DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
Commissioner's Bulletin

Date: December 7, 2000
Subject: Scoring of hazardous substances response sites using the Indiana Scoring Model (ISM).
Authority: Title 329 IAC 7-2-3 Sec. 3 of the Indiana Register, sets forth guidelines for publishing sites that have been scored using the ISM.
File Repository: The public may inquire at the Department of Environmental Management, 100 North Senate Avenue, P.O. Box 6015, Indianapolis, Indiana 46206-6015, to review and/or obtain specific information regarding a particular site's scoring package. For further details contact the Office of Land Quality - Site Investigation Section - also located at the aforementioned address.
Introduction: The Indiana Scoring Model (ISM) is a method of prioritizing, for state response actions, those hazardous substances response sites that are not on the National Priorities List (NPL). The ISM serves as the Commissioner's management tool to address those sites which pose the most significant threat to human health and the environment in addition to assuring the department's resources are allocated accordingly.

Hazardous substances response sites that are evaluated utilizing the ISM are assigned a numerical score. Site scoring is a dynamic process and scores may be subject to change based on significant changes in site circumstances, receipt of additional site information, or other relevant factors.

The ISM combines three (3) scores assigned to a hazardous substance response site as follows:

(1) S_M reflects the potential for harm to humans or the environment from the migration of a hazardous substance away from the facility by routes involving groundwater, surface water, or air. It is a composite of separate scores for each of the three (3) routes.

(2) S_{FE} reflects the potential for harm from substances that can explode or cause fires.

(3) S_{DC} reflects the potential for harm from direct contact with hazardous substances at the facility, i.e., no migration need be involved.

The score for each hazardous mode (migration, fire and explosion, and direct contact) or route is obtained by considering a set of factors that characterize the potential of the facility to cause harm. Each factor is assigned a numerical value (on a scale of zero (0) to three (3), five (5), or eight (8)) according to prescribed guidelines. This value is then multiplied by a weighting factor yielding the factor score. The factor scores are then combined and scores within a factor category are added. Then total scores for each factor category are multiplied together to develop a score for groundwater, surface water, air, fire and explosion, and direct contact.

In computing an individual migration route score, the product of its factor category scores is divided by the maximum possible score, and the resulting ratio is multiplied by one hundred (100). The last step puts all route scores on a scale of zero (0) to one hundred (100).

In computing S_{FE} or S_{DC} the product of its factor category divided by the maximum possible score and the resulting ratio is multiplied by ten (10). The last step puts all S_{FE} or S_{DC} scores on a scale of zero (0) to ten (10).

S_M is a composite of the scores for the three (3) possible migration routes:

$$S_M = \frac{1}{1.73}\sqrt{S^2_{gw} + S^2_{sw} + S^2_a}$$

Where: S_{gw} = groundwater route score
S_{sw} = surface water route score
S_a = air route score

The effect of this means of combining the route scores is to emphasize the primary (highest scoring) route in aggregating route scores while giving some additional consideration to the secondary or tertiary routes if they score high. The factor 1/1.73 is used simply for the purpose of reducing S_M scores to a one hundred (100) point scale.

The ISM does not quantify the probability of harm from a facility or the magnitude of the harm that could result, although the factors have been selected in order to approximate both those elements of risk. It is a procedure for ranking facilities in terms of the potential threat they pose by describing:

(1) the manner in which the hazardous substances are contained;

(2) the route by which they would be released;

(3) the characteristics and amount of the harmful substances; and

(4) the likely targets.

The multiplicative combination of factor category scores is an approximation of the more rigorous approach in which one would express the hazard posed by a facility as the product of the probability of a harmful occurrence and the magnitude of the potential damage.

Sites may be deleted from the list if the combined score is less than or equal to five (5). For more information on the deletion process see 329 IAC 7-11-1 and 329 IAC 7-11-2.

The following list of sites have been scored using the ISM. The site scores and the corresponding scoring dates are based on the most recent available information.

COMMISSIONER'S BULLETIN

List of hazardous waste sites scored
using the Indiana Scoring Model (ISM)
www.state.in.us/idem/olq/programs/statecleanup

County/City Site Name (Type of Facility) Address	*score based on potential impact* Score Rescore	Score Date Rescore Date	Contaminant Type	Environment Affected	Status
Adams/Berne National Oil Company (Bulk Plant) SR 218 & CR 150W	20.97 -/-	May - 92	Fuel	Soil Surface water	Investigation in progress
Blackford/Montpelier G.S. Service Corp. (Commercial) 6659 N 450E	24.60 -/-	Jun - 93	Metals	Soil	Surface waste removed
Cass/Logansport Midwest Plating #2 (Industrial) 2nd & Spear	30.07 -/-	Dec - 90	Metals	Soil	To be delisted 01/02/2001
Delaware/Albany Muncie Race Track (Dump) SR 67 & 700N	27.70 -/-	Feb - 91	Metals Solvents PCBs	Soil Groundwater	Waste isolated Landfill capped
Delaware/Muncie Stout Storage Battery (Industrial) 2505 West 8th	26.22 11.21	Dec - 90 May - 99	Lead	Soil	Cleanup Complete
Elkhart/Elkhart Federal Paper Board (Industrial) 600 Division	23.41 -/-	Mar - 91	Solvents Fuel	Soil Groundwater Surface Water	Cleanup in progress
Elkhart/Elkhart Lusher Avenue (Landfill) CR 18 & 21st St	31.00 -/-	Feb - 91	Solvents	Soil Groundwater	Residential water filters installed
Elkhart/Elkhart Sycamore Street Site (Drycleaner) 100 Sycamore	13.13 -/-	May - 91	Solvents	Groundwater	Alternate water supplied Delisting evaluation proposed 2001

Elkhart/Middlebury					
Universal Adhesives/Timminco	25.00	Dec - 90	Solvents	Soil	Cleanup completed
(Industrial)	-/-			Groundwater	Delisting evaluation proposed 2001
SR 13 South					
Fayette/Connersville					
Connersville Landfill	44.60	Feb - 91	Solvents	Soil	Waste study in progress
(Landfill)	-/-		Metals	Surface water	
SR 121 & Eastern Ave				Groundwater	
Franklin/Laurel					
Laurel Dump Site #1	20.89	Mar - 92	Solvents	Soil	Surface waste removed
(Dump)	-/-		Metals	Surface water	Delisting evaluation proposed 2001
24128 Old US 52				Groundwater	
Gibson/Princeton					
Indiana Refining	30.03	Dec - 90	Fuel	Soil	Surface waste removed
(Industrial)	-/-				Delisting evaluation proposed 2001
US 41 and 350 S					
Grant/Marion					
Grant County Landfill	15.48	Apr - 91	Metals	Soil	Ongoing investigation
(Landfill)	-/-			Groundwater	
750 E & SR 18					
Hancock/Fortville					
Meridian Road Landfill	40.16	Dec - 90	Solvents	Soil	Investigation complete
(Landfill)	-/-		Metals	Groundwater	Cleanup in progress
CR 1000 N and Meridian					
Hendricks/Clayton					
Clayton Wells	27.00	Dec - 90	Solvents	Groundwater	Filters supplied
(Commercial)	-/-				Periodic monitoring
Kentucky St					
Howard/Kokomo					
Midwest Plating	12.10	Dec - 90	Metals	Soil	To be delisted 01/02/2001
(Industrial)	0.00	Aug - 00	Solvents		
1509 N Washington					
Huntington/Huntington					
Huntington Terminals	28.90	Dec - 90	Fuel	Groundwater	Alternate water supplied
(Pipeline)	-/-				
Meridian & Erie Stone					
Jackson/Reddington					
Texas Eastern	26.26	Dec - 90	Fuel	Soil	
(Petroleum pipeline)	-/-			Groundwater	Cleanup in progress under Agreed Order
SW of Reddington					

Jackson/Medora United Plastics (Manufacturing) SR235 & 2nd Street	39.00 -/-	Jan - 91	Solvents Metals	Soil Groundwater	Waste removal in progress
Kosciusko/Warsaw Warsaw Chemical (Chem-Manufacturing) Argonne & Durban Street	47.45 -/-	Jan - 91	Solvents	Soil Groundwater	Cleanup in progress under Agreed Order
Lake/Hammond Calumet Containers (Industrial) 3631 Stateline Road	16.07 -/-	Dec - 90	Solvents	Soil	Removal completed by USEPA Confirmation sampling planned Delisting evaluation proposed 2001
Lake/East Chicago Energy Cooperative Inc. (Industrial) 3500 Indianapolis Blvd	19.87 -/-	Dec - 90	Fuel Lead	Soil Surface water Groundwater	Cleanup in progress under AO
Lake/Hammond J & L - Amoco (Refinery) Lake Ave & 129 Street	18.59 -/-	Mar - 91	Fuel Acid/bases Lead	Soil	Cleanup through RCRA Corrective Action
Lake/Cedar Lake Schreiber Oil Company (Petroleum Storage) 10601 W 133rd St	13.48 -/-	Dec - 90	Fuel	Soil	Surface waste removed
Lake/Hammond William Powers (Dump) 119th & Stateline	18.88 -/-	Mar - 91	Cyanide Sulfide	Soil Surface water	Confirmation sampling planned Delisting evaluation proposed 2001
Lawrence/Oolitic Oolitic Dump (Dump) Hoosier & 4th St	48.87 -/-	Jan - 91	Fuel	Soil Groundwater	Cleanup in progress under LUST
Madison/Anderson Prime Battery (Manufacturing) 230 Jackson	29.52 -/-	Dec- 91	Lead	Soil Groundwater	Removal completed Delisting evaluation proposed 2001
Marion/Indianapolis American Lead (Industrial) 2102 Hillside Avenue	21.78 -/-	Jun - 99	Lead	Soil	Agreed Order signed Ongoing investigation
Marion/Indianapolis Avanti Corporation (Industrial) South Harris Street	40.05 23.09	May - 93 Oct - 98	Lead	Soil Groundwater Surface Water	Surface waste removed

Marion/Indianapolis					
M Metal Co. Inc.	29.03	Oct - 91	Metals	Soil	Surface waste removed
(Industrial)	9.31	Feb - 99	PCBs		
1328 Dawson					
Marion/Indianapolis					
Marathon Rock Island	15.22	Jan - 91	Gasoline	Soil	Waste cleanup in progress under EPA
(Industrial)	-/-		Metals	Surface water	RCRA authority
500W 86th Street				Groundwater	
Marion/Speedway					
Marathon Terminal	21.04	Apr - 91	Fuel	Soil	Cleanup in progress
(Industrial)	-/-			Surface water	Multiple recovery wells
1304 Olin				Groundwater	SVE system in place
Marshall/Bourbon					
Bourbon Quad & Cont.	25.86	May - 92	Solvents	Soil	Cleanup in progress under LUST
(Commercial)	-/-		Fuel	Groundwater	
Bourbon and Quad Street					
Montgomery/Crawfordsville					
Crawfordsville Scrap & Salvage	29.67	Oct - 93	PCBs	Soil	Entered voluntary program
(Dump/Scrap)	-/-		Lead	Sediments	
419 N Green Street					
Montgomery/Crawfordsville					
P.R. Mallory	22.23	Sep - 91	PCBs	Soil	
(Electrical)	-/-			Sediments	Some surface waste removed by USEPA
SR 32 East					
Montgomery/Crawfordsville					
Shelly Ditch	24.04	Aug - 99	PCBs	Soil	Waste study in progress under
(Industrial)	-/-			Sediments	Superfund
1204 Darlington Avenue					
Morgan/Monrovia					
Davenport Dump	28.20	Dec - 90	Solvents	Surface water	Additional investigation planned
(Dump)	23.20	Jul - 00			
Hwy 67					
Porter/Wheeler					
Wheeler Landfill	31.19	Jan - 92	Solvents	Groundwater	Long-term monitoring under RCRA
(Landfill)	-/-		Caustics		Corrective Action
SR 130 & Jones Road					
Randolph/Union City					
A.O. Smith (Westinghouse)	44.67	Feb - 92	PCBs	Soil	Surface waste removed by IDEM
(Industrial)	-/-			Groundwater	Agreed Order pending
Frank Miller Road					

Randolph/Union City Little Mississenewa River (River) Frank Miller Road @ Little Mississenewa	31.37 -/-	Jul - 99	PCBs	Surface water Sediments	Agreed Order pending
Randolph/Union City UTA (Industrial) 1425 West Oak	33.70 -/-	Sep - 99	PCBs	Soil Groundwater	Agreed Order pending
St. Joseph/Granger Amoco/Granger (Industrial) Adams Road	54.76 26.02	Dec - 90 Jan - 96	Fuel Solvents	Groundwater	Cleanup in progress Agreed Order signed
St. Joseph/South Bend Allied Signal Corporation (Industrial) 717 N Bendix Drive	41.75 -/-	May - 92	Solvents Fuel	Soil Groundwater	Entered voluntary program
St. Joseph/South Bend ARCO (Industrial) 20630 West Ireland	46.74 -/-	Jul - 99	Fuel	Soil Groundwater	Remedial investigation in progress
St. Joseph/South Bend Avanti (Industrial) 765 S Lafayette Road	27.60 28.28	Mar - 90 Mar - 92	Solvents	Soil Groundwater	Drum removal complete Remedial investigation in progress
St. Joseph/South Bend Chippewa Avenue Well Field (Industrial) 600 W Chippewa	50.38 -/-	Aug - 99	Solvents	Groundwater	Remedial investigation in progress Cleanup in progress
St. Joseph/South Bend Toro-Wheelhorse (Industrial) 515 W Ireland Rd	29.89 -/-	Mar - 93	Solvents Metals	Soil Groundwater	Entered voluntary program
Shelby/Shelbyville Knauf Fiberglass (Industrial) 240 Elizabeth	43.86 17.85	Mar - 91 Mar - 94	Solvents	Groundwater Surface water	Cleanup Complete No further action
Shelby/Shelbyville IGC/PSI (Industrial) Noble Street	19.06 -/-	Mar - 91	Fuel by-products Cyanide	Soil Groundwater	Ongoing investigation

Shelby/Shelbyville					
Shelbyville Well Field	19.06	Jan - 96	Solvents	Groundwater	Well field relocated
(Municipal)	-/-				Delisting evaluation proposed 2001
Noble and Elizabeth Streets					
Shelby/Shelbyville					
TRW Inc.	42.83	Dec - 90	Solvents	Soil	Risk assessment in progress
(Industrial)	9.17	Mar - 94		Groundwater	Cleanup in progress
630 Noble/513 Hendricks					
Spencer/Troy					
Freeman Kline Site/Troy Refinery	31.17	Jun - 97	Petroleum	Soil	Immediate removal completed
(Refinery)	-/-			Surface water	Investigation in progress
SR 70 East				Groundwater	
Steuben/Jamestown					
Mud Lake Site	18.30	Dec - 90	Metals	Soil	Removal completed
(Dump)	-/-		Fuel		Confirmatory sampling planned
CR 200N & Interstate 80					Delisting evaluation proposed 2001
Sullivan/Dugger					
Dugger Electric	25.82	Feb - 91	Petroleum	Groundwater	Monitoring
(Commercial)	-/-		PCBs		
First and Main Streets					
Tippecanoe/Lafayette					
ALCOA	19.44	Dec - 90	PCBs	Soil	Ongoing investigation
(Industrial)	-/-			Sediments	
3131 E Main					
Tippecanoe/Lafayette					
Indiana Gas	44.35	Dec - 91		Soil	Cleanup complete
(Industrial)	39.65	Jul - 99	Fuel by-products	Groundwater	Long term monitoring
600 N 4th St			Cyanide		
Tippecanoe/Lafayette					
TRW/Ross Gear	58.54	Dec - 90	Solvents	Soil	Cleanup complete under Agreed Order
(Industrial)	42.60	Jan - 96		Groundwater	
800 Heath Street					
Vigo/Terre Haute					
J.I. Case	31.77	Dec - 90	Solvents	Groundwater	Agreed Order signed
(Industrial)	-/-				Pilot groundwater cleanup project in place
4901 N 13th Street					
Warrick/Booneville					
Booneville Mining Ser.	12.66	Feb - 91	Metals	Soil	Further investigation planned
(Mining)	-/-			Groundwater	Groundwater monitoring in progress
110 W Division Street					

Wayne/Richmond					
Dana/Springwood Park	43.17	Jan - 91	Solvents	Groundwater	Cleanup in progress under voluntary
(Industrial)	-/-				program and solid waste program
Williamsburg Pike					
Wells/Petroleum					
Merrill Meyers Prop.	25.26	Feb - 92	PCBs	Soil	
(Farm Equipment)	-/-				Immediate removals investigation pending
SR 1 & CR 900					
White/Monon					
Monon Well Field	28.40	Dec - 90	Solvents	Soil	Consent Order signed
(Commercial)	-/-			Groundwater	Air stripper in operation
Main St					

5 sites were deleted from the Commissioner's Bulletin in 2000

DEPARTMENT OF STATE REVENUE
COMMISSIONER'S DIRECTIVE #4
Revised November, 2000
(replaces Directive #4 dated August 16, 1983)

Disclaimer: Commissioner's directives are intended to provide non-technical assistance to the general public. Every attempt is made to provide information that is consistent with the appropriate statutes, rules, and court decisions. Any information that is inconsistent is not binding on either the Department or the taxpayer. Therefore, the information provided in this directive should serve only as a foundation for further investigation and study of the current law and procedures covered here.

Subject: Collection of Tax From Transient Merchants

References: IC 6-2.1-2; IC 6-2.1-5; IC 6-2.5-2; IC 6-2.8-8; IC 6-3-4; IC 6-3-5; IC 6-8-1; IC 6-8.1-5; IC 25-37-1

Introduction: The purpose of this directive is to outline the Department's position on the collection of sales tax, gross income tax, and adjusted gross income tax, from transient merchants.

Sales Tax: Under IC 6-2.5-2-2, a 5% sales tax is imposed on retail merchants' transactions which constitute selling at retail. Generally, before selling at retail in Indiana, a merchant is required to obtain a Registered Retail Merchant Certificate under IC 6-2.5-8. Retail merchants which have no certificate (or an invalid one) are subject to imprisonment and a fine (Class B misdemeanor). Finally, failure to remit any taxes collected by any retail merchant may also subject the merchant to a longer prison term and a higher fine (Class D felony). These criminal penalties are in addition to the civil sanctions and procedures described below.

However, in lieu of a Registered Retail Merchant Certificate, a "transient merchant" (defined in IC 25-37-1 as someone who engages in temporary business in Indiana) must obtain a transient merchant license from the county auditor of the county in which the merchant intends to do business. Ten days before applying to the auditor for a license, the merchant must send a written notice to the Department. The notice in general must contain the following:

(1) The period of time and the location from which the merchant intends to transact business;

(2) The approximate value of the items to be offered for sale;

(3) Any other information requested by the Department or required by Departmental rule.

If the transient merchant does not hold a valid certificate or license, any tax collected by the merchant is to be paid to a Department representative on request. If the merchant fails to remit the tax collected based on his sales, a notice of tax due will be issued, based on the best information available. Failure to pay the tax due will result in the issuance of a warrant, to be served on the transient merchant the next time the merchant is in the state. Refusal to pay the warrant can result in levy and execution on the merchant's property. These civil sanctions and procedures are in addition to the criminal penalties described above.

Gross Income Tax: Under IC 6-2.1-2-2, a tax is imposed on the taxable gross income of nonresident corporations derived from activities within Indiana. The rate of the gross income tax is three-tenths of one percent (.003%).

Under IC 6-2.1-5-1.1, a taxpayer is required to file a quarterly gross income tax return if his estimated liability exceeds $1,000 in any year. However, IC 6-8.12-5-3 allows the Department to make an immediate assessment of tax, interest, and penalties if it is determined that a taxpayer intends to: depart the state, remove his property, conceal his person or property, or to do any thing to

jeopardize, prejudice, or render ineffective, proceedings to collect the tax. If the tax is not paid upon demand, a warrant will be issued. This warrant will be served on the taxpayer the next time the taxpayer is in the state. Refusal to pay the warrant can result in levy and execution on the taxpayer's property.

Any tax paid under the above-cited law which is found to be in excess of the amount due may be claimed as a refund under IC 6-8-1-9.1.

Individual Income Tax: Under IC 6-3-2-1, a tax is imposed on nonresidents' adjusted gross income derived from sources within Indiana. While IC 6-3-5-1 provides that nonresidents from states having reciprocal agreements with Indiana are not subject to Indiana adjusted gross income tax, such reciprocal agreements only apply to salaries, wages, tips and commissions. Therefore, this Indiana Code section is not applicable to proceeds from transient merchant sales.

Under IC 6-3-4-4.1, a taxpayer is required to make a declaration of estimated tax if the taxpayer expects to owe $400 or more income tax on the income from which tax is not withheld under IC 6-3-4-8. IC 6-8.1-5-3, however, allows the Department to make an immediate assessment of tax, interest and penalties for the same reasons outlined under "Gross Income Tax", above. The warrant procedure will be used if the tax is not paid on demand.

Any taxes paid under preceding statutory provisions which are found to be in excess of the amount due may be claimed as refunds under IC 6-8.1-9-1.

Kenneth L. Miller, Commissioner
Indiana Department of State Revenue

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #2
Sales Tax
November 2000
(replaces bulletin #2 dated August 1991)

DISCLAIMER: Information bulletins are intended to provide nontechnical assistance to the general public. Every attempt is made to provide information that is consistent with the appropriate statutes, rules and court decisions. Any information, which is not consistent with the law, regulations, or court decisions is not binding on either the Department or the taxpayer. Therefore, the information provided herein should serve only as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein.

SUBJECT: Warranties and Maintenance Contracts

REFERENCE: IC 6-2.5-2-1; IC 6-2.5-3-2; IC 6-2.5-4-1; 45 IAC 2.2-4-2

Original Warranties or Dealer Warranties

Original warranties or dealer warranties warranting the condition of a product and providing that maintenance or replacement parts will be done for either no charge or a flat charge are subject to sales tax. Original warranties and dealer warranties are not offered as an option when the product is sold and are considered part of the selling price of the product. Any parts transferred to a buyer under the terms of original or dealer warranty are not subject to the sales tax because the parts and or property are considered to have been sold with the product as a part of the retail transaction on which sales tax was collected. Examples:

1. An automobile dealer sells an automobile for $20,000. Included in the selling price is a warranty that will cover any repairs for two years or 20,000 miles. This warranty is an original or dealer warranty. Tax is collected on the full $20,000.

2. Same warranty as in Example 1 above. The automobile needs a new engine after 5,000 miles and six months of driving. The dealer must provide and install the engine under the terms of the warranty. No sales tax is due on the price of the engine since tax was collected on the warranty when the automobile was purchased.

