INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

Title: Interim Guidance for the Reinforced Plastics Composites Fabricating Industry
Identification Number: Air-028-NPD
Date Originally Effective: April 5, 2002
Dates Revised: none
Other Policies Repealed or Amended: none
Brief Description of Subject Matter: New Composites Fabricators Association emission factors for nonatomized gel coat applicators.
Citations Affected: 326 IAC 20-25, Emissions from Reinforced Plastics Composites Fabricating Emission Units.

This nonrule policy document is intended solely as guidance and does not have the effect of law or represent formal Indiana Department of Environmental Management (IDEM) decisions or final actions. This nonrule policy document shall be used in conjunction with applicable laws. It does not replace applicable laws, and if it conflicts with these laws, the laws shall control. This nonrule policy document may be put into effect by IDEM thirty days after presentation to the air pollution control board and after it is made available to public inspection and comment, pursuant to IC 13-14-1-11.5. IDEM will submit the policy to the Indiana Register for publication. Revisions to the policy will follow the same procedure of presentation to the board and publication.

PURPOSE

The purpose of this nonrule policy is to describe the policies and procedures that IDEM will use to address the use of the emission factor for nonatomized gel coat application in the most recent version of the "Unified Emission Factors for Open Molding of Composites" dated July 23, 2001. The version of these factors cited in the rule to reduce emissions from the reinforced plastics composites fabricating industry, 326 IAC 20-25, Emissions from Reinforced Plastics Composites Fabricating Emission Units, is dated April 1999. The use of controlled spray emission factors must be approved by the commissioner as stated in the current rule. The updated emission factors include emissions from nonatomized gel coat applicators that significantly reduce emissions during the application of gel coats. The technology of nonatomized application of gel coats was not available when the reinforced plastics rule was final adopted by the Air Pollution Control Board although the rule allows for nonatomized gel coat application (326 IAC 20-25-3(c)(1)).

BACKGROUND

In March 1998, U.S. EPA removed from the "Compilation of Air Pollutant Emission Factors" (AP-42) the emission factors for certain open molding operations in the reinforced plastics composites fabricating industry: hand layup (manual application) and spray layup (mechanical application) of resin and gel coats, and filament winding. The emissions from these operations consist mainly of styrene, which is a volatile organic compound (VOC) and a hazardous air pollutant (HAP). U.S. EPA removed these emission factors because information developed by the U.S. EPA and industry indicated the AP-42 factors significantly underpredicted emissions. In fact, available information indicated that emissions are approximately two (2) times greater than previously estimated.

In June 1998, IDEM approved the use of new emission factors published by the Composites Fabricators Association in a report entitled "CFA Emission Models for the Reinforced Plastics Industries," dated February 28, 1998. These models are now referred to as the "Unified Emission Factors for Open Molding of Composites" ("CFA Factors", April 1999). The CFA Factors enable a facility to estimate emissions from use of conventional materials and methods of application as well as take into account emission reductions from pollution prevention techniques such as flowcoating, vapor suppressed resins, and low styrene and hazardous air pollutant (HAP) content resins and gel coats.

The CFA Factors, April 1999, was cited in a rule (326 IAC 20-25) adopted by the Air Pollution Control Board in October 2000 and effective March 2001. This rule establishes applicability, emission standards that includes application methods, work practice standards, operator training and testing, record keeping and reporting requirements for open molding process emissions units that emit styrene. Nonatomized application of resins or gel coats limits styrene emissions by limiting exposed surface area for evaporation. The control options are techniques to prevent emissions rather than controlling the air contaminants once they are emitted. The Indiana rule applies to open molding that uses styrene for reinforced products and open molding operations at boat manufacturers, but not to filament winding. The rule also incorporates low HAP resin and gel coats and application techniques to reduce emissions, and requires operator training. The CFA Factors, April 1999, is one of the methods listed in the rule for sources to make emission estimates for compliance purposes. See 326 IAC 20-25-(3)(i).

Since the adoption of 326 IAC 20-25, new technologies and products continue to be developed. After extensive testing, the Composites Fabricating Association (CFA) has updated its unified emission factors to include emissions from nonatomized gel coat applicators. The revised "Unified Emission Factors for Open Molding of Composites"(attached) is dated July 23, 2001. The only difference between the April 1999 version and the July 2001 version is the addition of emission factors for nonatomized gel coat application. Currently, 326 IAC 20-25 cites the CFA Factors, April 1999 emission factors, which does not differentiate between atomized and nonatomized gel coat applicators. The nonatomized gel coat applicators significantly reduce emissions. For example, at thirty seven percent (37%) styrene content in the gel coat, compliant with 326 IAC 20-25, the emissions drop from three hundred seventy seven (377) pounds of styrene per ton of gel coat used to two hundred thirty two (232) pounds per ton of gel coat used. The

use of nonatomized gel coat applicators will require a commitment from the companies that choose to implement them. Nonatomized gel coat applicators are expensive, and require additional maintenance and employee training.

POLICY

The Indiana rule, 326 IAC 20-25, Emissions from Reinforce Plastics Composites Fabricating Emission Units, specifically lists nonatomized application technology for gel coats as an acceptable application technology in section 3(c)(1), although no emission factor exists in the April, 1999 CFA Factors incorporated into the rule. That same section, 326 IAC 20-25-3(i)(3), allows the commissioner to approve other emission factors. In order to estimate emissions from the nonatomized gel coat application technology, sources must use the emission factors listed in the CFA Factors, "Unified Emission Factors for Open Molding of Composites" July 2001. IDEM recognizes that the nonatomized gel coat applicator technology will facilitate additional toxic reductions and that companies that wish to use the technology must make a significant investment. Therefore, it is IDEM's policy to allow the use of the emission factors for nonatomized gel coat application technology in the CFA Factors, dated July 23, 2001 for emissions estimate purposes.

One of the following methods can be used to incorporate nonatomized gel coat application into a source's permit.

• An application for and approval of a permit amendment or modification will be required to:

1) Change the version of the approved CFA emission factors Table to July 23, 2001, if the permit contains such language.

2) Revise a best available control technology (BACT) or maximum achievable control technology (MACT) determination, unless that determination already allows for the use of gel coat nonatomized technology by providing for "equivalent or better" gel coat application technologies.

3) Add the ability to average within or across material and application technology categories to comply with applicable styrene content limits if that language does not already exist in the permit.

• If a source's permit would allow the use of the nonatomized applicators, but a facility description in a permit contains information no longer accurate based on the use of new applicators, an administrative amendment under 326 IAC 2-7-11 may be appropriate to change the facility description.

Consistent with 326 IAC 20-25, an owner or operator must maintain complete and sufficient records to establish how much gel coat is applied with nonatomized applicators and the HAP content of the gel coat. Also, sources using monthly emissions averaging of gel coat emissions will be required to submit quarterly summary reports and supporting calculations.

Construction of a new emission unit, which includes gel coat nonatomized application technology, shall require preconstruction approval unless the project is determined to be exempt from permitting.

ADDITIONAL INFORMATION

If you have any questions concerning this policy or on styrene and the fiber reinforced plastics industry, please contact:
Greg Wingstrom (gwingstr@dem.state.in.us)
IDEM, Northern Regional Office
220 W. Colfax Avenue, Suite 200
South Bend, Indiana 46601-1634
1-800-753-5519 or 574-245-4870
www.state.in.gov/idem/ctap/fiber for styrene
If you have questions concerning permitting, please contact:
Rebecca Mason (rmason@dem.state.in.us)
IDEM, Office of Air Quality
100 North Senate Avenue, Tenth Floor
Indianapolis, Indiana 46206-6015
1-800-451-6027 extension 2-8325 or 317-232-8325

Copies of this policy are available at the Office of Air Quality, Indiana Department of Environmental Management, Indiana Government Center-North, Room 1001, 100 North Senate Avenue, Indianapolis, Indiana 46204.

INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

Title: Fugitive Dust from Coal Mines
Identification Number: Air-029-NPD
Date Originally Presented: March 6, 2002
Date Effective: April 5, 2002
Date Revised: None
Other Policies Repealed or Amended: None
Brief Description of Subject Matter: Describes IDEM's policy regarding fugitive dust from coal mines in certain situations.
Citations Affected: 326 IAC 6-4 Fugitive Dust Emissions

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PURPOSE

The purpose of this nonrule policy document is to make uniform the enforcement of 326 IAC 6-4 in regards to surface coal mines. Unless specifically exempted, all mining activities are subject to 326 IAC 6-4.

POLICY

Indiana's fugitive dust rule (326 IAC 6-4) contains certain exceptions to the rule at 326 IAC 6-4-6. IDEM will apply these exceptions to surface coal mines as follows:

1. After active mining and preliminary reclamation activities have been completed, coal companies are required by state and federal mining rules to plant agricultural crops on the land for a number of years before the reclamation can be declared complete. Fugitive dust from the tillage, planting, and harvesting of these crops will be considered agricultural operations and will be considered exempt from the rule as per 326 IAC 6-4-6(4), provided that every reasonable precaution is taken to minimize emissions and operations are terminated if a severe health hazard is generated because of prevailing meteorological conditions. Other normal agricultural operations including, but not limited to, mulching, lime and fertilizer spreading, and mowing are also exempt from this rule.

2. Reclamation activities after mining activities (other than those considered agricultural operations under paragraph 1 above) have been completed in a pit or area of the mine will be considered the same as construction. Therefore, the exception 326 IAC 6-4-6(3) will apply, provided that every reasonable precaution has been taken to minimize emissions.

Reasonable precautions include, but are not limited to:

- Watering or applying other dust control measures to haul roads over which traffic routinely travels.
- Taking reasonable precautions to minimize emissions and minimize or suspend operations if a severe health hazard is generated because of prevailing meteorological conditions.
- Tarping trucks where haul material is dry or blowing from trucks.
- For areas other than haul roads, applying dust suppressants or dust control measures where feasible.

3. Fugitive dust crossing utility easements such as power lines and pipe lines on surface coal mine property will not be considered a violation of 326 IAC 6-4, provided the coal mine owns or leases the property on both sides of the easement and the user of the easement is not affected by the fugitive dust. This does not include dust crossing public roads where the coal company owns the property on both sides of the road. 326 IAC 6-4 shall apply to dust crossing public roads. A public road that has been permanently closed under IC 8-20-8-1 is no longer a public road for the purposes of this policy. A public road that has been temporarily closed under IC 8-20-8-1 is not a public road for the purposes of this policy for the duration of the closure.

If you have any questions regarding this policy or coal mining, please contact:

Gene Kelso (gkelso@dem.state.in.us)
IDEM, Southwest Regional Office
204 N.W. 4th Street, Suite 201
Evansville, Indiana 47708-1353
1-812-436-2578 or 1-888-672-8323

DEPARTMENT OF LOCAL GOVERNMENT FINANCE

January 2, 2002

TO: County Assessors
FROM: Jon Laramore, Commissioner
RE: Exemptions

In 2001, the General Assembly directed the State Board of Tax Commissioners (now Department of Local Government Finance) to "adopt and instructional bulletin detailing the manner in which the county property tax assessment boards of appeal are to determine the applicability of property tax exemptions." P.L. 198-2001, sec. 120 (uncodified). Last fall, SBTC staff met with several interested county assessors to discuss this matter.

I am enclosing the first information we are providing to county assessors under this direction. It is a memorandum laying out the exemption process in a step-by-step fashion, with an attachment.

DLGF is continuing to work on this project and will provide additional material to county assessors in the next few weeks.

We intend to distribute a summary of case law relevant to exemptions. We also are considering instructional bulletins on more specific topics that local assessors have raised as presenting special problems. DLGF may also make rules under its authority in IC 6-1.1-10-36.5(c).

Please note that the General Assembly reminded local assessors in a statute enacted in 2001 that all exempt property (except government-owned property) "shall be assessed to the extent required under IC 6-1.1-11-9." This is a legislative reminder that exempt property must be assessed even though it is exempt. The General Assembly has directed the DLGF to gather information about the value of exempt property later in 2002, and the DLGF cannot complete this task unless the exempt property is assessed. This data-gathering operation is part of the new interest many members of the General Assembly are taking in exempt property.

Today marks the first day of operation of the Department of Local Government Finance, and I am honored that Governor O'Bannon has appointed me the agency's first commissioner. As before, if you have questions or concerns please call me at 317-232-3766.

PROCESS FOR REVIEW OF EXEMPTION APPLICATIONS

STEP 1: *Check* application for **completeness**.
STEP 2: *Verify* application information for **accuracy**.
STEP 3: *Check* the application for any **procedural defects** (such as timeliness.)
STEP 4: *Request* evidence of **ownership** (preferably a copy of deed.)
STEP 5: *Determine* the precise **statutory provision(s)** under which the application is based (See complete list of statutory exemptions available).
STEP 6: *Determine* whether the **exempt purpose(s) claimed** is: religious, educational, or charitable; a combination; or is authorized under the authority of a specific statute other than IC 6-1.1-10-16. You may ask for financial information, evidence of tax-exempt status, or other documentation to assist in determining whether there is an exempt purpose.
STEP 7: *Identify* the precise **exempt purpose(s) provided** by the applicant.
STEP 8: *Identify* the **precise use(s)** of ALL portions of the property—who uses it, when they use it, and in exactly what way their use furthers the exempt purpose. You may ask for calendars, diaries or other documentation showing how and when each portion of the property is used.
STEP 9: *Ask* for any **leases, licenses, or other documents** that the owner has given that authorizes other entities to use any portion of property.
STEP 10: *Determine* all **arrangements and relationships** between the applicant, owner, and/or occupants—legal or otherwise.
STEP 11: *Study* each use to determine if it is **"substantially related"** to the exempt purpose; request from the applicant as much information as is necessary to make these determinations.
STEP 12: *Ask* about any use of the property that is not clearly related to the exempt purpose, and ask for all **available records** to demonstrate the relationship
STEP 13: *Evaluate* the nature of any **activities** that occur on the property that may be operated independently or segregated from the operations of the entity seeking the exemption.
STEP 14: *Consider* asking the applicant or property occupant to certify or attest, via an **affidavit**, to any facts or circumstances that are important to the evaluation of the application, particularly matters on which the determination may hinge that can not be otherwise verified.
STEP 15: *Evaluate* whether the property as a whole is **"predominantly" used** for the exempt purpose as required under IC 6-1.1-10-36.3; whether it is used or occupied for one or more purposes during more than 50% of the time that it is used or occupied in the year that ends on the assessment date.

STEP 15 A: *Require*, if necessary, a **diagram of the property,** and have applicant provide a log of how each portion of the property is used—giving detail on how much is used for what purpose, and for what percentage of the time over the course of a year.

STEP 15 B: *Develop* **'use' calculations** to determine if it is demonstrated that the property, as a whole, is used for an exempt purpose more than 50% of the time; if not, the property does not qualify under IC 6-1.1-10-36.3 (apply your best judgment in a reasonable manner to this evaluation; it will not always be easy.)

STEP 15 C: *Apply* the **'use' calculations**; if they show that the property is used for a charitable purpose more than 50% of the time, but less than 100% of the time, an exemption percentage should be applied [Note: This STEP does not apply to property used for religious or educational purposes, only "charitable"; religious or educational property need only surpass the 50% mark to receive a 100% exemption. Also, minimal use of a property for non-charitable purposes – say less than 5% – need not lessen an exemption from 100%.]

STEP 16: *Consider* what existing **case law** is most relevant or factually similar to the subject property (DLGF will shortly furnish a summary of exemption caselaw).
STEP 17: *Distinguish* **this property** from similar case law if factually different in a meaningful way.

STEP 18: *Invite* the applicant to give full **explanations** of how the property at issue is similar to entities/properties that have been found to be exempt in the past, or unlike entities/properties that have been found not to qualify for exemption.
STEP 19: *Establish* proper **exempt status for subject property** based on all facts, information, statutes and case law.

REAL PROPERTY TAX EXEMPTIONS PROVIDED IN IC 6-1.1-10

IC 6-1.1-10-1 to –5.5	Government owned property
IC 6-1.1-10-6 to –8	Municipal and nonprofit utility property
IC 6-1.1-10-15	Airport property
IC 6-1.1-10-16	Educational, literary, scientific, religious, or Charitable
IC 6-1.1-10-17	Memorial corporation
IC 6-1.1-10-18	Nonprofit corporations supporting fine arts
IC 6-1.1-10-18.5	Nonprofit corporation property used for health facility or home for aged
IC 6-1.1-10-19	Public libraries
IC 6-1.1-10-20	Manual labor school, technical high school, Or trade school
IC 6-1.1-10-21	Churches or religious societies (including parsonages)
IC 6-1.1-10-22	Dormitories of church colleges and Universities
IC 6-1.1-10-23	Fraternal benefit associations
IC 6-1.1-10-24	College fraternities/sororities
IC 6-1.1-10-25	Miscellaneous organizations (YMCA, Salvation Army, Knights of Columbus, YMHA, YWCA, Disabled American Veterans, VFW, American Legion, Boy Scouts, Girl Scouts, American War Veterans, Spanish War Veterans)
IC 6-1.1-10-26	County or district agricultural association
IC 6-1.1-10-27	Cemetery corporations
IC 6-1.1-10-28	Free medical clinic
IC 6-1.1-10-32, -33	Property under control of executor that would be exempt if distributed.

PROPERTY TAX EXEMPTIONS PROVIDED OUTSIDE IC 6-1.1-10
(List Set Out in IC 6-1.1-10-38)

IC 4-20-5-14-3	Post Offices
IC 4-20.5-19	State-owned property (National monuments)
IC 5-1-4-26	Hospital Bonding Authorities
IC 8-10-1-27	Port Projects
IC 8-23-7-31	Rights, Easements, Legal Descriptions, Taxation
IC 8-15-2-12	Toll Roads
IC 8-21-9-31	Airport Facilities
IC 10-7-1-20	World War Memorials
IC 10-7-2-32	Indiana War Memorials
IC 10-7-5-12	City and County War Memorials
IC 10-7-6-21	City War Memorials
IC 10-7-12-9	Perpetual Existence of Memorial Corporations
IC 14-33-20-27	Water Supply Systems
IC 15-1.5-6-4	Fairgrounds and Property of State Fair Commission
IC 16-22-6-34	County Hospital Building Authorities
IC 20-12-6-11	Higher Education; Facilities
IC 20-12-7-5	Higher Education; Fieldhouses, Gymnasiums, Student Unions, and Halls of Music
IC 20-12-8-5	Higher Education; Dormitories
IC 20-14-7-3	Class 2 Public Libraries
IC 20-14-9-15	Library Service Authorities
IC 20-14-10-14	Leasing Library Property
IC 21-5-11-14	Education Finances; Public Holding Company
IC 21-5-12-10	Education Finances, Authority and Procedure to Lease to a Private Holding Company
IC 23-7-7-3	Historical Sites

IC 23-14-70-23	Trusts for Cemetery Associations
IC 36-1-10-18	Leased Structures, Systems and Transportation Projects
IC 36-7-14-37	Redevelopment of Blighted Areas [TIFs]
IC 36-7-15.1-25	Redevelopment of Blighted Areas in Marion County [TIFs]
IC 36-7-18-25	Housing Authorities
IC 36-9-4-52	Urban Mass Transportation Systems; Public Transportation Corporations
IC 36-9-11-10	Municipal Parking Facilities
IC 36-9-11.1-11	Parking Facilities in Marion County
IC 36-9-13-36	County Building Authority
IC 36-9-13-37	Bonds and Other Securities
IC 36-9-30-31	Solid Waste Collection and Disposal
IC 36-10-8-18	Capital Improvement Boards in Certain Counties
IC 36-10-9-18	Capital Improvement Board, Marion County

DEPARTMENT OF NATURAL RESOURCES
Information Bulletin #19
(First Amendment)
January 22, 2002

The purpose of this information bulletin is to establish fees applicable to an "annual pass" to enter a state park. An "annual pass" is issued by the department of natural resources and entitles the card holder and members of the card holder's immediate family to enter Indiana state parks an unlimited number of times during a calendar year without paying an admission fee. To be noted is that this bulletin supersedes Information Bulletin #19 published April 1, 1998, at 21 IR 2623.

As provided by state statute at IC 14-19-3-4 and IC 14-19-3-5, differing fees must be applied by the natural resources commission to the purchaser of an annual pass depending upon whether the purchaser is an (1) Indiana resident; (2) a nonresident; or, (3) an Indiana resident who is eligible for a Golden Hoosier Passport. Pursuant to a resolution of the commission made in December 1997, these fees are set as follows:

(1) Indiana Resident $22
(2) Nonresident $26
(3) Golden Hoosier Passport $11

DEPARTMENT OF STATE REVENUE

IN REGARDS TO THE MATTER OF:
MR. LEO KLEIN
DOCKET NO. 29-2001-0279

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DEPARTMENTAL ORDER

An administrative hearing was held on Tuesday, January 22, 2002 in the office of the Indiana Department of State Revenue, 100 N. Senate Avenue, Room N248, Indianapolis, Indiana 46204 before Bruce R. Kolb, an Administrative Law Judge acting on behalf of and under the authority of the Commissioner of the Indiana Department of State Revenue.

The Petitioner, Mr. Leo Klein, appeared *Pro Se*. Attorney Steve Carpenter, appeared on behalf of the Indiana Department of State Revenue.

A hearing was conducted pursuant to IC 4-32-8-1, evidence was submitted, and testimony given. The Department maintains a record of the proceedings. Being duly advised and having considered the entire record, the Administrative Law Judge makes the following Findings of Fact, Conclusions of Law and Departmental Order.

REASON FOR HEARING

On October 23, 2001 the Indiana Department of Revenue notified the Petitioner that he was prohibited from having any connection with Charity Gaming as described in IC 4-32-1-1 for a period of one (1) year. The Petitioner protested in a timely manner. A hearing was conducted pursuant to IC § 4-32-8-1.

SUMMARY OF FACTS

1) The Petitioner is purported to be an operator and conduct charity gaming for the Floyds Knobs Lions Club (Lions Club) located in New Albany, Indiana.
2) According to the charity gaming documents filed with the Department, the Lions Club was to hold its charity gaming events at the Improved Order of Redmen Manzanita Tribe #276 (Improved Order) located in New Albany, Indiana.
3) An Agent of the Indiana Department of Revenue's Criminal Investigation Division (CID) traveled to the principal office location given by the Lions Club on its CG-1.
4) The Lions Club principal office turned out to be the personal residence of its President.
5) The Department's Agent also investigated the address of the Improved Order.
6) During the course of the investigation the Department's investigator interviewed the Officers and members of the Improved Order.
7) The interviews revealed that they had not signed a lease with the Lions Club.
8) The interview with the officers of the Improved Order provided information that they had no agreement to rent their facility to the Lion's Club. They stated that they had given Petitioner the lease for another organization for which he was going to conduct bingo.
9) The Improved Order officers told the Department's investigator that they have no intention of leasing their facility to any other organization or individual that doesn't have the authority to sign a lease.
10) Petitioner testified on his own behalf.
11) Petitioner stated that he did not recognize any of the names of the Improved Order officers the Department's investigator questioned.
12) Petitioner stated that he spoke with several gentlemen who were allegedly on the Improved Order's building committee.
13) Petitioner contends that the Improved Order was only going to hold the hall for the Lions Club.
14) Petitioner argues that he has never broken the law.
15) The Department determined that Petitioner's actions constituted a fraud, deceit, and/or a misrepresentation of the actual facts in order to procure a charity gaming license to conduct bingo.
16) On October 23, 2001 the Indiana Department of Revenue prohibited Petitioner from having any connection with Charity Gaming for a period of one (1) year pursuant to IC 4-32-12-1(4).

FINDINGS OF FACTS

1) The Petitioner was listed as an operator on the Lions Club's CG-1 (Indiana Charity Gaming Qualification Application) and CG-2 (Indiana Department of Revenue Annual Bingo License Application)(See Department's Exhibits A and B respectively).
2) According to the President of the Lions Club (Petitioner's only witness), the Petitioner did not have the requisite authority to enter in to a lease agreement on behalf of the Lions Club.
3) Petitioner's witness also stated that she filled out the Lions Club CG-1 and CG-2.
4) Petitioner's witness contends that she did not read the lease given to her by the Petitioner and attached it to the organizations CG-2.
5) Petitioner's witness assumed the lease given to her was valid.
6) The lease attached to the Lions Club's CG-2 is a lease between the Manzanita Tribe No. 276 Order of Redmen and the Concerned Senior Citizens.
7) The lease agreement attached to the Lions Club CG-2 was not a valid lease.
8) The Petitioner, as a representative of Concerned Senior Citizens signed the lease in question.
9) The organization Concerned Senior Citizens was denied a charity gaming license by the Department on March 9, 2001 (See Department's Exhibit C).
10) The lease was also signed by a Mr. Blair on behalf of the Manzanita Tribe No. 276 Order of Redmen.

