

**Memorandum of Decision: 04-20181757R  
Gross Retail Tax Penalty  
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 Memorandum of Decision.

**HOLDING**

Out-of-State Clothing Company was entitled to a refund of a ten-percent "late" penalty because an error in executing an ACH payment of sales tax collected from its Indiana customers did not constitute "willful neglect."

**ISSUE**

**I. Gross Retail Tax - Late Payment Penalty.**

**Authority:** IC § 6-8.1-5-1(c); IC § 6-8.1-10-2.1(a)(2); IC § 6-8.1-10-2.1(a)(3); IC § 6-8.1-10-2.1(d); [45 IAC 15-11-2\(b\)](#); [45 IAC 15-11-2\(c\)](#).

Taxpayer argues it is entitled to a refund of a "late" penalty because its failure to timely execute a sales tax payment was not attributable to its own negligence.

**STATEMENT OF FACTS**

Taxpayer is an out-of-state company which sells clothing to customers located in multiple states including Indiana. Taxpayer collects sales tax from its Indiana customers; in turn, Taxpayer reports and remits tax to the Indiana Department of Revenue ("Department"). In February 2016, Taxpayer decided to change its method of payment from ACH credit to ACH *debit*. Taxpayer filed a sales tax return July 2016 and scheduled an ACH (Automated Clearing House) debit payment of approximately \$85,000. The payment was scheduled to be executed July 2016. The scheduled payment was not executed, and the Department did not receive the sales tax amount indicated on its previously filed return.

The Department collected the \$85,000 and an \$8,500 late payment penalty by offsetting credits in its corporate income tax account. Taxpayer filed a "Claim for Refund" (GA-110L) with the Department seeking a refund of the \$8,500 late penalty amount on the ground that its failure to timely pay the sales tax amount was not due to its own negligence. The Department responded in a letter dated May 2018 denying the refund. The letter explained, "The request for abatement of penalty exceeds discretionary limits." Taxpayer disagreed with the Department's decision and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representatives explained the basis for the protest. This Memorandum of Decision results.

**I. Gross Retail Tax - Late Payment Penalty.**

**DISCUSSION**

Taxpayer argues that it acted in "good faith," that it has since "corrected [its] payment processing to ensure that this situation does occur again", and that it has a "timely filing and payment history." Taxpayer asks the Department to exercise its discretion, waive the penalty, and issue the \$8,500 refund.

IC § 6-8.1-10-2.1(a)(3) requires that a ten-percent penalty be imposed if the tax deficiency results from the taxpayer's negligence. IC § 6-8.1-10-2.1(a)(2) requires a ten-percent penalty if the taxpayer "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."

IC § 6-8.1-10-2.1(d) states that, "If a person subject to the penalty imposed under this section can show that the failure to . . . pay the full amount of tax shown on the person's return . . . or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty."

Departmental regulation [45 IAC 15-11-2\(b\)](#) defines negligence as "the failure to use such reasonable care,

caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case by case basis according to the facts and circumstances of each taxpayer." *Id.*

Departmental regulation [45 IAC 15-11-2](#)(c) requires that 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 IC § 6-8.1-5-1(c), "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." An assessment - including the late payment penalty - is presumptively valid.

Taxpayer states that the error was not due to its negligence but was a simple omission. Taxpayer supplied a written communication from the bank with whom it arranged the ACH debit transaction. The bank's representative stated, "The item was returned due to your ACH Fraud Filer. The original debit was received on 7/21/2016 but due to the ACH company ID of the state not in the preauthorization list [bank] returned the ACH."

Taxpayer is, of course, entirely responsible for timely payment of the sales tax collected from its Indiana customers. However, in this case the Department agrees that the error was not so egregious as to constitute "willful neglect."

### FINDING

Taxpayer's protest is sustained.

October 5, 2018

*Posted: 01/30/2019 by Legislative Services Agency*  
An [html](#) version of this document.