DEPARTMENT OF STATE REVENUE

02-20170298.LOF

Letter of Findings: 02-20170298
Corporate Income Tax
For the Tax Years 2011 and 2012

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 requires the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Business did not establish it was taxable in other jurisdictions. Thus, the Department correctly included the protested jurisdictions in Business's Indiana throwback sales calculation.

I. Adjusted Gross Income Tax –Throw-back Sales.

Authority: IC § 6-8.1-5-1; IC § 6-3-2-2; *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); *Dep't of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480 (Ind. Tax Ct. 2012); *Indiana Dep't of Revenue v. Kimberly-Clark Corp.*, 416 N.E.2d 1264 (Ind. 1981); *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214 (1992); *Tyler Pipe Industries, Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987); 45 IAC 3.1-1-53; 45 IAC 3.1-1-38; 45 IAC 3.1-1-64, Letter of Findings, 02-20070527.

Taxpayer protests the throw-back of out-of-state sales to its Indiana income.

II. Tax Administration–Penalty.

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

Taxpayer protests the imposition of the negligence penalty.

STATEMENT OF FACTS

Taxpayer manufactures and sells large bins/boxes. Taxpayer is a subsidiary of a parent company. Both Taxpayer and parent operate in Indiana and throughout the U.S. and other countries.

The Indiana Department of Revenue ("Department") conducted an audit for the tax years ending 2011 and 2012. The Department assessed Taxpayer additional corporate income tax. Taxpayer protested the assessments and the imposition of the negligence penalties. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as necessary.

I. Adjusted Gross Income Tax–Throw-back Sales.

DISCUSSION

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "[t]he notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing . . . [courts] defer to an agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" *Dep't of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014). Thus all interpretations of

Indiana tax law contained within this decision, as well as the preceding audit, shall be entitled to deference. In addition, poorly developed and non-cogent arguments are subject to waiver. *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012).

Taxpayer protests the Department's decision to subject Taxpayer's income from sales to customers in other states to the "Throw-back" rule.

The adjusted gross income tax is imposed under IC § 6-3-2-2 for the years at issue, which stated in relevant parts:

> (a) With regard to corporations and nonresident persons, "adjusted gross income derived from sources within Indiana", for the purposes of this article, shall mean and include:
> (1) income from real or tangible personal property located in this state;
> (2) income from doing business in this state;
> (3) income from a trade or profession conducted in this state;
> (4) compensation for labor or services rendered within this state; and
> (5) income from stocks, bonds, notes, bank deposits, patents, copyrights, secret processes and formulas, good will, trademarks, trade brands, franchises, and other intangible personal property if the receipt from the intangible is attributable to Indiana under section 2.2 of this chapter.
> Income from a pass through entity shall be characterized in a manner consistent with the income's characterization for federal income tax purposes and shall be considered Indiana source income as if the person, corporation, or pass through entity that received the income had directly engaged in the income producing activity. Income that is derived from one (1) pass through entity and is considered to pass through to another pass through entity does not change these characteristics or attribution provisions. In the case of nonbusiness income described in subsection (g), only so much of such income as is allocated to this state under the provisions of subsections (h) through (k) shall be deemed to be derived from sources within Indiana. In the case of business income, only so much of such income as is apportioned to this state under the provision of subsection (b) shall be deemed to be derived from sources within the state of Indiana. In the case of compensation of a team member (as defined in section 2.7 of this chapter), only the portion of income determined to be Indiana income under section 2.7 of this chapter is considered derived from sources within Indiana. In the case of a corporation that is a life insurance company (as defined in Section 816(a) of the Internal Revenue Code) or an insurance company that is subject to tax under Section 831 of the Internal Revenue Code, only so much of the income as is apportioned to Indiana under subsection (r) is considered derived from sources within Indiana.
> . . .
> (e) The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the taxable year, and the denominator of which is the total sales of the taxpayer everywhere during the taxable year. Sales include receipts from intangible property and receipts from the sale or exchange of intangible property. However, with respect to a foreign corporation, the denominator does not include sales made in a place that is outside the United States. Receipts from intangible personal property are derived from sources within Indiana if the receipts from the intangible personal property are attributable to Indiana under section 2.2 of this chapter. Regardless of the f.o.b. point or other conditions of the sale, sales of tangible personal property are in this state if:
> (1) the property is delivered or shipped to a purchaser that is within Indiana, other than the United States government; or
> (2) the property is shipped from an office, a store, a warehouse, a factory, or other place of storage in this state and:
> (A) the purchaser is the United States government; or
> (B) the taxpayer is not taxable in the state of the purchaser.
> Gross receipts derived from commercial printing as described in IC 6-2.5-1-10 shall be treated as sales of tangible personal property for purposes of this chapter.
> . . .
> (n) For purposes of allocation and apportionment of income under this article, a taxpayer is taxable in another state if:
> (1) in that state the taxpayer is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax; or
> (2) that state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not.
> . . ..

