

**Letter of Findings Number: 43-20110104P
Underground Storage Tank Fees
For the Tax Years 2001-2010**

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ISSUES

I. Underground Storage Tank Fee – Imposition.

Authority: IC § 6-8.1-1-1; IC § 6-8.1-5-1; IC § 13-23-12-1; IC § 13-12-12-4.

Taxpayer protests the imposition of annual registration fees for underground storage tanks.

II. Tax Administration – Interest.

Authority: IC § 6-8.1-10-1.

Taxpayer protests the imposition of interest.

III. Tax Administration – Negligence Penalty.

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

Taxpayer protests the imposition of the ten percent negligence penalty.

IV. Underground Storage Tank Fee – Environmental Penalty.

Authority: IC § 13-23-12-1; IC § 13-12-12-7; [328 IAC 1-3-3](#).

Taxpayer protests the imposition of environmental penalties related to unpaid underground storage tank fees.

STATEMENT OF FACTS

Taxpayer is an Indiana company operating a gas station in Indiana. In 2001, Taxpayer hired contractors to build the gas station which contains three underground storage tanks ("UST"s).

In late 2010, Taxpayer was informed that it was required to register those three USTs and was required to pay an annual UST registration fee for each UST per year going back to 2001.

Taxpayer protests the imposition of the annual fees, plus the statutorily mandated ten (10) percent negligence penalty and interest. Taxpayer also protests the assessments of "environmental penalties" – \$6,000 for 2003, \$12,000 for 2004, \$18,000 for 2005, \$24,000 for 2006, \$30,000 for 2007, \$36,000 for 2008, and \$42,000 for 2009.

An administrative hearing was held for which Taxpayer explained the basis of its protest. After the hearing, Taxpayer employed a representative to represent Taxpayer regarding its protest. Neither Taxpayer nor its representative provided additional documentation to support Taxpayer's protest. This Letter of Findings is based on the information available within Taxpayer's protest file and at the hearing. Additional facts will be provided as necessary.

I. Underground Storage Tank Fee – Imposition.

DISCUSSION

IC §13-23-12-1 imposes a fee on underground storage tanks. Although the Indiana Department of Environmental Management ("IDEM") regulates underground storage tanks for the State, IC §13-12-12-4 mandates that the Indiana Department of Revenue ("Department") 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.

(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.

(c) If an underground storage tank consists of a combination of tanks, a separate fee shall be paid for each tank. (**Emphasis added**).

Thus, pursuant to the above statute, Taxpayer was required to register its three USTs and was required to pay the annual registration fees. In this instance, Taxpayer stated that, in 2001, it hired contractors to build the three USTs. Taxpayer remains the owner of the three USTs. Thus, Taxpayer is responsible for the annual

registration fees. Because Taxpayer did not pay the annual registration fees since 2001, the Department's assessments were proper pursuant to IC §13-23-12-1.

FINDING

Taxpayer's protest of the annual registration fees is respectfully denied.

II. Tax Administration – Interest.

DISCUSSION

Taxpayer protests the imposition of interest.

The Department assessed interest on the unpaid UST annual registration fees. Taxpayer requested that the Department waive interest.

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

If a person... fails to pay the full amount of tax... 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.

FINDING

Taxpayer's protest of interest is respectfully denied.

III. Tax Administration – Negligence Penalty.

DISCUSSION

Taxpayer requests that the Department abate 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.

In its February 15, 2011 protest letter, Taxpayer stated in relevant part, that "no one informed us otherwise that we were not getting our tanks and lines inspected to meet the requirements." Taxpayer did not provide any documentation to "establish reasonable cause." Additionally, Taxpayer stated that, in late 2010, an IDEM employee informed Taxpayer on the statutory UST requirements and also assisted Taxpayer in completing the registration of its three USTs. Subsequently, Taxpayer was billed for the UST registration fees for its three USTs. The annual UST registration fees, including the current year, remain unpaid.

As the above regulations illustrate,... "[i]gnorance 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."

Given the totality of the circumstances, in the absence of other supporting documentation, the Department is

not able to agree that Taxpayer has demonstrated that its failure to pay tax was due to reasonable cause and not due to negligence.

FINDING

Taxpayer's request for abatement of the negligence penalty is respectfully denied.

IV. Underground Storage Tank Fee – Environmental Penalty.

DISCUSSION

Taxpayer protests the imposition of environmental penalties for unpaid underground storage tank fees. IC § 13-23-12-7(a) states:

Except as provided in subsection (e), **an owner of an underground storage tank** who:

- (1) is required to pay the fee under section 1 of this chapter; and
- (2) fails to pay the fee when due as established under section 2 of this chapter;

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. (Emphasis added).

