

Letter of Findings: 03-20200311P
Withholding Tax
For the Years 2018

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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Company is liable for the late-filing penalty because there is no provision under Indiana law which allows for abatement of the penalty.

ISSUE

I. Tax Administration - Penalty.

Authority: IC § 6-8.1-5-1; IC § 6-3-4-8; IC § 6-3-4-16.5 (effective July 1, 2012 through and including June 30, 2019); IC § 6-8.1-10-6 (effective July 1, 1994 through and including June 30, 2019); *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); [45 IAC 15-11-6](#).

Taxpayer argues that it is entitled to an abatement of a late filing penalty.

STATEMENT OF FACTS

Taxpayer is an out-of-state company doing business in Indiana and employs more than 25 Indiana residents. Beginning January 1, 2013, Taxpayer was required to file its WH-3 annual withholding tax reports and corresponding W-2 wage statements ("W-2s") electronically. Taxpayer has been doing so since 2013.

In January 2019, Taxpayer mailed a CD, which contained its 2018 WH-3 annual withholding tax report and corresponding W-2s, to the Indiana Department of Revenue ("Department"). The Department rejected Taxpayer's filing by means of mailing a CD. In a letter to Taxpayer, the Department explained:

Starting on January 1, 2013, any employer that filed more than 25 withholding statements in a calendar year was required to file their annual WH-3 and their employees' W-2s electronically, this law (IC [§] 6-3-4-16.5) applies to all withholding statements filed after December 31, 2012.

...

[The Department] does not accept wage filings on disk, CD, DVD, 3480 or 3490 cartridges as electronic files .

...

To request an extension to file your WH-3 and corresponding wage statements, please send an e-mail to [the Department] titled "Extension Request"

Taxpayer did not request an extension. Rather, on or about March 11, 2019, Taxpayer filed electronically - which the Department accepted - its 2018 WH-3 annual tax report and the corresponding W-2s. Taxpayer was subsequently assessed a \$25,000 penalty for the late filing of its employees' W-2s.

Taxpayer protested the assessment. An administrative hearing was held. This Letter of Findings results. Further facts will be provided, as necessary.

I. Tax Administration - Penalty.

DISCUSSION

The Department assessed Taxpayer a \$25,000 penalty for filing the required W-2s, information returns, late.

Taxpayer argued that it timely filed the W-2s and that the Department erroneously imposed the penalty. Taxpayer requested that the Department abate the \$25,000 penalty.

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). Thus, the taxpayer is required to provide documentation explaining and supporting its 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).

IC § 6-3-4-8(e) requires that an "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."

IC § 6-3-4-16.5 (effective July 1, 2012 through June 30, 2019) states:

(a) This section applies to:

(1) Form W-2 federal income tax withholding statements;

(2) Form W-2G certain gambling winnings;

(3) Form 1099-R distributions from pensions, annuities, retirement or profit sharing plans, IRAs, insurance contracts or like distributions;

(4) Form WH-3 annual withholding tax reports; and

(5) Form WH-18 miscellaneous withholding tax statements for nonresidents;

filed with the department after December 31, 2012.

(b) If an employer or any person or entity acting on behalf of an employer files more than twenty-five (25):

(1) Form W-2 federal income tax withholding statements;

(2) Form W-2G certain gambling winnings;

(3) Form 1099-R distributions from pensions, annuities, retirement or profit sharing plans, IRAs, insurance contracts or like distributions; or

(4) Form WH-18 miscellaneous withholding tax statements for nonresidents;

with the department in a calendar year, **all forms and Form WH-3 annual withholding tax reports filed with the department in that calendar year by the employer or the person or entity acting on behalf of the employer must be filed in an electronic format specified by the department.**

(Emphasis added).

In addition, IC § 6-8.1-10-6 (effective July 1, 1994 through and including June 30, 2019) which provides the following:

(a) As used in this section, "information return" means the following when a statute or rule requires the following to be filed with the department:

(1) Schedule K-1 of form IT-20S, IT-41, or IT-65.

(2) Any form, statement, or schedule required to be filed with the department with respect to an amount from which tax is required to be deducted and withheld under [IC 6](#) or from which tax would be required to be deducted and withheld but for an exemption under [IC 6](#).

