Sale of one of Taxpayer's facilities, (2) Sale of land adjacent to the facility, (3) Another sale of land adjacent to the facility, (4) a termination fee as result of an unsuccessful merger ("Termination Fee"). The first three transactions are collectively referred to hereafter as "Three Asset Transactions" and the last transaction is referred to as "Termination Fee."

As a threshold issue, all tax assessments are prima facie evidence that the Department's assessment of tax is presumed correct; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

"Indiana imposes a tax on every corporation's adjusted gross income derived from sources within Indiana. [IC § 6-3-2-1(b).] In cases where a corporation derives business income from sources both within and without Indiana, the 'adjusted gross income derived from sources within the state of Indiana' is determined by an apportionment formula." Sherwin-Williams Co. v. Indiana Dep't. of State Revenue, 673 N.E.2d 849, 851 (Ind. Tax

Ct. 1996).

Taxpayer first, referring to both federal and Indiana case law, claims that its operation of certain facilities and its Indiana operations are "non-unitary" because the three-unity requirements (unity of ownership, unity of operation, and unity of use) are not satisfied. Thus, Taxpayer argues that its income from the sale of assets relating to its facilities, i.e., Three Asset Transactions, is income from "non-unitary" business. Taxpayer also argues that its income from the Three Asset Transactions is "nonbusiness" income. Taxpayer thus maintains that constitutional limitations prohibit Indiana from taxing its "non-unitary" and "nonbusiness" income. Specifically, Taxpayer asserts that:

In *Hunt v. Department of Revenue* (709 N.E.2d 766, 1999) the Indiana tax court determined that there are constitutional limitations on what income may be deemed as part of a taxpayer's Indiana apportionable base.

Under the unitary business principle, if a taxpayer's activities carried on within the state are not unitary with its activities carried on elsewhere, the state is constitutionally constrained from including the income from those out of state activities in the taxpayer's apportionable tax base.

Thus, Taxpayer maintains that it properly classified the income attributed to Three Asset Transactions as "non-unitary" and "nonbusiness" income and not subject to apportionment.

Taxpayer's reliance on the ruling of *Hunt Corp v. Indiana Dep't of State Revenue*, 709 N.E.2d 766 (Ind. Tax Ct. 1999), is misplaced. In *Hunt*, the Indiana Tax Court provided comprehensive guidance for computing a corporate taxpayer's tax liabilities when a taxpayer and its subsidiaries/affiliates file consolidated returns as a group where some income was attributable to its subsidiaries/affiliates' distributive shares in partnerships. Unlike the taxpayer in *Hunt*, Taxpayer states that since it began conducting business in Indiana, it files its own Indiana corporate income tax returns and does not file a consolidated return with any other related entity.

Nonetheless, the court in *Hunt* has provided general rules on computing a corporate taxpayer's tax liabilities. The court in *Hunt* first outlined what it considered "constitutional limitations" which restrict a state from looking "beyond its borders in order to determine the value of things within its borders." *Id.* at 770. The *Hunt* court stated that:

These limitations arise from the unitary business principle.... The unitary business principle allows a state to consider all of a corporate enterprise's income arising from the enterprise's unitary business in calculating that state's apportioned share of that income. However, where a corporate enterprise receives income from unrelated business activity which constitutes a discrete business enterprise, a state may not include that income in the apportionable base. (Internal quotation marks and citations omitted.) *Id.*

The court in *Hunt* further explained that IC § 6-3-2-2 "is a general provision that deals with how of all of a corporate taxpayer's adjusted gross income is attributed by way of allocation and apportionment rules.... [T]he fact that section 6-3-2-2 deals with the attribution of all of a corporate taxpayer's adjusted gross income means that income derived from a corporate partnership... is subject to section 6-3-2-2." *Id.* at 776.

