

**Letter of Findings: 03-20140069**  
**Withholding Tax**  
**For the 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.

**ISSUES**

**I. Withholding Tax – Failure to Withhold.**

**Authority:** IC § 6-3-4-8; [45 IAC 3.1-1-97](#).

Taxpayer argues that it should not be held financially responsible for paying the county withholding tax it failed to withhold on behalf of its employees.

**II. Penalties – Failure to Withhold and Timely Report.**

**Authority:** IC § 6-8.1-5-1(c); IC § 6-8.1-10-2.1(a)(3); IC § 6-8.1-10-2.1(a)(2); IC § 6-8.1-10-2.1(d); IC § 6-8.1-10-6(b); [45 IAC 15-11-2\(b\)](#); [45 IAC 15-11-2\(c\)](#).

Taxpayer asks that the Department of Revenue abate multiple penalties based on its failure to withhold and report county income tax.

**STATEMENT OF FACTS**

Taxpayer is an Indiana retail business. The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's business records and tax returns.

The Department assessed Taxpayer for the amount of county income tax it failed to withhold from its employees' paychecks. The Department determined the amount of tax by multiplying the employees' gross wages by the appropriate county rate to arrive at the audit assessment.

Taxpayer disagrees with the amount of the assessment and asks for an abatement of the assessment on the ground that its employees likely reported and paid the proper amount of tax.

**I. Withholding Tax – Failure to Withhold.**

**DISCUSSION**

Taxpayer disagrees with the assessment of county income tax it failed to withhold from its employees' wages. Taxpayer asserts that if it were to pay the tax, the state would be receiving a duplicate payment of the tax already paid by the employees.

The Department's regulation found at [45 IAC 3.1-1-97](#) states in relevant part:

Employers who make payments of wages subject to the Adjusted Gross Income Tax Act, and who are required to withhold Federal taxes pursuant to the Internal Revenue Code (USC Title 26), are required to withhold from employees' wages Adjusted Gross and County Adjusted Gross Income Tax. (Emphasis added).

The regulation derives from the statutory provision found at IC § 6-3-4-8 which states in part as follows:

(a) Except as provided in subsection (d), every employer making payments of wages subject to tax under this article, regardless of the place where such payment is made, who is required under the provisions of the Internal Revenue Code to withhold, collect, and pay over income tax on wages paid by such employer to such employee, shall, at the time of payment of such wages, deduct and retain therefrom the amount

prescribed in withholding instructions issued by the department. The department shall base its withholding instructions on the adjusted gross income tax rate for persons, on the total rates of any income taxes that the taxpayer is subject to under [IC 6-3.5](#), and on the total amount of exclusions the taxpayer is entitled to under [IC 6-3-1-3.5\(a\)\(3\)](#) and [IC 6-3-1-3.5\(a\)\(4\)](#). However, the withholding instructions on the adjusted gross income of a nonresident alien (as defined in Section 7701 of the Internal Revenue Code) are to be based on applying not more than one (1) withholding exclusion, regardless of the total number of exclusions that [IC 6-3-1-3.5\(a\)\(3\)](#) and [IC 6-3-1-3.5\(a\)\(4\)](#) permit the taxpayer to apply on the taxpayer's final return for the taxable year. Such employer making payments of any wages:

- (1) shall be liable to the state of Indiana for the payment of the tax required to be deducted and withheld under this section and shall not be liable to any individual for the amount deducted from the individual's wages and paid over in compliance or intended compliance with this section; and
- (2) shall make return of and payment to the department monthly of the amount of tax which under this article and [IC 6-3.5](#) the employer is required to withhold. (Emphasis added).

Taxpayer suggests that it should be relieved of its responsibility for withholding county income tax if it can demonstrate that individual employees did in fact report and pay the tax. However, there is nothing in Indiana law which allows such an exception. Under Indiana law, an employer is required to withhold taxes as prescribed and is liable for that tax if it fails to do so.

### FINDING

Taxpayer's protest is respectfully denied.

## II. Penalties – Failure to Withhold and Timely Report.

### DISCUSSION

Taxpayer was assessed a ten-percent "negligence" penalty at the time the assessment was made.

IC § 6-8.1-10-2.1(a)(3) requires that a ten-percent penalty be imposed if the tax deficiency results from the taxpayer's negligence. 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."

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\(b\)](#) 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.

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 . . . ."

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.

The Department finds that Taxpayer erred in failing to withhold county income tax and that the fact that Taxpayer hired a vendor to fulfill its withholding obligation does not mitigate its own failure to fulfill that responsibility. However, based on a "case-by-case" analysis and after reviewing "the facts and circumstances of each taxpayer" the Department agrees that the ten-percent negligence penalty should be abated.

However, Taxpayer was assessed multiple penalties pursuant to IC § 6-8.1-10-6(b) which states, that "If a person fails to file an information return required by the department, a penalty of ten dollars (\$10) for each failure to file a timely return, not to exceed twenty-five thousand dollars (\$25,000) in any one (1) calendar year, is imposed." Insofar as this penalty is concerned, there is no provision under Indiana law for requesting an abatement of the penalty.

### FINDING

Taxpayer's protest is sustained in part and denied in part; the ten-percent negligence penalty should be abated but the "failure to file" penalties should not be abated.

**SUMMARY**

Taxpayer's challenge to the assessment of withholding tax in Part I is denied. As described in Part II, the ten percent negligence penalty will be abated but the "failure to file" penalties will not be abated.

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