(3) Any form, statement, or schedule required to be filed with the Internal Revenue Service under 26 C.F.R. 301.6721-1(g) (1993).

The term does not include form IT-20FIT, IT-20S, IT-20SC, IT-41, or IT-65.

(b) If a person fails to file an information return required by the department, a penalty of ten dollars (\$10) for each failure to file a timely return, not to exceed twenty-five thousand dollars (\$25,000) in any one (1) calendar year, is imposed.

(c) For purposes of this section, the filing of a substantially blank or unsigned return does not constitute a return.

(Emphasis added).

According to [45 IAC 15-11-6](#):

For purposes of [IC 6-8.1-10-6](#), an "information return" shall constitute any return required by the Indiana Code, or department regulations to be filed by a taxpayer which does not report a tax liability. Such returns include, but are not limited to:

(1) An S corporation return.

- (2) A partnership return.
- (3) A W-2 return.**
- (4) A WH-18 return.
- (5) Certain fiduciary returns.
- (6) Not-for-profit returns. (**Emphasis added**).

Accordingly, in this instance, Taxpayer was required to file its 2018 WH-3 annual withholding tax report and the W-2s, *electronically*, on or before January 31, 2019, the statutory due date. The issue in this case is whether Taxpayer *properly* and *timely* filed the required W-2s.

Throughout the protest process, Taxpayer in this case argued that, by means of mailing a CD to the Department - postmarked January 31, 2019 - it timely filed its 2018 WH-3 annual tax report and W-2s. Specifically, Taxpayer argued that the Department erroneously applied the new law - effective July 1, 2019 - mandating Taxpayer to file W-2s *electronically* and assessing Taxpayer \$25,000 penalty under that new law. Taxpayer thus asserted that the \$25,000 penalty was not applicable in January 2019 because it timely filed the required 2018 WH-3 annual tax report and corresponding W-2 forms by means of mailing a CD to the Department. To support its protest, in addition to the certified U.S. mail receipt, Taxpayer offered its interpretation of the Indiana law.

Upon review, however, Taxpayer is mistaken. As stated earlier, the applicable IC § 6-3-4-16.5 mandates that Taxpayer must file its WH-3 annual tax report and the required W-2s "in an electronic format specified by the department" beginning January 1, 2013. As such, Taxpayer must file the required W-2s "in an electronic format specified by the department" on or before January 31, 2019. But Taxpayer did not do so on or before January 31, 2019. Specifically, here, Taxpayer chose to mail a CD to the Department. Under the applicable IC § 6-3-4-16.5, any filing by means of mailing a CD has not been accepted by the Department since 2013. Thus, Taxpayer's filing did not comport with the applicable IC § 6-3-4-16.5, effective July 1, 2012. The Department properly rejected Taxpayer's filing because Taxpayer failed to comply with the 2012 Indiana mandate.

Taxpayer was offered an opportunity to request an extension, but Taxpayer chose not to do so. Not until March 11, 2019, did Taxpayer file the WH-3 and W-2s in an electronic format specified by the department to comply with the applicable IC § 6-3-4-16.5, which has been effective since January 1, 2013 through and including June 30, 2019. In other words, Taxpayer properly filed the required W-2s on or about March 11, 2019 - 40 days after the statutory due date. As such, pursuant to the applicable IC § 6-8.1-10-6(b), a penalty of ten dollars (\$10) for each failure to file a *timely* information return, not to exceed twenty-five thousand dollars (\$25,000) in any one (1) calendar year, was properly imposed. Under IC § 6-8.1-10-6, the Department does not have the statutory authority to abate the penalty.

In short, given the totality of the circumstances, Taxpayer's supporting documents demonstrated that it failed to timely file W-2s in an electronic format specified by the department necessary to comply with the applicable IC § 6-3-4-16.5. Pursuant to the applicable IC § 6-3-4-16.5 and IC § 6-8.1-10-6, the penalty was properly imposed. The Department does not have the statutory authority to abate the penalty.

FINDING

Taxpayer's protest is respectfully denied.

December 1, 2020

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An [html](#) version of this document.