

Letter of Findings: 03-20190035
Withholding Tax
For The Tax Year 2017

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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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 Employer was responsible for additional withholding tax because it failed to substantiate that it timely filed the withholding tax returns and paid the withholding tax as required by the Indiana law.

ISSUE

I. Withholding Tax - Burden of Proof.

Authority: I.R.C. § 3402; IC § 6-3-4-8; IC § 6-8.1-5-1; IC § 6-8.1-8-1.5; IC § 6-8.1-9-2; *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480 (Ind. Tax Ct. 2012).

Taxpayer protest the Department's assessment of withholding tax for 2017.

STATEMENT OF FACTS

Taxpayer is an Indiana business which has several employees. In December 2018, the Indiana Department of Revenue ("Department") issued a proposed assessment pertaining to Form WH-3 (Annual Withholding Reconciliation Form) imposing additional withholding tax, penalty, and interest, for the tax year 2017.

Taxpayer timely protested the assessment. Taxpayer requested that the Department make the determination without an administrative hearing. The Department contacted Taxpayer, twice, attempting to clarify its protest and requesting additional supporting documents, but Taxpayer did not respond to the Department's request. As a result, this Letter of Findings ensues and addresses Taxpayer's protest of the proposed assessment based on the document submitted by Taxpayer and information available to the Department. Additional facts will be provided as necessary.

I. Withholding Tax - Burden of Proof.

DISCUSSION

The Department assessed additional tax, interest, and penalty because Taxpayer failed to timely file its WH-1 return for the December 2017 period, the 2017 annual WH-3 return, and remit the withholding tax due, as required by the Indiana law. Taxpayer disagreed, claiming that it actually overpaid for the 2017 withholding tax. The issue thus is whether Taxpayer demonstrated that the Department incorrectly assessed Taxpayer additional tax for 2017.

As a threshold issue, all tax assessments are *prima facie* evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012). Thus, the taxpayer is required to provide documentation explaining and supporting her challenge that the Department's assessment is wrong. Poorly developed and non-cogent arguments are subject to waiver. *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012).

An employer is required by law to withhold income tax on wages it pays to its employees. In other words, income tax is generally collected at the source unless specifically exempted. I.R.C. § 3402(a)(1) requires "every employer making payment of wages to deduct and withhold upon such wages a tax determined in accordance with prescribed tables" or a prescribed mathematical formula. Likewise, every employer is required to withhold state income tax on payments of wages it pays to its employees pursuant to IC § 6-3-4-8(a), which states in part as follows:

Except as provided in subsection (d), every employer making payments of wages subject to tax under this article, regardless of the place where such payment is made, who is required under the provisions of the Internal Revenue Code to withhold, collect, and pay over income tax on wages paid by such employer to such employee, shall, at the time of payment of such wages, deduct and retain therefrom the amount prescribed in withholding instructions issued by the department. The department shall base its withholding instructions on the adjusted gross income tax rate for persons, on the total local income tax rate that the taxpayer is subject to under [IC 6-3-6](#), and on the total amount of exclusions the taxpayer is entitled to under [IC 6-3-1-3.5\(a\)\(3\)](#) and [IC 6-3-1-3.5\(a\)\(4\)](#). However, the withholding instructions on the adjusted gross income of a nonresident alien (as defined in Section 7701 of the Internal Revenue Code) are to be based on applying not more than one (1) withholding exclusion, regardless of the total number of exclusions that [IC 6-3-1-3.5\(a\)\(3\)](#) and [IC 6-3-1-3.5\(a\)\(4\)](#) permit the taxpayer to apply on the taxpayer's final return for the taxable year. Such employer making payments of any wages:

- (1) shall be liable to the state of Indiana for the payment of the tax required to be deducted and withheld under this section and shall not be liable to any individual for the amount deducted from the individual's wages and paid over in compliance or intended compliance with this section; and
- (2) shall make return of and payment to the department monthly of the amount of tax which under this article and [IC 6-3-6](#) the employer is required to withhold.

(Emphasis added).

IC § 6-3-4-8(a) requires an employer to "withhold, collect, and pay over income tax on wages paid by such employer to such employee . . . [in] the amount prescribed in withholding instructions issued by the department." IC § 6-3-4-8(a)(1) provides that the employer is "liable to the state of Indiana for the payment of the tax *required* to be deducted and withheld." (*Emphasis added*). IC § 6-3-4-8 specifically provides that the employer is liable for the amount that it was *required* to withhold.

