

Supplemental Letter of Findings Number: 04-20170127
Tax Administration: Penalty
For Tax Years 2011-14

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 This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

HOLDING

Company established its failure to timely pay the use tax was not due to negligence and therefore was sustained in its protest.

ISSUE

I. Tax Administration–Penalty.

Authority: IC § 6-8.1-5-1; 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.

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 base tax, penalty, and interest. Taxpayer filed a protest regarding the penalties that were assessed. An administrative telephone hearing was scheduled on the protest at which Taxpayer failed to call or appear at. 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 explained why it failed to participate in the hearing and also requested a rehearing. A rehearing was granted and held on the matter, and this Supplemental Letter of Findings results. Further facts will be supplied as required.

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.

In the case at hand, Taxpayer states that the "tax due . . . was not the result of tax collected and not remitted," that Taxpayer "routinely accrues and pays use tax" Taxpayer also argues that "[p]rior to the audit, we were unaware that the tax percentage should be allocated for equipment used during both pre and post production activities." Finally, Taxpayer states that its software was "unable to calculate tax based on percentage usage uniquely allowable in Indiana." Taxpayer states:

Going forward, since our tax software system is incapable of computing on a pro-rated tax base, we have taken steps to ensure that we manually accrue the tax on the equipment used during both pre and post production

Taxpayer has established that its failure to pay the use tax was due to reasonable cause and not negligence. The taxability percentage of Taxpayer's manufacturing equipment was itself a fact sensitive question that the auditor had to examine. For example, in the Audit Report the auditor states that a determination was made regarding "forklifts, bobcats and loaders" used preproduction, production, and postproduction. The Audit Report states that "expenses such as fuel, oil, etc. charged to accounts where the items were used by this equipment and no tax was paid on the invoice, have been included as taxable[.]" The auditor also found that "Taxpayer has also been given inverse credit on invoices for purchases where use tax was accrued on 100[percent] of the purchase price." This illustrates the fact sensitive nature of the examination. Taxpayer also stated that its software system was unable to compute taxes on a pro-rated basis for partially exempt equipment. Prospectively, Taxpayer has taken steps to correct the issue going forward. The Department finds that waiver of penalties is thus warranted. Taxpayer has established that it "exercised ordinary business care and prudence" pursuant to [45 IAC 15-11-2\(c\)](#).

FINDING

Taxpayer's protest regarding the penalty is sustained.

Posted: 11/29/2017 by Legislative Services Agency
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