Optional Extended Warranties and Maintenance Agreements

Optional extended warranties and maintenance agreements may either be purchased alone, or purchased as an option with the sale of the covered product. Typically, the terms of these agreements provide assurances that any required service and parts will be provided in the event of a break down or malfunction of the covered product. However, some of these agreements also contain provisions for periodic inspection or preventative maintenance activities where tangible personal property will be supplied as a part of the unitary price.

Optional warranties and maintenance agreements that only contain the intangible right to have property supplied and there is no certainty that property will be supplied are not subject to sales tax. Any parts or tangible personal property supplied pursuant to this type of agreement are subject to use tax. The supplier of the parts or property would be liable for the use tax on the parts or property because the supplier is using the material to fulfill the service called for by the terms of the warranty or maintenance agreement. A merchant that maintains an inventory of parts for resale and uses some of the parts in fulfilling the terms of the warranty or maintenance agreement should self assess use tax on any parts so used. Example:

3. Same facts as in Examples 1 and 2 above, except that the automobile dealer offers to extend the warranty on the automobile for three additional years or 30,000 additional miles for a price of $1,500. This type of warranty is optional to the purchase price.

There is no certainty that any parts will be supplied to the buyer under the terms of the warranty, thus sales tax should not be collected on the additional $1,500. The automobile dealer is liable for the use tax on any parts or property subsequently transferred to the buyer under the terms of the warranty or maintenance agreement.

Optional warranties and maintenance agreements that also contain provisions for periodic services where tangible personal property will be supplied as a part of the unitary price fall within the ambit of Rule 45 IAC 2.2-4-2. This Rule, interpreting IC 6-2.5-4-1, states that where in conjunction with rendering services a service provider also transfers tangible personal property for a consideration, this will constitute a retail transaction unless:

1. The service provider is in an occupation that primarily furnishes and sells services, as distinguished from tangible personal property;
2. The tangible personal property is used or consumed as a necessary incident to the service;
3. The price charged for the tangible personal property is inconsequential (not to exceed 10%) compared with the service charge; and
4. The service provider pays gross retail tax or use tax upon the tangible personal property at the time of acquisition.

IC 6-2.5-2-1 imposes the state gross retail tax on retail transactions made in Indiana. If the provisions contained in the warranties or agreements are in complete compliance with all provisions of Rule 45 IAC 2.2-4-2, then the periodic transfer of tangible personal property will not constitute a transaction of a retail merchant constituting selling at retail. If such is the case, the service provider is not obligated to collect sales tax on the unitary price of the warranties or maintenance agreements. However, the service provider of the parts or property would be liable for the use tax on the parts or property because the service provider is using the material to fulfill the service called for by the terms of the warranty or maintenance agreement.

If the provisions contained in the warranties or agreements are not in complete compliance with all provisions of Rule 45 IAC 2.2-4-2, this will constitute a transaction of a retail merchant selling at retail. Thus, the service provider must collect sales tax on the unitary price pursuant to IC 6-2.5-2-1. Any tangible personal property subsequently transferred to the buyer under the terms of the warranty or maintenance agreement is not subject to sales tax.

Examples:

4. A computer software company sells a taxable software package to a customer. The customer also purchases an optional maintenance agreement from the company. The maintenance agreement entitles the customer to up to twenty hours of programmer help to deal with any problems the customer might have in using the software package. The maintenance agreement also entitles the customer to periodic software updates. The computer software company calculates that the price charged for the software updates is 5% compared with the service charge. The software maintenance agreement is not subject to sales tax.

5. An office supply company sells a photocopy machine to a customer. The customer also purchases an optional maintenance agreement from the company. The maintenance agreement entitles the customer to service and parts at no charge in the event of a breakdown of the photocopying machine. The agreement also provides for quarterly inspections, replacement of the drum after 100,000 copies have been made, and toner to be provided on an as needed basis. The office supply company calculates that the price charged for the above tangible personal property is 35% compared with the service charge. The sale of the maintenance agreement is a transaction of a retail merchant selling at retail and is subject to the collection of sales tax

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #14
Income Tax
November 2000
(Replaces Information Bulletin #14, dated January 1985)

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SUBJECT: Income Tax Credit for Donations to Colleges

REFERENCE: IC 6-3-3-5

INTRODUCTION:

The purpose of this Bulletin is to briefly summarize the provision in the Adjusted Gross Income Tax law which provides taxpayers a credit for any contribution made to an institution of higher education that is located in the State of Indiana.

I. ELIGIBLE INSTITUTIONS

The Department will recognize credits taken on individual and corporate tax returns for contributions made to an eligible institution or to any corporation or foundation organized and operated solely for the benefit of the institution of higher education.

II. DEFINITION OF "INSTITUTION OF HIGHER EDUCATION"

The term "institution of higher education" means any educational institution located within Indiana:

(1) which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on;

(2) which regularly offers education at a level above the twelfth grade;

(3) which regularly awards either associate, bachelors, masters, or doctoral degrees, or any combination thereof; and

(4) which is duly accredited by the North Central Association of Colleges and Schools, the Indiana state board of education, or the American Association of Theological Schools.

III. TAX CREDIT FOR CONTRIBUTIONS BY INDIVIDUALS

Individuals are allowed a tax credit against their adjusted gross income tax liability for contributions made to an institution of higher education. The amount of the individual's credit is fifty percent (50%) of the total amount given during the tax year. The credit may not exceed the lesser of: 1) $100 for a single return or $200 for a joint return; or 2) the adjusted gross income tax liability on any return less the credit for taxes paid to other states, the twenty first century scholars program, the unified tax credit for the elderly, and the enterprise zone credit.

IV. TAX CREDIT FOR CONTRIBUTIONS BY CORPORATIONS

Corporations are allowed a tax credit against their adjusted gross income tax liability or their gross income tax liability for contributions made to an institution of higher education.

The amount of a corporation's credit is equal to fifty percent (50%) of the total amount given during the tax year. However, the credit may not exceed the lesser of: 1) ten percent (10%) of the corporation's adjusted gross income tax liability, or 2) the amount of one thousand dollars ($1,000).

V. COMPUTATION SCHEDULE

Schedule CC-40 must be attached to the taxpayer's income tax return to substantiate the credit. Schedule CC-40 is used to calculate the allowable credit, and to list eligible institutions to which the contribution could have been made, the date of the contribution, and the amount of the contribution. Schedule CC-40 is available upon request from the Department, and on the Department's web site (www.ai.org/dor/pubs).

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #26
Income Tax
November 2000
(Replace Information Bulletin #26, dated October 1997)

DISCLAIMER: Information bulletins are intended to provide nontechnical assistance to the general public. Every attempt is made to provide information that is consistent with the appropriate statutes, rules, and court decisions. Any information that is inconsistent with the law, regulations, or court decisions is not binding on either the Department or the taxpayer. Therefore, the information provided in this Bulletin should only serve as a foundation for further investigation and study of the current law and procedures related to this subject matter.

SUBJECT: General Information Concerning Filing Requirements and Specific Tax Benefits Available to the Elderly

REFERENCE: IC 6-3-1-3.5; IC 6-3-2-3.7; IC 6-3-2-4; IC 6-3-3-9; IC 6-3.5-1.1-7; IC 6-3.5-6-24; IC 6-3.5-7-9

INTRODUCTION

Elderly taxpayers have many Indiana tax advantages available to them. The purpose of this bulletin is to highlight those advantages. The first part of the bulletin discusses the filing requirements that are necessary for the elderly and whether or not they are required to file an annual income tax return.

I. FILING REQUIREMENTS

The first step in determining whether an individual needs to file an Indiana return is to determine the residency status for the year. A taxpayer is considered a full - year resident if the taxpayer maintained a legal residence in Indiana for the entire year. A taxpayer does not have to be physically present in Indiana the entire year to be considered a full - year resident. If the taxpayer is a resident and the total value of personal, elderly and blind exemptions exceeds the taxpayer's federal adjusted gross income before deductions, the taxpayer does not have to file an annual income tax return. If the taxpayer is not required to file, but has withholding for Indiana state and local taxes, the taxpayer may file a return to claim a refund for taxes withheld.

NOTE: A taxpayer might not be required to file a federal return because the standard deduction amount and the number of exemptions exceed the taxpayer's gross income. However, this does not automatically mean that the taxpayer is not required to file an Indiana resident return.

If the taxpayer was a part - year resident, and the taxpayer had Indiana source income, the taxpayer must file an IT-40PNR (Part

Year Nonresident Return).

II. EXEMPTIONS

Indiana allows:

- a one thousand dollar ($1,000) exemption for each exemption claimed on the federal return;
- one thousand five hundred dollars ($1,500) for certain dependent children;
- one thousand dollar ($1,000) personal exemption for the taxpayer and spouse if they are over 65;
- one thousand dollar ($1,000) exemption for the taxpayer or spouse if they are blind; and
- five hundred dollars ($500) additional exemption for each individual age 65 or older if the federal adjusted gross income is less than forty thousand dollars ($40,000).

III. TAXABLE VERSUS NONTAXABLE INCOME

Taxable income includes, but is not limited to, income from the following sources:

Wages	Rental Income
Salaries	Farm Income
Commissions	Business Income
Tips	Pensions (taxable portion)
Interest	Annuities (taxable portion)
Dividends	Partnership/Shareholder Income
Royalty Income	Gain from sale or exchange of property

Nontaxable income would include, but is not limited to, income from the following sources:

Social Security
Railroad Retirement Benefits
Life Insurance Proceeds

The federal government taxes a portion of social security and railroad retirement benefits. Indiana allows a tax deduction for any social security or railroad retirement benefits included in federal adjusted gross income. Indiana also allows a deduction for a portion of unemployment compensation benefits received. For more information on taxation of unemployment compensation see Income Tax Information Bulletin #60.

IV. LIABILITY FOR COUNTY TAX

If the taxpayer's place of residence or principal place of work activity on January 1 was an Indiana county that had adopted the county adjusted gross income tax, county option income tax, or the county economic development income tax, the taxpayer may owe a county tax. The county tax schedule is included in the tax return booklet with a list of the adopting counties and their respective rates.

V. ADJUSTMENTS TO INDIANA INCOME

If a taxpayer is required to file an Indiana tax return, the taxpayer may be eligible for certain adjustments to Indiana income.

Civil Service Annuity Deduction

A taxpayer who is at least sixty-two (62) by the end of the taxable year may be allowed a deduction from adjusted gross income equal to the first two thousand dollars ($2,000) received during the taxable year from a Federal civil service annuity included in adjusted gross income. This annuity must be reduced by the total amount of any Social Security Benefits and Railroad Retirement Benefits received during the taxable year.

EXAMPLE: A taxpayer who received six thousand dollars ($6,000) in Federal civil service annuity benefits, and one thousand five hundred dollars ($1,500) in Social Security benefits will be allowed a five hundred dollar ($500) civil service annuity adjustment.

Military Retirement Pay Adjustment

A taxpayer who is at least sixty (60) years old by the end of the taxable year, or the taxpayer's surviving spouse, may qualify for a military retirement pay deduction. This deduction is limited to the first two thousand dollars ($2,000) of retirement or survivor's benefits received during the taxable year by the individual or the individual's surviving spouse for service in an active or reserve component of the armed forces.

Homeowner's Residential Property Tax Deduction

A taxpayer is eligible for an income tax deduction equal to the lesser of two thousand five hundred dollars ($2,500) or the amount of property taxes that are paid during the taxable year in Indiana by the individual, on the individual's principal place of residence.

Renter's Income Tax Deduction

A taxpayer is eligible for an income tax deduction if the taxpayer rents a dwelling for his principal place of residence. The deduction is equal to the lesser of the amount of rent actually paid, or two thousand dollars ($2,000).

VI. CREDITS AVAILABLE TO THE ELDERLY

Unified Tax Credit for the Elderly

An individual is eligible for the Unified Tax Credit for the Elderly if the individual meets all of the following requirements:

1. Taxpayer and/or spouse must be at least 65 by the end of the taxable year.
2. The taxpayer and spouse must file a join return if they lived together at any time during the taxable year.

3. The federal adjusted gross income must be less than ($10,000).

4. The qualifying taxpayer and/or spouse must have been a resident of Indiana at least six months during the taxable year.

A claim for this credit must be made by June 30 following the close of the taxable year. After June 30, no credit or refund will be allowed.

This credit can be claimed on the IT-40 or the IT-40PNR. If the income is under the limits that require the filing of an income tax return, but the taxpayer and/or spouse meets the qualifications to claim the credit, the credit can be claimed by filing a Form SC-40. The credit cannot be claimed on the behalf of a decedent unless the claim is filed by the surviving spouse on a joint return. If an individual is imprisoned for more than one hundred eighty (180) days during the taxable year, the individual is not eligible for the credit.

The amount of credit that may be claimed depends on the income and filing status of the taxpayer. Use the table below to calculate the amount of the credit.

If the taxpayer is filing a single return and is age 65 or older, or if the taxpayer is filing a joint return and only the taxpayer or spouse is over 65, use the following table.

If your income is:	Allowable credit
Less than $1,000	$100
Between $1,000 and $2,999	$ 50
Between $3,000 and $9,999	$ 40

If the taxpayer and spouse are filing a joint return and both are 65 or older, use the following table.

If your income is:	Allowable credit
Less than $1,000	$140
Between $1,000 and $2,999	$ 90
Between $3,000 and $9,999	$ 80

VII. CREDIT AGAINST COUNTY TAXES

If a taxpayer qualifies for the Federal Elderly Credit on Schedule R and is subject to county tax (CAGIT, COIT, or CEDIT), the taxpayer will be allowed a credit against the county tax.

The credit is the lesser of:

1. The product of:
   A) the amount of federal credit for the elderly; multiplied by
   B) a fraction, the numerator of which is the county tax rate, and the denominator of fifteen hundredths (0.15); or
2. The amount of county tax imposed on the county taxpayer.

If you need additional information concerning credits for the elderly, contact the Department of Revenue. The Department's web site is (www.state.in.us/dor).

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #38
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SUBJECT: Renter's Deduction

REFERENCE: IC 6-3-2-6

INTRODUCTION

Indiana residents who rent their dwelling and use it as their principal place of residence are allowed a deduction from adjusted gross income if the dwelling is subject to Indiana property tax. This deduction applies to both rent paid on a single family dwelling and any unit of a multiple family dwelling.

I. LIMITATION OF DEDUCTION:

The renter's deduction is limited to the actual amount of rent paid or two thousand dollars ($2,000), whichever is less.

EXAMPLE: Taxpayer A paid rent totaling twelve hundred dollars ($1,200) during the year. Because his total rent was less than the two thousand dollar ($2,000) limitation, he may deduct $1,200 on his return.

EXAMPLE: Taxpayer B paid rent totaling $2,400 during the year. Since the total rent exceeded the $2,000 limitation, the taxpayer may deduct $2,000 on the return.

EXAMPLE: If the taxpayer's payment includes items other than rent for the dwelling, the total payment must be segregated and the portion attributed to rent for a dwelling determined. Taxpayer C makes monthly payments of $200 for his apartment. His landlord provides the utilities which average $25 per month. Therefore, the taxpayer may only use $175 of his monthly payment as a basis for deduction. His total deduction on an annual basis would be $2,000.

II. CLAIMING THE DEDUCTION:

This deduction shall be claimed on the Indiana individual income tax return. When claiming the renter's deduction, the taxpayer is required to indicate the landlord(s) to whom the rent was paid and the location(s) of the property.

III. RENT ON MOBILE HOMES:

Rent paid for mobile homes and for land use for mobile homes qualifies for this deduction provided that the mobile home is the claimant's principal place of residence. Owners of mobile homes who maintain the mobile home as their dwelling may deduct rent paid for land use.

IV. MEMBERS OF COOPERATIVE HOUSING:

Members of cooperative type housing projects, whereby each member shares in the ownership of the entire property, are not permitted to take the renter's deduction available on the individual income tax return. The purpose of the renter's deduction is to afford to renters, on their individual returns, similar property tax relief as is now enjoyed by property owners in the form of a reduction in property tax liability. Since the payments made by the cooperative member to the cooperative association are based on a cost formula, it is the Department's position that each cooperative member will benefit from property tax relief through a reduction in his proportionate share of the cost. Furthermore, payments made by the member to the cooperative association are considered investments and do not constitute rent.

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #41
Sales Tax
October 2000
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SUBJECT: Sales Tax Application to Furnishing of Accommodations

REFERENCE: IC 6-2.5-4-4; 45 IAC 2.2-4-8; 45 IAC 2.2-4-9

INTRODUCTION:

Indiana sales tax applies to the rental of rooms, lodgings, camping space, or other accommodations in Indiana furnished by any person engaged in the business of renting or furnishing such accommodations for periods of less than thirty (30) days. Persons furnishing such accommodations must register as a retail merchant and must collect sales tax from their customers.

I. DEFINITION OF ACCOMMODATIONS

"Accommodation" means any space, facility, structure, or combination thereof including booths, display spaces and banquet facilities, together with all associated real or personal property which is intended for occupancy by persons for a period of less than thirty (30) days. The term includes the following:

- Rooms in hotels, motels, lodges, ranches, villas, apartments, houses, bed and breakfast establishments, and vacation homes or resorts.
- Gymnasiums, coliseums, banquet halls, ball rooms, or arenas, and other similar accommodations regularly offered for rent.
- Cabins or cottages.
- Tents or trailers (when situated in place).
- Houseboats and other craft with over night facilities.
- Space in camper parks and trailer parks wherein spaces are regularly offered for rent for periods of less than thirty (30) days.
- The renting or furnishing of cubicles or spaces used for adult relaxation, massage, modeling, dancing, or other entertainment to another person.

II. IMPOSITION OF TAX

The tax is imposed on the gross receipts received by the retail merchant and include the amount which represents consideration for the rendition of those services which are essential to the furnishing of the accommodation, and those services which are regularly provided in furnishing the room or accommodation. Such amounts are subject to tax even if they are separately itemized on the statement or invoice. This includes telephone access charges. It also includes free food or drinks provided by the retail merchant to the customer, if it is included in the room charge. If there is a membership fee charges to the customer, it is included in gross receipts.

III. EXEMPTIONS FROM THE TAX

An accommodation that is rented for thirty (30) days or more is not subject to the sales tax. The customer is required to pay the tax for the first thirty (30) days if the customer is billed on less than a monthly basis.

EXAMPLE: A business rents accommodations for its employees and signs a lease for four months, payable monthly, the first thirty days would not be subject to tax.

Same situation as above; however the business pays the rental on a weekly basis. The business is required to pay sales tax on the first thirty days of rental.

If an entity rents the rooms for employees, the entity is renting the rooms and not the person who stays in the room. The contract would not have to be for a specific room as long as the continuous stay portion of the contract remains in effect.

EXAMPLE: An innkeeper moves two occupants of rooms rented on an extended stay to make a contiguous area for a convention that wants all of their rooms together. Moving the people in the extended stay contract does not void the contract.

The tax does not apply to the rental of meeting rooms to charitable or other exempt organizations if the facility is to be used for furtherance of the purpose for which they are granted the exemption.

A person is not a retail merchant if the person is a promoter that rents a booth or display space in a facility that is operated by a political subdivision (including a capital improvement board established under IC 36-10-8 or IC 36-10-9) or the state fair commission. However, this does not exempt the renting of accommodations by a political subdivision or the state fair commission to a promoter or an exhibitor.

NOTE: All exemptions applicable to the sales tax apply to the various innkeepers' taxes.

IV. SUBLEASING ACCOMMODATIONS

The rental of rooms, lodgings, camping space or other accommodations to a person for periods of less than thirty (30) days for the purpose of subleasing or subletting such accommodations to others, may be done exempt from tax. However, in such situations, the sublessor must register as an Indiana retail merchant and must collect the tax from the person to whom the accommodation is ultimately leased.

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #42
Income Tax
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SUBJECT: Indiana Income Tax Forms and Schedules

REFERENCE: IC 6-2.1; IC 6-3; IC 6-3.1; IC 6-3.5; IC 6-5.5; IC 6-8.1

INTRODUCTION

The Indiana Department of Revenue has the sole authority to prescribe and furnish forms and schedules used in the administration and collection of state income taxes. These forms are available to the taxpayer free of charge upon request. The forms can also be obtained by retrieving them from the Department's web site (www.state.in.us/dor/pubs/bullets/bullet.html).

Software developers who wish to produce forms that are acceptable to the Department should consult Departmental Notice #4 for more detailed information.

I. FORMS AND SCHEDULES FOR USE BY INDIVIDUALS ONLY

Form IT-9	Application for automatic extension of time to file Indiana IT-40 or IT-40PNR
Form IT-40	Indiana full-year resident individual income tax return
Form IT-40EZ	Indiana full-year resident EZ (short form) return
Form IT-40ES	Declaration of estimated tax

Form IT-40P	Indiana individual income tax return filing an original return for a year prior to 1997
Form IT -40PNR	Part-year or nonresident Indiana individual income tax return
Schedule IT-40PNRA	Indiana apportionment schedule for nonresident individuals
Schedule IT 40-NOL	Individual income tax net operating loss computation
Form IT-2440	Indiana disability retirement deduction
Schedule CT-40	County income tax schedule for Indiana residents
Form IN-MSA	Indiana medical savings account income tax information return
Form IT-40X	Amended Indiana individual income tax return
Schedule IT-2210	Underpayment of estimated tax by individuals
Schedule IT-2210A	Annualized schedule for underpayment of estimated tax by individuals
Form SC-40	Unified tax credit for the elderly
Schedule IN-EIC	Computation of Indiana's earned income tax credit

II. FORMS AND SCHEDULES FOR CORPORATIONS ONLY

Form 4A	Income tax schedule-farmers mutual insurance company
Form 7A	Income tax schedule - fire, casualty, and assessment life and accident insurance company
Schedule 8D	To accompany consolidated gross income tax return of two or more corporations
Form 9A	Income tax schedule - life insurance companies
Schedule E-7	Three factor apportionment schedule for entities involved with interstate transportation
Form IT-20	Corporation income tax return for gross, adjusted gross and supplemental net income taxes
Form FIT-20	Annual return for an entity conducting the business of a financial institution
Form IT-20S	S Corporation return
Form IT-20SC	Indiana special corporation return
Form IT-20X	Amended Indiana corporation income tax return
Schedule IT-2220	Underpayment of estimated tax by corporations

III. PARTNERSHIPS, TRUST AND ESTATE RETURNS

Form IT-65	Partnership return
Form IT-41	Fiduciary return

IV. NOT-FOR-PROFIT ORGANIZATION RETURNS

Form IT-20NP	Not-for-profit organization return
Form IT-35A	Application to file as a not-for-profit organization
Form IT-35AR	Return of not-for-profit organization exempt from Indiana gross income tax
Form IT-20G	Gross income tax return, governmental units and agencies
Form GC-22(h)	Report of construction and other service contracts by Indiana governmental units

V. MISCELLANEOUS FORMS FOR USE BY MOST TAXPAYERS

Form POA-1	Power of attorney
Form CC-40	Indiana college credit
Form IT-6	Indiana corporation quarterly income tax return
Form IT-11A	Information return transmittal form
Form IT-20REC	Indiana credit for increased research activity
Form NC10/20	Neighborhood assistance credit application
Schedule TSE	Claim for credit by employers of eligible teachers during summer recess
Schedule IN-H	Indiana household employee taxes

VI. WITHHOLDING TAX FORMS

Form WH-1	Employers' withholding tax return
Form WH-3	Annual reconciliation of employers withholding tax returns (Form WH-1) with amounts shown on withholding forms (Form W-2)
Form WH-4	Employee's withholding exemption and county residence certificate
Form WH-15	Indiana substitute (W-2)
Form WH-47	Certificate of residence for out of state employees

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #60

Sales Tax
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SUBJECT: Construction Contractors

REFERENCE: IC 6-2.5-3-3; IC 6-2.5-4-9; IC 6-2.5-5-3; 45 IAC 2.2-3-7 through 45 IAC 2.2-3-12; 45 IAC 2.2-4-21 through 45 IAC 2.2-4-26

INTRODUCTION

The general rule for the application of sales or use tax is that all sales of tangible personal property are taxable, and all sales or real property are not taxable. This general rule is not changed by the conversion of tangible personal property into realty. Therefore, all construction material purchased by a contractor is taxable either at the time of purchase, or if purchased exempt (or otherwise acquired exempt) upon disposition unless the ultimate recipient could have purchased it exempt.