The court further illustrated that:

Under section 6-3-2-2, in order to determine where the income from the corporate partnership is to be attributed, it must first be determined whether that income constitutes business or nonbusiness income for the affiliated group. That determination is made by ascertaining whether the affiliated group and the partnerships are engaged in a unitary business or not. If the income from the partnerships constitutes business income (i.e., if the affiliated group and the partnerships are engaged in a unitary business), under section 6-3-2-2, all of that income would be subject to apportionment based on an application of the affiliated group's property, payroll, and sales factors. If the income from the partnerships constitutes nonbusiness income for the affiliated group (i.e., if the affiliated group and the partnerships are not engaged in a unitary business), that income will be allocated to a particular jurisdiction. Section 6-3-2-2 does not specifically address the question of whether a partnership's property, payroll, and sales factors may be considered in apportioning a corporation's business income derived from a corporate partnership. The regulation [\[45 IAC 3.1-1-153\]](#) addresses this technical problem and provides a comprehensive description of the treatment of income derived from corporate partnerships. Mirroring the analysis required by section 6-3-2-2, the regulation makes the crucial distinction between the situation where the corporate partner's activities and the partnership's activities constitute a unitary business and when they do not. *Id.*

As mentioned above, Taxpayer files its own Indiana corporate income tax returns since it began conducting business in Indiana, and does not file consolidated returns with its affiliates/subsidiaries. Regardless of whether the Indiana LLC was treated as a partnership or a disregarded entity for federal income tax purposes, Taxpayer files its own Indiana returns and its income should be attributed pursuant to IC § 6-3-2-2.

Even if, for the purpose of argument, that the "unitary business principle" is applicable, Taxpayer's business activities within and without Indiana have satisfied the three-unity requirements outlined by the United States Supreme Court. The United States Supreme Court's jurisprudence establishes what is considered "unitary business" and allows a state to apply formula apportionment taxing income which does not have its source in the taxing state. When in dispute, the Court examines whether "contributions to income of the subsidiaries resulted from functional integration, centralization of management, and economies of scale." *Container Corp. v. Franchise Tax Board*, 463 U.S. 159, 179 (1983).

In this instance, Taxpayer is a "diversified... company" in a certain industry. Its documentation shows that it owns and operates various facilities that only companies in its industry may operate. Taxpayer asserts that its "operations, including [the facility in Indiana], have always had their own management." Taxpayer further maintains that "[o]ther than the ownership of [the Indiana facility], [Taxpayer] has had no other operations or activities in the state of Indiana."

Taxpayer's documentation, however, demonstrates otherwise. Its documentation establishes that the Indiana facility is its "first company-designed and developed" facility. Taxpayer's documentation, in relevant part, further states:

[Taxpayer's] strategic plan is to continue to grow its [] business by (i) expanding and increasing the utilization of its existing properties, (ii) developing real estate at its existing properties and developing projects at new sites, and (iii) making selected acquisitions, principally in [its] industry, to diversify its operations and to achieve economies of scale.

In fact, Taxpayer's documentation shows that one of its facilities is located on the same property of the Three Asset Transactions. Thus, Taxpayer's documentation demonstrates that there are functional integration, centralization of management, and economies of scale within its business enterprise.

Taxpayer and the Indiana LLC thus are in a unitary business. Pursuant to IC § 6-3-2-2, for the purpose of calculating a corporation's adjusted gross income tax liability, business income is apportioned between Indiana and other states using a three-factor formula, while nonbusiness income is allocated to Indiana or another state. A corporation's net income is its adjusted gross income, with certain adjustments. IC § 6-3-1-3.5(b). Thus, whether income is deemed business or nonbusiness income determines whether it is allocated to a specific state or whether it is apportioned between Indiana and other states wherein the taxpayer is conducting its trade or business.

IC § 6-3-1-20 provides:

The term "business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and **includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitutes integral parts of the taxpayer's regular trade or business operations. (Emphasis added).**

IC § 6-3-1-21 defines "nonbusiness income" as follows:

The term "nonbusiness income" means all income other than business income.

[45 IAC 3.1-1-29](#) further explains:

"Business Income" is defined in the Act as income from transactions and activity in the regular course of the taxpayer's trade or business, including income from tangible and intangible property **if the acquisition, management, or disposition of the property are integral parts of the taxpayer's regular trade or business.**

Nonbusiness income means all income other than business income.