45 IAC 3.1-1-53 states:

> Gross receipts from the sales of tangible personal property (except sales to the United States Government-See Regulation 6-3-2-2(e)(050) [45 IAC 3.1-1-54] are in this state: (a) if the property is delivered or shipped to a purchaser within this state regardless of the F.O.B. point or other conditions of sales; or (b) if the property is shipped from an office, store, factory, or other place of storage in this state, and the taxpayer is not taxable in the state of the purchaser. See Regulation 6-3-2-2(n)(010) [45 IAC 3.1-1-64].
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> Examples:
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> . . .
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> (5) *If the taxpayer is not taxable in the state of the purchaser, the sale is attributed to this state if the property is shipped from an office, store, warehouse, factory, or other place of storage in this state. Such sale is termed a "Throwback" sale*. Example: The taxpayer has its head office and factory in State A. It maintains a branch office and inventory in Indiana. Taxpayer's only activity in State B is the solicitation of orders by a resident salesman. All orders by the State B salesman are sent to the branch office in Indiana for approval and are filled by shipment from the inventory in Indiana. Since the taxpayer is immune under P.L.86-272 from tax in State B, all sales of merchandise to purchasers in State B are attributed to Indiana, the state from which the merchandise was shipped.
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> . . ..
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> (*Emphasis added*).

45 IAC 3.1-1-38 provides:

> 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 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.*
>
> As stated in Regulation 6-3-2-2(b)(010) [45 IAC 3.1-1-37], corporations doing business in Indiana as well as other states are subject to the allocation and apportionment provisions of IC 6-3-2-2(b)-(n).
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> (*Emphasis added*).

45 IAC 3.1-1-64 states:

> A corporation is "taxable in another state" under the Act when such state has jurisdiction to subject it to a net income tax. This test applies if the taxpayer's business activities are sufficient to give the state jurisdiction to impose a net income tax under the Constitution and statutes of the United States. *Jurisdiction to tax is not present where the state is prohibited from imposing the tax by reason of the provision of Public Law 86-272, 15 U.S.C.A. §381-385*. In the case of any "State," as defined in IC 6-3-1-25, other than a state of the United States or political subdivision of such state, the determination of whether such "state" has jurisdiction to subject the taxpayer to a net income tax shall be made by application of the jurisdictional standards applicable to that state of the United States. If jurisdiction to tax is otherwise present, such "state" is not considered as being without jurisdiction to tax by reason of the provisions of a treaty between that state and the United States.
>
> Example:
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> Corporation X is actively engaged in manufacturing farm equipment in State A and foreign country B. Both State A and foreign country B impose a net income tax but foreign country B exempts corporations engaged in manufacturing farm equipment. Corporation X is subject to the jurisdiction of State A and foreign country B.
>
> *Taxpayers are not subject to throwback on sales into states in which they are taxable under this regulation [45 IAC 3.1-1-64]*. See Regulation 6-3-2-2(e)(040) [45 IAC 3.1-1-53].
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> (*Emphasis added*).

The Indiana Supreme Court explained in *Indiana Dep't of Revenue v. Kimberly-Clark Corp.*, 416 N.E.2d 1264, 1265 (Ind. 1981):

> Public Law 86-272 (*15 U.S.C.A. § 381*), in pertinent part is as follows:
> (a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:
> (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
> (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

The court then explained:

> We also believe that Congress perceived "solicitation" as embodying "sundry activities so long as those activities [are] closely related to the eventual sale of a product." Finally, when a corporate representative performs an "act of courtesy" in order to accommodate a customer, he has not ventured beyond the realm of "solicitation."