DEFINITIONS

A. "Construction Contractor" means anyone who is obligated under the terms of a contract to furnish the necessary labor or materials, or both, to convert construction material into realty, including a general or prime contractor, a subcontractor, or a specialty contractor. The term includes a person engaged in the business of: building, cement work, carpentry, plumbing, heating and cooling, electrical work, roofing, wrecking, excavating, plastering, tile work, road construction, landscaping, or installing underground sprinkler systems.

Persons selling and installing personal property such as manufacturing equipment, carpeting, appliances, water softeners, water heaters, garage door openers, telephone or intercom systems under a "lump sum purchase price" are not construction contractors. However, the sales and installation of these properties do result in the conversion of tangible personal property into realty. Therefore, these persons must collect the Indiana sales tax on the purchase price of the personal property and all incidental materials used to install the personal property. The retail merchant must list separately on its invoices any charges for services not specifically taxable, and the purchase price for tangible personal property which is taxable. If the service charges are not separately stated as required, the entire invoice amount will be taxable as a unitary transaction.

B. "Construction materials" means any tangible personal property to be used for incorporation in or improvement of a facility or structure constituting or becoming part of realty. A "facility" means any additions to the land.

C. "Lump sum contract" means a contract to incorporate construction materials into real estate with the charge for labor and materials being quoted as one price. The contractor may subsequently furnish a breakdown of the charges for labor and materials without changing the nature of the lump sum contract. For example, a typical lump sum contract provides that the contractor will build a structure for a total state price such as $40,000. A lump sum contractor generally must pay sales tax to the vendor who sells the contractor construction materials. If the vendor is located out-of-state and is not required to collect Indiana sales tax or if the person for whom the structure is being built would be exempt from sales tax for the purchase of the construction materials, the lump sum contractor would not pay sales tax. Although the contractor may not pay sales tax when purchasing material from an out-of-state vendor, the contractor would be liable for use tax if the construction materials are stored, used or consumed in Indiana for a nonexempt purpose. Unless otherwise exempt, when a lump sum contractor purchases construction materials free of sales tax, the contractor must pay use tax on those materials when they are incorporated into real property in Indiana. To purchase construction materials exempt from sales tax, a lump sum contractor must be registered as a retail merchant.

D. "Time and materials contract" means a contract to incorporate construction materials into real estate with the charge for the labor and materials being separately stated and the final contract price being dependent on the cost of the materials and the amount of labor it actually takes to complete the contract. For example, a typical time and materials contract provides that the contractor will build a permanent structure for ten percent (10%) above the actual cost of the materials plus forty dollars ($40.00) per hour for the labor. Time and materials contractors are considered retail merchants making retail transactions with respect to the sale of construction materials and must register as retail merchants with the Department. Contractors that perform time and material contracts must separately state the charge for any construction materials and must collect Indiana sales tax on the full sales price of the construction material including overhead and profit charges. The construction materials used by a contractor in a time and materials contract should be purchased exempt by the contractor. The sales tax collected by the contractor must be separately stated on the invoice. A time and materials contractor would be entitled to the one percent (1%) collection allowance for timely remittances. Exemption certificates and direct pay permits must be retained by time and materials contractors to prove their non-liability for collecting sales tax on a sale of construction materials. If a time and materials contractor purchases construction materials exempt from sales tax and subsequently uses those materials to fulfill a lump sum contract, the contractor would be subject to use tax on those materials.

E. "Improvement to real estate" means that personal property has been incorporated into and becomes a permanent part of the real property. To accomplish this, the personal property generally takes on an immovable character. An immovable fixture is

characterized by three elements:

(1) Real or constructive annexation of the article in question to the land.

(2) Adaptation of the personal property as part of the land.

(3) The intention of the party making the annexation to make the personal property a permanent part of the land so that it would pass with the land upon a sale.

Indiana Property Tax regulations may be consulted as a guideline to determine whether property is real or personal, but it should not be considered determinative.

Tax Consequences

A contractor's purchase of machinery, tools, equipment and supplies that are not incorporated into the structure being built is subject to sales and/or use tax at the time of purchase. No exemption is available to the contractor because of the exempt status of the customer. Rule 45 IAC 2.2-3-12(c), which is specifically applicable to contractors under contract for an improvement to real estate with an organization entitled to exemption from sales and use tax, states:

(1) Utilities, machinery, tools, forms, supplies, equipment, and any other items used or consumed by the contractor and which do not become part of the improvement to real estate are not exempt regardless of the exempt status of the person for whom the contract is performed.

The use of traffic signals, signs and barrels, barricades, temporary pavement markings, and similar property by government highway contractors clearly falls within the ambit of the above regulation. The property at issue does not become a part of an improvement to real estate, hence, no exemption is available to the government highway contractor.

For the property described above, no relief is afforded the government highway contractor from the sales/use tax as a result of its contractual relationship with the government.

Direct Payment Permits

A contractor holding a direct payment permit may issue it to his suppliers, but when acting as a contractor should remember that he must obtain an exemption certification -- not a direct payment permit -- from any exempt customer for whom he is making an improvement to real estate as a result of a lump sum contract.

A lump sum contractor does not sell tangible personal property or collect sales tax as a result of the contract and may not accept a direct payment permit. If the organization, for which the contractor is constructing the improvement, is entitled to an exemption, it must give the contractor an exemption certificate (Form ST 105) -- not a direct payment permit -- certifying the exemption.

A prime contractor receiving an exemption certificate for a particular job should pass the exemption on to the subcontractor.

Asphalt Manufacturers

The manufacturing exemption will apply to an asphalt plant and paver, including repair parts and fuel for the respective equipment. Asphalt manufacturers/contractors will be granted an exemption for dump trucks used to transport "hot mix asphalt" from their asphalt plant to the job site. No exemption is available to the extent the respective dump trucks are used to haul "raw materials". Additionally, no exemption for dump trucks is available to contractors who do not produce "hot mix asphalt. Actual records must be maintained to document the exempt usage, if any. Graders, rollers, distributors, front-end loaders and other construction equipment are not exempt and will be subject to Indiana sales and use tax.

Streets and Sewer

Contractors acquiring material for incorporation as an integral part of a public street or of a public water, sewage or other utility service system are exempt from sales tax on the purchase of the construction material. The public street or public utility service system must be required under an approved subdivision plot and must be accepted by the appropriate Indiana political subdivision to be publicly maintained after its completion.

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #66
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SUBJECT: Enterprise Zones

REFERENCE: IC 6-2.1-3-32; IC 6-3-2-7; IC 6-3-3-10; IC 6-3.1-7; IC 6-3.1-10

INTRODUCTION

An enterprise zone is an area within a city where there is a significant amount of unemployment, and several business facilities that are not being used to their maximum. An enterprise zone created is in effect for ten years with the potential for two five year renewals. There are currently eighteen areas that have been designated as enterprise zones. There are five state tax incentives and one local property tax incentive to encourage businesses to locate in a zone.

The state income tax incentives that are available include: gross income tax exemption; the employee tax deduction; the employment expense credit; the loan interest credit; and the investment cost credit.

I. GROSS INCOME TAX EXEMPTION (IC 6-2.1-3-32)

Generally, a qualified business (Regular C Corporation) pays no gross income tax on increased receipts earned by operating in an enterprise zone. The amount of the increased receipts is determined by subtracting the receipts of the current year from receipts of the base year. The base year is the twelve month period immediately preceding the designation of an enterprise zone. For businesses new to an enterprise zone, the base year receipts are zero.

For purposes of this exemption, "gross income derived from sources within an enterprise zone" means:

1. Gross income from real or tangible property located in an enterprise zone;
2. Income from doing business in an enterprise zone;
3. Income from a trade or profession conducted in an enterprise zone;
4. Compensation for labor or services rendered within an enterprise zone; and
5. Income from stocks, bonds, notes, bank deposits, patents, copyrights, secret processes and formulas, good will, trademarks, trade brands, franchises and other tangible personal property having a situs in an enterprise zone.

If the business income derived from sources within an enterprise zone cannot be separated from the business income derived from sources without the enterprise zone, then the business income derived from sources within the enterprise zone is determined by multiplying the business income derived from sources both within and without the enterprise zone by a fraction. The numerator of the fraction is the property factor plus the payroll factor plus the sales factor. The denominator of the fraction is three (3).

If all of the business activity is derived from sources within the enterprise zone, then there is no need to apply the apportionment factor to the business.

II. EMPLOYEE INCOME TAX DEDUCTION (IC 6-3-2-8)

There is an income tax deduction for qualified employees of an enterprise zone business. The qualified employee is an individual who is employed by a taxpayer where the employee's principal place of residence is in the enterprise zone where the employee is employed. The employee must perform services for the employer, ninety percent (90%) of which are directly related to the conduct of the taxpayer's business that is located in the enterprise zone. The employee must perform fifty percent (50%) of the employee's service for the taxpayer during the taxable year in the enterprise zone.

The qualified employee is entitled to a deduction from his adjusted gross income equal to the lesser of;

1. one-half (1/2) of his adjusted gross income for the taxable year that he earns as a qualified employee; or
2. seven thousand five hundred dollars ($7,500).

III. EMPLOYMENT EXPENSE CREDIT (IC 6-3-3-10)

There is an income tax credit for employers that hire qualified employees. A qualified employee is one who lives in the enterprise zone, works fifty percent (50%) of his time in the enterprise zone, and performs services for the taxpayer, ninety percent (90%) of which are directly related to the conduct of the taxpayer's trade or business that is located in the enterprise zone.

The credit is the lesser of ten percent (10%) multiplied by the qualified increased employment expenditures of the taxpayer for the taxable year; or one thousand five hundred dollars ($1,500) multiplied by the number of qualified employees employed by the taxpayer during the taxable year.

The tax credit can be carried forward for ten years or carried back for three years. Pass through entities' partners or shareholders are eligible for the credit in the same proportion as the distributive income to which the shareholder or partner is entitled.

IV. LOAN INTEREST CREDIT (IC 6-3.1-7)

Any entity that makes a loan to an entity that uses the loan proceeds for:

(1) a purpose that is directly related to a business located in an enterprise zone;

(2) an improvement that increases the assessed value of real property located in an enterprise zone;

(3) rehabilitation, repair, or improvement of a residence.

A taxpayer is entitled to a credit against his state tax liability for a taxable year if he receives interest on a qualified loan in that taxable year. The amount of the credit to which the taxpayer is entitled is five percent (5%) multiplied by the amount of interest received by the taxpayer during the taxable year from the qualified loans. The credit can be carried forward for ten (10) years.

V. ENTERPRISE ZONE INVESTMENT COST CREDIT (IC 6-3.1-10)

A taxpayer may purchase a qualified investment which means the purchase of an ownership interest in a business located in an enterprise zone if the purchase is approved by the department of commerce.

The amount of the credit to which a taxpayer is entitled is the percentage determined by the department of commerce multiplied by the price of the qualified investment made by the taxpayer in the taxable year.

If the department of commerce finds that a purchase is a qualified investment, the department shall certify the percentage credit based upon the following:

(1) A percentage credit of ten percent (10%) may be allowed based upon the need of the business for equity financing, as demonstrated by the inability of the business to obtain debt financing.

(2) A percentage credit of two percent (2%) may be allowed for business operations in the retail, professional, or warehouse/distribution codes of the SIC Manual.

(3) A percentage credit of five percent (5%) may be allowed for business operations in the manufacturing codes of the SIC Manual.

(4) A percentage credit may be allowed for jobs created during the twelve (12) month period following the purchase of an ownership interest in the zone business, as determined under the following table:

JOBS CREATED	PERCENTAGE
Less than 11 jobs	1%
11 to 25 jobs	2%
26 to 40 jobs	3%
41 to 75 jobs	4%
More than 75 jobs	5%

(5) A percentage credit of five percent (5%) may be allowed if fifty percent (50%) or more of the jobs created in the twelve (12) month period following the purchase of an ownership interest in the zone business will be reserved for zone residents.

(6) A percentage credit may be allowed for investments made in real or depreciable personal property, as determined under the following table:

AMOUNT OF INVESTMENT	PERCENTAGE
Less than $25,001	1%
$25,001 to $50,000	2%
$50,001 to $100,000	3%
$100,001 to $200,000	4%
More than $200,000	5%

The total percentage credit may not exceed thirty percent (30%). The credit can be carried forward from one taxable year to the next; however there is no carry back or refund of any unused credit.

Enterprise zone income tax questions:
Indiana Department of Revenue
Tax Policy Division
100 N. Senate, Room N248
Indianapolis, IN 46204
(317) 232-7282

Other questions:
Indiana Department of Commerce
Enterprise Zone Program
One North Capitol, Suite 700
Indianapolis, IN 46204
(317) 232-8917

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #70
Income Tax
November 2000
(Replaces Information Bulletin #70, dated October 1985)

DISCLAIMER: Information bulletins are intended to provide nontechnical assistance to the general public. Every attempt is made to provide information that is consistent with the appropriate statutes, rules, and court decisions. Any information that is inconsistent with the law, regulation, or court decisions is not binding on either the Department or the taxpayer. Therefore, the information provided in this Bulletin should only serve as a foundation for further investigation and study of the current law and procedures related to its subject matter.

SUBJECT: Disability Income Deduction

REFERENCE: IC 6-3-2-9

INTRODUCTION

The General Assembly established a deduction from adjusted gross income for persons retired on disability who are permanently and totally disabled and who have not attained the age of 65 by the end of a taxable year.

I. QUALIFICATIONS

To qualify for the deduction, an individual must meet all of the following qualifications:

(1) must not have attained age sixty-five (65) before the end of the tax year; and

(2) must be retired on disability before the end of the taxable year; and

(3) must be permanently and totally disabled at the time of retirement.

II. PERMANENTLY AND TOTALLY DISABLED

An individual is permanently and totally disabled if the individual is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death or that has lasted or can be expected to last for a continued period of not less than twelve (12) months.

III. PROOF OF DISABILITY

For the purposes of IC 6-3-2-9(c), a person may furnish proof of permanent and total disability by including any of the following documents with the person's adjusted gross income tax return. Failure to provide proof of disability will result in disallowing the deduction. The following documents are acceptable to the Department to determine that a person is permanently and totally disabled:

(1) A properly executed Schedule IT-2440;

(2) A copy of a properly executed Physician's Statement (contained in Schedule R of the Internal Revenue Service Form 1040;

(3) A copy of any properly executed document, utilized by any agency of the United States or the State of Indiana, which requires at least the same information as the Physician's Statement of Permanent and Total Disability contained in the IT-2440; or

(4) A properly executed document or documents showing that the person received federal supplemental security income (SSI) during the tax year.

IV. COMPUTATION OF DISABILITY DEDUCTION

STEP 1: Determine the amount received by the individual during the taxable year through an accident and health plan for personal injury or sickness to the extent that:

(A) these amounts are attributable to contributions by the individual's employer that were not includable in the individual's gross income or are paid by the employer; and

(B) these amounts constitute wages or payments in lieu of wages for a period during which the employee is absent from work because of permanent and total disability.

STEP 2: Determine for each week of the taxable year the amount by which each payment referred to in STEP 1 exceeds one hundred dollars ($100), then add these amounts.

STEP 3: Determine the amount by which the individual's federal adjusted gross income for the taxable year, as defined by Section 62 of the Internal Revenue Code, exceeds fifteen thousand dollars ($15,000).

STEP 4: Subtract the amount determined in STEP 1 from the total amount determined in STEP 2 and STEP 3.

The remainder is the individual's allowable disability income deduction. This amount should be inserted in the section for Indiana modifications to adjusted gross income on Form IT-40.

Any questions concerning the disability income deduction may be directed to the Individual Income Tax Section of the Compliance Division.

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #76
Income Tax
August 2000
(Replaces Information Bulletin#76, dated May 1987)

DISCLAIMER: Information bulletins are intended to provide nontechnical assistance to the general public. Every attempt is made to provide information that is consistent with the appropriate statutes, rules, and court decisions. Any information that is inconsistent with the law, regulation, or court decisions is not binding on either the Department or the taxpayer. Therefore, the information provided in this Bulletin should only serve as a foundation for further investigation and study of the current law and procedures related to its subject matter.

SUBJECT: Claim for Refund of County Tax for Certain Unemployed Taxpayers

REFERENCE: IC 6-3.5-1.1-5

INTRODUCTION:

IC 6-3.5-1.1-5 provides relief for certain taxpayers subject to the County Adjusted Gross Income Tax (CAGIT) who left employment through no fault of their own. In order to take advantage of this relief, a taxpayer must be subject to CAGIT in a county where the tax is in effect only for a part of the year. Therefore, it applies only in a year when the tax is adopted or rescinded.

I. ELIGIBILITY FOR RELIEF

The claimant must be unemployed for that part of the year during which the tax was in effect. An individual is unemployed when no remuneration is payable to him for personal services.

County taxpayers who were discharged for just cause are not eligible. Retired taxpayers are not part of the work force; therefore, they cannot file a claim for refund.

During the part of the year that CAGIT is in effect, the claimant cannot have any earned income. Earned income consists of wages, salaries, tips, other employee compensation and net earnings from self employment (sole proprietor, independent contractor, working partners of a partnership). Earned income also includes strike benefits, certain disability pensions and anything of value received for services performed. Interest, dividends, pensions, and annuities are not earned income.

If a taxpayer has **any** earned income during the part of the year that CAGIT was in effect, he is not eligible to file a claim for refund.

If a joint tax return was filed, one or both of the taxpayers may qualify. If there is only one claimant on a joint return, all the qualifications must be met by the claimant.

II. FILING A CLAIM FOR REFUND WITH THE DEPARTMENT

A qualified taxpayer must file a claim for refund with the Department. A statement from the employer, on employer's letterhead, must be attached to the claim. If CAGIT was adopted during the year and the employee left employment before the tax became effective, the statement must contain the date the employee left and state that the employee was not discharged for just cause. If CAGIT was rescinded during the year and the employee was hired after the tax became effective, the statement must give the date of hire.

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #90
Income Tax
November 2000

DISCLAIMER: Information bulletins are intended to provide nontechnical assistance to the general public. Every attempt is made to provide information that is consistent with the appropriate statutes, rules and court decisions. Any information that is not consistent with the law, regulations or court decisions is not binding on either the Department or the taxpayer. Therefore, the information provided herein should serve only as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein.

SUBJECT: State Universities and Colleges

REFERENCE: IC 6-2.1-1-16; IC 6-2.1-3-19; IC 6-2.1-3-20; IC 6-2.1-3-23; IC 6-2.1-3-29; 45 IAC 1.1-1-22; 45 IAC 1.1-3-7; 45 IAC 1.1-3-14

INTRODUCTION

This information bulletin is directed to those colleges and universities which are recognized as governmental agencies and were created by an Indiana statute. As a governmental agency, a state college or university would be exempt from the gross income tax except to the extent that it receives income from engaging in private or proprietary activities or business.

I. DEFINITIONS

(a) "**Educational materials**" means materials which communicate information, graphic images or sound, that are utilized in teaching, instruction, or research. Educational materials may be in the form of any of a number of different communications media,

including but not limited to the following:

(1) journals, reviews, and papers;

(2) cartographic materials reports, papers, surveys, polling data and summaries;

(3) books, guides, and other printed materials which support governmental purposes;

(4) audio-visual and digital materials which support the governmental purposes; and

(5) software and computerized tools which support governmental purposes.

(b) **"General Public"** means the community at large. For governmental functions, the term does not include patient, official visitor, or member of the faculty or staff of a state college or university. "Official visitor" means an individual who is present on campus to facilitate the carrying out of the governmental and educational purpose of the university.

(c) **"Proprietary activities"** means activities generating revenues for state colleges or universities from the general public that are both customarily associated with the conduct of a private business enterprise, and are outside the scope of activities of governmental and educational functions as defined herein for state colleges or universities.

(d) **"Public services"** means any activity that involves the general public benefit. The term includes any activity that promotes economic and agricultural development within the state; intellectual, social, recreational and physical health and welfare of citizens of the state; and cultural development through the arts and sciences.

(e) **"Student"** means an individual enrolled or registered in, and participating in any of the types of educational activities that are associated with the governmental and educational functions of a state college or university.

II. GOVERNMENTAL AND EDUCATIONAL FUNCTIONS OF STATE COLLEGES AND UNIVERSITIES

State colleges and universities carry out a wide range of governmental and educational functions in service to the citizens of the state of Indiana. These governmental functions fall into the three primary categories of teaching, research, and other governmental functions.

(a) The category of teaching involves educating citizens, businesses and institutions through the use of various mediums and facilities to provide:

(1) courses which grant credit toward the attainment of an undergraduate or graduate degree;

(2) post-graduate practical training and instruction in academic disciplines offered by state universities;

(3) continuing education courses (non-credit) and cooperative extension activities;

(4) professional development activities; and

(5) educational conferences, seminars, and training meetings.