IC § 6-3-4-8(b) establishes a general due date that the employer is required to file the return and remit the tax due. It provides:

An employer shall pay taxes withheld under subsection (a) during a particular month to the department no later than thirty (30) days after the end of that month. However, in place of monthly reporting periods, the department may permit an employer to report and pay the tax for a calendar year reporting period, if the average monthly amount of all tax required to be withheld by the employer in the previous calendar year does not exceed one thousand dollars (\$1,000). An employer using a reporting period (other than a monthly reporting period) must file the employer's return and pay the tax for a reporting period no later than the last day of the month immediately following the close of the reporting period. (**Emphasis added**).

Additionally, to reconcile the amount of income taxes withheld throughout the year, the employer is required to file a "Form WH-3 annual withholding tax reports with the department not later than thirty-one (31) days after the end of the calendar year," under IC § 6-3-4-8(e) (stating, in relevant part, that "the employer shall file Form WH-3 annual withholding tax reports with the department **not later than thirty-one (31) days after the end of the calendar year.**"). (**Emphasis added**).

IC § 6-3-4-8(g) further provides:

The provisions of [IC 6-8.1](#) relating to additions to tax in case of delinquency and penalties shall apply to employers subject to the provisions of this section, and for these purposes any amount deducted or required to be deducted and remitted to the department under this section shall be considered to be the tax of the employer, and with respect to such amount the employer shall be considered the taxpayer. In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes, shall be personally liable for such taxes, penalties, and interest.

Taxpayer in this instance argued that, as an employer, it did not owe any withholding tax for 2017; rather, it overpaid. Specifically, Taxpayer referenced its one-page summary, which included "Submission Date," "Payment Locator Number," "Amount," and "Period Date" of each payment, to support its protest.

Upon review, however, Taxpayer is mistaken. The Department does not quarrel that Taxpayer made several payments electronically during 2017. Nonetheless, Taxpayer - as an employer - is required by statute to timely (1) file the monthly WH-1 returns, (2) file the WH-3 annual withholding tax report "not later than thirty-one (31) days after the end of the calendar year," and (3) remit the tax due. Taxpayer was responsible for additional penalty and interest in addition to the tax due when Taxpayer failed to do so. To that end, when Taxpayer made payments, the Department is required to apply payments according to IC § 6-8.1-8-1.5, which states:

Whenever a taxpayer makes a partial payment on the taxpayer's tax liability, the department shall apply the partial payment in the following order:

- (1) To any penalty owed by the taxpayer.
- (2) To any interest owed by the taxpayer.
- (3) To the tax liability of the taxpayer.

A further review of the Department records showed that Taxpayer failed to timely file the required WH-1 return for December 2016 and the annual WH-3 return for the tax year 2016. Eventually, Taxpayer filed the 2016 WH-3 return on February 11, 2017. The Department processed that late WH-3 return - which was due January 30, 2017 - and issued a proposed assessment ("2016 outstanding tax liability") in late 2017. Taxpayer did not respond to that 2016 outstanding tax liability, which was subsequently advanced to a "Demand Notice for Payment (AR-40)," due on January 2, 2018.

Similarly, the Department's records showed that Taxpayer failed to timely file the required WH-1 return for December 2017 and the annual WH-3 return for the tax year 2017. Taxpayer filed the 2017 WH-3 return on January 31, 2018.

Thus, when Taxpayer made its December 31, 2017 payment for the tax period December 2017, there was no corresponding December WH-1 return because Taxpayer did not file its return. Without that December 2017 WH-1 return, the Department was not able to process the return and apply the payment accordingly. As a result, that December 31, 2017 payment was an overpayment and, in turn, was applied to Taxpayer's 2016 outstanding tax liability pursuant to IC § 6-8.1-9-2(a), which in part states:

If the department finds that a person has paid more tax for a taxable year than is legally due, the department shall apply the amount of the excess against any amount of that same tax that is assessed and is currently due. The department may then apply any remaining excess against any of the listed taxes that have been assessed against the person and that are currently due.

As a result, when Taxpayer failed to file its December 2017 WH-1 and filed the 2017 WH-3 return late, the Department processed the late 2017 WH-3 return and assessed Taxpayer for the deficiency because Taxpayer did not make any corresponding payment for its 2017 WH-3 filing.

Taxpayer in this instance did not dispute that it was responsible for the 2016 assessment, which was then "currently due" in December 2017. Taxpayer's supporting document also failed to establish that it timely filed the December 2017 WH-1 return and that December 31, 2017 payment should have been applied to the December 2017 tax period. As mentioned earlier, "[p]oorly developed and non-cogent arguments are subject to waiver." Given the totality of the circumstances, in the absence of other supporting documentation, the Department is not able to agree that Taxpayer met its burden to demonstrate that the 2017 assessment is incorrect.

FINDING

Taxpayer's protest is respectfully denied.

February 26, 2019

Posted: 04/24/2019 by Legislative Services Agency
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