

**Letter of Findings: 03-20140644
Withholding Tax
For the Year 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Indiana Employer shall and thus was required to withhold county income tax on payments of wages it paid to its employees for the 2011 tax year. Indiana Employer was also responsible for the statutory interest and negligence penalty.

ISSUES

I. Withholding Tax - County Withholding Tax.

Authority: I.R.C. § 3402; IC § 6-3-4-8; IC § 6-3-4-13; IC § 6-8.1-5-1; IC § 6-8.1-7-1; 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); Indiana Dep't of State Rev. v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); [45 IAC 3.1-1-97](#).

Taxpayer argues that, as an employer, it is not responsible for paying withholding tax for the 2011 year because it can purportedly establish that its employees reported and paid the proper amount of county income tax on their 2011 individual tax returns.

II. Tax Administration - Interest and Negligence Penalty.

Authority: IC § 6-8.1-3-17; IC § 6-8.1-5-2; IC § 6-8.1-10-1; IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the interest and negligence penalty.

STATEMENT OF FACTS

Taxpayer, an Indiana S Corporation, employs several individuals to conduct its business. In 2014, the Indiana Department of Revenue ("Department") audited Taxpayer's business records and withholding tax returns for the 2011 and 2012 tax years. Pursuant to the audit, the Department's audit found that Taxpayer withheld Indiana state income tax from the payments of wages it paid to its employees but failed to withhold county income taxes. The Department assessed Taxpayer the county tax for the 2011 tax year as a result.

Taxpayer disagreed with the assessment and filed a protest to that effect. An administrative hearing was conducted during which Taxpayer's representative explained the basis for the protest. This Letter of Findings results. Additional facts will be provided as necessary.

I. Withholding Tax - County Withholding Tax.

DISCUSSION

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 its 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 n.9 (Ind. Tax Ct. 2012). Also, "all statutes are presumptively constitutional." *Indiana Dep't of State Rev. v. Caterpillar, Inc.*, 15 N.E.3d 579, 587 (Ind. 2014) (citing *UACC Midwest, Inc. v. Indiana Dep't of State Rev.* 629 N.E.2d 1295, 1299 (Ind. Tax Ct. 1994)). When an agency is charged with enforcing a statute, the courts defer to the agency's reasonable interpretation of that statute "over an equally reasonable interpretation by another party." *Caterpillar, Inc.*, 15 N.E.3d at 583.

The Department assessed Taxpayer for 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, claiming that its employees paid the taxes when they filed their 2011 Indiana individual income tax returns. Taxpayer thus asks for a reduction in the liability by the actual amount paid in the employees' respective tax returns to the State of Indiana attributable to the employees' given county. Taxpayer further asserts that if it were to pay the tax, the state of Indiana is receiving twice the amount of actual county taxes. The issue in this instance is whether Taxpayer, as an employer, is liable for the withholding tax, a trust tax.

Every employer is required to withhold taxes on payments of wages it pays to its employees pursuant to 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.

...

(g) The provisions of [IC 6-8.1](#) relating to additions to tax in case of delinquency and penalties shall apply to employers subject to the provisions of this section, and for these purposes any amount deducted or required to be deducted and remitted to the department under this section **shall be considered to be the tax of the employer**, and with respect to such amount the employer shall be considered the taxpayer. **In the case of a corporate or partnership employer**, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes **shall be personally liable for such taxes, penalties, and interest.** (Emphasis added).

Accordingly, IC § 6-3-4-8(a) requires an employer to "withhold, collect, and pay over income tax on wages paid by such employer to such employee . . . [in] the amount prescribed in withholding instructions issued by the department." IC § 6-3-4-8(a)(1) provides that the employer is "liable to the state of Indiana for the payment of the tax required to be deducted and withheld." (Emphasis added). IC § 6-3-4-8 specifically provides that the employer is liable for the amount that it was required to withhold.

[45 IAC 3.1-1-97](#) further explains 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 employers are "withholding agents . . . shall make return of and payment to the Department . . . tax due, for either County and State." Id. "All amounts deducted and withheld by an employer shall immediately upon deduction become the money of the State." Id. The regulation further states, "In the case of delinquency or nonpayment of withholding tax, the employer is liable for such tax, penalties, and interest." Id.

