

**Letter of Findings: 03-20150420**  
**Withholding Tax**  
**For the Years 2011 - 2013**

**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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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 established that the audit assessment was overstated and that it was not responsible for state or county withholding tax from wages it paid to several employees. Indiana Employer failed to establish that negligence penalty should be abated.

### ISSUES

#### I. Withholding Tax - Imposition.

**Authority:** IC § 6-3-4-8; 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](#); Income Tax Information Bulletin 32 (July 2008); Income Tax Information Bulletin 33 (August 2008); Departmental Notice 1 (November 1, 2011); Departmental Notice 1 (December 1, 2011); Departmental Notice 1 (October 1, 2012); Departmental Notice 1 (November 1, 2012); Departmental Notice 1 (October 1, 2013).

Taxpayer argues that the audit's adjustment of Indiana and county withholding tax was overstated.

#### II. Tax Administration - Negligence Penalty.

**Authority:** IC § 6-3-4-8; IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the negligence penalty.

### STATEMENT OF FACTS

Taxpayer, an Indiana Corporation, employs individuals to conduct its business in Marion County, Indiana. In 2014, the Indiana Department of Revenue ("Department") audited Taxpayer's business records and withholding tax returns for the 2011, 2012, and 2013 tax years ("Tax Years at Issue"). Pursuant to the audit, the Department found that Taxpayer failed to withhold Indiana and county income tax from the payments of wages it paid to various employees. The Department thus assessed Taxpayer additional state and county withholding taxes for the Tax Years at Issue as a result.

Taxpayer timely protested the assessment. An administrative hearing was conducted during which Taxpayer's representatives explained the basis for the protest. This Letter of Findings results. Additional facts will be provided as necessary.

#### I. Withholding Tax - Imposition.

### DISCUSSION

Pursuant to the audit, the Department determined that Taxpayer failed to properly withhold state and county tax from wages it paid to various employees for the Tax Years at Issue. Thus, the audit assessed additional state and county withholding taxes.

Taxpayer agreed that "an adjustment needs to be made," but "disagreed with the calculation of the adjustment." Specifically, for Indiana withholding tax, Taxpayer first stated the audit erred in assessing Indiana withholding tax on an employee who "was a resident of Ohio . . . and Ohio taxes were withheld pursuant to the reciprocal agreement. . . ." Taxpayer further asserted that one employee "was a non-Indiana employee in Connecticut that transferred to Indiana during May 2012. The auditor assessed Indiana income tax on the twelve months of wages." Taxpayer maintained that "the audit assessment should only be for the eight months that the employee was a resident of Indiana. . . ."

Additionally, Taxpayer disagreed with the audit adjustment regarding county withholding tax from wages it paid to various employees by using the resident rate of Marion County, Indiana where Taxpayer is located. Taxpayer stated that it was not responsible for county withholding tax on several employees who were nonresidents of Indiana on January 1st of the calendar year during the Tax Years at Issue although they subsequently moved to Indiana to begin their employment. Taxpayer also claimed that it should only be responsible for the Marion County nonresident rate when its employees failed to submit the required WH-4 forms or the employees were new hired and subsequently "may have moved into the State during the year." Taxpayer further claimed that it was not responsible for county withholding tax on (1) two employees who resided in Hamilton County, Indiana and where the county tax was properly withheld and (2) two employees who resided in Lake County, Indiana and where Lake County does not impose the county income tax.

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). 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." Indiana Dep't of State Rev. v. Caterpillar, Inc., 15 N.E.3d 579, 583 (Ind. 2014).

Every employer is required to withhold taxes on payments of wages it pays to its employees pursuant to IC § 6-3-4-8(a) (as in effect during the Tax Years at Issue), which states in part as follows:

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.

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.

For individuals who work in Indiana but reside in states which established "reciprocity agreements with Indiana (including Kentucky, Michigan, Ohio, Pennsylvania, and Wisconsin), Indiana will not impose adjusted gross income tax on the salaries, wages, tips, and commissions earned by the legal residents of states with reciprocity who work in Indiana." Income Tax Information Bulletin 33 (August 2008), 20080827 Ind. Reg. 045080660NRA. Those qualified nonresident employees who work in Indiana are required to submit properly completed WH-47 forms to their employers. Id. The WH-47 form "identifies the employee's state of legal residence." Id. Nonetheless, the "reciprocity agreements do not affect withholding requirements concerning the Indiana County Adjusted Gross Income Tax. . . ." Id. The "Indiana employers are not required to withhold Indiana adjusted gross income tax from qualified nonresidents but are encouraged to withhold local optional income taxes at the nonresident rate if applicable." Id.

For the county income tax withholding, the Department's Income Tax Information Bulletin 32 (July 2008), 20080827 Ind. Reg. 045080659NRA, generally explains as follows:

#### **I. County of Residence and County of Work**

The taxpayer's county of residence is determined as of January 1 each year. For purposes of county tax, an individual's county of residence is determined by the county where the taxpayer maintains his home.

The taxpayer's county of principal work activity is also determined as of January 1 each year. An individual's county of principal work activity is that county where the taxpayer receives the greatest percentage of his gross income from salaries, wages, commissions, fees or other income of this type. . . .

