DEPARTMENT OF STATE REVENUE

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Letter of Findings: 02-20221113
Indiana Corporate Income Tax
For the Years 2013, 2014, 2015, and 2016

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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

HOLDING

The Department agreed with Information Technology Company that it was entitled to carry-forward attributes and adjustments called for in three federal Revenue Agent Reports; the Department required Company to submit the requisite amended returns as statutorily required.

ISSUES

I. Indiana Corporate Income Tax - Carrying Forward Prior Year Revenue Agent Report Adjustments.

Authority: IC 6-3-4-6; IC 6-8.1-5-1; *Indiana Dep't of State Rev. v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *E.I. DuPont De Nemours and Company v. Indiana Department of State Revenue*, 79 N.E.3d 1016 (Ind. Tax Ct. 2017); *Indiana Dept. of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480 (Ind. Tax Ct. 2012); *Scopelite v. Indiana Dep't of Local Gov't Fin*., 939 N.E.2d 1138, (Ind. Tax Ct. 2010); *Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); *Phoenix Coal Co. v. Comm'r*, 231 F.2d 420 (2d Cir. 1956).

Taxpayer argues that the Department erred in failing to carry-forward adjustments attributable to federal Revenue Adjustments.

STATEMENT OF FACTS

Taxpayer is an out-of-state company in the information technology business. Taxpayer conducts business in Indiana, other states, and in locations outside the United States. Taxpayer routinely files both federal and Indiana corporate income tax returns. Fiscal year 2013 was the first year Taxpayer filed an Indiana consolidated IT-20 income tax return including related entities conducting business within the state. The 2013 return included various subsidiaries as did Taxpayer's 2014, 2015, and 2016 returns. However, each year's returns did not always include the same subsidiaries.

The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's 2013, 2014, 2015, and 2016 federal and Indiana returns and Taxpayer's business records.

The audit resulted in an assessment of additional Indiana corporate income tax. Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted by telephone, and this Letter of Findings results.

I. Indiana Corporate Income Tax - Carrying Forward Prior Year Revenue Agent Report Adjustments.

DISCUSSION

At the outset, the Department here notes that there are three revenue agent reports ("RAR") at issue: Those three RARs are designated as follows:

- The first RAR was for the fiscal year ending October 31, 2013, through October 31, 2015. This first 2013 through 2015 RAR was dated and signed on March 29, 2019. (**2013 to 2015 RAR**).
- The second RAR was for fiscal year ending October 31, 2016, and was dated July 9, 2020, and signed on July 31, 2020. (**2016 RAR**).
- The third RAR was for the periods ending October 31, 2002, to October 31, 2003, and is dated January 30, 2008. (**2002 to 2003 RAR**).

The issue is solely whether Taxpayer may claim the "attributes" (Net Operating Losses, Offsets) from the three RARs on an going-forward basis. In other words, do Taxpayer's beneficial RAR attributes domino forward year-after-year? Taxpayer's argument is that the Department should have carried forward these attributes on a year-by-year basis and - in Taxpayer's analysis - can now be used to offset any current liability; as a result, this is a protest addressing a pending assessment.

The issue is *not* whether Taxpayer is entitled to a refund; the issue is *not* whether the federal adjustments were or were not incorrect. Simply stated, Taxpayer argues that the federal adjustments should be recognized and carried forward, and that the Department is obliged to apply the adjustments against the pending 2016 assessment.

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

In order to meet the statutory burden of establishing the correctness of its position, each taxpayer challenging an assessment. is required to provide documentation explaining and supporting its challenge that the Department's position is wrong. 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).

In addition, the Department points out the statures and authorities relied upon by the Department, "are presumptively constitutional." *Indiana Dep't of State Rev. v. Caterpillar, Inc.,* 15 N.E.3d 579, 587 (Ind. 2014). When an agency is charged with enforcing a statute, the jurisprudence defers to the agency's reasonable interpretation of that statute "over an equally reasonable interpretation by another party." *Caterpillar, Inc.*, 15 N.E.3d at 583.

