

Revenue Letter of Findings: 03-20231745
Withholding Tax
For the Years 2020 and 2021

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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

In part, the Department agreed with Indiana Employer that its submission of 1099s and W-2s, justified a review of the original withholding tax assessment. Indiana Employer failed to establish that the negligence penalty should be abated.

ISSUES

I. Withholding Tax - Imposition.

Authority: [IC 6-3-4-8](#); [IC 6-8.1-5-1](#); *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); *Indiana Dep't of State Rev. v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); [45 IAC 3.1-1-97](#).

Taxpayer argues that the audit's adjustment of Indiana and county withholding tax was overstated.

II. Tax Administration - Negligence Penalty.

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

Taxpayer protests the imposition of the negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana company in the business of selling used cars at four different locations.

The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's withholding tax returns and business records. During the course of the audit review, the Department arrived at two different conclusions.

The first conclusion was that Taxpayer withheld state and county income taxes but neither reported nor remitted the taxes withheld.

The second conclusion was Taxpayer failed to withhold state and county income taxes for certain employees. According to the Department's audit report, "[T]axpayer has full behavioral and financial control of its employees" based upon standards defined by the IRS. In certain instances, the Department found that Taxpayer issued Form 1099 Misc. instead of issuing those employees W-2 "Wage and Tax Statements." As such, the Department found that, "These are employees subject to withholding of income taxes."

The Department adjusted Taxpayer's records on workpapers labeled "Wages Per Audit," "Withholding Tax Adjustment Calculation," and "Withholding Reconciliations." These adjustments resulted in an assessment of tax, penalty, and interest of approximately \$40,000.

Taxpayer disagreed with the assessment and submitted a protest to that effect. The Department scheduled a phone hearing in order to permit Taxpayer's representative an opportunity to explain the basis for its protest.

This Letter of Findings is based upon the original audit report, Taxpayer's protest, and on information available to the Department.

I. Withholding Tax - Imposition.

DISCUSSION

The issue is whether Taxpayer has met its burden of establishing that the \$40,000 assessment is overstated, and that the assessment should be reduced to approximately \$15,000.

As a threshold issue, all tax, penalty, and interest 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 its challenge that the Department's assessment is wrong.

In assessing whether a taxpayer has met that burden, the Department bears in mind that 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). 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." *Indiana Dep't of State Rev. v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014).

Every employer is required to withhold taxes on payments of wages it pays to its employees pursuant to [IC 6-3-4-8\(a\)](#) (as in effect during July 1, 2021, to December 31, 2023), 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 rates of any income taxes that the taxpayer is subject to under [IC 6-3.5](#), 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 6-3.5](#) the employer is required to withhold. See also [IC 6-3-4-8\(a\)](#) (effective January 1, 2017, to June 30, 2021).

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.*

Taxpayer explains the purported audit errors.

(Employee One) Taxpayer states it is being charged tax, penalties, and interest for a particular employee and that Taxpayer correctly issued the individual a form 1099.

(Employee Two) The Department assessed tax, penalties, and interest for the Taxpayer's owner and that owner filed and paid Indiana individual income tax.

(Employee Three) The Department assessed tax, penalties, and interest for a particular third employee. According to Taxpayer, the Department double-counted the third employee's salary and "[Third Employee] did not ever live in [Indiana] County while he worked for [Taxpayer]."

(Employee Four) The Department assessed tax, penalty, and interest for a particular fourth employee. According to Taxpayer, the fourth employee "is listed on the [audit report] twice."

(Employee Five) The Department assessed tax, penalty, and interest for a fifth employee. The audit indicated that fifth employee was paid \$23,500 while the fifth employee was actually paid \$0. The error was attributable to Taxpayer's incorrect entry into a "Patriot Software" for which the owner "was not trained on how to use [this software] properly."

(Employee Six) The Department assessed tax, penalty, and interest for a sixth employee based on a purported salary of approximately \$29,000. According to Taxpayer, sixth employee's salary was actually \$0. Taxpayer explained that the sixth employee never did any work for Taxpayer because sixth employee "never came to work"

(Employee Seven) The Department assessed tax, penalty, and interest for a seventh employee. The Department erroneously attributed approximately \$65,000 in seventh employee's salary. According to Taxpayer, the seventh employee was the owner's sister who, never did any work, and was paid \$0.

Taxpayer also indicates that the Department assessed owner and employees one through seven with additional county income tax based on the Department's error in attributing two different salary amounts for each employee or for indicating that certain of the "employees" worked for Taxpayer and were paid wages/salaries.

The Department is unable to acknowledge certain aspects of Taxpayer's protest. Taxpayer states that accounting errors on its part led to portions of the assessment. Those errors include entering the names of persons who applied for employment but were never hired. Taxpayer states that these names were entered into the system's accounting system and then assigned the salaries associated with those prospective employees.

However, after reviewing Taxpayer's written protest and the records made available at the time of the original audit, The Department agrees that 1099s and W-2s warrant consideration, but any remaining assessment or adjustment will be based strictly on the documentation in front of it. To whatever extent these documents warrant, the Department will adjust the assessment to reflect that review.

FINDING

To the extent called for by the supplemental documentation, Taxpayer's protest is sustained.

II. Tax Administration - Penalties and Interest.

DISCUSSION

Taxpayer argues that it is entitled to an abatement of any interest or penalties associated with the original liability.

Taxpayer 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."

Under [IC 6-8.1-5-1\(c\)](#), "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." An assessment - including the negligence penalty - is presumptively valid.

In the case of the penalties, the Department finds itself unable to move beyond the fact that "taxpayer failed to file required returns" requiring the Department to prepare estimated returns. Try as one might, it is not possible to reconcile the "ordinary business care and prudence" standard with Taxpayer's failure to correctly file the returns.

In this instance, Taxpayer did not affirmatively establish that its failures to report withholding tax were not due to negligence.

In the case of the interest charges, the Department is unable to assist because under [IC 6-8.1-10-1\(e\)](#), the Department is unable to abate or refund any the interest charges.

FINDING

Taxpayer's protest is respectfully denied.

SUMMARY

Taxpayer is sustained on Issue I to the extent warranted by review of the supplemental documentation provided during the protest process. Taxpayer is denied on Issue II regarding the imposition of penalty and interest. However, penalty and interest will be recalculated to reflect an adjustment (if any) to base withholding tax as determined by review of the supplemental documentation, as determined in Issue I.

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Finding Replaces: New

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