

Letter of Findings: 04-20110283
Sales and Use Tax
For the Years 2006-2009

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales Tax—Overpayments: Prepaid Sales Tax.

Authority: IC § 6-2.5-7-5; IC § 6-2.5-7-6; IC § 6-8.1-5-1; IC § 6-8.1-9-2; Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the application of its overpayments of prepaid sales tax.

II. 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 company which sells gasoline at retail through metered pumps. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer owed additional sales and use tax and issued proposed assessments for sales tax, use tax, negligence penalty, and interest for the 2007 through 2009 tax years. The Department determined that Taxpayer had made overpayments of prepaid sales tax for the 2006, 2007, and 2008 tax years and underpayments of sales and use tax for the 2007, 2008, and 2009 tax years.

Taxpayer protested the proposed assessments relating to the application of its overpayments of prepaid sales tax and to the imposition of the negligence penalty. An administrative hearing was held, and this Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales Tax—Overpayments: Prepaid Sales Tax.

DISCUSSION

The Department notes that 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); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

The Department determined the amount of sales and use tax due on items, assessed interest and penalty, and then applied the amount of prepaid sales tax overpayments to the amounts of tax, interest, and penalty. Taxpayer protests the Department's application of its prepaid sales tax overpayments. Taxpayer asserts that the overpayments should be applied to the tax base first before interest and penalty are calculated. Taxpayer further argues that overpayments from one tax period to another should be applied to the tax due for another period before interest and penalty are assessed for that second period.

IC § 6-2.5-7-5(c) provides:

A retail merchant is entitled to deduct from the amount of state gross retail tax required to be remitted under subsection (b) the amount determined under STEP THREE of the following formula:

STEP ONE: Determine:

(A) the sum of the prepayment amounts made during the period covered by the retail merchant's report;
minus

(B) the sum of prepayment amounts collected by the retail merchant, in the merchant's capacity as a qualified distributor, during the period covered by the retail merchant's report.

STEP TWO: Subject to subsections (d) and (f), for qualified reporting periods beginning after June 30, 2009, and ending before July 1, 2020, determine the product of:

(A) eighteen cents (\$0.18); multiplied by

(B) the number of gallons of E85 sold at retail by the retail merchant during the period covered by the retail merchant's report.

STEP THREE: Add the amounts determined under STEPS ONE and TWO.

For purposes of this section, a prepayment of the gross retail tax is presumed to occur on the date on which it is invoiced.

Accordingly, a taxpayer is allowed to deduct the amount of prepayment sales tax from the amount of sales tax required to be remitted. Thus, the amounts that a taxpayer has paid in prepayment sales tax which include the overpayments should be applied to the amount of gross retail sales tax determined to be due before the calculation of interest and penalty for that period.

While Taxpayer may, pursuant to IC § 6-2.5-7-6, elect to receive a refund when the deduction exceeds the amount of gross retail tax required for that tax year, Taxpayer's refund from one tax year to another is not applied as suggested by Taxpayer. IC § 6-8.1-9-2(a) provides that refunds are applied to liabilities that are assessed and

currently due. Thus, offsets from refunds from other tax years are applied to the fully determined liability of the other years—i.e., the tax base, interest, and penalty due in the other year.

Therefore, Taxpayer's protest is sustained in part and denied in part. Taxpayer's protest is sustained to the extent that the prepaid sales tax overpayments for a particular tax period were not applied to the sales and use tax amounts for that period before calculating interest and penalty due for that period. However, Taxpayer's protest is denied, to the extent that Taxpayer is requesting that refunds determined for a certain tax period are to be applied to the base tax amounts for another period before interest and penalty would be assessed to the tax due for that other period.

FINDING

Taxpayer's protest is sustained in part and denied in part.

II. Tax Administration – Negligence Penalty.

DISCUSSION

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.

The standard for waiving the negligence penalty is given at [45 IAC 15-11-2](#)(c) 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 affirmatively established, as required by [45 IAC 15-11-2](#)(c), that its failure to pay sales tax on its purchases was due to reasonable cause and not due to negligence.

FINDING

Taxpayer's protest is respectfully sustained.

CONCLUSION

As discussed in Issue I, Taxpayer's protest to the application of the pre-paid sales tax overpayments is sustained in part and denied in part. Taxpayer's protest is sustained to the extent that the prepaid sales tax overpayments for a particular tax period were not applied to the sales and use tax amounts for that period before calculating interest and penalty due for that period. However, Taxpayer's protest is denied, to the extent that Taxpayer is requesting that refunds determined for a certain tax period are to be applied to the base tax amounts for another period before interest and penalty would be assessed to the tax due for that other period. As discussed in Issue II, Taxpayer's protest to the imposition of penalty is sustained.

Posted: 12/28/2011 by Legislative Services Agency

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