

DEPARTMENT OF STATE REVENUE

04-20182435.LOF

Letter of Findings Number: 04-20182435
Gross Retail Tax
For Tax Years 2014, 2015, and 2016

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 This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

HOLDING

Indiana Retailer was not entitled to abatement of negligence penalties because it failed to demonstrate that its failure to remit sales and use tax was due to reasonable cause and not negligence.

ISSUE**I. Tax Administration - Negligence Penalty.**

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-8-8; IC § 6-8.1-10-2.1; IC § 6-2.5-4-1; IC § 6-8.1-5-1; [45 IAC 15-11-2](#).

STATEMENT OF FACTS

Taxpayer is an Indiana retailer in the business of selling automotive parts and supplies. The Indiana Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer's business records and tax returns for tax years 2014 through 2016. The audit found that Taxpayer failed to collect sales tax on sales to non-exempt customers, and failed to self-assess use tax on various purchases of supplies and capital assets. Taxpayer had previously been audited for use tax for tax years 2009, 2010, and 2011.

As a result of the current audit under protest, Taxpayer was assessed additional sales tax, use tax, interest, and penalties. Taxpayer protests the penalty and requests waiver of the negligence penalty portion of the assessments. Taxpayer waived its right to an administrative hearing and requests a final determination based upon the documents provided with its protest submission. This Letter of Findings results. Further facts will be addressed below as necessary.

DISCUSSION

Taxpayer protests the imposition of penalties pursuant to IC § 6-8.1-10-2.1. Regarding the imposition of penalty, the Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

Pursuant to IC § 6-2.5-2-1, a sales tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. Retail transactions generally involve the transfer of tangible personal property. IC § 6-2.5-4-1. A complementary excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. IC § 6-2.5-3-2.

An exemption from the gross retail tax exists under certain circumstances where the Taxpayer receives an exemption certificate from an exempt purchaser. When a purchaser claims that a retail transaction is exempt from the sales tax, the purchaser is required to provide and the retail merchant (i.e., seller) must collect a properly executed exemption certificate. IC § 6-2.5-8-8 further provides the general rules for exemption certificates. "A person . . . , who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. IC § 6-2.5-8-8(a). "The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase." *Id.*

Taxpayer failed to collect sales tax from certain purchasers who did not supply Taxpayer with a properly executed exemption certificate from the Department. Additionally, the Department concluded that Taxpayer had failed to pay sales tax at the time it purchased various pieces of equipment and supplies, including tools, software, clothing, office supplies, equipment fees, signage, and other items, and that Taxpayer had failed to self-assess use tax on these purchases. Taxpayer does not dispute the assessment of additional tax; rather, Taxpayer asks the Department to abate the negligence penalties imposed on the audit assessment.

Regarding imposition of a negligence penalty, IC § 6-8.1-10-2.1(a) states, in relevant part:

Except as provided in [IC 6-3-4-12\(k\)](#) and [IC 6-3-4-13\(l\)](#) , a person that:

- (1) fails to file a return for any of the listed taxes;
 - (2) 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;
 - (3) incurs, upon examination by the department, a deficiency that is due to negligence;**
 - (4) fails to timely remit any tax held in trust for the state; or**
 - (5) is required to make a payment by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department;
- is subject to a penalty. (**Emphasis added**).

[45 IAC 15-11-2\(b\)](#) clarifies the standard for the imposition of the negligence penalty as follows:

"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.

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(d) further provides:

If a person subject to the penalty imposed under this section can show that the failure to file a return, pay the full amount of tax shown on the person's return, timely remit tax held in trust, 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.

The standard for waiving the negligence penalty is further explained at [45 IAC 15-11-2\(c\)](#) as follows:

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. (**Emphasis added**).

Taxpayer was previously audited and notified of its failure to remit use tax on certain items it believed were exempt during their audit for tax years 2009, 2010, and 2011. However, during Taxpayer's audit for tax years 2014, 2015, and 2016, the Department concluded that Taxpayer once again failed to self-assess use tax on

certain non-exempt purchases. Taxpayer argues that "human error and human judgment" warrant waiver of the negligence penalty, and asserts that "negligence implies that we willfully were trying to avoid remitting sales and use tax[.]"

However, Taxpayer is mistaken as to the standard for the imposition of the negligence penalty under IC § 6-8.1-10-2.1 and [45 IAC 15-11-2\(b\)](#). Indiana law clearly states, "[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.**" [45 IAC 15-11-2\(b\)](#) (**Emphasis added**). Negligence does not require that a taxpayer intentionally or recklessly fail to collect and remit gross retail tax. In this instance, mistakes in human error or judgment fall squarely within the statutory definition of negligence, particularly considering that Taxpayer was previously audited for the same tax type.

After review of the documentation and analysis provided in the protest process, the Department finds that Taxpayer has not demonstrated its failure to collect and remit sales tax and to self-assess and pay use tax was due to reasonable cause. Therefore, considering the particular facts and circumstances of this protest, the Department finds that waiver of penalties is not warranted.

FINDING

Taxpayer's protest is respectfully denied.

January 31, 2019

Posted: 03/27/2019 by Legislative Services Agency
An [html](#) version of this document.