

Letter of Findings: 04-20120629
Gross Retail Tax
For the Years 2009 and 2010

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ISSUE

I. Negligence Penalty – Gross Retail Tax.

Authority: IC § 6-8.1-5-1(c); IC § 6-8.1-10-2.1(a)(3); 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 negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana "Rural Electric Membership Power Cooperative" which provides utility services to its customers. The Department of Revenue ("Department") conducted an audit review of Taxpayer's business records. The Department found that Taxpayer had failed to collect sales tax from certain of its non-exempt customers. The audit resulted in the assessment of additional sales tax along with interest and penalty. Taxpayer paid all amounts due but challenges the assessment of the penalty seeking to obtain a refund of the penalty amount. Taxpayer submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representatives explained the basis for the protest. This Letter of Findings results.

I. Negligence Penalty – Gross Retail Tax.

DISCUSSION

Taxpayer challenges the assessment of the ten-percent negligence penalty arguing that the circumstances surrounding its failure to collect sales tax justify waiver of the penalty.

IC § 6-8.1-10-2.1(a)(3) requires a ten-percent penalty if the taxpayer "incurs, upon examination by the department, a deficiency that is due to negligence." Since Taxpayer did not collect and remit the proper amount of tax, 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.*

Taxpayer explains that its failure to collect certain amounts of sales tax was attributable to the installation of a new and revised computer billing program. The predecessor billing program required Taxpayer to designate new utility customers as "exempt." The new and "improved" software program required that each new utility customer be designated "exempt" twice. As Taxpayer explains, it failed to "go to a second screen and make an additional click selection in order to properly bill sales tax on a customer invoice." The result was that a number of new, non-exempt customers were not billed for sales tax during an eight month period.

Taxpayer states that it had independently discovered the billing error and was in the process of resolving that error at the time the Department's audit commenced. Taxpayer provided information establishing that it had, indeed, undertaken corrective measures prior to the start of the Department's audit. In addition, Taxpayer provided information establishing that it has undertaken proactive corrective actions to assure that similar errors do not recur.

Once the billing error was discovered, Taxpayer promptly paid the tax, interest, and penalty.

Taxpayer is a relatively small utility provider but is fully capable of assuring that its billing system functions correctly and that, as an agent for the state, it properly collect and remit the proper amount of sales tax. However, there is insufficient information to establish that Taxpayer's failure to more promptly detect and correct the error was so serious as to constitute "willful neglect." Based on a "case-by-case" analysis, considering Taxpayer's past compliance history, 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.

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