STATEMENT OF LAW

1) Pursuant to IC 6-8.1-5-1, the Department's findings are prima facie evidence that the Department's claim is valid. The burden of proving that the findings are wrong rests with the person against whom the findings are made. See Portland Summer Festival v. Department of Revenue, 624 N.E.2d 45 (Ind.App. 5 Dist. 1993).
2) A lease when used in reference to tangible personal property, means a contract by which one owning such property grants to another the right to possess, use and enjoy it for a specified period of time in exchange for periodic payment of a stipulated price, referred to as rent.
3) IC 4-32-12-1(4) provides, "The department may suspend…an individual under this article for any of the following: (4) Commission of fraud, deceit, or misrepresentation."

CONCLUSIONS OF LAW

1) The Petitioner's witness stated that the Petitioner was the Chairman of the Bingo Committee for the Lions Club Bingo, but did not have the authority to enter into a lease.

2) The lease in question was not dated nor was it for a specific period of time.
3) The lease is not legal a document.
4) Petitioner having placed his name on a lease purporting to be a representative of the Lions Club, and submitting the lease to the Department with the CG-2 constitutes a material misrepresentation under IC 4-32-12-1.

DEPARTMENTAL ORDER

Following due consideration of the entire record, the Administrative Law Judge holds the following:
Petitioner's appeal is denied. The Department's actions are hereby upheld. Petitioner is prohibited from associating with Charity Gaming for a period of one (1) year from the date this decision is final.

1) Under IC 6-8.1-5-1, the organization may request a rehearing. However, rehearings are granted only under unusual circumstances. Such circumstances are typically the existence of facts not previously known that would have caused a different result if submitted prior to issuance of the Departmental Order.
2) A request for rehearing shall be made within seventy-two (72) hours from the issue date of the Departmental Order and should be sent to the Indiana Department of Revenue, Legal Division, Appeals Protest Review Board, P.O. Box 1104, Indianapolis, Indiana 46206-1104.
3) Upon receipt of the request for rehearing, the Department will review the respective file and the rehearing request to determine if sufficient new information has been presented to warrant a rehearing.
4) The Department will then notify the organization in writing whether or not a rehearing has been granted. In the event a rehearing is granted, the organization will be contacted to set a rehearing date.
5) If the request for rehearing is denied or a request is not made, all administrative remedies will have been exhausted. The organization may then appeal the decision of the Department to the Court of proper jurisdiction.

THIS DEPARTMENTAL ORDER SHALL BECOME THE FINAL ORDER OF THE INDIANA DEPARTMENT OF STATE REVENUE UNLESS OBJECTIONS ARE FILED WITHIN SEVENTY-TWO (72) HOURS FROM THE DATE THE ORDER IS ISSUED.

Dated: _____

_____
Bruce R. Kolb / Administrative Law Judge

DEPARTMENT OF STATE REVENUE

02980716.LOF

LETTER OF FINDINGS NUMBER: 98-0716
Indiana Corporate Income Tax
For the Tax Years 1995, 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 the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Applicability of Gross Income Tax to Commissions Attributable to the Sale of Mutual Funds by Out-of-State Independent Agents

Authority. IC 6-2.1-1-2; IC 6-2.1-2-2; IC 6-2.1-3 et seq.; IC 6-2.1-4 et seq.; IC 6-8.1-5-1; Indiana Dept. of Revenue, Gross Income Tax Division v. Beemer Enterprises, Inc., 386 N.E.2d 187 (Ind. App. 1979); 45 IAC 1-1-96

Taxpayer protests the assessment of Gross Income Tax against commissions attributable to the sale of mutual funds in various foreign states.

II. Apportionment of Taxpayer's Commission Income for Purposes of Calculating Adjusted Gross Income and Supplemental Net Income Tax

Authority. IC 6-3-2-2; 45 IAC 3.1-1-38

Taxpayer protests the audit's determination that it was unnecessary to apportion taxpayer's income based on audit's decision that taxpayer was not "doing business" in any foreign state.

III. Request for Abatement of the Ten percent Negligence Penalty

Authority. IC 6-8.1-10-2.1; 45 IAC 15-11-2(b); 45 IAC 15-11-2(c)

Taxpayer requests that the Department of Revenue (Department) exercise its discretion to abate the ten percent negligence penalty made against taxpayer's additional corporate income tax assessment. Taxpayer argues that because the additional assessments are entirely erroneous and violative of the Department's regulations, state statutes, and the United States Constitution, the ten percent negligence penalty is patently without merit.

STATEMENT OF FACTS

Taxpayer is an in-state "broker/dealer" – registered and designated as such for securities law purposes – and receives commissions attributable to the sale of mutual funds in various foreign states. During the years at issue, taxpayer was registered and qualified to do business in Indiana and in 24 additional states in which it paid income and/or franchise taxes. Taxpayer is a wholly owned subsidiary of in-state insurance company (hereinafter "parent insurance company"). For purposes of Indiana's gross income tax, taxpayer reported only those commissions attributable to sales to Indiana customers.

The audit determined that the commissions received as a result of out-of-state transactions were subject to gross income tax and, as a consequence, assessed additional tax liability. In arriving at that conclusion, the audit determined the commissions were paid by parent insurance company, all applications for the sale of equity products were reviewed and accepted by taxpayer's in-state office, taxpayer had no employees or physical presence outside Indiana, and that taxpayer did not establish a business situs outside Indiana. Accordingly, under the provisions of IC 6-2.1-2-2 and 45 IAC 1-1-51, all of the commissions – received from both in-state and out-of-state transactions – were subject to the state's gross income tax.

In addition, because the audit determined that taxpayer had no business situs outside of Indiana – for purposes of determining taxpayer's adjusted gross and supplemental net income tax liabilities – it was not necessary to apportion the taxpayer's income between Indiana and the foreign states.

Although registered as a "broker/dealer," the taxpayer maintains that it acted neither as a "broker" or a "dealer" within the meaning which the Department has attributed to those terms for gross income tax purposes. Taxpayer predicates this assertion on the fact that it did not itself purchase any of the mutual funds, did not sell any of the mutual funds, and did not "arrange" to sell any of the mutual funds.

Taxpayer argues that the audit's factual and legal conclusions are both erroneous. To that end, taxpayer describes its business arrangements as follows:

1. Independent out-of-state agents sold mutual funds to out-of-state customers.
2. The independent out-of-state agents did not sell parent insurance company's mutual funds.
3. The mutual funds sold by out-of-state agents were those of third-party mutual fund vendors.
4. The independent out-of-state agents used application forms in their marketing activities which were supplied by the third-party mutual fund vendors.
5. The independent out-of-state agents filled out, or assisted the out-of-state customer to fill out, the application forms.
6. The independent out-of-state agent forwarded the completed application form, along with a check made out directly to the third-party mutual fund vendor, to the taxpayer for the taxpayer's review and processing "as required by securities laws."
7. The application was then forwarded to the third-party mutual fund vendor, which accepted or rejected the application, cashed the check, established the mutual fund account on behalf of the out-of-state customer, and confirmed the transaction and account with the out-of-state customer.
8. The commissions which taxpayer received did not derive from the sale of parent insurance company's mutual funds.
9. The commissions derived from the sale of mutual funds were not paid to parent insurance company by the third-party mutual fund vendors.
10. The commissions derived from the sale of equity products were paid directly to taxpayer pursuant to various "agreements" with the third-party mutual fund vendors.
11. The taxpayer received commissions, attributable indirectly to the sale of the mutual funds, both at the time the out-of-state customer made the initial investment in the fund and after each time the out-of-state customer made a subsequent addition to the fund.

In summary, independent out-of-state agents sold mutual funds to out-of-state customers. The mutual funds were those of third-party mutual fund vendors entirely unrelated to the equity products sold by parent insurance company. Third-party mutual fund vendors paid taxpayer commissions attributable to the sale of these particular equity products. The commissions did not flow through and were not attributable to parent insurance company. According to taxpayer, "all sales generating commissions were consummated at out-of-state offices of the third parties." While conceding that the commissions were "attributable to the sale of [the] mutual funds," the taxpayer maintains that it did not engage in purchasing the mutual funds, selling them to others, or in negotiating for the sale of the funds on behalf of the third-party mutual fund vendors to the out-of-state purchasers.

Taxpayer sets forth various legal arguments challenging the validity of the gross income tax assessments. According to taxpayer, the additional assessment conflicts with both Departmental regulations and the relevant state statutes. However, taxpayer's protest centers on the argument that the assessment is invalid because it violates the Interstate Commerce Clause of the United States Constitution.

Similarly, taxpayer challenges the audit's determination that it was unnecessary to apportion taxpayer's income for purpose of calculating Adjusted Gross and Supplemental Net Income tax assessments. The audit concluded that taxpayer was not "doing business" in any other state because it had no business situs outside of Indiana and that apportionment of the taxpayer's income was not warranted.

I. Applicability of Gross Income Tax to Commissions Attributable to the Sale of Mutual Funds by Out-of-State Independent Agents

Gross income tax is imposed upon the receipt of the entire taxable gross income of a resident or domiciliary of Indiana. IC 6-2.1-2-2. The term "taxable gross income" means all gross income which is not exempt from tax under IC 6-2.1-3 et seq. less all deductions which are permitted under IC 6-2.1-4 et seq. In particular, IC 6-2.1-1-2 provides that "'gross income' mean all the gross receipts a taxpayer receives (1) from trades, business, or commerce...." In regards to the taxpayer's own commission income, 45 IAC 1-1-96 provides that "[g]ross receipts from services means receipts derived from activities performed in the process of completing a service agreement or contract... Such income includes, but is not limited to commissions, fees, receipts from service contracts, or income from similar sources." Accordingly, taxpayer's commission income would appear to fall within the state's authority to impose the gross income tax.

However, that authority is not entirely unfettered. In Indiana Dept. of Revenue, Gross Income Tax Division v. Beemer Enterprises, Inc., 386 N.E.2d 187 (Ind. App. 1979), the court held that the taxpayer's commissions were not subject to the gross income tax. In that case, Beemer was an Indiana corporation retaining the services of commissioned salespersons outside of the state. Beemer had an agreement with a Pennsylvania corporation allowing it to act as the Pennsylvania corporation's sales representative. The Pennsylvania corporation supplied order forms to Beemer's out-of-state salespersons. The out-of-state salespersons forwarded orders directly to the Pennsylvania corporation. The Pennsylvania corporation manufactured its merchandise outside of Indiana and shipped its orders directly to the out-of-state customers. In consideration for the activities of Beemer's out-of-state salespersons, the Pennsylvania corporation paid Beemer a sales commission. The court held that the commissions derived from the out-of-state salespersons' activities in selling products that were produced, ordered, and delivered entirely outside of Indiana were not subject to the gross income tax. The court stated that "it was led to the inescapable conclusion that the State of Indiana may not tax commissions which are generated from the interstate sales of products." Beemer at 190.

As described by the taxpayer, its activities would seem to fall within the exemption defined by the court in Beemer. The taxpayer asserts that its salespersons generated sales on behalf of out-of-state third-party mutual fund vendors. The third-party mutual fund vendors supplied the salespersons with the necessary order forms. The salespersons were engaged in selling "products" which were supplied by the third-party mutual vendors. The out-of-state customers made payments to the third-party mutual fund vendors.

However, the Department's audit of taxpayer made a determination which differed from taxpayer's own description of the manner in which the taxpayer received the commissions. The audit found that the commissions were paid to the taxpayer not by the third-party mutual fund vendors, but were paid to the taxpayer by the taxpayer's own parent insurance company. That determination echoed an identical finding within an audit conducted in 1995. If, as the audit determined, the commission was derived as the result of a business arrangement between itself and the parent insurance company, the income was derived from a transaction conducted and completed entirely within the state and falls outside the interstate commerce exemption as set out in Beemer.

Under 6-8.1-5-1(b), "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." The taxpayer was fully aware that the audit determined, on two separate occasions, that the commission payments were made by the parent insurance company to the taxpayer. That determination could have been refuted by specific evidence concerning the relationship between the parent insurance company and the taxpayer. That determination could have been refuted by specific evidence of the contractual relationship between the third-party mutual fund vendors and either the taxpayer or the parent insurance company. Taxpayer's bare averments are decidedly insufficient to overcome the presumption afforded under IC 6-8.1-5-1.

FINDING

Taxpayer's protest is respectfully denied.

II. Apportionment of Taxpayer's Commission Income for Purposes of Calculating Adjusted Gross Income and Supplemental Net Income Tax

The audit determined that, for apportionment purposes, the taxpayer was not "doing business" in any other state and that no apportionment of the commission income was required. The taxpayer disagrees stating that, based upon the activities of independent out-of-state agents, the income attributable to the activities of those independent out-of-state agents must be apportioned.

Under Indiana law, the taxpayer's business income is subject to the apportionment formula set out in IC 6-3-2-2. Central to that formula is the determination of whether or not the taxpayer is "doing business" within the state. 45 IAC 3.1-1-38 sets out the rule:

For apportionment purposes, a taxpayer is "doing business" in a state if it operates a business enterprise or activity in such state including, but not limited to:

(1) Maintenance of an office or other place of business in the state

(2) Maintenance of an inventory or merchandise or material for sale distribution, or manufacture, or consigned goods.

(3) Sale or distribution of merchandise to customers in the state directly from company-owned or operated vehicles where title to the goods passes at the time of sale or distribution

(4) Rendering services to customers in the state

(5) Ownership, rental or operation of a business or of property (real or personal) in the state

(6) Acceptance of orders in the state

(7) Any other act in such state which exceeds the mere solicitation of orders so as to give the state nexus under P.L. 86-272 to tax its net income.

The audit determined that none of the taxpayer's out-of state activities brought it within the purview of the regulation. Taxpayer argues that, based upon 45 IAC 3.1-1-38(7), the audit erred and that the commission income should be apportioned. As taxpayer states, "the commission income received by the Taxpayer was attributable to marketing services provided by independent agents on behalf of the Taxpayer in the states in which the Taxpayer was subjected to income and/or franchise tax during the Period in Issue."

However, the taxpayer also states that it "never purchased any of the securities (mutual funds), nor did it sell any of the mutual funds or 'arrange the purchase and sale' of mutual funds on behalf of others." Taxpayer further states that the income was "received for out-of-state marketing services in marketing mutual funds sold by unrelated, out-of-state third-party mutual fund families. The Taxpayer did not establish or carry accounts for the purchasers of mutual funds, and the Taxpayer did not determine or 'negotiate' terms for the purchase and sale of mutual funds." Taxpayer summarizes its activities stating that it "engaged in marketing – it did not engage in purchasing funds and selling them to others or in negotiating terms for the sale of funds from fund families to purchasers."

The taxpayer argues that the income at issue should be apportioned because the activities of the out-of-state agents "exceed[ed] the mere solicitation of orders so as to give the [foreign] state nexus under P.L. 86-272 to tax its net income." 45 IAC 3.1-1-38(7). Taxpayer's argument would have a certain cogency except for the fact that the out-of-state agents are not the taxpayer's, the products being sold by the agents are not the taxpayer's products, and the taxpayer admittedly played whatsoever no role in the "purchase and sale" of the products.

Any causal relationship between the out-of-state sale of the mutual funds and the receipt of the commission income is simply too amorphous to justify a finding that the taxpayer was "doing business" within the foreign state and that, as a result, the commission income should be apportioned.

FINDING

Taxpayer's protest is respectfully denied.

III. Request for Abatement of the Ten percent Negligence Penalty

Taxpayer has requested that the ten percent negligence penalty, imposed under authority of IC 6-8.1-10-2.1(a), be abated. The taxpayer argues that the penalty is "patently without merit." The penalty was assessed against taxpayer's corporate income tax liabilities determined for the tax years 1995, 1996, and 1997.

IC 6-8.1-10-2.1(d) states that if a person, subject to the negligence penalty, imposed under IC 6-8.1-10-2.1(a), can show that the failure to file a return, pay the full amount of tax shown on the person's return, timely remit tax held in trust, or pay the deficiency determined by the Department, was due to reasonable cause and not due to willful neglect, the Department shall waive the penalty. 45 IAC 15-11-2(b) defines "negligence" as the failure to use the "reasonable care, caution, or diligence, as would be expected of an ordinary reasonable taxpayer." Negligence results from a "taxpayer's carelessness, thoughtlessness, disregard, or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations." Id.

In order to waive the negligence penalty, the taxpayer must demonstrate that its failure to pay the full amount of tax due was due to "reasonable cause." 45 IAC 15-11-2(c). Taxpayer may establish reasonable cause by "demonstrat[ing] that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed...." Id. In determining whether reasonable cause exists, the Department may consider the nature of the tax involved, previous judicial precedents, previous Department instructions, and previous audits. Id.

Taxpayer prepared and submitted 1995, 1996, and 1997 tax returns based upon an interpretation of the law which was found to be erroneous during the 1995 audit. Taxpayer chose to discount the 1995 determination and, for three consecutive years, continued to file tax returns in adherence with its previous interpretation of the tax laws and regulations. Although the taxpayer chose not to protest the 1995 audit, it undoubtedly realized that something was amiss. However deeply felt its position may have been, taxpayer's decision to ignore the results of the 1995 audit takes that decision out of the "ordinary business care" standard necessary for the Department to grant the taxpayer's request.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

02980740.LOF

LETTER OF FINDINGS NUMBER: 98-0740
Gross Income Tax
For Tax Period: 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.

ISSUES

I. Gross Income Tax – Imposition of Gross Income Tax

Authority: IC 6-2.1-3-24.5, IC 6-8.5-5-1(b), IC 6-2.1-2-2, 26 USCA 1361(b), 26 USCA 1504(a)

The taxpayer protests the imposition of the gross income tax.

STATEMENT OF FACTS

The taxpayer is an Indiana corporation whose operations include metered fuel sales, transport fuel and heating oil sales, repair work and other general sales such as wipers and fountain drinks. After an audit, the taxpayer was assessed gross income tax, interest and penalty. The taxpayer protested the assessment. Further facts will be provided as necessary.

I. Gross Income Tax – Imposition of Gross Income Tax

DISCUSSION

During the audit period, the taxpayer filed as a small business corporation. An Indiana corporation that qualifies as a small business corporation for federal purposes also qualifies as a small business corporation in Indiana. IC 6-2.1-3-24.5 9 (a). To qualify as a small business corporation, the corporation must have only one class of stock and the shareholders must be individuals. 26 USCA 1361 (b). The taxpayer corporation met these requirements. Any Indiana corporation qualified to file as a small business corporation is exempt from the Indiana gross income tax. IC 6-2.1-3-24.5 9 (b).

26 USCA 1361 (b) states that a corporation does not qualify for small business corporation status if it is a member of an affiliated group as determined under 26 USCA 1504. The audit revealed that the taxpayer corporation owned one hundred per cent (100%) of two other corporations. Pursuant to 26 USCA 1504 (a), a corporation's ownership of at least eighty per cent (80%) of the value and the voting power of another corporation's stock constitutes affiliation unless the subsidiary has no gross income. In this case, the subsidiaries had gross income. Since the corporate taxpayer appeared to be part of an affiliated group, the taxpayer corporation did not qualify as a small business corporation and did not qualify for the small business corporation exemption from gross income tax. Therefore, the auditor assessed gross income tax, interest and penalty against the taxpayer.

Tax assessments are prima facie evidence that the tax is owed and taxpayers bear the burden of proving that a tax assessment is incorrect. IC 6-8.1-5-1 (b).

After the telephone hearing, the taxpayer submitted stock certificates showing that an individual owned the controlling interest in the stock of the two "affiliate" corporations. The corporations' records in the Secretary of State's office also indicate that the corporations are owned by an individual. Pursuant to 26 USCA 1504, an "affiliated group" is a group of corporations that meet certain requirements. There is no way to be an "affiliated group" if the corporations are owned by individuals rather than affiliated corporations. The taxpayer is unable to submit copies of amended federal 1120 returns because the years in question are out of statute. The taxpayer corporation met the statutory requirements to be a small business corporation and receive the exemption from the gross income tax.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

02980766.LOF

LETTER OF FINDINGS NUMBER: 98-0766
Corporate Adjusted Gross Income Tax – Combined Filing
Corporate Gross Income Tax – Sale/Leaseback
For Tax Year 1995-1996

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. Corporate Adjusted Gross Income Tax – Combined Filing

Authority: IC § 6-3-2-2; 45 IAC 3.1-1-62; IC § 6-3-3-3; IC § 6-8.1-1-1; IC § 6-8.1-5-1(b); *Mobil Oil Corporation v. Commissioner of Taxes of Vermont,* 445 U.S. 425, 100 S.Ct. 1223 (1980); *Exxon Corp. v. Department of Revenue of Wisconsin,* 447 U.S. 207, 100 S.Ct. 2109 (1980); *ASARCO, Inc. v. Idaho State Tax Commission,* 458 U.S. 307, 102 S.Ct. 3103 (1982); *F.W. Woolworth v. Taxation and Revenue Department of New Mexico,* 458 U.S. 354, 102 S.Ct. 3128 (1982); *Allied-Signal, Inc. v. Director, Division of Taxation,* 504 U.S. 768, 112 S. Ct. 2251 (1992)

Taxpayer protests the Department's finding that taxpayer may not file a combined return for the tax year at issue.

II. Corporate Gross Income Tax – Sale/Leaseback or Sales of Tangible Personal Property

Authority: IC § 6-2.1-1-2(a)(3); 45 IAC 1-1-29; IC § 6-2.1-2-2; IC § 6-2.1-2-3; IC § 6-2.1-2-4; IC § 6-2.1-2-5

Taxpayer protests the assessment of Indiana gross income tax on what taxpayer alleges is a "non-taxable financing transaction."

STATEMENT OF FACTS

Taxpayer is a subsidiary of an out-of-state holding company (Parent). Taxpayer and 17 affiliates (Subsidiaries) filed a combined return based on the unitary business concept. Only two of the Subsidiaries had nexus with Indiana for purposes of assessing Indiana gross and adjusted gross income tax. All 18 Subsidiaries manage restaurants; there are approximately 50 restaurants in Indiana. Taxpayer had previously requested permission from the Department to file a combined return; pursuant to a phone conversation with a Department of Revenue staff member recommending combined filing "pending approval," taxpayer filed combined returns during the tax year in question. During the audit, an issue arose as to whether or not the Department had granted the required statutory permission in writing. The auditor determined written permission had not been granted, and made adjustments to taxpayer's adjusted gross income tax liability based on the apportionment formula instead of the combined filing method.

A second issue also arose during the audit concerning the characterization of a sale/leaseback transaction as subject to Indiana's gross income tax. Taxpayer asserted in its protest letter that the transaction at issue was a "non-taxable financing arrangement." The audit assessed gross income tax on the sale/leaseback transaction and imposed the 10% negligence penalty. Additional facts will be added as necessary.

I. Corporate Adjusted Gross Income Tax – Combined Filing

DISCUSSION

Taxpayer protests the Audit Division's disallowance of taxpayer's combined filing for 18 affiliated companies for the 1995-1996 tax year. According to taxpayer, the Department recommended that taxpayer file a combined return "pending approval," and then failed to act on taxpayer's request "in a timely manner." Taxpayer now argues that the Department "cannot and should not revoke retroactively its permission allowing [taxpayer] to file a combined return." At the outset, it should be noted that under IC § 6-8.1-5-1(b), a "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."

