

**Letter of Findings Number: 02-20110279**  
**Income Tax**  
**For Fiscal Years Ending 2000, 2002, 2003, and 2004**

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**ISSUES**

**I. Income Tax–Failure to File.**

**Authority:** IC § 6-8.1-5-4; IC § 6-8.1-5-2; IC § 6-8.1-5-1(c).

Taxpayer protests the proposed assessment of Indiana income tax for years it failed to file.

**II. Tax Administration–Penalty.**

**Authority:** IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#); IC § 6-8.1-10-3.

Taxpayer protests the imposition of a penalty.

**STATEMENT OF FACTS**

Taxpayer is in the agricultural industry. During the audit for tax years 2007 through 2009, it was discovered by the auditor that "taxpayer's corporate income tax... revealed multiple missing years." The years missing were for "[t]ax years ending 2/29/2000, 2/28/2002, 2/28/2003, 2/29/2004 and 2/28/2005...." The Department therefore issued proposed assessments for the years at issue. The Audit Report notes that the "return for tax year ending 2/28/2005 was filed by the taxpayer during the course of [the] audit." After the audit, Taxpayer protested the assessments for these years; a hearing was held with Taxpayer and its representative, and this Letter of Findings results. Further facts will be supplied as required below.

**I. Income Tax–Failure to File.**

**DISCUSSION**

Taxpayer in its protest letter states the following:

[D]uring the audit it was also discovered that state forms (IT-20) according to the state database had not been filed for tax years ending Feb. 28, 2000; 2002; 2003; 2004. All the other years had been filed and filed timely. As you will note[,] 3 out of the 4 years listed are beyond the 7 year statute of limitations. We know that the statute [ sic] of limitations does not start until the return is filed, but the client truly believed the returns had been filed as the Federal returns were timely filed for these years. Also no notices have been received from the state indicating returns were missing.

It is not clear what seven year statute the taxpayer is referring to, and at the hearing this argument was basically reiterated. At the hearing Taxpayer argued that it had moved into a different building, and that its representative instructed it that it did not need to keep or retain documents that were seven years or older. Thus Taxpayer destroyed those documents. Taxpayer argues that it filed its Indiana income taxes for the years at issue (but did not retain the documents). Taxpayer further asserts that it "feel[s] the state has a responsibility... to inform the taxpayer of missing returns a year or two after the due date [.]" This latter argument will be addressed in Section II below.

IC § 6-8.1-5-4, which deals with record retention, states:

(a) Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.

(b) A person must retain the books and records described in subsection (a), and any state or federal tax return that the person has filed:

- (1) for an unlimited period, if the person fails to file a return or receives notice from the department that the person has filed a suspected fraudulent return, or an unsigned or substantially blank return; or
- (2) in all other cases, for a period of at least three (3) years after the date the final payment of the particular tax liability was due, unless after an audit, the department consents to earlier destruction.

In addition, if the limitation on assessments provided in section 2 of this chapter is extended beyond three (3) years for a particular tax liability, the person must retain the books and records until the assessment period is over.

(c) A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times.

(d) A person must, on request by the department, furnish a copy of any federal returns that he has filed.

(Emphasis added).

IC § 6-8.1-5-2 states in part that, "[T]he department may not issue a proposed assessment... more than three (3) years after the latest of the date the return is filed...." However, IC § 6-8.1-5-2 also provides in relevant part

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that "if a person does not file a return" then "there is no time limit within which the department must issue its proposed assessment."

The burden of proving a proposed assessment is wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c). In the Taxpayer's case, Taxpayer has not established that it filed returns for the years at issue. Thus under IC§ 6-8.1-5-4 Taxpayer had a duty to retain the relevant records, and under IC § 6-8.1-5-2 there is no time limit for the Department to issue its proposed assessment since Taxpayer has not established that it filed returns with the State of Indiana for the years at issue.

#### FINDING

Taxpayer's protest is respectfully denied.

### II. Tax Administration—Penalty.

#### DISCUSSION

Taxpayer protests the imposition of the ten percent negligence penalty. The waiver of the penalty 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 in relevant part:

(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.

(Emphasis added).

Regarding the penalty, Taxpayer's argument is that it should not be penalized given the amount of time that has elapsed, and that it did not receive notification of the failure to file from the State of Indiana. Taxpayer does not develop this argument, nor does Taxpayer provide a statutory citation. Taxpayer appears to be referring to IC § 6-8.1-10-3, which states:

(a) If a person fails to file a return on or before the due date, the department shall send him a notice, by United States mail, stating that he has thirty (30) days from the date the notice is mailed to file the return. If the person does not file the return within the thirty (30) day period, the department may prepare a return for him, based on the best information available to the department. The department prepared return is prima facie correct.

(b) If the department prepares a person's return under this section, the person is subject to a penalty of twenty percent (20[percent]) of the unpaid tax. In the absence of fraud, the penalty imposed under this section is in place of and not in addition to the penalties imposed under any other section.

Taxpayer, however, was not penalized at the 20 percent rate—thus IC § 6-8.1-10-3 is not applicable.

Taxpayer's penalty was at the 10 percent rate under IC § 6-8.1-10-2.1 (the Department further notes that even if, for the sake of argument, IC § 6-8.1-10-3 were applicable, the statute does not state what happens if the Department does not send the notice). In reviewing Taxpayer's filing history, Taxpayer has prior instances of failing to file its Indiana tax returns dating back to the late 1990s. The Department finds that Taxpayer has failed to establish reasonable cause under [45 IAC 15-11-2](#).

#### FINDING

Taxpayer's protest of the penalty is respectfully denied.

#### SUMMARY

Taxpayer's protest regarding income tax is respectfully denied; Taxpayer's protest of the penalty is respectfully denied.

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