The classification of income by the labels occasionally used, such as manufacturing income, compensation for services, sales income, interest, dividends, rents, royalties, gains, operating income, non-operating income, etc., is of no aid in determining whether income is business or nonbusiness income. Income of any type or class and from any source is business income if it arises from transactions and activity occurring in the regular course of a trade or business. **Accordingly, the critical element in determining whether income is "business income" or "nonbusiness income" is the identification of the transactions and activity which are the elements of a particular trade or business. (Emphasis added).**

[45 IAC 3.1-1-30](#) also illustrates:

For purposes of determining whether income is derived from an activity which is in the regular course of the taxpayer's trade or business, the expression "trade or business" is not limited to the taxpayer's corporate charter purpose of its principal business activity. A taxpayer may be in more than one trade or business and derive business therefrom depending upon but not limited to some or all of the following:

- (1) The nature of the taxpayer's trade or business.
- (2) The substantiality of the income derived from activities and transactions and the percentage that income is of the taxpayer's total income for a given tax period.
- (3) The frequency, number, or continuity of the activities and transactions involved.
- (4) The length of time the property producing income was owned by the taxpayer.
- (5) The taxpayer's purpose in acquiring and holding the property producing income.

The Indiana Tax Court, in *May Dep't Store v. Indiana Dep't of State Revenue*, 749 N.E.2d 651 (Ind. Tax Ct., 2001), concluded that the statutory definition of "business income" was ambiguous and, thus, established two tests—a transactional test and a functional test—to determine whether a taxpayer's income is considered "business income" pursuant to IC § 6-3-1-20. *Id.* at 661-63.

The court in *May* explained, in relevant part, that:

Under the transactional test, the controlling factor by which business income is identified is the nature of the particular transaction giving rise to the income. In deciding whether a specific transaction generated business income, pertinent considerations include: (1) the frequency and regularity of similar transactions; (2) the

former practices of the business; and (3) the taxpayer's subsequent use of the income.

...

Under the functional test, all gain from the disposition of a capital asset is considered business income if the asset disposed of was used by the taxpayer in its regular trade or business operations.... Under the functional test,... the extraordinary nature or infrequency of the sale is irrelevant. ("If the property had an integral function in the taxpayer's unitary business, its income properly can be apportioned and tax as business income, even though the transaction itself does not reflect the taxpayer's normal trade or business.") (Internal citations omitted.) *Id.* at 658-60.

The court in *May* further illustrated, in relevant part, that:

The functional test focuses on the property being disposed of by the taxpayer. By the very terms of the statute, the "acquisition, management, and disposition" of the property generating income must constitute an "integral" part of the taxpayer's regular trade or business operations. Thus, the property at issue must have been acquired, managed and divested or disposed of by the taxpayer. More importantly, this process (i.e., acquisition, management and disposition) must be integral to the taxpayer's regular trade or business operations. It is not enough that the property was used to generate business income for the taxpayer prior to its disposition. The disposition too must be an integral part of the taxpayer's regular trade or business operations.

The term "integral" may be defined as "part or constituent component necessary or essential to complete the whole." (Internal citations omitted.) *Id.* at 664 -65.

Ruling in favor of the petitioner, the court in *May* determined that the gains from the sale of the petitioner's subsidiary's assets did not qualify as business income under the transactional test. *Id.* The court in *May* stated that the planned transaction was a one-time event because the petitioner was in the business of department store retailing, not buying and selling the assets of entire divisions. *Id.* The court further opined that the sale of the subsidiary's assets also did not qualify as business income under the functional test because the divestiture of the assets was neither a necessary nor an essential part of the petitioner's business operation—the planned transaction was ordered by a court and was for the benefit of a competitor. *Id.*

In this instance, under the transactional test, the income generated from the Three Asset Transactions and Termination Fee was not Taxpayer's business income because, as Taxpayer claims and the Department agrees, Taxpayer "has never been in the regular practice of buying and selling [facilities] and receiving termination fees." However, under the functional test, which focuses on the income-producing property, the critical inquiry is the relationship between the subject property and Taxpayer's business operations.