The procedure governing combined returns is found at IC § 6-3-2-2(q), which states that "one (1) or more taxpayers may petition the department under subsection (l) for permission to file a combined income tax return for a taxable year." (Emphasis added). Subsection (l) sets forth the standards for filing a combined return:

> If the allocation and apportionment provisions of this article do not fairly represent the taxpayer's income derived from sources within the state of Indiana, the taxpayer may petition for or the department may require, in respect to all or any part of the taxpayer's business activity, if reasonable:
>
> (1) separate accounting;
>
> (2) the exclusion of any one (1) or more of the factors;
>
> (3) the inclusion of one (1) or more additional factors which will fairly represent the taxpayer's income derived from sources within the state of Indiana; or
>
> (4) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income. (Emphasis added).

Subsection (p) circumscribes somewhat the Department's authority to require a taxpayer to file a combined return:

> Notwithstanding subsections (l) and (m), the department may not require that income, deductions, and credits attributable to a taxpayer and another entity... be reported in a combined income tax return for any taxable year, unless the department is unable to fairly reflect the taxpayer's adjusted gross income for the taxable year through use of other powers granted to the department by subsections (l) and (m). (Emphasis added).

The recurring theme here is the Indiana Legislature's concern with fairly representing a "taxpayer's income derived from sources within the state of Indiana." (IC § 6-3-2-2[l]). Consequently, the Department must exercise a certain degree of care in determining which method fairly represents a corporate taxpayer's liability under Indiana's Adjusted Gross Income Tax statutes and regulations. Since the granting of permission to file a combined return is discretionary with the Department, at any time a combined filing does not fairly represent a taxpayer's Indiana income, then IC § 6-3-2-2(b)'s apportionment formula applies. The Department finds that the requisite statutory permission to file a combined return was not granted to taxpayer. As the phrase "pending approval" implies in the Department's conversations with taxpayer, a reasonable taxpayer would have ascertained whether permission had in fact been granted.

The audit determined taxpayer's combined filing did not fairly represent "taxpayer's income derived from sources within the state of Indiana" for the tax year at issue. (IC § 6-3-2-2[l]). The real issue then becomes whether the Audit Division erred in determining that taxpayer's combined filing status should be disallowed on the basis that the combined return inaccurately reported taxpayer's Indiana income. There are 2 questions to be answered: (1) whether a unitary relationship actually existed between taxpayer and the other 17 Subsidiaries; (2) whether filing a combined return was the only way to fairly represent taxpayer's Indiana income.

The Supreme Court over the years has developed a three-part test in determining whether a unitary relationship exists: common ownership, common management, and common use or operation. *See, e.g., Mobil Oil Corporation v. Commissioner of Taxes of Vermont,* 445 U.S. 425, 100 S.Ct. 1223 (1980); *Exxon Corp. v. Department of Revenue of Wisconsin,* 447 U.S. 207, 100 S.Ct. 2109 (1980); *ASARCO, Inc. v. Idaho State Tax Commission,* 458 U.S. 307, 102 S.Ct. 3103 (1982); *F.W. Woolworth v. Taxation and Revenue Department of New Mexico,* 458 U.S. 354, 102 S.Ct. 3128 (1982); *Allied-Signal, Inc. v. Director, Division of Taxation,* 504 U.S. 768, 112 S. Ct. 2251 (1992). The first item to be considered under this three-part test is common ownership. As a general rule, at least 50% of a corporation's stock must be commonly owned (either directly or indirectly) in order for a corporation to be considered part of a unitary business. The Parent corporation owns a minimum of 80% of its Subsidiaries' stock. The auditor found that the Parent "has ownership of a majority of the voting stock of all other companies included in the returns," including taxpayer. Therefore, taxpayer has established common ownership.

The second criteria to be considered is common management. Common management is shown when a parent corporation provides a management role that is grounded in the parent's own operation expertise and overall operational strategy. *See, e.g., Container Corp. v. Franchise Tax Board,* 463 U.S. 159, 180, n. 19, 103 S.Ct. 2933, 2948, n. 19 (1983). The Parent also owns a management company (Management Company) which is "primarily responsible for supporting field operations through centralized management, accounting, advertising, product development, site selection and development," etc. The Parent's Board of Directors is also the Board of Directors for all of the Subsidiaries; each Subsidiary is dependent on the Parent for overall decision-making and strategic planning and direction. The auditor determined that the "group utilizes central decision-making in merchandise selection, advertising, accounting, purchasing, warehousing, training and financing. Centralized management is in evidence, including interlocking directorates and extensive communication between the parent and subsidiaries at high management levels." Therefore, taxpayer has established common management.

The third test is that of common operation or use. Evidence of a common operation exists where certain functions are performed for the group by the parent (such as purchasing, financing, advertising, marketing, research, tax compliance, insurance, and pension plan management) which independent companies would perform for themselves. The Parent negotiates purchasing, insurance, advertising, and similar contracts on a company-wide versus individual company basis. The auditor determined that "economies of scale are utilized between members of the group regarding various expenses. The separate corporations operate effectively as geographic divisions of one business, and the auditor is in agreement that the Taxpayer's unitary reporting fairly represents its activities." (Emphasis added). Therefore, taxpayer has established common use or operation.

The auditor, despite the foregoing evidence and analysis, asserted that "this does not more fairly reflect the Taxpayer's Indiana income than separate reporting," and therefore disallowed the combined filing, based solely on the permission issue discussed *supra*, and on an insufficient flow of product, not services, between companies to justify the filing of a unitary return.

But the analysis does not stop at this point. The question now becomes whether requiring taxpayer to use a standard apportionment or separate company filing method, instead of a combined filing, would result in a failure to fairly reflect the income taxpayer reported as Indiana sources income. The answer to this question turns on whether, under all the circumstances of the unitary relationship between the Parent, taxpayer, and the other Subsidiaries, standard apportionment fulfills the statutory purpose of avoiding distortion of, and realistically portraying, Indiana source income pursuant to IC § 6-3-2-2(p).

It is clear from the language in subsection (l) that the preferred method of filing returns is the standard apportionment or separate company filing method of representing a taxpayer's income derived from Indiana sources. Other methods of income allocation and apportionment (including the combined reporting method) should only be allowed when those provided for by IC § 6-3-2-2 do not fairly reflect a taxpayer's Indiana income. In short, if the Indiana sources income in the instant case can be fairly represented on the basis of standard apportionment or separate company filing method, then such filing methods should be used.

The foundation of much of taxpayer's argument rests upon its assertions that it is impossible and inequitable to attribute Indiana income to it on a separate accounting basis since, due to the unitary nature of the relationship among the entities, the production and service processes of taxpayer, Parent, the other Subsidiaries, and the Management Company, were so interdependent that taxpayer's Indiana income could not be separately determined. However, despite the finding of a unitary relationship between and among taxpayer, Parent, Subsidiaries, and Management, it does not appear that the operation of the businesses were so integrated to the point where the filing of separate returns would lead to a distortion of income. This is the key inquiry and taxpayer's burden of proof: that the preferred method of filing returns does not fairly represent taxpayer's Indiana source income. Taxpayer has not met this burden of proof.

The Department finds that taxpayer has not met its burden of proof in this case. Not only did taxpayer not have the requisite statutory written permission to file a combined return; taxpayer has not demonstrated that its Indiana source income is not fairly represented by using the preferred method of filing, the apportionment formula set forth in IC § 6-3-2-2(b).

FINDING

Taxpayer's protest concerning the Department's disallowance of combined filing of tax returns is denied. When and if circumstances permit, taxpayer may petition the Department again for written permission to file a combined return.

II. Corporate Gross Income Tax – Sale/Leaseback or Sales of Tangible Personal Property

DISCUSSION

Taxpayer protests the assessment of Indiana's gross income tax on what taxpayer alleges is a "non-taxable financing transaction." Taxpayer purchases, installs, and uses restaurant equipment in restaurants. At some point, taxpayer sells the equipment to another entity which then leases the equipment back to taxpayer. The issue is whether or not the income taxpayer received from the transaction is includable in its Indiana gross income.

For purposes of Indiana's gross income tax, gross income is defined as "all the gross receipts a taxpayer receives... from the sale, transfer, or exchange of property, real or personal, tangible or intangible." (IC § 6-2.1-1-2(a)[3]). Indiana imposes the gross income tax "upon the receipt of the taxable gross income derived from activities or businesses or any other sources within Indiana by a taxpayer who is not a resident or a domiciliary of Indiana." (IC § 6-2.1-2-2(a)[2]). Subsection (b) establishes an "applicable rate of tax... determined by the type of transaction from which the taxable gross income is received;" *see*, IC §§ 6-2.1-2-3—6-2.1-2-5. The transaction at issue falls squarely within the ambit of 45 IAC 1-1-29:

> Gross receipts derived from leasing real or personal property are taxable at the higher rate... However, when the leasing agreement is purely a financing device for a sale of tangible personal property and such property is sold in the regular course of business by a retail merchant, receipts from the contract are taxable at the lower rate as selling at retail...

Indiana's statutes and regulations do not state that such a transaction is not taxable at all. The only question is which tax rate applies, an issue not addressed in the audit. Taxpayer has provided no evidence to support its argument that the transaction at issue is a "non-taxable financing transaction."

FINDING

Taxpayer's protest concerning the assessment of Indiana gross income tax on an alleged "non-taxable financing transaction" is denied.

DEPARTMENT OF STATE REVENUE

04990228.LOF

LETTER OF FINDINGS NUMBER: 99-0228
Sales/Use Tax
For the Tax Periods: 1995 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. Sales/Use Tax – Utility Purchases

Authority: IC 6-2.5-4-5(c)(3), IC 6-2.5-5-5.1; Mynsberge v. Department of State Revenue, 716 N.E.2d 629 (Ind. Tax 1999**)**

Taxpayer protests proposed assessments of use tax on its utility purchases.

II. Sales/Use Tax – Foundations

Authority: IC 6-2.5-5-3(b); 45 IAC 2.2-5-8(c)

Taxpayer protests proposed assessments of use tax on its purchase of equipment foundations.

III. Sales/Use Tax – Forklifts

Authority: IC 6-2.5-5-3; 45 IAC 2.2-5-8; Indianapolis Fruit Co. v. Department of State Revenue, 691 N.E.2d 1379 (Ind. Tax 1998)

Taxpayer protests the Department's calculation of the pro rata exemptions afforded to taxpayer's forklifts.

IV. Sales/Use Tax – Refuse Chip Conveyor System

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

Taxpayer protests proposed assessments of use tax on its purchase of a Refuse Chip Conveyor System (RCCS).

V. Sales/Use Tax – Pallet Washer

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

Taxpayer protests proposed assessments of use tax on its purchase of a Pallet Washer.

VI. Sales/Use Tax – Lot Control System

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

Taxpayer protests proposed assessments of use tax on purchases of Lot Control Systems.

VII. Sales/Use Tax –"Factory Link" Equipment

Authority: IC 6-2.5-5-3(b)

Taxpayer protests proposed assessments of use tax on its purchases of "Factory Link" Equipment.

VIII. Negligence Penalty

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

Taxpayer protests assessment of the ten-percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is a Delaware corporation with its base of operations located in a state other than Indiana. Taxpayer's Indiana business activity consists of an engine assembly plant. As a result of a sales and use tax audit for tax periods 1994 through 1997, assessments of use tax were proposed. Taxpayer now protests these assessments.

I. Sales/Use Tax – Utility Purchases

DISCUSSION

Taxpayer protests Audit's assessment of use tax on taxpayer's purchase of certain utilities. According to taxpayer, the utility purchases in question qualify for either the exclusion (pro rata or predominate usage) provided by IC 6-2.5-4-5(c)(3) or the pro rata consumption exemption provided by IC 6-2.5-5-5.1.

The exclusion statute (IC 6-2.5-4-5(c)(3)) requires the utilities to have been "used by the purchaser for the excepted uses listed...." The exemption statute (IC 6-2.5-5-5.1) affords an exemption for utilities consumed "if the person acquiring the property acquires it for direct consumption as a material to be consumed in the direct production of other tangible personal property in the person's business of manufacturing...." Consequently, the purchaser of the utilities must also be the consumer in order for any exclusion or exemption to apply.

Taxpayer explains the current scenario:

> Until 1991, [Taxpayer] directly owned and operated the foundry and engine plants located [in] Indiana (the ["Indiana Plant"]). During 1991, Taxpayer contemplated selling its foundry operation. To facilitate the potential sale, [Taxpayer] created a separate entity, ["Subsidiary"], and transferred the ownership of the foundry operation to Subsidiary. The sale of the foundry operation never occurred and Subsidiary continues to be a wholly owned subsidiary of Taxpayer.
>
> The metering of the utilities at the [Indiana Plant] did not change when Subsidiary was created. In fact, such an endeavor would be cost-prohibitive for Subsidiary and unnecessary given the existing metering allows for an accurate, straight-forward method for separating utility cost by entity.

Taxpayer depends upon a prior utility study to establish its qualification for the predominate use exclusion. This prior utility study was completed before Taxpayer and Subsidiary became separate entities. Because of this fundamental change of circumstances—and the conspicuous absence of an appropriate utility study—Audit, in computing the exempt use for Taxpayer, proposed assessments on all of Taxpayer's utility purchases. Taxpayer was instructed that in order to receive credit for the portion used in production for the audit period, Taxpayer needed to conduct new utility studies for each meter.

In response to Audit's comments and conclusions, Taxpayer conducted a new utility study ("Updated Utility Study") documenting the exempt usage of its utility purchases for the period following the separation of the Subsidiary's foundry activities from Taxpayer's engine assembly operations.

In Mynsberge v. Department of State Revenue, 716 N.E.2d 629 (Ind. Tax 1999), the Indiana Tax Court found that "the [utility] exclusion [of IC 6-2.5-4-5(c)] is predicated on the [P]urchaser of the utility services and commodities consuming those services and commodities." Id. at 634. The explicit language of the exemption statute (IC 6-2.5-5-5.1) requires the purchaser of utility services to have consumed the utilities in the prescribed manner to qualify for the exemption. As Taxpayer did not consume a portion of the utilities purchased, Taxpayer may not claim such consumption—and the concomitant exemptions or exclusions—for itself. That is, Taxpayer may not include the exempt usage attributable to Subsidiary in calculating its own exempt usage percentages.

FINDING

Taxpayer's protest is respectfully denied. Audit will review the recently submitted Updated Utility Study to modify the exempt use percentages properly attributable to Taxpayer.

II. Sales/Use Tax – Foundations

DISCUSSION

Audit has assessed use tax on taxpayer's purchase of foundations constructed specifically to support its production equipment. Taxpayer argues these foundations qualify for the manufacturing equipment exemptions provided by IC 6-2.5-5-3(b) and 45 IAC 2.2-5-8(c). Specifically, IC 6-2.5-5-3(b) provides:

> Transactions involving manufacturing machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for the direct use in the direct production, manufacture, fabrication... of other tangible personal property.

In support of exempt treatment, taxpayer reasons:

> The manufacturing equipment could not operate without the support of the attached foundations. These specially designed foundations become a part of the machinery, and are required for proper support and stabilization of the machinery. In fact, the cost of these foundations are capitalized by [taxpayer] in its fixed asset system as machinery and equipment.... A much smaller foundation would be required if it was only supporting the real estate improvements.

Taxpayer is correct. Foundations constructed specifically to support exempt manufacturing equipment—exempt pursuant to IC 6-2.5-5-3(b)—are also exempt as equipment acquired "for the direct used in the direct production... of other tangible personal property." This exemption, with regard to foundations, is construed narrowly. Foundations not constructed specifically for exempt equipment—that is not necessary and integral to the operation of the exempt equipment—will be characterized as improvements

to real estate. Such improvements are not within the purview of IC 6-2.5-5-3(b).

FINDING

Taxpayer's protest is sustained.

III. Sales/Use Tax – Forklifts

DISCUSSION

Taxpayer and Audit disagree as to the percentage of exempt use properly attributable to taxpayer's forklifts. Taxpayer explains this disagreement:

> Pursuant to the audit, the Auditor recalculated Taxpayer's exempt usage percentage related to the forklift trucks and reduced the refund claim proportionate to the Auditor's exemption recalculation, which excluded use of the forklifts by [an affiliated corporation]. This exempt use recalculation was erroneous since the exempt used claimed by the refund appropriately calculated the correct exempt use of the forklifts by both companies.

Audit responds with the following reasoning:

> The forklift analysis submitted [by taxpayer] as part of the Claim [for Refund] computed [a] taxable usage of 43%. The taxpayer's study includes forklifts for the taxpayer and [the affiliated corporation's] adjacent plant. In prior years, the [affiliated corporation] was a division of [taxpayer] and this method [of computing exempt usage] was appropriate. As they are now separate corporations, forklifts of the [affiliated corporation] should not be included in the study.

The exemption referred to by both Audit and taxpayer is based on the language of IC 6-2.5-5-3(b), which states:

> Transactions involving manufacturing machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for direct use in the direct production, manufacture, fabrication, assembly…of other tangible personal property.

Audit interprets the cited language as requiring the *purchaser* of the equipment to *use* the equipment in the prescribed manner to qualify for the exemption. Taxpayer contends that as long as the equipment is used in an exempt manner, the identity of the user is irrelevant. Taxpayer misreads this exemption statute.

The regulation interpreting IC 6-2.5-5-3 requires the purchaser of the property—not a third party—to use the purchased property in an exempt manner. As the prologue to 45 IAC 2.2-5-8 informs:

> Sec. 8. (a) In general, all purchases of tangible personal property by persons engaged in the direct production, manufacture, fabrication, assembly, or finishing of tangible personal property are taxable. The exemption provided in this regulation *[45 IAC 2.2]* extends only to manufacturing machinery, tools, and equipment **directly used by the purchaser** in direct production. It does not apply to material consumed in production or to materials incorporated into tangible personal property produced. (Emphasis added.)

And finally, the Department notes that the agricultural exemptions (IC 6-2.5-5-1 and IC 6-2.5-5-2), as well as the other industrial exemptions (IC 6-2.5-5-4, IC 6-2.5-5-5.1, IC 6-2.5-5-6), all require the purchaser of the tangible personal property to use the property in a prescribed manner in order to qualify for exempt treatment. The Indiana Tax Court in Indianapolis Fruit Co. v. Department of State Revenue, 691 N.E.2d 1379 (Ind. Tax 1998) echoed this principle when it stated:

> Indianapolis Fruit contends that it is entitled to the exemptions contained in sections 6-2.5- 5-1 to -3 for its banana and tomato ripening equipment and the protective clothing worn by its employees at the Garden Cut facility. Sections 6-2.5-5-1 and -2 exempt tangible personal property used in agricultural production. **Section 6-2.5-5-3 is a more general provision, and is often referred to as the equipment exemption.** It exempts manufacturing machinery, tools, and equipment used to produce "other tangible personal property." Ind. Code Ann. § 6-2.5-5-3(b) (West Supp. 1997).
>
> **All three exemption provisions require that the taxpayer engage in production before qualifying for the exemption.** See Mechanics Laundry & Supply, Inc. v. Department of State Revenue, 650 N.E.2d 1223, 1228-29 (Ind. Tax Ct. 1995) (construing section 6-2.5-5-3 as requiring production); Department of State Revenue v. American Dairy, Inc., 338 N.E.2d 698, 700 (Ind. App. 1975) (construing predecessor statute to sections 6-2.5-5-1 and -2 as requiring production). (Emphasis added.)

FINDING

Taxpayer's protest is respectfully denied.

IV. Sales/Use Tax – Refuse Chip Conveyor System

DISCUSSION

Audit has assessed use tax on taxpayer's purchase of a Refuse Conveyor System ("RCCS"). Taxpayer explains the utility of this system:

> One of the many steps in the... engine manufacturing process is the "broaching operation." A broach is a tapered or serrated tool used to place metal into a flat surface. When the broach planes the surface of the cylinder head, the RCCS catches the small pieces of metal, turnings and shavings ("chips") that the planing creates. The RCCS operates in the front end of the head line. The RCCS immediately removes the chips so that the chips do not clog up the equipment and cause damage. The base of the manufacturing machinery contains openings that allow chips to fall onto the chip conveyor and move away from the equipment. This operation is continuous throughout the production cycle and must be contrasted to periodic or pre- or post

production cleaning or maintenance.

Given the function of the RCCS within the context of the aforementioned production process, taxpayer argues that this equipment is "essential and integral" to the process of producing engines. See IC 6-2.5-5-3 and 45 IAC 2.2-5-8.

Taxpayer also presents an alternate theory in support of exempt treatment for its RCCS. As taxpayer explains:

> The chips collected by the RCCS are a manufactured by-product which is collected, gathered, packaged, and sold as scrap by [taxpayer]. Once the chip is manufactured by the broaching process, the conveyor transports it [the chips] to the packaging department where the chips are placed in a gondola. The gondola serves as the package for [taxpayer's customer]. The RCCS, thus, provides transportation between production stages in regard to the manufacture of this by-product.

Taxpayer manufactures engines. One step in taxpayer's manufacturing process—the broaching operation—creates unwanted residue of small metal chips. Uncorralled, these chips pose a hazard to both taxpayer's manufactured product and manufacturing equipment. Taxpayer, therefore, purchased equipment (RCCS) to assist in the removal (via conveyor) of these chips from production areas. According to taxpayer, these removal activities are "continuous throughout the production cycle...."

These metal chips represent an unwanted byproduct from taxpayer's manufacturing operations. Although the removal of such byproducts is a necessary ancillary activity to that of manufacture, such removal does not appear, functionally, to be "essential and integral" to taxpayer's integrated production process. Rather, the removal of the metal chips is best characterized as a nonexempt post-production maintenance activity. 45 IAC 2.2-5-8(h).

And finally, the fact that these "chips"—a byproduct of taxpayer's manufacturing process—have economic value does not make taxpayer, for purposes of Indiana sales/use tax exemptions, a producer, manufacturer, fabricator, assembler, extractor, minor, processor, refiner, or finisher of "chips." Rather, despite the economic consequences of doing so, the gathering, collecting, and disposing of byproduct from a manufacturing activity remain routine nonexempt post-production maintenance activities. 45 IAC 2.2-5-8(h).

FINDING

Taxpayer's protest is respectfully denied.

V. Sales/Use Tax – Pallet Washer

DISCUSSION

Audit has proposed assessments of use tax on taxpayer's purchase of a Pallet Washer. Taxpayer opines:

> The Pallet Washer is used to facilitate the flow of the production line by removing dirt, shavings, loctite and RTW sealant from the pallets, which, if left undisturbed, will cause engines [taxpayer's product] to become out of location during the assembly process. The presence of such contaminants during the production process will interfere with the attainment of the exacting specifications required for engine production and will cause engine failure.

Taxpayer, therefore, reasons that its "purchase of the Pallet Washer [should be exempt] from Indiana sales and use tax pursuant to Ind. Code § 6-2.5-5-3 since it constitutes manufacturing machinery and equipment acquired for the direct use in the direct production…of other tangible personal property."

Even assuming *arguendo* that taxpayer's pallets qualify for a manufacturing exemption as "production equipment," the cleaning of such equipment—regardless of necessity—does not qualify for similar treatment. The cleaning and maintenance of production equipment are legitimate nonexempt pre and post-production activities. As 45 IAC 2.2-5-8(h) instructs:

> Machinery, tools, and equipment used in the normal repair and maintenance of machinery used in the production process which are predominantly used to maintain production machinery are subject to tax.

Or conversely, as Audit succinctly stated, "Pallet washers do not have a direct effect on the article being produced." See IC 6-2.5-5-3.

FINDING

Taxpayer's protest is respectfully denied.

VI. Sales/Use Tax – Lot Control System

DISCUSSION

Audit has proposed assessments of use tax on taxpayer's purchase of "Lot Control Systems." According to taxpayer:

> These [Lot Control] systems input data regarding production and identify batches by serial number. The system allows taxpayers to recall batches going through the process whenever a problem is discovered. Lot control systems are an integral part of manufacturing equipment which is used during the production process and which has an immediate effect on the article being produced. Such systems are an essential and integral part of the production process, since only non-defective products are acceptable for sale.

Audit characterized the function of taxpayer's Lot Control Systems as one of inventory management—a nonexempt use.

The Department disagrees with taxpayer's conclusions. From the narrative presented it would be impossible for the Department to conclude that taxpayer's Lot Tracking System has been acquired "for direct use in the direct production, manufacture, fabrication, assembly…of other tangible personal property. IC 6-2.5-5-3(b). The tracking or monitoring of inventory, for whatever purposes, is not "essential and integral" to the production of the inventory being monitored. Such usage (inventory management) is best characterized as a nonexempt post-production activity. 45 IAC 2.2-5-8.

