

Letter of Findings: 03-20130613P
Penalty
For Tax Year 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 This document is effective as of its date of publication and remains in effect until the date it is superseded by the publication of another document in the Indiana Register.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 – Penalty.

Authority: IC § 6-3-4-12; IC § 6-3-4-13; IC § 6-8.1-1-4; IC § 6-8.1-3-11; IC § 6-8.1-5-1; IC § 6-8.1-10-5; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); [45 IAC 15-1-2](#); [45 IAC 15-11-5](#).

Taxpayer protests the imposition of 100 percent penalty for its payment, which was later dishonored.

STATEMENT OF FACTS

Taxpayer is an S Corporation doing business in Indiana. Taxpayer is required to file and withhold tax on taxable income it distributes to its shareholders, who reside outside of Indiana on or before the statutory due date.

For the year ending December 31, 2012, Taxpayer failed to timely file the nonresident shareholder withholding tax return (WH-1 form) and to remit the withholding tax on or before the statutory due date. Based on the best information available, the Indiana Department of Revenue ("Department") issued and mailed Taxpayer a Proposed Assessment (AR-80) (Liability Number: 2012-04595387), dated June 3, 2013, imposing base tax, penalty, and interest ("BIA assessment").

On June 19, 2013, Taxpayer filed the actual WH-1 return for the tax year 2012 and paid the tax due, in the amount of \$5,341, by providing its bank routing information through the Department's INtax system. Upon receiving Taxpayer's actual return, the Department cancelled the BIA assessment. Because Taxpayer did not timely file its nonresident shareholder WH-1 return and remit the tax due, a ten percent late penalty and applicable statutory interest were imposed, which resulted in additional tax liability (Liability Number: 2012-04692242). This liability subsequently advanced to a Demand Notice for Payment on September 13, 2013, in the total amount of approximately \$570.

In the process of applying Taxpayer's \$5,341 payment, the Department was informed that Taxpayer's payment was dishonored. On June 28, 2013, the Department mailed Taxpayer a Notification of Returned Payment (Liability Number: 2012-04720256), informing Taxpayer that "[y]our payment in the amount of \$5,341.00 has been returned unpaid by your banking institution due to Routing Symbol." Taxpayer was afforded additional ten (10) days to correct this problem. This notification further informed Taxpayer, as follows:

The penalty amount shall be increased to the face value of the payment or one hundred percent (100[percent]) of the unpaid tax, whichever is smaller, if not paid by July 8, 2013. Any permits and/or licenses issued by the Department may be revoked if the liability is not paid immediately.

Taxpayer failed to respond to the Department's June 28, 2013, Notification of Returned Payment. On July 19, 2013, the Department mailed Taxpayer a Demand Notice for Payment (AR-40), imposing based tax, 100 percent penalty, and statutory interest. Taxpayer also did not respond to the Department's Demand Notice for Payment, and this tax liability subsequently advanced to a warrant stage on August 16, 2013. In late September 2013, the Department's contract collection agency began the process of levying Taxpayer's bank account.

Upon learning of the levy, Taxpayer promptly paid the above tax liabilities (Liability Numbers 2012-04692242 and 2012-04720256) also by entering its banking routing information through the Department's INtax system again. However, both of these payments were also dishonored. As a result, again, the Department mailed Taxpayer two

separate Notifications of Returned Payment (Liability Numbers: 2012-05505522 and 2012-05505523). When Taxpayer was in the process of paying the Liability Number: 2012-04720256 by check, the collection agency levied Taxpayer's account. Subsequently, the Department refunded Taxpayer a portion of the overpayment, after applying all applicable penalties, interest, fees, and costs.

Taxpayer requested that the Department abate the 100 percent penalty imposed on the first Notification of Returned Payment (Liability Number 2012-04720256). The Department denied Taxpayer's request and Taxpayer protested the Department's denial. A hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Tax Administration – Penalty.

DISCUSSION

A 100 percent penalty was imposed because Taxpayer failed to timely address the issue that its payment was dishonored. Taxpayer, to the contrary, claimed that it was not negligent and thus the 100 percent penalty for the dishonored payment should be abated.

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012). Thus, the taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's assessment is wrong. Poorly developed and non-cogent arguments are subject to waiver. Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480, 486, fn. 9 (Ind. Tax Ct. 2012).

