

**Letter of Findings: 03-20120720**  
**Withholding Tax**  
**For the Year 2010**

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**ISSUE**

**I. Late Penalty – Withholding Tax.**

**Authority:** IC § 6-8.1-5-1(c); IC § 6-8.1-10-2.1(a)(2); IC § 6-8.1-10-2.1(d); [45 IAC 15-11-2\(b\)](#); [45 IAC 15-11-2\(c\)](#).

Taxpayer argues that it is entitled to an abatement of a ten-percent penalty.

**STATEMENT OF FACTS**

Taxpayer is an out-of-state company taxed as a partnership for state and federal purposes. The company was formed in 2009. Taxpayer paid estimated withholding tax on behalf of its non-resident partners. The payment was late. The Department of Revenue ("Department") assessed a penalty. Taxpayer disagreed with the penalty and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representatives explained the basis for the hearing. This Letter of Findings results.

**I. Late Penalty – Withholding Tax.**

**DISCUSSION**

According to Taxpayer, it recently discovered that it "became responsible to withhold and remit Indiana income tax on distributive shares of partnership income credited or paid to its members who are nonresidents of Indiana and who are not registered to do business in Indiana." Taxpayer cites to IC § 6-3-4-12 authority for this conclusion.

However, in discussion with its "members" during March 2011, Taxpayer purportedly became aware that certain of those members were not registered to do business in Indiana. Therefore, Taxpayer filed forms WH-3 and WH-18 along with a payment intended to "cover the estimated Indiana withholding tax on its 2010 estimated income [distribution] to its nonresident members."

IC § 6-8.1-10-2.1(a)(2) requires a ten-percent penalty if the taxpayer "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." Since the estimated withholding payment was untimely, the Department assessed the penalty.

However, Taxpayer asks that the Department exercise its authority to abate the penalty.

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 the late-payment penalty – is presumptively valid.

Indiana law contains a provision allowing for abatement of penalty. IC § 6-8.1-10-2.1(d) states that, "If a person subject to the penalty imposed under this section can show that the failure to... pay the full amount of tax shown on the person's return... or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall wave the penalty."

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..."

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.

As grounds for abatement of the penalty, Taxpayer points out that after making the estimated payment, it actually reported a taxable loss for 2010 and that none of its "non-resident members had distributive income for 2010."

Taxpayer promptly and independently attempted to correct an error in calculating its withholding tax liability. Had withholding tax actually been owed, Taxpayer's payment was undisputedly late. Taxpayer is a large, sophisticated Taxpayer fully capable of determining its state tax liabilities. However, in this case there is insufficient information to establish that Taxpayer's decisions were so egregious as to constitute "willful neglect." Based on a "case-by-case" analysis and after reviewing "the facts and circumstances of each taxpayer" the Department agrees that the ten-percent penalty should be abated.

**FINDING**

Taxpayer's protest is sustained.

*Posted: 03/27/2013 by Legislative Services Agency*

