

**Letter of Findings: 02-20130660P
Income Tax
For the Tax Periods 2010 and 2011**

NOTICE: [IC 6-8.1-3-3.5](#) and [IC 4-22-7-7](#) require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded by the publication of another document in the Indiana Register.

ISSUE

I. Tax Administration–Penalty.

Authority: [IC 6-3-4-13](#); [IC 6-8.1-5-1](#); [IC 6-8.1-10-2.1](#); [45 IAC 15-11-2](#).

Taxpayer seeks abatement of a penalty for failure to file two composite returns.

STATEMENT OF FACTS

Taxpayer is an Indiana S Corporation. The Indiana Department of Revenue ("Department") determined that Taxpayer failed to file an IT-20S composite form for the 2010 and 2011 tax years and was assessed two \$500 penalties for the Taxpayer's failure to list its nonresident shareholder on the composite schedule pursuant to [IC 6-8.1-10-2.1\(j\)](#). Taxpayer protests the imposition of penalty. An administrative hearing was held, and this Letter of Findings results.

I. Tax Administration–Penalty.

DISCUSSION

Taxpayer protests the imposition of two \$500 penalties for failure to file composite return schedules.

[IC 6-3-4-13\(j\)](#) and (k) provides:

(j) A partnership shall file a composite adjusted gross income tax return on behalf of all nonresident individual partners. The composite return must include each nonresident individual partner regardless of whether or not the nonresident individual partner has other Indiana source income.

(k) If a corporation described in subsection (a) does not include all nonresident shareholders in the composite return, the corporation is subject to the penalty imposed under [IC 6-8.1-10-2.1\(j\)](#).

Additionally, [IC 6-8.1-10-2.1\(j\)](#) provides:

If a partnership or an S corporation fails to include all nonresidential individual partners or nonresidential individual shareholders in a composite return as required by [IC 6-3-4-12\(h\)](#) or [IC 6-3-4-13\(j\)](#), a penalty of five hundred dollars (\$500) per partnership or S corporation is imposed on the partnership or S corporation.

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 negligence penalty – is presumptively valid.

[IC 6-8.1-10-2.1\(d\)](#) and (f) also provides:

(d) 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) The department shall adopt rules under [IC 4-22-2](#) to prescribe the circumstances that constitute reasonable cause and negligence for purposes of this section.

Indiana Regulation [45 IAC 15-11-2\(b\)](#) clarifies the standard for the imposition of the negligence penalty as follows:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at [45 IAC 15-11-2\(c\)](#) as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. 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 under this section.

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 penalties upon a showing that the failure to file the return 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"

Taxpayer maintains that the shareholders are Illinois residents and every year they have paid nonresident withholding and it was paid timely every month; however, this does not address why the IT-20S composite forms were not filed. [IC 6-3-4-13](#)(i) provides that:

If a corporation fails to withhold and pay any amount of tax required to be withheld under this section and thereafter the tax is paid by the shareholders, such amount of tax as paid by the shareholders shall not be collected from the corporation but it shall not be relieved from liability for interest or penalty otherwise due in respect to such failure to withhold under [IC 6-8.1-10](#).

Taxpayer has not provided sufficient information to establish that its failure to file the composite Form IT-20S in this instance was not due to Taxpayer's negligence, but was due to reasonable cause as required by [45 IAC 15-11-2](#)(c). Consequently, they have not met their burden for waiver of the late payment penalty.

FINDING

Taxpayer's protest is respectfully denied.

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