The Indiana General Assembly has required a partnership or a corporation, which is doing business in Indiana, to file a return and withhold tax on taxable income which it distributes to its nonresident partners or shareholders, if any. The requirements for the partnership to file and to withhold is established in IC § 6-3-4-12 and the requirements for the corporation to do the same is outlined in IC § 6-3-4-13.

IC § 6-3-4-13 (as in effect for the tax year 2012), in relevant part, states:

(a) Every corporation which is exempt from tax under [IC 6-3](#) pursuant to [IC 6-3-2-2.8\(2\)](#) shall, at the time that it pays or credits amounts to any of its nonresident shareholders as dividends or as their share of the corporation's undistributed taxable income, withhold the amount prescribed by the department. Such corporation so paying or crediting any nonresident shareholder:

- (1) shall be liable to the state of Indiana for the payment of the tax required to be withheld under this section and shall not be liable to such shareholder for the amount withheld and paid over in compliance or intended compliance with this section; and
- (2) when the aggregate amount due under [IC 6-3](#) and [IC 6-3.5](#) exceeds one hundred fifty dollars (\$150) per quarter, then such corporation shall make return and payment to the department quarterly, on such dates and in such manner as the department shall prescribe, of the amount of tax which, under [IC 6-3](#) and [IC 6-3.5](#), it is required to withhold.

(b) Every corporation shall, at the time of each payment made by it to the department pursuant to this section, deliver to the department a return upon such form as shall be prescribed by the department showing the total amounts paid or credited to its nonresident shareholders, the amount withheld in accordance with the provisions of this section, and such other information as the department may require. **Every corporation withholding as provided in this section shall furnish to its nonresident shareholders annually, but not later than the fifteenth day of the third month after the end of its taxable year, a record of the amount of tax withheld on behalf of such shareholders on forms to be prescribed by the department.**

(c) All money withheld by a corporation, pursuant to this section, shall immediately upon being withheld be the money of the state of Indiana and every corporation which withholds any amount of money under the provisions of this section shall hold the same in trust for the state of Indiana and for payment thereof to the department in the manner and at the times provided in [IC 6-3](#). Any corporation may be required to post a surety bond in such sum as the department shall determine to be appropriate to protect the state of Indiana with respect to money withheld pursuant to this section.

(d) The provisions of [IC 6-8.1](#) relating to additions to tax in case of delinquency and penalties shall apply to corporations subject to the provisions of this section, and for these purposes any amount withheld, or required to be withheld and remitted to the department under this section, shall be considered to be the tax of the corporation, and with respect to such amount it shall be considered the taxpayer.

(e) Amounts withheld from payments or credits to a nonresident shareholder during any taxable year of the corporation in accordance with the provisions of this section shall be considered to be a part payment of the tax imposed on such nonresident shareholder for the shareholder's taxable year within or with which the corporation's taxable year ends. A return made by the corporation under subsection (b) shall be accepted by the department as evidence in favor of the nonresident shareholder of the amount so withheld from the shareholder's distributive share.

(f) This section shall in no way relieve any nonresident shareholder from the shareholder's obligation of filing a return or returns at the time required under [IC 6-3](#) or [IC 6-3.5](#), and any unpaid tax shall be paid at the time prescribed by section 5 [\[IC 6-3-4-5\]](#) of this chapter.

(g) Instead of the reporting periods required under subsection (a), the department may permit a corporation to file one (1) return and payment each year if the corporation pays or credits amounts to its nonresident shareholders only one (1) time each year. **The withholding return and payment are due on or before the fifteenth day of the fourth month after the end of the taxable year of the corporation.**

(Emphasis added).

Accordingly, a corporation which has nonresident shareholder(s) is required to file the withholding return(s), WH-1 form(s), and remit the tax on the taxable income it distributes to its nonresident shareholder(s) before the required statutory due date, "the fifteenth day of the fourth month after the end of the taxable year of the corporation." If the corporation fails to do so, it is subject to applicable penalties under IC § 6-8.1.

IC § 6-8.1-10-5 (as in effect for the tax year 2012) provides:

(a) If a person makes a tax payment with a check, credit card, debit card, or electronic funds transfer, and the department is unable to obtain payment on the check, credit card, debit card, or electronic funds transfer for its full face amount when the check, credit card, debit card, or electronic funds transfer is presented for payment through normal banking channels, a penalty of ten percent (10[percent]) of the unpaid tax or the value of the check, credit card, debit card, or electronic funds transfer, whichever is smaller, is imposed.

