

**Letter of Findings: 03-20210005
Withholding Tax
For the Years 2019**

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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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; *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. Taxpayer was required to file its WH-3 annual withholding tax reports. Taxpayer has been filing its WH-3 since 2009. Taxpayer submitted its 2019 WH-3 late. Taxpayer was subsequently assessed a \$16,830 penalty for the late filing of its WH-3. Taxpayer protested the assessment but waived its right to an administrative hearing. This Letter of Findings results based on the information in the file. Further facts will be provided, as necessary.

I. Tax Administration - Penalty.

DISCUSSION

The Department assessed Taxpayer a \$16,830 penalty for filing its WH-3 return late. Taxpayer argued that it had issues uploading the information and has requested the Department waive the penalty. Taxpayer supported its argument stating that it did not have late filing issues with other entities and all payments were made on time. Further Taxpayer notes that it does not have a history of overdue or erroneous returns or payments.

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) states in relevant part 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 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.

Accordingly, in this instance, Taxpayer was required to file its 2018 WH-3 annual withholding tax report and the WH-3, *electronically*, on or before January 31, 2020, the statutory due date. Taxpayer admitted they filed the WH-3 on February 20, 2020 and that they were late. Nonetheless, Taxpayer requests the Department waive the penalty. While the Department appreciates Taxpayer's forthrightness, the fact remains that Taxpayer was late.

Therefore, pursuant to 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 WH-3 in an electronic format specified by the Department necessary to comply with the applicable IC § 6-3-4-16.5. The penalty under IC § 6-3-4-16.5 and IC § 6-8.1-10-6, was properly imposed. The Department does not have the statutory authority to abate the penalty.

FINDING

Taxpayer's protest is respectfully denied.

March 5, 2021

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