Id. at 1268.

The United States Supreme Court explained its standard for determining "solicitation of sales" in *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214 (1992). In *Wrigley*, the Court explained:

> We proceed, therefore, to describe what we think the proper standard to be. Once it is acknowledged, as we have concluded it must be, that "solicitation of orders" covers more than what is strictly *essential* to making requests for purchases, the next (and perhaps the only other) clear line is the one between those activities that are *entirely ancillary* to requests for purchases -- those that serve no independent business function apart from their connection to the soliciting of orders -- and those activities that the company would have reason to engage in anyway but chooses to allocate to its in-state sales force. *National Tires, Inc. v. Lindley,* 68 Ohio App. 2d 71, 78-79 426 N.E.2d 793, 798 (1980) (company's activities went beyond solicitation to "functions more commonly related to maintaining an on-going business"). Providing a car and a stock of free samples to salesmen is part of the "solicitation of orders," because the only reason to do it is to facilitate requests for purchases. Contrariwise, employing salesmen to repair or service the company's products is not part of the "solicitation of orders," since there is good reason to get that done whether or not the company has a sales force. Repair and servicing may help to *increase* purchases; but it is not ancillary to *requesting purchases*, and cannot be converted into "solicitation" by merely being assigned to salesmen. See, *e. g., Herff Jones Co. v. State Tax Comm'n,* 247 Ore. 404, 412, 430 P.2d 998, 1001-1002 (1967) (no § 381 immunity for sales representatives' collection activities).

Id. at 228-30.

The Court further explained:

> By contrast, Wrigley's in-state recruitment, training, and evaluation of sales representatives and its use of hotels and homes for sales-related meetings served no purpose apart from their role in facilitating solicitation. The same must be said of the instances in which Wrigley's regional sales manager contacted the Chicago office about "rather nasty" credit disputes involving important accounts in order to "get the account and [Wrigley's] credit department communicating." App. 71, 72. It hardly appears likely that this mediating function between the customer and the central office would have been performed by some other employee -- some company ombudsman, so to speak -- if the on-location sales staff did not exist. The purpose of the activity, in other words, was to ingratiate the salesman with the customer, thereby facilitating requests for purchases.
>
> Finally, Wrigley argues that the various nonimmune activities, considered singly or together, are *de minimis*. In particular, Wrigley emphasizes that the gum sales through "agency stock checks" accounted for only 0.00007 [percent] of Wrigley's annual Wisconsin sales, and in absolute terms amounted to only several hundred dollars a year. We need not decide whether any of the nonimmune activities was *de minimis* in isolation; taken together, they clearly are not. Wrigley's sales representatives exchanged stale gum, as a matter of regular company policy, on a continuing basis, and Wrigley maintained a stock of gum worth several thousand dollars in the State for this purpose, as well as for the less frequently pursued (but equally unprotected) purpose of selling gum through "agency stock checks." Although the relative magnitude of these

> activities was not large compared to Wrigley's other operations in Wisconsin, we have little difficulty concluding that they constituted a nontrivial additional connection with the State. Because Wrigley's business activities within Wisconsin were not limited to those specified in § 381, the prohibition on net-income taxation contained in that provision was inapplicable.

Id. at 234-5.

In determining how the actions of an independent contractor affected nexus for an out-of-state business in Washington, in *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987), the United States Supreme Court explained:

> Tyler seeks a refund of wholesale taxes it paid on sales to customers in Washington for the period from January 1, 1976, through September 30, 1980. These products were manufactured outside of Washington. Tyler argues that its business does not have a sufficient nexus with the State of Washington to justify the collection of a gross receipts tax on its sales. Tyler sells a large volume of cast iron, pressure and plastic pipe and fittings, and drainage products in Washington, but all of those products are manufactured in other States. Tyler maintains no office, owns no property, and has no employees residing in the State of Washington. Its solicitation of business in Washington is directed by executives who maintain their offices out-of-state and by an independent contractor located in Seattle.

Id. at 249.

