## INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

**Title:** Environmental Notice for Mitigation required in Clean Water Act Section 401 State Water Quality Certifications
**Identification Number:** Water-006-NRD
**Date Originally Effective:** October 14, 2005
**Dates Revised:** None
**Other Policies Repealed or Amended:** None
**Brief Description of Subject Matter:** To consistently implement the Clean Water Act Section 401 State Water Quality Certification program and the State Regulated Wetland Permitting program, IDEM will not require a deed restriction as a condition for a Clean Water Act Section 401 State Water Quality Certification.
**Citations Affected:** IC 13-18-22; 327 IAC 17

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 30 days after presentation to the appropriate board**.** Pursuant to IC 13-14-11.5, this policy will be available for public inspection for at least 45 days prior to presentation to the appropriate board. If the nonrule policy is presented to more than one board, it will be effective 30 days after presentation to the last. 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.

**General Background**

Certain proposed impacts to Indiana's wetlands are required to be authorized under either a federal 404 permit, issued by the United States Army Corps of Engineers (USACOE) following a 401 certification by IDEM, or a state regulated wetland permit, issued by IDEM. IDEM's authority to issue 401 certifications is given directly through the Clean Water Act (CWA). Therefore, there is no need for a delegation agreement between USACOE and IDEM. Thus, grossly simplified, the 401 process is:

1) IDEM receives a complete application to discharge fill into a water of the US.
2) IDEM writes a certification with appropriate conditions to assure compliance with the appropriate state water quality standards (WQS).
3) USACOE issues a 404 permit, which includes the 401 conditions and any other conditions the USACOE deems appropriate.
4) The USACOE enforces all conditions of the 404 permit, including those from the 401. With USACOE enforcement, IDEM is not precluded from enforcing the conditions of the 401 certification.

Since the USACOE enforces the conditions of the 404 permit, IDEM's own enforcement abilities are of limited concern for federally jurisdictional wetlands. This is not the case with State Regulated Wetlands. State Regulated Wetlands are, by definition, not under federal jurisdiction. IDEM has sole enforcement responsibility. <u>The USACOE could require a deed restriction condition on the 404 permit regardless of whether IDEM required one through the 401 certification.</u> Inclusion of a deed restriction condition on 404 permits is a POLICY (not a requirement) of the USACOE. Following is the applicable excerpt from the USACOE's mitigation guidance:

> "g. Site Protection: Compensatory mitigation plans should include a written description of the legal means for protecting mitigation area(s), and permits will be conditioned accordingly. The wetlands, uplands, riparian areas, or other aquatic resources in a mitigation project should be permanently protected, in most cases, with appropriate real estate instruments, e.g., conservation easements, deed restrictions, transfer of title to Federal or state resource agencies or non-profit conservation organizations. Generally, conservation easements held by tribal, state or local governments, other Federal agencies, or non-governmental groups, such as land trusts, are preferable to deed restrictions. Homeowners' associations should be used for these purposes only in exceptional circumstances, such as when the association is responsible for community open spaces with restrictive covenants. Districts may require third party monitoring if necessary to ensure permanent protection. In no case will the real estate instrument require a Corps official's signature. Also, Districts will not approve a requirement that results in the Federal government holding deed restrictions on properties, or that contains real estate provisions committing Corps Districts to any interest in the property in question, unless proper statutory authority is identified that authorizes such an arrangement."

**Legal Background**

A February 22, 2005 memorandum from IDEM Office of Legal Counsel staff to IDEM Office of Water Quality program staff concludes that IDEM has no legal authority to enforce deed restrictions for wetland mitigation. Following is the main body of the memo in its entirety:

> "Indiana case law has established that deed restrictions and other types of restrictive covenants are essentially contract rights; express contracts between a grantor and grantee which restrict the grantee's use of land. Parties who do not hold an interest that runs with the land do not have standing to enforce a covenant that runs with the land. The Court of Appeals of Indiana has made this finding numerous times, e.g., *Holliday v. Crooked Creek Villages*, 759 N.E. 2d 1088 (Ind. App. 2001), *Hrisomalos v. Smith*, 600 N.E. 2d 1363 (Ind. App. 1992).

However, there is statutory authority under IC 13-14-2-6(5) for IDEM to enforce restrictive covenants created in connection to remediations, cleanups, closures or corrective actions. Restrictive covenants intended to protect wetland mitigation sites do not meet the criteria for enforceability under IC 13-14-2-6(5). That the Indiana legislature recognized the need to provide specific statutory authority for the state to enforce those specific covenants reinforces the position that absent the granting of such authority, IDEM may not enforce covenants concerning wetland mitigation sites."

**Policy Resolution**

Considering the USACOE will, likely, require a deed restriction condition on the 404 permit regardless of whether IDEM required one through the 401 certification; and

Considering the Indiana legislature did not recognize the need to provide specific statutory authority for the state to enforce covenants concerning wetland mitigation sites, IDEM may not enforce covenants concerning wetland mitigation sites; and

Noting that IDEM believes it is important to consistently implement the Clean Water Act Section 401 State Water Quality Certification program and the State Regulated Wetland Permitting program; and

Understanding that the Water Pollution Control Board, on March 9,2005 adopted rules (327 IAC 17) concerning state regulated wetlands and wetland activity permits which do not require a deed restriction as a condition for a wetland activity permit.

**IDEM will not require a deed restriction as a condition for a Clean Water Act Section 401 State Water Quality Certification.** IDEM will require, as a condition for a Clean Water Act Section 401 State Water Quality Certification, that an applicant establishing a mitigation wetland must file a signed and recorded environmental notice, which describes the compensatory mitigation contained in the mitigation plan, with the department within sixty (60) days of the applicant's release from monitoring requirements.

**Explanation**

IDEM believes it is important that rules be clear and enforceable. Additionally, implementation of rules should be predictable across similar programs. Specifically, as noted above, IDEM believes it is important to consistently implement the Clean Water Act Section 401 State Water Quality Certification program and the State Regulated Wetland Permitting program.

IDEM does not believe it is appropriate to require any conditions that are not enforceable. As IDEM does not have standing to enforce deed restrictions for wetland mitigation, IDEM believes it is not appropriate to require deed restrictions for wetland mitigation required for either the Clean Water Act Section 401 State Water Quality Certification program, or the State Regulated Wetland Permitting program.

**DEPARTMENT OF INSURANCE**

**October 3, 2005**

**Bulletin 134**

**PATIENT'S COMPENSATION FUND – SURCHARGE RATES FOR HOSPITALS AND PHYSICIANS**

This bulletin is directed to all health care providers electing to be qualified under Indiana's Medical Malpractice Act (IC 34-18-1-1 *et seq.*) and to insurers that provide coverage to those health care providers.

Pursuant to IC 34-18-5-2, the Commissioner of the Department of Insurance in his capacity as administrator of the Patient's Compensation Fund hereby notifies physicians and hospitals of the following surcharge for qualification under the Medical Malpractice Act. The rates are effective for coverage beginning **January 1, 2006.**

PHYSICIANS

The percentage increase to the physician rates is the same for each specialty class. A complete list of physician specialty class codes is published at 760 IAC 1-60.

| CLASS | ANNUAL RATE |
|---|---:|
| 0 | $2,910 |
| 1 | 3,880 |
| 2 | 5,431 |
| 3 | 6,983 |
| 4 | 8,729 |
| 5 | 11,638 |
| 6 | 17,457 |
| 7 | 27,155 |
| 8 | 32,974 |

HOSPITALS

The surcharge for a hospital is calculated using the attached worksheet. The completed worksheet shall be submitted to the Department along with the surcharge payment.

INDIANA DEPARTMENT OF INSURANCE
James Atterholt, Commissioner

**HOSPITAL EXPOSURE WORKSHEET FOR SURCHARGE CALCULATION**

Name of Hospital: ______________________________

License No: ______________________________

Attach a list of the following:

(1) All facilities and/or services operated under the hospital license, as identified on the Department of Health Application for License to Operate a Hospital;

(2) All assumed business names used by the hospital;

(3) All employed physicians included in this coverage along with their specialty class code and surcharge computation;

Any entity, person or activity not identified in this surcharge worksheet may not be included in the hospital's coverage with the Patient's Compensation Fund.

| CATEGORY | EXPOSURE | MANUAL | TOTAL |
|---|---|---|---|
| Provide # of Beds | | | Category x Manual=Total |
| | Hospital (Acute care and Intensive Care) | 791.12 | |
| | Mental Health/Rehabilitation | 395.56 | |
| | Extended Care/Intermediate Care/Residential | 39.44 | |
| | Nursing Home/Critical Extended Care | 395.56 | |
| | Health Institution/Assisted Living/Other | 157.76 | |
| | Bassinets | 791.12 | |
| # of Visits (in 100s) | | | |
| | Emergency Room | 79.11 | |
| | Clinics/Others | 39.56 | |
| | Mental Health/Rehabilitation | 19.78 | |
| | Health Institution | 15.82 | |
| | Home Health Care | 39.56 | |
| Provide # of Surgeries/Births (in 100s) | | | |
| | Births | 3,164.48 | |
| | Outpatient Surgeries | 79.11 | |
| | Inpatient Surgeries | 1,582.24 | |
| Employed* Physicians Sharing Limits | 75% of Specialty Code | | |
| | | **SUB-TOTAL** | |
| | Lack of Risk Management Program | 10% Penalty x sub-total | |
| | Hospital with > 500 beds | 3% multiplier of subtotal | |
| | | **TOTAL DUE** | |

Definitions:

Hospital bed - licensed hospital beds usually on a short term basis for patients who are need of acute medical treatment and skilled nursing care 24 hours a day (Intensive diagnostic and invasive treatment for acute illness)

Mental Health/ Mental and Physical Acute Rehab bed - Care, diagnosis, and treatment for acute psychiatric, emotionally challenged, and physical handicapped patients needing 24 hour supervision, assistance and treatment.