FINDING

Taxpayer's protest is respectfully denied.

VII. Sales/Use Tax –"Factory Link" Equipment

DISCUSSION

Audit has proposed assessments of use tax on taxpayer's purchase of certain equipment. Taxpayer explains:

The Auditor has proposed to assess [use] tax on Taxpayer's purchase of certain production equipment from FactoryLink, Deemstop and Englewood (together referred to as "FactoryLink"). The purchase of FactoryLink equipment is exempt from sales and use tax pursuant to Ind. Code § 6-2.5-5-3(b)…. FactoryLink equipment is necessary and essential to production when used in its Tool Management and Gage Management function modes since FactoryLink equipment will take the balance of the manufacturing machine out of cycle when tool wear reaches its maximum allowable amount. *See* 45 IAC 2.2-5-8(c)(5).

Audit characterized taxpayer's FactoryLink system as non-production, nonexempt "supervisory control and data acquisition [equipment]." Audit described the utility of the FactoryLink equipment in the following manner:

FactoryLink shuts down machinery when predetermined and routine maintenance is due. FactoryLink tracks the number of operations performed, but does not monitor the production process.

From the facts presented, it appears the FactoryLink equipment is used exclusively to monitor production equipment in order to determine when routine maintenance should be performed. Such use is neither essential nor integral to taxpayer's integrated production process. Taxpayer's use is more a function of maintenance rather than production. The equipment, therefore, does not qualify for the exemption provided by IC 6-2.5-5-3(b).

FINDING

Taxpayer's protest is respectfully denied.

VIII. Negligence Penalty

DISCUSSION

Taxpayer has requested that the Department exercise its statutory discretion to abate the ten-percent negligence penalty assessed under authority of IC 6-8.1-10-2.1(a). The penalty was assessed against the taxpayer's additional sales and use tax liabilities.

IC 6-8.1-10-2.1(d) provides potential relief from imposition of the penalty. The statute states that if a person – subject to the negligence penalty imposed under IC 6-8.1-10-2.1(a) – can demonstrate that the failure to file a tax return, pay the full amount of tax shown on the person's return, timely remit tax held in trust, or pay a deficiency determined by the Department, was due to reasonable cause and not due to willful neglect, the Department shall waive the penalty. 45 IAC 15-11-2(b) defines "negligence" as the failure to use the "reasonable care, caution, or diligence, as would be expected of an ordinary reasonable taxpayer." Negligence results from a "taxpayer's carelessness, thoughtlessness, disregard, or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations."

In order to waive the negligence penalty, the taxpayer must demonstrate that its failure to pay the full amount of tax was due to "reasonable cause." 45 IAC 15-11-2(c). Taxpayer may establish "reasonable cause" by "demonstrat[ing] that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed...." Id. In determining whether "reasonable cause" exists, the Department may consider the nature of the tax involved, previous judicial precedents, previous Department instructions, and previous audits. Id.

The Department finds that the taxpayer has established "reasonable cause" sufficient to warrant abating the ten-percent negligence penalty.

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

04990298.LOF

LETTER OF FINDINGS NUMBER: 99-0298
Sales and Use Tax
For Tax Periods: 1995-1997

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 specific issues.

ISSUES

1. Sales and Use Tax – Trailers and Fuel

Authority: IC 6-2.5-3-2(a), IC 6-2.5-5-3, IC 6-8.1-5-1(b), 45 IAC 2.2-5-10(c), 45 IAC 2.2-5-8, *Gross Income Tax Division v. National Bank and Trust Co.,* 79 NE 2d 651 (Ind. 1948), *Indiana Department of Revenue v. Cave Stone*, 457 NE 2d 520 (Ind. 1983)

The taxpayer protests the imposition of tax on trailers and fuel used to transport sawmills to branch offices.

2. Sales and Use Tax – Weiming Knife Grinder and Grinding Wheels

Authority: IC 6-2.5-5-3, 45 IAC 2.2-5-8(h)(1), *Rotation Products v. Department of State Revenue,* 690 NE 2d 795 (Ind. Tax 1998)

The taxpayer protests the imposition of tax on the Weiming Knife Grinder and grinding wheels.

3. Sales and Use Tax – Bander Machine and Strapper Machine

Authority: IC 6-2.5-5-3, 45 IAC 2.2-5-8(d)

The taxpayer protests the imposition of tax on the Bander Machine and Strapper Machine at the end of the production line of new band saw blades.

4. Sales and Use Tax – Purchases on which North Carolina Sales Tax was Paid

Authority: IC 6-2.5-5-3

The taxpayer protests the imposition of tax on purchases on which North Carolina sales tax was paid.

5. Sales and Use Tax – Rental of Gas Storage Tank

Authority: IC 6-2.5-5-3, 45 IAC 2.25-8(c)(3)

The taxpayer protests the imposition of tax on the rental of a gas storage tank.

6. Sales and Use Tax – Parts and Equipment to Sharpen Customers' Band Saw Blades

Authority: IC 6-2.5-5-3

The taxpayer protests the imposition of tax on parts and equipment to sharpen customers' band saw blades.

7. Sales and Use Tax – Item Listed Twice in the Audit

Authority: IC 6-2.5-3-2

The taxpayer protests the listing of an item twice in the audit.

8. Sales and Use Tax – Calculation of Error Percentage

Authority: IC 6-8.1-4-2(b)

The taxpayer protests the error percentage used in the audit.

9. Tax Administration – Penalty

Authority: IC 6-8.1-10-2.1, 45 IAC 15-11-2(b)

The taxpayer protests the imposition of the negligence penalty.

STATEMENT OF FACTS

The taxpayer is an Indiana corporation that engages in the business of manufacturing portable band saw mills, blades, sawmill options and accessory products. After an audit, the taxpayer was assessed additional sales and use tax, interest and penalty. The taxpayer protested this assessment and a hearing was held. Further facts will be provided as necessary.

1. Sales and Use Tax – Trailers and Fuel

DISCUSSION

Pursuant to IC 6-2.5-3-2(a), Indiana imposes an excise tax on tangible personal property stored, used, or consumed in Indiana. A number of exemptions are available from use tax, including those collectively referred to as the manufacturing exemptions. All exemptions must be strictly construed against the party claiming the exemption. *Gross Income Tax Division v. National Bank and Trust Co.,* 79 NE 2d 651(Ind.1948). IC 6-2.5-5-3 provides for the exemption of "manufacturing machinery, tools and equipment which is to be directly used by the purchaser in the direct production, manufacture, fabrication... of tangible personal property." In *Indiana Department of Revenue v. Cave Stone.* 457 NE 2d 520, (Ind. Tax 1983*),* the Indiana Supreme Court found that a piece of equipment qualifies for the manufacturing exemption if it is essential and integral to the production process. 45 IAC 2.2-5-10(c) further describes manufacturing machinery and tools as exempt if they have an immediate effect on the property in production.

Indiana Department of Revenue assessments are prima facie evidence that the taxes are owed by the Taxpayer who has the burden of proving that the assessment is incorrect. IC 6-8.1-5-1(b).

The taxpayer's first item of protest concerns the imposition of use tax on fuel and trailers used to transport saw mills to branch offices. The taxpayer produces the sawmill at the Indiana manufacturing facility. After completion at this facility, the sawmill is in two pieces. The taxpayer ships the two pieces on a specially designed trailer to its own distribution centers in other areas of the country. Trained company personnel assemble the sawmills at the distribution centers. The taxpayer contends that the fuel and trailers qualify for the directly used in direct production exemption because they transport the sawmills during an integrated production process. 45 IAC 2.2-5-8 concerns the exemption of transportation equipment.

(2) Tangible personal property used for moving finished goods from the plant after manufacture is subject to tax.

(3) Transportation equipment used to transport work-in-process or semi-finished materials to or from storage is not subject to tax if the transportation is within the production process.

(4) Transportation equipment used to transport work-in-process, semi-finished, or finished goods between plants is taxable, if the plants are not part of the same integrated production process.

Pursuant to this theory, most of the construction of the sawmills takes place in the Indiana facility and then the remaining construction takes place in the taxpayer's distribution offices. The taxpayer contends that it is not the mere assembling of the parts

of the sawmill but actual production of the sawmills. In support of this contention, the taxpayer states that trained persons with special equipment must assemble the sawmills so that they are calibrated properly. The taxpayer then argues that the fuel and trailers used to transfer the parts of the sawmills between the production facility and the distribution facility qualify for exemption as transportation between two integrated production process stations comparable to the exemption of a conveyer belt between two production stations within one facility.

The taxpayer's argument that the trailers and fuel qualify for the transportation in an integrated production process exemption is not persuasive. In this situation there are not two plants as stated in the Regulation clarifying when transportation would qualify for exemption. Rather, the production facility is in Indiana and the other facilities are distribution centers. Some buyers pick up the sawmills and transport the totally assembled sawmill from the Indianapolis facility. Some purchasers assemble their sawmills. The transportation of the sawmills to the distribution centers is not truly part of an integrated production system. Rather the sawmills are totally produced at the Indiana facility. They are stored in Indiana and then transported to centers for distribution to customers. The sawmills are not transported between stations in an integrated production system as required by the law and regulation to qualify for exemption.

FINDING

The taxpayer's first point of protest is denied.

2. Sales and Use Tax – Weiming Knife Grinder and Grinding Wheels

DISCUSSION

The taxpayer also operates a wood mill where it manufactures fine wood molding made of various hardwoods. For special orders it makes special knives to cut the molding. For standard type molding, The taxpayer may purchase or make its own knife.

The audit assessed tax on fifty per cent (50%) of the knife grinder and grinding wheels because they are used fifty per cent (50%) of the time for producing new blades and fifty per cent (50%) of the time for sharpening of blades. The auditor assessed tax on the fifty per cent (50%) of the use for sharpening blades on the theory that sharpening blades is routine maintenance. The taxpayer contends that the total use of the items qualifies for exemption pursuant to the directly used in direct production of a manufactured product exemption pursuant to IC 6-2.5-5-3 because the sharpening is actually the production of a blade. This exemption is clarified in the Regulations at 45 IAC 2.2-5-8(h)(1) as follows:

> Machinery, tools, and equipment used in the normal repair and maintenance of machinery used in the production process which are predominantly used to maintain production machinery are subject to tax.

The taxpayer cites *Rotation Products v. Department of State Revenue*, 690 N.E.2d 795 (Ind.Tax 1998) in support of its contention that the knife grinder and grinding wheels qualify for the manufacturing exemption as directly used in direct production. In that case, Rotation Products took worn out and useless ball bearings and performed several complicated processes on them and processed them into usable ball bearings which were comparable to new ball bearings. The Court found that this was actually a production process and materials directly used in the direct production of the reworked ball bearings qualified for a manufacturing exemption from the use tax. The taxpayer contends that the process of sharpening the blades to specific standards is so precise that it constitutes processing rather than mere maintenance as in the usual situation involving the sharpening of blades.

In deciding the *Rotation Products* case, the Court considered the extensive work done to the ball bearings to change them from a useless item to a new and marketable product, a ball bearing. The taxpayer's case does not meet that standard. Rather it is more like the repeated dry cleaning of items which allows the items to be reused within their normal life cycle which the Court cited as a taxable form of maintenance. The taxpayer did not sustain its burden of proving that the sharpening of the blades transformed them into entirely new marketable products. Rather the sharpening merely perpetuates the useful life of the blades. Therefore the sharpening is a maintenance function. As such the materials used in that maintenance function do not qualify for the exemption.

FINDING

The taxpayer's protest is denied.

3. Sales and Use Tax – Bander Machine and Strapper Machine

DISCUSSION

At the end of production of bandsaw blades, the taxpayer bands the blades so that they can be packed in boxes for shipping. The taxpayer then straps the boxes to pallets for shipping. The taxpayer contends that the machines which band the bandsaw blades for packaging in the boxes and the strapper machine qualify for exemption pursuant to the manufacturing exemption found at IC 6-2.5-5-3 and clarified at 45 IAC 2.2-5-8(d) as follows:

> Pre-production and post-production activities. "Direct use in the production process" begins at the point of the first operation or activity constituting part of the integrated production process and ends at the point that the production has altered the item to its completed form, including packaging, if required.

The machine that bands the saws for packing in the box affects the band saw blades prior to the end of the production process as it is defined in the Regulation. The box the band saw blades are placed in is the packaging that the Regulation clearly considers the end of the production process. Therefore this machine has the necessary effect on the product during the production process and qualifies for exemption.

The other machine straps the boxes to the pallets. At the time this machine operates, the band saw blades have already been placed in the required final packaging. This machine is used after the completion of the production process as it is defined in the regulation. Therefore this machine does not qualify for exemption.

FINDING

The protest to the tax imposed on the banding machine is sustained. The protest to the tax imposed on the strapping machine is denied.

4. Sales and Use Tax – Purchases on which North Carolina Sales Tax was Paid

DISCUSSION

The taxpayer protests the assessment of tax on certain items on which the taxpayer paid the four per cent (4%) sales tax to North Carolina. The taxpayer paid the tax on some of the computers and computer supplies that it purchased from a company in North Carolina. The taxpayer accepted delivery of the items in Indiana and the sale was completed here. Therefore, the retail transaction is subject to the Indiana sales and use tax rather than the North Carolina sales and use tax. The use of the items in Indiana is subject to the Indiana use tax pursuant to IC 6-2.5-3-2(a). Therefore the Indiana use tax is the tax that is properly due and owing.

FINDING

This point of the taxpayer's protest is denied.

5. Sales and Use Tax – Rental of Gas Storage Tank

DISCUSSION

The audit assessed use tax on the taxpayer's rental of a storage tank. The taxpayer agrees that the rental of the tank would be subject to the use tax if it stored a raw material. The taxpayer contends, however, that the tank actually stores oxygen for use in a plasma cutter. The taxpayer contends that the gas is not just a raw material but is actually used in the taxpayer's production process and therefore qualifies for exemption. The taxpayer contends that this storage tank is comparable to the storage tanks for lubricating and coolant fluids example considered exempt in the Regulations at 45 IAC 2.25-8-(c)(3) as follows:

> The following types of equipment constitute essential and integral parts of the integrated production process and are, therefore, exempt. The fact that such equipment is built in a manner to service various pieces of exempt equipment, as an alternative to building the equipment into each of the pieces of exempt machinery, is not determinative.
>
> (A) Pumping and filtering equipment and related tanks and tubing used to supply lubricating and coolant fluids to exempt drilling and cutting machinery.

The taxpayer did not sustain its burden of proving that the supply tank in this case is actually analogous to the tanks supplying lubricating and coolant fluids to exempt drilling and cutting machinery referred to in the example. Rather, the tank in question appears to be a taxable storage tank.

FINDING

This point of the taxpayer's protest is denied.

6. Sales and Use Tax – Parts and Equipment to Sharpen Customers' Band Saw Blades

DISCUSSION

The taxpayer protests the assessment of tax on parts and equipment used to sharpen customers' band saw blades. Customers send dull band saw blades to the taxpayer who then sharpens the blades, boxes the blades and delivers the sharpened blades to the customer. The taxpayer argues that these items qualify for the directly used in direct production exemption pursuant to IC 6-2.5-5-3.

As in the previous discussion of the Weimig knife grinder and grinding wheels, these parts and equipment are used to maintain the band saw blades and allow them to be utilized throughout the normal life cycle of the existing band saw blades.

FINDING

This point of the taxpayer's protest is denied.

7. Sales and Use Tax – Item Listed Twice in the Audit

DISCUSSION

The taxpayer contends that it was assessed use tax on each of two listings of one item, 415 6410-410 IN, in the audit. Pursuant to IC 6-2.5-3-2(a), use tax is imposed on tangible personal property purchased in a retail sale and used in Indiana. There is no provision for the use of any one item to be subjected twice to the use tax.

FINDING

The taxpayer's protest is sustained subject to audit verification.

8. Sales and Use Tax – Calculation of Error Percentage

DISCUSSION

Pursuant to IC 6-8.1-4-2(b), the Indiana Department of Revenue has the authority to audit taxpayers to determine if taxes were properly paid. In this case, the auditor employed a sampling and projection method to determine taxpayer's proper tax liability. The auditor used 1997 as the base period to develop the error percentage and applied this ratio to the 1995 and 1996 tax periods. The taxpayer protests the projection method used by the auditor to determine general purchases subject to additional use tax for 1995 and 1996. The taxpayer argues that the 1997 ratio overstates the error rate for 1995 and 1996 because of internal accounting issues

present in 1997 that were not present during the prior years. The taxpayer further contends that the mistaken error percentage in 1997 is evidenced by the taxpayer's higher self-assessment of use tax in 1995 and 1996 as compared to 1997.

The auditor's worksheet concerning the determination of the error percentage is page 62 of the audit. This worksheet clearly shows that the taxpayer was given credit for all use taxes actually accrued and paid in 1995 and 1996. Therefore, the auditor's computation took any accounting issues into effect and properly reflects the tax for each of the years 1995 and 1996.

FINDING

The taxpayer's protest is denied.

9. Tax Administration – Penalty

DISCUSSION

Taxpayer's final point of protest concerns the imposition of the ten per cent negligence penalty pursuant to IC 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2(b) clarifies the standard for the imposition of the negligence penalty as follows:

> 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 audit report assessed use tax on many clearly taxable items such as brooms, oil pads and office supplies. This breach of the taxpayer's duty to properly accrue and remit use tax on taxable items constitutes negligence.

FINDING

This point of the taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

02990399.LOF

LETTER OF FINDINGS NUMBER: 99-0399
Indiana Corporate Income tax
For the Tax Years 1988 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 the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Imposition of State Corporate Income Tax on Out-of-State Provider of Services to Indiana Customers

Authority: IC 6-3-2-1; IC 6-3-2-2(a); IC 6-3-2-2(a)(2); IC 6-2.1-1-2(a); IC 6-2.1-2-2; IC 6-2.1-2-2(a)(2); IC 6-8.1-5-1(b); Bethlehem Steel v. Dept. of State Revenue, 597 N.E.2d 1327 (Ind. Tax Ct. 1992); Indiana-Kentucky Elec. Corp. v. Indiana Dept of State Revenue, 598 N.E.2d 647 (Ind. Tax Ct. 1992); 45 IAC 1-1-49; 45 IAC 1-1-120; 45 IAC 3.1-1-38

Taxpayer is an out-of-state provider of reporting services. Taxpayer protests the audit's determination to subject taxpayer's Indiana source income to the state's corporate income tax. Taxpayer believes its activities are not sufficient to establish nexus with Indiana.

STATEMENT OF FACTS

Taxpayer provides reporting services, of varying degrees of complexity and specificity, to various consumers of these services. Typical consumers of taxpayer's services include television stations, radio stations, municipalities, and other entities requiring immediate and particularized information. Certain of the consumers are located in Indiana.

Taxpayer alleges that it assembles and prepares the information at its Pennsylvania headquarters. The information is transmitted to consumers in one of two ways. Information is transmitted by means of telephone lines or by satellite. When the information is transmitted by satellite, the following procedure is followed. Taxpayer transmits the information to a third-party satellite service located in Illinois. The third-party satellite service broadcasts the information to a satellite at which point the information becomes available to authorized consumers. The authorized consumers can down-link the information by means of specialized satellite receiving equipment. In some instances, the consumer makes use of its own equipment to access the information. In other instances, the necessary receiving equipment is obtained directly from the third-party satellite service provider.

Taxpayer does not own real or personal property within the state. Taxpayer does not assemble or prepare the information within the state. Taxpayer does not maintain personnel within the state. There is no indication that taxpayer sends its personnel into the state for the purpose of soliciting new customers or for providing localized services for existing customers.

The audit determined that taxpayer's Indiana source income, derived from the information delivered via satellite, was subject to Indiana corporate income tax. The audit determined that the receipt of the information – from satellite to Indiana location – was intrastate in nature and subject to the gross income tax and to the adjusted gross income tax. Because the taxpayer declined the opportunity to provide the audit access to the necessary information, the audit calculated taxpayer's tax liability based on the "best information available."

DISCUSSION

I. Imposition of State Corporate Income Tax on Out-of-State Provider of Services to Indiana Customers

A. Adjusted Gross Income Tax.

IC 6-3-2-1 imposes a tax on the adjusted gross income derived from "sources within Indiana." IC 6-3-2-2(a) provides that adjusted gross income derived from sources within Indiana includes "income from doing business in this state." IC 6-3-2-2(a).

45 IAC 3.1-1-38, in interpreting IC 6-3-2-2(a), provides that for apportionment purposes a taxpayer is "doing business" in Indiana if it operates a business enterprise or activity in Indiana including, but not limited to:

(1) Maintenance of an office or other place of business in the state

(2) Maintenance of an inventory of merchandise or material for sale distribution, or manufacture, or consigned goods

(3) Sale or distribution of merchandise to customers in the state directly from company-owned or operated vehicles where title to the goods passes at the time of sale or distribution

(4) Rendering services to customers in the state

(5) Ownership, rental or operation of a business or of property (real or personal) in the state

(6) Acceptance of orders in the state

(7) Any other act in such state which exceeds the mere solicitation of orders so as to give the state nexus under P.L. 86-272 to tax its net income.

It is apparent that taxpayer falls outside the ambit of the state's adjusted gross income tax scheme. Under the facts presented by the taxpayer and as contained within the audit report, there is no indication that taxpayer's income is "income [derived] from doing business in this state." IC 6-3-2-2(a)(2). Instead, taxpayer's services – consisting of the gathering, analyzing, and "packaging" of information – occurs entirely outside the state. Taxpayer's Indiana customers may be the beneficiaries of that information, but there is no indication that the performance of the service occurs within the state.

B. Gross Income Tax.

Under the provisions of IC 6-2.1-2-2, the Indiana gross income tax is imposed on the receipt of "the taxable gross income derived from activities or businesses or any other sources within Indiana by a taxpayer who is not a resident or a domiciliary of Indiana." IC 6-2.1-2-2(a)(2).

Taxpayer asserts that it is not subject to the state's gross income tax. The Indiana tax court has set forth a three-part test to determine whether a non-resident taxpayer has sufficient contacts with the state to warrant imposition of the gross income tax. The taxability of a non-resident taxpayer is dependent on determining whether (1) the taxpayer's receipts constitute "gross income," (2) whether the "gross income," is derived from "sources within Indiana," and (3) whether the "gross income," derived from those sources within Indiana is "taxable gross income." Bethlehem Steel v. Dept. of State Revenue ,597 N.E.2d 1327, 1330 (Ind. Tax Ct. 1992), *aff'd* 639 N.E.2d 264 (Ind. 1994). *See also* Indiana-Kentucky Elec. Corp. v. Indiana Dept of State Revenue, 598 N.E.2d 647, 661 (Ind. Tax Ct. 1992).

As a preliminary question, it must be determined that the receipt of income from the performance of a contract represents Indiana gross income. IC 6-2.1-1-2(a) provides that "[e]xcept as expressly provided in this article, 'gross income' means all the gross receipts a taxpayer receives... from the performance of contracts." Taxpayer has entered into various contracts to provide information services to recipients located within the state of Indiana. Those Indiana recipients pay for those services. Taxpayer receives that payment. Accordingly, under IC 6-2.1-1-2(a), those payments constitute "gross income" for the purpose of determining the applicability of the state's gross income tax.

It is the second provision of the Bethlehem Steel test which is central to taxpayer's protest. In order for the Department to establish that taxpayer's income is subject to the state's gross income tax, the Department must establish that taxpayer's income is derived from a source within Indiana. Specifically, "[i]f the activities giving rise to the income sought to be taxed do not occur within Indiana, then the tax may not be levied – not because to do so is forbidden by the United States Constitution (although it may well be) – but rather because under those facts the levy is forbidden by the statute." Bethlehem Steel, 597 N.E.2d at 1330. 45 IAC 1-1-120 instructs in part that "[a]s a general rule, income derived from sales made by nonresident sellers to Indiana buyers is not subject to gross income tax unless the seller was engaged in business activity within the State [i.e., tax situs]." The court in Indiana-Kentucky explained stating that "the regulations teach that a nonresident is subject to taxation if the 'source' of the gross income is an Indiana *tax situs*, i.e., an Indiana *business situs* at which business activities are performed that are connected with or facilitate the transaction... giving rise to the gross income." Indiana- Kentucky, 598 N.E.2d at 662 (*Emphasis added*).

