

Letter of Findings: 03-20120110P
Withholding Tax
For the Tax Period Ending October 31, 2011

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ISSUE

I. Withholding Tax – Negligence Penalty.

Authority: IC § 6-3-4-8; 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 file a return and remit Indiana employee withholding taxes by the November 21, 2011, due date. However, Taxpayer's payroll service provider remitted Indiana employee withholding tax on November 22, 2011, one day after the deadline, and filed the returns on November 29, 2011, eight days after the deadline. The Indiana Department of Revenue ("Department") assessed a ten-percent negligence penalty. 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 – Negligence Penalty.

DISCUSSION

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

IC § 6-3-4-8(a) provides:

(a) Except as provided in subsection (d), **every employer making payments of wages subject to tax under this article**, regardless of the place where such payment is made, **who is required under the provisions of the Internal Revenue Code to withhold, collect, and pay over income tax on wages paid by such employer to such employee, shall, at the time of payment of such wages, deduct and retain therefrom the amount prescribed in withholding instructions issued by the department.** The department shall base its withholding instructions on the adjusted gross income tax rate for persons, on the total rates of any income taxes that the taxpayer is subject to under [IC 6-3.5](#), and on the total amount of exclusions the taxpayer is entitled to under [IC 6-3-1-3.5\(a\)\(3\)](#) and [IC 6-3-1-3.5\(a\)\(4\)](#). However, the withholding instructions on the adjusted gross income of a nonresident alien (as defined in Section 7701 of the Internal Revenue Code) are to be based on applying not more than one (1) withholding exclusion, regardless of the total number of exclusions that [IC 6-3-1-3.5\(a\)\(3\)](#) and [IC 6-3-1-3.5\(a\)\(4\)](#) permit the taxpayer to apply on the taxpayer's final return for the taxable year. **Such employer making payments of any wages:**

(1) shall be liable to the state of Indiana for the payment of the tax required to be deducted and withheld under this section and shall not be liable to any individual for the amount deducted from the individual's wages and paid over in compliance or intended compliance with this section; and

(2) **shall make return of and payment to the department monthly** of the amount of tax which under this article and [IC 6-3.5](#) the employer is required to withhold. (**Emphasis added**).

IC § 6-3-4-8(g) also provides:

The provisions of [IC 6-8.1](#) relating to additions to tax in case of delinquency and penalties shall apply to employers subject to the provisions of this section, and for these purposes any amount deducted or required to be deducted and remitted to the department under this section shall be considered to be the tax of the employer, and with respect to such amount the employer shall be considered the taxpayer. In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest. (**Emphasis added**).

IC § 6-8.1-10-2.1 provides, 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.

...

(e) If a person subject to the penalty imposed under this section can show that the failure to file a return, pay the full amount of tax shown on the person's return, timely remit tax held in trust, or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty.

(f) A person who wishes to avoid the penalty imposed under this section must make an affirmative showing of all facts alleged as a reasonable cause for the person's failure to file the return, pay the amount of tax shown on the person's return, pay the deficiency, or timely remit tax held in trust, in a written statement containing a declaration that the statement is made under penalty of perjury. The statement must be filed with the return or payment within the time prescribed for protesting departmental assessments. A taxpayer may also avoid the penalty imposed under this section by obtaining a ruling from the department before the end of a particular tax period on the amount of tax due for that tax period.

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 states it remitted Taxpayer's employee withholding taxes one day late because of the person operating the payroll service had a family emergency. Taxpayer representative requests abatement of the "penalty and interest due to the family matter and the past history since 2004 of paying the taxes timely." However, Taxpayer has had multiple late tax payments and filing issues for previous periods. Based on its history of late payments and filing issues 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 to the imposition of penalty and interest is denied.

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