

Letter of Findings: 04-20150626P
Tax Administration
For The Tax Years 2012 and 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

When Department found that Company overpaid certain tax and also had an outstanding tax liability, the overpayment was required to be applied to Company's outstanding tax liability before it could be refunded. When the overpayment was a partial payment, it was, by statute, first applied to penalties and interest owed and then to the tax. The payment made prior to September 15, 2015 was not refundable under the Emergency Rules of the 2015 Amnesty. Company paid full amount of assessment under protest as a result; since its full payment was not an amnesty payment, penalty could be abated pursuant to the general Indiana law. The interest was mandated by statute.

ISSUES

I. Tax Administration - Partial Payments and Application.

Authority: IC § 6-8.1-3-17; IC § 6-8.1-5-1; IC § 6-8.1-8-1.5; IC § 6-8.1-9-1; IC § 6-8.1-9-2; IC § 6-8.1-10-1; IC § 6-8.1-10-2.1; 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); Miller Brewing Co. v. Indiana Dep't of State Revenue, 903 N.E.2d 64 (Ind. 2009); Indiana Dep't of State Rev. v. Caterpillar, Inc., 15 N.E.3d 579, 587 (Ind. 2014); 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); Emergency Rule 15-240(E).

Taxpayer requests that the Department abate the penalty and interest pursuant to an amnesty program established in late 2015.

II. Tax Administration - Interest and Negligence Penalty.

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

Taxpayer requests that the Department abate the negligence penalty.

STATEMENT OF FACTS

Taxpayer is a company doing business in Indiana. Taxpayer is required to file sales tax and withholding tax returns and remit those taxes to the Indiana Department of Revenue ("Department").

In late 2014, the Department audited Taxpayer for tax years 2012 and 2013. The audit was concluded in early 2015. The Department's audit assessed Taxpayer additional sales and use tax for 2012 and 2013. The audit also determined that Taxpayer overpaid the withholding tax for the tax year 2013. The Department subsequently refunded the overpayment on July 9, 2015. After the refund check was issued, the Department applied it to Taxpayer's outstanding liability - audit assessments - on July 16, 2015. The check payment was specifically applied to Taxpayer's 2012 tax liability which was then currently due - penalty, interest, and some base tax in that order. The proposed assessment of the 2012 tax liability was issued July 20, 2015, which stated the remaining balance due.

In July 2015, the Indiana General Assembly enacted a special provision, 2015 Ind. Acts 2959, P.L. 213-2015 § 91 (codified at IC § 6-8.1-3-17(c)) (effective as of July 1, 2015), requiring that the Department establish and implement a tax amnesty program ("Amnesty Program"). The Department promulgated Emergency Rule

15-240(E) (effective July 27, 2015), 20150729 Ind. Reg. 045150240ERA. A letter, dated August 24, 2015, informed Taxpayer of the Amnesty information.

On September 11, 2015, Taxpayer contacted the Department intending to participate in the Amnesty Program, but it was unable to do so because Taxpayer's remaining balance of 2012 liability had no penalty or interest. Had there been penalty and interest, the penalty and interest would have been removed under Amnesty. Taxpayer paid the remaining base tax balance on September 15, 2015, and protested the Department's application of its overpayment and requested penalty abatement.

An administrative phone hearing was held during which Taxpayer's representative explained the basis of Taxpayer's protest. This Letter of Findings ensues and addresses Taxpayer's protest. Additional facts will be provided as necessary.

I. Tax Administration - Partial Payments and Application.

DISCUSSION

Pursuant to the audit, the Department assessed Taxpayer additional sales and use tax for 2012 and 2013 tax years. Taxpayer argued that it was entitled to pay a reduced amount of the tax it owed on the 2012 tax liability, resulting in a refund, because it was eligible and intended to participate in the 2015 Amnesty Program. Taxpayer asserted that it was not able to do so because the Department applied its 2013 overpayment to the penalty and interest before issuing the assessment for the balance due. The issue is whether the Department erroneously applied Taxpayer's overpayment.

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). "Each assessment and each tax year stands alone." *Miller Brewing Co. v. Indiana Dep't of State Revenue*, 903 N.E.2d 64, 69 (Ind. 2009). 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 jurisprudence defers 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.