The Court then explained:

> As a matter of law, the Washington Supreme Court concluded that this showing of a sufficient nexus could not be defeated by the argument that the taxpayer's representative was properly characterized as an independent contractor instead of as an agent. We agree with this analysis. In Scripto, Inc. v. Carson, 362 U.S. 207 (1960), Scripto, a Georgia corporation, had no office or regular employees in Florida, but it employed wholesalers or jobbers to solicit sales of its products in Florida. We held that Florida may require these solicitors to collect a use tax from Florida customers. Although the "salesmen" were not employees of Scripto, we determined that "such a fine distinction is without constitutional significance." Id., at 211. This conclusion is consistent with our more recent cases.

Id. at 250.

Finally, the Court explained:

> As the Washington Supreme Court determined, "he crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales." 105 Wash. 2d, at 323, 715 P. 2d, at 126. The court found this standard was satisfied because Tyler's "sales representatives perform any local activities necessary for maintenance of Tyler Pipe's market and protection of its interests . . . ." Id., at 321, 715 P. 2d, at 125. We agree that the activities of Tyler's sales representatives adequately support the State's jurisdiction to impose its wholesale tax on Tyler.

Id. at 250-51.

During the audit, the Department noted that Taxpayer's original Indiana IT-20 for the years at issue calculated throwback sales by total company sales listed by destination state and country, excluded sales destined to nine states in 2011 and twelve states in 2012, estimated Indiana throwback sales at 50 percent of the remaining destination sales, and sales from Missouri and Kentucky each calculated at 25 percent of the remaining destination sales without considering that the two plants in those locations closed in the previous years.

Taxpayer states that its activities in those states exceed the protection of P.L. 86-272 and provide sufficient nexus with those states to subject it to net income taxes in those states. Therefore, Taxpayer believes that the income from those sales should not be subject to the throwback rule and that it should not be subject to additional Indiana adjusted gross income tax ("AGIT").

Taxpayer then engaged a third party consultant to prepare amended returns for 2011 and 2012 to reduce throwback sales. To support the amended returns Taxpayer asserted that it filed tax returns in twelve states in 2011 and thirteen states in 2012. During the audit however, Taxpayer did not provide requested state returns but instead provided "provisions and calculations of estimated taxes for year-end reporting." Taxpayer also asserted that it filed combined/unitary returns filed by the parent company for California, Illinois, Massachusetts, Michigan, Minnesota, Oregon, and Texas. Taxpayer argues that it "is taxable in the seven states in which combined/unitary returns reported the taxable income of the federal consolidated group, and Indiana throwback sales may not

include Indiana origin sales destined to those states in which the combined/unitary returns were filed." The audit report stated that:

> Under Indiana Tax Policy []6 the Finnigan Rule will only apply to corporations which file Indiana unitary/combined returns. Corporations not filing Indiana unitary/combined returns must apply the throwback sales rule as provided in Indiana Code § 6-3-2-2(e). For years 2011 and 2012 [Taxpayer] filed Indiana IT-20 returns as a separate corporation, Indiana-origin sales to the seven (7) states in which unitary returns were filed by affiliates must be included in the Indiana Throwback Sales calculation.

In addition, no records were provided for state returns filed in Kansas or Pennsylvania and no nexus was established in those states, the Department threw back sales in those states to Indiana.

Taxpayer also argues that it is subject to a franchise or privilege tax in fourteen states: Alabama, Arkansas, Connecticut, Georgia, Louisiana, Mississippi, New Hampshire, North Carolina, New York, Oklahoma, South Carolina, Tennessee, Washington, and West Virginia. The audit report stated that:

> The taxpayer references language of many state statutes which define *doing business* in that state as *each and every act or privilege exercised*. The taxpayer contends that solicitation and interstate sales constitute taxable activities. The taxpayer claims a franchise/privilege tax liability in each state although [Taxpayer] has not filed tax returns in any of the fourteen (14) identified states.
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> . . .
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> Upon request the taxpayer must provide proof that the taxpayer has filed the requisite tax return in the other state and has paid any taxes imposed under the law of the other state. The filing of a tax return in a state is generally sufficient to determine that the taxpayer is subject to tax in that state. [Taxpayer] did not pay income or franchise tax to any of the fourteen (14) states. The taxpayer asserts there is a filing requirement due to home offices and sales solicitation. [Taxpayer] travel expense reports for years 2011-2013 were provided for seven (7) sales representatives who reside in six (6) states where the taxpayer does not have property.
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> . . .
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> Franchise taxes of Connecticut, New York, and South Carolina are imposed on net income and may not be levied upon the taxpayer which is engaged only in interstate commerce and therefore protected under Public Law 86-272. The activities of sales representatives do not meet the definition of *transacting business* to create nexus for franchise/privilege taxes. Taxes measure by property held in the state will not result in a tax liability in states where there is only sales solicitation. (*Emphasis original*).

