

DEPARTMENT OF STATE REVENUE

02-20140651.LOF

**Letter of Findings Number: 02-20140651
Adjusted Gross Income Tax
For Tax 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 This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

The LLC did not affirmatively establish that it did not have to file a composite tax return for the year at issue and is therefore subject to the assessed Adjusted Gross Income tax. Thus the imposition of the \$500 penalty was proper.

ISSUES**I. Adjusted Gross Income Tax - Requirement to File Composite Withholding Return.**

Authority: IC § 6-3-4-12; IC § 6-3-1-19; IC § 6-8.1-5-1; Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Indiana Dept. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests that an individual member's return was filed and the individual return reported all allocable income and paid tax due, therefore the Taxpayer should be relieved from the requirement to have filed a composite withholding return and withhold income tax.

II. Tax Administration - Failure to File Composite Return Penalty.

Authority: IC § 6-3-4-12; IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of \$500 penalty for failure to file a composite return.

STATEMENT OF FACTS

Taxpayer is a Limited Liability Company ("LLC") that elected to be treated as a partnership. The Indiana Department of Revenue ("Department") audited Taxpayer for adjusted gross income tax for the tax years 2011, 2012, and 2013. The Department determined that Taxpayer failed to file a composite return and remit the withheld income tax for 2011. The Department therefore issued a proposed assessment for the Indiana Adjusted Gross Income Tax which should have been withheld for 2011. In addition, Taxpayer was assessed a \$500 penalty for failure to file a return for 2011. Taxpayer protested the results of the audit. An administrative hearing was held, and this Letter of Findings results. Further facts will be supplied as needed.

I. Adjusted Gross Income Tax - Requirement to File Composite Withholding Return.**DISCUSSION**

The Department conducted an income tax audit for 2011, 2012, and 2013. The Department discovered that a partnership tax return was not filed for the tax year 2011. In 2012 and 2013, composite withholding tax returns were filed. Taxpayer failed to file an Indiana composite return and remit the tax due for the non-resident members of the partnership for the years 2011. The Department prepared a composite return for 2011 and determined composite return withholding tax of \$7,162.00.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Indiana Dept. of State Revenue v. Rent-A-Center East,

Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing. . . [courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579, 583 (Ind. 2014). Thus, all interpretations of Indiana tax law contained within this decision, as well as the preceding audit, shall be entitled to deference.

Taxpayer protests the Department's assessment on the Taxpayer's failure to file a composite return, or IT-65, for the tax year 2011. Specifically, Taxpayer states that a member remitted Indiana Adjusted Gross Income Tax on his individual return. Therefore, Taxpayer believes, no further Indiana Adjusted Gross Income Tax is due.

Taxpayer has elected to be treated as a pass-through entity under IC § 6-3-1-19(a), which provides that an LLC is treated as a partnership in Indiana if the LLC is treated as a partnership for Federal income tax purposes.

According to IC § 6-3-4-12-(a):

Every partnership shall, at the time that the partnership pays or credits amounts to any of its nonresident partners on account of their distributive shares of partnership income, for a taxable year of the partnership, deduct and retain therefrom the amount prescribed in the withholding instructions referred to in section 8 of this chapter. Such partnership so paying or crediting any nonresident partner:

- (1) shall be liable to the state of Indiana for the payment of the tax required to be deducted and retained under this section and shall not be liable to such partner for the amount deducted from such payment or credit and paid over in compliance or intended compliance with this section; and
- (2) shall make return of and payment to the department monthly whenever the amount of tax due under [IC 6-3](#) and [IC 6-3.5](#) exceeds an aggregate amount of fifty dollars (\$50) per month with such payment due on the thirtieth day of the following month, unless an earlier date is specified by section 8.1 of this chapter.

Next, the Department refers to IC § [IC 6-3-4-12\(h\)](#) which states:

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.

The audit report incorrectly cited to IC § 6-3-4-13 which applies to corporations. Since Taxpayer elected to be treated as a partnership the appropriate statute is IC § 6-3-4-12. Both statutes require a partnership or corporation to file a composite return. IC § 6-3-4-13(j); IC § 6-3-4-12(h).

At the hearing, Taxpayer argued that it was not responsible for the additional tax because one nonresident shareholder filed their own Indiana individual income tax return. To support its protest, Taxpayer submitted a copy of the IT-40PNR individual tax return and a copy of form 1120S for the 2011 tax year. Taxpayer did not reference any statutes or administrative code in its protest or at hearing.

Upon review, however, the Department is not able to agree. Pursuant to IC § 6-3-4-12(h), Taxpayer is required to file Indiana composite tax returns for nonresident partner's adjusted gross income. Taxpayer did not do so. Taxpayer's protest fails because IC § 6-3-4-12 does not alleviate the partnership from its withholding tax obligation when tax was paid by a member. The Department properly assessed composite return withholding tax. Taxpayer did not provide sufficient evidence to meet its burden of proof to prove the proposed assessments wrong under IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is denied.

II. Tax Administration– Failure to File Composite Return Penalty.

Taxpayer claims that it timely filed an individual return for the year in question, reporting the allocable income and paying individual income tax due. Taxpayer disagrees that composite withholding tax is due on this income in addition to individual tax already paid. Taxpayer also argues that it did not know of the requirement to file a composite return.

DISCUSSION

The Department assessed a \$500 penalty for not filing a return. Taxpayer claims that an individual member timely filed an individual return for the year in question, reporting the allocable income and paying individual income tax due on this income in addition to individual tax already paid. Taxpayer also argues that it did not know of the requirement to file a composite return.

Pursuant to IC § 6-3-4-12(i), if a partnership "does not include all nonresident partners in the composite return, the partnership is subject to the penalty imposed under [IC 6-8.1-10-2.1\(j\)](#)."

IC § 6-8.1-10-2.1 further provides in relevant part:

...

(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.

(e) A person who wishes to avoid the penalty imposed under this section must make an affirmative showing of all facts alleged as a reasonable cause for the person's failure to file the return, pay the amount of tax shown on the person's return, pay the deficiency, or timely remit tax held in trust, in a written statement containing a declaration that the statement is made under penalty of perjury. The statement must be filed with the return or payment within the time prescribed for protesting departmental assessments. A taxpayer may also avoid the penalty imposed under this section by obtaining a ruling from the department before the end of a particular tax period on the amount of tax due for that tax period.

...

(j) 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.

....

Accordingly, a \$500 penalty is assessed each time there is a failure to file a composite return. A person wishing to avoid the penalty must make an affirmative showing of all facts alleged as a reasonable cause for the actions in questions IC § 6-8.1-10-2.1(e). In this instance, Taxpayer did not file a composite return as required by IC § 6-3-4-12(h) and made no affirmative showing of reasonable cause. Taxpayer is presumed to know the law. [45 IAC 15-11-2](#). The imposition of the \$500 non-filing penalty provided by IC § 6-8.1-10-2.1(j) was therefore correct.

FINDING

Taxpayer's protest is denied.

SUMMARY

For the reasons discussed above, Taxpayer's protest is denied with regard to the imposition of Adjusted Gross Income Tax assessed in Issue I. In addition Taxpayer's protest is denied with regards to failure to file a composite return as stated in Issue II.

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