Based upon the information provided by the taxpayer, it is apparent that taxpayer has entered into contracts for the provision of specialized reporting services to Indiana customers. However, those services are performed entirely out-of-state and the income

here at issue is derived exclusively from the performance of those out-of-state services.

Therefore, it appears – based exclusively on the limited information that the taxpayer chose to present to the Department – that the taxpayer falls outside the purview of the state's gross income tax provisions because there is no indication that taxpayer has contacts with the state sufficient to establish an Indiana business situs from which taxpayer's Indiana source income is derived. Based on that limited information, it would appear that taxpayer has no personnel or property within the state. Similarly, there is no indication that taxpayer's representatives enter into the state either to conduct or facilitate the taxpayer's business. Whatever taxpayer's Indiana activities may be, there is insufficient evidence to establish that those activities are "more than minimal, and not remote or incidental to the total transaction...." Indiana-Kentucky, 598 N.E.2d at 663.

Accordingly, to the extent that taxpayer's documentary information can be verified by the supplemental audit, taxpayer's protest is sustained. The ability of the supplemental audit to verify taxpayer's factual assertions is, of course, subject to the requirement that taxpayer provide unfettered access to the information necessary to verify those assertions. To that end, taxpayer is reminded of the provisions contained with IC 6-8.1-5-1(b) which states that the "burden of the proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

FINDING

Taxpayer's protest is sustained subject to verification by the supplementary audit.

DEPARTMENT OF STATE REVENUE

04990532.LOF

LETTER OF FINDINGS NUMBER: 99-0532 ST
Sales and Use Tax
For Tax Periods: 1996 through 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 specific issues.

ISSUE

Sales and Use Tax – Public Transportation Exemption

Authority: IC 6-2.5-3-2, IC 6-2.5-5-27, IC 26-1-2-319(1), 45 IAC 2.2-5-61 (b), National Serv-All, Inc. v. Indiana Department of State Revenue, 644 N.E. 2d 960 (Ind. Tax 1994), Indiana Waste Systems of Indiana, Inc. v. Indiana Department of State Revenue, 644 N.E. 2d 960 (Ind. Tax 1994), Panhandle Eastern Pipeline Company and Trunkline Gas Company v. Indiana Department of State Revenue, 741 N.E.2d 816 (Ind. Tax 2001)

The taxpayer protests the assessment of tax on a truck, associated gasoline and associated repair parts.

STATEMENTS OF FACTS

The taxpayer is an Indiana corporation that sells tools, electronics and collectibles. The Indiana Department of Revenue assessed additional sales and use tax, interest and penalty after a routine audit. The taxpayer timely protested a portion of the assessment. Further facts will be provided as necessary.

Sales and Use Tax – Public Transportation Exemption

DISCUSSION

IC 6-2.5-3-2 imposes the use tax on "the storage, use, or consumption of tangible personal property in Indiana." Certain items qualify for the public transportation exemption to the use tax pursuant to IC 6-2.5-5-27:

The taxpayer purchases tools, electronics and collectibles as close-out items from other retailers and wholesalers. The taxpayer then sells these items from its two Indiana stores, mail orders and road sales. The auditor assessed tax on the taxpayer's trucks, gasoline and repair parts. One of the taxpayer's trucks is used to re-supply road shows. That truck backhauls merchandise belonging to others. The taxpayer contends that this truck and the associated gasoline and repair parts qualify for the public transportation exemption from the use tax pursuant to the following provisions of IC 6-2.5-5-27:

> Transactions involving tangible personal property and services are exempt from the state gross retail tax, if the person acquiring the property or service directly uses or consumes it in providing public transportation for persons or property.

The taxpayer supports this contention by citing the definition of public transportation found at 45 IAC 2.2-5-61 (b) as follows:

> Public transportation shall mean and include the movement, transportation, or carrying of persons and/or property for consideration by a common carrier, contract carrier, household goods carrier, carriers of exempt commodities, and other specialized carriers performing public transportation service for compensation by highway, rail, air or water, which carriers operate under authority issued by, or are specifically exempt by statute or regulation from economic regulation of, the public service commission of Indiana, the Interstate Commerce Commission, the aeronautics commission of Indiana, the U.S. Civil Aeronautics Board, the U.S. Department of Transportation, or the Federal Maritime Commissioner; however, the fact that a company possesses a permit or authority issued

by the P.S.C.I., I.C.C., etc., does not of itself mean that such a company is engaged in public transportation unless it is in fact engaged in the transportation of persons or property for consideration as defined above.

The taxpayer alleges that its operation of the re-supply truck meets this definition of public transportation since it transports merchandise belonging to third parties.

The issue to be determined in this case is how the public transportation exemption from the use tax applies to the taxpayer's re-supply truck.

The Indiana Tax Court has addressed the issue of public transportation in several cases. The first two cases involved contract hauling of garbage. In National Serv-All, Inc. v. Indiana Department of State Revenue, 644 N.E. 2d 954 (Ind. Tax 1994), the Court stated that although National Serv-All "engaged in 'public transportation' when it hauled Contract garbage," nonetheless National Serv-All did not prove "that its hauling of Contract garbage was the *predominant share* of its use of the items at issue." Id. At 959. (Emphasis in the original). The Court concluded: "Although National engaged in the public transportation of property within the meaning of IC 6-2.5-5-27 when it hauled Contract garbage, it did not prove it predominantly engaged in public transportation." Id. at 960.

The Court faced a similar issue concerning the applicability of the public transportation exemption to the contract hauling of garbage in Indiana Waste Systems of Indiana, Inc. v. Indiana Department of State Revenue, 644 N.E. 2d 960 (Ind. Tax 1994). In that case the Court held as follows:

> Waste Management's maximum annual revenue from public transportation was 17.7 percent of its total revenue, and therefore, the remaining 80 percent of its revenue came from non-public transportation. The predominant use of Waste Management's trucks and other items, therefore, is not exempt...
>
> Id. at 962.

The third case dealing with this issue is Panhandle Eastern Pipeline Company and Trunkline Gas Company v. Indiana Department of State Revenue, 741 N.E.2d 816 (Ind. Tax 2001). The petitioners were pipeline companies that transported natural gas belonging to third parties and natural gas belonging to the petitioners. In each case, the predominate use of the pipelines was to transport natural gas belonging to others. The Court, after noting the relevance of its two previous cases on public transportation, stated the following.

> If a taxpayer acquires tangible personal property for predominate use in providing public transportation for third parties, then it is entitled to the exemption. If a taxpayer is not predominately engaged in transporting the property of another, it is not entitled to the exemption.
>
> Id. at 819.

The Indiana Tax Court has set out a two-pronged test to determine if a particular business qualifies for the public transportation exemption from sales and use tax. First the taxpayer must be predominately engaged in public transportation of the property of another. Secondly, the taxpayer's property must be predominately used for providing public transportation.

The first prong looks at the taxpayer itself. A determination must be made whether or not the taxpayer is engaged in public transportation. The second prong looks at the individual units to determine how they are used. Both prongs must be satisfied for the taxpayer to qualify for the public transportation exemption.

In this situation, the taxpayer is primarily engaged in the purchase and resale of tools, electronics and collectibles. It is not predominately engaged in public transportation. Therefore, having failed the first prong of the test, the taxpayer does not qualify for the public transportation exemption from the sales and use tax for any of the years of the audit. The Department does not need to determine whether the taxpayer's use of the one re-supply truck qualifies that truck for the public transportation exemption.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

03990592P.LOF

LETTER OF FINDINGS NUMBER: 99-0592P
Withholding Tax
Month of November 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

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 the late filing of the deposit due for the month of November 1998.

The taxpayer is a producer, agent, and shipper of metallurgical coal, coke, coke breeze, dry coke, petroleum coke, and other carbon products. The taxpayer provides worldwide service to all industrial carbon markets. The taxpayer is headquartered outside of Indiana.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer erred in determining the due date of the Indiana state tax. The error resulted in late deposits for October 1998 and November 1998. The error was corrected so future deposits would be made timely. As the error was not the result of willful negligence, the taxpayer argues penalty should be waived.

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 of Indiana tax regulations. 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

0420000140.LOF

LETTER OF FINDINGS NUMBER: 00-0140
State Gross Retail Tax
For Tax Years 1996 through 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. State Gross Retail Tax – Utility Exclusion

Authority: IC 6-2.5-4-5(c); IC 6-2.5-5-5.1; Sales Tax Information Bulletin #55

Taxpayer protests the auditor's determination that taxpayer's electrical consumption during October and November of 1997 was subject to sales tax because it was not used predominately in taxpayer's production process.

II. State Gross Retail Tax – Manufacturing Exemption

Authority: *General Motors Corp. v. Indiana Dept. of State Revenue*, 578 N.E.2d 399 (Ind.Tax 1991), *aff'd*, *Indiana Dept. of State Revenue v. General Motors Corp.*, 599 N.E.2d 588 (Ind. 1992)**;** IC 6-2.5-2-1; IC 6-2.5-5-3(b); 6-8.1-5-1(b); 45 IAC 2.2-5-8; 45 IAC 2.2-5-12(a)

Taxpayer protests the auditor's determination that various items of equipment did not qualify for the manufacturing exemption from sales tax because they lacked an essential and integral relationship with the taxpayer's manufacturing process.

III. State Gross Retail Tax – Credit for Use Tax Paid to Foreign Jurisdictions

Authority: IC 6-2.5-3-2; IC 6-2.5-3-5

The taxpayer protests the proposed assessment of use tax on the purchase of computer equipment upon which use tax was assessed by a foreign jurisdiction.

IV. Tax Administration – Abatement of Penalty

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

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

STATEMENT OF FACTS

Taxpayer operates a manufacturing facility in Indiana which produces high strength steel truck load floor assemblies for the automotive industry. Full scale production of the products began in the calendar year 1998; however, a limited production process began in October of 1997. At issue are the Audit Division's proposed assessments of sales and use tax on taxpayer's electrical consumption and various equipment. Additional facts are discussed below.

I. State Gross Retail Tax – Utility Exclusion

DISCUSSION

Taxpayer protests the auditor's determination that taxpayer's electrical consumption during October and November of 1997 was subject to sales tax. The Audit Division determined that December of 1997 marked the beginning of the full scale production period based upon taxpayer's records of shipments of finished parts to its customers. Taxpayer argues that the production process actually began much earlier and contends that over fifty percent (50%) of the electricity purchased between September 25, 1997 and November 24, 1997 was consumed in the production process. Given predominant use, taxpayer believes it is entitled to the one hundred percent (100%) exclusion provided by IC 6-2.5-4-5(c).

Electricity directly consumed in the direct production of other tangible personal property by a business engaged in "manufacturing, processing, refining..." is exempt from sales tax. IC 6-2.5-5-5.1. This exemption is applied on a pro rata basis. An exclusion is provided for sales of electricity made by public utilities if the services sold (i.e., the electricity purchased) are "consumed as an essential and integral part of an integrated process that produces tangible personal property and those sales are separately metered for the excepted uses... or if those sales are not separately metered but are predominately used by the purchaser for the excepted uses listed in this subdivision." IC 6-2.5-4-5(c).

Sales Tax Information Bulletin #55, which addresses the application of sales tax to sales of utilities used in manufacturing or production, provides in pertinent part:

> Use in manufacturing or one of the other listed production processes begins at the point of the first operation or activity constituting part of an integrated production process and ends at the point that the production process has altered the item to its completed form, including packaging, if required. To qualify for the exemption, the listed utility must be consumed as an essential and integral part of an integrated process which produces tangible personal property. In general, utilities will meet this test to the extent that they power equipment used as an essential and integral part of an integrated production process.

From the date taxpayer was awarded the contract to produce truck load assemblies for the automobile manufacturer to the date actual production of the product began, approximately two years passed. During this two-year period, taxpayer built the assembly plant and entered into a pre-production approval process period (hereinafter, "PPAP"). The PPAP is a testing phase during which inspectors from the automobile manufacturing company inspect and monitor taxpayer's production process to ensure that it will be able to meet production quantity and quality standards. If the production process fails to meet the standards, changes are made. Once the production process is approved, the PPAP phase ends and actual production of the product begins.

After its protest hearing, taxpayer interviewed numerous plant personnel who were associated with the launch of the production of the truck load assemblies. From the interviews, taxpayer determined that the PPAP period ended in late summer or early fall of 1997. Thereafter, from October to November 1997, taxpayer was engaged in limited actual production of finished parts for shipment to the automobile manufacturer in early 1998. Taxpayer fully invoiced the automobile manufacturer for the finished parts. The finished parts were installed in the automobile manufacturer's vehicles.

To further support its contention, taxpayer has provided a copy of a schedule which details the physical inventory on hand at the Indiana manufacturing facility on December 31, 1997. The inventory contained large quantities of finished assemblies, as well as large quantities of works in process. Also, taxpayer has provided a shipping history inquiry report that chronicles shipments of finished parts to its customers. Significant amounts of finished parts were shipped from the Indiana manufacturing facility in early 1998.

A review of taxpayer's utility invoices bolsters taxpayer's assertions. The utility invoices show that taxpayer's kilowatt usage increased from 43,200 KWH for the month of August, to 56,400 KWH for the month of September, to 96,000 KWH for the month of October, to 122,400 KWH for the month of November. The gradual increase in production, which precedes full scale production, is referred to by taxpayer as the "ramp up" period. During this "ramp up" period, taxpayer's production was consistent with and pursuant to the instructions taxpayer received from the automobile manufacturer as to the quantity of manufactured parts that were required.

Based upon the evidence contained in the file, and specifically the near fifty percent increase in kilowatt usage for the month of October 1997, we find that taxpayer's PPAP period ended in September of 1997, and that actual production of the manufactured product began in October of 1997. Because taxpayer was engaged in the manufacturing process and predominately used the electricity in manufacturing, taxpayer's electricity consumption for the months of October and November 1997 should have been excluded from sales tax.

FINDING

Taxpayer's protest is sustained.

II. State Gross Retail Tax – Manufacturing Exemption

DISCUSSION

Taxpayer protests the auditor's determination that various items of equipment do not qualify for exemption from sales tax, under the manufacturing exemption set forth in 45 IAC 2.2-5-8, because the equipment does not have an essential and integral relationship with the taxpayer's manufacturing process. These items include chain hoists, forklifts, forklift replacement parts, LP gas for use in the forklifts, tool room equipment, and crossover stairs.

Pursuant to IC 6-2.5-2-1, a sales tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana unless

a valid exemption is applicable. Under IC 6-2.5-5-3(b), 45 IAC 2.2-5-12(a), an exemption from the state gross retail tax is provided for transactions involving manufacturing machinery, tools, and equipment if the person acquiring that property acquires it for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property. (Emphasis added). 45 IAC 2.2-5-8(c) defines "direct use" as use having an immediate effect on the article being produced. Property has such an immediate effect if it is an essential and integral part of an integrated process that produces tangible personal property. 45 IAC 2.2-5-8(g).

Two Chain Hoists and a Forklift

Taxpayer manufactures its product using a roll forming assembly line. At the end of the roll forming line, a robot removes the product from the line and places the product in a customer-owned container. A forklift then moves the container to the "repack" area, where two chain hoists remove the product from one customer-owned container and place the product in another customer-owned shipping container. Taxpayer's customer requires the products to be "packaged" in the customer-owned shipping container prior to shipping. Taxpayer's customer will not accept the finished product from taxpayer if the finished product is delivered in any other form or by any other means. Taxpayer cites 45 IAC 2.2-5-8(d) for the proposition that the production process does not end until "production has altered the item to its completed form, including packaging, if required", and claims that its own manufacturing process does not end until the finished product is removed to the customer-owned shipping containers. Therefore, according to taxpayer, the purchase of the two chain hoists and the use of the forklifts to move the product from the end of the roll forming line to the repack area are exempt from sales tax under the manufacturing exemption.

In *General Motors Corp. v. Indiana Dept. of State Revenue*, 578 N.E.2d 399 (Ind.Tax 1991), *aff'd*, *Indiana Dept. of State Revenue v. General Motors Corp.*, 599 N.E.2d 588 (Ind. 1992), the Tax Court held, *inter alia*, that General Motors' purchases of packing materials were exempt from sales/use tax because they were used to protect component parts that were shipped to assembly plants and used to finish General Motors' most marketable product. *General Motors*, 578 N.E.2d at 404. In so finding, the Tax Court stated that "[a]n integrated production process terminates upon the production of the most marketable finished product, *e.g.*, the product actually marketed." *Id*. Therefore,

> [u]nder an approach focusing on the actual end product marketed, GM's packing materials used to transport component parts sold to non-GM manufacturers and those used to transport finished replacement parts would still be [subject to sales/use tax]. On the other hand, packing materials used to transport work in process parts from GM's component plants to GM's assembly plants would be exempt as an essential and integral part of GM's integrated production process of manufacturing finished automobiles.
>
> *Id*. at 405 (emphasis added).

In the instant case, the customer-owned shipping container is not an integral and essential part of taxpayer's production process. The truck load assemblies that taxpayer manufactures are not "work in process parts". The fact that taxpayer's customer will not accept the finished product if it is not shipped in the customer-owned shipping containers is of no moment. Taxpayer's production process ends at the end of the roll forming line. At that point, taxpayer has produced a finished, marketable product. The removal of the product from the customer-owned container to the customer-owned shipping container is a post-production operation. As such, the forklift used to move the customer-owned container to the repack area, and the two chain hoists used to remove the product from the customer-owned container to the customer-owned shipping container are not exempt from sales/use tax under the manufacturing exemption.

Forklifts, Forklift Replacement Parts, LP Gas

Taxpayer also protests the tax assessed on the forklifts used in the manufacturing process. Based upon taxpayer's argument set forth above, taxpayer asserts that sixty percent (60%) of the usage of the forklifts is production usage, and forty percent (40%) of the usage is non-production usage. As such, taxpayer maintains that 60% of the costs of the forklifts, the forklift replacement parts, and the LP gas used in the forklifts should be exempted from sales tax. The auditor determined that taxpayer's production use of the forklifts was twenty-five percent (25%). The auditor, therefore, allowed a 25% exemption for the forklifts, the forklift replacement parts, and LP gas used in the forklifts.

We have determined that taxpayer's use of the forklifts to transport the finished product from a customer-owned container to the customer-owned shipping container does not qualify for the manufacturing exemption. Furthermore, taxpayer did not provide a study showing a detailed analysis of its use of forklifts in the production process. "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." IC 6-8.1-5-1(b). In this instance, taxpayer has failed to meet its burden of proof that the assessment is wrong. Therefore, taxpayer is liable for the taxes due.

Tool Room Equipment

Taxpayer protests the tax assessed on equipment purchased for its tool room. Taxpayer's position is that its tool room manufactures new and replacement tools used in the production process in addition to repairing and maintaining old tools and equipment. The auditor determined that the tool room equipment was purchased solely to maintain the production machinery. Taxpayer estimates that twenty percent (20%) of the tool room's activities are devoted to producing new or replacement tools

(including dies, jigs, and miscellaneous parts) for use in taxpayer's production process. In support of this claim, taxpayer has provided an affidavit from its vice president of manufacturing which states:

> That 20% of [taxpayer's] tool room activities at its... Indiana manufacturing facility are devoted to producing new or replacement tools (including dies, jigs, and miscellaneous parts) for use in [taxpayer's] manufacturing machinery.

Taxpayer believes that because 20% of its tool room's requisition expense is attributable to the manufacture of new or replacement tools used in the production process, the equipment should be exempt from sales tax.

The regulations, at 45 IAC 2.2-5-8(h), address the issue of maintenance:

> (h) Maintenance and replacement equipment.
>
> (1) Machinery, tools, and equipment used in the normal repair and maintenance of machinery used in the production process which are predominantly used to maintain production machinery are subject to tax.
>
> (2) Replacement parts, used to replace worn, broken, inoperative, or missing parts or accessories on exempt machinery and equipment, are exempt from tax.
>
> -EXAMPLE-
>
> A manufacturer of sheet metal repairs and upgrades used machinery by replacing worn or broken parts and adding new elements and features available in state-of-the-art equipment. All items which become components of the upgraded machinery are exempt from tax. However, all tools and equipment used to repair or upgrade used machinery would be taxable.

Here, taxpayer has failed to provide sufficient documentation supporting its conclusion that it is entitled to a 20% exempt usage percentage. Taxpayer merely states in conclusory terms that the percentage should be 20%. Taxpayer has not performed an analysis or study indicating the percentage of tool room activity that was devoted to the manufacturing of new or replacement production equipment. We, therefore, find that taxpayer has not met the burden of proof necessary to sustain its protest as outlined under IC 6-8.1-5-1(b). "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." IC 6-8.1-5-1(b).

Crossover Stairs

Taxpayer protests the auditor's assessment of use tax on its crossover stairs. Taxpayer installed crossover stairs above the roll forming line to provide quick and effective access to the production equipment controls and to allow for an overhead inspection of the product as it moves through the various phases of the production process. Taxpayer maintains that the crossover stairs are essential to the production process, and therefore exempt from sales tax, because (1) taxpayer's employees must have access to the operational controls of the equipment used in the production process; and (2) taxpayer's employees must be able to inspect the roll forming line to ensure that it is operating correctly and safely.

Under IC 6-2.5-5-3(b), exemption from the state gross retail tax requires that the item in question be for the "direct use in the direct production" of the tangible property. 45 IAC 2.2-5-8(i) provides the following with respect to testing and inspection: "... Machinery, tools, and equipment used to test and inspect the product as part of the production process are exempt [from the state gross retail and use tax]." The example following this regulation reasons that when selected parts are removed from production, according to a schedule dictated by statistical sampling methods, and tested separate from the production line, an interrelationship between the testing equipment and the machinery on the production line is formed. The testing equipment becomes an integral part of the integrated production process and is exempt. *See* 45 IAC 2.2-5-8(i), Example. Here, we find that taxpayer's evidence is not convincing that the crossover stairs are for the direct use in the direct production of the tangible property or a part of the testing or inspection process. Rather, the crossover stairs are used as a time saving device and a convenience to taxpayer's production process.

FINDING

Taxpayer's protests are denied. The auditor did not err in determining that the chain hoists, forklifts, forklift replacement parts, LP gas, tool room equipment, and crossover stairs do not qualify for exemption from sales tax.

III. State Gross Retail Tax – Credit For Use Tax Paid to Foreign Jurisdictions

Taxpayer protests the auditor's assessment of use tax on taxpayer's purchase of computer equipment upon which the Michigan Department of Treasury has indicated that it will assess use tax. The Michigan Department of Treasury determined that use tax should be assessed upon the computer equipment because the items were shipped to taxpayer's Michigan situs for approval prior to being shipped to Indiana.

Taxpayer claims relief from the proposed use tax assessment under IC 6-2.5-3-5 which states, in relevant part: "(a) A person is entitled to a credit against the use tax imposed on the use, storage, or consumption of a particular item of tangible personal property equal to the amount, if any, of sales tax, purchase tax, or use tax paid to another state, territory, or possession of the United States for the acquisition of that property." This credit, if available, is applied against the Indiana tax applied under IC 6-2.5-3-2.

Here, the computer equipment was first shipped to taxpayer's situs in Michigan, and then shipped to taxpayer's facility in Indiana. The Michigan Department of Revenue assessed use tax on the computer equipment because the items were shipped to taxpayer's Michigan situs for approval prior to being shipped to the Indiana facility. Subsequent to its protest hearing, taxpayer submitted evidence that use tax was paid on the purchase of the computer equipment to the Michigan Department of Revenue. Taxpayer's protest is sustained to the extent of a credit against the Indiana use tax for use tax paid in Michigan.

FINDING

Taxpayer's protest is sustained, subject to verification by the Audit Division.

IV. Tax Administration – Abatement of Penalty

DISCUSSION

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

IC 6-8.1-10-2.1(d) states that if a person subject to the negligence penalty imposed under said section can show that the failure to file a return, pay the full amount of tax shown on the person's return, timely remit tax held in trust, or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty. 45 IAC 15-11-2 defines negligence as the failure to use reasonable care, caution or diligence as would be expected of an ordinary reasonable taxpayer. Negligence results from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or Department regulations.

