

**Letter of Findings: 03-20200406
Withholding Tax
For the Years 2017 and 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Indiana Employer was responsible for additional withholding tax because Indiana Employer failed to substantiate its claim that its weekly payments were payments to several individuals who were not its employees. Indiana Employer was also responsible for the statutory interest and negligence penalty.

ISSUES

I. Withholding Tax - Independent Contractors.

Authority: IC § 6-3-1-6; IC § 6-3-4-8; IC § 6-8.1-5-1; *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); *Indiana Dep't of State Rev. v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); [45 IAC 3.1-1-97](#); *IRS Publication 15-A* (2017); *Income Tax Information Bulletin 52* (August 2008); *Black's Law Dictionary* (8th ed. 2004).

Taxpayer protests the imposition of withholding tax on weekly payments to several individuals.

II. Tax Administration - Interest and Negligence Penalty.

Authority: IC § 6-8.1-3-17; IC § 6-8.1-5-2; IC § 6-8.1-10-1; IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).
Taxpayer protests the imposition of the interest and negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana construction company that provides both residential and commercial construction and remodeling services as well as heating and cooling repairs, landscaping, mowing and snow removal.

The Indiana Department of Revenue ("Department") audited Taxpayer's business records and withholding tax returns for the 2017 and 2018 tax years. Pursuant to the audit, the Department's audit found that Taxpayer failed to withhold Indiana state and local income tax from periodical payments it paid to several individuals. The Department assessed Taxpayer additional withholding tax as a result.

Taxpayer disagreed with the assessment and filed a protest to that effect. Taxpayer requested that the Department review additional information submitted and make the final determination without a hearing. This Letter of Findings results based on the documents submitted, the correspondence with Taxpayer's representative, and the information within the file. Additional facts will be provided, as necessary.

I. Withholding Tax - Independent Contractors.

DISCUSSION

Pursuant to the audit, the Department determined that Taxpayer employed several individuals to perform assigned tasks and those individuals were Taxpayer's employees because Taxpayer had (1) behavioral control, (2) financial control, and (3) an employee-employer relationship with respect to those individuals. The Department's audit found that Taxpayer misclassified those individuals as subcontractors and failed to withhold state and county income taxes on the periodical payments paid to them.

Taxpayer to the contrary claimed that it was not responsible for withholding tax because those individuals were independent contractors. Thus, the issue is whether Taxpayer demonstrated that those individuals in question were contractors and, as such, it was not required to withhold tax on the payments to them.

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); *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 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). Also, "all statutes are presumptively constitutional." *Indiana Dep't of State Rev. v. Caterpillar, Inc.*, 15 N.E.3d 579, 587 (Ind. 2014) (citing *UACC Midwest, Inc. v. Indiana Dep't of State Rev.* 629 N.E.2d 1295, 1299 (Ind. Tax Ct. 1994)). When an agency is charged with enforcing a statute, the courts defer to the agency's reasonable interpretation of that statute "over an equally reasonable interpretation by another party." *Caterpillar, Inc.*, 15 N.E.3d at 583 (citation omitted).

Every employer is required to withhold taxes on payments of wages it pays to its employees pursuant to IC § 6-3-4-8, which states in part as follows:

(a) 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.

...

(g) 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.**

(Emphasis added).

Accordingly, 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.

[45 IAC 3.1-1-97](#) further explains in relevant part:

Employers who make payments of wages subject to the Adjusted Gross Income Tax Act, and who are required to withhold Federal taxes pursuant to the Internal Revenue Code (USC Title 26), **are required to withhold from employees' wages Adjusted Gross and County Adjusted Gross Income Tax.** (Emphasis added).

The employers are "withholding agents . . . shall make return of and payment to the Department . . . tax due, for either County and State." *Id.* "All amounts deducted and withheld by an employer shall immediately upon deduction become the money of the State." *Id.* The regulation further states, "In the case of delinquency or nonpayment of withholding tax, the employer is liable for such tax, penalties, and interest." *Id.*

IC § 6-3-1-6 follows section 3401(c) of the Internal Revenue Code, which defines "employer" and "employee." "Employer" is defined as "[a] person who controls and directs a worker under an express or implied contract of hire and who pays the worker's salary or wages." *Black's Law Dictionary* 565 (8th ed. 2004). "Employee" is defined as "[a] person who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance." *Id.* at 564. "Independent contractor" is defined as "[o]ne who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it." *Id.* at 785.

The Internal Revenue Service ("IRS"), in its Publication 15-A, in relevant part, states:

To determine whether an individual is an employee or an independent contractor under the common law, the relationship of the worker and the business must be examined. In any employee-independent contractor determination, all information that provides **evidence of the degree of control and the degree of independence** must be considered. (**Emphasis added**).

The IRS illustrates that "facts that provide evidence of the degree of control and independence fall into three categories: behavioral control, financial control, and the type of relationship of the parties." The IRS, in its Publication 15-A, further provides factors to be considered, in relevant part, as follows:

Behavioral control. Facts that show whether the business has a right to direct and control how the worker does the task for which worker is hired include the type and degree of:

Instructions that the business gives to the worker. An employee is generally subject to the business' instructions about when, where, and how to work. All of the following are examples of types of instructions about how to do work.

- When and where to do the work.
- What tools or equipment to use.
- What workers to hire or to assist with the work.
- Where to purchase supplies and services.
- What work must be performed by a specified individual.
- What order or sequence to follow.

The amount of instruction needed varies among different jobs. Even if no instructions are given, sufficient behavioral control may exist if the employer has the right to control how the work results are achieved. A business may lack the knowledge to instruct some highly specialized professionals; in other cases, the task may require little or no instruction. The key consideration is whether the business has retained the right to control the details of a worker's performance or instead has given up that right.

