

**Letter of Findings: 03-20200416**  
**Withholding Tax Penalty**  
**For the Year 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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**

The Department agreed with Indiana Contractor that it provided sufficient evidence and explanation justifying abatement of a late filing penalty because Contractor acted in a business-like manner and was not willfully neglectful.

**ISSUE**

**I. Withholding Tax - Late Penalty.**

**Authority:** IC § 6-8.1-5-1; IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#); DOR: *WH-3/W-D Withholding*, <https://www.in.gov/dor/business-tax/withholding-income-tax/wh-3w-2-withholding-tax-electronic-filing>.

Taxpayer asks that the Department abate a ten percent "late penalty" on the ground that Taxpayer acted reasonably and with good cause in failing to file its WH-3 withholding tax return in a timely manner.

**STATEMENT OF FACTS**

Taxpayer is an Indiana commercial contractor. According to publicly available information, Taxpayer provides its customers "drywall, fireproofing and plaster services."

Taxpayer routinely withholds income tax on behalf of its employees and submits WH-1 and WH-3 returns reporting that tax. During the year 2019, Taxpayer timely filed monthly (WH-1) returns. The yearly summary reconciliation return, (WH-3) which was due January 31, 2020, was not submitted until February 18, 2020. In other words, the WH-3 return was 18 days late.

As a result, the Department issued a ten percent proposed "late pay penalty" of approximately \$2,090. Taxpayer disagreed with the penalty and submitted a protest to that effect. In submitting its protest, Taxpayer indicated that it sought a "final determination without a hearing." This Letter of Finding results and is based on Taxpayer's protest submission and on the facts contained in the Department's own records.

**I. Withholding Tax - Late Penalty.**

**DISCUSSION**

The issue is whether Taxpayer has met its burden of establishing that - given the circumstances - the Department should exercise its authority to abate the ten-percent late penalty assessed Taxpayer.

Taxpayer argues that the penalty should be abated because, according to Taxpayer, the WH-3 return "is an informational form only and does not nor did it affect the timely payment of taxes detailed on this form by [Taxpayer]." In addition, Taxpayer points out that "[a]ll of the referenced taxes were timely paid monthly throughout all of 2019."

Indiana law imposes the ten percent "late payment" penalty as follows.

IC § 6-8.1-10-2.1 provides in part:

- (a) Except as provided in [IC 6-3-4-12\(k\)](#) and [IC 6-3-4-13\(l\)](#), a person that:

- (1) fails to file a return for any of the listed taxes;
- (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;
- (4) fails to timely remit any tax held in trust for the state; or
- (5) is required to make a payment by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)), overnight courier, or personal delivery, and the payment is not received by the department by the due date in funds acceptable to the department; is subject to a penalty.

(b) Except as provided in subsection (g), the penalty described in subsection (a) is ten percent (10[percent]) of:

- (1) the full amount of the tax due if the person failed to file the return;
- (2) the amount of the tax not paid, if the person filed the return but failed to pay the full amount of the tax shown on the return;
- (3) the amount of the tax held in trust that is not timely remitted;
- (4) the amount of deficiency as finally determined by the department; or
- (5) the amount of tax due if a person failed to make payment by electronic funds transfer, overnight courier, or personal delivery by the due date.

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

(d) If a person subject to the penalty imposed under this section can show that the failure to file a return, pay the full amount of tax shown on the person's return, timely remit tax held in trust, 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. (*Emphasis added*).

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 an assessment of a penalty - is presumptively valid.

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.*

IC § 6-8.1-10-2.1(d) allows the Department to waive the penalty upon a showing that the failure to pay the deficiency was based on "reasonable cause and not due to willful neglect." 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 states that the late-filed WH-3 was a one-time error on its part and that has "never missed a filing deadline for any payment or form in the past . . . ." With that in mind Taxpayer again "requests that this penalty be waived or significantly reduced."

The Department does not entirely agree with Taxpayer that the WH-3 filing is something of a meaningless formality. The Department has emphasized that "[a]ll employers *must file the WH-3* by January 31 each year. If you previously registered to file withholding tax, *you must still file Forms WH-1 and WH-3* for each period even if no tax is due or to report no employees for that time period." DOR: WH-3/W-D Withholding, <https://www.in.gov/dor/business-tax/withholding-income-tax/wh-3w-2-withholding-tax-electronic-filing> (Last visited February 16, 2022) (*Emphasis added*).

Taxpayer does have a well-earned reputation for timely filing numerous Indiana tax returns. However, it is not a perfect record. At Taxpayer's request, the Department previously abated a similar late penalty in 2015. Nonetheless, the Department acknowledges both its own discretionary responsibility and Taxpayer's reputation. The Department agrees that Taxpayer has met its burden of establishing that its failure to file and submit the WH-3 in a timely manner was not due to "willful neglect" and that Taxpayer has demonstrated that it "exercised ordinary business care" in filing the return. As a result, the Department agrees that the penalty should be abated.

## FINDING

Taxpayer's protest is sustained.

March 1, 2022

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