Thus, if an owner of an UST does not pay the 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." [328 IAC 1-3-3\(e\)\(3\)](#). The Indiana Administrative Code clarifies this penalty, stating that:

For sites containing only tanks that were never registered, or sites containing only tanks for which no tank fees were paid when due, the penalty will be calculated at two thousand dollars (\$2,000) under [IC 13-23-12-7\(a\)](#) per petroleum underground storage tank per year that passes after each year's fee is due. [328 IAC 1-3-3\(f\)\(2\)\(A\)](#).

In this instance, Taxpayer owned three USTs since 2001. The Department assessed Taxpayer the environmental penalty for the years beginning 2003 through 2009—i.e., \$6,000 for 2003, \$12,000 for 2004, \$18,000 for 2005, \$24,000 for 2006, \$30,000 for 2007, \$36,000 for 2008, and \$42,000 for 2009. The environmental penalty is cumulative. Per IC § 13-23-12-7(a), the penalty is "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" (**Emphasis added**). For example, if a fee on one of the tanks that was due in Year 1 was not paid until Year 4, then \$2,000 is assessed **for each year that passed** before that Year 1 fee was paid (\$2,000 for Year 1; \$2,000 for Year 2; \$2,000 for Year 3; and \$2,000 for Year 4). With that being the case, the environmental penalties against Taxpayer on its three USTs were assessed as illustrated below:

Years	2003	2004	2005	2006	2007	2008	2009
2003 Fees	\$ 6,000	\$ 6,000	\$ 6,000	\$ 6,000	\$ 6,000	\$ 6,000	\$ 6,000
2004 Fees		\$ 6,000	\$ 6,000	\$ 6,000	\$ 6,000	\$ 6,000	\$ 6,000
2005 Fees			\$ 6,000	\$ 6,000	\$ 6,000	\$ 6,000	\$ 6,000
2006 Fees				\$ 6,000	\$ 6,000	\$ 6,000	\$ 6,000
2007 Fees					\$ 6,000	\$ 6,000	\$ 6,000
2008 Fees						\$ 6,000	\$ 6,000
2009 Fees							\$ 6,000
Subtotal	\$6,000	\$12,000	\$18,000	\$24,000	\$30,000	\$36,000	\$42,000

Taxpayer did not pay the annual registration fees described in IC § 13-23-12-1. Thus, pursuant to the above mentioned statute and regulations, the environmental penalties for those years were properly imposed.

In early 2011, the IDEM promulgated new regulations, which include [328 IAC 1-3-3](#), 20110323 Ind. Reg. 328080684FRA, effective April 22, 2011. The new language to [328 IAC 1-3-3\(f\)\(2\)\(A\)](#), in relevant part, provides:

For sites containing only tanks that were never registered, or sites containing only tanks for which no tank fees were paid when due, the penalty will be calculated at two thousand dollars (\$2,000) under [IC 13-23-12-7\(a\)](#) per petroleum underground storage tank per year that passes after each year's fee is due. **The penalty will be calculated by multiplying the total number of years that have passed since the fee was due by the total number of tanks and multiplying the result by two thousand dollars (\$2,000). (Emphasis added).**

At the time when the assessments were made, the Department, following the then-effective regulations, properly assessed the environmental penalties against Taxpayer. Nonetheless, the new regulations came into effect after Taxpayer sent its protest letter and before the Department addressed Taxpayer's protest. Pursuant to the new [328 IAC 1-3-3\(f\)\(2\)\(A\)](#) calculation, although the imposition of the environmental penalties remains statutorily mandatory, Taxpayer will benefit from a reduction of the environmental penalties.

Given the totality of the circumstances in this case, it is reasonable to apply the new [328 IAC 1-3-3\(f\)\(2\)\(A\)](#). Thus, the Department will reassess the environmental penalties pursuant to the new regulation [328 IAC 1-3-3\(f\)\(2\)\(A\)](#).

FINDING

Taxpayer's protest of the imposition of environmental penalties is respectfully denied. However, the Department will reassess the environmental penalties pursuant to the new regulation [328 IAC 1-3-3\(f\)\(2\)\(A\)](#).

SUMMARY

For the reasons discussed above, Taxpayer's protest of the annual registration fees is respectfully denied. Taxpayer's protest of interest and negligence penalty is also respectfully denied. Additionally, Taxpayer's protest of the imposition of environmental penalties is respectfully denied. However, the Department will reassess the environmental penalties pursuant to the new regulation [328 IAC 1-3-3\(f\)\(2\)\(A\)](#).

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