(b) The category of research involves expanding the knowledge base of the citizens, businesses and institutions of the state of Indiana through scientific inquiry and dissemination of scholarly information. Activities customarily associated with the fulfillment of the research function include participation in laboratory and field research, the development and distribution of course related materials, and the development and distribution of educational or research related tools or materials that are published, copyrighted or patented.

(c) The category of other governmental functions involves activities that are consistent with other governmental and educational functions served by the state of Indiana, and other charitable, not-for-profit purposes for which the universities are granted exemption from federal income tax. This category also includes activities that are exempt by statute such as:

(1) the operation of a park or recreation facility,

(2) the sale or lease of real property,

(3) the occasional sale or lease of personal property, and

(4) the performance of similar governmental services.

Similar governmental services are addressed in Regulation 45 IAC 1.1-3-14.

(d) The following are examples of governmental and educational functions being fulfilled by state colleges and universities:

(1) sponsoring continuing education/extended service activities;

(2) operating the cooperative extension service for the state;

(3) providing public access to intercollegiate athletic functions;

(4) providing public access to recreational and physical fitness facilities;

(5) providing public access to musical, theatrical, and artistic performances; and

(6) providing access to informational and cultural events and productions.

(7) providing regulatory functions for other governmental entities.

III. INCOME GENERALLY EXEMPT FROM TAX

State colleges and universities have a dual status under the law as both governmental organizations of the state of Indiana, and as bona fide not-for-profit educational organizations. As such, gross income of state colleges and universities is exempt to the extent that the revenues are raised in the fulfillment of either a governmental function or a bona fide not-for-profit educational function. The sale of educational materials and revenue received from research and other governmental activities, as defined herein, are specifically exempt from the gross retail tax.

The sale of goods or services that might otherwise be taxable, will be exempt from the gross income tax if students or employees of the state college or university are actively involved in the development or sale of the goods or services in support of instruction,

research or public service, and, the sale of the goods or services is designed to recover the program's expenses. The following are examples of student-run educational programs:

(1) Catering and food services provided by students enrolled in a state college or university restaurant and hotel management program.

(2) Medical services provided by students participating in a state college or university health sciences, nursing, or other health care instructional programs, including veterinary science.

(3) Producing and selling agricultural commodities pursuant to the operation of research and experimental farm facilities under IC 15-4-2.

(4) Publishing cartographic, demographic and other survey or research-based information for use by the general public.

IV. TAXABLE ACTIVITIES

(a) Certain revenue generating activities of state colleges and universities are taxable under state law as a private or proprietary business, or, as an "unrelated trade or business" under Section 513 of the Internal Revenue Code. Further, exemptions and exclusions from taxation are provided for certain types of income, in Section 512 of the Internal Revenue Code, such as passive income and sales for the convenience of an organization's students, employees, official visitors, patients or members. However, this does not include any trade or business in which:

(1) substantially all the work in carrying on such trade or business is performed for the college or university without compensation; or

(2) the college or university primarily carries it on for the convenience of its members, students, patients, officers, or employees. Therefore, except for the exceptions cited above, the sale of any goods or services to the general public that are substantially unrelated to the governmental or not-for-profit function of a state college or university are subject to the gross income tax.

(b) The following are examples of taxable activities, when sold or provided to the general public by state colleges or universities:

(1) The sale of merchandise, cards, clothing, toiletries, and other goods typically purchased in a retail outlet, if sold from a location intended to be readily accessible to the general public.

(2) The sale of computers or processing time on computers to the general public.

(3) Advertising sales.

(4) The sale of athletic apparel and merchandise at intercollegiate athletic events and in retail operations to the general public.

(5) Child care services provided to the general public except where students provide these services as part of their formal academic training primarily for the convenience of the members, students, patients, officers, or employees of the college or university.

(6) The sale of catering or food services to the general public unless students provide these services as part of their formal academic training in the restaurant and hotel management program.

(7) Parking revenues generated from non-university functions.

(8) State university campus police auctions, other sales of abandoned, unusable personal property and salvageable sales of personal property used in connection with teaching, research, or public service functions, if such sales are held on a regular or consistent basis.

V. SALES BY THIRD PARTIES ON A STATE COLLEGE OR UNIVERSITY CAMPUS

Exemptions from gross income tax that are provided to a state college or university do not extend to sales made by a third party with whom a state college or university has contracted to provide service. The income of that third party would be subject to gross income tax as would any other business enterprise.

VI. STUDENT ORGANIZATIONS AT STATE COLLEGES AND UNIVERSITIES

(a) The gross income received by a university sponsored organization is exempt from the gross income tax. As used in herein, "university sponsored organization" includes a fraternity, sorority, or student cooperative housing organization which is connected with and supervised by a college, university, or other such educational institution. Furthermore, the student organization's records must be maintained by the university as an "external agency" account.

(b) The exemption will not apply to an organization if any part of the gross income received is used for the private benefit or gain of any member, trustee, shareholder, employee, or associate of the organization. As used in this subsection, "private benefit or gain" does not include reasonable compensation to an employee for services actually performed.

(c) The exemption does not apply to gross income derived from an unrelated trade or business as defined in Section 513 of the Internal Revenue Code.

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE

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LETTER OF FINDINGS NUMBER: 92-0017
Adjusted Gross Income Tax
For the Tax Period of 1986 through 1990

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Adjusted Gross Income Tax – Games of Chance

Authority: 26 U.S.C. §513; IC 6-3-2-3.1; IC 6-8.1-5-1; IC 4-32-3-2,;*Treas Reg*. §1.513-1; *Ball vs. Indiana Department of Revenue,* 563 N.E.2d 522 (Ind. 1990); *Letter of Finding* 95-0336; *Gen. Couns. Mem.* 39,061 (Nov. 30, 1983); *IRS Announcement* 89-138, (Nov. 7, 1988)

The Taxpayer protests the assessment of gambling proceeds as unrelated business income.

II. Tax Administration – Penalty

Authority: IC 6-8.1-10-2.1; 45 IAC 15-11-2

The Taxpayer protests the imposition of penalty.

III. Tax Administration – Interest

Authority: IC 6-8.1-1-10-1

The Taxpayer protests the imposition of interest.

FACTS

Taxpayer is a partially exempt non-profit organization. Taxpayer was assessed gross income tax and adjusted gross income tax on unrelated income due to gambling proceeds. More facts provided as necessary.

DISCUSSION

Here, the Taxpayer was assessed gross income tax and adjusted gross income tax on "game boards" and other games of chance as unrelated business income. Taxpayer concedes the income is subject to gross income tax, however, maintains that the revenue should not be subject to adjusted gross and supplemental net income taxes.

IC 6-3-2-3.1 provides in relevant part:

(a) Except as otherwise provided in subsection (b), income is not exempt from the adjusted gross income tax, or the supplemental net income tax, under section 3 (a) of this chapter if the income is derived by the exempt organization from an unrelated trade or business, as defined in Section 513 of the Internal Revenue Code.

Accordingly, the litmus test concerning the propriety of assessing Indiana adjusted gross income tax on the gaming income is whether the Internal Revenue Code would do likewise. The Internal Revenue Code (26 U.S.C. §513) defines unrelated business income as:

…any trade or business the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 501….

Also, *Treas. Reg*. §1.513-1 (d)(2) states:

Type of relationship required. Trade or business is "related" to exempt purposes, in the relevant sense, only where the conduct of the business activities has causal relationship to the achievement of exempt purposes (other than through the production of income); and is 'substantially related,' for purposes of section 513.

Taxpayer states that the organization is a non-profit fraternal order that provides benefits to its members as well as providing a program of charitable giving for the community. They state that the games of chance helped provide for those charities. Furthermore, Taxpayer argues that the federal rules regarding unrelated business income have distinguished between transactions conducted with an organization's members or intended beneficiaries versus transactions conducted with the general public. They have provided *Gen. Couns. Mem.* 39,061 (Nov. 30, 1983) and *IRS Announcement* 89-138, (Nov. 7, 1988) to support their claim. Taxpayer has provided affidavits from former administrators' of the organization stating that pull-tabs were not sold to non-members.

Prior to March 16, 1990, Indiana did not have a statute authorizing non-profit organizations covered under Section 501 of the Internal Revenue Code to offer games of chance. Consequently, these acts are considered illegal and cannot be considered to further the exempt purpose of the organization regardless if limited only to members. The General Council Memorandum and the IRS Announcement provided by the Taxpayer have no legal authority and would not apply to illegal activities.

Taxpayer also provides a prior *Letter of Finding* 95-0336 for another fraternal organization discussing the same issue. However, the *Letter of Finding* is only binding on the parties involved and cannot be used as precedent in this case. Furthermore, the protest period for the referred to *Letter of Finding* 95-0336 is 1991 through 1993 which is after Indiana adopted IC 4-32-3-2 allowing certain organizations to conduct contests, games of chance, raffles, and award door prizes.

Finally, Taxpayer argues that there was an extraordinarily long time between the Taxpayer's submission of a protest, and the scheduling of a hearing by the Department. Taxpayer contends that the doctrine of laches applies. The Indiana Supreme Court held in *Ball vs. Indiana Department of Revenue,* 563 N.E.2d 522 (Ind. 1990), that laches would apply if the Department acted "in an unusually dilatory manner." The Department previously sent several letters attempting to establish contact prior to the hearing and only received a response upon establishing a hearing date and time. Pursuant to IC 6-8.1-5-1 (b), Taxpayer carries the burden of proving that the Department is incorrect. Taxpayer presented no evidence that the Department acted in an unusually dilatory manner in this case.

FINDING

The Taxpayer's protest is respectfully denied.

II. Tax Administration – Penalty

DISCUSSION

IC 6-8.1-10-2.1(d) allows a penalty to be waived upon a showing that the failure to pay the deficiency was due to reasonable cause. Also, 45 IAC 15-11-2(c) requires that in order to establish reasonable cause, the taxpayers must show that they exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed. The Department finds that the Taxpayer demonstrated reasonable cause for their failure to pay tax.

FINDING

The Taxpayer's protest of the penalty is sustained.

III. Tax Administration - Interest

DISCUSSION

Taxpayer protests the imposition of interest on the assessments. IC 6-8.1-1-10-1 does not allow the Department to waive interest. Therefore, Taxpayer's protest is respectfully denied.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

99970201.LOF

LETTER OF FINDINGS NUMBER: 97-0201 MVE
Motor Vehicle Excise Tax
For the Tax Period: 1995

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Motor Vehicle Excise Tax – Imposition

Authority: IC 9-13-2-78, IC 9-18-2-1, IC 6-3-2-6, *Black's Law Dictionary* 484 (6th ed. 1990)

The Taxpayer protests the imposition of the motor vehicle excise tax on his 1993 Mazda.

STATEMENT OF FACTS

Taxpayer was assessed the Motor Vehicle Excise Tax on a 1993 Mazda for a period of September 1995 to June 1996. Taxpayer sent a written protest of this assessment to the Department. After making several attempts to contact the Taxpayer, an administrative hearing was scheduled in which the Taxpayer failed to appear. The Letter of Finding is based on information previously submitted by the Taxpayer. More facts will be provided as necessary.

I. Motor Vehicle Excise Tax – Imposition

DISCUSSION

Pursuant to IC 9-18-2-1, within sixty days of becoming an Indiana resident, a person must register all motor vehicles owned by that person that will be operated in Indiana.

IC 9-13-2-78 defines "Indiana resident" as a person who is one of the following:

(1) A person who has been living in Indiana for a least one hundred eighty-three (183) days during a calendar year and who has a legal residence in another state. However, the term does not include a person who has been living in Indiana for any of the following purposes:

(A) Attending an institution of higher education

(B) Serving on active duty in the armed forces of the United States.

(2) A person who is living in Indiana if the person has no other legal residence.

(3) A person who is registered to vote in Indiana.

(4) A person who has a child enrolled in an elementary or secondary school located in Indiana.

(5) A person who has more than one-half (1/2) of the person's gross income derived from sources in Indiana… However, a person who is considered a resident under this subdivision is not a resident if the person proves by a preponderance of the evidence that the person is not a resident under subdivisions (1) through (4).

Taxpayer concedes that he was present in Indiana from September 30, 1995 through December 31, 1995. Yet, Taxpayer argues that he should not be assessed because he maintained other residences in Utah and Mississippi and was not present in Indiana to establish residency. Taxpayer does not provide any evidence that either of the other two residences was considered his domicile.

A person may have more than one residence but only one domicile. A domicile is defined by Black's Law Dictionary as, "[a] person's legal home. That place where a man has his true, fixed, and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning." *Black's Law Dictionary* 484 (6th ed. 1990). Here, Taxpayer claimed a renter's deduction on his 1995 Indiana individual income tax return. Pursuant to IC 6-3-2-6 (a):

Each taxable year, an individual who rents a dwelling for use as his principal place of residence may deduct from his adjusted gross income, as defined in IC 6-3-1-3.5(a), the lesser of:

(1) the amount of rent paid by him with respect to the dwelling during the taxable year; or

(2) two thousand dollars ($2,000).

By claiming the renter's deduction on his Indiana tax return, Taxpayer has conceded that he considered Indiana as his principal place of residence.

FINDING

The Taxpayer's protest is respectfully denied. Taxpayer has failed to prove his legal residence was somewhere other than Indiana throughout the assessment period. As an Indiana resident, Taxpayer was required to license and register his vehicle in Indiana.

DEPARTMENT OF STATE REVENUE

04970389.LOF

LETTER OF FINDINGS NUMBER: 97-0389RST
Sales and Use Tax
For Years 1990, 1991, 1992, and 1994

NOTICE: Under Ind. Code § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales Tax – Assessment of Sales Tax on Services and Tangible Personal Property Sold by Funeral Home

Authority: Ind. Code § 6-2.5-2-1; Ind. Code § 6-2.5-6-7; Ind. Code § 6-8.1-5-1; Indiana Department of Revenue Sales Tax Information Bulletin #49 (Dec. 1997)

The taxpayer protests the assessment of retail sales tax on its provision of services and tangible personal property to its customers.

II. Sales Tax – Responsible Officer Liability

Authority: Ind. Code § 6-2.5-9-3; Ind. Code § 6-8.1-5-1; Indiana Department of State Revenue v. Safayan, 654 N.E.2d 270 (Ind. 1995)

The taxpayer protests personal liability for retail sales tax due on the provision of services and tangible personal property to his customers.

STATEMENT OF FACTS

The taxpayer is the owner of a funeral home in Indiana. The funeral home provides funeral services, along with tangible personal property associated with funeral services, to its customers. The owner, as a responsible officer, was assessed sales tax liability for the services and tangible personal property provided by the funeral home. The time period the assessment related to was the years 1990, 1991, 1992, and 1994.

The taxpayer failed to appear for administrative hearings scheduled for June 22, 2000, and July 25, 2000. The taxpayer was given additional time, until August 11, 2000, to submit evidence in support of his protest but failed to do so. The taxpayer's protest letters do not cite any statutes, regulations, or court cases, or present additional facts or arguments. Consequently, this Letter of Findings is based solely upon the information contained in the taxpayer's Department of Revenue file.

I. Sales Tax – Assessment of Sales Tax on Services and Tangible Personal Property Sold by Funeral Home

DISCUSSION

The taxpayer received numerous liability notices for retail sales tax that was not paid or paid late, and for checks issued to the Department that were returned for insufficient funds. Additional assessments for sales tax were made based upon the best information

available.

(a) An excise tax, known at the state gross retail tax, is imposed on retail transactions made in Indiana.

(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

Ind. Code § 6-2.5-2-1.

The Department has issued an information bulletin specifically dealing with the application of sales tax to the provision of funeral services and tangible personal property by morticians and funeral directors.

If a funeral home provides a service to an individual for one lump sum and does not separate charges for services and tangible personal property, then the sales tax is due on one hundred percent (100%) of the lump sum price. This is a unitary transaction and tax shall be included on all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is included.

Indiana Department of Revenue Sales Tax Information Bulletin #49, part I (Dec. 1997).

The amount of sales tax owed is equal to five percent (5%) of the taxpayer's total gross retail income from taxable transactions, regardless of the amount of tax he actually collects. Ind. Code § 6-2.5-6-7.

"The notice of proposed assessment is *prima facie* evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Ind. Code § 6-8.1-5-1(b). The taxpayer has submitted no evidence to show that the proposed assessment is wrong.

FINDING

The taxpayer's protest is denied.

II. Sales Tax – Responsible Officer Liability

DISCUSSION

The taxpayer was personally assessed sales tax liability as a responsible officer.

An individual who:

(1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and

(2) has a duty to remit state gross retail or use taxes (as described in IC 6-2.5-3-2) to the department;

holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

Ind. Code § 6-2.5-9-3.

Various factors are considered when determining whether a person is a responsible officer. Those factors include the person's position within the corporation, the person's authority according to the company's articles of incorporation, and whether the person actually exercised control over the finances of the business. Indiana Department of State Revenue v. Safayan, 654 N.E.2d 270, 273 (Ind. 1995).

The taxpayer in the instant case is the owner of the funeral home as evidenced by the word, "Owner," appearing below his signature and printed name on the protest letters. Additionally the taxpayer personally submitted the limited financial information contained in the Department's file. This evidence is sufficient to meet the requirements set forth in Safayan for determination of responsible officer status.

"The notice of proposed assessment is *prima facie* evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Ind. Code § 6-8.1-5-1(b). The taxpayer has submitted no evidence to show that he is not a responsible officer. The evidence that is available indicates that the taxpayer is a responsible officer and, therefore, personally liable for retail sales tax due the state.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

02970475.LOF

LETTER OF FINDINGS NUMBER: 97-0475 ITC
Gross Income Tax
for Years 1991, 1992, 1993, and 1994

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Gross Income Tax – Application

Authority: 45 IAC 1-1-49; 45 IAC 1-1-120, IC 6-2.1-3-3; First National Leasing and Financial Corp., v. Indiana Department of State Revenue, 598 N.E.2d 640, (Tax Court 1992)

Taxpayer is protesting the application of Indiana Gross Income Tax to taxpayer's receipts.

STATEMENT OF FACTS

Taxpayer is located outside of Indiana and owns and operates two cable channels that broadcast worldwide. Taxpayer's Indiana income is derived from both its satellite broadcast of programs to Indiana cable operators for their transmission to consumers and taxpayer's agency relationship with an Indiana corporation for the production of videotapes for viewers purchasing copies of taxpayer programs.

I. Gross Income Tax – Application

DISCUSSION

IC 6-2.1-3-3 exempts from gross income tax gross income "… to the extent the state of Indiana is prohibited from taxing that gross income by the United States Constitution." The application of this tax is detailed by 45 IAC 1-1-120 which indicates in relevant parts "Sales made by nonresidents with no in-state business situs nor local business activities, and the goods are shipped directly to the buyer upon receipt of a prior order," are not taxable, "unless the seller was engaged in business activity within the State and such activity was connected with or facilitated the sales."

First National Leasing and Financial Corp., v. Indiana Department of State Revenue, 598 N.E.2d 640, (Tax Court 1992) expounded on the application of the above rules with an emphasis on the necessity of a business situs within Indiana as defined by 45 IAC 1-1-49, which states in relevant part:

Sec. 49. Business Situs Defined. For purposes of these regulations [45 IAC 1-1], a taxpayer may establish a "business situs" in ways including, but not limited to, the following:

(1) Use, occupancy or operation of an office, shop, construction site, store, warehouse, factory, agency route or other place where the taxpayer's affairs are carried on;

While taxpayer does operate, by agency, an office for the taping and distribution of videotapes, this only relates to its satellite broadcasting operation in an inferior capacity-i.e. the broadcasts generate requests for the videotapes. Consequently; the income from the operations of the videotape distribution facility are subject to the gross income tax based on its location within the state.

The income from the broadcasting operation, which does not maintain local offices or engage in business within the state connected with or facilitating sales, is derived solely from payments by local cable operators for reception and rebroadcast of taxpayer's satellite transmissions which are shipped to them via satellite transmission.

FINDINGS

Taxpayer protest is sustained for income from sales to cable operators. Taxpayer's protest is denied for income from videotape operations within state.

DEPARTMENT OF STATE REVENUE

04980075.LOF

LETTER OF FINDINGS NUMBER: 98-0075
Use Tax
For Years 1994 through 1996

NOTICE: Under Ind. Code § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Use Tax – Imposition of Use Tax on Various Pieces of Equipment Purchased by the Taxpayer

Authority: Ind. Code § 6-2.5-3-2; Ind. Admin. Code tit. 45, r. 2.2-5-10; Indianapolis Fruit Co. v. Department of State Revenue, 691 N.E.2d 1379 (Ind. Tax Ct. 1998)

The taxpayer protests the imposition of use tax on its purchases of various pieces of equipment.

II. Tax Administration – Penalty

Authority: Ind. Code § 6-8.1-10-2.1; Ind. Admin. Code tit. 45, r. 15-11-2

The taxpayer protests the imposition of the ten percent (10%) negligence penalty.

STATEMENT OF FACTS

The taxpayer is an Indiana corporation in the business of manufacturing and selling ice. The ice is manufactured in one building, moved to another room where it is bagged, and finally moved into a prefabricated building known as the Leer building. The ice is kept in the Leer building until it is transported and delivered to various retailers throughout southern Indiana.

A sales and use tax audit was completed on November 24, 1997. The taxpayer timely filed a protest and a hearing was held on July 18, 2000. Additional facts will be provided as necessary.

I. Use Tax – Imposition of Use Tax on Various Pieces of Equipment Purchased by the Taxpayer

DISCUSSION

The taxpayer protests the imposition of use tax on its purchases of various pieces of equipment during the audit period. The taxpayer purchased the Leer building and several pieces of equipment associated with the building. The associated equipment consists of a bagging room wall; slant doors, hinges, hinge cover, chains, and chainstop; freezer units (compressors) and parts for those units; and a freezer addition. Sales tax was not paid on the purchases of the Leer building and equipment, nor was use tax remitted on these purchases.

The taxpayer also purchased several merchandisers and did not pay sales tax at the time of purchase, nor was use tax remitted. Some merchandisers were leased by the taxpayer and no sales or use tax was remitted on those transactions either. A merchandiser is a refrigerated storage unit, a freezer, where ice is stored until it is purchased by customers. The taxpayer manufactures the ice and delivers it to the merchandiser units at the retail locations.

"An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." Ind. Code § 6-2.5-3-2(a).