In order to waive the negligence penalty, taxpayer must prove that its failure to pay the full amount of tax due was due to reasonable cause. 45 IAC 15-11-2. Taxpayer may establish reasonable cause by "demonstrat[ing] that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed...." 45 IAC 15-11-2(c). In determining whether reasonable cause existed, the Department may consider the nature of the tax involved, previous judicial precedents, previous department instructions, and previous audits. *Id*.

In the instant case, the Audit Division imposed the penalty because it found that taxpayer appeared to have no understanding of taxable versus nontaxable purchases. Although taxpayer is subject to its first audit by the Department, taxpayer has, nevertheless, failed to demonstrate that, in the area of concern raised by the Department, it exercised the degree of reasonable care required to justify waiving the ten percent negligence penalty. Waiver of the penalty is inappropriate.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0420000190.LOF

LETTER OF FINDINGS NUMBER: 00-0190
Use Tax
For Tax Years 1997 through 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. Sales Tax – Studio Rental

Authority: 45 IAC 2.2-4-8; 45 IAC 2.2-4-9

Taxpayer protests imposition of sales tax on rental of studio space.

STATEMENT OF FACTS

Taxpayer operated a music store, which included studio space for music lessons. The music teachers were not employees of the store. The teachers rented the studio space from the store. The Department of Revenue ("Department") issued proposed assessments on the basis that the studios were rented on an hourly basis. Taxpayer believes that the studios were rented on a monthly basis. Further facts will be supplied as required.

I. Sales Tax – Studio Rental

DISCUSSION

Taxpayer operated a music store and rented studio space to independent music teachers. The teachers paid taxpayer twenty-five percent (25%) of the lesson fee as rent. Taxpayer believes that, since the teachers and taxpayer had no lease or contract governing the rental of the studio space, the teachers rented the studio space on an indefinite basis. Taxpayer considered the rentals to be for longer than thirty (30) days and therefore not taxable.

45 IAC 2.2-4-8 explains in part:

(a) For the purpose of the state gross retail tax and use tax: Every person engaged in the business of renting or furnishing for periods of less than 30 (thirty) days any accommodation including booths, display spaces and banquet facilities, in any place where accommodations are regularly furnished for a consideration is a retail merchant making retail transactions in respect thereto and the gross income received therefrom shall constitute gross retail income from retail unitary transactions.

(b) In general, the gross receipts from renting or furnishing accommodations are taxable. An accommodation which is rented for a period of thirty (30) days or more is not subject to the gross retail tax.

Taxpayer refers to 45 IAC 2.2-4-9, which states:

(a) For purposes of the state gross retail and use tax, an "accommodation" is any space, facility, structure, or combination thereof including booths, display spaces and banquet facilities, together with all associated personal or real property (including land), which is intended for occupancy by human beings for a period less than thirty (30) days including:

(1) Rooms in hotels, motels, lodges, ranches, villas, apartments or houses.

(2) Gymnasiums, coliseums, banquet halls, ballrooms, or arenas, and other similar accommodations requlary *[sic.]* offered for rent.

(3) Cabins or cottages.

(4) Tents or trailers (when situated in place).

(5) Spaces in camper parks and trailer parks wherein spaces are regularly offered for rent for periods of less than thirty (30) days.

(6) Rooms used for banquets, weddings, meetings, sales displays, conventions or exhibits.

(7) Booths or display spaces in a building, coliseum or hall.

(b) The tax does not apply to rental of meeting rooms to charitable or other exempt organizations to be used in the furtherance of the purpose for which they are granted exemption.

—EXAMPLE—

If a person moves into a room for an indefinite period, but pays weekly, sales tax must be collected until a person has rented the room for longer than 30 consecutive days.

Taxpayer believes that the teachers rented the studios for longer than thirty consecutive days and therefore 45 IAC 2.2-4-9 provides that the rentals were not subject to sales tax. Taxpayer submitted documentation to support its protest. This documentation explains that the teachers were considered to be private contractors, and had exclusive use of the studios during store hours and were allowed to keep personal items such as music and equipment in the studio, but that the store would not be responsible for it in any way. Taxpayer did not establish that any teachers did keep personal items in the studios. The documentation also shows that the teachers did not rent the studios for thirty consecutive days, but rather paid by the hour. Taxpayer believes that the absence of written contracts results in an indefinite period of rental, and so sales tax would only be collected for the first thirty days of the audit period.

The Department does not agree with this analysis. Unlike the example provided in 45 IAC 2.2-4-9, the teachers did not move into the studios for an indefinite period. Taxpayer's documentation establishes that none of the teachers rented the studios for thirty consecutive days. The documentation also shows that the teachers paid for the actual time they were in the studio, but they did not pay for the privilege of storing equipment in the studios. The teachers rented the studios for a definite period (hourly), and therefore are taxable under 45 IAC 2.2-4-8(a).

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420000371.LOF

LETTER OF FINDINGS NUMBER: 00-0371
Gross Retail Tax – Responsible Officer Liability
For Tax Year 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.

ISSUE

I. Responsible Officer Liability – Gross Retail Tax

Authority: IC § 6-2.5-9-3; 45 IAC 2.2-9-5; *Indiana Department of State Revenue v. Safayan*, 654 N.E.2d 270 (Ind. 1995)

Taxpayer protests the imposition of responsible officer liability for uncollected and nonremitted state gross retail taxes.

STATEMENT OF FACTS

Following receipt of a proposed assessment for uncollected and nonremitted gross retail taxes for tax year 1996, taxpayer submitted to the Department, in September of 2000, a letter protesting the assessment. Taxpayer stated she did not owe the taxes as she was not a responsible officer for the corporation. The Department sent five (5) letters to taxpayer, each one explaining the protest and appeals hearing procedures, offering several different mechanisms by which taxpayer could prove her case: in person, by telephone, or in writing. None of the letters were returned to the Department. Taxpayer did not respond. The Department sent a letter on November 15, 2001, setting a telephone hearing date, time, and phone number to call. Taxpayer neither requested an extension of time nor did she telephone the Department for her hearing on December 18, 2001. Accordingly, this Letter of Findings

has been prepared based upon the information contained in the file and taxpayer's 2000 letter of protest. Additional facts will be added as necessary.

I. Responsible Officer Liability – Gross Retail Tax

DISCUSSION

Taxpayer protests the imposition of responsible officer liability for uncollected and nonremitted state gross retail taxes. The corporation alleged to be in arrears for gross retail tax for tax year 1996 was a small restaurant run by taxpayer and her father, a fact not mentioned in taxpayer's letter of protest. Taxpayer's father, in financial trouble in 1996, asked one of his other employees to incorporate the business with his daughter. The incorporation occurred in June. No corporate meetings were ever held. Taxpayer did not sign the Articles of Incorporation as the registered agent for the corporation; the other employee (Ms. Y) did. In September, taxpayer's father purchased 300 shares of the corporation. Taxpayer did not sign the offer and acceptance form. The only place where taxpayer signed in her "official capacity" was on the September 1996 Waiver of Notice of the First Board of Director's meeting. The business closed in February of 1997.

IC § 9-2.5-9-3 states that an "individual who... is an employee, officer... and has a duty to remit state gross retail... 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." 45 IAC 2.2-9-4's definition of "responsible officer" tracks the statutory language, and, in subsection (a), imposes the liability: "Businesses hold sales and use taxes in trust accounts for the state of Indiana. If businesses do not properly remit these taxes, responsible officers can be held personally liable for those trust fund taxes." Based on the information contained in the file, the Department cannot sustain taxpayer's protest. Other than the bare assertions contained in her Letter of Protest, taxpayer has not offered any further evidence as to why she should not be held responsible for the delinquent taxes.

FINDING

Taxpayer's protest is denied. No penalty was assessed.

DEPARTMENT OF STATE REVENUE

4520000401.LOF

LETTER OF FINDINGS NUMBER: 00-0401
Gaming Card Excise Tax
For Tax Periods: 1997-1999

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 specific issues.

ISSUES

1. Gaming Card Excise Tax – Imposition

Authority: IC 4-32-15-2, 45 IAC 18-3-1, 45 IAC 18-3-1 (b)(8), 45 IAC 18-4-2 (a)(1)(B), *Muncie Novelty v. Department of State Revenue,* 720 N.E.2d 779 (Ind. Tax 1999)

The taxpayer protests the imposition of gaming card excise tax.

2. Gaming Card Excise Tax – Calculation of Gaming Card Excise Tax

Authority: IC 4-32-15-2

The taxpayer contends that the auditor made several errors in calculating the gaming card excise tax.

STATEMENT OF FACTS

The taxpayer is engaged in the business of manufacturing and distributing novelties including gaming devices. During the tax period, the taxpayer made substantial cash sales of gaming devices at their facility. The taxpayer charged sales tax rather than gaming card excise tax on these sales. The taxpayer did not keep records as to who purchased the taxable gaming devices and other information required by the Indiana Department of Revenue. In an audit, the taxpayer was assessed gaming card excise tax on sales of the gaming devices and received a credit for sales taxes collected and remitted. The taxpayer protested the assessment and a hearing was held. More facts will be provided as necessary.

DISCUSSION

Indiana imposes a ten per cent (10%) excise tax on businesses such as the taxpayer when they transfer "pull tabs, punchboards, or tip boards to qualified organizations in Indiana for resale by those qualified organizations." IC 4-32-15-2.

The first issue to be determined is whether or not the Indiana Department of Revenue imposed the gaming card excise tax on the sale of pull tabs, punchboards or tip boards.

"Pull tabs" are defined at 45 IAC 18-3-1 (b)(5) as follows:

As used in this article, "pull-tab" means a game conducted in the following manner:

(A) A single folded or banded ticket or a two (2) ply card with perforated break-open tabs is bought by a player from a qualified organization.

(B) The face of each card is initially covered or otherwise hidden from view, concealing a number, letter, symbol, or set of letters or symbols.

(C) In each set of tickets or cards, a designated number of tickets or cards have been randomly designated in advance as winners.

(D) Winners or potential winners, if the game includes the use of a seal, are determined by revealing the faces of tickets or cards. The player may be required to sign the player's name on numbered lines provided, if a seal is used.

(E) The player with a winning pull-tab ticket or numbered line receives the prize stated on the flare from the qualified organization. The prize must be clearly and fully described on the flare or on the game information side of the card.

"Punchboard" is defined at 45 IAC 18-3-1 (b)(6) as follows:

As used in this article, "punchboard" means a card or board that contains a grid or section that hides the random opportunity to win a prize based on the results of punching a single section to reveal a symbol or prize amount.

"Tip board" is defined at 45 IAC 18-3-1 (b)(8) as follows:

As used in this article, "tip board" means a board, placard, or other device that is marked off in a grid or columns, with each section containing a hidden number or other symbol that determines a winner. The prize and the price of each tip must be described on the board.

The taxpayer's representative brought samples of many of the items on which gaming card excise tax was imposed and explained the use of each of these gaming devices to the hearing officer. These gaming devices include but are not limited to "All Event Sportscard," "33 Line Race Board," "Victory Lane Nascard Board," "Redemption Tickets," "Bankers Club Seal Card," "Happy Hour Pull Tabs," "High Bowler Club," "Twin 100.00's Seal Card," "Book Cover Tops," "Twin 100.00s Cards," "Double Roll Tickets," and "Single Roll Tickets." After the hearing, the hearing officer had the opportunity to apply the definitions of pull tabs, punchboards and tip boards to the items on which gaming card excise tax was imposed. The "Redemption Tickets," "Single Roll Tickets," and "Double Roll Tickets" were the only protested items that did not meet the regulatory definitions of gaming devices subject to the gaming card excise tax; therefore, the taxpayer properly collected sales tax rather than gaming card excise tax on the transfer of these items.

Business entities selling gaming devices are required to maintain records so that the Indiana Department of Revenue can ascertain the date of sale, the customer name and business address, a full description including serial numbers of the item sold, the quantity and sale price of each item, the manufacturer's or distributor's license number, the customers' license number and the gaming card excise tax due on the sale. 45 IAC 18-4-2 (a)(1)(B). The taxpayer admitted that it did not keep such records. The taxpayer argued that its computer system could not produce and maintain such copious records. This lack of records made it impossible for the auditor to determine which sales of gaming cards were made to qualified organizations. Therefore the auditor assumed that all sales of pull tabs, punchboards and tip boards were made to qualified organizations. The auditor assessed the ten per cent (10%) gaming card excise tax on each of the sales and credited the taxpayer for the five per cent (5%) sales tax collected on each of the sales.

The issue to be determined is whether or not the audit properly assessed gaming card excise tax on all the sales of pull tabs, punchboards and tip boards when there are inadequate records to determine which gaming cards were sold to qualified organizations. The Indiana Tax Court dealt with this issue in *Muncie Novelty v. Department of State Revenue,* 720 N.E.2d 779 (Ind. Tax 1999). In that case a gambling device distributor failed to keep the required records on its sales of pull tabs, punchboards and tip boards. Just as in this case, the distributor knew the identity of the customers and could easily determine if they were qualified organizations. Since the taxpayer did not have the required records to prove which sales were made to qualified organizations subject to the gaming card excise tax, the auditor assessed the gaming card excise tax on all of the sales. The Court held that it was "reasonable for the Department to assume that all unidentified customers were qualified and thus owed the 10% GCET." Id. at page 782. These facts are identical to the facts in taxpayer's situation. The auditor properly assessed gaming card excise tax on all the sales of pull tabs, punchboards and tip boards.

FINDING

The taxpayer's protest to the assessment of gaming card excise tax on redemption tickets, single roll tickets and double roll tickets is sustained. The taxpayer's protest to the other assessments of gaming card excise tax is denied.

2. Gaming Card Excise Tax – Calculation of Gaming Card Excise Tax

DISCUSSION

The taxpayer contends that the auditor made several calculation errors in determining the taxpayer's gaming card excise tax liability. Specifically the taxpayer alleges that the auditor assessed gaming card excise tax on several credit invoices and transposed some numbers when recording the amount of sales. A review of the audit indicates that the auditor did make some calculation errors. The gaming card excise tax is only assessed on the actual value of the sales of pull tabs, punchboards and tip boards. IC 4-32-15-2.

FINDING

The taxpayer's protest is sustained subject to audit verification.

DEPARTMENT OF STATE REVENUE

0420000453.LOF

LETTER OF FINDINGS NUMBER: 00-0453
Use Tax
Calendar Years 1995, 1996, 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 a paper and box manufacturer that was audited previously on July 14, 1995.

In the current audit, the taxpayer failed to assess use tax on clearly taxable items that were issues in the prior audit. The taxpayer's parent company was aware that an audit was to be performed when they acquired the taxpayer in 1998. The parent company was unable to locate and provide many records that were requested for the examination, therefore, the gross retail tax assessment, for the most part, was based on the best information available at the time of the audit.

On November 21, 2000 taxpayer's parent company protested the assessment stating it has since located computer files and other records relative to the audit period and believes that a reexamination was necessary to determine the correct liability for the audit period. The file was returned to the auditor based upon the letter and a minimal adjustment was made for all years at issue.

Taxpayer failed to remit sixty-eight percent (68%), fifty-seven percent (57%), sixty-nine percent (69%), twenty-nine percent (29%), and thirty-five percent (35%), in use tax for calendar years 1995, 1996, 1997, 1998, and 1999 respectively.

Taxpayer's representative and the Department's hearing officer discussed the issue by telephone on January 3, 2001. It was mutually decided to base the assessment of a penalty upon information contained in the audit file and taxpayer's final letter dated December 6, 2001.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer was acquired in a stock acquisition in 1998. Taxpayer's parent company requests a penalty waiver because it did not own or have control of the acquired company during most of the audit period and many records were unavailable.

The assessment is for the failure to self assess use tax on clearly taxable items for issues that were issues in a prior audit. During the audit period, more than fifty percent (50%) of the use tax was not self assessed or paid.

45 IAC 15-11-2(b) states, "Negligence, on behalf of the 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 penalty appropriate. Taxpayer's failure to remit the tax was not the result of reasonable cause.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220000476.LOF

LETTER OF FINDINGS NUMBER: 00-0476
Adjusted Gross and Supplemental Net Income Tax
For the Years Ending 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. Adjusted Gross Income Tax and Supplemental Net Income Tax – Unrelated Business Income

Authority: IC 35-45-5-3; IC 6-2.5-5-25; IC 6-2.1-3-23; IC 6-3-2-3.1(a); IC 6-3-1-17(a); 45 IAC 3.1-1-68

The taxpayer protests the imposition of adjusted gross and supplemental net income tax on proceeds from illegal gambling machines and pull tab sales.

II. Tax Administration – Penalty

Authority: IC 6-8.1-10-2.1; 45 IAC 15-11-1 & 2

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

STATEMENT OF FACTS

As a result of an income tax audit conducted by the Department of Revenue, illegal gambling machines were discovered at the taxpayer's location. The taxpayer was also selling pull tabs illegally. Neither the taxpayer nor its representative appeared for the hearing. This Letter of Findings is written based upon the information contained in taxpayer's file.

I. Adjusted Gross and SNIT – Unrelated Business Income

DISCUSSION

Under Indiana Code section 35-45-5-3 the machines operated in taxpayer's establishment constitute illegal gambling. Proceeds from illegal gambling are considered unrelated business income and subject to Indiana gross or adjusted gross and supplemental net income tax. Indiana State Police estimate that the amount of gross income from illegal gambling machines is approximately $104,000 per year for a single machine. The taxpayer was also selling pull tabs without a license from the Department of Revenue.

In its protest letter, the taxpayer argues that it did not have any machines on the premises in 1997. In 1998, the taxpayer states that they had five (5) machines from January through October of that year. The taxpayer then states that it acquired an additional five (5) machines from October through December of 1998. The taxpayer also provided that Department with records starting in 1999 which allegedly shows the average monthly revenue of thirty thousand dollars ($30,000) for all ten machines. The taxpayer also maintains that the pay out on the machines was eighty percent (80%).

First, the taxpayer contends that the machines are not illegal and are used primarily in raising money for charitable purposes. The taxpayer also contends that the money raised from the machines helped support their charitable purpose and was also used to supplement their operation. However, using any of the money from the illegal machines cannot in any way be characterized as a charitable purpose. Second, taxpayer protests the imposition of gross, adjusted gross, and supplemental net income tax on proceeds from the machines. Third, the taxpayer states that the amount of money attributable to the machines was significantly less according to their records.

IC 35-45-5-3 provides in pertinent part:

> A person who knowingly or intentionally: … (3) maintains, in a place accessible to the public slot machines, one-ball machines or variants thereof… commits professional gambling, a Class D felony.

The Department determined that illegal gambling by the taxpayer was unrelated to taxpayer's exempt purpose. Exemption from tax for exempt organizations is tied to the gross income tax provisions with respect to exempt organizations. IC 6-2.5-5-25. As provided under IC 6-2.1-3-23, exempt organizations are not entitled to exemption from gross income received by a taxpayer that is derived from an unrelated trade or business, as defined in Section 513 of the Internal Revenue Code. Thus, the Department's determination was guided by I.R.C. § 513, which provides, in part, the following:

> …The term "unrelated trade or business" means, in the case of any organization subject to the tax imposed by section 511, 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.

Pursuant to IC 6-3-2-3.1(a) and IC 6-3-1-17(a), the Indiana General Assembly has expressly adopted the Code's tax treatment, with respect to Code section 501(c) organizations, for purposes of the Indiana adjusted gross and supplemental income tax analysis. Moreover, the Department's rule 45 IAC 3.1-1-68 defines an unrelated trade or business under the same guidelines as IRC section 513, and the rule also subjects any unrelated business income to the Indiana taxes. Additionally, the rule cites taxpayers to Code sections 511 through 515 for guidance in determining whether income is subject to the taxes.

FINDING

The taxpayer's protest is denied.

II. Tax Administration – Liability for 10% Negligence Penalty

DISCUSSION

The taxpayer protests the Department's imposition of the ten percent (10%) penalty assessment. Indiana Code section 6-8.1-10-2.1 requires a ten percent (10%) penalty to be imposed if the tax deficiency is due to the negligence of the taxpayer. Department regulation 45 IAC 15-11-2 provides guidance in determining if the taxpayer was negligent. 45 IAC 15-11-1(b) defines negligence

as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is also to be determined on a case-by-case basis according to the facts and circumstances of each taxpayer.

Subsection (d) of IC 6-8.1-10-2.1 allows the penalty to be waived upon a showing that the failure to pay the deficiency was due to reasonable cause. Departmental regulation 45 IAC 15-11-2(c) requires that in order to establish reasonable cause, the taxpayer must show that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed.... "

In this instance, the taxpayer has not shown reasonable cause. The taxpayer has not provided to the Department's satisfaction, sufficient justification for interpreting the code as it did.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120010256.LOF

LETTER OF FINDINGS NUMBER: 01-0256 AGI
Adjusted Gross Income Tax
For Tax Periods: 1999-2000

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 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

Adjusted Gross Income Tax – Imposition

Authority: IC 6-3-2-1, IC 6-3-4-8(a), IC 6-3-1-8, 26 U.S.C.A. Sec. 61(a), 26 USCA 3402(1), Thomas v. Indiana Department of Revenue, 675 N.E.2d 362 (Ind. Tax 1997), Snyder v. Indiana Department of Revenue, 723 N.E.2d 487 (Ind. Tax 2000)

The taxpayer protests the imposition of the adjusted gross income tax.

STATEMENT OF FACTS

The taxpayer filed Indiana Part Year or Full Year Non Resident Individual Income Tax Returns for the years 1999 and 2000. He claimed a refund of the taxes withheld for each of the two years. The Indiana Department of Revenue did not pay the refund for 1999. After review, the Indiana Department of Revenue determined that the taxpayer owed additional individual income taxes for the year 2000 and issued a bill for the additional taxes, interest and penalty. The taxpayer protested the additional assessment and the denial of the refund for 1999. A hearing was held. More facts will be provided as necessary.

Adjusted Gross Income Tax – Imposition

DISCUSSION

An adjusted gross income tax is imposed upon all Indiana residents. IC 6-3-2-1.

The taxpayer argues that he has no Indiana Adjusted Gross Income for 1999 and 2000 and therefore does not owe any tax. The taxpayer notes that the Indiana Code borrows some of its definitions from the Internal Revenue Code. For instance, "gross income" is defined at IC 6-3-1-8 as having the meaning as defined by section 61(a) of the Internal Revenue Code." Section 61 (a) that states in part:

> Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:
>
> (1) Compensation for services, including fees, commissions, fringe benefits, and similar items...

The taxpayer contends that since the word "wages" is not listed in Section 61, wages are not taxable income. Therefore he entered "zero" on the line titled "Wages, Tips, other Compensation" on his federal tax returns. He then entered his federal adjusted gross income of "zero" on his Indiana returns. Following this logic, the taxpayer protested the assessment of additional tax, penalty and interest for 2000 and denial of the refund for 1999.

The Indiana Tax Court has disposed with arguments that wages do not constitute income. In Thomas v. Indiana Department of Revenue, 675 N.E.2d 362 (Ind. Tax 1997), the Tax Court stated:

> [e]ven assuming the validity of Thomas's legal framework, monetary payments made in exchange for labor are clearly severed from labor and received or drawn by the recipient for his separate use, benefit, or disposal.

In Snyder v. Indiana Department of Revenue,723 N.E.2d 487 (Ind. Tax 2000), the Court specifically states at page 491 that "wages are income for purposes of Indiana's adjusted gross income tax." The taxpayer's income is subject to the Indiana Adjusted Gross Income Tax.

The taxpayer further argued that his employer erred by withholding taxes from his compensation after the taxpayer asserted that he had no liability for Indiana income tax. Pursuant to IC 6-3-4-8(a). Indiana employers are required by law to withhold Indiana

individual income taxes if they are required to withhold federal income taxes on any employee. 26 USCA 3402(1) requires that "every employer making payment of wages shall deduct and withhold upon such wages." In this case, the employer was paying wages and had to deduct taxes from those wages no matter what the taxpayer averred.

FINDING

The taxpayer's protest and claim for refund are denied.

