

Letter of Findings: 03-20231592
Withholding Tax Penalty
For the Years 2019, 2020, 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

The Department agreed with Retailer that it provided sufficient evidence and explanation justifying an abatement of a negligence penalty because it acted in a business-like manner, was not willfully neglectful, and exercised ordinary business care in accounting for its employees' withholding tax.

ISSUE

I. Withholding Tax - Negligence Penalty.

Authority: [IC 6-3-4-8](#); [IC 6-8.1-5-1](#); [IC 6-8.1-10-2.1](#); *Indiana Dept. of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480 (Ind. Tax Ct. 2012); *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138 (Ind. Tax Ct. 2010); *Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); [45 IAC 15-11-2](#).

Taxpayer asks that the Department abate a ten-percent penalty on the grounds that Taxpayer acted reasonably and exercised ordinary business care despite its failure to account for county withholding tax that should have been withheld on behalf of certain employees.

STATEMENT OF FACTS

Taxpayer is an out-of-state retailer operating stores in Indiana and outside Indiana. The stores sell a broad range of goods to its customers. Taxpayer sells groceries, office supplies, construction materials, and the like.

The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's withholding tax and business records. In conducting that examination, the Department reviewed Taxpayer's W2 records (Wage and Tax Statements) and WH-4 records (Employee's Withholding Exemption and County Status Certificate).

The Department concluded that "[d]uring the audit period, the review of the [T]axpayer's W2s and WH-4 records revealed that county income taxes were not being withheld for some of the [T]axpayer's employees." As a result, the Department made "[a]n adjustment to assess the [T]axpayer the county income taxes that were not withheld from the employee wages in accordance with [IC 6-3-4-8](#)."

In addition, the Department's audit proposed "an adjustment to address the discrepancies between the WH-1s and the WH-3 for all years under audit." The WH-1 is a "Indiana Withholding Tax Voucher," and the WH-3 is Indiana's "Annual Withholding Tax Form."

As a result of this review, the Department issued proposed assessments of approximately \$70,000 in tax, \$3,400 in interest, and \$7,200 in penalties.

Taxpayer paid the tax, interest, and penalty assessments. Taxpayer disagreed with the \$7,200 penalty charge and now seeks a refund on the grounds that it acted in good faith, exercised due diligence, and its actions were without "willful neglect."

Taxpayer submitted a protest, and a hearing was conducted by telephone in order to allow Taxpayer's representatives an opportunity to explain the basis for its protest. This Letter of Findings results.

I. Withholding Tax - Negligence Penalty.

DISCUSSION

The issue is whether or not Taxpayer has met its burden of establishing that the ten-percent *penalty* should not have been assessed and that the Department should now refund that penalty.

The Department here points out that the tax and interest assessments are not at issue. Questions about WH-1s, W2s, WH-3s, WH-4s, and the like are not addressed here because those issues and questions have come and gone.

As with any assessment of Indiana listed taxes, it is Taxpayer's responsibility here to establish that the proposed penalty assessment was incorrect. As stated in [IC 6-8.1-5-1\(c\)](#) and Indiana case law, "The notice of proposed assessment is prima facie evidence that the [D]epartment's claim for the unpaid tax is valid, including during an action appealed to the tax court under this chapter. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *See also Indiana Dept. of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

If a taxpayer provides only a poorly developed or non-cogent argument, the Department will treat that argument as having been waived. *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).

Nonetheless, [IC 6-8.1-10-2.1\(d\)](#) states that, "If a person subject to the penalty imposed under this section can show that the failure to . . . pay the full amount of tax shown on the person's return . . . or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty."

Departmental regulation [45 IAC 15-11-2\(b\)](#) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case by case basis according to the facts and circumstances of each taxpayer." *Id.*

Departmental regulation [45 IAC 15-11-2\(c\)](#) requires that in order to establish "reasonable cause," 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. . . ."

Taxpayer points out that it operates more than 40 retail outlets employing more than 5,000 Indiana employees and that the Department found that "county withholding tax was not withheld on less than one percent of [its] Indiana employees." In addition, Taxpayer notes that the "Department did not find any discrepancies with respect to [Taxpayer's] state tax withholding tax"

As noted above, [IC 6-8.1-5-1\(c\)](#) requires that Taxpayer establish that the penalty was unwarranted. In this case, the Department and Taxpayer agree that Taxpayer erred in failing to account for employees' county withholding tax. However, there is insufficient information to establish that Taxpayer's actions were so egregious as to constitute "willful neglect." Based on a "case by case" analysis and after reviewing "the facts and circumstances of [Taxpayer]," the Department agrees that the penalty should be refunded.

FINDING

Taxpayer's protest is sustained.

December 19, 2023

Replaces Finding Document at: New

Posted: 02/28/2024 by Legislative Services Agency
An [html](#) version of this document.