Taxpayer did not file tax returns nor pay tax in the fourteen identified states for years 2011-2012. Based on the above stated law, the Department adjusted Taxpayer's Indiana income to throwback those sales to Indiana. The Department also adjusted Taxpayer's throwback sales calculation to include two foreign jurisdictions. The audit report noted that Taxpayer provided no documentation that Taxpayer is subject to tax in either jurisdiction. Taxpayer argued that they had nexus in these jurisdictions; however, the audit report stated that "[n]exus of an affiliate is not extended to [Taxpayer]. Sales which originated in Indiana and were destined to [foreign jurisdictions] must be included in the calculation of Indiana Throwback Sales."

Taxpayer protested the adjustment to its throwback sales calculation. Taxpayer's protest letter states:

> The sole issue in this case is whether [Taxpayer] is "taxable" in the destination jurisdictions in dispute. Since [Taxpayer] may not actually file tax returns in every state, it must analyze what it means to be "subject to" tax. The Indiana Tax Court held in its 2010 decision *United States Parcel, Inc. v. Indiana Department of Revenue*, that the term "subject to" tax, as related to the Indiana premiums tax, does not necessarily mean that the tax was paid, but that one is "placed under the authority, dominion, control or influence" of a tax. The Decision was subsequently overturned by the Supreme Court. However, the Supreme Court did not necessarily disagree with the Tax Court's explanation of the term "subject to" but added that "doing business in the state" is a necessary condition to be "subject to" tax.

Taxpayer went on to list all twenty-two jurisdictions individually and state how it is taxable in each jurisdiction. Each jurisdiction will be discussed according to similarities of Taxpayer's protest and arguments.

A. Consolidated/Unitary Returns Filed

Taxpayer argues that "for [2011 and] 2012 and later years, Taxpayer was included in parent company's combined/unitary returns in the following states: California, Illinois, Kentucky, Massachusetts, Michigan, Minnesota, Oregon, and Texas. Taxpayer specifically protested and provided returns for Michigan and Texas. Taxpayer also provided returns for Kentucky, Massachusetts, and Wisconsin, but did not list them as protested jurisdictions nor provide any other explanation as to why those states should not be included in Indiana throwback sales calculation. Thus, as stated above, poorly developed and non-cogent arguments are subject to waiver. *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012). Therefore, the protests of Kentucky, Massachusetts, and Wisconsin are deemed waived. During the audit, the Department determined that:

> Under Indiana Tax Policy []6 the Finnigan Rule will only apply to corporations which file Indiana unitary/combined returns. Corporations not filing Indiana unitary/combined returns must apply the throwback sales rules as provided in Indiana Code § 6-3-2-2(e). For years 2011-2012 [Taxpayer] filed Indiana IT-20 returns as a separate corporation. Indiana-origin sales to states in which unitary returns were filed by affiliates must be included in the Indiana Throwback Sales calculation.

Thus, for states in which Taxpayer filed combined/unitary returns Taxpayer must include those sales in Indiana throwback calculations. In this instance, Taxpayer filed a consolidated return with Parent Company, and combined/unitary returns for California, Illinois, Michigan, Minnesota, Oregon, and Texas, thus just because Taxpayer filed in California, Illinois, Kentucky, Massachusetts, Michigan, Minnesota, Oregon, and Texas does not mean it is considered taxable in California, Illinois, Kentucky, Massachusetts, Michigan, Minnesota, Oregon, and Texas for throwback purposes. Thus, the Department was correct in including Taxpayer's California, Illinois, Michigan, Minnesota, Oregon, and Texas sales in Indiana throwback sales calculation. Taxpayer also provided its 2011 and 2012 Pennsylvania returns, which were not combined/unitary returns. Taxpayer did not provide the return to the auditor, even though it was requested to by the auditor, thus, the audit division will now review the returns and determine whether Taxpayer was in fact subject to Pennsylvania income tax as required by IC § 6-3-2-2(e).