As a general rule, if a taxpayer believes that it has overpaid the tax, the taxpayer is required to timely file a claim for a refund with the Department pursuant to IC § 6-8.1-9-1. In addition, IC § 6-8.1-9-2(a), in relevant part, provides:

If the department finds that a person has paid more tax for a taxable year than is legally due, the department shall apply the amount of the excess against any amount of that same tax that is assessed and is currently due. **The department may then apply any remaining excess against any of the listed taxes that have been assessed against the person and that are currently due (Emphasis added).**

When a taxpayer "incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment." IC § 6-8.1-10-1. Further, a taxpayer will be responsible for a ten percent penalty when the taxpayer incurs, "upon examination by the [D]epartment, a deficiency that is due to negligence." IC § 6-8.1-10-2.1(a).

Whenever the taxpayer makes a partial payment on its tax liability, the Department is required to apply the partial payment first to any penalty owed by the taxpayer, then to any interest owed by the taxpayer, and finally to the tax liability of the taxpayer. IC § 6-8.1-8-1.5.

A taxpayer is also responsible for a ten percent negligence penalty, interest, in addition to the base tax, when the Department determines that the taxpayer incurs a deficiency. When a partial payment is received, the Department must apply any penalties first and then interest. As a result, the unpaid tax continues accruing the interest and the interest may not be waived under IC § 6-8.1-10-1(e).

Emergency Rule 15-240(E) specifically addresses issues concerning the Amnesty Program which began "September 15, 2015, through 8 p.m. on November 16, 2015." Emergency Rule 15-240(E), § 1(c), 20150729 Ind. Reg. 045150240ERA at 1. Section 1(b) explains that "'Amnesty eligible liability' means an unpaid tax liability for a listed tax that was due and payable for a period ending before January 1, 2013." Id. Additionally, Section 4(f) provides that "[p]ayments received by the department before September 15, 2015, for an amnesty eligible liability are not eligible for the abatement of penalties, interest, costs, or collection fees under Section 5" Id. at 2-3.

Section 13 further provides, as follows:

If the department determines:

- (1) An overpayment has been made by a taxpayer during the amnesty period for an amnesty eligible liability; and
- (2) The overpayment was due to a computational error;

The overpayment may be refunded to the taxpayer. If the overpayment is not refunded, it shall be credited to the taxpayer.

Id. at 6.

In this instance, Taxpayer overpaid the withholding tax for 2013. Taxpayer claimed that the Department erroneously applied its overpayment to penalty and interest of its 2012 tax liability. As a result, Taxpayer argued it was erroneously excluded from the opportunity to participate in the Amnesty Program. To support its protest, Taxpayer further provided additional documentation, including the Department's August 24, 2015 letter.

Upon review, however, Taxpayer's reliance on the August 24, 2015 letter is misplaced. First, pursuant to the audit, the Department determined that Taxpayer overpaid the withholding and also had additional sales and use tax liability in July 2015, before the enactment of the special legislation, which established the Amnesty Program. The Department is required to abide by the statutory mandates concerning tax administration. Taxpayer did not file a GA-110L form requesting a refund of its overpayment pursuant to IC § 6-8.1-9-1(a). Rather, the Department, in an audit, found that Taxpayer had overpaid its withholding tax. IC § 6-8.1-9-2(a) specifically requires that the Department "shall apply the amount of the excess against any amount of that same tax that is assessed and is currently due." Id. The Department "may then apply any remaining excess against any of the listed taxes that have been assessed against the person and that are currently due" Id. Only "if any excess remains after the [D]epartment has applied the overpayment against the person's tax liabilities," the Department is allowed to refund Taxpayer. Id. The Department properly applied the overpayment to Taxpayer's 2012 tax liability and the amount of the overpayment was less than the full amount of Taxpayer's liability. The overpayment was thus a partial payment, which must be applied to penalties first and then interest pursuant to IC § 6-8.1-8-1.5. Thus, in July 2015, in the absence of the applicable special amnesty statute and the related Emergency Rules, the Department properly followed the statutory requirements every step of the way regarding the overpayment at issue.