A. Three Asset Transactions.

Taxpayer's documentation showed that the Three Asset Transactions pertain to a sale of a facility and sales of two parcels of land adjacent to that facility. The facility and two parcels of land were located at the same undivided land which was originally acquired and designed for the business purposes of the company. According to Taxpayer's documentation, the facility was used in Taxpayer's core business operation. Additionally, the two adjacent parcels of land were used as accommodations for Taxpayer's customers during their visits. Thus, the facility and the two adjacent parcels of land, as a whole, were used to facilitate Taxpayer's business operations. Taxpayer's documentation further showed that, subsequent to the sale of the facility, Taxpayer leased back the same facility to continue its operations and later subleased the property to an unrelated third party. Thus, Taxpayer's documentation demonstrates that it controlled and utilized the three subject assets to facilitate its business and, thus, the subject assets are essential and integral to Taxpayer's regular business operation. Therefore, the income generated from Three Asset Transactions was business income under the functional test.

B. Termination Fee.

The Department's audit reclassified Taxpayer's income attributed to "Termination Fee" as business income. Taxpayer, to the contrary, maintains that its receipt of "Termination Fee" was a result of an unsuccessful merger. Thus, Taxpayer asserts that it properly classified the "Termination Fee" as nonbusiness income.

"Termination fee" is defined, as follows:

A fee paid if a party voluntarily backs out of a deal to sell or purchase a business or a business's assets. • Termination fees are usu. negotiated and agreed on as part of corporate merger or acquisition negotiations. The fee is designed to protect the prospective buyer and to deter the target corporation from entertaining bids from other parties. – Also termed break-up fee.

Black's Law Dictionary 1511 (8th ed. 2004).

In this instance, Taxpayer states that it entered into a merger agreement to "gain access" to "new market[s]" in its industry. Taxpayer's documentation, in relevant part, also states that its "strategic plan is to continue to grow its... business by... making selected acquisitions, principally in [its] industry, to diversify its operations and to achieve economies of scale." Thus, whether Taxpayer can successfully complete its merger determines whether its business can prosper. Before Taxpayer can manage its merged business and gain access to properties in new markets, it would have incurred expenses. Those expenses are costs of doing business, which Taxpayer claims as "business expenses" and deducts them from its income tax returns. Those expenses also include expenses incurred in the process of acquiring Taxpayer's business assets, which would have generated business income

for Taxpayer if the deal goes through.

Taxpayer negotiated and the seller agreed to a "termination fee" to ensure the desired result—completion of the acquisition. Thus, the "Termination Fee" was intended to prevent the seller-company from entertaining higher bidders and breaching the merger agreement. It also serves as a remedy to compensate Taxpayer for its effort and costs incurred during the acquisition. Thus, the "Termination Fee" was essential and integral part of Taxpayer's business operations. Accordingly, under the functional test, the income attributed to the "Termination Fee" is business income.

In conclusion, Taxpayer's income attributed to the Three Asset Transactions and Termination Fee is business income under the functional test established by May.

FINDING

Taxpayer's protest is respectfully denied.

II. Corporate Income Tax – Credits of Overpayments – Add-Back County Tax.

DISCUSSION

Referring to IC § 6-3-1-3.5(b)(3) and [45 IAC 3.1-1-8](#)(3)(a), Taxpayer maintains that it is entitled to credits for county tax that it paid but mistakenly added back to its Indiana income tax returns.

IC § 6-3-1-3.5(b), in relevant part, states:

In the case of corporations, the same as "taxable income" (as defined in Section 63 of the Internal Revenue Code) adjusted as follows:

- (3) Add an amount equal to any deduction or deductions allowed or allowable pursuant to Section 63 of the Internal Revenue Code for taxes based on or measured by income and levied at the state level by any state of the United States.

[45 IAC 3.1-1-8](#) further, in pertinent part, explains:

"Adjusted Gross Income" with respect to corporate taxpayers is "taxable income" as defined in Internal Revenue Code--section 63 with three adjustments:

- (3) Add back deductions taken pursuant to Internal Revenue Code-section 63 for:
 - (a) Taxes based on or measured by income and levied at the state level. For purposes of this subsection, the Indiana Gross Income Tax is a state tax measured by income and must be added back (see *Miles v. Department of Treasury*, 209 Ind. 172 (1935));
 - (b) Property taxes levied by a political subdivision of any state; and
 - (c) Indiana motor vehicle excise taxes, except for that portion of the tax not considered an ad valorem tax.