Extended Care/ Intermediate/ Residential bed- non-acute occasional incidental medical and emergency assistance to residents living independently in retirement apartments and communities. Facilities provided with security and emergency call boxes. Some contact services are available to residents.

Nursing Home/Critical Extended Care bed - A step-down from acute medical care for patients still needing 24 hour nursing care usually for an extended or long term basis. Skilled care services needed such as medication administration, tube feeding, injections, catherizations *[sic.]* and other procedures ordered by a physician.

Health Institution/ Assisted Living/Other bed- Sub-acute minor health care and related personal services to assist residents on an ongoing and regular basis. Minor nursing care and assistance in such activities as laundry, meal preparations, bathing, social functions.

* Employed physician - A physician is considered an employee for PCF purposes if the hospital withholds and pays Social Security and Medicare taxes and pays unemployment tax on wages paid to the employee. If a physician is treated as an independent contractor for tax purposes then he/she can not be considered an employee for PCF purposes.

**NATURAL RESOURCES COMMISSION**
**Information Bulletin #46 (First Amendment)**

**GEOCACHING ON DNR PROPERTIES**

**1. Purpose and Application**

The purpose of this information bulletin is to provide guidance for the management of geocaching activities on a DNR property. A person who participates in geocaching is subject to 312 IAC 8. A "cache" is a "device" and requires a license from the department under 312 IAC 8-2-10(6)(B). The standards for a license are outlined by this information bulletin.

**2. Definitions**

(1) "Cache" means a container that is used in association with geocaching. A cache typically includes items such as a logbook, pen, pencil, map, or trinkets.
(2) "Department" refers to the department of natural resources.
(3) "DNR property" has the meaning set forth in 312 IAC 8-1-4(3).
(4) "Geocaching" means a game pursued by global positioning system (or "GPS") users. An individual or organization places a cache or caches and shares its or their location on the Internet. A participant in the game applies the GPS coordinates to locate a target cache or caches. When located, the participant records the find on a designated website such as www.geocaching.com. The game may provide that objects are traded at the cache.
(5) "Multi-cache" refers to containers that are located from information received in another cache.
(6) "Virtual cache" refers to the target for geocaching for which there is no container. The location itself is the cache. Objects are not traded at the site of a virtual cache.

**3. License Applications**

(a) A person must obtain an "official geocaching placement license" on a department form before placing a cache on or within a DNR property. A cache that is placed without first obtaining a license under this information bulletin may be removed by the department and disposed as provided in "Personal Property Found on DNR Properties" (Information Bulletin #23).

(b) The property manager is authorized to issue, condition, or deny a license application.

(c) A person who is aggrieved by a determination by the property manager may seek informal review from the division director. A determination by the division director is subject to administrative review under 312 IAC 3-1.

**4. General Prohibitions, Limitations, and Requirements**

The following prohibitions apply to the placement of any cache and to any geocaching activity:
(1) A person must not violate 312 IAC 8 or another state or a federal law.
(2) Properties administered in whole or in part by the following divisions of the department do not qualify for geocaching:
 (A) Division of nature preserves (including any property dedicated under IC 14-31-1).
 (B) Division of outdoor recreation.
(3) A person must not dig or otherwise disrupt the ground when placing a cache.
(4) A person is limited to a maximum of two (2) official geocaching placement licenses on a particular DNR property at any time.
(5) The maximum number of caches that can be approved on a DNR property at any time is the lesser of the following:
 (A) Twenty-five (25); or
 (B) The number derived by dividing the total acreage of the DNR property by two hundred (200) acres. A DNR property containing fewer than two hundred (200) acres does not qualify for geocaching. This subdivision does not apply to a property administered by the division of museums and historic sites.
(6) A property manager is not required to approve any multi-cache but may approve not more than five (5) multi-caches under an official geocaching placement license.
(7) As soon as practicable after placing a cache, the person who holds an official geocaching placement license must record the exact location on the copy of the license maintained by the property manager.
(8) The person who holds an official geocaching placement license must inspect any cache at least once every six (6) months to help ensure compliance with this information bulletin. During the inspection, the person must remove from the cache any food, alcohol, firearms, drugs, items unsuitable for minors, or other items that may pose a danger to people or wildlife.
(9) An official geocaching placement license expires one (1) year after the date of issuance.

**5. License Standards**

The property manager shall exercise reasonable discretion in determining whether to issue, condition, or deny an application for an official geocaching placement license. In the exercise of discretion, the following factors and principles apply:

(1) A cache cannot be approved for placement in a sensitive archaeological, historical, or ecological area. Examples include historic buildings or structures, caves, or areas that contain rare, threatened, or endangered plant or animals.

(2) A scheduled resource management activity, such as a timber sale or a prescribed burn, shall be considered in evaluating a license application.

(3) A cache cannot be approved for placement in an area that could reasonably cause danger to a geocaching participant or to another person who visits the DNR property. Examples of inappropriate areas include cliffs, bluffs, trees, lakes, streams, and roads.

(4) For inclusion with the license application, the property manager may require a person issued an official geocaching placement license to provide a photograph of the cache, the site where the cache is placed, or both.

(5) Any other factor reasonably consistent with proper use and protection of the particular DNR property, including implementation of a master plan.

(6) A virtual cache is exempted from licensing under this information bulletin, but a person who administers or seeks a virtual cache must comply with 312 IAC 8.

**6. License Suspension or Revocation and Site Reclamation**

(1) The property manager may suspend or revoke an official geocaching placement license, if a term of the license or of this information bulletin is violated, or if the location of the cache is found to pose a hazard to safety or the environment. The property manager shall make a reasonable attempt to notify the license holder of the action, as well as to notify the designated website. The reasons for the property manager's action shall be recorded with the license. If the license holder elects to relocate the cache, a new license application is required.

(2) Upon the suspension, revocation, or termination of an official geocaching placement license, the license holder is responsible for removal of the cache, for site restoration, and for any associated expenses. A person who places a cache without a license has the same responsibilities as if issued a license.

(3) A person who is aggrieved by a suspension or revocation may seek administrative review under 312 IAC 3-1.

**7. History**

The Natural Resources Commission approved this information bulletin on November 16, 2004. The information bulletin was published initially in the Indiana Register and became effective on January 1, 2005. The Commission approved amendments on September 20, 2005 to include the Division of Museums and Historic Sites among those DNR properties where geocaching placement could be approved. These amendments were effective November 1, 2005.

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**NATURAL RESOURCES COMMISSION**
**Information Bulletin #49**
**Waterfowl Resting Area**

**I. Introduction**

Indiana law grants the Department of Natural Resources (DNR) broad authority to manage the fish and wildlife resources of the State of Indiana. With respect to a DNR property, 312 IAC 8-2-1(a) provides that DNR may post a sign to authorize a particular use or close an area to entry by the public and 312 IAC 8-2-1(b) provides that a person must not violate a posted sign. DNR's Division of State Parks and Reservoirs and Division of Fish and Wildlife have posted signs designating certain areas they manage as a "Waterfowl Resting Area." These signs generally prohibit entry by the public and may or may not also include specific dates when entry is prohibited.

The designation of an area as a Waterfowl Resting Area is a wildlife management tool whose general purpose is to provide a place for waterfowl to congregate in an area where disturbance is held to a minimum. In order to accomplish this objective, large areas of land and water need to be set aside and posted. The objective is to limit, but not totally eliminate, access to an area designated or posted as a Waterfowl Resting Area. A Waterfowl Resting Area is not the same as a "Refuge" which is commonly understood to mean an area where access by the public and activities such as hunting are completely prohibited. Each DNR property will also have an established management plan and goals.

The Division of Reservoirs and Division of Fish and Wildlife of DNR have used designated Waterfowl Resting Areas for thirty years. This management tool has been a very effective way of balancing the use of the area by waterfowl hunters and those users that may want to enter the area for other approved activities. With competition for areas by property users with varied interests, this system has been extremely effective and allows the property management personnel to better manage the public's resource for all users and still protect the resources that are entrusted to DNR.

As stated, the primary purpose of designating a Waterfowl Resting Area is to reduce human disturbance and create favorable conditions that in turn will increase use by waterfowl. However, DNR recognizes the public may also have interests that are compatible with secondary uses of a WRA for activities such as hiking, birdwatching, boating, educational field trips, research studies or special hunting, fishing or trapping activities as deemed appropriate by the Property Manager.