Taxpayer failed to substantiate a protest for Kentucky, Massachusetts, and Wisconsin, as required by IC § 6-8.1-5-1(c). Therefore, the Department's inclusion of these states in its Indiana throwback sales calculation stands. Under the Finnegan Rule, the Department was correct in including California, Illinois, Michigan, Minnesota, Oregon, and Texas, in the Indiana throwback sales calculation. Taxpayer has not provided a reason as to why this rule should not be followed; thus, Taxpayer has not met its burden under IC § 6-8.1-5-1(c). Finally, Taxpayer provided its 2011 and 2012 Pennsylvania return, in which the audit division will now analyze and determine whether Taxpayer was subject to Pennsylvania income tax.

B. Solicitation of Sales

Taxpayer argues that it "employed sales people which engage in the solicitation of sales" in Alabama, Arkansas, Connecticut, Georgia, Louisiana, Mississippi, New Hampshire, North Carolina, New York, Oklahoma, South Carolina, Tennessee, Washington, and West Virginia. Taxpayer employed sales people who either resided in the state or merely solicited sales from the listed states. Taxpayer protested each states' inclusion on Indiana throwback sales calculation. However, given the similarities between the states, and Taxpayer's protest for the listed states, this portion of the protest will be discussed as a whole. Taxpayer's representative cited to a statute from each jurisdiction protested. However upon research of each statute the Department determined that Taxpayer's representative either cited to that state's definition of a corporation or merely to portion of that state's code which discusses how to calculate the tax. Taxpayer's representative did not provide supporting documentation or substantive legal argument to link the cited statutes to show that the listed states should not be included in Taxpayer's Indiana throwback sales calculation.

In this instance, Taxpayer **only** provided expense reports of employees, to show that it is taxable under each states' law. Taxpayer did not provide any tax returns or registration to do business in the listed states. Furthermore Taxpayer's representative's protest letter states that the only business conducted in the state is the "solicitation of sales." This statement only reinforces the Department's position, and reliance on *Wrigley* and IC § 6-3-2-2(e). Thus, Taxpayer did not meet its burden under IC § 6-8.1-5-1(c), and the Department must include the listed states' sales in Indiana's throwback sales calculation.

Taxpayer's representative also argued that in Georgia it was subject to sales tax, therefore, Georgia sales should be excluded from Indiana throwback sales calculation. Taxpayer stated that it filed sales tax returns in Georgia for

the years at issue. Taxpayer did not provide any evidence to verify this filing thus the Department cannot determine whether or not Taxpayer filed sales tax in that state. In addition, sales tax does not establish that Taxpayer is doing business in Georgia. According to IC § 6-3-2-2(e), a taxpayer must be taxed on its **income** to be taxable in that state. Sales tax and income tax are two different taxes. Taxpayer's representative has provided no evidence to support that Taxpayer's income is taxable in Georgia. Thus, Taxpayer has not met its burden under IC § 6-8.1-5-1(c).

Furthermore as stated above, poorly developed and non-cogent arguments are subject to waiver. *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012). Taxpayer provided no documentation as to why Georgia should be excluded from the Indiana Throwback sales calculation. Thus, Taxpayer's protest for this state is deemed waived. Taxpayer's representative failed to fully substantiate Taxpayer's position regarding Georgia throwback sales. Thus, the Department was correct in including Taxpayer's Georgia sales in Indiana throwback sales calculation.

C. Foreign Sales

Taxpayer conducts business in foreign countries. Taxpayer claimed it is taxable in these countries; during the audit however, Taxpayer provided no documentation or evidence that it is taxable in these countries. The Department therefore determined the nexus Parent Company has does not extend to Taxpayer and sales from these countries were included in Indiana throwback sales calculation. Taxpayer's representative stated in its protest letter, "[Taxpayer] has employees and representatives solicitation sales in [foreign countries]." Taxpayer's representative went on to state:

> Public Law 86-272 is not applicable to foreign counties and does not prohibit those "states" from imposing an income tax on Taxpayer. Taxpayer asserts the proper threshold for determining "jurisdiction" is the United States Constitution and notes California courts have held as much in the California decision, Appeal of Dresser Industries. That decision interpreted California statutes that are identical to those at issue here. As such while not binding on Indiana courts, the decision is persuasive.
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> The U.S. Supreme Court has stated that the Due Process Clause of the Fourteenth Amendment imposes two requirements for state taxation of income from interstate transactions: a "minimal connection" or "nexus" between the interstate activities and the taxing state, and "a rational relationship between the income attributed to the State and the intrastate values of the enterprise." (Exxon Corporation v. Wisconsin Dept. of Revenue, 447 U.S. 207, 219-220 []).
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> . . .
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> Audit contends that there was no nexus, because Taxpayer itself, as a separate corporate entity, did not do business in the foreign countries in question, and because the acts of the sales subsidiaries in these countries cannot be ascribed to appellant for nexus purposes. **Here the record reveals a regular and systematic pattern of local sales solicitation on Taxpayer's behalf in the foreign countries in question.**

(**Emphasis original**).

Taxpayer's representative cites to Indiana Department of Revenue decisions in which the Department determined that an **independent contractor's actions** may be considered when determining nexus.

First, neither Taxpayer nor Taxpayer's representative provided any "record" or evidence to support the solicitation of sales on Taxpayer's behalf in the foreign countries. Second, as stated by Taxpayer's representative, it is not the Taxpayer conducting business in these countries, but an affiliate or parent is soliciting sales in foreign countries. Taxpayer's reference to Letter of Findings 02-20070527 (October 1, 2008), 20081001 Ind. Reg. 045080699NRA is improper. The LOF states that an independent contractor's actions **may** be considered when determining nexus; in addition, the taxpayer in that case was able to show that the independent contractor's actions rose to the level above "mere solicitation" therefore the Department was able to sustain the taxpayer in that case. *Id.* Taxpayer's representative also stated that pursuant to treaties, Taxpayer properly excluded these throwback sales from Indiana's calculation. Taxpayer's representative failed to provide even the citation or name of the supposed treaties, thus, the Department will not address this issue.

In this case Taxpayer, is not conducting business in the foreign countries and Taxpayer has provided no evidence that the actions of Taxpayer's parent or affiliates rises to something more than mere solicitation. In fact Taxpayer's

representative states in the protest letter that Taxpayer "has employees and representatives soliciting sales" in these countries. Based on this information, the Department must conclude that even if Taxpayer could establish a proper nexus in these foreign countries it is only soliciting sales. Thus, according to *Wrigley*, Taxpayer's sales in these foreign countries were properly included in Indiana throwback sales calculations. Therefore, Taxpayer did not meet its burden as required by IC § 6-5.1-5-1(c) to prove the Department's assessment incorrect.

FINDING

Taxpayer's protest is denied. However, the audit division will review the returns provided during the protest process and determine whether Taxpayer was in fact subject to Pennsylvania income tax as required by IC § 6-3-2-2(e).

II. Tax Administration–Penalty.

Taxpayer requested that the Department abate the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1(a), the Department may assess a negligence penalty if the taxpayer:

> (1) fails to file a return for any of the listed taxes;
> (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
> (3) incurs, upon examination by the department, a deficiency that is due to negligence;
> (4) fails to timely remit any tax held in trust for the state; or
> (5) is required to make a payment by electronic funds transfer (as defined in IC 4-8.1-2-7), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department.

45 IAC 15-11-2(b) further states:

> "Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty when "the taxpayer affirmatively establishes that the failure . . . was due to reasonable cause and not due to negligence." 45 IAC 15-11-2(c). The taxpayer "must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section." *Id*. The Department is mindful that "[r]easonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case." *Id*.

In this instance, Taxpayer has not demonstrated that its actions were reasonable as described in 45 IAC 15-11-2(c). In addition, Taxpayer's representative stated in the hearing that he advised Taxpayer that it would cost Taxpayer more money to file in the listed jurisdictions than it would be to become compliant in those states. This statement only support's the Department's assertion of negligence on behalf of Taxpayer and its Representative. Thus, Taxpayer's request for penalty abatement is denied.

FINDING

Taxpayer's protest of the negligence penalty is denied.

CONCLUSION

As stated in Issue I, Taxpayer's protest is denied. However, the audit division will review the return and determine whether Taxpayer was in fact subject to Pennsylvania income tax as required by IC § 6-3-2-2(e). Taxpayer's protest of penalty in Issue II is denied.

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