The taxpayer argues that the Leer building and associated equipment and the merchandisers are manufacturing machinery, tools, or equipment and qualify for exemption under Ind. Admin. Code tit. 45, r. 2.2-5-10(c). That regulation states:

> Purchases of manufacturing machinery, tools, and equipment to be directly used by the purchaser in processing or refining are exempt from tax; provided that such machinery, tools, and equipment are directly used in the production process; i.e., they have an immediate effect on the tangible personal property being processed or refined. The property has an immediate effect on the article being produced if it is an essential and integral part of an integrated process which processes or refines tangible personal property.

The taxpayer maintains that the purchases of the Leer building and the equipment qualify for the manufacturing exemption. After the ice is produced, it is moved to the bagging room. The temperature in the bagging room is approximately 50 degrees Fahrenheit. After bagging, the ice is moved to the Leer building where the temperature is kept at 20 degrees Fahrenheit, or below. The temperature in the merchandisers is also kept at 20 degrees or below. The taxpayer states that the Leer building and the merchandisers, because of their lower temperatures, continue to act upon the ice and that this constitutes a continuation of the refining process. The taxpayer makes a distinction between what it terms the "soft ice" that goes into the Leer building subsequent to bagging and the "hard ice" it becomes after exposure to the low temperature in the Leer building.

The term "refining" is defined in the same regulation cited by the taxpayer. "Processing or refining is defined as the performance by a business of an integrated series of operations which places tangible personal property in a form, composition, or character different from that in which it was acquired. The change in form, composition, or character must be a substantial change." Ind. Admin. Code tit. 45, r. 2.2-5-10(k). The taxpayer produces ice which is then put in the Leer building for storage. Of course the Leer building is refrigerated or the ice would not be ice for very long. The transformation from water to ice, induced by the taxpayer, has already taken place before the ice enters the Leer building. It is ice going in and it is ice when it is removed for transport to retailers. Likewise it is ice the taxpayer delivers to the merchandisers and it remains ice while being stored in the merchandisers. The Leer building and the merchandisers act to store the ice at temperatures that prevent the ice from melting.

During the hearing, the taxpayer indicated that it was also relying on Indianapolis Fruit Co. v. Department of State Revenue, 691 N.E.2d 1379 (Ind. Tax Ct. 1998). In that case, the court held that items integral and essential to a banana ripening process were exempt from sales and use tax. Id. at 1385. The court found that the petitioner's efforts resulted in the transformation of the bananas from an unmarketable product to a marketable one. Id. In the same case, the court found that the petitioner was not entitled to a tax exemption for items associated with the process of ripening tomatoes since the tomatoes ripened on their own without the petitioner's efforts.

Although the taxpayer did not elaborate on how its situation is similar to the one in Indianapolis Fruit, the taxpayer's case is distinguishable from the one in Indianapolis Fruit. The banana ripening process in Indianapolis Fruit was actively induced by the petitioner and those efforts transformed an unmarketable product to a marketable one. While the taxpayer processes water into ice, this process is completed by the time the bagged ice enters the Leer building or is delivered to the merchandisers.

> Tangible personal property used in or for the purpose of storing raw material, work in process, semi-finished or finished goods is subject to tax except for temporary storage equipment necessary for moving materials being processed or refined from one production step to another.
>
> Storage facilities or containers for finished goods after completion of the production process are subject to tax.
>
> Ind. Admin. Code tit. 45, r. 2.2-5-10(e)(2).

The Leer Building and the merchandisers are storage facilities for the taxpayer's finished goods, ice, and are subject to tax. Since the Leer building itself is taxable and no production occurs in the building, purchases of items associated with the building are also subject to tax.

FINDING

The taxpayer's protest is denied regarding the purchase of the Leer building and equipment. The taxpayer's protest is denied

regarding the purchase and lease of the merchandisers.

II. Tax Administration – Penalty

DISCUSSION

The taxpayer protests the imposition of the ten percent (10%) negligence penalty. The Department imposed the negligence penalty due to the taxpayer's failure to remit use tax on several purchases made during the audit period. "If a person incurs, upon examination by the department, a deficiency that is due to negligence, the person is subject to a penalty." Ind. Code § 6-8.1-10-2.1(a)(3). The penalty is ten percent (10%) of "the amount of the deficiency as finally determined by the department." Ind. Code § 6-8.1-10-2.1(b)(4). Negligence is defined in the Administrative Code 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." Ind. Admin. Code tit. 45, r. 15-11-2(b).

Provision is made for the waiver of the ten percent (10%) penalty:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. 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 under this section.

Ind. Admin. Code tit. 45, r. 15-11-2(c).

The taxpayer has failed to affirmatively show reasonable cause for not remitting the tax due. The penalty in this case is proper.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04980083.LOF

LETTER OF FINDINGS NUMBER: 98-0083 RST
Sales/Use Tax – Maintenance Contracts
Tax Administration – Penalty
For Tax Periods: 1994 through 1996

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales/Use Tax – Service/Maintenance Agreements

Authority: IC 6-2.5-1-2; IC 6-2.5-2-1; IC 6-2.5-3-2; IC 6-2.5-3-4; IC 6-2.5-4-1; 45 IAC 2.2-4-2; *Information Bulletin #2, Sales Tax* (August 1991)

Taxpayer protests proposed assessments of Indiana use tax on certain items of tangible personal property.

II. Tax Administration – Penalty

Authority: IC 6-8.1-10-2; IC 6-8-10-2.1; 45 IAC 15-11-2; 45 IAC 2.2-3-20

Taxpayer protests imposition of a ten percent (10%) negligence penalty.

STATEMENT OF FACTS

Taxpayer sells computer hardware and peripherals. Taxpayer also provides consulting, repair, and warranty services. Among the services provided include a variety of agreements for the repair and servicing of computer equipment.

Taxpayer (as vendor) entered into an agreement with a not-for-profit customer. During the life of this agreement, tangible personal property was transferred from Taxpayer to its not-for-profit customer. At issue is whether Taxpayer should have self-assessed and remitted use tax, or collected sales tax, on the tangible personal property transferred.

I. Sales/Use Tax – Maintenance Agreements

DISCUSSION

Taxpayer entered into a computer hardware service/maintenance agreement ("Agreement") with a not-for-profit customer ("customer"). Taxpayer did not collect sales tax on the sale of its Agreement. Neither did Taxpayer pay sales tax on parts purchased and used in maintaining and repairing its customer's computer equipment under the Agreement. Additionally, Taxpayer failed to remit use tax or collect sales tax on parts transferred.

As a result, Audit proposed assessments of use tax on the parts purchased exempt and subsequently used by Taxpayer to repair and maintain its customer's computer equipment. Audit asserts no sale of tangible personal property occurred *as the maintenance*

agreement was exclusively for the sale of services. Taxpayer, therefore (according to Audit), had no obligation to collect sales tax on the repair parts. Rather, Taxpayer, as service provider, should have self-assessed and remitted use tax on the repair parts as Taxpayer was using them to fulfill its obligations under the Agreement. (See 45 IAC 2.2-4-2.)

Audit refers to *Information Bulletin #2, Sales Tax* (August 1991), which states in part:

Any parts or tangible personal property supplied pursuant to a **nontaxable optional warranty or maintenance agreement** are subject to use tax. *The supplier of the parts or property would be liable for the use tax on the parts or property because the supplier is using the material to fulfill the service called for by the terms of the warranty or maintenance agreement.* (emphasis added).

Taxpayer disagrees. Taxpayer characterizes its Agreement as one for the sale of parts and services rather than one for services only. Taxpayer notes that among the Agreement's terms were billing rates for services to be provided and discounts for parts to be sold. Taxpayer believes its Agreement is analogous to a "time and materials" contract—a contract in which sales tax must be collected (as opposed to self-assessing and remitting use tax) on the tangible personal property transferred. Furthermore, since its customer was a not-for-profit entity with valid exemption certificates, Taxpayer contends sales tax should not have been collected anyway.

Except for certain enumerated services, sales of services are not characterized as retail transactions and are not subject to Indiana sales/use tax. IC 6-2.5-3-2. While charges for non-enumerated services are exempt from *sales tax*, a service provider must self-assess *use tax* on tangible personal property used in the performance of exempt services—unless, of course, the service provider has previously paid sales tax on these items. IC 6-2.5-3-4.

Conversely, retail transactions made in Indiana are subject to sales tax. IC 6-2.5-2-1. A retail transaction is defined generally as an activity in which a retailer acquires and subsequently sells tangible personal property. IC 6-2.5-4-1. When service providers also sell repair or replacement parts, sales tax must be collected on the parts sold, but not on the charges for services rendered. IC 6-2.5-4-1(e) and 45 IAC 2.2-4-2.

The Department must determine whether Taxpayer should have self-assessed use tax on the tangible personal property used in fulfilling the terms of this Agreement with its not-for-profit customer, or collected sales tax on the property sold in conjunction with its sale of services. The answer, of course, depends upon the characterization of the Agreement. If the Agreement was exclusively for the sale of services, Taxpayer should have **self-assessed use tax** on the property used to fulfill its contractual obligations. But if the Agreement was for the sale of services **and** tangible personal property, Taxpayer should have **collected sales tax** on the property sold— absent issuance of any direct pay permits or exemption certificates.

In determining whether the Agreement was for the sale of parts and services, or for services only, the Department "looks" to the Agreement to identify, and characterize, what the parties have contractually agreed to.

The not-for-profit, in its search for a vendor to repair and maintain its microcomputers and related equipment, issued a request for proposals. In this request, the not-for-profit announced its intention to "purchase a maintenance program for…microcomputers, printers, plotters, scanners and other associated input and output devices…." This request also contained nineteen (19) requirements that vendors submitting proposals must meet. Among the listed requirements were the following:

- Each vendor will be responsible for providing their own storage and repair facility complete with all required outside services.
- Each vendor must be able to service all the equipment on the inventory.
- [Not-For-Profit's Designated Department] will be considered to be the point of contact for all repair calls.
- [Not-For-Profit's Designated Department] will screen service calls in an attempt to eliminate problems caused by software and/or user error.
- Each vendor must indicate on what equipment brands and/or types of devices they are certified to do warranty repairs.
- The proposal shall cover all internal boards, chips, and additional equipment contained in the various devices listed on the inventory list.
- On-site response time…shall not exceed four (4) hours or one-half (1/2) work day.
- Service for all items must be available five (5) days weekly….
- The vendor must guarantee that replacement components or items are certified to be at least equal to, or greater than, the quality of the components removed for repairs.
- The proposal shall guarantee the per item cost specified in the response will not change for the three year period of the maintenance agreement. Payment for these maintenance services will be made on July 1 of each of the three years covered in the contract.

After reviewing this request, Taxpayer responded with a proposal that was subsequently accepted by the not-for-profit (now customer). Taxpayer tendered an "Annual Service Agreement" which incorporated, with only minor modifications, the not-for-profit's nineteen (19) requirements. The Agreement also included a "Cap & Retainer" maintenance pricing option.

CAP & RETAINER

1st year	$250,000.00	[RETAINER AMOUNT]
2nd year	$250,000.00	[RETAINER AMOUNT]

3rd year $250,000.00 [RETAINER AMOUNT]

This option includes $250,000.00 [the RETAINER AMOUNT] annually paid in full to [Taxpayer]. [Taxpayer] will respond to all service calls dispatched by [the Customer]. [Taxpayer] will internally invoice once a month against the $250,000.00 [RETAINER AMOUNT] until it is consumed. Once this amount is consumed, [Taxpayer] will invoice in $25,000 increments with a total ceiling cost of [CAP AMOUNT].

[TAXPAYER] LABOR RATE $60.00 PER HOUR

10% DISCOUNT ON PARTS

This option will allow [the Customer] to control the overall cost of the project. You [the Customer] will then be able to decide if the equipment is cost effective to repair or replace.

[Taxpayer] will send reports with a breakdown of the services delivered and associated cost.

At first blush, the terms of Taxpayer's agreement strongly suggest *the existence of a maintenance agreement* (as that term is used in *Sales Tax Information Bulletin #2*) *exclusively for the provision of services*. The parties' characterization of the Agreement, as evidenced by language used, supports these assessments. The not-for-profit customer formally requested proposals for "Microcomputers and Related Equipment Maintenance." Taxpayer responded by submitting a document entitled "Annual Service Agreement."

Additionally, the terms tendered, and accepted, emphasize the service nature of the Agreement. Key terms discussed included payment amounts ("based on the number of units in the inventory list"), service coverage ("all the equipment on the inventory"), service availability (five days per week), on-site service response times (four hours or one-half work day), length of the Agreement ("The vendor shall respond for a three (3) year period…. Responses will not be entertained for service for less than this time period"), and payment requirements ("Payment for these maintenance services will be made on July 1 of each of the three years covered in the contract").

And finally, the "Maintenance Pricing" option ("CAP & RETAINER") chosen by the customer suggests the tender and acceptance of a maintenance agreement for services only. At the beginning of each year, the customer remits a RETAINER AMOUNT to Taxpayer. If Taxpayer's "services…and associated costs" are less than this RETAINER AMOUNT, Taxpayer enjoys a windfall. Collectively, these terms are consistent with Audit's characterization of Taxpayer's maintenance agreement as one exclusively for services.

However, the parties' performance under the contract leads the Department to a different conclusion. The parties' interpretation and subsequent performance of the contract suggest the execution of a requirements contract whereby Taxpayer (as vendor) agrees to supply a range of goods and services to the customer throughout the life of the Agreement. In return, the customer promises (at least implicitly) to acquire such goods and services exclusively from Taxpayer.

As previously noted, Taxpayer's provision of goods and services is limited by the predetermined CAP AMOUNT. Taxpayer's contractual responsibilities, therefore, terminate when the CAP AMOUNT has been reached—or upon expiration of the Agreement period. It is possible under the Agreement's terms that Taxpayer could have received a windfall if the value of the parts and services sold were less than the RETAINER AMOUNT. But such a situation never occurs because the RETAINER AMOUNT, at the customer's insistence, represents an artificially low figure. Taxpayer, therefore, profits only to the extent of the "markup" for parts and labor. And although Taxpayer receives no "windfall," Taxpayer accepts no risks. All costs associated with fulfilling the terms of the Agreement are billed to the customer.

The customer benefits as well. Convenience. Given the size and nature of its operations, it would be difficult, if not impossible, for this customer to arrange and coordinate maintenance and repair activities on an ad hoc, "as needed," basis. With this agreement, the customer receives a commitment from a qualified vendor to provide, annually, a pre-determined amount of goods and services. On-site response time, service availability, and vendor expertise are assured. Hourly labor charges and part discounts are "locked in." And consistent with the vendor's limited "windfall" opportunity, the customer cannot "profit" if costs incurred by its vendor exceed benefits received. The customer pays for all parts received and labor provided.

To summarize, the Department finds that Taxpayer's "maintenance" agreement with its not-for-profit customer does not represent the typical "nontaxable optional maintenance agreement" as discussed in *Information Bulletin #2, Sales Tax*. In this instance, Taxpayer should have collected sales tax on all tangible personal property transferred during the Agreement period. However, since the sales transactions occurred between Taxpayer and a not-for-profit customer with valid exemption certificates, Taxpayer, ultimately, was not required to collect any sales tax on these transactions.

FINDING

Taxpayer's protest is sustained.

II. Tax Administration – Penalty

DISCUSSION

The negligence penalty imposed under IC 6-8.1-10-2.1(e) may be waived by the Department where reasonable cause for the deficiency has been shown by the taxpayer. Specifically:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-2.1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust or pay a deficiency was due to reasonable

cause and not due to negligence. 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 under this section. 45 IAC 15-11-2(e).

In addition to these protested assessments, Audit proposed assessments on issues which Taxpayer conceded. With regard to both the "contested" and "non-contested" assessments, Taxpayer has provided sufficient evidence to allow the Department to conclude that the "reasonable cause" standard has been met. Consequently, the negligence penalty will be waived.

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

02980084.LOF

LETTER OF FINDINGS NUMBER: 98-0084
Corporate Income Tax
For the Period: 1990 through 1993

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Corporate Income Tax – Student Loan Marketing

Authority: IC 6-2.1-3-1; Information Bulletin #19

The taxpayer protests the disallowance of its deduction of interest income.

II. Corporate Income Tax – Apportionment of Payroll on a Mileage Basis

Authority: IC 6-3-2-2; 45 IAC 3.1-1-49

The taxpayer protests the disallowance of the apportionment of payroll on a mileage basis.

III. Corporate Income Tax – Indiana Sales Numerator

Authority: IC 6-3-2-2

The taxpayer protests the "throwback" of income to Indiana.

STATEMENT OF FACTS

The taxpayer owns and operates a variety of businesses. Given the diverse nature of the companies, equipment, holdings, etc., at issue, specific facts that are salient to the discussion will be provided as needed below.

I. Corporate Income Tax – Student Loan Marketing

DISCUSSION

For the years at issue, the taxpayer was disallowed its deduction for interest income received from investments in a "student loan marketing association" (hereinafter "SLMA"). The taxpayer believes that the auditor mistakenly confused the SLMA bonds with the Federal National Mortgage Association bonds. The taxpayer argues that the interest is exempt, since it was derived directly from United States Government Obligations.

Indiana Income Tax Information Bulletin #19, which deals with governmental obligations, sheds light on the issue:

> [O]bligations issued by the following organizations are considered direct United States Government obligations [and are] specifically exempted from state income taxation by federal law. [An enumerated list follows]
>
> 22.) Student Loan Marketing Association (20 U.S.C. Section 1087-2).

FINDING

The taxpayer is sustained to the extent that the interest can be verified to be from SLMA interest.

II. Corporate Income Tax – Apportionment of Payroll Based on Mileage

DISCUSSION

For clarity and anonymity purposes, letters (e.g., "X") will designate the companies at issue in this portion of the protest. Two subsidiaries—companies C and P—of company N, employed drivers to be leased to company V and company T. V and T are also subsidiaries of company N. The source of income of C and P was from the leasing of its drivers and equipment to be used by V and T in interstate commerce. (*Taxpayer Letter, 10/15/97*).

Whether or not C and P can apportion their payroll using the mileage percentage turns on the issue of public transportation. Are C and P providing public transportation? C and P did not derive their income from *engaging* in public transportation. Instead, drivers and equipment and equipment were *leased* to V and T.

This distinction is supported by case law. In Indiana Dept. of State Revenue v. E.W. Bohren, Inc., 178 N.E.2d 438, 440 (Ind. 1961), the Indiana Supreme Court stated the following regarding a lease situation:

It appears to us that appellee's income is not derived from operating a truck line or carrier in interstate commerce, but rather the receipts are received as a result of the appellee's property and equipment under a contract or lease to an interstate carrier.

C and P are not in the interstate trucking business for the protest at hand; instead, V and T are. All C and P are doing is leasing their drivers and equipment to interstate carriers.

The taxpayer argues in the alternative that 45 IAC 3.1-1-49 is applicable along with IC 6-3-2-2(l). The pertinent language that the taxpayer picks up from 45 IAC 3.1-1-49 is the following:

Employees engaged in the transportation of persons and/or materials as part of the taxpayer' regular business activities, i.e., truck or bus drivers, shall have their wages assigned to this state based on miles traveled in this state.

The invocation of this regulation presupposes that C and P are engaged in public transportation, and that this is part of C and P's regular business activities. But as the above analysis has shown, in the case at hand C and P are in the leasing business.

The Apportionment Schedule for Interstate Transportation (Schedule E-7), also reflects this distinction on Line 19:

Enter rents paid during the tax period for movable transportation revenue producing property rented and/or purchased through a lease contract, less any sub-rentals. Rented/leased property is valued at eight (8) times its annual rental rate.

Purchased transportation, defined as "the taxpayer's use of motor vehicle owned and operated by … for which a charge is incurred," is included in the calculation of rented property... [W]hen the charge for the use of such purchased property cannot be separated from the charge for compensating the operator of the property, the value of the total charge is reduced by 20%.

CAUTION: The 20% attributable to compensating the operator should *not be included in the payroll factor*. (Emphasis added)

FINDING

The taxpayer's protest is denied.

III. Corporate Income Tax – Indiana Sales Numerator

DISCUSSION

The auditor made adjustments of the sales numerator for two subsidiaries of the taxpayer. The auditor contends that neither subsidiary has "payroll or property in any state except Indiana" and that all income should be attributed to Indiana.

The taxpayer argues that the auditor has an "erroneous understanding of the facts", stating that the subsidiaries do in fact have nexus with other states. According to the taxpayer, the two subsidiaries had payroll and property outside of Indiana and post-sales activities outside Indiana. To quote the taxpayer:

These companies [the two subsidiaries] did have payroll and property outside of Indiana and due to their activities had nexus with many other states. [The two subsidiaries] also were included in income tax returns filed in several states, including California, Illinois, Minnesota, New Hampshire, Ohio, Oregon, and Utah.

(*Taxpayer Letter, 6/22/00*).

The taxpayer also states that the two subsidiaries "have activities in several states that would create nexus and, thus give those states jurisdiction to tax these activities." (*Taxpayer Letter, 10/15/97*). The taxpayer concludes:

The sales to these states should be included in the sales numerators of those states and not to Indiana. Taxpayer believes these sales are not subject to Indiana throwback rules and should be removed from the Indiana numerator.

(Ibid.).

Indiana's "throwback" rule is provided for in Indiana Code 6-3-2-2. Throwback issues can arise when sales are made to a purchaser in another state and the taxpayer is not subject to tax or jurisdiction in that other state. Indiana Code 6-3-2-2(n) states:

For purposes of allocation and apportionment of income under this article, a taxpayer is taxable in another state if:

(1) in that state he is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax; or

(2) that state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not.

The taxpayer argues that the two subsidiaries are "included in unitary filings in several states" and subject to taxation in several states. However, a unitary filing in another state does not necessarily mean that the subsidiaries, which are included within the unitary group, are subject to tax in that state. Nor does it mean that they are subject to that state's taxing jurisdiction. Tax Policy Directive #6 clarifies this:

The basic premise in filing combined/unitary returns is that all activities carried on by separate entities are part of a single unitary business... [California's treatment of the issue is explained]

[In conclusion] Corporations not filing combined/unitary returns in Indiana will continue to apply the throwback sales rule in the normal fashion.

Some of the members of the unitary group, specifically the two subsidiaries, were not (per the auditor) subject to taxation in any state but Indiana. And a unitary return was not filed for the state of Indiana. Thus, the throwback rule applies.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04980229.LOF

LETTER OF FINDINGS NUMBER: 98-0229
Sales and Use Tax
For Tax Periods: 1994-1996

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

1. Sales and Use Tax – Services

Authority: IC 6-2.5-2-1; IC 6-2.5-4-1; IC 6-8.1-5-1(b); IC 6-2.5-4-1(e)(2); 45 IAC 2.2-4-2;(b); Information Bulletin # 49, December, 1997; Cowden & Sons Trucking, Inc. v. Indiana Department of Revenue, 575 N.E.2d 718 (Ind. Tax Ct. 1991)

Taxpayer protests the imposition of sales tax on the value of certain services.