IC § 6-8.1-9-1(a) states:

If a person has paid more tax than the person determines is legally due for a particular taxable period, the person may file a claim for a refund with the department. Except as provided in subsections (f) and (g), in order to obtain the refund, the person must file the claim with the department within three (3) years after the latter of the following:

- (1) The due date of the return.
- (2) The date of payment.

For purposes of this section, the due date for a return filed for the state gross retail or use tax, the gasoline tax, the special fuel tax, the motor carrier fuel tax, the oil inspection fee, or the petroleum severance tax is the end of the calendar year which contains the taxable period for which the return is filed. **The claim must set forth the amount of the refund to which the person is entitled and the reasons that the person is entitled to the refund. (Emphasis added).**

[45 IAC 15-9-2](#), in relevant part, illustrates:

- (b) The department has no legal method of generating a claim for refund. A claim for refund can only be initiated pursuant to [IC 6-8.1-9-1](#).

EXAMPLE

A taxpayer is audited by the department for the tax period 19X3. This audit results in an overpayment of tax. The department has no legal authority to automatically [sic] refund or credit this overpayment to the taxpayer. Instead, the taxpayer must file a claim for refund as prescribed in [IC 6-8.1-9-1](#) and [45 IAC 15-9-1](#).

...

- (d) When filing a claim for refund with the department the taxpayer's claim shall set forth:

- (1) the amount of refund claimed;
- (2) a sufficiently detailed explanation of the basis of the claim such that the department may determine its correctness;
- (3) the tax period for which the overpayment is claimed; and
- (4) the year and date the overpayment was made.

The claim for refund shall be filed on a form prescribed by the department. (Emphasis added).

The Department further explains the requirements to properly address a taxpayer's refund claim in the Commissioner's Directive 13 (July 2007), 20070801 Ind. Reg. 045070431NRA. Later, the Commissioner's Directive 13 (July 2007) was updated and the Commissioner's Directive 13 (August 2010), 20100728 Ind. Reg. 045100472NRA, in relevant part, states:

The claim for refund must be filed on a **Claim for Refund (Form GA-110L), an amended income tax return**, or a withholding tax return (Form WH-3) that **indicates an overpayment of tax**.

[IC 6-8.1-9-1](#)(a) also mandates that the claim must set forth the amount of the refund claimed and the reasons that the taxpayer is entitled to the refund. [45 IAC 15-9-2](#)(d) provides that the claim for refund must set forth:

- (1) The amount of refund claimed;
- (2) A sufficiently detailed explanation of the claim so that the Department can determine its correctness;
- (3) The tax period for which the overpayment is claimed; and
- (4) The year and date the overpayment was made.

Pursuant to [IC 6-8.1-9-1](#)(b), which requires the Department to consider the claim for refund, the Department, as part of its consideration of the claim, may request any additional information that might be necessary in making a determination regarding the validity of the claimed overpayment. (**Emphasis added**).

Taxpayer's documentation failed to demonstrate that it has filed a claim for refund regarding the overpayments of tax during the audit to support its protest. Moreover, upon reviewing the Department's audit and relevant documentation, the Department is not able to find any documentation regarding the overpayments of income tax. Thus, given the totality of the circumstances, in the absence of documentation, the Department is not able to agree that Taxpayer is entitled to the credits of overpayments of income tax to set off the assessment.

FINDING

Taxpayer's protest is respectfully denied.

III. Tax Administration – Negligence Penalty.

DISCUSSION

Taxpayer also protests the imposition of the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1(a), the Department may assess a ten (10) percent negligence penalty if the taxpayer:

- (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.

[45 IAC 15-11-2](#)(b) further states:

"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.

The Department may waive a negligence penalty as provided in [45 IAC 15-11-2](#)(c), in part, as follows:

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 has demonstrated that the imposition of the negligence penalty is not appropriate.

FINDING

Taxpayer's protest is sustained.

SUMMARY

For the reasons discussed above, Taxpayer's protest of the imposition of negligence penalty is sustained. However, Taxpayer's remaining protest is respectfully denied.

Posted: 09/28/2011 by Legislative Services Agency
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