Taxpayer in this case asserts that it should be relieved of its statutory responsibility for withholding county income tax because it can demonstrate that individual employees did in fact report and pay the tax. At the hearing, Taxpayer provided a copy of an employee's 2011 income tax return. Subsequently after the hearing, Taxpayer also offered copies of ten (10) General Affidavits which were signed by its employees. Each of individual employees stated that "I filed my state tax income return and paid the tax for 2012."

Upon review, however, Taxpayer is mistaken. First, in this instance, Taxpayer disputes its tax liability for the 2011 tax year concerning the withholding tax. The General Affidavits offered by Taxpayer however state that the tax was paid for the 2012 tax year. Whether Taxpayer's employees filed their "state tax income return[s] and paid the tax for 2012" is beyond the scope of the protest.

Moreover, Taxpayer in this case references no statutory or regulatory authority to support its position that there is a statutory exception, which relieves its responsibility for the withholding tax even if its employees had paid the income tax when they file their individual income tax returns; nor does Taxpayer offers any documents to show that it did withhold as statutorily required and that the Department's assessment is wrong. Rather, Taxpayer asks that the Department look beyond the W-2s and look at each of the individual employees' tax return information. By doing so, Taxpayer essentially shifts its statutory burden and requests that the Department perform individual income tax audits of each of its employees to determine if the tax that it was required to pay was paid by the individuals (an individual income tax) to relieve Taxpayer of its responsibility for withholding tax (a trust tax). The Department must decline Taxpayer's invitation.

IC § 6-8.1-7-1(a) generally prohibits the Department from sharing one taxpayer's information—i.e., the employee's tax information—with another taxpayer—i.e., the employer, unless specifically authorized by statutes, such as in Indiana nonresident withholding statute. See IC § 6-3-4-13(i) (authorizing the sharing of this information by providing relief of tax for a withholding agent when the adjusted gross income tax had been paid by a shareholder who files his or her individual income tax return). IC § 6-3-4-8 does not provide such remedy for an employer with employee withholding tax liabilities when the employee has paid the tax. But cf. I.R.C. § 3402(d) (explaining similar authorization to share information and relief for the employer's federal employee withholding liability when the employees pay individual income tax on the employees' returns). Regardless of whether the employees have paid individual income tax, the employer under IC § 6-3-4-8 is liable to the State of Indiana for the withholding tax that it was required to withhold, plus penalties and interest.

Pursuant to the above mentioned statutes and regulations, Taxpayer shall and thus is required to withhold taxes as prescribed. 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 of proof demonstrating that the audit assessment was incorrect.

FINDING

Taxpayer's protest is respectfully denied.

II. Tax Administration - Interest and Negligence Penalty.

DISCUSSION

Taxpayer requested that the Department abate the statutory interest. However, pursuant to IC § 6-8.1-10-1(e), the Department is only permitted to waive the interest under IC § 6-8.1-3-17(c) and IC § 6-8.1-5-2. Taxpayer provided no documentation to support its request for the waiver. Thus, the Department does not have the authority to waive the interest imposed.

Taxpayer also requested that the Department abate the negligence penalty. The Department may assess a negligence penalty if the taxpayer "(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; [or] (4) fails to timely remit any tax held in trust for the state" IC § 6-8.1-10-2.1(a).

[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 when "the taxpayer affirmatively establishes that the failure . . . was due to reasonable cause and not due to negligence." [45 IAC 15-11-2\(c\)](#). 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." *Id.* The Department is mindful 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 did not provide documents to affirmatively establish that its failure to pay tax was not due to negligence.

FINDING

Taxpayer's protest of the imposition of statutory interest and negligence penalty is denied.

SUMMARY

For the reasons discussed above, Taxpayer's protest of the Department's proposed assessment of additional tax is denied. Taxpayer's protest of the statutory interest and the negligence penalty is also respectfully denied.

Posted: 08/26/2015 by Legislative Services Agency
An [html](#) version of this document.