DEPARTMENT OF STATE REVENUE

0320010272P.LOF

LETTER OF FINDINGS NUMBER: 01-0272P
Withholding Tax
Month Ending 02/29/00

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 assessed a late filing penalty for the month of February 2000. In a letter dated September 27, 2001, taxpayer's payroll processing center requests the department waive the penalty assessed against it and has submitted copies of three letters previously sent to the Collection Division. The Department denied the taxpayer a penalty waiver in letters dated April 3, 2001 and August 13, 2001.

Taxpayer's payroll processor states there was a software problem that caused a corruption in its tax liability files for the period in question and requests a penalty waiver because it has not had a problem with remitting the tax previously. In a letter dated August 1, 2000, taxpayer amended its reason for the late payment and stated that its systems incorrectly calculated the due date as the end of the month rather than the 20th and it has corrected the problem.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer failed to timely remit withholding tax for the month of February 2000 and states there was a corruption in its tax liability files in its software.

Taxpayer has a payroll processing company that prepares its returns. The agent should assure that all payments are timely and to assure that no payments are late, it should have procedures in place that would eliminate late payments.

Taxpayer's failure to remit the tax timely was not the result of reasonable cause. Taxpayer has a payroll processing center that should have procedures in place to assure that payments are timely made.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420010285P.LOF

LETTER OF FINDINGS NUMBER: 01-0285P
Sales and Use Tax Penalty
For Tax Period: 1999 and 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 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 an Indiana corporation that purchased two aircraft, one in 1999 and one in the year 2000. The Cessna "Aircraft Bill of Sale" is dated the 4th of February 2000 and was purchased by six co-owners. The Used Aircraft Purchase Agreement dated February 2, 2000 was signed by taxpayer along with an addendum for the co-owners. The Beechcraft King Air "Aircraft Bill of Sale" is dated November 10, 1999 and was purchased by six co-owners. The "Warranty Bill of Sale was dated October 27, 1999 and addresses all six co-owners. On November 1, 2001 a Power of Attorney was submitted along with a letter protesting the penalty assessment.

A hearing was conducted on Tuesday, January 15, 2001.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer states that the aircraft applications were filed untimely because the aircraft ownership was in debate and that two of the entities that now own the aircraft were in the midst of merger discussions and corporate restructuring. Taxpayer further states that the companies and individuals were hesitant to register the aircraft until such time that merger and the restructuring issues were resolved.

The aircraft were purchased November 10, 1999 and February 4, 2000. Taxpayer submitted its aircraft registration forms that lists all six co-owners as originally shown on the Aircraft Bills of Sale on June 27, 2000 along with two checks for the tax. Taxpayer states that both aircraft were registered on May 8, 2000. No changes in ownership were noted after the original sales.

IC 6-6-6.5-2(a) requires any resident of this state who owns an aircraft to register the aircraft with the department not later than thirty-one (31) days after the purchase date. IC 6-6-6.5-19(d) further states that if an owner does not register its aircraft and pay the gross retail or use tax when required by this chapter, the owner shall be subject to a penalty and interest on the unpaid gross retail or use tax as established in IC 6-8.1-10-1.

Taxpayer failed to provide reasonable cause for the late registration and payment of tax for both aircraft. Taxpayer also held its checks more than six weeks after signing them along with the signed copies of its aircraft registrations.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420010287P.LOF

LETTER OF FINDINGS NUMBER: 01-0287P
Sales Tax
For March and April 2001

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 paid its March and April 2001 sales tax late and was assessed a late payment penalty.

Taxpayer transferred $16,676.30 on May 22, 2001 that paid March in the amount of $8,160.08 and April 2001 that paid $8,516.22. Both payments were late.

Taxpayer, in a letter dated October 23, 2001 requests that the department waive the late payment penalty due to an oversight which was not intentional and it has always made its payment on time.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer was assessed a ten percent (10%) penalty because it paid its tax after the due date of the return for March and April 2001.

Taxpayer, in a letter dated October 23, 2001 protested penalties assessed and stated it did not make the late payments intentionally but was due to an oversight.

Taxpayer has not provided reasonable cause to allow a waiver of the penalty assessed.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0320010289P.LOF

LETTER OF FINDINGS NUMBER: 01-0289P
Withholding Tax
Months Ending 12/31/00, 01/31/01, 2/28/01, 4/30/01, and 5/31/01

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 assessed late filing penalties for several months in the years 2000 and 2001. In a letter dated October 15, 2001, taxpayer requests the department waive the penalties and interest assessed against it. On November 21, 2001, the taxpayer's president called the hearing officer and stated that he wanted the penalty waived.

Taxpayer states it changed accounting software the first part of January 2001 and following the migration of the software, the taxpayer was unable to generate reports write checks, etc. Taxpayer states she called the Revenue department to inquire which months she owed withholding taxes. Taxpayer further states that she has received letters for January, February, April, and May 2001 since the December 2000 assessment letter and requests a penalty waiver due to computer problems. Taxpayer states it intends to file its returns on a timely basis in the future.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer failed to timely remit withholding tax for several months in the years 2000 and 2001 and states she was unfamiliar with the accounting software.

Taxpayer has received another late payment billing for July 2001 since the department received the letter of protest. It seems apparent that the taxpayer has not made an effort to timely remit tax since the problem first occurred.

Taxpayer's failure to remit the tax was not the result of reasonable cause. Taxpayer must make itself aware of proper filing procedures and time limits when paying taxes.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120010290P.LOF

LETTER OF FINDINGS NUMBER: 01-0290P
Individual Income Tax
Calendar Year 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 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 – Late payment penalty

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

Taxpayer protests the penalty assessed for the late payment.

STATEMENT OF FACTS

Taxpayer's CPA, in a letter dated October 31, 2001 protested the late payment penalty because it had properly filed the Federal form 4868 and submitted a copy with its state income tax return. Because the taxpayer filed a return that was under a valid extension taxpayer does not believe it owes a penalty. Taxpayer filed its IT-40 return on April 23, 2001 with a balance of tax due in the amount of $2,449 that included a penalty for underpayment of estimated tax in the amount of $121.

I. Tax Administration – Penalty

DISCUSSION

At issue is whether the taxpayer may pay the balance of tax due without any penalties if an extension to file has been submitted.

Taxpayer made no payments until after the due date of the return. Taxpayer states it filed an automatic extension of time to file with the Federal Government and included a copy of form 4868 with its return. Upon completion of its return, the taxpayer made a payment in the amount of $2,449 on April 23, 2001.

IC 6-8.1-10-2 (a) states:

If a person fails to file a return for any of the listed taxes or fails to pay the full amount of tax shown on his return on or before the due date for the return or payment, incurs, upon examination by the department, a deficiency which is due to negligence, or fails to timely remit any tax held in trust for the state, the person is subject to a penalty.

IC 6-8.1-6-1(c) states:

If the Internal Revenue Service allows a person an extension on his federal Income tax return, the corresponding due dates for the person's Indiana income Tax returns are automatically extended for the same period as the federal extension, plus thirty (30) days. However, the person must pay at least ninety percent (90%) of the Indiana income tax that is reasonably expected to be due on the original due date by that due date, or he may be subject to the penalties imposed for failure to pay the tax.

Taxpayer should have remitted at least ninety percent (90%) of the tax due by April 16, 2001 and has not provided reasonable cause for its failure to do so.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

2820010296.LOF

LETTER OF FINDINGS NUMBER: 01-0296 CSET
Controlled Substance Excise Tax
For Tax Periods: 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

1. Controlled Substance Excise Tax – Imposition

Authority: IC 6-7-3-5

The taxpayer protests the assessment of Controlled Substance Excise Tax.

STATEMENT OF FACTS

The taxpayer was arrested for possession of marijuana. Criminal charges were filed against the taxpayer and subsequently dismissed. On August 22, 2001, the county prosecutor requested in writing that Controlled Substance Excise tax be assessed against the taxpayer. The Indiana Department of Revenue issued a record of Jeopardy Finding, Jeopardy Assessment Notice and Demand on August 29, 2001 in a base tax amount of $12,586.70. The taxpayer filed a protest to the assessment and a hearing was held on January 9, 2002. Further facts will be provided as necessary.

1. Controlled Substance Excise Tax – Imposition

DISCUSSION

IC 6-7-3-5 imposes the Controlled Substance Excise Tax on the possession of marijuana in the State of Indiana. The taxpayer admitted at the hearing that he was in possession of the marijuana on which tax was assessed. Therefore the Controlled Substance Excise Tax was properly imposed in this instance.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220010299P.LOF

LETTER OF FINDINGS NUMBER: 01-0299P
Adjusted Gross Income Tax
For Calendar Year Ended December 31, 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 is in the business of importing and marketing oil products such as polyethylene and is located out of the country. Although the taxpayer is not subject to gross income tax, it is liable for an apportioned amount of adjusted gross income tax because it has inventory in the state of Indiana.

Taxpayer filed a penalty protest letter dated August 16, 2001.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it had filed its returns in a timely and accurate manner, there was no intent to deprive the state of any taxes due, and the audit primarily relates to the state's treatment of interest income resulting from an intercompany loan with taxpayer's parent. At the time the returns were filed, taxpayer took the position that the interest was non-business income because the parent is an out of country company with no presence in Indiana or the United States. Taxpayer felt that the interest should be treated as non-business income since the company had no connection with U.S. operations.

The taxpayer received interest income as a result of a loan to the taxpayer's parent corporation and interest received as a result of tax refunds. Since these transactions are dependent upon and contribute to the operations of the taxpayer's economic enterprise as a whole and were created in the regular and ordinary course of business, the income received is deemed to be business income and must be apportioned.

45 IAC 15-11-2(b) states, "Negligence, on behalf of the 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."

Taxpayer reported its interest income as nonbusiness income and has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420010307P.LOF

LETTER OF FINDINGS NUMBER: 01-0307P
Use Tax
Calendar Years 1998, 1999, and 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 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 manufactures puzzles and games.

Upon audit it was found that the taxpayer failed to self assess use tax on clearly taxable items such as construction materials, subscriptions, publications, raw materials transportation equipment, repair and maintenance items, managerial, sales, administrative, and other non-production items, and had no use tax accrual system in place. Taxpayer was also given credit for tax exempt items upon which sales tax was paid at point of purchase.

In a letter dated November 6, 2001, taxpayer protests the penalty assessed and states it has made corrections, the purchases were immaterial in comparison to the total volume of purchases, and listed several other reasons why the penalty should not be assessed.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states it paid sales tax on most of the invoices and missed a small percentage. The largest item not taxed was for the purchase of fabricated building parts which it believed was not taxable.

The audit indicates that the taxpayer had no use tax accrual system in place and taxpayer made no attempt to self assess the tax. Taxpayer has not provided reasonable cause to allow a penalty waiver.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420010309P.LOF

LETTER OF FINDINGS NUMBER: 01-0309P
Sales 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 a manufacturer of plastic and aluminum products. Taxpayer was previously audited on April 6, 1990. At audit, it was determined that the taxpayer failed to self assess and remit use tax for clearly taxable items, some of which are similar to those assessed in a prior audit. Taxpayer failed to remit sales tax in February and March 1999 and an adjustment was made for that period. Taxpayer had sales tax credits that it did not deduct in 1998 that reduced the sales tax assessment.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that the errors were not intentional and represent relatively few transactions. Taxpayer states it has implemented procedures to guard against these types of errors from occurring in the future.

45 IAC 15-11-2(b) states, "Negligence, on behalf of the 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 taxpayer had no use tax accrual system in place thereby failing to remit one hundred percent (100%) of the use tax due and has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120010314P.LOF

LETTER OF FINDINGS NUMBER: 01-0314P
Individual Income Tax
Calendar Year 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 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 paid with the tax return.

STATEMENT OF FACTS

Taxpayer's representative, in a letter dated November 7, 2001, requested an abatement of the penalty and a refund in the amount of $464.20 paid with the tax return.

Taxpayer filed its return late with a tax balance due of $4642 or seventy-one percent (71%) and remitted the tax, penalty, and interest with the return. Taxpayer's representative requests a refund of the penalty because the taxpayer had timely filed an extension through its office. The representative enclosed a copy of the extension which showed the computer generated time and date stamp of April 10, 2001 at 4:14 p.m. The taxpayer, however, did not remit an extension payment.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer's representative merely states that it had an extension on file and requests a refund of the penalty remitted with the filing of the tax return.

Taxpayer remitted twenty-nine percent (29%) of its tax by the due date of the return. An extension to file at a later date is not an extension to make a late payment.

The Department finds the penalty appropriate.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420010318P.LOF

LETTER OF FINDINGS NUMBER: 01-0318P
Use Tax
Calendar Year 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 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.

II. Tax Administration – Interest

Authority: IC 6-8.1-10-1

Taxpayer protests the interest assessed.

STATEMENT OF FACTS

Taxpayer does research, development, consulting, and manufacturing for the federal government. Upon audit it was found that the taxpayer failed to self assess use tax on clearly taxable items and had no use tax accrual system in place. Taxpayer filed its 2000 ST103 return on April 2, 2001 and was assessed a late penalty.

In a letter dated September 19, 2001, taxpayer protests the penalty and interest for calendar year 2000 that was not included in the audit. Taxpayer had assumed that the year 2000 would be included in the audit. Taxpayer states it was not until it received a notice that it realized something might be wrong and it was not a result of neglect but misunderstanding.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it withheld the submission of the year 2000 sales tax form because it believed the audit would include the year 2000.

The taxpayer was audited for 1998 and 1999 and had no use tax accrual system in place. There is no indication that the taxpayer would have paid use tax in the year 2000 as the return was not filed until April of 2001 after the audit for 1998 and 1999 was completed. Taxpayer filed its return after the due date and has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

II. Tax Administration – Interest

DISCUSSION

Taxpayer protests the interest assessed.

IC 6-8.1-10-1 does not allow the department to waive interest.

FINDING

Taxpayer's protest is denied.

CONCLUSION

Taxpayer's protest is denied for issues I and II.

DEPARTMENT OF STATE REVENUE

0420010321.LOF

LETTER OF FINDINGS NUMBER: 01-0321
Sales Tax
Calendar Years 1998, 1999, and 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 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. Sales Tax – Rental Accommodations

Authority: 45 IAC 2.2-4-8; IFB#41

Taxpayer protests the sales tax assessment.

II. 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 bed and breakfast establishment. Taxpayer rents rooms with breakfast included in the price. Taxpayer also performs in-house catering and rents the facility for small gatherings. At audit, it was determined that the taxpayer failed to collect sales tax for accommodations rented.

Taxpayer opened its business in June 1994 and has submitted ST-103's with "zero" sales based upon advice from its CPA, which is the basis for the protest.

I. Sales Tax – Rental Accommodations

DISCUSSION

Taxpayer did not show for a hearing scheduled for Wednesday, December 19, 2001. The discussion follows taxpayer's protest letter dated November 27, 2001 and audit control no. 278186-08 dated August 31, 2001.

Taxpayer relied on the advice of its CPA. Taxpayer states it was unaware that it should have collected Indiana Sales Tax up until the time of the audit and believes the Department should consider the misinformation received from the CPA.

45 IAC 2.2-4-8 clearly states that Indiana sales tax applies to the rental of rooms, lodging, 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. Sales Tax Information Bulletin #41 (4/98) further defines accommodations and includes bed and breakfast establishments. Further, the CPA was engaged by the taxpayer, and therefore, any error made by the CPA becomes the responsibility of the taxpayer.

FINDING

Taxpayer's protest is denied.

II. Tax Administration – Penalty

DISCUSSION

Although the taxpayer did not specifically protest the penalty, the department addresses it based upon the content of taxpayer's protest letter.

Taxpayer states it did not collect and remit tax on taxable sales because its CPA advised it not to.

45 IAC 15-11-2(b) states, "Negligence, on behalf of the 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 reliance on the advice of a CPA does not insulate the taxpayer from the negligence penalty. Such factors must be considered in aggregate. In this case, taxpayer's failure to remit the tax was not the result of reasonable cause.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

042001330P.L0F

LETTER OF FINDINGS NUMBER: 01-0330P
Use Tax
Calendar Years 1998, 1999, and 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 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 has manufacturing plants in Indiana, out of state, and out of country and is a wholly owned subsidiary of a European international industrial group. Taxpayer was previously audited for 1993 and 1994. At audit, it was determined that the taxpayer failed to self assess and remit use tax for clearly taxable items, some of which are similar to those assessed in a prior audit. The audit allowed credit for sales tax paid on non-taxable items at point of purchase. Items assessed tax include fixed assets, software, office supplies, aircraft parts, computer parts and equipment, posters, calendars, service awards, maintenance agreements, and miscellaneous items.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and itemizes some of the items with an explanation why the tax was not paid. Taxpayer further states there was no willful intent to evade or delay payment of the tax and the audit report verifies that it made every effort to assess tax correctly since there were several overpayments of tax as well as underpayments.

45 IAC 15-11-2(b) states, "Negligence, on behalf of the 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 taxpayer was previously audited with primarily the same issues. The prior audit assessed $19,000 in tax while the current audit assessed $109,814. Taxpayer has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0320010331P.LOF

LETTER OF FINDINGS NUMBER: 01-0331P
Withholding Tax
Months Ending 1/31/01, 2/28/01, 4/30/01, 5/31/01, 7/31/01, and 8/31/01

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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.

II. Tax Administration – Interest

Authority: IC 6-8.1-10-1; 45 IAC 15-11-1

Taxpayer protests the interest assessed.

STATEMENT OF FACTS

Taxpayer was assessed late filing penalties for several months in the year 2001. In a letter dated November 27, 2001, taxpayer requests the department waive the penalties and interest assessed against it.

Taxpayer states its payroll was being outsourced and a decision was made to bring it back in house with its new software capable of processing payroll. Taxpayer further states it notified the payroll outsourcing company to that effect but that company did not inform them nor send paperwork stating it was paying by EFT. Taxpayer states it was unaware of the proper filing requirements and believes the blame lies with the payroll outsourcing company. Taxpayer states it has resolved the problem and has been timely paying monthly as required.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer had an outsourcing company prepare its payroll until the year 2001 when it began remitting its own tax. Taxpayer states it was unaware of the filing requirements or the proper reporting procedure. Taxpayer further states it has cleared up the problem and has begun to file and pay monthly as required.

The Department finds the penalty appropriate. Taxpayer's failure to remit the tax was not the result of reasonable cause. Taxpayer must make itself aware of proper filing procedures and time limits when removing its representative from a filing procedure.

FINDING

Taxpayer's protest is denied.

II. Tax Administration – Interest

DISCUSSION

Taxpayer requests that the department waive the interest assessed.

The Indiana statute does not allow a waiver of interest.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420010332P.LOF

LETTER OF FINDINGS NUMBER: 01-0332P
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 was audited for calendar years 1996, 1997, and 1998. At audit, it was determined that the taxpayer failed to self assess and remit use tax for clearly taxable items. In 1996 it remitted seven percent (7%), in 1997 one-half percent (1/2%), and none in 1998. Taxpayer remitted the minimal tax on its income tax returns.

Taxpayer failed to self assess use tax for clearly taxable items such as beds, mattresses, wallpaper, carpeting, electrical equipment, food and beverages not sold, and other miscellaneous items.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states the underpayment of use tax on purchases does not fall within the definition of negligence because the returns and payments of tax were remitted timely, and it has taken considerable time and effort to ensure that use taxes are paid appropriately. Taxpayer further states that all errors found in the field audit were errors that it had no knowledge of at the time and thus had no control over preventing.

45 IAC 15-11-2(b) states, "Negligence, on behalf of the 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."

Taxpayer failed to self assess and remit use tax on more than ninety percent of its purchases and has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120010334P.LOF

LETTER OF FINDINGS NUMBER: 01-0334P
Individual Income Tax
Calendar Year 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, in a letter dated November 12, 2001, requested an abatement of the penalty and a refund in the amount of $409.94 for penalty and interest paid upon receipt of a tax due notice.

Taxpayer filed its return late with a tax balance due of $2,784 or one hundred percent (100%) and remitted the tax and underpayment penalty with the return. No updated interest was calculated or paid. Taxpayer requests a refund of the penalty and interest because the taxpayer had timely filed an extension. The taxpayer enclosed a copy of the extension. The taxpayer, however, did not remit an extension payment.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer merely states that it had an extension on file and requests a refund of the penalty and interest remitted upon receiving the Department's notice of late payment. Taxpayer states it did not have previous Indiana income on which to base estimates.

Taxpayer remitted no tax by the due date of the return. An extension to file at a later date is not an extension to make a late payment. According to IC 6-8.1-6-1, a Taxpayer must remit at least ninety percent (90%) of the current year's tax by the due date. Any tax that remains unpaid during an extension period accrues interest.

Taxpayer has not provided reasonable cause to allow the Department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220010335P.LOF

LETTER OF FINDINGS NUMBER: 01-0335P
Gross and Adjusted Gross Income 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 was audited for 1997, 1998, and 1999 and was disallowed NOL carryforward. The NOL was carried backward and resulted in a tax adjustment.

The department disallowed a loss carryforward based upon an Illinois court case that was appealed and decided against the taxpayer in 1997. A prior Indiana audit of the taxpayer's income tax for the years April 1994, April 1995, April 1996, and December 1996 resulted in assessments from the disallowance of Net Operating Loss carryforwards for those tax years. Taxpayer protested these findings and was denied in a Letter of Findings completed on August 11, 2000.

The Department notes that the taxpayer protested similar assessments proposed by the Illinois Department of Revenue. The court's opinion in that case clearly disallowed that taxpayer a loss carryforward. This was the basis that the department assessed a penalty.

Taxpayer filed a penalty protest letter dated October 31, 2001.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it received its Letter of Findings in August, 2000, and given that the 1997 and 1998 corporate Income Tax returns were filed under the premise that it would be allowed the NOL deduction for these tax years. Taxpayer asks that the Department consider these facts and circumstances in its request for abatement of the penalty.

Taxpayer had a protest for the Net Operating Loss deduction issue for 1994 through 1996 that was not completed by the department until August 11, 2000. The current audit, relating to the same issue and Letter of Findings, was assigned the auditor in July 2000 and on September 9, 2000, the auditor made an appointment with the taxpayer for October 31, 2000. Taxpayer was not aware before the current audit began that it was not allowed to carry losses forward and the taxpayer did not amend the returns because the years were being audited.

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0220010336P.LOF

LETTER OF FINDINGS NUMBER: 01-0336P
Gross and Adjusted Gross Income Tax
Fiscal Years ended 03/31/95, 03/31/96, 03/31/97, and 03/31/98

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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 distributes electronic components and computer systems. At audit it was determined that the taxpayer failed to report audit adjustments from two federal audits as required. Taxpayer also failed to report Indiana destination sales for fiscal year 1998 and reported only eleven percent (11%) of the actual tax liability.

Taxpayer filed a penalty protest letter dated November 16, 2001.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it had totally restructured the tax department in the past three years with a complete new staff. Taxpayer further states that it has taken numerous actions to bring it into compliance with Indiana tax regulations.

45 IAC 15-11-2(b) states, "Negligence, on behalf of the 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.

Taxpayer failed to remit approximately eighty-eight percent (88%) of its tax for fiscal year 1998, failed to report Federal RAR adjustments, made other errors, and has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420010359P.LOF

LETTER OF FINDINGS NUMBER: 01-0359P
Use Tax
Calendar Years 1997, 1998, and 1999

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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 an Indiana division of a Michigan corporation that was previously audited in 1992. At audit, it was determined that the taxpayer failed to self assess and remit use tax for clearly taxable items, some of which are similar to those assessed in a prior audit.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that all matters were matters of interpretation and not tax avoidance.

45 IAC 15-11-2(b) states, "Negligence, on behalf of the 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 taxpayer was previously audited with primarily the same issues. Taxpayer also failed to remit use tax on approximately forty-seven percent (47%) of its purchases and has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120010362.LOF

LETTER OF FINDINGS NUMBER: 01-0362
Individual Income Tax
Calendar Year 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 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 – Interest

Authority: IC 6-8.1-10-1; 45 IAC 15-11-1

Taxpayer protests the interest assessed.

STATEMENT OF FACTS

Taxpayer made a tax payment during a valid extension period that was made after the original due date of the return. IC 6-8.1-8-1.5 clearly states that payment is first applied to penalty, interest, and finally the tax liability. The application of taxpayer's payment resulted in a tax balance due that accrued interest. Taxpayer protests the interest assessed on the penalty and states that the state took a year to contact him about the penalty owed.