The Departmental Notice 1 (current version is available at <http://www.in.gov/dor/reference/files/dn01.pdf>, last visited August 5, 2016) provides relevant information to compute the state and county taxes, as follows:

Both the county of residence and the county of principal employment of an individual are determined on January 1 of the calendar year in which the individual's taxable year commences. An individual cannot be subject to both a resident rate and a nonresident rate at the same time. If a person resides in an adopting county on January 1, he or she is subject to that county's resident rate. If a person resides out-of-state on January 1, but works in an Indiana county as of January 1, he or she is subject to the nonresident rate corresponding to his or her Indiana county of principal employment. . . . See also Departmental Notice 1 (November 1, 2011); Departmental Notice 1 (December 1, 2011); Departmental Notice 1 (October 1, 2012); Departmental Notice 1 (November 1, 2012); Departmental Notice 1 (October 1, 2013) (stating that "If a person resides in a non-adopting county (including out-of-state), but works in an Indiana adopting county, he or she is subject to the nonresident rate corresponding to his or her county of principal employment).

Accordingly, an Indiana employer is required to withhold Indiana income tax from wages it paid to individual employees who work in Indiana unless these employees are qualified nonresident employees and they properly submit the completed WH-47 forms, which identify that they are residents of the above mentioned reciprocal states. In those instances, the Indiana employer is encouraged to withhold the county tax on these qualified nonresident employees. Otherwise, when the employees reside outside of Indiana or in non-adopting counties within Indiana as of January 1 of the calendar year, the Indiana employer is required to withhold "the nonresident rate corresponding to [the] Indiana county of principal employment." In this instance, the Indiana county of principal employment is Marion County, Indiana. Additionally, when a new nonresident employee who is first hired and works in Marion County, Indiana, after January 1 of the calendar year, the Indiana employer is required to withhold state tax, but not county tax, from wages it paid to the newly hired employee when the employment begins.

Taxpayer in this instance submitted its workpapers which explained the reasons that it was not responsible for the state and county withholding taxes on various employees. In addition, Taxpayer offered copies of W-2s, its offer

letters to several employees, employment application, and some e-mail correspondence in addition to manually copied screen-prints of address information from company's personnel system to support its protest.

Upon review, Taxpayer provided sufficient documentation to show that one "individual was a non-Indiana employee in Connecticut that transferred to Indiana during May 2012." Thus, Taxpayer is only responsible for the Indiana withholding tax beginning May 2012. Taxpayer also established that it properly withheld county tax from wages it paid to two employees who resided in Hamilton County, Indiana. Taxpayer further established that it was not responsible for withholding county tax from wages it paid to several employees as of January 1 of the calendar year because those employees were first hired after January 1 of each calendar year during the Tax Years at Issue, as follows:

For 2011, RG and JD who were first hired after January 1, 2011;  
For 2012, EC and LR who were first hired after January 1, 2012; and  
For 2013, AW who was first hired after January 1, 2013.

Finally, upon a careful review of its supporting documentation, the Department further found that Taxpayer manually produced various types of documents concerning employees' addresses from its internal personnel system including screen-prints and an employment application. Without additional information, independently or otherwise, the information could not be verified to corroborate Taxpayer's assertion because the data entries of Taxpayer's internal system could be manually changed anytime. Thus, the Department is not able to agree that Taxpayer met its burden of proof to demonstrate that it was not responsible for state or county withholding tax on wages it paid to those remaining employees in question.

In short, Taxpayer demonstrated that it properly withheld county tax from wages it paid to two employees who resided in Hamilton County, Indiana. Also, the Department is prepared to agree that (1) Taxpayer is not responsible for the county withholding tax on five (5) individuals including RG and JD (for 2011), EC and LR (for 2012), and AW (for 2013); and (2) Taxpayer is only partially responsible for the Indiana withholding tax from wages it paid to one employee who transferred to Indiana beginning May 2012. However, Taxpayer remains responsible for the state and county withholding taxes on wages it paid to the remaining employees in question.

### FINDING

Taxpayer's protest is sustained in part and denied in part. Taxpayer demonstrated that it properly withheld county tax from wages it paid to two employees who resided in Hamilton County, Indiana. Taxpayer is not responsible for the county withholding tax on five (5) individuals who were first hired after January 1. Further, Taxpayer is only partially responsible for the Indiana withholding tax from wages it paid to one employee who transferred to Indiana beginning May 2012. However, Taxpayer remains responsible for the state and county withholding taxes on wages it paid to the remaining employees in question.

## II. Tax Administration - Negligence Penalty.

### DISCUSSION

The Department imposed a negligence penalty pursuant to IC § 6-3-4-8(g), which states in relevant part that:

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. . . .

Taxpayer 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 negligence penalty is denied.

#### **SUMMARY**

For the reasons discussed above, Taxpayer's protest is sustained in part and denied in part. Taxpayer demonstrated that it properly withheld county tax from wages it paid to two employees who resided in Hamilton County, Indiana. Taxpayer is not responsible for the county withholding tax on five (5) individuals who were first hired after January 1. Further, Taxpayer is only partially responsible for the Indiana withholding tax from wages it paid to one employee who transferred to Indiana beginning May 2012. However, Taxpayer remains responsible for the state and county withholding taxes on wages it paid to the remaining employees in question.

Taxpayer's protest of the negligence penalty is also respectfully denied.

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