

Supplemental Letter of Findings: 04-20110043
Gross Retail Tax
For the Years 2006, 2007, and 2008

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ISSUE

I. Ten-Percent Negligence Penalty.

Authority: IC § 6-8.1-5-1(c); IC § 6-8.1-10-2.1(a)(3); IC § 6-8.1-10-2.1(a)(2); IC § 6-8.1-10-2.1(d); [45 IAC 15-11-2\(b\)](#); [45 IAC 15-11-2\(c\)](#).

Taxpayer asks that the Department exercise its discretionary authority to abate the ten-percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is a company in the business of selling heavy equipment. Although Taxpayer is headquartered in Kentucky, it also operated business locations in Indiana. The equipment Taxpayer sells is used for lawn and gardening, construction, forestry, and agriculture. The Department of Revenue conducted a sales and use tax audit for the years 2006 through 2008. The audit resulted in the assessment of additional sales/use tax. Taxpayer protested, and an administrative hearing was conducted by telephone during which Taxpayer's representative explained the basis for its protest. A Letter of Finding was issued in which Taxpayer's protest was sustained to the extent that Taxpayer had supplied documentation establishing that it assessed and collected Kentucky sales tax on the transactions at issue. A supplemental audit was conducted in which Taxpayer was afforded a "credit" as outlined in the original Letter of Findings. However, Taxpayer sought a rehearing on the ground that the Department failed to consider Taxpayer's request that the ten-percent negligence penalty be abated. A second administrative hearing was conducted and this Supplemental Letter of Findings results.

I. Ten-Percent Negligence Penalty.

DISCUSSION

Taxpayer asks that the ten-percent negligence penalty be abated on the ground that it acted as an ordinary and reasonable taxpayer in self-reporting its sales and use tax liabilities.

The audit noted that Taxpayer had been audited previously and that the assessment was relatively large due in part to Taxpayer's "less than adequate maintenance of records." In addition although the audit "allowed [T]axpayer wide discretion in areas of taxability including maintenance of receipts for diesel fuel purchases [and] location of rental equipment," Taxpayer was assessed tax on sales of equipment where Taxpayer's own records indicated that the equipment was delivered into Indiana.

IC § 6-8.1-10-2.1(a)(3) requires that a ten-percent penalty be imposed if the tax deficiency results from the taxpayer's negligence. IC § 6-8.1-10-2.1(a)(2) requires a ten-percent penalty if the taxpayer "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."

IC § 6-8.1-10-2.1(d) states that, "If a person subject to the penalty imposed under this section can show that the failure to... pay the full amount of tax shown on the person's return... or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall wave the penalty."

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...."

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.

The audit report indicates that Taxpayer was given considerable latitude in determining its sales tax liability. For example, Taxpayer was simply "placed on notice" that its equipment rentals to Indiana customers generated a stream of rental income subject to Indiana sales tax but that any corresponding "adjustment has not been pursued in this audit." The audit found that Taxpayer had failed to self-assess use tax on "vehicle repair parts, shop tools, shop supplies, advertising and promotional materials, rental of telecommunication equipment, and general office and marketing supplies." The audit also assessed tax on shop supplies which Taxpayer acquired but which were "not transferred to the customer as part of the retail transaction." In addition, the audit found that Taxpayer had

erred in adding its own use tax liability to invoices issued to out-of-state vendors rather than self-assessing that use tax liability. The audit report correctly noted that "Taxpayer does not know whether an [out-of-state] vendor is registered with the Department to collect Indiana sales and use tax" and that even if the out-of-state vendor was registered with the Department was registered with the state, "there [was] no reasonable certainty that the overpayment received by the vendor [would] be correctly remitted to the Department."

Taxpayer argues that the Department's audit took an inordinate amount of time to complete and that the additional interest expense attributable to that delay should be taken into consideration in weighing whether or not the penalty should be abated. In addition, Taxpayer maintains that it cooperated fully with the Department's audit and that it was told that the negligence penalty was added to the assessment as a matter of routine.

The Department must disagree with Taxpayer's assertion that the negligence penalty was totally unjustified or that it is common practice to impose the penalty regardless of the facts and circumstances surrounding each particular audit. Taxpayer complains that the audit took an excessive amount of time to complete; however, whether or not the audit took an excessive amount of time to complete, at least a portion of that time is attributable to the Taxpayer's own "less than adequate maintenance of records." In addition, it should be noted that the Department's audit exercised considerable discretion in determining whether or not Taxpayer's records justified Taxpayer's assertion that a particular transaction was or was not subject to sales/use tax.

Nonetheless, the Department is prepared to agree that there is insufficient information to establish that Taxpayer's faulty record-keeping was so egregious as to constitute "willful neglect." Based on a "case-by-case" analysis and after reviewing "the facts and circumstances of [this] taxpayer" the Department agrees that the ten-percent negligence penalty should be abated.

FINDING

Taxpayer's protest is sustained.

Posted: 09/28/2011 by Legislative Services Agency
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