

Letter of Findings: 04-20130690P
Negligence Penalty
For Tax Years 2010, 2011 and 2012

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 This document is effective as of its date of publication and remains in effect until the date it is superseded by the publication of another document in the Indiana Register.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 – Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer requests that the Department abate the negligence penalty.

STATEMENT OF FACTS

Taxpayer, a construction company, is a general contractor, providing construction services in Indiana. In 2013, the Indiana Department of Revenue ("Department") audited Taxpayer's business records for the tax years 2010, 2011, and 2012. Pursuant to the audit, the Department determined that Taxpayer failed to collect and remit the proper amount of sales tax on some sales. The Department's audit also determined that Taxpayer purchased certain tangible personal property to be used in the course of its business without paying sales tax or self-assessing use tax. As a result, the Department assessed additional sales tax, use tax, penalty, and interest.

Taxpayer paid the base tax and interest, but it requested that the Department abate the negligence penalty. A phone hearing was held. Taxpayer subsequently provided additional documentation to support its protest. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Tax Administration – Negligence Penalty.

DISCUSSION

The Department's audit imposed a ten percent negligence penalty for the tax period in question. Taxpayer requested that the Department abate the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1(a), the Department may assess a ten (10) percent negligence penalty if the taxpayer:

- (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.

[45 IAC 15-11-2](#)(b) further states:

"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 Department may waive a negligence penalty as provided in [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. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and

circumstances of each case.

In this instance, Taxpayer requested that the Department abate the negligence penalty for various reasons. Primarily, Taxpayer asserted that its actions were due to reasonable cause and not due to negligence. Taxpayer explained that, for the three audit years at issue, it had large annual sales; among those sales, the Department's audit found that for approximately 0.02 percent of them Taxpayer failed to provide exemption certificates. Also, Taxpayer explained that, to perform the contract jobs, its employees at the job sites often need to replace or repair tools and equipment at job sites. Thus, certain of Taxpayer's employees purchase items which were needed to perform the work by using the company's credit cards ("Procurement Cards") assigned to those individuals. Taxpayer maintained that it has established a policy and a procedure concerning the Procurement Cards to ensure that the sales tax or use tax on the expense purchases was properly paid or remitted; however, it was not able to provide the source documentation for approximately 1.6 percent of the audit sampling transactions, because the documents were several years old and it was not able to locate or find them at its storage. Taxpayer further contacted the retail merchants for assistance but was not able to obtain copies of the documents for the same reason. Moreover, Taxpayer stated that it began implementing an internal audit procedure to address this issue after the audit. To support its protest, Taxpayer further submitted additional documentation, including a copy of its "Procurement Card Instructions."

Upon review, the Department agrees that Taxpayer provided sufficient documentation to demonstrate that the negligence penalty should be abated.

FINDING

Taxpayer's protest of the imposition of negligence penalty is sustained.

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