I. Tax Administration – Interest

DISCUSSION

Taxpayer requests that the Department waive the interest assessed because the state did not notify him of the penalty due until a year later. There was no interest assessed on the penalty. Interest was only assessed on the tax balance due after payment was applied according to the requirements of IC 6-8.1-8-1.5.

FINDING

The Indiana statute does not allow a waiver of interest. Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020002P.LOF

LETTER OF FINDINGS NUMBER: 02-0002P
Use Tax
Calendar Years 1995, 1996, and 1997

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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 has manufacturing plants in Indiana, out of state, and out of country and is privately held. Taxpayer was previously audited on May 24, 1996 and remitted some use tax. At audit, it was determined that the taxpayer failed to self assess and remit use tax for clearly taxable items, some of which are similar to those assessed in a prior audit.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states the underpayment of use tax on purchases was unintentional and the result of errors made in the normal course of business operations.

45 IAC 15-11-2(b) states, "Negligence, on behalf of the 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 taxpayer was previously audited with primarily the same issues. Taxpayer failed to self assess and remit use tax on one hundred percent of its purchases and has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020004P.LOF

LETTER OF FINDINGS NUMBER: 02-0004P
Gross and Adjusted Gross Income Tax
For Calendar Years 1997, 1998, and 1999

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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 provides dedicated warehousing services to large corporate customers and has two warehouses in Indiana. At audit it was determined that the taxpayer failed to report all of its receipts in gross income for calendar year 1999. Taxpayer also made errors in the computation of the Indiana payroll for the payroll apportionment factor that was to its benefit and failed to make a fourth quarter estimated payment for 1997. For 1997 and 1999 the underpayment was over ten percent (10%) of the actual tax liability.

Taxpayer filed a penalty protest that was received by the Indiana Department of Revenue on December 17, 2001.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it had relocated the financial records and lost some of its former employees. Certain financial records are no longer available to support the Indiana tax returns. Further, receipts were not intentionally excluded from the tax base but it was unaware of the department's position on the issue of expense reimbursements from customers incurred by a service provider. Finally, the taxpayer believes that the less than ten percent (10%) tax increase for the three year period shows it did not grossly under report or underpay its tax liability.

45 IAC 15-11-2(b) states, "Negligence, on behalf of the 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."

Taxpayer failed to remit approximately ninety-three percent (93%) of its tax for the three-year period and failed to report service income in gross income for calendar year 1999 and has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020005P.LOF

LETTER OF FINDINGS NUMBER: 02-0005P
Use Tax
Calendar Years 1995, 1996, 1997, and 1998

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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 has several business locations in Indiana and its principal line of business is to serve the investment and capital needs of individual and institutional clients. Taxpayer was previously audited on August 23, 1994. At audit, it was determined that the taxpayer failed to self assess and remit use tax for clearly taxable items, some of which are similar to those assessed in a prior audit.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that due to the magnitude of its overall operations, and the vast number of invoices received from its vendors, not every invoice can be examined to determine if the appropriate Indiana sales tax should have been applied. Taxpayer further states it did not intentionally disregard any Indiana sales tax statutes.

45 IAC 15-11-2(b) states, "Negligence, on behalf of the 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 taxpayer was previously audited with primarily the same issues. Taxpayer failed to self assess and remit use tax on more than ninety percent of its purchases and has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020006P.LOF

LETTER OF FINDINGS NUMBER: 02-0006P
Gross and Adjusted Gross Income Tax
Calendar Years 1995, 1996, 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 leases vending machines in Indiana and out of state. Rent paid for the leasing of the vending machines was omitted from the apportionment factors in 1995 and 1996. It was included in subsequent years. The lease income for the vending machines was reported at the low rate and was changed to the high rate in the audit report. Taxpayer understated gross income by $102,049 in 1998 and overstated gross income by $4,105 in 1999. The company was sold in the last quarter of the year 2000 and the tax return for that year had not been filed at date of audit.

Taxpayer filed a penalty protest letter dated November 6, 2001.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that all original returns and liabilities for the referenced audit periods were timely filed and remitted. Taxpayer further states that it did not intentionally disregard its filing responsibility and exercised ordinary business care and prudence when it prepared and filed its returns.

45 IAC 15-11-2(b) states, "Negligence, on behalf of the 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."

Taxpayer failed to remit seventy-four percent (74%) of its tax for all years at issue and has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020016P.LOF

LETTER OF FINDINGS NUMBER: 02-0016P
Use Tax
Calendar Years 1997, 1998, 1999, and 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 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 an Indiana limited partnership with two partners. At audit, it was determined that the taxpayer failed to self assess and remit use tax for clearly taxable items.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states the underpayment is wholly attributable to use tax, and as a result of the audit, taxpayer has implemented procedures to identify use tax liabilities in the future. Taxpayer requests an abatement of the penalties as they were incurred on use taxes due to an oversight on their part and not an intentional disregard of the law.

45 IAC 15-11-2(b) states, "Negligence, on behalf of the 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."

Taxpayer failed to self assess and remit use tax on one hundred percent of its purchases in 2000 and remitted less than ten percent (10%) of the tax due in 1997, 1998, and 1999 and has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

03960565.SLOF

SUPPLEMENTAL LETTER OF FINDINGS NUMBER: 96-0565 ITC
Withholding Tax
For Years 1995 and 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. Withholding Tax – Liability of Employer

Authority: 45 IAC 3.1-1-97

Taxpayer protests assessment of tax on lump sum payment.

II. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

III. Tax Administration – Interest

Authority: IC § 6-8.1-10-1

Taxpayer protests the imposition of interest.

STATEMENT OF FACTS

Taxpayer is a subcontractor who was contracted to provide labor and/or materials for a lump sum improvement to realty in Indianapolis, Indiana. The taxpayer was not registered with the Secretary of State nor was it registered with the Department of Revenue as a withholding agent. The audit investigation assumed that the company provided labor only and that all moneys received were subject to adjusted gross income tax withholding. The period under investigation was May 25, 1995 through June 26, 1996.

The investigation was completed on August 23, 1996. Taxpayer, in a letter dated October 17th, 1996 stated it was trying to resolve the matter by determining the correct amount of tax that should have been paid. On October 23rd, 1996 it remitted a check in the amount of $10,399.00, which the taxpayer believed to be the correct amount of tax due. On October 30, 1996, a power of attorney was requested and received with a letter stating information would be furnished from which the department would be able to determine the total amount of wages paid on the project in question.

On March 27th, 1997, the file was returned to the auditor for resolution. The auditor contacted the taxpayer for additional information on April 1st, 1997 by telephone and by letter dated May 9th, 1997. On June 4th, 1997 the file was returned to the Legal Division unresolved with notation that the taxpayer representative had not contacted the auditor.

On September 1st, 1998 the hearing officer wrote taxpayer's representative and asked for additional information in order to resolve the investigation. On September 17th, 1998, the day the taxpayer representative's letter was returned to the department by the post office, a copy of the letter was faxed to the president of the corporation with a follow up letter dated October 26th, 1998. The letter dated September 1st, 1998 was again faxed on October 30th, 1998 as requested by the taxpayer.

After further contacts, taxpayer representative provided a breakdown of costs associated with the project on January 29th, 1999, admitting a tax liability $10,685 ($284 more than taxpayer's original estimate and payment) and requesting a waiver of penalties and interest. A hearing was set for October 11th, 2001, taxpayer did not respond and this Letter of Finding was prepared based on documentation already submitted by taxpayer.

I. Withholding Tax – Liability of Employer

Taxpayer was assessed based on 45 IAC 3.1-1-97, which states in relevant part:

> Employers who make payments of wages subject to the Adjusted Gross Income Tax Act, and who are required to withhold Federal taxes pursuant to the Internal Revenue Code (USC Title 26), are required to withhold from employees' wages Adjusted Gross and County Adjusted Gross Income Tax.

Inasmuch as no information was available to the auditor, the tax was assessed on 100% of the amount paid to the taxpayer.

Taxpayer has since provided a purported breakdown of costs and expenses associated with the project in question that alleges the actual liability was $10,685. Inasmuch as this documentation is self-authenticated the proposed adjustment will be subject to- and contingent on- audit review.

FINDING

Taxpayer protest is sustained subject to audit verification.

II. Tax Administration – Penalty

Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. IC § 6-8.1-10-2.1. The Indiana Administrative Code 45 IAC 15-11-2 further provides:

> ….(b) "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.
>
> (c) 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. Factors which may be considered in determining reasonable cause include, but are not limited to:
>
> (1) the nature of the tax involved;
>
> (2) judicial precedents set by Indiana courts;
>
> (3) judicial precedents established in jurisdictions outside Indiana;

(4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;

(5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer failed to file or register with the state of Indiana while conducting a major construction project within the state. When taxpayer was contacted and assessed there was over a two year delay in responding with information as to taxpayer's operations within this state. While Department concurs with taxpayer's claim of no malicious intent, the imposition of the negligence penalty is based on this "… taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations." 45 IAC 15-11-2. No grounds exist for waiver of the negligence penalty.

FINDING

Taxpayer protest is denied.

III. Tax Administration – Interest

Taxpayer has requested a waiver on the interest applied to the liability pursuant to IC 6-8.1-10-1, which states in relevant part: If a person fails to file a return for any of the listed taxes, fails to pay the full amount of tax shown on his return by the due date for the return or the payment, or incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment.

….

(e) Except as provided by IC § 6-8.1-5-2(f)2 [an extension signed and agreed to by Department and taxpayer] the department may not waive the interest imposed under this section.

No agreement was entered by taxpayer and Department, and absent this no waiver of interest is permitted by the statute.

FINDING

Taxpayer protest is denied.

DEPARTMENT OF STATE REVENUE

02980733.SLOF

SUPPLEMENTAL LETTER OF FINDINGS NUMBER: 98-0733
Gross Income Tax
For the Years: 1993, 1994, 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. Gross Income Tax – Intangibles

Authority: IC 6-2.1-2-3, IC 6-2.1-2-4, IC 6-2.1-2-5, IC 6-2.1-1-9, IC 6-2.1-2-1, IC 6-2.1-1-12

The Taxpayer protests the Department's assessment of gross income tax on lease income.

STATEMENT OF FACTS

The Taxpayer is an out-of-state subsidiary corporation that leases and finances trucks produced by its parent corporation. The Taxpayer provides its customers via independent dealers with financing and leasing options when the customers make their transactions. The Taxpayer maintains one employee in Indiana that works out of his home and is responsible for solicitation in Indiana and neighboring states. The employee has no authority to approve contracts. The accounting, approval, and collection of the contracts take place out-of-state. Taxpayer was assessed Indiana gross income tax during audit.

After the initial hearing and Letter of Finding, the Department granted a rehearing with regards to: 1) whether interest should have been excluded from the sales factor numerator in determining adjusted gross income, and; 2) whether the low rate of gross income tax should be applied to receipts from Taxpayer's sales of vehicles from inventory no longer held for leasing. More facts will be provided as necessary.

I. Gross Income Tax – Intangibles

DISCUSSION

Taxpayer provides its customers, via independent dealers, with financing and leasing options. During the audit, Taxpayer was determined to be improperly reporting income tax on a gross earnings basis and that the entire gross receipts from the revenue producing property located within Indiana was subject to the gross income tax.

The Department granted a rehearing with regards to: 1) whether interest should have been excluded from the sales factor numerator in determining adjusted gross income, and; 2) whether the low rate of gross income tax should be applied to receipts from Taxpayer's sales of vehicles from inventory no longer held for leasing.

Taxpayer contends that the original Letter of Findings should have addressed whether interest should have been excluded from the sales factor in computing adjusted gross income. Taxpayer makes no mention of this issue in their original protest letter and has not briefed the Department with regards to this matter. Hence, this issue is beyond the scope of the original Letter of Finding and will not be addressed in the Supplemental Letter of Finding.

Taxpayer states that the low rate of gross income tax should be applied to receipts from Taxpayer's sales of vehicles from inventory no longer held for leasing. Pursuant to IC 6-2.1-2-3:

(a) The receipt of gross income from transactions described in section 4 [IC 6-2.1-2-4] of this chapter is subject to a tax rate of three-tenths of one percent (0.3%).

(b) The receipt of gross income from transactions described in section 5 [IC 6-2.1-2-5] of this chapter is subject to a tax rate of one and two-tenths percent (1.2%)

IC 6-2.1-2-4 applies the low rate (0.3%) in part to wholesale sales or when the Taxpayer is selling at retail. IC 6-2.1-2-5 states in relevant part that the high rate applies to qualified lessors (*See* IC 6-2.1-1-9) and to any activity not described in IC 6-2.1-2-4. Taxpayer was found not to be a qualified lessor in the original Letter of Finding.

IC 6-2.1-2-1(b)(1) states:

"Selling at retail" means a transaction in which a retail merchant in the ordinary course of his regularly conducted business transfers the ownership of tangible personal property to another, conditionally or otherwise, for a consideration if:

(A) the retail merchant had previously acquired that tangible personal property for the purpose of reselling it; and

(B) the transferee acquiring the property does not acquire the tangible personal property for the purpose of making a wholesale sale.

IC 6-2.1-1-12 defines a retail merchant as "a taxpayer who is regularly and occupationally engaged in the business of purchasing tangible personal property and providing the tangible personal property to his customers at a fixed and established place of business."

Also, IC 6-2.1-2-1(c)(1) in relevant part states that:

"Wholesale sales" means any sale described in this subsection in which the purchaser is not a division, subdivision, agency, instrumentality, unit, or department of government:

(A) Sales of tangible personal property (except capital assets or depreciable assets of the seller) for resale in the form in which it was purchased.

Taxpayer is an out-of-state subsidiary corporation that leases and finances trucks produced by its parent corporation. They provide their customers via independent dealers with financing and leasing options when the customers make their transactions. Taxpayer has not demonstrated that it is a retail merchant selling at retail. Furthermore, Taxpayer has not provided evidence that it is not selling depreciable assets or that the transactions should be categorized as wholesale sales. Thus, the sale of vehicles no longer held for leasing are subject to the high rate in accordance with IC 6-2.1-2-5.

FINDING

The Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE
Revenue Ruling # 2002-02ST
January 25, 2002

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 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

Sales/Use Tax – Electric Power Generating Station and Wholesale Sales of Electricity

Authority: IC 6-2.5-5-10, IC 6-2.5-4-5, Rule 45 IAC 2.2-4-11

The taxpayer requests the Department to rule on the application of sales/use tax to a electric power generating station and to the wholesale sales of electricity. The taxpayer submitted the following statements in relation to this request for Department review.

1. The taxpayer's purchase, storage, use or consumption of all items that would be treated as production plant or power production expenses according to the Uniform System of Accounts for electric utilities, including without limitation all power generation equipment (such as turbines and generators) and consumables (such as natural gas and fuel oil, including such items purchased from an affiliate), will be exempt from Indiana sales and use tax.

2. Wholesale sales of electricity by the taxpayer and its affiliates will not be subject to Indiana sales and use tax.

STATEMENT OF FACTS

The taxpayer is a limited liability company organized and existing under the laws of the State of Indiana. The taxpayer is an indirect, wholly owned subsidiary of one of the largest unregulated producers of electricity in the United States. On February 23, 2001, the Indiana Utility Regulatory Commission (hereinafter, "IURC") ruled that the Taxpayer was a "public utility" as defined under IC 8-1-2-1. The IURC further declined to exercise its jurisdiction over Taxpayer's construction, ownership and operation of a gas-fired, combined cycle electric generating facility. The IURC's Order incorporates by reference certain terms of a settlement agreement entered into between the taxpayer and the Indiana Office of Utility Consumer Counselor (hereinafter, "Settlement Agreement").

The taxpayer has agreed to waive certain rights and to fulfill certain obligations under the terms of the Settlement Agreement. First, the taxpayer agreed that the facility will be connected to an existing gas supply pipeline (not owned by taxpayer) that crosses the taxpayer's property. The taxpayer is prohibited, however, from connecting or supplying any third party with gas service through the pipeline without the IURC's prior approval. Second, the taxpayer has waived any and all special rights, powers and privileges granted to Indiana public utilities, including without limitation, the power of eminent domain and the use of public rights-of-way. Third, the taxpayer has agreed that it will enter into interconnection agreements with retail energy merchants and that such agreements will be regulated by the Federal Energy Regulatory Commission (hereinafter, "FERC") in accordance with its jurisdiction under the Federal Power Act, 16 U.S.C.A. § 791(a) et seq. (hereinafter, "FPA). Fourth, among other obligations, the taxpayer has agreed that all electricity generated by the Facility will be for resale into the wholesale market and not at retail. The wholesale electric energy sales will be at rates that will be subject to the FERC's jurisdiction, as sales made by an Exempt Wholesale Generator (hereinafter, "EWG").

The taxpayer has filed an application with the FERC for a determination that it will be qualified as an EWG. As an EWG, the taxpayer will be prohibited from making retail sales. Accordingly, the taxpayer anticipates that most of its sales of electricity will be made to electric power-marketing affiliates for resale. The affiliates will, in turn, resell the electricity to other public utilities, electric cooperatives, municipal electric generators, other power marketers, and other entities for resale. Any other sales of electricity made by the taxpayer will be at wholesale to other entities, including investor-owned and municipal utilities.

DISCUSSION

IC 6-2.5.5.10 states:

Transactions involving tangible personal property are exempt from the state gross retail tax, if:

(1) the property is classified as production plant or power production expenses, according to the uniform system of accounts which was adopted and prescribed for the utility by the Indiana utility regulatory commission; and

(2) the person acquiring the property is:

(A) a public utility that furnishes or sells electric energy, steam, or steam heat in a retail transaction described in IC 6-2.5-4-5…

IC 6-2.4-4-5 states:

(b) A…person engaged as a public utility is a retail merchant making a retail transaction when the…person furnishes or sells electrical energy, natural or artificial gas, water, steam, or steam heating service to a person for commercial or domestic consumption.

Regulation 45 IAC 2.2-4-11 defines a public utility for sales tax purposes as follows:

(d) the term "public utilities" as used in this regulation [45 IAC 2.2] means any organization which is engaged in the furnishing or selling of electricity…and having the right of eminent domain or subject to government regulation in connection with the furnishing of public utility services…

The IURC has ruled that the taxpayer is a "public utility" pursuant to IC 8-1 thus making the taxpayer "subject to" IURC regulation and, in addition, the taxpayer will be subject to regulation as a public utility by FERC under the Federal Power Act; therefore, the taxpayer is a "public utility" for purposes of both IC 6-2.5-4-5 and IC 6-2.5-5-10 and within the meaning of 45 IAC 2.2-4-11. As a "public utility," all of the taxpayer's machinery, equipment and other tangible personal property that is treated as production plant or power production expenses according to the Uniform System of Accounts for electric utilities are exempt from Indiana sales/use tax.

RULING

The taxpayer's purchase, storage, use or consumption of all items that would be treated as production plant or power production expenses according to the Uniform System of Accounts for electric utilities, including without limitation all power generation equipment (such as turbines and generators) and consumables (such as natural gas and fuel oil, including such items purchased from an affiliate), will be exempt from Indiana sales and use tax.

DISCUSSION

IC 6-2.5-4-5(b) provides that sales of electrical energy by a public utility constitute retail transactions subject to sales tax; however, IC 6-2.5-4-5(c)(2) exempts sales to "another public utility."

(c) Notwithstanding subsection (b), a…person engaged as a public utility is not a retail merchant making a retail transaction when:

(2) The…person sells the services or commodities listed in subsection (b) to another public utility or power subsidiary…;

For the purpose of the imposition of sales tax under IC 6-2.5-4-5(c), the Department has determined that "a person engaged as a public utility" includes anyone selling utility services. The "sales for resale" (wholesale sales) by the taxpayer, therefore, are exempt from sales tax as the purchasers of the electricity, also, meet the definition of "public utility." Also, both the taxpayer's affiliate and the purchasers of the electricity sold by the taxpayer's affiliate are "public utilities," hence, the sales of electricity by the taxpayer's affiliate are not subject to sales tax.

RULING

Wholesale sales of electricity by the taxpayer and its affiliates will not be subject to Indiana sales and use 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 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, a regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection.

DEPARTMENT OF STATE REVENUE
Revenue Ruling #2002-03ST
March 5, 2002

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.

ISSUES

Sales and Use Taxes – Collection of Indiana sales and use taxes by a designated third party

Authority: IC 6-2.5; IC 6-2.5-1-1; IC 6-2.5-1-2; IC 6-2.5-1-3; IC 6-2.5-1-5; IC 6-2.5-2-1; IC 6-2.5-3-1, IC 6-2.5-4-1, IC 6-2.5-4-2

The Taxpayer, an entity which has agreed to collect Indiana sales or use tax on the retail sales by its financial institution customers of checks and related products ("Checks") to the customers' account holders, requests the Department to rule:

1. On its collection responsibilities with respect to delivery charges that are included in a single lump sum charge to the account holders,
2. On its collection responsibilities when its customers are agencies of the United States Government and, as such, are exempt from the collection of Indiana Sales and Use Taxes.

STATEMENT OF FACTS

The Taxpayer is a commercial printer of Checks for financial institutions (banks, credit unions and savings and loan associations), which in turn sell the Checks to their customers (i.e., account holders). The Taxpayer is an Indiana registered retail merchant.

Financial institutions enter into agreements with the Taxpayer whereby the Taxpayer is to produce and supply Checks to the financial institutions. The Checks are produced by the Taxpayer pursuant to orders regularly received by it from its financial institution customers, which orders are based upon account holders' orders for Checks. Under the purchase agreements between the Taxpayer and its financial institution customers, title to the Checks passes to the financial institutions upon shipment of the Checks by the Taxpayer. The Taxpayer invoices the financial institutions, separately stating the delivery charges for the Checks.

The Taxpayer ships the Checks directly to the account holders. For billing and collection purposes, the Taxpayer, on behalf of the financial institutions, initiates a lump sum charge against the account holder's bank account, which charge includes the price of the Checks, any financial institution mark-up or commission, the delivery charge and Indiana sales or use tax due. The Taxpayer then remits the Indiana sales or use tax to the Department and causes the remaining proceeds to be distributed accordingly.

DISCUSSION

(1). In this instance, the account holder is the final consumer of the Checks. The retail sale is between the financial institution and the account holder. In instances where the delivery charges are included in a single lump sum charge to the account holder, Indiana use tax must be computed on the full charge to the account holder, including the delivery charges, unless the account holder is otherwise exempt.

Since the Taxpayer is collecting on behalf of the financial institution, the tax so collected and remitted is properly classified as the account holder's use tax. The Taxpayer agreed with the financial institution to administer the sales tax process and, as such, should collect and remit Indiana tax due on the total lump sum amount charged for Checks its ships to Indiana account holders,

including the sales price, financial institution mark-up or commission and delivery charges, unless the account holder is otherwise exempt.

Sales of Checks by the Taxpayer to financial institutions for their own use will be exempt to the extent the financial institution qualifies for exemption. Separately stated delivery charges to financial institutions on items purchased for their own use are nontaxable.

(2). With regard to sales of Checks to account holders of federal credit unions, which by statute are considered agencies of the federal government, the federal credit union is not responsible for collection of Indiana sales/use tax on the sale of tangible personal property to Indiana account holders. However, the fact that the credit union is not liable for the collection of the tax does not exempt the account holder from responsibility for the use tax due on the storage, use, or consumption of the tangible personal property within Indiana [see IC 6-2.5-3-2 (a)].

In the present case, the Taxpayer, by agreement with the federal credit union, has assumed the collection responsibility for the account holders' use tax and therefore must collect the total tax due on the total lump sum amount charged for Checks shipped to Indiana federal credit union account holders.

Sales of Checks by the Taxpayer to federal credit unions for their own use will continue to be exempt.

RULING

The Department rules that for Indiana sales and use tax purposes:

1. Since the Taxpayer has agreed to collect tax on behalf of its financial institution customers, it should collect tax on delivery charges for the Checks when those delivery charges are included in a single charge against the account holder's bank account, unless the account holder is exempt from tax.
2. Indiana use tax is owed on Checks shipped to Indiana federal credit union account holders and the Taxpayer should collect that tax on the total lump sum amount billed to such an account holder, unless the account holder is exempt from 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 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.