STATEMENT OF FACTS

Taxpayer is in the business of creating and selling signs, banners, decals, vinyl letters and other miscellaneous items. After a routine audit, Taxpayer was assessed additional sales tax, interest and penalty. Taxpayer protested the assessment and a hearing was held. Further facts will be provided as necessary.

DISCUSSION

1. Sales and Use Tax – Services

Retail transactions made in Indiana are subject to sales tax. IC 6-2.5-2-1. A retail transaction is defined generally as the acquiring and subsequent selling of tangible personal property. IC 6-2.5-4-1. Sales of services are generally not retail transactions and are not subject to sales tax. Many transactions contain both service and transfer of tangible personal property components. It is more difficult to determine whether these mixed transactions are taxable as retail transactions, exempt as the provision of services, or include taxable property and exempt services.

An Indiana Department of Revenue Notice of Proposed Assessment is presumed to be accurate and taxpayers carry the burden of proving that a proposed liability is inaccurate. IC 6-8.1-5-1(b). In this case, since a Notice of Proposed Assessment was issued subsequent to an audit and Taxpayer is contending that certain transactions qualify for the service exemption to the gross retail tax, Taxpayer has the burden of proving that its transactions qualify for the exemption.

Taxpayer's business of artistic sign making includes both the creation and painting of signage and artwork on property belonging to his customer such as paint detailing work on automobiles. The auditor did not assess additional tax on these sorts of transactions. Most of Taxpayer's business consists of creating and preparing a sign with tangible personal property that is used as the raw materials in the creation of his work. Examples of the property used in Taxpayer's business are wood and paint. After Taxpayer provides the service of transforming the personal property into an artistic sign, Taxpayer transfers the completed product to his customer. When Taxpayer bills its customers, Taxpayer states the cost of the tangible personal property separately and charges and collects sales tax on the value of the tangible personal property. Taxpayer does not charge sales tax on the service of designing, creating and preparing the signage. The issue to determine is whether this separation of the service charges from the tangible personal property charges on the bill exempts the service charges from the gross retail tax.

Taxpayer contends sales tax should not be collected on the service portion of the transaction pursuant to the holding in Cowden & Sons Trucking, Inc. v. Indiana Department of Revenue, 575 N.E.2d 718 (Ind. Tax Ct. 1991. That case stands for the proposition that services are subject to sales tax only if the transfer of the property and the rendition of the services are inextricable and indivisible. In the Cowden case, the Court held that the trucking company did not have to collect and remit sales tax on the service of delivering gravel when the customers bargained for the sale of the gravel from a gravel provider and separately bargained for the delivery service.

Taxpayer also cites Information Bulletin #49, December, 1997, as evidence that Taxpayer should not collect and remit sales tax on the services provided in the sale of artistic signs. This Information Bulletin deals with sales tax applications to morticians. When funeral services are billed separately from property used in the services such as caskets and urns, funeral directors only collect and remit sales tax on the transfer of the tangible personal property. Once again, customers bargain separately for the caskets, urns, flowers, vaults and other personal property. The separate bargaining for the tangible personal property and the services distinguishes the provisions of Information Bulletin #49, dated December, 1997, from Taxpayer's provision of artistic signs.

The law governing Taxpayer's fact situation is very specific. To the extent service income represents "any bona fide charges which are made for the preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records," the income becomes part of the retail merchant's gross retail receipts. IC 6-2.5-4-l (e)(2).

The Regulations provide guidance on how to determine the taxability of a transaction at 45 IAC 2.2-4-2 (b) as follows:

(b) Services performed or work done in respect to property and performed prior to delivery to be sold by a retail merchant must

however, be included in taxable gross receipts of the retail merchant.

In Taxpayer's situation, the services are performed prior to the delivery of the finished product to the customer. There is no bargaining for the tangible personal property separate from the bargaining for the service. Sales tax must be collected on the total price of the finished product.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04990128.LOF

LETTER OF FINDINGS NUMBER: 99-0128 ST
Sales and Use Tax
For the Tax Periods: 1993 through 1997

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Use Tax – Manufacturing Exemption: Fork-Lifts

Authority: 45 IAC 2.2-5-8

Taxpayer protests amount of use tax assessed on its purchase and rental of fork-lifts.

II. Use Tax – Manufacturing Exemption: Scissor Lift

Authority: IC 6-8.1-5-1(b); 45 IAC 2.2-5-8

Taxpayer protests use tax assessed on its purchase of a scissor lift.

III. Use Tax – Manufacturing Exemption: Hoist

Authority: 45 IAC 2.2-5-8

Taxpayer protests the amount of use tax assessed on its purchase of a hoist.

IV. Use Tax – Manufacturing Exemption: Shrink-Wrap Machine

Authority: 45 IC 6-2.5-5-3; 45 IAC 2.2-5-8

Taxpayer protests use tax assessed on its purchase of a shrink-wrap machine.

V. Use Tax – Environmental Control Equipment

Authority: IC 6-2.5-5-30

Taxpayer protests the amount of use tax assessed on its purchase of environmental control equipment.

VI. Use Tax – Steel Detailing

Authority: 45 IAC 2.2-4-2; Maurer v. Indiana Dept. of Revenue, 607 N.E.2d 985, 987 (Ind. Tax Ct. 1993).

Taxpayer protests use tax assessed on its purchase of steel detailing.

VII. Negligence Penalty – Imposition

Authority: IC 6-8.1-10-2.1

Taxpayer protests the Department's imposition of a 10% negligence penalty.

STATEMENT OF FACTS

Taxpayer is a manufacturer of thermal insulation. Taxpayer's products include ceramic fiber blankets, insulation boards, and ceramic papers and ropes. Its products are used by, among others, automobile manufacturers, ceramic and glass manufacturers, aerospace industries. During the audit period taxpayer purchased numerous items tax-exempt. Taxpayer now protests the proposed assessment of use tax on these items.

I. Use Tax – Manufacturing Exemption: Fork-Lifts

DISCUSSION

Taxpayer protests use tax assessed on its purchase and rental of fork-lifts. Taxpayer argues that these fork-lifts are wholly or partially exempt from tax because they are used to transport work-in-process. The Department regulations provide the following illustrations:

(1) A forklift is used exclusively to move work-in-process from a temporary storage area in a plant and to transport it to a production machine for processing. Because the forklift functions as an integral part of the integrated system comprising the production operations, it is exempt.

(2) A forklift is used exclusively to move finished goods from a storage warehouse and to load them on trucks for shipment to customers. The forklift is taxable because it is used outside the integrated production process.

(3) A forklift is regularly used 40% of the time for the purpose described in Example (1) and 60% of the time for the purpose described in Example (2). The taxpayer is entitled to an exemption equal to 40% of the gross retail income attributable to the

transaction in which the forklift was purchased.

45 IAC 2.2-5-8. Audit explained in the audit report that certain forklifts were used for shipping and warehousing and that certain fork-lifts were used for exempt purposes. Whole or partial credit was given for use tax paid upon that portion of forklift use determined to be exempt while assessments were made to the extent that the forklifts were used for non-exempt purposes. Thus, the Department finds that audit correctly determined the taxability of taxpayer's forklifts.

FINDING

Taxpayer's protest is denied.

II. Use Tax – Manufacturing Exemption: Scissor Lift

DISCUSSION

Taxpayer protests use tax assessed on its scissor lift. Taxpayer states the "scissor lifts hold the pallets that the bags of insulation are stacked on prior to final packaging." Taxpayer argues that since the production process includes "packaging, if required," the scissor lift is used directly in the direct production because it is within that process. 45 IAC 2.2-5-8(d).

Taxpayer has failed to meet its burden of demonstrating that the scissor lift equipment comes within the exemption provided under 45 IAC 2.2-5-8. There is no substantive evidence which shows this equipment is involved in the "direct production, manufacture, fabrication, assembly" or has an "immediate effect" on taxpayer's insulation products. 45 IAC 2.2-5-8(a), (c). Taxpayer's vague assertion that the equipment is involved in the final packaging of the insulation is insufficient. IC 6-8.1-5-1(b) places the burden of proving that auditor's assessment is wrong on the "person against whom proposed assessment is made."

FINDING

Taxpayer's protest is denied.

III. Use Tax – Manufacturing Exemption: Hoist

DISCUSSION

Taxpayer protests the assessment of use tax on a hoist. In order for manufacturing equipment to be exempt from the gross retail and use tax, the equipment must be purchased for direct use in the production process and must have an immediate effect on the article being produced. 45 IAC 2.2-5-8(c). Property has an immediate effect on the article being produced if the property is an essential and integral part of an integrated process that produces tangible personal property. Id.

As one step in taxpayer's production process, taxpayer uses a laminating machine to attach a continuous paper backing unto one side of its insulation products whereby the paper backing becomes an integral part of the finished product. In conjunction with the laminating machine, a hoist-like device is used to lift and place into position rolls of paper intended to be used as paper backing. When the original hoist proved inadequate, taxpayer purchased a replacement. It is this replacement which is the subject of taxpayer's protest.

Although the laminating machine itself is exempt from the gross sales and use tax under 45 IAC 2.2-5-8(c), the replacement hoist is not. The laminating machine is exempt because it has an immediate effect on taxpayer's insulation product and because it is an "essential and integral part of [the] integrated process which produces tangible personal property." Id. The replacement hoist is not exempt because it is one step removed from that integrated process and because it does not have an immediate effect on the taxpayer's finished products. The example provided at 45 IAC 2.2-5-8(c)(4)(G) is illustrative. The example states that "[e]quipment used to remove raw materials from storage prior to introduction into the production process..." is not exempt because it does not have "an essential and integral relationship with the integrated production system...." Id.

FINDING

Taxpayer's protest is denied.

IV. Use Tax – Manufacturing Exemption: Shrink-Wrap Machine

DISCUSSION

Taxpayer protests the assessment of use tax on the purchase of a shrink-wrap machine. Taxpayer argues that this equipment should be exempt from tax under IC 6-2.5-5-3 because the equipment is used in the direct production of taxpayer's insulating products.

At the final stage of taxpayer's production process taxpayer has produced forty-pound bundles of bulk insulating material. Each bundle is placed into plastic bags, weighed, x-rayed, and then positioned on a pallet. It is at this point that the pallet, loaded with the forty-pound bundles of bulk insulating material, is shrink wrapped. Taxpayer maintains that its customers require that the insulating materials be shrink wrapped, that the shrink wrapping protects the product during shipping, that the shrink wrapping serves to "enclose" the product, and that the shrink wrapping protects the product from contaminants.

The direct production of tangible personal property "ends at the point that the production has altered the item to its completed form, including packaging, if required." 45 IAC 2.2-5-8(d). Taxpayer's production process ends before the insulating product is shrink wrapped. By the time the bundles of packaged insulating material are stacked on the shipping pallet and are ready to be shrink wrapped, the product has reached the final marketable form in which the product will be received by taxpayer's customers. The shrink wrapping, although unquestionably aiding in the distribution of the product, does not constitute a production activity but is, instead, a post-production activity outside the scope of production. Therefore the shrink-wrap machine is taxable.

FINDING

Taxpayer's protest is denied.

V. Use Tax – Environmental Control Equipment

DISCUSSION

Taxpayer protests use tax assessed on its purchase of environmental control equipment. Audit exempted the structure of taxpayer's environmental control equipment. However, tax was assessed on bulk bags that are used in the pollution control equipment. Taxpayer explains that the bags filter the air and are essential to the functioning of the pollution control equipment.

Sales of tangible personal property are exempt from the state gross retail tax if: (1) the property constitutes, is incorporated into, or is consumed in the operation of device, facility, or structure predominantly used and acquired for the purpose of complying with any state, local, or federal environmental quality statutes, regulations, or standards; and (2) the person acquiring the property is engaged in the business of manufacturing, processing, refining, mining, or agriculture. IC 6-2.5-5-30.

The bulk bags are used to filter the air and are essential to the functioning of taxpayer's pollution control equipment. Therefore, the Department finds that the bulk bags used in the pollution control equipment are not subject to tax.

FINDING

Taxpayer's protest is sustained.

VI. Use Tax – Steel Detailing

DISCUSSION

Taxpayer protests the assessment of use tax on its acquisition of "steel detailing" services. "Steel detailing" is a term-of-art employed by steel framing engineers. As used in this context, "steel detailing" refers to the pre-construction preparation of the designs, engineering, and specifications for the steel framing used in the construction of taxpayer's engineered metal buildings. As such, it is analogous to the work an architect would perform in designing and determining the technical specifications of a non-engineered building.

Professional services with respect to property not owned by the person rendering those services are not categorized as selling at retail and, therefore, not subject to the gross retail tax. IAC 2.2-4-2. Necessarily, the taxpayer's completed purchase of the "steel detailing" was evidenced by the transfer of the results of the service provider's design work in a tangible form. Taxpayer describes this tangible form as "specifications." In such circumstances the regulation provides that "[w]here, in conjunction with rendering professional services, personal services, or other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail unless:

(1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from personal property;

(2) The tangible personal property purchased is used or consumed as a necessary incident to the service;

(3) The price charged for tangible personal property is inconsequential (not to exceed 10%) compared with the service charge; and

(4) The serviceman pays gross retail or use tax upon the tangible personal property at the time of acquisition."

45 IAC 2.2-4-2. Taxpayer's purchase of "steel detailing" is exempt from the gross retail tax under 45 IAC 2.2-4-2. Taxpayer's service provider is in the business of providing design specifications. The cost of the specifications is inconsequential when compared to the cost of the design work. The specifications - at least in their tangible form – are used as an incident to the provision of the steel detailing services. Taxpayer was indifferent as to the form or manner in which the results of the service provider's work were transferred since the object of taxpayer's purchase was the "steel detailing" not the incidental means by which that work was transferred. Moreover, in Indiana, it is the substance not the form of the transaction which determines the transaction's tax consequences. Maurer v. Indiana Dept. of Revenue, 607 N.E.2d 985, 987 (Ind. Tax Ct. 1993).

FINDING

Taxpayer's protest is sustained.

VII. Negligence Penalty – Imposition

DISCUSSION

Pursuant to IC 6-8.1-10-2.1, taxpayer was assessed a negligence penalty for failure to remit use tax to the Department. Taxpayer argues that this deficiency was due to reasonable cause. The taxpayer took prudent care in establishing a use tax accrual system to self-assess tax on taxable purchases. This effort, among other factors, demonstrates that the taxpayer exercised ordinary business care and prudence in carrying out its duty to remit use tax on its taxable purchases.

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

02980293.LOF

LETTER OF FINDINGS NUMBER: 99-0293
Corporate Income Tax
For Years 1993 - 1995

NOTICE: Under Ind. Code § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana

Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Income Tax – Sales Factor Denominator

Authority: Ind. Code § 6-8.1-5-1

The taxpayer protests the calculation of the sales factor denominator.

II. Income Tax – Foreign Source Dividends

Authority: Ind. Code § 6-3-2-12; Kraft General Foods, Inc. v. Iowa Dept. of Revenue, 112 S. Ct. 2365 (1992)

The taxpayer protests the reduction of the foreign source dividend deduction by related expenses.

III. Income Tax – Interest and Royalties as Business Income

Authority: Ind. Code § 6-8.1-5-1; Ind. Admin. Code tit. 45, r. 3.1-1-59; Ind. Admin. Code tit. 45, r. 3.1-1-61

The taxpayer protests the treatment of interest and royalty income as business income.

STATEMENT OF FACTS

The taxpayer is a Delaware corporation doing business in the state of Indiana. The taxpayer is a manufacturer of paper machine clothing, which is a fabric material used in the manufacture of paper. The paper machine clothing conveys the developing paper web through various production steps in a papermaking machine. A corporate income tax audit was completed on November 24, 1997. The taxpayer filed a protest and a telephone conference was held on April 27, 2000. The taxpayer was given additional time to submit evidence concerning foreign dividend income expense and, on June 16, 2000, did submit such evidence.

I. Income Tax – Sales Factor Denominator

DISCUSSION

The taxpayer protests the calculation of the sales factor denominator. "The notice of proposed assessment is *prima facie* evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Ind. Code § 6-8.1-5-1(b). The taxpayer has met its burden of proof on this issue. The Department has determined that the Audit Division miscalculated the sales factor denominator for the audit period. For purposes of calculating the sales factor, sales in the numerator and denominator are to be reported at net of returns and allowances, rather than at gross. However, to allow for a consistent calculation of both the numerator and denominator for this taxpayer, the denominator will be adjusted to gross sales.

FINDING

The taxpayer's protest is sustained.

II. Income Tax – Foreign Source Dividends

DISCUSSION

The taxpayer protests the reduction of its foreign source dividend income deduction by 15% for related expenses. The taxpayer's position is that U.S. source dividend deductions are not subject to the 15% reduction for related expenses while foreign source dividends are. The taxpayer maintains this discriminates against foreign commerce in violation of the U.S. Constitution. The taxpayer has cited the case of Kraft General Foods Inc. v. Iowa Dept. of Revenue, 112 S. Ct. 2365 (1992), to support its argument.

As is provided by Indiana law, the taxpayer was given a 100% deduction for foreign source dividend income from corporations the taxpayer had an 80% or larger ownership interest in; an 85% deduction for dividends from corporations the taxpayer owned a 50- 80% interest in; and a 50% deduction for dividends from corporations the taxpayer owned less than a 50% interest in. Ind. Code § 6-3-2-12(b-e).

The instant case is distinguishable from the Kraft case. In Kraft, the Supreme Court found that an Iowa law that taxed foreign source dividends of corporations, but not domestic source dividends, discriminated against foreign commerce in violation of the Commerce Clause of the U.S. Constitution. The Indiana statute, in contrast to the Iowa law, does permit the deduction of foreign source dividend income.

The presumption that 15% of dividend income represents related expenses is rebuttable upon presentation by the taxpayer of acceptable proof that a lesser amount is attributable to such expenses. The taxpayer has submitted sufficient evidence to rebut the Department's finding that 15% of the taxpayer's foreign dividend income is attributable to direct expenses.

FINDING

The taxpayer's protest is sustained.

III. Income Tax – Interest and Royalties as Business Income

DISCUSSION

The taxpayer stated in its protest letter that it did "not entirely agree with the agent's position on the issue of non-business income." Taxpayer's Protest Letter, p. 2 (Feb. 9, 1998). During the telephone conference, the taxpayer indicated that what it disagreed with was the auditor's assessment of tax on interest income and income from rents and royalties. The taxpayer offers no further argument or evidence.

According to the audit report, the interest income received by the taxpayer came from loans the taxpayer had made to its foreign subsidiaries. The taxpayer had deducted the interest income on its tax returns as non-business income. The auditor disallowed the deduction, stating that the interest was apportionable business income.

Interest income is non-business income if the intangible with respect to which the interest was received did not arise out of or was not created in the regular course of the taxpayer's trade or business operations or where the purpose for acquiring and holding the intangible was not related to or incidental to such trade or business operations.

Ind. Admin. Code tit. 45, r. 3.1-1-59.

The auditor determined that the interest income was created in the regular course of the taxpayer's trade or business and was, therefore, apportionable business income, rather than allocable non-business income.

Similarly, the auditor found that the taxpayer's royalty income was non-deductible business income. The royalty income is from the licensing of technology by the taxpayer to its foreign subsidiaries.

Patent and copyright royalties are non-business income if the patent or copyright with respect to which the royalties were received did not arise out of or was not created in the regular course of the taxpayer's trade or business operations or where the purpose for acquiring and holding the patent or copyright is not related to or incidental to such trade or business operations.

Ind. Admin. Code tit. 45, r. 3.1-1-61.

The auditor determined that the royalty income was directly related to the taxpayer's trade or business and was, therefore, apportionable business income, rather than allocable non-business income.

The taxpayer has the burden of proving that the tax assessment is wrong. Ind. Code § 6-8.1-5-1(b). The taxpayer has offered no evidence to show that the interest and royalty income should be classified as deductible non-business income. The auditor correctly treated the interest and royalty income as taxable business income.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04990557.LOF

LETTER OF FINDINGS NUMBER: 99-0557
Sales Tax
For Calendar Years 1994, 1995, 1996, 1997, and 1998

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE(S)

I. Tax Administration – Proposed Assessment of Tax

Authority: IC 6-8.1-5-1

Taxpayer protests the assessment because it was made without an examination of the actual records and he asserts that he is not liable for sales tax because he is a broker.

STATEMENT OF FACTS

Taxpayer is a retailer of new and used medical equipment and medical supplies and operates out of his home. Taxpayer is organized as a sole proprietor for federal income tax purposes. Taxpayer is not a registered retail merchant with the State of Indiana and has made purchases from his vendors claiming exemption for resale. During the field audit, the taxpayer indicated that he did not sell equipment and merely facilitated the sale of the equipment by matching up the sellers with the buyers. Taxpayer argues that he did not take title to any equipment, he was not a retail merchant, and did not need to be registered. Taxpayer further states he acted as an agent and sold the equipment on behalf of the seller and received a commission from the sale. However, SMSI sold equipment to the taxpayer, invoicing and shipping directly to the taxpayer's home in Indiana. SMSI billed the taxpayer sales tax, but the taxpayer refused to pay it claiming exemption for resale. Taxpayer issued an improper exemption certificate to SMSI after several attempts were made by SMSI to collect the sales tax.

Taxpayer was advised of the impending audit and initially agreed to provide records. However, the taxpayer failed to fulfill the initial records request and subsequently failed to respond to any of the auditor's requests for records and failed to reply to any of the auditor's contacts. The audit proposed a "Best Information Audit" assessment for sales tax on unreported sales. The assessment is based upon the average annual taxable sales of a local new and used medical equipment retailer believed to be about the same size and volume as the taxpayer.

Tax Administration – Proposed Assessment of Tax

DISCUSSION

Taxpayer has not filed Indiana income tax returns since 1993. Records examined include information obtained from the Internal Revenue Service on income reported for the years 1994, 1995, and 1996, and other working papers.

IC 6-8.1-5-1 (a) provides, in part: "[i] f the department believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department." The statute also provides: "[t] he notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid, and the burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

Here, the Department proposed an assessment of tax that the taxpayer protested. The taxpayer merely sent a few copies of invoices and/or offers to buy and sell and states he is a broker.

Barron's Law Dictionary defines a broker as "one who for commission or fee, brings parties together and assists in negotiating contracts between them." At best, the taxpayer may be classed as a jobber. Barron's Law Dictionary defines a jobber or "a middleman in the sale of goods, or typically, one who buys goods from a wholesaler and then sells them to a retailer. A jobber is distinguished from a broker or agent, who sells goods on another's behalf; a jobber actually purchases the goods himself, and the resells them."