During the course of the audit, Taxpayer first presented the Department's audit representative the two finalized IRS revenue agent reports ("RAR"). As explained above, those first two RARs were the **2013 to 2015 RAR** and the **2016 RAR.**

Taxpayer asked that both the **2013 to 2015 RAR** and the **2016 RAR** be incorporated into the pending audit review.

According to Taxpayer, the Department declined to incorporate the **2013 to 2015 RAR** citing to IC 6-3-4-6(a) which provides.

> Any taxpayer, upon request by the department, shall furnish to the department a true and correct copy of any tax return which the taxpayer has filed with the United States Internal Revenue Service which copy shall be certified to by the taxpayer under penalties of perjury.
>
> (b) Each taxpayer shall notify the department of any modification as provided in subsection (c) of:
> (1) a federal income tax return filed by the taxpayer after January 1, 1978; or
> (2) the taxpayer's federal income tax liability for a taxable year which begins after December 31, 1977.
>
> The taxpayer shall file the notice on the form prescribed by the department within one hundred twenty (120) days after the modification is made if the modification was made before January 1, 2011, and one hundred eighty (180) days after the modification is made if the modification is made after December 31, 2010.

The audit specifically cited to the time limitation provided in IC 6-3-4-6(e) as follows:

> If the federal modification results in a change in the taxpayer's federal or Indiana adjusted gross income, the taxpayer shall file an Indiana amended return within one hundred twenty (120) days after the modification is made if the modification was made before January 1, 2011, and one hundred eighty (180) days after the modification is made if the modification is made after December 31, 2010.

Taxpayer argues that its amended Indiana return - reflecting the results of the **2013 to 2015 RAR** - was timely

filed and that the results should have been incorporated into the audit's calculations.

In support of its protest, Taxpayer provided a copy of an email forwarded to the Department's auditor. The email is dated May 9, 2019. Attached to that email was a copy of the **2013 to 2015 RAR**. As explained by Taxpayer:

> [A]fter discussions with [Auditor], the RARs' were provided directly to [Auditor], in May of 2019. The amended returns were not filed with the Department after guidance from [Auditor] to provide the changes directly to her. Per Ind. Code § 6-3-4-6(b), the period for notifying the state of changes to the [T]axpayer's Federal return is 180 days, therefore [Taxpayer] provided the RARs to [Auditor] timely.

Taxpayer maintained that it notified the Department of the **2013 to 2015 RAR** within approximately 40 days of the date the federal adjustments were signed. Taxpayer attempted to do what it was supposed to do under IC 6-3-4-6(a) because it submitted the RARs with 180 days after the federal modification was made. However, there is no indication that Taxpayer followed up by filing an amended Indiana income return as required IC 6-3-4-6(e).

There is no indication that Taxpayer timely filed an amended income tax returns reflecting the **2013 to 2015 RAR**. Although Taxpayer may not claim a "cash-in-hand" refund, it did provide the **2013 to 2015 RAR** within "one hundred eighty (180) days" from the date of that federal modification.

The Department here notes that the Department's audit apparently did exactly what Taxpayer wants. The Department's audit incorporated the results of the **2013 to 2015 RAR** and the **2016 RAR** into the then pending audit. As explained in the audit report:

> The auditor adjusted the Taxpayer's federal taxable income and Indiana modifications to incorporate the RAR adjustments into the adjusted gross income calculations in accordance with the requirements of IC 6-3-1-3.5.

At the conclusion of the audit during the "final conference," Taxpayer presented the third RAR (**2002 to 2003 RAR**) dated January 30, 2008. According to the audit report, Taxpayer believed that the adjustments contained within the January 2008 RAR "would increase the [T]axpayer's net operating losses originating in the fiscal years ending October 31, 2002, and October 31, 2003."

The audit report noted that the Department had no record of receiving Indiana amended returns reflecting the January RAR. In addition, the Department determined that "any changes to these two years would result in additional NOLs that would be carried into the fiscal year October 31, 2013, tax year which is out of statute." Therefore the Department "declin[ed] to make these informational adjustments which will not have any tax effect."

