DEPARTMENT OF STATE REVENUE

03-20120082P.LOF

Letter of Findings: 03-20120082P
Withholding Tax
For the Tax Period Ending October 31, 2011

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 It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register.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.

ISSUE

I. Withholding Tax – Late Payment Penalty.

Authority: IC § 6-8.1-5-1; IC § 6-8.1-10-1; IC § 6-8.1-10-2.1; 45 IAC 15-11-2.

Taxpayer seeks abatement of the penalty for late payment of employee withholding tax.

STATEMENT OF FACTS

Taxpayer is a company doing business in Indiana. For the period ending October 31, 2011, Taxpayer was required to remit Indiana employee withholding taxes on November 21, 2011. However, Taxpayer's payroll service provider remitted Indiana employee withholding tax on November 22, 2011, one day after the deadline. The Indiana Department of Revenue ("Department") assessed a ten-percent penalty for the late payment of employee withholding tax. Taxpayer's payroll service submitted a protest letter on Taxpayer's behalf. The Department conducted the administrative hearing by telephone, and this Letter of Findings results. Further facts will be provided as required.

I. Withholding Tax – Late Payment Penalty.

DISCUSSION

Taxpayer argues that it is entitled to abatement of the penalty for late payment of employee withholding tax.

IC § 6-8.1-10-2.1 states in relevant part:

(a) If a person:

(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;

the person is subject to a penalty.

(b) Except as provided in subsection (g), the penalty described in subsection (a) is ten percent (10 [percent]) of:

(1) the full amount of the tax due if the person failed to file the return;

(2) the amount of the tax not paid, if the person filed the return but failed to pay the full amount of the tax shown on the return;

(3) the amount of the tax held in trust that is not timely remitted;

(4) the amount of deficiency as finally determined by the department; or

(5) the amount of tax due if a person failed to make payment by electronic funds transfer, overnight courier, or personal delivery by the due date.

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 an assessment of a penalty – is presumptively valid.

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...."

For the month ending September 30, 2011, Taxpayer's payroll service provider also remitted employee withholding taxes on behalf of Taxpayer one day after the statutory deadline. For that month, the Department abated Taxpayer's potential penalty prior to the Department issuing a proposed assessment.

Taxpayer's payroll service provider remitted Taxpayer's employee withholding taxes one day late because of the person operating the payroll service had a family emergency. However, Taxpayer has had multiple late tax

payments for previous periods. Based on its history of late payments in conjunction with the current late payment, Taxpayer has not provided sufficient information to justify penalty waiver.

Taxpayer also protests the imposition of interest, however the Department may not waive interest as provided by IC § 6-8.1-10-1(e).

FINDING

Taxpayer's protest is denied.

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