The standards below for issuance of licenses are designed to accommodate various reasons why members of the public may want to enter an area designated or posted as a Waterfowl Resting Area.

**II. Definitions**

As used in this policy document:

"Waterfowl" means a wild goose, brant, or wild duck as defined in Ind. Code 14-22-7-1.

"Waterfowl Resting Area" or "WRA" means an area set aside by the DNR, including land and water, to reduce human disturbance and create favorable conditions for increased use by waterfowl. A WRA may be operated on a permanent or seasonal basis.

**III. Policy Statement for Issuance of Licenses**

The following standards are established for the issuance of licenses to enter a Waterfowl Resting Area:

1. The individual, group or organization desiring to enter must make a verbal or written request in advance to the DNR property manager or other designated DNR representative. The request must include the:
   (a) name, address and telephone number of the individual, group or organization;
   (b) activity or purpose(s) for entering;
   (c) date and expected duration of the license; and
   (d) number of persons to be covered by the license.
2. The property manager shall evaluate the request based on the management plan and goals for the particular DNR property for which entry is being sought. The property manager may deny or modify the request if it is not consistent or compatible with:
   (a) the management plan or goals of the particular DNR property; or
   (b) any other request to enter the property.
3. A license to enter a Waterfowl Resting Area shall be in writing and note any conditions or limitations determined by the property manager to be appropriate.
4. An individual, group or organization issued a license to enter a Waterfowl Resting Area shall:
   (a) keep the license in its possession at all times while in the WRA;
   (b) comply with any conditions or limitations noted on the license; and
   (c) comply with all applicable federal, state, and local laws.
5. The property manager has the authority to determine dates for special hunts in the WRA that shall require compliance with 312 IAC 8-2-3(c)(2).
6. Each DNR property manager may create forms, keep such records, and implement other procedures deemed necessary to carry out the purposes of this policy.

**DEPARTMENT OF STATE REVENUE**
**INFORMATION BULLETIN # 95**
**INCOME TAX**
**OCTOBER 2005**

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

**SUBJECT:** Hoosier Business Investment Tax Credit

**REFERENCES:** IC 6-3.1-26

**INTRODUCTION**

The Hoosier business investment tax credit (HBITC) was originally passed in 2003 effective for taxable years beginning after December 31, 2003. The statute was amended during the 2005 session of the Indiana General Assembly to expand the entities eligible for the credit, to change the calculation of the credit, and expand the definition of qualified investment.

**I. QUALIFIED ENTITIES**

A taxpayer is defined as an individual, corporation, partnership or other entity that has a state tax liability.

Pass through entities are defined as S Corporations, partnerships, trusts, limited liability companies, or limited liability partnerships. If a pass through entity does not have state tax liability against which the tax credit may be applied, a shareholder, partner, or member of the pass through entity is entitled to the credit.

**II. QUALIFIED INVESTMENTS**

The qualified investment is determined to be the amount of a taxpayer's expenditure in Indiana for any of the following items:

- The purchase of, costs associated with modernization of, or the construction of facilities and equipment used for telecommunications, production, manufacturing, fabrication, assembly, extraction, mining, processing, refining, finishing, distribution, transportation, or logistical distribution.
- Costs associated with the purchase of machinery, equipment, or special purpose buildings used to make a motion picture or audio production. Motion picture or audio production includes a feature length film, video, television services, commercial, music video or audio recording. The term also includes a corporate production for any combination of theatrical, television, or other media viewing or a television pilot.

Qualified investments include expenditures for onsite infrastructure improvements, and costs associated with retooling existing machinery and equipment. Costs associated with the construction of special purpose buildings and foundations for use in the computer, software, biological sciences, or telecommunications industry are also qualified investments.

Property that can be readily moved outside of Indiana does not qualify as a qualified investment.

All qualified investments must be made during the period from January 1, 2004 through December 31, 2007 effective for taxable years beginning after December 31, 2003.

**III. CREDIT CALCULATION PRIOR TO MAY 15, 2005**

Prior to May 15, 2005 the credit in a taxable year equaled the lesser of thirty percent (30%) of the qualified investment or the taxpayer's state tax liability growth. The following provisions apply to HBITC certifications for a pass through entity prior to May 15, 2005. "State tax liability growth" means the difference between a taxpayer's state tax liability in a taxable year minus the greater of the taxpayer's state tax liability in the most recent prior taxable year or the taxpayer's base state tax liability. "Base state tax liability" means a taxpayer's state tax liability in the taxable year immediately preceding the taxable year in which a taxpayer makes a qualified investment. The base state tax liability amount shall not be adjusted as a result of any net operating loss that could be carried back to the base year. The taxpayer can file an amended return to use a net operating loss deduction, but it will not change the amount of the base state tax liability for purposes of calculating the HBITC.

**EXAMPLE:** A regular C Corporation (taxpayer) made a qualified investment of $2,000,000 in 2004. The taxpayer had a state tax liability of $350,000 in 2003 (base state tax liability). The taxpayer's state tax liability in 2004 was $520,000. The state tax liability growth is the difference between the current year liability and the base state tax liability ($520,000-350,000=$170,000). The amount of the credit is the lesser of $600,000 (30% of the qualified investment (30% multiplied by $2,000,000=$600,000)), or the state tax liability growth of $170,000). The remaining tax credit balance of $430,000 can be carried forward to future tax years.

A pass through entity by definition is not subject to the adjusted gross income tax, and therefore does not have a state tax liability to calculate a base state tax liability or the amount of state tax liability growth, but the legislation creating the HBITC provides that pass through entities shall be eligible for the credit.

In order for a pass through entity to claim a credit, the pass through entity will calculate a state tax liability based on its Indiana taxable income and the tax liability that would be incurred based on the imputed tax liability of its partners, shareholders, or members.

**EXAMPLE:** A limited liability company has individuals and a regular C Corporation as members. The individuals represent 80% of the ownership and the Regular C Corporation represents 20%. The members' imputed rate is 4.42% (.8 multiplied by.034) for the individual members and (.2 multiplied by.085) for the Regular C member. This is arrived at by taking the individual members' percent of ownership multiplied by the individual income tax rate, plus the Regular C member's percent of ownership multiplied by the corporate adjusted gross income tax rate.

After the determination of the imputed tax rate is made for the base year, the rate shall be applied to the Indiana taxable income to arrive at the base state tax liability amount. The imputed rate will be recalculated on an annual basis to be used to calculate the state tax liability growth amount and the amount of credit that the entity is eligible to claim.

**IV. CREDIT CALCULATION FOR CERTIFICATIONS AFTER MAY 15, 2005**

SEA 496-2005 amended the HBITC statute to change the calculation of the credit by eliminating the state tax liability growth as a calculation to be used in determining the amount of the credit that an entity is eligible to receive.

The amount of credit that may be claimed by a taxpayer for a taxable year is a percentage determined by the Indiana Economic Development Corporation (IEDC), not to exceed ten percent (10%) of the amount of the qualified investment made by the taxpayer during the taxable year.

**V. ADMINISTRATION OF THE CREDIT**

**A. Application**

A taxpayer that proposes a project to create new jobs or increase wage levels in Indiana shall apply to the IEDC before the taxpayer makes the qualified investment.

**B. Amount of Credit**

The IEDC shall certify the amount of the qualified investment that is eligible for a credit. The IEDC shall grant a credit that is up to ten percent (10%) of the amount of qualified investment that is directly attributable to expanding the workforce in Indiana.

**C. Claiming the Credit**

A taxpayer claiming a credit is required to submit to the Department a copy of the certificate of verification when claiming the credit on the tax return filed by the taxpayer. The certificate of verification shall be supplied to the taxpayer by the IEDC.

**D. Carry Forward of Credit**

A taxpayer is allowed to carry forward an unused credit for the number of years determined by the IEDC, but not to exceed nine (9) consecutive taxable years, beginning with the taxable year after the taxable year in which the taxpayer makes the qualified investment.

**E. Expiration and Time Limitation of Credit**

The credit applies to qualified investments made for taxable years beginning after December 31, 2003, and ending on or before December 31, 2007. A taxpayer is not prevented from carrying forward an unused credit to a taxable year beginning after December 31, 2007 for a qualified investment made before January 1, 2008.

For further information concerning this tax credit, contact the Indiana Economic Development Corporation at One North Capitol, Suite 700, Indianapolis, IN 46204.

John Eckart
Commissioner

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**DEPARTMENT OF STATE REVENUE**

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**SUPPLEMENTAL LETTER OF FINDINGS: 01-0127; 01-0128**
**Indiana Corporate Income Tax**
**For the Years 1996 and 1997**

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

**ISSUES**

**I. Applicability of the Throw-Back Rule – Adjusted Gross Income Tax.**

**Authority**: 15 U.S.C.S. § 381; IC 6-3-2-2; IC 6-3-2-2(e); IC 6-3-2-2(n); IC 6-3-2-2(n)(1); IC 6-8.1-5-1(b); Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co., 112 S.Ct. 2447 (1992); 45 IAC 3.1-1-53(5); 45 IAC 3.1-1-64.

