

DEPARTMENT OF STATE REVENUE

03-20181653R.ODR

**Final Order Denying Refund: 03-20181653R.ODR
Withholding Tax
For the Year 2016**

NOTICE: IC § 4-22-7-7 permits the publication of this document in the Indiana Register. The publication of this document provides the general public with information about the Indiana Department of Revenue's official position concerning a specific set of facts and issues. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Final Order Denying Refund.

HOLDING

The Department was unable to agree with Out-of-State Business that it was entitled to a refund of collection fees incurred by the Department's collection agent; Out-of-State Business ceased filing Indiana withholding tax returns, failed to respond to the Department's proposed assessment of estimated tax, and the Department's collection agent was entitled to the fees attributable to the agent's effort to collect the assessments.

ISSUE

I. Tax Administration - Collection Costs and Fees.

Authority: IC § 6-8.1-5-1(b); IC § 6-8.1-8-2(b); IC § 6-8.1-8-4; IC § 6-8.1-10-3; *P/S, Inc. v. Ind. Dep't of State Revenue*, 853 N.E.2d 1051 (Ind. Tax Ct. 2006)

Taxpayer argues that the Department erred in denying it a refund of collection costs and fees.

STATEMENT OF FACTS

Taxpayer is an out-of-state security and data management company. Taxpayer formerly operated an Indiana business location and paid Indiana withholding tax on behalf of its employee. Taxpayer states that it ceased operating the Indiana satellite office and that it now has no Indiana employees. Taxpayer also ceased filing Indiana withholding tax returns.

In the absence of the requisite withholding tax returns, the Indiana Department of Revenue ("Department") issued Taxpayer proposed assessments of additional withholding tax. Although the assessments were sent to Taxpayer's correct mailing address and were not returned to the Department, Taxpayer failed to respond to the proposed assessments. When the amounts went unpaid and unaddressed, the matter was referred to the Department's collection agency.

Acting on behalf of the Department, the collection agency placed a levy on Taxpayer's bank account. The Department obtained approximately \$21,000.

Taxpayer submitted a form GA-110L (Claim for Refund) seeking return of the \$21,000 arguing that it did not owe withholding tax because it had closed its Indiana location and no longer had an Indiana employee or employees. The Department granted the claim in part declining, however, to return \$3,500 in collection fees.

Taxpayer disagreed with the decision and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representative explained the basis for the protest. This Final Order Denying Refund results.

I. Tax Administration - Collection Costs and Fees.

DISCUSSION

The issue is whether Taxpayer was responsible for paying costs incurred by the Department's collection agent.

When the Department determined that Taxpayer failed to file its withholding returns on behalf of its employee (or employees), Indiana law permitted and required the Department to issue assessments based on the "best information available."

IC § 6-8.1-5-1(b) provides in relevant part:

If the department reasonably believes that a person has not reported the proper amount of tax due, the department *shall make a proposed assessment* of the amount of the unpaid tax on the basis of the best information available to the department. The amount of the assessment is considered a tax payment not made by the due date and is subject to [IC 6-8.1-10](#) concerning the imposition of penalties and interest. The department shall send the person a notice of the proposed assessment through the United States mail. (*Emphasis added*).

When a proposed amount remains "unpaid," the Department adds a ten-percent penalty as provided for under IC § 6-8.1-8-2(b).

If the person does not pay the amount demanded or show reasonable cause for not paying the amount demanded within the ten (10) day period, the department may issue a tax warrant for the amount of the tax, interest, penalties, collection fee, sheriff's costs, clerk's costs, and fees established under section 4(b) of this chapter when applicable. When the department issues a tax warrant, a collection fee of ten percent (10[percent]) of the unpaid tax is added to the total amount due.

In addition, the Department is entitled to employ the services of a collection agent which - in turn - is entitled to impose penalties sufficient to compensate the collection agent for its own efforts. The statutory authority is found at IC § 6-8.1-8-4.

(a) When the department collects a judgment arising from a tax warrant, it may proceed in the same manner that any debt due the state is collected, except as provided in this chapter. The department may employ special counsel or contract with a collection agency for the collection of a delinquent tax plus interest, penalties, collection fees, sheriff's costs, clerk's costs, and reasonable fees established under subsection (b) if:

(1) an unsatisfied warrant has been issued by the department; or

(2) the department received a tax payment by check or other instrument drawn upon a financial institution, and the check or other instrument was not honored by that institution.

(b) The commissioner and the budget agency shall set the fee that the special counsel or collection agency will receive and payment of the fee shall be made after a claim for that fee has been approved by the department.

(c) The fees become due and owing by the taxpayer upon the filing of an amended warrant with the circuit court clerk adding the fee authorized by subsection (b) to the amount of the judgment lien under section 2 of this chapter.

However, Taxpayer explains that it "did not have any employees during Q1 2016. We disagree that we should pay collection fees related to a balance due that we did not owe."

Taxpayer also correctly notes that it has since filed a form BC-100 ("Indiana Business Tax Closure Request") effectively "closing" the withholding account as of January 2015. The BC-100 was received by and processed by the Department November 2016.

Nonetheless, the Department notes that the proposed assessments were sent to the address indicated in the Department's records. It is these proposed assessments which eventually led to the issuance of the collection warrants and the subsequent levy on Taxpayer's account.

The Department issued the notices of proposed assessments for periods during which Taxpayer failed to file the requisite withholding returns. The Department did so under authority and under the requirements set out in IC § 6-8.1-10-3 which provides as follow:

If a person fails to file a return on or before the due date, the department shall send him a notice, by United States mail, stating that he has thirty (30) days from the date the notice is mailed to file the return. If the person does not file the return within the thirty (30) day period, the department may prepare a return for him, based on the best information available to the department. The department prepared return is *prima facie* correct.

The Indiana Tax Court has provided guidance on this issue in *P/S, Inc. v. Ind. Dep't of State Revenue*, 853 N.E.2d 1051 (Ind. Tax Ct. 2006). In that decision, the court explained that the petitioner was responsible for paying collection fees because it had not rebutted the presumption that it received notices which the Department mailed

and - as a result - had not timely responded to the notices. *Id.* at 1054-55. The court explained that the petitioner in that case merely asserted that it had not received notice and that the Department explained it had not received the notices back by return mail. *Id.* The court concluded that the petitioner was presumed to have timely received the demand notices, and therefore was not entitled to a refund of collection fees that attached upon the issuance of the tax warrants. *Id.* at 1055.

The only remaining issue is whether - as between the state of Indiana and Taxpayer - who should be responsible for paying the collection fees incurred by the Department's agent. The Department is unable to agree that it is the state of Indiana which should incur these fees or that the fee amount should be refunded to Taxpayer. There is nothing to indicate that either the Department or its agent failed to follow Taxpayer's directions in this matter. There is nothing to indicate that it was the Department or its agent's error which led to the efforts to collect the withholding tax amounts.

FINDING

Taxpayer's protest is respectfully denied.

September 6, 2018

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