Training that the business gives to the worker. An employee may be trained to perform services in a particular manner. Independent contractors ordinarily use their own methods.

Financial Control. Facts that show whether the business has a right to control the business aspects of the worker's job include:

The extent to which the worker has unreimbursed business expenses. Independent contractors are more likely to have unreimbursed expenses than are employees. Fixed ongoing costs that are incurred regardless of whether work is currently being performed are especially important. However, employees may also incur unreimbursed expenses in connection with the services that they perform for their employer.

The extent of the worker's investment. An independent contractor often has a significant investment in the facilities or tools he or she uses in performing services for someone else. However, a significant investment is not necessary for independent contractor status.

The extent to which the worker makes his or her services available to the relevant market. An independent contractor is generally free to seek out business opportunities. Independent contractors often

advertise, maintain a visible business location, and are available to work in the relevant market.

How the business pays the worker. An employee is generally guaranteed a regular wage amount for an hourly, weekly, or other period of time. This usually indicates that a worker is an employee, even when the wage or salary is supplemented by a commission. An independent contractor is often paid a flat fee or on a time and materials basis for the job. However, it is common in some professions, such as law, to pay independent contractors hourly.

The extent to which the worker can realize a profit or loss. An independent contractor can make a profit or loss.

Type of relationship of the parties. Facts that show the parties' type of relationship include:

- **Written contracts describing the relationship the parties intended to create.**
- **Whether or not the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay.**
- **The permanency of the relationship.** If you engage a worker with the expectation that the relationship will continue indefinitely, rather than for a specific project or period, this generally considered evidence that your intent was to create an employer-employee relationship.
- **The extent to which services performed by the worker are a key aspect of the regular business of the company.** If a worker provides services that are a key aspect of your regular business activity, it is more likely that you will have the right to direct and control his or her activities. For example, if a law firm hires an attorney, it is likely that it will present the attorney's work as its own and would have the right to control or direct that work. This would indicate an employer-employee relationship. (*Emphasis in original*).

The above factors may not all apply to a particular situation; nonetheless, the factors are applied when relevant.

During the audit process, the auditor repeatedly requested Taxpayer provide verifiable supporting documents concerning its claim that those individuals were contractors. In other words, Taxpayer was required to demonstrate that it did not have (1) behavioral control, (2) financial control, and (3) employee-employer relationship with respect to those individuals. Taxpayer responded with several invoices and the individual business cards. The Department's audit was not able to verify the information provided.

Similarly, throughout the protest process, Taxpayer asserted that it issued 1099s to those individuals and submitted Form 1096, Annual Summary and Transmittal of U.S. Information Returns, to support its protest. However, the Form 1096 simply summarizes the total amount Taxpayer paid and did not have details to address (1) behavioral control, (2) financial control, and (3) employee-employer relationship with respect to those individuals. Thus, based on the information provided, the Department is not able to agree that those individuals were contractors.

Finally, whether those individuals had full-time employment somewhere else is irrelevant. The Department's Income Tax Information Bulletin 52 (August 2008), 20080827 Ind. Reg. 045080662NRA, outlines the tax withholding requirements from part-time, temporary, or seasonal employees, in relevant part, states:

I. WITHHOLDING OF TAX FROM PART-TIME, TEMPORARY, OR SEASONAL EMPLOYEES

Withholding agents are required to withhold both state income tax and county tax at the applicable rates stated on the rate schedules, from the income of all employees, **including part-time, temporary, and seasonal employees. The fact that the employee will not earn in excess of the \$1,000 exemption has no bearing on the withholding by the withholding agent. The Internal Revenue Service, which allows an employee to waive withholding for federal tax purposes when the income is not expected to exceed the federal filing requirements and income allowances, has no bearing on the withholding of taxes from the income of employees for Indiana tax purposes. (Emphasis added).**

Pursuant to the above-mentioned statutes and regulations, Taxpayer *shall* and thus is required to withhold taxes as prescribed. 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 of proof demonstrating that the audit assessment was incorrect.

In short, those individuals were Taxpayer's employees, not independent contractors. Taxpayer thus was required to have withheld state and county income taxes and remitted those taxes to the Department.

FINDING

Taxpayer's protest is respectfully denied.

II. Tax Administration - Interest and Negligence Penalty.

DISCUSSION

Taxpayer requested that the Department abate the statutory interest. However, pursuant to IC § 6-8.1-10-1(e), the Department is only permitted to waive the interest under IC § 6-8.1-3-17(c) and IC § 6-8.1-5-2. Taxpayer provided no documentation to support its request for the waiver. Thus, the Department does not have the authority to waive the interest imposed.

Taxpayer also requested that the Department abate the negligence penalty. The Department may assess a negligence penalty if the taxpayer "(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; [or] (4) fails to timely remit any tax held in trust for the state" IC § 6-8.1-10-2.1(a).

[45 IAC 15-11-2](#)(b) further states:

"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.

The Department may waive a negligence penalty when "the taxpayer affirmatively establishes that the failure . . . was due to reasonable cause and not due to negligence." [45 IAC 15-11-2](#)(c). 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." *Id.* The Department is mindful that "[r]easonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case."

In this instance, Taxpayer did not provide documents to affirmatively establish that its failure to pay tax was not due to negligence.

FINDING

Taxpayer's protest of the imposition of statutory interest and negligence penalty is denied.

SUMMARY

For the reasons discussed above, Taxpayer's protest of the Department's proposed assessment of additional tax is denied. Taxpayer's protest of the statutory interest and the negligence penalty is also respectfully denied.

March 2, 2021

Posted: 04/28/2021 by Legislative Services Agency
An [html](#) version of this document.