The evidence provided by the taxpayer indicates it made purchases to be resold. No other evidence was provided.

IC 6-8.1-5-1 (c) provides, in part: "{t}he department shall demand payment...of any part of the proposed tax assessment, interest and penalties that is finds owing because:...after consideration of the evidence presented in the protest or hearing, the department finds the person still owes the tax.

Here, the taxpayer failed to provide evidence either to the auditor or the hearing officer after subsequent opportunities to present evidence were afforded. The charging of sales tax against "best information available" income was appropriate because no alternative means for the tax assessment existed. The auditor used the best and only information available at the commencement of the audit and the taxpayer has failed to present any viable evidence to rebut the presumptive validity of the assessment.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04990660P.LOF

LETTER OF FINDINGS NUMBER: 99-0660P
Sales & Use Tax
Calendar Years 1995, 1996, 1997, 1998, and Short Year May 31, 1999

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Tax Administration – Penalty

Authority: IC 6-8.1-10-2.1(d); 45 IAC 15-11-2

The taxpayer protests the negligence penalty.

II. Tax Administration – Interest

Authority: IC 6.8-1-10.1

The taxpayer protests the interest assessment.

STATEMENT OF FACTS

The negligence penalty and interest were assessed on a sales and use tax assessment resulting from a Department audit conducted for the calendar years 1995, 1996, 1997, 1998 and short year May 31, 1999.

The taxpayer sells household appliances including refrigerators, washers, dryers, and ranges. The taxpayer also sells parts and accessories for the appliances. The taxpayer is located out-of-state and makes deliveries by company truck into Indiana.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer argues the negligence penalty should be waived as the taxpayer was unaware of how Indiana sales tax regulations pertained to sales to Indiana locations.

Furthermore, the taxpayer said the penalty should be waived as the error was unintentional.

45 IAC 15-11-2(b) 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 finds the taxpayer was ignorant of tax duties. Ignorance is negligence and negligence is subject to penalty. As such, the Department finds the penalty proper and denies the penalty protest.

FINDING

The taxpayer's penalty protest is denied.

II. Tax Administration – Interest

DISCUSSION

The taxpayer protests the interest assessed.

IC 6.8-1-10.1 does not allow the waiver of interest. As such, the Department finds the assessment of interest proper and denies the interest protest.

FINDING

The taxpayer's interest protest is denied.

DEPARTMENT OF STATE REVENUE

0420000032P.LOF

LETTER OF FINDINGS NUMBER: 00-0032P
Sales and Use Tax
Calendar Year 1995

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Tax Administration – Penalty

Authority: IC 6-8.1-10-2.1(d); 45 IAC 15-11-2

The taxpayer protests the negligence penalty.

STATEMENT OF FACTS

The negligence penalty was assessed on a sales tax assessment resulting from a Department audit conducted for the calendar year 1995.

The taxpayer is a large pharmaceutical manufacturer. The taxpayer's personnel call on physicians in the state and provide sample drugs in the hope the physician prescribes the drug. In addition, physicians in the state perform clinical trials on new drugs being developed. The taxpayer maintains some cold-storage inventory in the state.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer argues the negligence penalty should be waived as the taxpayer performed their tax duties in a good faith manner and the error in the audit was inadvertent.

The Department points out the error was the result of the unintentional failure of the taxpayer to prepare an amended return, and, the issue was an issue in the prior audit. Furthermore, the error was material.

45 IAC 15-11-2(b) 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 finds the taxpayer was inattentive to tax duties. Inattention is negligence and negligence is subject to penalty. As such, the Department finds the penalty proper and denies the penalty protest.

FINDING

The taxpayer's penalty protest is denied.

DEPARTMENT OF STATE REVENUE

0120000116.LOF

LETTER OF FINDINGS NUMBER: 00-0116
Individual Income Tax
For the Period: 1997 and 1998

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Individual Income Tax – Imposition

Authority: Indiana Code 6-3 (IC 6-3-1-9; IC 6-3-1-12; IC 6-3-2-1; IC 6-3-4-1; IC –6-3-1-3.5; *inter alia*). Richey v. Indiana Dept. of State Revenue, 634 N.E.2d 1375 (Ind. Tax 1994); Thomas v. Indiana Dept. of State Revenue, 675 N.E.2d 362 (Ind. Tax 1997)

Taxpayer protests the imposition of Indiana Individual Income Tax on his income.

STATEMENT OF FACTS

The taxpayer protests the imposition of Individual Income Tax on his income. In a letter sent to the Indiana Department of Revenue, dated November 21, 1999, the taxpayer states:

> Since I owe no Federal tax for 1997 [and by extension, taxpayer argues, 1998], and Indiana follows Federal tax codes, I therefore owe no state [i.e., Indiana] taxes.

The taxpayer also sent a letter stating,

> Since I filed federal 1040 for 1998 at zero income, and I owed no income taxes to the federal government, I therefore can owe none to you [Indiana Department of Revenue], either. I filed zero on my state forms.

Despite the fact that the taxpayer did in fact have income for 1997 and 1998 (as evidenced by taxpayer's W-2 Wage and Tax Statement) and in fact had tax withheld for 1997, the taxpayer on his IT-40 (Indiana Full-Year Resident Individual Tax Return) listed "zero" as his income.

On his 1998 IT-40 the taxpayer simply put zeroes for all entries. His W-2 for 1998 lists income, but apparently the taxpayer instructed his employer to not withhold income tax for federal, state, and local purposes (though Social Security taxes were in fact withheld). The taxpayer also attached a document with what appears to be boilerplate language on why he had "zero income" for the tax year. The attached document was filled with string citations of cases and covered the argument that income is not defined by Internal Revenue Code, that wages are not income, and that he had "no earnings." In the Administrative Hearing, and in a subsequent letter the taxpayer reiterated this line of reasoning, stating "[T]here is no liability for income tax, there is no where in the law that specifically says that you must pay income tax, no where in the IRS code does it make anyone liable for income tax, and income as defined by the Supreme Court means corporate profit."

I. Individual Income Tax – Imposition

DISCUSSION

The Indiana Tax Court has dealt with arguments similar to those of the taxpayer. In Thomas v. Indiana Dept. of State Revenue, 675 N.E.2d 362, 368 (Ind. Tax 1997), the Tax Court dealt with the argument that "the federal definition of income does not include wages, salaries, or other forms of compensation." The Tax Court noted that Thomas relied upon the United States Supreme Court case Eisner v. Macomber, 252 U.S. 189, to reach the "mistaken" conclusion that wages do not constitute income to their recipients. The Tax Court enunciated two reasons the taxpayer was mistaken: (1) the monetary payments made in exchange for labor were "severed from labor and received or drawn by the recipient for his separate use," and (2) even if, *arguendo*, the federal government overstepped its constitutional authority, it would not have affected Indiana's sovereign authority to levy the Indiana income tax. Thomas at 368.

Another Indiana Tax Court case is worth noting—Richey v. Department of State Revenue, 634 N.E.2d 1375 (Ind. Tax 1994). In that case, the Tax Court rejected Richey's argument that the income tax in Indiana did not apply to income earned in a trade. The Richey case states at the outset:

> Does the State of Indiana, under the current constitutional and statutory framework of income taxation, possess the authority to tax the Indiana adjusted gross income of an individual Indiana resident? Although the question may suggest its own answer to most, it has nonetheless led the Petitioner, Jerry Richey, on a quest for the tax protester's grail—a court ruling that income taxation in this state and this country is void *ab initio*. Alas, no Merlin's magic or Excalibur can aid Richey's quest: Indiana has the authority to tax Richey's adjusted gross income.

From his letters and statements, it appears the taxpayer is under the mistaken belief that if he puts erroneous numbers on his federal tax returns, he can then transfer those numbers to his Indiana tax return for state tax purposes and thus not owe Indiana income tax. But as Indiana Code 6-3-1-8 makes clear, we adopt the *definition* of income used by the Internal Revenue Code. A zeroed out return, when the taxpayer had wages of over $100,000 for 1997 and 1998 combined, obviously means the taxpayer has erroneously excluded taxable income. In other words, taxable income means as defined by the Internal Revenue Code, not as reported on the federal return. (*See* Cooper Industries v. Indiana Department of State Revenue, 673 N.E.2d 1209, 1213 (Ind. Tax 1996)).

It is clear that wages are in fact taxable at the federal level and are part of gross income in the Internal Revenue Code. As District Judge Kanne noted regarding "the familiar and discredited arguments" that wages are not taxable for federal income tax purposes:

[A]rguments about who is a "person" under the tax laws, the assertion that "wages are not income," and maintaining that payment of taxes is purely voluntary function do not comport with common sense—let alone the law.

McKeown v. Ott, et al., 1985 WL 11176 (N.D. Ind.).

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420000197.LOF

LETTER OF FINDINGS NUMBER: 00-0197
Sales Tax and Use Tax
Calendar Years 1996, 1997, and 1998

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE(S)

I. Tax Administration – Penalty

Authority: IC 6-8.1-10-2.1(d); 45 IAC 15-11-2

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer is a subsidiary which operates within Indiana and provides intrastate telecommunications services.

I. Tax Administration – Penalty

DISCUSSION

At issue is whether the taxpayer was negligent in reporting its sales and use taxes. A prior audit containing identical issues was completed on June 30, 1997.

Taxpayer protests the penalty based upon reasonable cause, primarily, that the assessment was a small error rate and the issues were brought up after a prior audit was closed.

A review of the current audit revealed the taxpayer made no attempt to self assess use tax on clearly taxable items and had no use tax accrual system in place. The penalty is appropriate as the taxpayer made no effort to self assess use tax and the issue was present in two prior audits.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220000256.LOF

LETTER OF FINDINGS NUMBER 00-0256
Financial Institutions Tax
For Years 1996 and 1997

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Taxpayer's Qualifications to File Under Indiana's Financial Institution Tax – Conducting the Business of a Financial Institution

Authority: IC 6-5.5 et seq.; IC 6-5.5-1-17(d)(1); IC 6-5.5-1-17(d)(2); IC 6-5.5-1-17(d)(2)(B); IC 6-5.5-3-1; IC 6-8.1-5-1(b); 45 IAC 17-2-1(a); 45 IAC 17-2-3(d)(1), (2); 45 IAC 17-2-4(b), (c); 45 IAC 17-2-4(b), (c), (e)(2); 45 IAC 17-2-4(e)(2); Rev. Rul. 55-540, § 162(4) 1955-2 CB 39; Rev. Proc. 75-21, § 4, 1975-1 CB 715

Taxpayer is protesting the audit's decision, based upon taxpayer's relevant qualifications, to change taxpayer's filing status from a FIT-20 status to that of a IT-20 regular filer.

STATEMENT OF FACTS

Taxpayer is in the business of leasing and financing the purchase of construction equipment and engines throughout the world. Taxpayer's primary method of earning income is from leasing and rental activity. The taxpayer is a Delaware corporation with its headquarters located outside Indiana. Taxpayer's Indiana activities include the rental, leasing, and sale of equipment within the state. However, the taxpayer does not maintain a sales office within Indiana.

I. Taxpayer's Qualifications to File Under Indiana's Financial Institution Tax – Conducting the Business of a Financial Institution

DISCUSSION

The taxpayer has protested audit's decision to change the taxpayer's filing status from that of an FIT-20 filer to an IT-20 regular filer. The taxpayer maintains that, because it is in the business of leasing and financing construction equipment, it qualifies as a financial institution based on 45 IAC 17-2-3(d)(1)(2). The taxpayer argues that it qualifies to file as a financial institution because, as required under 45 IAC 17-2-4(b), (c), more than 80% of its total gross income is derived from leasing that is the economic equivalent of extending credit. Taxpayer maintains that the auditor's decision was based upon an incomplete consideration of its qualifying interest income.

Indiana imposes a franchise tax, known as the Financial Institution Tax (FIT), on corporations transacting the business of a financial institution inside the state. IC 6-5.5 et seq. The tax is imposed on resident financial institutions, nonresident financial institutions, and to non-bank entities that transact the business of a financial institution. 45 IAC 17-2-1(a). Non-resident corporations, such as the taxpayer, transacting the business of a financial institution, are included in the FIT, when they meet one of the eight tests listed in IC 6-5.5-3-1 whereby the non-resident corporation demonstrates that it has established an economic presence in Indiana. For the purpose of determining whether a taxpayer is qualified to file as a FIT, the taxpayer will have established an economic presence in Indiana if the taxpayer:

> (1) maintains an office in Indiana; (2) has an employee, representative, or independent contractor conducting business in Indiana; (3) regularly sells products or services of any kind or nature to customers in Indiana that receive the product or service in Indiana; (4) regularly solicits business from potential customers in Indiana; (5) regularly performs services outside Indiana that are consumed within Indiana; (6) regularly engages in transactions with customers in Indiana that involve intangible property, including loans, but not property described in section 8(5) of this chapter, and result in receipts flowing to the taxpayer within Indiana; (7) owns or leases tangible personal or real property located in Indiana; or (8) regularly solicits and receives deposits from customers in Indiana. IC 6-5.5-3-1.

It is not disputed that the taxpayer, under the provisions of IC 6-5.5-3-1, has sufficiently demonstrated that it maintains an economic presence in Indiana.

Because the taxpayer is not conducting the business of a traditionally regulated financial institution as defined in IC 6-5.5-1-17(d)(1), the taxpayer bases its claim to FIT status under the provisions of IC 6-5.5-1-17(d)(2)(B) which grants FIT status to those corporations which obtain 80% of their gross income from the "leasing [of] real and personal property that is the economic equivalent of the extension of credit if the transaction is not treated as a lease for federal income tax purposes." Id.

That definition is amplified in the Department of Revenue regulations. A corporation is subject to the FIT if it is conducting the business of a financial institution. 45 IAC 17-2-4(b), (c). The benchmark for determining whether the taxpayer is conducting the business of a financial institution is if 80% of the corporation's gross income is derived from the economic equivalent of extending credit. Id. The corporation must not only derive 80% of its income from garnering interest, that interest must be derived from a lease that is "*not* treated as a lease for federal income tax purposes." 45 IAC 17-2-4(e)(2) (Emphasis added). Therefore, to satisfy the 80%

benchmark, the interest must be both "the economic equivalent of the extension of credit" and from a lease "*not* treated as a lease for the federal income tax purposes." Id.

The taxpayer, looking to qualify as a FIT filer, is required to demonstrate that the transactions from which it derives interest income are not true leases but financing leases. A financing lease appears on the surface to be a lease and may be labeled as such but in substance is simply a device which enables the lessor to retain a security interest in the property until the purchase price is paid by the lessee. In effect, under a financing lease, the lessor is making a conditional sale to the lessee. IRS Revenue Ruling 55-540 provides the guidelines used in determining the treatment of equipment leases for use in the trade or business of the lessee. Whether a lease agreement is a lease, or in reality a conditional sale, depends on the provisions of the agreement in light of the facts and circumstances existing at the time the agreement was executed. Rev. Rul. 55-540, § 162(4) 1955-2 CB 39. In the "absence of compelling persuasive factors" demonstrating otherwise, a transaction is a conditional sales contract if one or more of the following factors are present:

(1) Portions of the periodic payments are specifically applicable to the equity to be acquired by the lessee;

(2) the lessee acquires title upon a payment of a stated amount of rentals which under the contract the lessee is required to make,

(3) the total amount paid by the lessee for a relatively short period of use constitutes an inordinately large proportion of the total payments required to secure transfer of title,

(4) the rental payments materially exceed the fair rental value,

(5) the property can be acquired under a purchase option at a price which is nominal in relation to the value of the property at the time the option may be exercised or which is a relatively small amount when compared to the total,

(6) some portion of the payments is specifically designated as interest or is otherwise recognizable as the equivalent of interest. Id.

IRS Revenue Procedure 75-21 expands on Revenue Ruling 55-540 by elaborating on the facts and circumstances that indicate whether a transaction is, in contrast to a conditional sale, a true lease. A transaction will constitute a true lease if *all* of the following conditions are met;

(1) The lessor must have a minimum unconditional risk investment in the property at the inception of the transaction,

(2) the lessor must maintain the minimum at risk investment throughout the lease and that risk must remain at the end of the lease,

(3) the minimum at risk investment must be equal to at least 20% of the cost of the property and must remain at 20% throughout the entire lease term,

(4) and, there must be a residual investment of at least 20% at the end of the lease term. Rev. Proc. 75-21, § 4, 1975-1 CB 715.

The taxpayer must meet its burden of proof by demonstrating that the proposed tax assessment, requiring the taxpayer to file under IT-20, is incorrect. IC 6-8.1-5-1(b) states in relevant part that "[t]he notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with person against whom the proposed assessment is made."

The taxpayer has presented evidence that purports to establish that, during the 1996 and 1997 tax years, it received interest income that exceeded the 80% benchmark figure required under IC 6-5.5-1-17(d)(2). The documentary evidence is labeled as "Transactions as a Percentage of Gross Income per Tax," "Transactions as a Percentage of Assets Per Book," and "Transactions as a Percentage of Assets Per Tax." The taxpayer represents this information as establishing yearly interest percentages ranging between 86.99% to 93.25%. However, for purposes of establishing the prerequisites necessary for filing under the FIT, the information is either irrelevant or inadequate. Taxpayer needs to establish that 80% of its income derives from income that is the economic equivalent of extending credit and that, in taxpayer's situation, the interest income derives from a particularized type of "lease." 45 IAC 17-2-4(b), (c), (e)(2). There is no indication that taxpayer's interest income is received from transactions which qualify as conditional sales under IRS Revenue Ruling 55-540 or that the income is not simply derived from true leases under Revenue Procedure 75-21. The documentary evidence offered by the taxpayer may be of some arcane significance but it does not enable the taxpayer to meet the statutory burden of demonstrating the proposed assessment is incorrect.

In addition, a cursory review of the taxpayer's 1996 and 1997 federal tax returns indicate that the taxpayer is ineligible to qualify to file under the Indiana FIT. The amount of interest and rental income claimed on those returns does not approach the 80% threshold requirement. Further, there is no indication that the interest income listed on the federal returns is derived from the economic equivalent of extending credit.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0420000230P.LOF

LETTER OF FINDINGS NUMBER: 00-0230P
Sales and Use Tax
Period March 31, 1999

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Tax Administration – Penalty

Authority: IC 6-8.1-10-2.1(d); 45 IAC 15-11-2

The taxpayer protests the negligence penalty.

STATEMENT OF FACTS

The negligence penalty was assessed on a late filing of a sales tax return for the period March 31, 1999.

The taxpayer is located in Indianapolis and is a movie theatre.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer argues the negligence penalty should be waived as the taxpayer claims to have mailed the return in a timely manner and the return was evidently either lost by the Post Office or by the Department. The taxpayer argues the penalty should be waived as this was not the taxpayer's error. The Department received no return or check within the filing period. The taxpayer has not produced anything from the Post Office indicating the Post Office attempted to deliver the return and/or check to the Department. In short, there is no proof the return or check were actually mailed to the Department.

The Department points out the taxpayer has had 31 problem billings within the past seven years, including many late payments and returned checks.

45 IAC 15-11-2(b) 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 finds the taxpayer was inattentive to tax duties. Inattention is negligence and negligence is subject to penalty. As such, the Department finds the penalty proper and denies the penalty protest.

FINDING

The taxpayer's penalty protest is denied.

DEPARTMENT OF STATE REVENUE

0420000293P.LOF

LETTER OF FINDINGS NUMBER: 00-0293P
Sales Tax
For the Month Ending October 31, 1999

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE(S)

I. Tax Administration – Penalty

Authority: IC 6-8.1-10-2.1(d); 45 IAC 15-11-2

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer protests the penalty assessed for failing to timely remit sales tax for October 1999.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer failed to timely remit sales tax for October 1999. The department disallowed the collection allowance and assessed a penalty.

Taxpayer requests a waiver of the penalty because it was in the process of converting from a manual to a computerized system and had recently changed accounting firms. Taxpayer is an early filer with EFT payments due on the twentieth of each month. November 20 and November 21 were on a Saturday and Sunday respectively. It made payment on Tuesday, November 23, 2000 and was one day late.

Taxpayer states it had a late penalty abated for the period ending September 30, 1999 and the facts for October are no different than that in September. Because of varying factual situations, the Department's waiving of one penalty does not obligate or commit

the department to waiving another.

The taxpayer was negligent in failing to timely remit the sales tax collected and has not provided reasonable cause for failure to do so.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220000357P.LOF

LETTER OF FINDINGS NUMBER: 00-0357P
Gross and Adjusted Gross Income Tax
Calendar Years 1996, 1997, and 1998

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE(S)

I. Tax Administration – Penalty

Authority: IC 6-8.1-10-2.1(d); 45 IAC 15-11-2

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer is incorporated in Pennsylvania and has three Indiana business locations. Upon audit it was discovered that the taxpayer made various errors in preparing its income tax returns such as the failure to report material sales for gross income tax, failing to include Indiana sales in the numerator of the sales factor, failure to throwback sales for apportionment, and the erroneous classification of business income to non business income.

Taxpayer protests the penalty and states that it has made an honest attempt to correctly report its liabilities and has a history of paying its tax liabilities timely. It has made necessary changes to insure it does not happen in the future.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer was assessed a negligence penalty for failure to correctly report receipts in gross income, various errors in the apportionment factor and failure to correctly report business income. Taxpayer paid 70.7%, 94.5%, and 85.7% of the tax due for calendar years 1996, 1997, and 1998 respectively.

Taxpayer, in a letter dated May 9, 2000, protested penalties assessed because it has a history of paying its tax liabilities timely, has made an honest attempt to correctly report its tax liabilities, and has made necessary changes to insure these errors are corrected in the future.

Taxpayer made errors in various areas of its tax return that should have been verified before filing. Taxpayer has not provided reasonable cause to allow the department to waive the negligence penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220000358P.LOF

LETTER OF FINDINGS NUMBER: 00-0358P
Adjusted Gross Income Tax - Penalty
For Calendar Years 1997 and 1998

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE(S)

I. Tax Administration – Penalty

Authority: IC 6-8.1-10-2.1(d); 45 IAC 15-11-2

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer was audited for calendar years 1996, 1997, and 1998. Upon audit it was discovered that the taxpayer improperly apportioned its income and failed to report its Indiana modifications properly.

Taxpayer protests the penalty and requests a waiver.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer provided no reason for its request for penalty waiver.

Taxpayer was assessed a negligence penalty because it failed to correctly apportion its income and report Indiana modifications. Both issues were issues in a prior audit. Taxpayer has not provided reasonable cause.