Taxpayer argues that the Department of Revenue (Department) erred when it determined that the money taxpayer received from the sale of auto parts to its Illinois customer should have been included in the sales factor numerator.

**II. Management Fees and Royalty Payments as Indiana Source Income – Adjusted Gross Income Tax.**

**Authority**: IC 6-3-2-1; IC 6-3-2-2(a); 45 IAC 3.1-1-38; 45 IAC 3.1-1-38(4); 45 IAC 3.1-1-55; Mobil Oil Corp. v. Dep't of Treasury, 373 N.W.2d 730 (Mich. 1985).

Taxpayer maintains that as the out-of-state parent company, the money it received in the form of management fees and royalties from its Indiana manufacturing subsidiary was not subject to Indiana's adjusted gross income tax.

**STATEMENT OF FACTS**

Taxpayers are in the business of manufacturing and selling original equipment auto parts. Two separate but related entities are involved in this protest. The first entity is the out-of-state parent company; the second entity is the manufacturing subsidiary which operates a production facility within Indiana.

The Department originally conducted an audit review of taxpayers' 1996 and 1997 business records and tax returns concluding that both taxpayers owed additional corporate income tax. Taxpayer manufacturing subsidiary (located in Indiana) argues that the money received from the sale of its auto parts to an Illinois auto manufacturer should not have been "thrown back" to Indiana. Taxpayer parent company (located in Michigan) argues that money received from taxpayer manufacturing subsidiary in the form of management fees and royalties was not subject to Indiana's corporate income tax.

Both taxpayers challenged the audit's conclusions and the assessment of additional income tax. They submitted a protest to that effect, an administrative hearing was conducted, and a Letter of Findings (LOF) was issued denying taxpayers' protest. In the belief that the Department's conclusions set out in the LOF were erroneous, taxpayers asked for and were given the opportunity for a rehearing. The rehearing was held, and this Supplemental Letter of Findings (SLOF) results.

**DISCUSSION**

**I. Applicability of the Throw-Back Rule – Adjusted Gross Income Tax.**

Taxpayer manufacturing subsidiary argues that the Department erred when it "threw back" to Indiana the Illinois sales. Taxpayer manufacturing subsidiary further argues that the LOF compounded the original error when it failed to determine that the sales were subject to Illinois income tax.

The audit determined – and the LOF agreed – that, for purposes of determining taxpayer's Indiana tax liability, sales of taxpayer's auto parts to Illinois should be thrown back to Indiana because the sales were made within Illinois where taxpayer (the Indiana manufacturing subsidiary) was not subject to that state's income tax.

The audit arrived at this conclusion because taxpayer did not have an Illinois situs, Illinois property, Illinois payroll, or an Illinois nexus. The audit found authority for its decision to throw back the Illinois sales at 45 IAC 3.1-1-53(5) which states that "[i]f the taxpayer is not taxable in the state of the purchaser, the sales is attributed to [Indiana] if the property is shipped from an office, store, warehouse, factory, or other place of storage in the state." These sales are called "throw-back" sales.

The underlying rule is found at IC 6-3-2-2. IC 6-3-2-2(e) provides that "[s]ales of tangible personal property are in this state if... (2) the property is shipped from an office, a store, a warehouse, a factory, or other place of storage in this state and... (B) the taxpayer is not taxable in the state of the purchaser." IC 6-3-2-2(n) provides that "[f]or purposes of allocation and apportionment of income... 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." Accordingly, in order to properly allocate income to a foreign state, taxpayer must show that one of the taxes listed in IC 6-3-2-2(n)(1) has been levied against him or that the foreign state has the jurisdiction to impose a net income tax regardless of "whether, in fact, the state does or does not." Id.

Therefore, in order to avoid having the Illinois sales receipts thrown back to Indiana, the taxpayer must show that its Illinois activities are such that it was brought within the orbit of the Illinois tax scheme. In support of the proposition that the sales should be thrown back to Indiana, the audit report noted that the taxpayer did not pay Illinois income tax during 1996 and 1997 and that it had not filed Illinois tax returns during that period. In addition, the audit reported that taxpayer did not maintain an Illinois business location, did not have property within Illinois, and did not have payroll attributable to Illinois.

The fact that taxpayer did not pay Illinois income tax during this period and – in fact – did not even file Illinois returns is useful in resolving the throw-back issue, but it is not determinative. Instead, whether or not Indiana can throw back these sales hinges on whether or not "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." 45 IAC 3.1-1-64.

15 U.S.C.S. § 381 (Public Law 86-272) controls those occasions in which a state – such as Illinois – can impose a tax on the net income, derived from sources within that state, received by foreign (out-of-state) taxpayers. 15 U.S.C.S. § 381 sets a minimum standard for the imposition of a state income tax based on the solicitation of interstate sales. Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co., 112 S.Ct. 2447, 2453 (1992). 15 U.S.C.S. § 381 prohibits Illinois from imposing its net income tax on taxpayer if taxpayer's only business activity within Illinois is the solicitation of sales. Illinois may not impose its net income tax on income received from an out-of-state's entity's business activities unless those business activities exceed the "mere" solicitation of sales. Conversely, the effect of Indiana's throw-back rule is to revert this sales income back to Indiana – by including the destination state sales in taxpayer's Indiana sales numerator – in those situations where 15 U.S.C.S. § 381 deprives the destination state of the authority to impose a net income tax. 45 IAC 3.1-1-64. In effect, 15 U.S.C.S. § 381 allows Indiana to tax out-of-state business activities, without violating the Commerce Clause and without subjecting taxpayer to double taxation, because Indiana's right to tax those out-of-state activities is derivative of the foreign state's own taxing authority. In every sales transaction, at least one state has the constitutional authority to tax income derived from the sale of tangible personal property; if the state wherein the sale occurred is precluded from doing so by 15 U.S.C.S. § 381, then that income may be "thrown back" to the originating state.

Taxpayer maintains that its Illinois activities during 1996 and 1997 brought it within the realm of the Illinois income tax. Specifically, taxpayer notes that it has multiple employees who "work at the customer facility in Illinois to ensure that all the needs and concerns of the customer are addressed." Taxpayer explains that "[c]ertain of these employees spend 100% of their time at the customer location in Illinois." Taxpayer concludes that its Illinois "activities were not sporadic, not de minimis, and a proper interpretation of Wrigley could not conclude that these activities are protected by PL 86-272.

During the initial audit – conducted during 1999 – the audit reported that taxpayer's controller indicated that a "trouble shooter" traveled to Illinois to examine defective auto parts but that this occurred only sporadically. It is apparent that taxpayer and the audit differ as to the extent of the Indiana employees' involvement in Illinois. The audit found that the employees rarely traveled to Illinois; taxpayer claims that it has Indiana employees who spend 100 percent of their time in Illinois thereby subjecting itself to Illinois income tax.

When a taxpayer challenges a tax assessment, it is up to the taxpayer to demonstrate that the assessment is incorrect. "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). Set up against the audit's finding that the employees' Illinois activities were de minimis, taxpayer has submitted the bare assertion that its employees' involvement with its Illinois customer is considerably more extensive. However, taxpayer has provided nothing specific documenting the extent of this involvement during 1996 and 1997.

The Department is unable to conclude that taxpayer has met its "burden of proving that the proposed assessment is wrong...." Id. Although not conclusive on the issue, the Department finds especially telling the fact that taxpayer itself did not conclude that it was subject to Illinois income tax during 1996 and 1997 and, in fact, did not submit Illinois state income tax returns during that period. The Department is unable to depart from its original conclusion as stated in the LOF; "Taxpayer's sporadic inspection of non-conforming [auto] parts 'is sufficiently *de minimis* to avoid loss of the tax immunity conferred by § 381' The inspection of the auto parts did not void the immunity from Illinois income taxes conferred under 15 U.S.C.S. § 381 and Illinois may not tax these particular receipts."

The Department stands by its original decision that the audit was correct in concluding that the income received from Illinois sales should have been thrown back to Indiana.

**FINDING**

Taxpayer's protest is respectfully denied.

**II. Management Fees and Royalty Payments as Indiana Source Income – Adjusted Gross Income Tax.**

Taxpayer parent company (Michigan) and taxpayer manufacturing subsidiary (Indiana) entered into an arrangement by which taxpayer manufacturing subsidiary paid money to taxpayer parent company. Taxpayer parent company agreed to provide taxpayer manufacturing subsidiary with "patented proprietary technology," "ancillary technical services," the right to use taxpayer parent company's trade name, and the right to use proprietary "just in time computer technology." (*Hereinafter* "intellectual property") In return, taxpayer manufacturing subsidiary agreed to produce auto parts which met taxpayer parent company's standards for quality of materials, procedures, and manufacturing methods. Taxpayer manufacturing subsidiary agreed to pay taxpayer parent company a five percent royalty fee based on the invoice price of the auto parts.

Taxpayer parent company also agreed to provide management services to taxpayer manufacturing subsidiary. According to the audit report, taxpayer parent company's personnel visited the Indiana facility, provided engineering services, provided research and development services, and provided various management functions. In return, taxpayer manufacturing subsidiary paid taxpayer parent company a "management fee."

The audit review concluded that taxpayer parent company (Michigan) should have been paying Indiana adjusted gross and supplemental net income tax on the royalties and management fees received from taxpayer manufacturing subsidiary (Indiana). Taxpayer disagreed and submitted a protest. The Department's original LOF concluded that the intellectual property had acquired an Indiana "business situs" and that the provision of management services constituted "income from doing business in this state."

Taxpayer parent company continues to disagree stating that the conclusions set out in the LOF were "both factually and technically incorrect." In regards to the management services agreement, taxpayer claims that there is no evidence that taxpayer parent company ever actually performed any services for its Indiana affiliates; taxpayer parent company states that the management services agreement was in place only to cover the *possibility* that such services would be needed by the Indiana affiliates.

IC 6-3-2-1 imposes a tax on the adjusted gross income derived from "sources within Indiana." IC 6-3-2-2(a) states 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 "[r]endering services to customers in the state." 45 IAC 3.1-1-38(4).

Taxpayer parent company appears to be arguing that the money attributable to the parties' management services contract is not subject to Indiana adjusted gross income tax because taxpayer parent company never actually did anything *within* this state to earn this money. However, questions of taxability are not determined by whether or not the parties to an agreement have struck a satisfactory bargain or whether one of the parties ever performed its part of the bargain. In effect, taxpayer manufacturing subsidiary was simply paying for the assurance that *if* it ever needed these services within the state, taxpayer parent company would be prepared to provide them. If taxpayer parent company never performed any of these services but merely stood ready to provide them, then that assurance was the very service that taxpayer parent company was providing to the Indiana entity.

In this case, taxpayer was providing a service to taxpayer manufacturing subsidiary in return for which taxpayer manufacturing subsidiary paid taxpayer parent company a not insubstantial amount of money. Taxpayer manufacturing subsidiary and taxpayer parent company entered into an agreement by which taxpayer parent company would provide taxpayer manufacturing subsidiary certain "management services." Questions over who got the best of the bargain or whether taxpayer manufacturing subsidiary received $1 worth of services or $1,000,000 worth of services are irrelevant; the fact remains that taxpayer parent company received money from an Indiana entity to provide a "service" to that Indiana entity.

In addition, taxpayer continues to assert that the royalties paid for the use of the intellectual property is not subject to adjusted gross income tax. According to taxpayer, the intellectual property never acquired an Indiana situs. Taxpayer contends that only Michigan can include the royalty income within that state's receipts factor. According to taxpayer, the royalty income is "sourced to Michigan under the definition of 'gross receipt.'" However, it should be noted that Michigan exempts royalty income from taxation; the Michigan Single Business Tax Act taxes the one which pays royalties, not the one which receives them. *See* Mobil Oil Corp. v. Dep't of Treasury, 373 N.W.2d 730, 742-43 (Mich. 1985).

In order for Indiana to tax the money received from an intangible – such as taxpayer parent company's patents and trademarks – the intangible must have acquired a "business situs" within the state. 45 IAC 3.1-1-55 states that "[t]he situs of intangible personal property is the commercial domicile of the taxpayer... unless the property has acquired a 'business situs' elsewhere. 'Business situs' is the place at which the intangible personal property is employed as capital; or the place where the property is located if possession and control of the property is localized in connection with a trade or business so that substantial use or value attaches to the property."

Taxpayer parent company's commercial domicile is in Michigan. However, by virtue of the royalty agreement between taxpayer parent company and taxpayer manufacturing subsidiary, the intellectual property has acquired a "business situs" within Indiana. Taxpayer parent company licensed taxpayer manufacturing subsidiary to make use of the trademarks and patents within Indiana in conjunction with the manufacture and sale of taxpayer manufacturing subsidiary's auto parts. The "substantial use or value" which attaches to this intellectual property derives from the licensee's right to exploit that intellectual property. The entity which exploits the intellectual property is taxpayer manufacturing subsidiary because it is the licensee in the royalty agreement. As the licensee, taxpayer manufacturing subsidiary exploits that intellectual property within Indiana. The royalties are simply the economic benefits which derive from the ability of taxpayer manufacturing subsidiary to exploit the intellectual property; those economic benefits (the royalties) flow from taxpayer manufacturing subsidiary to taxpayer parent company but these benefits are attributable to the Indiana licensee's activities. Under 45 IAC 3.1-1-55, the trademarks have acquired an Indiana business situs; under IC 6-3-2-2(a), the royalty payments are subject to Indiana's adjusted gross income tax.

**FINDING**

Taxpayer's protest is respectfully denied.

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**DEPARTMENT OF STATE REVENUE**

04-20020502.LOF

**LETTER OF FINDINGS: 02-0502**
**Sales and Use Tax**
**For Tax Period 1995-1998**

**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 the document will provide the general public with information about the Department's official position concerning a specific issue.

**ISSUES**

**I. Sales and Use Tax—Out-of-state use**

**Authority**: Ind. Code § 6-2.5-3-2; Ind. Code § 6-2.5-3-7

Taxpayer protests the assessment of use tax with respect to display tables that Taxpayer maintains were stored in another state.

**II. Sales and Use Tax—Services**

**Authority**: Ind. Code § 6-2.5-4-10

Taxpayer protests the assessment of use tax with respect to tangible personal property that it maintained was under the control of a third party providing installation of other property.

**III. Sales and Use Tax—Out-of-state purchases**

**Authority**: Ind. Code § 6-2.5-3-2; Ind. Code § 6-2.5-3-5; Ind. Code § 6-2.5-5-3; Ind. Code § 6-2.5-5-5.1

Taxpayer protests the assessment of use tax with respect to several items that it maintains were purchased for use outside Indiana.

**IV. Sales and Use Tax—Real property improvements**

**Authority**: Ind. Code § 6-2.5-4-9; 45 IAC 2.2-4-21 to -26

Taxpayer protests the assessment of use tax with respect to tangible personal property that was incorporated into real estate.

**V. Tax Administration: Negligence Penalty**

**Authority**: Ind. Code § 6-8.1-10-2.1; 45 IAC 15-11-2

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

**STATEMENT OF FACTS**

Taxpayer is engaged in a variety of industries. Taxpayer operated a number of plants in Indiana and other states during the period in question. During the years in question the Department audited Taxpayer. As a result of the audit, use tax was assessed on a number of items. Several issues were resolved prior to hearing; however, several items remained in dispute. These items included use tax on display tables, items that Taxpayer maintained were for services rather than rental or leasing of tangible personal property, certain items that Taxpayer maintained were shipped to and used at facilities outside Indiana, and personal property that became part of Taxpayer's Indiana real estate. Taxpayer has also protested the imposition of penalties with respect to its assessment.

**DISCUSSION**

**I. Sales and Use Tax—Out-of-state use**

First, Taxpayer argues that its display tables were shipped to Michigan and stored in Michigan. Under Ind. Code § 6-2.5-3-7(a),

A person who acquires tangible personal property from a retail merchant for delivery in Indiana is presumed to have acquired the property for storage, use, or consumption in Indiana, unless the person or the retail merchant can produce evidence to the contrary.

Here, Taxpayer's invoice indicates that the tables were shipped to an Indiana address. Accordingly, the presumption exists that the property was used in Indiana within the meaning of Ind. Code § 6-2.5-3-2. Taxpayer has not otherwise provided sufficient information to rebut this presumption. Further, Taxpayer's ordinary procedure, per their representative, was to have property shipped to the location where the property would be used. In this case, Taxpayer shipped the property to Indiana, which lends further support to the auditor's position.

**FINDING**

Taxpayer's protest is denied.

**II. Sales and Use Tax-Services**

**DISCUSSION**

Second, Taxpayer argues that a number of items for which it was assessed use tax actually represented non-taxable services. For instance, Taxpayer argues that it entered into contracts for installation of property. As part of the installation, Taxpayer was charged for several items, including labor charges that Department concedes are not taxable. However, several items appeared on the invoices, including fork trucks, gas welders, and "cutting outfits." The Department concluded that Taxpayer rented or leased tangible personal property in Indiana, and accordingly was responsible for use tax under Ind. Code § 6-2.5-4-10.

Here, Taxpayer has provided sufficient information to conclude that Taxpayer merely purchased for the services of the contractor for installation, rather than the right to the personal property used in the installation process. Accordingly, Taxpayer is sustained.

**FINDING**

Taxpayer's protest is sustained.

**III. Sales and Use Tax-Out of state purchases**

**DISCUSSION**

Third, Taxpayer argues that a number of items for its appliance control facilities, along a handful of computer-related parts, were not shipped into Indiana. Taxpayer argues that its arrangement is to have a plant order the equipment as necessary, and the part is shipped to that plant. Taxpayer operated facilities that required the items in dispute in multiple states, including Indiana. The auditor noted that the parts in question were shipped from another state into Indiana and that no tax was paid to the states where the parts were shipped. If this is the case, Taxpayer is subject to use tax per Ind. Code § 6-2.5-3-2. A credit is allowable for use tax paid to another state per Ind. Code § 6-2.5-3-5; however, Taxpayer indicated that it did not pay sales or use taxes to the other states.

Taxpayer has not provided further information (e.g, parallel purchases for its Indiana facilities, or information that would allow the Department to compare Taxpayer's and Department's respective contentions) that would allow the Department to sustain Taxpayer.

Taxpayer further argues that the items in question were part of its manufacturing process, and accordingly exempt per Ind. Code § 6-2.5-5-3 or -5.1. However, Taxpayer has not provided sufficient information to substantiate this argument.

**FINDING**

Taxpayer's protest is denied.

**IV. Sales and Use Tax-Real property improvements**

**DISCUSSION**

Fourth, Taxpayer argues that several items for which the auditor assessed tax were items that were incorporated into real estate. As a result, Taxpayer argues that the contractor was responsible for payment of sales tax rather than Taxpayer.

Under Ind. Code § 6-2.5-4-9(a), retail purchases of tangible personal property generally are subject to sales and use tax when the purchaser incorporates the personal property into a structure or other facility, and the property becomes part of the structure.

Generally, 45 IAC 2.2-4-21 to -26 create liability for contractors for sales tax for their purchases of tangible personal property to be incorporated into real estate. Here, however, Taxpayer purchased items of tangible personal property. The tangible personal property became part of Taxpayer's realty via installation by a contractor. Taxpayer is the purchaser and user of the tangible personal property in this instance, and accordingly is subject to tax.

**FINDING**

Taxpayer's protest is denied.

**V. Tax Administration: Negligence Penalty**

Finally, Taxpayer protests the assessment of negligence penalties with respect to the assessment. The Department may impose a ten percent (10%) negligence penalty. Ind. Code § 6-8.1-10-2.1 and 45 IAC 15-11-2. Taxpayer's failure to timely file income tax returns, generally, will result in penalty assessment. Ind. Code § 6-8.1-10-2.1(a)(1). The Department, however, may waive this penalty if the taxpayer can establish that its failure to file "was due to reasonable cause and not due to negligence." 45 IAC 15-11-2(c). A taxpayer may demonstrate reasonable cause by showing "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*. Taxpayer has not made the necessary showing in this case.

**FINDING**

Taxpayer's protest is denied.

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**DEPARTMENT OF STATE REVENUE**

0220040025.LOF

**LETTER OF FINDINGS NUMBER: 04-0025**
**Corporate Income Tax**
**For the Years 1999, 2000, and 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**

**I. Corporate Income Tax—Net Operating Loss**

**Authority:** C 6-8.1-5-1(b); IRC § 172.

Taxpayer protests the denial by the Department to apply NOLs from previous years to Taxpayer's current assessment.

**II. Penalties**

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

Taxpayer seeks an abatement of penalties.

**STATEMENT OF FACTS**

Taxpayer filed a consolidated gross and adjusted gross income tax return which included three affiliated companies. Audit determined that two of the affiliated companies conducted activities of a financial institution and should have filed Financial Institutions returns; therefore, these two companies should not have been included in corporate income tax returns. Audit excluded the two financial institution affiliates from the gross and adjusted gross income tax returns. This exclusion resulted in assessments of corporate income tax against Taxpayer.

Taxpayer requested that its 1995 - 1997 net operating losses (NOLs) be carried forward to offset income generated in 1999, 2000, and 2001. Taxpayer stated those losses would reduce the assessment by $3,538. Taxpayer acknowledged in its protest letter that the NOLs from tax years 1995 – 1997 inadvertently were not utilized in tax years 1998 – 2000.

**DISCUSSION**

All tax assessments are presumed to be accurate; the taxpayer bears the burden of proving that an assessment is incorrect. IC 6-8.1-5-1(b).

IRC § 172 allows a deduction for net operating losses. For tax years 1995 – 1997, an NOL could be carried back three years and carried forward fifteen years. An NOL must be carried back before being carried forward unless an election is made to forego the carry back. The election to forego the carry back is found on the federal corporate tax return. *See* Form 1120, Schedule K. A taxpayer must check the box to forego carrying back the NOL. On Taxpayer's 1995/96 federal return, it calculated a loss, but did not check the box on line 14 of Schedule K to forego the carry back. The same is true for 1996 and 1997.

Taxpayer asks that losses from tax years 1995 – 1997 be applied to the current audit assessment. NOLs are applied in a particular way. Taxpayer did not elect to forego carrying back the losses. Additionally, Taxpayer did not utilize the NOLs in tax years 1998 – 2000. Taxpayer has failed to establish the existence of NOLs that could be used to offset the proposed assessment.

**FINDING**

For the reasons stated above, Taxpayer's protest is denied.

**II. Penalties**

**DISCUSSION**

IC 6-8.1-10-2.1 requires that a penalty be imposed if the tax deficiency results from the taxpayer's negligence. 45 IAC 15-11-2(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." *Id.* IC 6-8.1-10-2.1(d) allows the Department to waive the penalty upon a showing that the failure to pay the deficiency was based on "reasonable cause and not due to willful neglect." 45 IAC 15-11-2(c) requires that in order to establish "reasonable cause," the taxpayer must demonstrate that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed...." Taxpayer has not shown it used the "ordinary business care and prudence" expected of an "ordinary reasonable taxpayer" that would warrant abatement of the negligence penalty.

**FINDING**

For the reasons stated above, Taxpayer's protest is denied.

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**DEPARTMENT OF STATE REVENUE**

0420040236.LOF

**LETTER OF FINDINGS NUMBER: 04-0236**
**Sales and Use Tax**
**For the Periods 2000 & 2001 and 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 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**. **Sales Tax—Requirement to calculate and collect sales tax on retail transactions**

**Authority**: IC 6-8.1-5-1(b); IC 6-2.5-2-1; IC 6-2.5-4-1.

Taxpayer protests the assessment of sales tax due.

**STATEMENT OF FACTS**

Taxpayer's principal business activity is the manufacturing of various signs. These signs include aluminum signs, illuminated signs, single-faced and double-faced wooden signs, coroplast signs, sandwich signs, and magnetic signs. The signs are sold over the counter and in some instances the signs are installed by Taxpayer. Taxpayer's sales also include vinyl letters & numbers, lettering of customers' vehicles, banners, show cards, billboards, sandblasting, trade booth logos, name plates, and car plates.

Taxpayer was not registered as a retail merchant for the years covered by the audit. Taxpayer stated that when he first opened the business in 1989, he contacted the Department and was told he did not need to register and collect sales tax. It was his understanding that he should pay sales tax on all materials he purchased. Taxpayer does not remember who gave him this information; neither does Taxpayer have anything in writing from the Department to support his statements.

A review of sales invoices revealed sales of tangible personal property on which no sales tax was charged or collected by Taxpayer. An adjustment was made to assess sales tax on all tangible personal property sold. Items taxed included aluminum signs, illuminated signs, single-faced and double-faced wooden signs, coroplast signs, sandwich signs, magnetic signs, banners, and other miscellaneous items.

Taxpayer also had service receipts which were not taxed in the audit, as in accord with Indiana statutes.

Sales tax due was assessed on all taxable retail transactions. Credit was given to Taxpayer on the purchase invoices on which Taxpayer paid sales tax when he purchased the items, but which were resold to his customers.

Taxpayer filed a protest and a hearing was held.

**I**. **Sales Tax—Requirement to withhold and submit sales tax**

**DISCUSSION**

All tax assessments are presumed to be accurate; the taxpayer bears the burden of proving that an assessment is incorrect. IC 6-8.1-5-1(b). IC 6-2.5-2-1 imposes sales tax on retail transactions made in Indiana and a retail merchant is required to collect the tax as agent for the state. IC 6-2.5-4-1 defines a retail transaction as the acquisition of tangible personal property for resale to a customer for consideration. When tangible personal property is transferred to a customer, sales tax is to be calculated and collected.

Taxpayer stated in his protest letter that he operates a small sign painting and manufacturing company that began in 1989. Taxpayer stated that the business began with most of the work being the labor-intensive painting of custom signs and billboards. Taxpayer further stated that when he opened the business, he phoned the Department of Revenue for instructions on collecting sales tax. He explained that his work consisted of painting signs and billboards and that his prior experience had been that sales tax is paid when the sign company he had worked for purchased supplies. Taxpayer recalls being told that this is correct, except when the supplies purchased are significant items of the sign, then materials and labor should be stated separately and sales tax remitted on the materials, less any tax paid on the original purchase. Unfortunately, no documentation exists of this interaction with the Department. Taxpayer paid sales tax on his material purchases and thought he was not meeting the criteria for collecting sales tax.

At the hearing, Taxpayer explained that the business has expanded over the years and that he continued to rely on the information he had received from the Department in 1989. It needs to be noted, that based on what Taxpayer informed the Department his business activities would be, the information provided was sound. However, Taxpayer's business has expanded and at the time of the audit significant retail transactions were occurring upon which sales tax should have been calculated and collected from customers. Taxpayer's business evolved from painting signs into selling signs and sign materials. The Taxpayer's representative conceded at the hearing that Taxpayer's business had expanded and that Taxpayer had been relying upon information obtained from the Department years earlier. Taxpayer sold signs and sign materials at retail and sales tax needed to have been calculated and collected from the customers.

**FINDING**

For the reasons stated above, Taxpayer's protest is denied.

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**DEPARTMENT OF STATE REVENUE**

0420040323.LOF
0420040324.LOF

**LETTER OF FINDINGS NUMBER: 04-0323 and 04-0324**
**Sales and Use Tax**
**For the Periods 2001 - 2003**

**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. Sales Tax—Shipping charges**

**Authority**: IC 6-8.1-5-1(b); IC 6-2.5-2-1; 45 IAC 2.2-4-1(b); 45 IAC 2.2-4-3.

Taxpayer protests the assessment of sales tax due on shipping charges listed on its invoices to customers.

**STATEMENT OF FACTS**

Taxpayer has two primarily lines of business. First, it is a forms distributor, acting as a retailer of various business forms that are printed by its vendors. Taxpayer outsources the order to various vendors that make the product and then ship it to Taxpayer's customers. Second, Taxpayer is an in-house print shop. It makes printed booklets, programs, continuous forms, carbonless forms, business checks, letterheads, envelopes, brochures, banners, and labels. The business activity is sales and the product is printing.

An audit was conducted and the Department noted that Taxpayer had not charged sales tax, when applicable, on shipping and handling charges. The Department assessed Taxpayer the sales tax due. Taxpayer filed a protest and a hearing was held.

**I. Sales Tax—Shipping charges**

**DISCUSSION**

All tax assessments are presumed to be accurate; the taxpayer bears the burden of proving that an assessment is incorrect. IC 6-8.1-5-1(b). IC 6-2.5-2-1 imposes sales tax on retail transactions made in Indiana and a retail merchant is required to collect the tax as agent for the state. Under Indiana statutes and regulations, any and all charges prior to delivery are subject to sales tax if the transaction is taxable. Taxpayer's invoices have a separate line—marked "SHIPPING & HANDLING"—for shipping and handling charges.

45 IAC 2.2-4-1(b) states that all elements of consideration are included in gross retail income subject to tax; elements of consideration include, any additional bona fide charges added to or included in the price for preparation, fabrication, alteration, modification, finishing, completion, or delivery. 45 IAC 2.2-4-3 states that separately stated delivery charges are considered part of selling at retail and are subject to sales tax if the delivery is made by or on behalf of the seller of the property. The regulation also includes guidelines based upon F.O.B. But these guidelines do not apply because Taxpayer did not separately state delivery charges on its invoices, but instead included the delivery charges under the combined line item, "SHIPPING & HANDLING." This combined charge is taxable under 45 IAC 2.2-4-1(b).

Taxpayer argued at the hearing that it can show that the shipping and handling line item charge was the pass-through cost to ship the items via UPS or other delivery carriers. While this may be true, Taxpayer listed the charged under a combined line item for preparation and delivery, not a separately stated line items for delivery only. Taxpayer rebutted by stating that it used preprinted invoices with a line item marked "SHIPPING & HANDLING." While this may be true and may be an industry standard preprinted form, Taxpayer was not bound to have to use that preprinted line, but could have separately stated the delivery charge on the invoice to indicate the charge was for delivery or freight alone.

**FINDING**

For the reasons stated above, Taxpayer's protest is denied.

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**DEPARTMENT OF STATE REVENUE**

0320040332.LOF

**LETTER OF FINDINGS NUMBER: 04-0332**
**Responsible Officer**
**Periods of 2002 and 2003**

**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: Responsible Officer Liability**

**Authority:** IC 6-2.5-9-3; IC 6-3-4-8; IC 6-8.1-5-1 (b); Indiana Department of Revenue v. Safayan 654 N.E.2d 270, 273 (Ind.1995).

The taxpayer protests the proposed assessment of responsible officer liability for withholding taxes.

**STATEMENT OF FACTS**

The taxpayer was the Vice President of a business (hereinafter "Company X"). Her former husband was President of Company X. More facts will be provided as needed below.

**I. Withholding Tax: Responsible Officer Liability**

**DISCUSSION**

The proposed withholding taxes were assessed against taxpayer pursuant to IC 6-3-4-8(f), which states in part that "All money deducted and withheld by an employer shall immediately upon such deduction be the money of the state, and every employer who deducts and retains any amount of money … shall hold the same in trust for the state of Indiana…." Also of import is Indiana Department of Revenue v. Safayan, 654 N.E.2d 270, 273 (Ind.1995), which states "The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that they are paid." Finally, under IC 6-8.1-5-1(b) Indiana Department of Revenue proposed assessments are "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."

Regarding Company X, the taxpayer states that for the years "2002 and 2003, [taxpayer] was not:

A. A shareholder in such business;

B. An employee of such business, either as an officer, director or regular employee; and

C. All interest in such business had been awarded to her husband in July 2001, pursuant to Decree of Dissolution of their marriage … and while [taxpayer's] former husband was to pay her for that interest, she never received a dime and her husband ended up taking bankruptcy."

Additionally, the taxpayer argues that "Even prior to 2001, [taxpayer] had no real participation in that business" and the title of "Vice President" was only a nominal title. Taxpayer asserts that she "was not in charge of any other employees, did not write any checks on the business, including payroll checks for employees, nor did she fill out any withholding forms or do any real book work for the company." To buttress her case that she is not responsible for the trust taxes, taxpayer cites to the deposition testimony of her former husband. In relevant part, the taxpayer's spouse testified while deposed to the following:

> Q: What position did your former wife have in that business?
> A: She was the vice president.
> ***
> Q: What did she do? What did she do as vice president?
> A: She did nothing.

And further:

> Q: You were the guy that wrote the checks and paid the bills…
> A: For [Company X].
> Q: Basically, she didn't do anything but have a title and you're the one that ran the business?
> A: Exactly.
> Q: And it's consequence because you were the guy that ran the business. This was basically your business she didn't have squat to do with it. She basically had a title and that was about it…
> A. Right, because she was married to me.
> ***
> Q: So you had to pay the 9-40s [*sic*] and the 9-41s [*sic*] and all that kind of stuff. That was your responsibility?
> A: Yes, and the job that she was supposed to do she didn't do and I had to ask…I paid a secretary eight ($8.00) bucks an hour to do it later on….

Taxpayer states that her spouse "was the person solely in charge of employee compensation and 940's and 941's and any of the recordkeeping of the business and payment of the bills, taxes, etc. Taxpayer knew nothing of these matters." Taxpayer also provided faxed copies of the Dissolution Settlement Agreement, dated for July of 2001, and a Decree of Dissolution also dated for July of 2001.

The Department also argues that IC 6-8.1-10-9 is applicable (which would also make the taxpayer liable for IFTA taxes for 2003). In relevant part, that statute states:

(c) Unless a clearance is issued under subsection (g), for a period of one (1) year following the filing of the form of notification with the department, or the filing of all necessary tax returns as required by this title, including the final tax return, whichever is later, the *corporate officers* and *directors remain personally liable*, subject to IC 23-1-35-1(e) or IC 23-17, for any acts or omissions that result in the distribution of corporate assets in violation of the interests of the state or a political subdivision (as defined in IC 36-1-2-13). An officer or director held liable for an unlawful distribution under this subsection is entitled to contribution:

(1) from every other director who voted for or assented to the distribution, subject to IC 23-1-35-1(e) or IC 23-17; and

(2) from each shareholder for the amount the shareholder accepted.

(d) The corporation's *officers'* and *directors' personal liability* includes all taxes, penalties, interest, and fees associated with the collection of the liability due the department or the county. In addition to the penalties provided elsewhere in this title, a penalty of up to thirty percent (30%) of the unpaid tax may be imposed on the corporate officers and directors for failure to take reasonable steps to set aside corporate assets to meet the liability due the department or the county.

(*Emphasis added*).

IC 23-1-35-1(e) states:

A director is not liable for any action taken as a director, or any failure to take any action, unless:

(1) the director has breached or failed to perform the duties of the director's office in compliance with this section; and

(2) the breach or failure to perform constitutes willful misconduct or recklessness.

A "Summary of Business Entity Information" from the Indiana Secretary of State notes that the company was "Voluntarily Dissolved," and that the "Date Terminated" for the company was July 11, 2003. The "Summary" does not list the taxpayer as the registered agent, president, or secretary. The taxpayer is only listed on the "Summary" as an incorporator. The "Summary" also notes the following: "Entity Reports: 1997/1998, 1999/2000, 2001/2002-."

The "Summary" does not show the taxpayer as a corporate officer or director as of the last "entity report" date. And, as noted earlier regarding Company X, the taxpayer has stated that for the years "2002 and 2003, [taxpayer] was not:

A. A shareholder in such business;

B. An employee of such business, either as an officer, director or regular employee; and

C. All interest in such business had been awarded to her husband in July 2001, pursuant to Decree of Dissolution of their marriage … and while [taxpayer's] former husband was to pay her for that interest, she never received a dime and her husband ended up taking bankruptcy."

**FINDING**

The taxpayer's protest is sustained.