(b) When a penalty is imposed under subsection (a), **the department shall notify the person by mail that the check, credit card, debit card, or electronic funds transfer was not honored and that the person has ten (10) days after the date the notice is mailed to pay the tax and the penalty either in cash, by certified check, or other guaranteed payment. If the person fails to make the payment within the ten (10) day period, the penalty is increased to one-hundred percent (100[percent]) multiplied by the value of the check, credit card, debit card, or electronic funds transfer, or the unpaid tax, whichever is smaller.**

(c) If a person has been assessed a penalty under subsection (a) more than one (1) time, the department may require all future payments for all listed taxes to be remitted with guaranteed funds.

(d) If the person subject to the penalty under this section can show that there is reasonable cause for the check, credit card, debit card, or electronic funds transfer not being honored, the department may waive the penalty imposed under this section.

(Emphasis added).

[45 IAC 15-11-5](#) further explains:

For purposes of [IC 6-8.1-10-5](#), **reasonable cause** for waiving the penalty **shall** constitute **circumstances which were totally beyond the control of the taxpayer**. Determination of reasonable cause is at the discretion of the department. **(Emphasis added).**

In this instance, Taxpayer asserted that the 100 percent penalty for its dishonored payment was not warranted

because it has reasonable cause and was not due to "willful negligence." Taxpayer stated that, for the tax year 2012, Taxpayer was for the first time required to withhold the tax on the taxable income it paid to its nonresident shareholder because it had losses previously. Taxpayer further maintained that it did not receive the multiple notices mailed by the Department because the mailing address used by the Department did not specify "Suite 5." At the hearing, Taxpayer further claimed that the Department's records contain an erroneous address, P.O. Box 4XXX5, Jacksonville, Florida, which it never used to file its returns. Additionally, Taxpayer asserted that it did not know that its bank routing information had changed, which caused its payment to be dishonored. Taxpayer further claimed that it has filed an "extension" with the Department and, thus, it was penalized for filing the return (WH-1) and making the payment early when the due date has been extended. To support its protest, Taxpayer provided additional documentation, including, but not limited to, various letters from its bank and its return preparer. Taxpayer also provided copies of e-mail exchanges among its employees, shareholder, as well as its representative and neighbors. In addition, Taxpayer submitted copies of printouts related to its payments through the Department's INtax system, which were dishonored. Thus, Taxpayer argued that its documentation supports its claim that the Department should abate the 100 percent penalty.

Upon reviewing Taxpayer's supporting documentation and the Department's records, however, the Department is not able to agree. First, Taxpayer's reliance on the standards of "negligence" is misplaced. The 100 percent penalty was imposed pursuant to IC § 6-8.1-10-5(b), which specifically instructed the Department to notify Taxpayer via U.S. mail, informing Taxpayer that its payment "was not honored" and that Taxpayer "has ten (10) days after the date the notice is mailed to pay the tax and the penalty . . . [and if Taxpayer] fails to make the payment within the ten (10) day period, the penalty is increased to one-hundred percent. . . ." IC § 6-8.1-10-5(b) makes no reference of the "negligence" standards in imposing the 100 percent penalty. As [45 IAC 15-11-5](#) explains, "For purposes of [IC 6-8.1-10-5](#), reasonable cause for waiving the penalty shall constitute circumstances which were totally beyond the control of the taxpayer." Thus, the proper standard for waiving the 100 percent penalty on dishonored payment is whether a taxpayer affirmatively demonstrates any reasonable cause that constitutes circumstances which were totally beyond the taxpayer's control. Although the Department has the discretion in determining reasonable cause, the Department recognizes that "[r]easonable 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 claimed that it was the first time it was required to file a WH-1 and to withhold the tax on taxable income paid to its nonresident shareholders and thus it was also the first time that its payment was dishonored. However, the Department's records demonstrate otherwise. The Department's records showed that, previously, Taxpayer filed its income tax returns (1120S and IT-20S) for the 2011 tax year, reporting additional taxable income paid to its nonresident shareholder. Similarly, Taxpayer failed to timely file its WH-1 and to remit the withholding tax for the 2011 tax year, resulting in additional tax liability (Liability Number: 2011-04037984). The Department's records further show that Taxpayer's 2011 payment was dishonored. Various notices concerning the 2011 tax liability were mailed to Taxpayer and those notices were not returned to the Department. Taxpayer also did not timely address the issue of the 2011 dishonored payment. As a result, the Department's contract collection agency collected from Taxpayer the amount due in late 2012 after the liability advanced to the warrant stage.

This leads to Taxpayer's second argument that it never received the Department's multiple notices because the Department mailed the notices to an address without specifying "Suite 5" and it never provided the Department nor had it used a P.O. Box in Jacksonville, Florida in filing its returns. The Department's records also demonstrate otherwise. In this instance, Taxpayer filed the actual WH-1 on June 19, 2013 after the Department issued the BIA assessment on June 3, 2013. The BIA assessment was mailed to the same address without specifying "Suite 5." Presumably, Taxpayer received the BIA assessment, which prompted Taxpayer to file the actual WH-1 and remit the tax due on June 19. Taxpayer's supporting documentation further demonstrated that its mailing address within the INtax system does not contain the specific "Suite 5." Additionally, the Department's records show that both Taxpayer's 2011 and 2012 returns (IT-20S and 1120S), as filed, stated that its address is P.O. Box 4XXX5, Jacksonville, Florida. Thus, Taxpayer's assertion contradicts the Department's records and Taxpayer's own filings. In this instance, the mailing address stated in those notices at issue was the information provided by Taxpayer either when it initially registered or was changed when its representative contacted the Department updating the address. Taxpayer did not dispute the validity of the mailing address previously nor did it update its mailing address then when it had the opportunity in reviewing and confirming the information contained within the INtax system. Only after the collection agency began the tax levy for the 2012 dishonored payment, did Taxpayer raise the issue of its mailing address. Pursuant to IC § 6-8.1-3-11(b)(1), the Department is only required to notify Taxpayer via United States first-class mail. The Department has done so. The Department properly follows every step as required by the statute, mailing multiple notices to Taxpayer at the mailing address provided and designated by Taxpayer. Since none of the notices were returned to the Department, Taxpayer is presumed to have received the notices.

Third, Taxpayer referred to the letter from its bank, stating that it did not know that its bank routing information has been changed, which caused its payment to be dishonored. However, Taxpayer's documentation demonstrated that, after the bank's merger, the bank routing number was changed in June 14, 2010. Taxpayer's documentation did not explain that it did not know this information until October 2013—three years later. Specifically, from June 2010 through October 2013, more than one payment was dishonored, but Taxpayer never once reviewed its monthly statements and/or balanced its bank account for those years, which presumably is under its control.

Finally, Taxpayer is mistaken in arguing that it was penalized for filing the WH-1 and paying the tax early. As mentioned earlier, Taxpayer is required to file the WH-1 return and to remit the tax on taxable income distributed to its nonresident shareholder "on or before the fifteenth day of the fourth month after the end of" its taxable year. Taxpayer's taxable year ends December 31, and thus it must file the required WH-1 and remit the tax on the taxable income paid to its nonresident shareholder "on or before" April 15 of the following year. For the tax year 2012, the statutory due date is April 15, 2013.

While the Department's records show that Taxpayer filed a Form 7004 with its 2012 income tax returns, that extension is specific for its federal and Indiana corporation income tax return filings, i.e., 1120S and IT-20S, and cannot be considered as an extension for its 2012 WH-1 for withholding tax purposes. Even if, assuming that Taxpayer could extend its annual withholding tax filings, an extension for the filing of a return does not extend the due date of the payment. IC § 6-8.1-1-4; [45 IAC 15-1-2](#) (stating that the due date cannot be extended for the payment of tax, but can be extended for the filing of a return). Thus, the tax is due on or before April 15, 2013 and cannot be extended. Taxpayer's payment not only was late but also was dishonored, like its previous 2011 payment.

As mentioned earlier, Taxpayer must affirmatively demonstrate reasonable cause that circumstances were totally beyond its control. Given the totality of the circumstances, in the absence of other supporting documentation, the Department is not able to agree that Taxpayer met its burden.

In short, the 100 percent penalty imposed on the dishonored payment is appropriate. Taxpayer's protest is respectfully denied.

FINDING

Taxpayer's protest is respectfully denied.

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