

Supplemental Letter of Findings Number: 04-20170111
Tax Administration: Penalty
For Tax Years 2013-2015

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 This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

HOLDING

Company failed to establish reasonable cause for its failure to properly accrue use tax, thus imposition of a negligence penalty was warranted.

ISSUE

I. Tax Administration–Penalty and Interest.

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

Taxpayer protests the imposition of penalty and interest.

STATEMENT OF FACTS

Taxpayer was audited by the Indiana Department of Revenue ("Department"), and as a result of that audit Taxpayer received proposed assessments for sales and use tax, penalty, and interest. Taxpayer filed a protest regarding the penalties and interest that were assessed. An administrative telephone hearing was scheduled on the protest at which Taxpayer failed to call or appear. As a result of Taxpayer's failure to participate in the originally scheduled hearing date, the Department's Legal Division mailed to Taxpayer a default letter. After receiving that default letter, Taxpayer contacted the Department and explained why it failed to participate in the hearing and also requested a rehearing. A rehearing was held on the matter and this Supplemental Letter of Findings results. Further facts will be supplied as required.

I. Tax Administration–Penalty and Interest.

DISCUSSION

As a threshold issue, it is 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.

The Department notes that penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. IC § 6-8.1-10-2.1. The Indiana Administrative Code, [45 IAC 15-11-2](#) further provides in relevant part:

(b) "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.

(c) 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. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

The underlying audit that resulted in the negligence penalty was for sales and use tax. Regarding the former, the audit report states "the taxpayer is in substantial compliance with the State's sales tax regulations and no sales tax adjustments were required." Turning to use tax, the auditor found that "taxpayer does have a use tax accrual system in place" and that "taxpayer has either paid sales to its vendors or remitted use tax on items purchased for use outside of the production process." However, the audit report also states the "audit has found exceptions which are included in this audit." The audit used a statistical sample for the period of 2013 through 2015; the audit found that "taxpayer purchased various items for use outside of the production process for which no sales tax was paid nor use tax remitted, but should have been." These "[e]xception items" included "items associated with the administrative and office functions of the taxpayer and non-productive type activities." The items included taxable safety supplies and equipment, taxable maintenance items, taxable lab supplies, forklifts that "were used in both a taxable and an exempt manner," and "other taxable non-operational or non-production items." Regarding the latter, the audit report states the items included "employee awards, candy bars, vacation planners, stools, 3-wheel bike, laptops for office use" The audit found software and also packaging equipment that were subject to tax.

Turning to Taxpayer's explanation regarding the negligence penalty, Taxpayer states that it files its sales and use taxes "in a timely manner[.]" Taxpayer offers no real argument regarding the negligence penalty, and instead focuses on the prospective changes that Taxpayer states that it is making—e.g., it is "sending individuals to sales and use tax training . . . to have a better understanding of what should be taxed and what shouldn't." This does not address the fact that this was Taxpayer's *second* sales and use tax audit by the Department. Also, Taxpayer does not address the fact that the audit found numerous taxable items, including items obviously outside of Taxpayer's production process where no sales tax was paid nor use tax remitted. Taxpayer has not established that it "exercised ordinary business care and prudence" pursuant to [45 IAC 15-11-2\(c\)](#). Taxpayer has not met its burden of proof under IC § 6-8.1-5-1(c). Regarding Taxpayer's protest of the interest, pursuant to IC § 6-8.1-10-1(e) interest cannot be waived.

FINDING

Taxpayer's protest is denied.

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