

Letter of Findings: 03-20120376
Withholding Tax
For the Tax Period Ending December 31, 1998

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ISSUE

I. Tax Administration – Collection Authority.

Authority: IC § 6-8.1-5-1; IC § 6-8.1-5-2; IC § 6-8.1-8-2; IC § 34-11-1-2.

Taxpayer argues that the Department cannot collect the tax owed because the statute of limitations has lapsed.

STATEMENT OF FACTS

Taxpayer is a company doing business in Indiana. For the period ending December 31, 1998, Taxpayer on March 15, 1999, sent in their 1998 withholding return with a \$6,000 payment. However, on March 22, 2000, Taxpayer's WH-3 was credited in the system. A \$6,000 refund was issued on April 13, 2000, by the Indiana Department of Revenue ("Department") in error. An amended return was filed by the Taxpayer in September of 2003. It stated that \$5,445 was due. A Demand Notice of Payment was sent to Taxpayer for the amount owed. This bill was cancelled in September of 2003, when Taxpayer agreed to pay the \$5,445 that was owed, and that the payment would be sent by September 15, 2003. It was apparently never paid. In March of 2012, a new Notice of Proposed Assessment was issued to Taxpayer for this 1998 liability when the Department applied a refund to another liability of Taxpayer.

Taxpayer protested these assessments. The Department conducted the administrative hearing, and this Letter of Findings results. Further facts will be provided as required.

I. Tax Administration – Collection Authority.

DISCUSSION

Taxpayer argues that the Department does not have the legal right to collect Taxpayer's withholding tax liability. The issue is whether the Department's collection actions were proper. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

IC § 6-8.1-5-1(b) provides that:

If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. The amount of the assessment is considered a tax payment not made by the due date and is subject to IC § 6-8.1-10 concerning the imposition of penalties and interest. The department shall send the person a notice of the proposed assessment through the United States mail.

IC § 6-8.1-5-2(a) provides that:

Except as otherwise provided in this section, the department may not issue a proposed assessment under section 1 of this chapter more than three (3) years after the latest of the date the return is filed, or either of the following:

(1) The due date of the return.

(2) In the case of a return filed for the state gross retail or use tax, the gasoline tax, the special fuel tax, the motor carrier fuel tax, the oil inspection fee, or the petroleum severance tax, the end of the calendar year which contains the taxable period for which the return is filed.

Taxpayer also cites to IC § 6-8.1-5-2(g), which provides that:

If any part of a listed tax has been erroneously refunded by the department, the erroneous refund may be recovered through the assessment procedures established in this chapter. An assessment issued for an erroneous refund must be issued:

(1) within two (2) years after making the refund; or

(2) within five (5) years after making the refund if the refund was induced by fraud or misrepresentation.

Taxpayer argues that it has already been over three years in the case of the due date of the return or the date of the return being filed per IC § 6-8.1-5-2(a), and over two years since the refund was issued in error per IC § 6-8.1-5-2 (g). Therefore, the Taxpayer argues, the Department no longer has the right to issue a Notice of Proposed Assessment to collect the \$5,445.

However, IC § 6-8.1-8-2 provides in relevant part:

(a) Except as provided in IC § 6-8.1-5-3 [relating to jeopardy assessments], the department must issue a demand notice for the payment of a tax and any interest or penalties accrued on the tax, if a person files a tax return without including full payment of the tax or if the department, after ruling on a protest, finds that a

person owes the tax before the department issues a tax warrant. The demand notice must state the following:

- (1) That the person has ten (10) days from the date the department mails the notice to either pay the amount demanded or show reasonable cause for not paying the amount demanded.
- (2) The statutory authority of the department for the issuance of a tax warrant.
- (3) The earliest date on which a tax warrant may be filed and recorded.
- (4) The statutory authority for the department to levy against a person's property that is held by a financial institution.
- (5) The remedies available to the taxpayer to prevent the filing and recording of the judgment.

If the department files a tax warrant in more than one (1) county, the department is not required to issue more than one (1) demand notice.

(b) If the person does not pay the amount demanded or show reasonable cause for not paying the amount demanded within the ten (10) day period, the department may issue a tax warrant for the amount of the tax, interest, penalties, collection fee, sheriff's costs, clerk's costs, and fees established under section 4(b) of this chapter when applicable. When the department issues a tax warrant, a collection fee of ten percent (10 [percent]) of the unpaid tax is added to the total amount due.

The procedures relating to demand notices apply when a taxpayer files a return reporting a liability but fails to pay the full liability OR when a taxpayer has unsuccessfully protested a proposed assessment. The Department issued a Demand Notice on September 8, 2003, which was subsequently cancelled.

With regard to the Department issuing demand notices and filing tax warrants after the taxpayer fails to pay taxes after the issuance of a demand notice, Indiana statutes do not provide a specific statute of limitations such as provided in IC § 6-8.1-5-2. In such an instance, the so-called residual statute of limitations under IC § 34-11-1-2 controls and provides that:

- (a) A cause of action that:
 - (1) arises on or after September 1, 1982; and
 - (2) is not limited by any other statute; must be brought within ten (10) years.

The ten-year period is subject to tolling, i.e., the "clock stops," for certain actions by a taxpayer, such as moving out of state or concealment.

The Department maintains that its notice or determination that a tax liability is unpaid represents a cause of action relating to unpaid taxes. An unpaid tax liability is the prerequisite for any judgment to enforce the payment of tax.

The cause of action arises the first day the Department could issue a demand notice. At the demand notice stage—however it arises—the unpaid tax liability has become settled. The bringing of the "cause of action" is the entry of judgment regarding a tax warrant. Thus, the Department has ten years from the first date a demand notice could be issued to file a tax warrant.

Taxpayer owed the \$5,445, and yet has not paid this tax. Taxpayer has not shown why the Department does not have the right to collect this money, and therefore Taxpayer has not met the burden of proof set out in IC § 6-8.1-5-1.

FINDING

Taxpayer's protest is denied.

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