In preparing the roll-out of the Amnesty Program, the Department's August 24, 2015, letter stated in relevant part, "Although you are eligible to participate in [the] Amnesty [Program], you are not required to do so and are entitled to protest the audit assessment" The letter provided Taxpayer general information of the Amnesty Program after the audit. The letter also explained that the "amounts [Taxpayer] paid as part of the [Amnesty Program] cannot later be refunded, and [Taxpayer] forgoes any right to later protest or continue a protest of the underlying assessment." The overpayment at issue was received, July 16, 2015, "before September 15, 2015," and it was a payment "for an amnesty eligible liability" and thus was "not eligible for the abatement of penalties or interest" Emergency Rule 15-240(E) § 4(f). 20150729 Ind. Reg. 045150240ERA at 2. Only when the Department determines that Taxpayer overpaid "during the amnesty period for an amnesty eligible liability" and "the overpayment was due to a computational error," is the Department permitted to refund an amnesty payment made under the Amnesty Program. Emergency Rule 15-240(E) § 13, 20150729 Ind. Reg. 045150240ERA at 6. Taxpayer's documentation did not demonstrate that a "computational error" occurred. Were the overpayment a payment under the Amnesty Program, the Department is not able to refund the overpayment at issue pursuant to the above mentioned statutes and regulations.

Finally, Emergency Rule 15-240(E) § 16(a) states that a "payment by a taxpayer made in anticipation of an audit assessment for a listed tax is not considered an amnesty payment unless the taxpayer is filing an amended return admitting to previous underreporting of a tax liability for the tax period." Id. Taxpayer's documentation showed that it made full payment, under protest, for both 2012 and 2013 audit assessments and did not file "an amended return admitting to previous underreporting of a tax liability for the tax period." Thus, its full payment "is not

considered an amnesty payment" and thus the general statute and regulations also apply concerning its request of abatement of interest and negligence penalty, discussed in Issue II.

In short, the July 2015 overpayment was a partial payment received by the Department before September 15, 2015, which was not refundable under Amnesty.

FINDING

Taxpayer's protest of Issue I is respectfully denied.

II. Tax Administration - Interest and Negligence Penalty.

DISCUSSION

The Department's August 24, 2015 letter explained in part that Taxpayer is "entitled to protest the audit assessment" Taxpayer's documentation also demonstrated that it paid the **full** amount of its tax liabilities, including interest and negligence penalty, **under protest**, which stemmed from the Department's audit—an audit assessment. Thus, Taxpayer's payment here was a "payment . . . made in anticipation of an audit assessment for a listed tax" and it was not an amnesty payment. See Emergency Rule 15-240(E) § 16(a), 20150729 Ind. Reg. 045150240ERA at 6. Taxpayer requested abatement of the interest and negligence penalty.

In this instance, a portion of Taxpayer's payment under protest was applied to the interest. As mentioned above in Issue I, statutory interest is mandatory when Taxpayer incurred a deficiency upon a determination by the Department. IC § 6-8.1-10-1(a). The Department does not have the authority to waive the interest. IC § 6-8.1-10-1(e).

The Department also imposed a ten percent negligence penalty when Taxpayer incurred, "upon examination by the [D]epartment, a deficiency that [was] due to negligence." IC § 6-8.1-10-2.1(a); (b).

[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 **shall** abate the penalty when a taxpayer "can show that the failure to . . . pay the deficiency determined by the [D]epartment was due to reasonable cause and not due to willful neglect." IC § 6-8.1-10-2.1(d); [45 IAC 15-11-2](#) (**Emphasis added**).

In this instance, Taxpayer stated that this was its first audit by the Department. Taxpayer also asserted that it misunderstood its business activity constituted a taxable unitary transaction, not a nontaxable service, and has corrected its business records to comport with the Department's audit findings. Taxpayer further demonstrated that it maintains a good history of compliance. Thus, upon review, the Department agrees that the negligence penalty should be abated. Since Taxpayer paid the full amount of the assessment for 2012 and 2013, the Department **shall** refund the amount of penalty.

FINDING

Taxpayer's protest of the imposition of negligence penalty is sustained; however, the statutory interest cannot be waived. The Department shall refund the full amount of penalty.

SUMMARY

Taxpayer's protest of the imposition of negligence penalty is sustained. The remainder, however, is respectfully denied. The Department shall refund the full amount of penalty.