The department finds that a negligence penalty is proper.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420000361P.LOF

LETTER OF FINDINGS NUMBER: 00-0361P
Sales Tax and Use Tax
Calendar Years 1997, 1998, and 1999

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE(S)

I. Tax Administration – Penalty

Authority: IC 6-8.1-10-2.1(d); 45 IAC 15-11-2

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer is engaged in retail sales consisting of clothing and accessories. Taxpayer has approximately two hundred stores, five of which are in Indiana.

I. Tax Administration – Penalty

DISCUSSION

At issue is whether the taxpayer was negligent in reporting its use taxes.

Taxpayer protests the penalty based upon reasonable cause, primarily, that it used ordinary care and prudence in preparation of its tax renditions, the majority of the issues in the audit were minor compared to the total dollars reported and it is timely on all occasions.

A review of the current audit revealed the taxpayer made no attempt to self assess use tax on clearly taxable items and had no use tax accrual system in place. The penalty is appropriate as the taxpayer made no effort to self assess use tax as required under IC 6-2.5-3-2.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220000364P.LOF

LETTER OF FINDINGS NUMBER: 00-0364P
Income Tax Penalty
Calendar Year 1997

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE(S)

I. Tax Administration – Penalty

Authority: IC 6-8.1-10-2.1(d); 45 IAC 15-11-2

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer, in a letter dated August 24, 2000 protested the penalty assessed for 1997.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer was assessed a negligence penalty for failure to timely pay its entire tax liability by the due date of the return. $43,600, due by April 15, 1998 was not received until October 14, 1998.

Taxpayer states it employs a "Big Five" accounting firm to prepare its state tax returns and submit payments as soon as it is notified to do so. Taxpayer further states that due to an omission in the extension calculation for 1997, there was a shortfall in payment that was not recognized until the preparation of the return. Taxpayer states that it has been assured by its accountants that such an error will never take place in the future. Taxpayer requests the penalty be considered for abatement.

Taxpayer was several months late in paying all of its tax liability. Overlooking the tax due upon filing a return is not considered reasonable cause.

The department finds that a negligence penalty is proper.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

28940004.SLOF

SUPPLEMENTAL LETTER OF FINDINGS NUMBER: 94-0004 CSET
Controlled Substance Excise Tax
For Tax Periods: 1993

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

Controlled Substance Excise Tax – Imposition

Authority: IC 6-7-3-5; IC 6-8.1-5-1(b)

Taxpayer protests the assessment of Controlled Substance Excise Tax.

STATEMENT OF FACTS

Taxpayer was arrested for possession and distribution of marijuana. The Indiana Department of Revenue issued a Record of Jeopardy Finding, Jeopardy Assessment Notice and Demand on November 8, 1993 in a base tax amount of $2,366,924.00. Taxpayer filed a protest to the assessment. A hearing was held by telephone on December 13, 1999. Taxpayer was granted until June 22, 2000 to submit additional evidence. A Letter of Findings was issued on June 30, 2000. Taxpayer did not receive the Hearing Officer's May 13, 2000 letter setting the final date for him to submit evidence on his behalf until August 13, 2000. Therefore, Taxpayer was granted a supplemental hearing and the opportunity to submit additional evidence until September 17, 2000. Taxpayer did not submit any additional evidence. Further facts will be provided as necessary.

Controlled Substance Excise Tax – Imposition

DISCUSSION

IC 6-7-3-5 imposes the Controlled Substance Excise Tax on the possession and delivery of marijuana and cocaine in the State of Indiana. Taxpayer bears the burden of proving that the assessment of tax is incorrect. IC 6-8.1-5-1(b). The arresting officer's report and Indiana State Police Laboratory report indicate that Taxpayer was in possession of 59173.1 grams of marijuana. Taxpayer alleged at the hearing that he was not in possession of that much marijuana. Taxpayer did not submit any evidence to prove that the Indiana State Police Laboratory report had the incorrect weight. Taxpayer did not sustain his burden of proving that the assessment was incorrect.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220000114P.SLOF

SUPPLEMENTAL LETTER OF FINDINGS NUMBER: 00-0114P
Indiana Corporate Income Tax
For Tax Year Ending 1997

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Ten Percent Negligence Penalty Assessed for Late Payment of Indiana Corporate Income Tax

Authority: IC 6-8.1-10-2.1(a)(2); IC 6-8.1-10-2.1(a)(3); IC 6-8.1-10-2.1(b)(2), (4); 45 IAC 15-11-2(b); 45 IAC 15-11-2(c)

Taxpayer protests the assessment of a 10% negligence penalty based upon the taxpayer's 1997 corporate income tax deficiency attributable, according to the taxpayer, to a computational error on the part of the taxpayer's outside tax consultants.

II. Ten Percent Penalty Assessed for Underpayment of the Taxpayer's Quarterly Estimated Tax

Authority: IC 6-3-4-4.1(e); IC 6-3-4-4.1(e)(1), (2); IC 6-8.1-10-2.1(b); 45 IAC 15-11-2(c)

STATEMENT OF FACTS

The taxpayer is a mid-sized manufacturing enterprise in the business of producing cold drawn steel tubes. On December 27, 1999, the Department issued an AR-80 assessing a ten-percent negligence penalty based upon the taxpayer's failure to make complete payment of its 1997 Indiana Corporation Tax. On March 1, 2000, the Department issued an AR-80 assessing a ten-percent penalty stemming from the taxpayer's underpayment of its second quarterly estimated 1997 income tax. A portion of that penalty was attributable to the Department's failure to timely post the taxpayer's second quarterly payment. However, even after the Department's error was corrected, the taxpayer's second quarterly estimated tax payment was underpaid by approximately $81,000.

DISCUSSION

I. Ten Percent Negligence Penalty Assessed for Late Payment of Indiana Corporate Income Tax

The taxpayer protests the assessment of a ten-percent negligence penalty for the late payment of the taxpayer's 1997 Indiana Corporate Income Tax. The taxpayer characterizes the late payment as the result of an "isolated computational error." The origins of the "isolated computational error" stemmed from the time the taxpayer received notice that its 1996 taxes had been overpaid. That overpayment was credited over to the taxpayer's first quarter 1997 estimated tax liability. The taxpayer subsequently made second, third, and fourth quarter estimated payments for the 1997 tax year. When the taxpayer, acting through its outside tax consultants, calculated its final 1997 tax liability, it inadvertently gave itself a duplicate credit for the 1996 overpayment. This cascading series of errors resulted in the underpayment of the taxpayer's 1997 tax in the amount of $95,526. The taxpayer has since made complete payment of its 1997 tax liability.

Under IC 6-8.1-10-2.1(a)(2), a taxpayer is subject to a penalty if the taxpayer "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." IC 6-8.1-10-2.1(a)(3), imposes on the taxpayer a penalty for "a deficiency that is due to negligence." The penalty is limited to ten-percent of the amount of the tax that was not timely remitted. IC 6-8.1-10-2.1(b)(2), (4). The standards under which negligence is determined and the penalty imposed is found at 45 IAC 15-11-2(b) which states that "'[n]egligence' 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 taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to the duties placed upon the taxpayer by the Indiana Code or department regulations." The regulation goes on to state that the Department shall determine negligence "on a case by case basis according to the facts and circumstances of each taxpayer." Id.

The Department is authorized to waive the penalty "if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence." 45 IAC 15-11-2(c). The regulation provides a non-exclusive list of factors, which go toward establishing reasonable cause, but concludes 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. Id.

The "particular facts and circumstances" presented by the taxpayer lead to a conclusion that the late payment was due to "reasonable cause and not due to negligence." Taxpayer's late payment of its 1997 tax liability stemmed from its failure to properly account for the effect of the 1996 overpayment when the taxpayer calculated, in October of 1998, its final 1997 tax liability. The error is imbedded within the taxpayer's computation of its 1996 return, within the calculation of its 1997 return, and the erroneous crediting of the 1996 overpayment over the span of two tax years. When reviewed individually, both the 1996 and 1997 returns are facially correct. Evidence of the computation error can only be found in the work papers prepared by the taxpayer's outside tax consultants and, at least initially, unavailable when the taxpayer reviewed the 1997 returns. Standing alone none of the taxpayer's arguments – that it reasonably relied on the advice of its tax advisors, that it promptly remedied the deficiency when brought to its attention, that the computation error was a transcription error – are dispositive but they are factors which are indicative of the taxpayer's reasonable care, caution, or diligence.

FINDING

Taxpayer's protest is sustained.

DISCUSSION

II. Ten Percent Penalty Assessed for Underpayment of the Taxpayer's Quarterly Estimated Tax

Distinguished from the first issue concerning taxpayer's 1997 income tax, is the protest the taxpayer sets forth regarding the penalty assessed for the underpayment of the taxpayer's second quarter estimated 1997 corporation income tax. The taxpayer argues that an underpayment of its 1997 second quarter estimated tax in the amount of $1,025 does not warrant the imposition of a civil penalty of $8,076 and that, based on general equitable principles, the penalty should be abated.

Under IC 6-3-4-4.1(e), a penalty is imposed for the underpayment of estimated tax and incorporates by reference the ten-percent negligence rate under IC 6-8.1-10-2.1(b). IC 6-3-4-4.1(e) incorporates the ten-percent *rate* but does not incorporate the negligence

standard. Rather, IC 6-3-4-4.1(e) simply states that the penalty "shall be assessed by the department on corporations failing to make payments as required...."

Taxpayer mischaracterizes the basis upon which the $8,076 penalty was determined. IC 6-3-4-4.1(e) assesses the ten-percent penalty on the amount by which the taxpayer underestimated its 1997 tax liability. In its 1997 second quarter estimated tax payment, taxpayer underestimated its liability by $80,763 and it is this figure that served as the basis for determining the penalty.

In order to avoid the ten-percent penalty, taxpayer had the option of estimating its 1997 final tax liability to within 80% of its actual liability. IC 6-3-4-4.1(e)(1), (2). Alternatively, taxpayer could have based its estimate on its final tax liability for the previous year. Id. Taxpayer chose the former, miscalculated its 1997 income, and made a deficient payment of its estimated tax liability. In effect, taxpayer fell $1,025 short of reaching the "safe harbor" provisions found under IC 6-3-4-4.1(e). However, as a basis for determining the resulting ten-percent penalty, the $1,025 figure is entirely irrelevant. The miscalculation is unfortunate but results from the taxpayer's reasoned, if erroneous, decision making. Having no equitable or statutory basis upon which to abate the ten-percent penalty, the Department must decline the opportunity to do so.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE
Revenue Ruling #2000-02 FIT
October 11, 2000

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

Financial Institutions Tax – Attribution of Receipts

Authority: IC 6-5.5-4-2; IC 6-5.5-1-10; IC 6-5.5-4 (Sections 3 through 13)

The taxpayer requests the Department to rule on the inclusion of "investment receipts other than from Indiana municipal investments" in the apportionment factor for Indiana financial institutions tax purposes.

STATEMENT OF FACTS

The taxpayer is a bank holding company domiciled in Indiana. The taxpayer's principal bank subsidiary (hereinafter "Bank") is also a resident taxpayer with operations in Indiana, Ohio, Kentucky and Illinois. The taxpayer and Bank file a combined Indiana Financial Institution Tax Return under the unitary concept. Bank is in the business of accepting deposits and investing those deposits in commercial loans, residential loans, consumer loans, Indiana municipal investments, non-Indiana municipal investments, U. S. Treasuries, Federal Agencies and corporate securities. Bank currently manages its municipals and other investments within Indiana.

The taxpayer submitted the following specific questions for Departmental review:

1. Are the "receipts from investments other than from Indiana municipal investments" included in the denominator of the apportionment factor?

2. Are the "receipts from investments other than from Indiana municipal investments" attributable to Indiana and included in the numerator of the apportionment factor by virtue of the fact that the taxpayer and Bank are commercially domiciled in Indiana and the investment management takes place in Indiana?

DISCUSSION

A definition of receipts is contained in IC 6-5.5-4-2 that provides in part:

Sec. 2. For purposes of computing receipts or the receipts factor under this article the following apply:

(1) "Receipts" means gross income (as defined in IC 6-5.5-1-10), plus the gross income excluded under Section 103 of the Internal Revenue Code, less gross income derived from sources outside the United States. However, upon the disposition of assets such as securities and money market transactions, when derived from transactions and activities in the regular course of the taxpayer's trade or business, receipts are limited to the gain (as defined in Section 1001 of the Internal Revenue Code) that is recognized upon the disposition.

Pursuant to IC 6-5.5-1-10, "Gross income" means gross income (as defined in Section 61 of the Internal Revenue Code) for federal income tax purposes. The denominator for the receipts factor, therefore, is to include any gross income reported for federal income tax purposes.

The attribution rules of Sections 3 through 13 of Indiana Code 6-5.5-4 determine the composite receipts that are included in the numerator of the apportionment factor. Receipts from Indiana municipal investments are specifically attributable under IC 6-5.5-4-12, however, there is no attribution rule defining how "investment receipts other than from Indiana municipal investments" are to be included in the numerator of the apportionment factor.

RULING

1. The denominator of the apportionment factor is to include any gross income reported for federal income tax purposes under Section 61 of the Internal Revenue Code. "Receipts from investments other than from Indiana municipal investments" must be included in the denominator of the apportionment factor to the extent they have been included as gross income for federal income tax purposes. Any "receipts from investments other than from Indiana municipal investments" which are for the disposition of assets such as securities and money market transactions are limited to the gain that is recognized upon disposition in accordance with IC 6-5.5-4-2(1).

2. Receipts included in the numerator of the apportionment factor are limited to those specifically enumerated in IC 6-5.5-4-3 through IC 6-5.5-4-13. "Receipts from investments other than from Indiana municipal investments" are not specifically enumerated and, therefore, not included in the numerator of the apportionment factor irrespective of the fact that the taxpayer's commercial domicile is in Indiana or the fact that the management of "investments other than Indiana municipal investments" takes place in Indiana.

CAVEAT

This ruling is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances, as stated herein, are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. However, other taxpayers with substantially identical factual situations may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material respect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this ruling, a change in statute, regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection.

DEPARTMENT OF STATE REVENUE
#2000-07 IT
October 17, 2000

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

Gross Income Tax – Determination of Indiana Gross Income Tax Rate for Provision of Certain Services

Authority: IC 6-2.1-2-4; IC 6-2.1-1-0.6; IC 6-2.1-2-5

The taxpayer requests the Department to determine the Indiana gross income tax rate for the provision of certain services.

STATEMENT OF FACTS

The taxpayer presents the following services for Departmental determination:

1. Full-serve Black & White, Color, and Oversize Printing –

This activity entails the production of printed materials utilizing high- to very high-volume printing equipment. The equipment consists of printers, copiers, scanners, computers, and multi-function devices (computer, scanner, and/or printer combined) that can cost as much as a few hundred thousand dollars. Although older equipment has the capability of processing digital and scanned documents, the new machines being deployed by the taxpayer do not possess scanning capabilities. The newer machines function as printers that require a separate computer and scanner to print the traditional hardcopy original received from a customer. The equipment can print in sizes from envelope to 11" X 17" and up to banner or poster sizes, utilizing bond paper, transparencies, mailing labels, glossy and specialty papers, vellum, and mylar. The equipment is capable of performing document enhancements and additional services, including document manipulation; pre-press activities of receiving, processing, moving, storing, and transmitting the copy elements and image to be printed; image shifting; enlarging/reducing; and color and contrast alteration. Additionally, this equipment has the capability of performing various finishing services, including stapling, collating, folding, inserting tabbed pages, and binding. Toner a dry form of ink, is applied by one or more processes (specifically by digital means) and in certain pieces of equipment liquid ink is applied. This equipment is operated solely by employees of the taxpayer and is located in areas of the stores that are not accessible to customers.

2. Self-serve Black & White, Color, & Oversize Printing –

This activity is closest to the traditional business of photocopying. Generally, the printing is performed by the customer at the self-photocopying equipment. However, the equipment does employ digital technology to print the materials and is comprised of various high-volume copiers. The machines do possess document enhancement capabilities, including image shifting, enlarging/reducing, and color and contrast alteration. Additionally, the equipment can perform limited assembly functions of collating and stapling. Although the equipment may be capable of receiving electronic files, generally the equipment is not

connected to receive such. Toner, a dry form of ink, is applied by one or more processes (specifically by digital means) and in certain pieces of equipment liquid ink is applied.

3. Full-serve Finishing and Binding –

This activity represents the various finishing and binding services that the taxpayer provides to its customers generally along with full-serve black & white, color, and oversize printing. The equipment consists of high-volume, high-capacity drills, cutters, bindery equipment, laminators, folders, shrink wrappers, collators, and other equipment that drill, cut, bind, laminate, fold, package, mount, score, insert, and collate printed materials. The binding equipment is capable of various binding methods, including tape, channel, comb, velo, perfect, coil, and wire bindings. Additionally, certain equipment can perform booklet making and saddle stitching. The equipment that the taxpayer utilizes in its business is the same bindery equipment as used in commercial printing. This equipment is operated solely by employees of the taxpayer and is located in areas of the stores that are not accessible to customers.

4. Full-serve Document Creation –

This activity represents the various activities and functions of the taxpayer in organizing and manipulating customer content (i.e., text and graphics provided by the customer). Specifically, these activities are pre-press activities and functions that include the taxpayer's employees receiving either physical or electronic text or graphic images (copy elements and images); the processing of these text or graphic images so that the elements may be combined or moved as directed by the customer; and the storing of the elements so that the final product can be transmitted to the printing equipment for reproduction. Employees of the taxpayer do not draft copy or create artwork for reproduction; only customer content (text and graphics) is utilized. The equipment used to perform these activities and functions consists of computers, scanners, and software that produce output to be printed on the taxpayer's Full-serve Black & White, Color, and Oversize Printing equipment. The equipment can create documents, including brochures, forms, invitations, letterhead, programs, resumes, menus, flyers, posters, and banners. Additional activities included in this activity are preparing/creating a cd-rom diskette (creating a cd-rom master) from text or graphics provided by the customer and preparing tabbed dividers printed with customer-provided descriptions. These activities are performed by the taxpayer's employees and utilize equipment that is available for use by the taxpayer's employees and that can be rented by customers.

5. Full-serve Shipping & Mailing Services –

This activity represents the various shipping and mailing services provided by the taxpayer to its customers. The gross income from this activity includes charges relating to distribution of the printed materials, including postage and UPS/Fedex charges, as well as the charges to package or insert the printed materials, address the mailings and affix postage, and correlate/maintain the mailings of printed materials printed by the taxpayer.

6. Full-serve Custom Products Printing –

This activity represents the specialty printing services provided by the taxpayer to its customers. The gross income from this activity is derived from the taxpayer's printing or placing the customer's text or graphics on custom cards (including greeting cards), calendars, t-shirts, buttons, mousepads, etc. Toner, ink and/or a printed decal are applied by one or more processes. Due to the non-standard nature of this type of printing, employees of the taxpayer may have to assemble the printed item and repackage the completed job for the customer. The activities included in this category are performed by employees of the taxpayer.

DISCUSSION

IC 6-2.1-2-4 provides that the receipt of gross income from the business of commercial printing that results in printed materials, excluding the business of photocopying, is subject to the tax rate of three-tenths of one percent (0.3%). IC 6-2.1-1-0.6 defines "commercial printing" as a process or activity, or both, that is related to the production of printed materials for others, including the following:

1. Receiving, processing, moving, storing, and transmitting, either physically or electronically, copy elements and images to be reproduced.
2. Plate-making or cylinder-making.
3. Applying ink by one (1) or more processes, such as printing by letter press, lithography, gravure, screen, or digital means.
4. Casemaking and binding.
5. Assembling, packaging, and distributing printed materials.

The taxpayer in providing its services, in certain instances, performs one or more similar processes and utilizes similar equipment to commercial printers. Further, the technologies underlying the businesses of commercial printing and photocopying have been in a process of converging for a number of years. Notwithstanding these statements, the taxpayer in providing its services does not perform the identical processes and utilize the identical equipment associated with commercial printing. The taxpayer, therefore, is not in the business of "commercial printing", but, rather in the business of photocopying. Consequently, the taxpayer's gross income derived from the provision of its services is subject to the tax rate of one and two-tenths percent (1.2%) pursuant to IC 6-2.1-2-5.

RULING

The Department rules that the taxpayer's gross income derived from the provision of its services is subject to the tax rate of

one and two-tenths percent (1.2%).

CAVEAT

This Ruling is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances, as stated herein, are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. However, other taxpayers with substantially identical factual situations may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material respect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this ruling, a change in a statute, regulation, or case law could void he ruling. If his occurs, the ruling will not afford the taxpayer any protection.

DEPARTMENT OF STATE REVENUE
Revenue Ruling #2000-09 ST
October 31, 2000

Notice: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

Sales/use Tax – Application of Sales/use Tax on a Catering Service's Service Charges

Authority: IC 6-2.5-4-1(g)

The taxpayer requests the Department to rule on the taxability of service charges related to catering.

STATEMENT OF FACTS

The taxpayer is an Indiana catering service which charges a 15% service charge on the total amount of their invoices which range from room rental to food and beverage to equipment rental to various other charges. The 15% service charge is figured on the total invoice and then the sales tax is computed on the total invoice amount including the service charge. This charge is for the labor and wages paid out to set up and work the event, insurance, and other operational costs. The service charge is not a gratuity and is stated separately on the invoice.

DISCUSSION

IC 6-2.5-4-1(g) states:

> Gross retail income does not include income that represents charges for serving or delivering food or beverages furnished, prepared, or served for consumption at a location, or on equipment, provided by the retail merchant. However, the exclusion under this subsection only applies if the charges for the serving or delivery are stated separately from the price of the food or beverages when the purchaser pays the charges.

This statute is intended to exempt only those services which are directly related to serving and/or delivering food. The intent is not to provide a blanket exemption for overhead charges while serving and/or delivering food. Therefore, a 15% service charge to serve and/or deliver food would be exempt from sales/use tax. Service charges for insurance and other operational costs would not be exempt. Even a service charge for preparing food in this case is subject to sales/use tax, as the preparation of the food is not part of the serving and/or delivery of the food. In the case that the charges are exempt, they must be separately stated on the invoice and excluded from the calculation of the total tax due.

RULING

The Department rules that separately stated service charges which are directly related to the serving and/or delivery of food are not subject to sales/use tax. As taxpayer's service charge includes overhead such as insurance, the entire charge is subject to tax.

CAVEAT

This ruling is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances, as stated herein, are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. However, other taxpayers with substantially identical factual situations may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material respect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this ruling, a change in statute, regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection.