

**Letter of Findings Number: 02-20150607
Adjusted Gross Income Tax
For Tax Years 2012-14**

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 This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Company did not provide documentation sufficient to establish that it was not subject to penalty. Therefore, imposition of penalty was appropriate.

ISSUE

I. Adjusted Gross Income Tax–Penalty.

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

Taxpayer protests the imposition of penalties.

STATEMENT OF FACTS

Taxpayer is an S corporation which was incorporated in 2012 and which operated multiple locations with gasoline sales with attached convenience stores. Taxpayer filed monthly sales tax returns, including fuel sales and inside convenience store sales. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had underreported taxable sales for the tax years 2012, 2013, and 2014. The Department adjusted Taxpayer's sales in a separate audit and issued proposed assessments for sales tax. Taxpayer protested those proposed assessments and a separate Letter of Findings denied Taxpayer's protest. The increase in sales also resulted in an increase in income. Since Taxpayer is an S-corp, the income flowed through to the two shareholders and no proposed assessments of base income tax were issued to Taxpayer. Only proposed assessments for non-filing penalties for each tax year at issue were issued to Taxpayer.

As explained in the audit report, the Department first contacted Taxpayer in August 2014, to schedule the first meeting of the audit process. One of Taxpayer's shareholders ("Shareholder One") responded to the Department's letter and agreed to meet with the first auditor involved in the audit ("Auditor One") during the first week of August 2014. On the day of the scheduled meeting, no one representing Taxpayer showed up for the scheduled meeting. On September 23, 2014, Auditor One received a call from Shareholder One's business partner/former spouse ("Business Partner") requesting a detailed list of records required for the audit. Business Partner is not a shareholder in Taxpayer. Later that same day, Shareholder One called to request information about the audit of the store. Auditor One and Shareholder One agreed to reschedule the meeting for October 10, 2014. On that day, Auditor One was unable to meet with Shareholder One and arrangements were made for Auditor One's supervisor to meet with Shareholder One and to accept the requested records. The supervisor was also unable to meet with Shareholder One due to unforeseen circumstances. Shareholder One arrived at the Department's District Office and left a message for Auditor One to call him. Shareholder One did not leave any records with the Department at that time.

Later, Shareholder One emailed Auditor One to reschedule the meeting for October 27, 2014. Auditor One agreed and requested that Shareholder One bring records to that meeting. On October 27, 2014 Shareholder One and another person arrived at the Department's District Office, but did not bring any records. Shareholder One explained that his partner did not believe that Taxpayer was being audited and so Shareholder One requested a written statement from the Department explaining that an audit was underway. Auditor One complied with this request despite the fact that several written documents discussing the audit had already been sent to Shareholder One. The Department also gave Taxpayer until October 31, 2014 to provide the requested documents. The Department explained that without those documents the audit would proceed based on the best information available to it.

On October 31, 2014, Shareholder One had an employee call Auditor One to request additional time to provide records. Auditor One explained that October 31, 2014 was the deadline and that it would not be extended. Auditor One retired before the audit was finished, and on February 20, 2015 the file was assigned to another auditor ("Auditor Two"). On March 3, 2015, Auditor Two sent an email to Shareholder One to advise him that she would be completing the audit. Auditor Two also requested that Shareholder One contact her to discuss the audit and to let him know that he could bring additional records at the time of the meeting. On March 4, 2015, Auditor Two called Shareholder One, but there was no answer and no voicemail option. On March 6, 2015, Auditor Two called again with similar results. Auditor Two sent Shareholder One an email with a complete list of records required to complete the audit and setting a deadline of March 11, 2015 to contact Auditor Two to avoid having the audit completed using the best information available to it. On March 11, 2015, Shareholder One called Auditor Two to set a meeting on March 18, 2015. On March 12, 2015, Auditor Two sent a confirmation email to Shareholder One regarding the new meeting date and repeating the list of required documents.

On March 18, 2015, two managers for the stores arrived at the Department's District Office, explaining that Shareholder One was ill and would not be attending. The two managers did not bring any records with them. They explained that Shareholder One and Taxpayer's other shareholder ("Shareholder Two") were estranged and were not communicating directly with each other. This lack of communication, according to the two managers, caused Shareholder Two to decide not to cooperate with the audit process even though he held most of the relevant records. Also, the two managers stated that they sent a package to the Department through FedEx. Auditor Two informed the managers that no package was received by the Department and requested that they either obtain and send in proof of delivery through FedEx or that they send the records again. During this meeting, the two managers provided the hours of operation for all of the stores operated by Taxpayer.

On March 27, 2015, Auditor Two sent an email to Shareholder One to recap the meeting on March 18 and to advise him that, unless additional records were provided, the audit would be completed using the best information available. No records were provided. The Department therefore issued proposed assessments for sales tax, penalties, and interest for those years, based on the best information available. Taxpayer protested a portion of the assessments.

On March 1, 2016, the Hearing Officer sent Taxpayer's representative a letter which scheduled the administrative hearing for March 17, 2016. The representative called the Hearing Officer requesting that the hearing be rescheduled to a date in late April 2016. The Hearing Officer explained that the hearing could be moved, but that a six week delay was not possible. The hearing was rescheduled for April 5, 2016. On April 4, 2016, the representative called the Hearing Officer to state that Shareholder One would be unavailable for the April 5 hearing due to a funeral. The representative again requested that the hearing be rescheduled for late April. The Hearing Officer informed the representative that, because the hearing had already been rescheduled once and because Shareholder One's presence was not required since representative was authorized to represent Taxpayer, the hearing would not be rescheduled a second time. The administrative hearing was held on April 5, 2016, with additional time until April 22, 2016 allowed for the submission of additional documentation and analysis, and this Letter of Findings results. Taxpayer's representative protested the Department's audit methodology however, as previously explained, no assessments for base income tax were issued to Taxpayer, therefore this Letter of Findings will not discuss the audit, the audit results, and the protest of the audit. Rather, this Letter of Findings will only address the proposed assessments for penalty which were issued to Taxpayer. Further facts will be supplied as needed.

I. Tax Administration—Penalty.

DISCUSSION

Taxpayer protests the imposition of non-filing penalties for 2012, 2013, and 2014. The Department imposed a \$250 penalty for failure to file 2012-14 Indiana income tax returns. Taxpayer protests that it did not owe additional income tax.

The Department refers to IC § 6-8.1-10-2.1(g), which states:

A person who fails to file a return for a listed tax that shows no tax liability for a taxable year, other than an information return (as defined in section 6 of this chapter), on or before the due date of the return shall pay a penalty of ten dollars (\$10) for each day that the return is past due, up to a maximum of two hundred fifty dollars (\$250).

IC § 6-8.1-10-2.1(d), which states:

(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.
(Emphasis added).

Next, the Department refers to [45 IAC 15-11-2\(b\)](#), which 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.
(Emphasis added).

Finally, [45 IAC 15-11-2\(c\)](#) provides in pertinent part:

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. . . .
(Emphasis added).

In this case, the Department determined that Taxpayer did not file Indiana adjusted gross income tax returns for 2012, 2013, and 2014. The Department imposed penalty under IC § 6-8.1-10-2.1(g). Taxpayer has not affirmatively established that it acted reasonably, as required by [IC 6-8.1-10-2.1\(d\)](#) and [45 IAC 15-11-2\(b\)](#). The \$250 penalties will not be waived.

FINDING

Taxpayers' protest is denied.

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