The underlying issue was raised in *E.I. DuPont De Nemours and Company v. Indiana Department of State Revenue*, 79 N.E.3d 1016 (Ind. Tax Ct. 2017). In that case, the petitioner argued that the Department was precluded from making adjustments to DuPont's pre-2005 tax returns which resulted in a decrease in DuPont's available NOLs. *Id.* at 1020. The petitioner argued that "those tax years were 'closed,' i.e., outside the statute of limitations." *Id.* The court disagreed finding as follows:

> Indiana Code § 6-8.1-5-2(a) prohibits the Department from issuing a proposed assessment to a taxpayer more than 3 years after the date its return is filed or due, whichever is later. Ind. Code § 6-8.1-5-2(a)(1) (2006) (amended 2009). The statute is silent regarding whether adjustments may be made to tax returns outside that time frame. See I.C. § 6-8.1-5-2(a)(1). Because Indiana Code § 6-8.1-5-2(a) sets time limits on assessments only, its plain language does not support DuPont's claim that the Department was prohibited from adjusting the NOLs DuPont reported prior to 2005. *Id.* at 1021.

Federal law governing net operating losses has also dealt with this situation. In *Phoenix Coal Co. v. Comm'r*, 231 F.2d 420 (2d Cir. 1956), the court held that the income for a closed year could be recomputed to determine the proper amount of net operating loss allowed to be carried to an open year. *Id*. at 421-22. The court reasoned that, even though additional taxes could not be assessed for the closed year, the net operating loss from the closed year affects an open year and as such can be recomputed to determine the correct tax liability for the open year.

Additionally, in *Caterpillar*, the Indiana Supreme Court provided instructions to properly calculate and correctly report available Indiana Net Operating Loss for Indiana corporate income tax purposes. *Caterpillar, Inc.,* 15 N.E.3d at 583-85 (explaining that "Indiana corporate taxpayers calculate Indiana NOLs by modifying their federal NOLs using a three-step process . . . .").

The Department here finds compelling the analysis set out by the Tax Court in *DuPont* in which the court found

that the Department was not precluded from carrying from NOL adjustments from years otherwise outside the statute of limitations to an open year. The Circuit Court's decision in *Phoenix Coal* also supports the proposition that closed year NOL adjustments could be carried forward to determine any then current year assessment. In this instance, the maxim that, "What's good for the goose is good for the gander" seems appropriate. In both *DuPont* and *Phoenix Coal*, the courts held that the taxing authority was entitled to carry forward adjustment in order to justify a then pending assessment because the taxing authority were not attempting to assess tax against otherwise closed years.

As with the **2013 to 2015 RAR, 2016 RAR**, and **2002 to 2003 RAR** Taxpayer is precluded from receiving a "cash-in-hand" hand refund because there is nothing to indicate that Taxpayer files the requisite amended returns. In the case of the **2002 to 2003 RAR,** Taxpayer failed to provide the 180-day notice required under IC 6-3-4-6(a). Nonetheless and regardless of whether the result is either an assessment of additional tax or a modification to a pending assessment, Taxpayer is entitled to carry-forward the attributes of the three RARs. To that end, Taxpayer is required to provide the requisite amended returns as statutorily required to properly and correctly apply and claim the potentially available Indiana NOLs carryover pursuant to Indiana law.

In short, although the Department is prepared to agree with Taxpayer in principle and as described above, it is another thing to actually execute the changes Taxpayer seeks under Indiana law. In order to do so, the Department requires that Taxpayer prepare amended returns tracking the adjustments year-by-year, return-by-return, dollar-by-dollar, and entity-by-entity for all years in which the RAR adjustments had an effect. In addition, the Department requests a schedule of the attributes and the affect of those attributes year-by-year. The Department asks that these returns and schedule be completed and submitted within 90 days of the date this decision is issued.

FINDING

On the sole issue of whether Taxpayer is entitled to carry-forward the adjustments called for in three federal RARs, Taxpayer's protest is sustained. As provided above, in order to implement the proposed adjustments, Taxpayer is required to file all appropriately detailed returns and supporting documentation with 90 days of the date this decision is issued.

January 3, 2023

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An html version of this document.