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**DEPARTMENT OF STATE REVENUE**

0420040350.LOF

**LETTER OF FINDINGS NUMBER: 04-0350**
**Sales and Use Tax**
**For Tax Years 2003**

**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. Sales and Use—Aircraft Purchase**

**Authority:** 45 IAC 2.2-4-27; 45 IAC 2.2-5-15; Black's Law Dictionary 898 (7th ed. 1999)

Taxpayer protests the imposition of sales tax on the purchase of an aircraft.

**STATEMENT OF FACTS**

Taxpayer purchased an aircraft, but did not pay sales tax on the purchase. Taxpayer claimed that the purchase was exempt from sales tax because the aircraft was to be used for rental or leasing to others. The Indiana Department of Revenue ("Department") conducted an investigation regarding the rental or leasing of the aircraft and determined that there was insufficient evidence to support the claim of rental or leasing as the use of the aircraft. As a result of this investigation, the Department denied the claim for exemption and issued a proposed assessment for use tax on the purchase of the aircraft. Taxpayer protests the assessment. Further facts will be supplied as required.

**DISCUSSION**

**I. Sales and Use—Aircraft Purchase**

Taxpayer protests the imposition of sales tax on its purchase of an aircraft in 2003. Taxpayer paid one million, five hundred ninety-five thousand dollars ($1,595,000.00) for the aircraft. The Department compared a non-related aircraft rental company's rate of one thousand dollars per hour ($1,000.00/hour) for the same type of aircraft, to the rate of thirty-five hundred dollars per month ($3,500.00/month) taxpayer charged for its aircraft. The rental rate was far below the market rate and took no measure of actual usage. The aircraft could only be used 3.5 hours per month to meet the market rate. Taxpayer provided records indicating far more than 3.5 hours use for most months. Also, the same individual signed the lease as both lessor and lessee. The Department determined that taxpayer was not renting the aircraft and denied the exemption.

The exemption at issue is found in 45 IAC 2.2-5-15, which states:

(a) The state gross retail tax shall not apply to sales of any tangible personal property to a purchaser who purchases the same for the purpose of reselling, renting or leasing, in the regular course of the purchaser's business, such tangible personal property in the form in which it is sold to such purchaser.

(b) General rule. Sales of tangible personal property for resale, renting or leasing are exempt from tax if all of the following conditions are satisfied:

(1) The tangible personal property is sold to a purchaser who purchases this property to resell, rent or lease it;

(2) The purchaser is occupationally engaged in reselling, renting or leasing such property in the regular course of his business; and

(3) The property is resold, rented or leased in the same form in which it was purchased

(c) Application of general rule.

(1) The tangible personal property must be sold to a purchaser who makes the purchase with the intention of reselling, renting or leasing the property. This exemption does not apply to purchasers who intend to consume or use the property or add value to the property through the rendition of services or performance of work with respect to such property.

(2) The purchaser must be occupationally engaged in reselling, renting or leasing such property in the regular course of his business. Occasional sales and sales by servicemen in the course of rendering services shall be conclusive evidence that the purchaser is not occupationally engaged in reselling the purchased property in the regular course of his business.

(3) The property must be resold, rented or leased in the same form in which it was purchased.

45 IAC 2.2-5-15(b) requires that three conditions be met in order to qualify for the exemption. One condition is 45 IAC 2.2-5-15(b)(2), which states that the purchaser must be occupationally engaged in reselling, renting or leasing such property in the regular course of his business. The Department notes that a single individual signed as both lessee and lessor on the leasing agreement. A lease is defined as "[a] contract by which the rightful possessor of personal property conveys the right to use that property in exchange for consideration." Black's Law Dictionary 898 (7th ed. 1999). The parties' agreement reflected the fact that lessee never expected to pay consideration sufficient to justify recognizing the agreement as a lease. This shows that taxpayer was not occupationally engaged in reselling, renting or leasing the aircraft in the regular course of its business.

Under these circumstances, taxpayer does not satisfy 45 IAC 2.2-5-15-(b)(2) and does not qualify for the leasing exemption.

Taxpayer protests that the Department did not look carefully enough at the method taxpayer used to compute the rental rate. Taxpayer explains that it used a formula that took into account the cost of capital, the tax depreciation benefit and the obsolescence factor. Taxpayer assumes that the Department compared rates that included costs for maintenance, hangar, insurance and possibly fuel costs, which taxpayer explains were paid by its lessee.

The Department refers to 45 IAC 2.2-4-27(d), which states in relevant part:

The rental or leasing of tangible personal property, by whatever means effected and irrespective of the terms employed by the parties to describe such transaction, is taxable.

(1) Amount of actual receipts. The amount of actual receipts means the gross receipts from the rental or leasing of tangible personal property without any deduction whatever for expenses or costs incidental to the conduct of the business. The gross receipts include any consideration received from the exercise of an option contained in the rental or lease agreement; royalties paid, or agreed to be paid, either on a lump sum or other production basis, for use of tangible personal property; and any receipts held by the lessor which may at the time of their receipt or some future time be applied by the lessor as rentals.

…

This regulation means that taxpayer was required to collect sales tax on all consideration it received from its customer for lease of the aircraft. Taxpayer was not collecting sales tax on the consideration it received from its customer when the customer paid for insurance, hangar, fuel, and maintenance. This is further evidence that taxpayer's relationship with its customer was not a valid lessor/lessee relationship.

Taxpayer states that even if the rental rate was too low, the proper remedy would be to adjust the rental rate, not to disallow the rental exemption. Taxpayer has provided no citation to any statute or regulation to support its position that the proper remedy would be to adjust the rental rate. 45 IAC 2.2-5-15 simply states what the exemption is. The only options are to either approve or deny the exemption. There is no provision to retroactively adjust the rental rate in order to bring taxpayer into compliance.

In conclusion, taxpayer was not leasing the aircraft at a fair market rate. The rental rate and period did not reflect actual usage. There is no provision in 45 IAC 2.2-5-15 to retroactively adjust the rental rate. Taxpayer applied for an exemption and did not qualify. The Department properly denied the claim.

**FINDING**

Taxpayer's protest is denied.

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**DEPARTMENT OF STATE REVENUE**

0320040379.LOF

**LETTER OF FINDINGS NUMBER: 04-0379**
**Income Tax Withholding**
**For the Years 1997 - 2003**

**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. Income Tax Withholding—Employees compared to Independent Contractors**

**Authority**: IC 6-8.1-5-1(b); IC 6-3-4-8, IC 6-3-1-5, IC 6-3-1-6, GKN Co. v. Magness, 744 N.E.2d 397 (Ind. 2001), Information Bulletin #52.

Taxpayer asserts that he hired independent contractors and not employees—and thus was not required to withhold Indiana state and local income taxes.

**STATEMENT OF FACTS**

Taxpayer rents gaming tables and provides the dealers for the tables as entertainment for corporate events. The games include blackjack, craps, roulette, Caribbean stud poker, Let-it-Ride, and money wheel. A withholding tax audit was completed and the Department assessed state withholding tax and county withholding tax—determining that Taxpayer hired employees, not independent contractors. Taxpayer filed a protest and a hearing was held.

**I. Income Tax Withholding—Employees compared to Independent Contractors**

**DISCUSSION**

All tax assessments are presumed to be accurate; the taxpayer bears the burden of proving that an assessment is incorrect. IC 6-8.1-5-1(b). IC 6-3-4-8 requires an employer to deduct and withhold from each employee's wages the Indiana adjusted gross income tax and any county income tax due. The employer is required to submit those withheld taxes to the Department. *See id*. If an employer fails to withhold state and local income taxes on wages paid to employees, the taxes are assessed against the employer and the employer is liable to pay them. *See id*.

IC 6-3-1-5 defines "employer" as defined in section 3401(d) of the Internal Revenue Code. IC 6-3-1-6 defines "employee" as defined in section 3401(c) of the Internal Revenue Code. Since Indiana tax code ties its definitions of "employer" and "employee" to the definitions given in federal tax code, it is appropriate to use the IRS guidelines to determine whether Taxpayer's workers were employees or independent contractors.

The IRS has developed a 20 factor guideline—based on the common law—to help determine whether a worker is an employee or an independent contractor. The Department's audit report summarized the 20 factors and the ones bolded below are the factors that the auditor noted as applying to Taxpayer:

**1. Must comply with employer's instructions about work**
2. Receive training from, or at the direction of, the employer
**3. Provide services that are integrated into the business**
**4. Provide services that must be rendered personally**
5. Hire, supervise, and pay assistants for the employer
**6. Have a continuing working relationship with the employer**
**7. Must follow set hours**
8. Work full-time for the employer
9. Do their work on the employer's premises

10. Must do their work in a sequence set by the employer
11. Must submit regular reports to the employer
12. Receive payments of regular amounts at set intervals
13. Receive payments for business or traveling expenses
**14. Rely on the employer to furnish tools and materials**
**15. Lack a major investment in facilities used to perform service**
**16. Cannot make a profit or suffer a loss from their services**
17. Work for one employer at a time
18. Do not offer their services to the public
19. Can be fired by the employer
**20. May quit work anytime without incurring a liability**

Not all the 20 factors apply to a particular situation, but are applied when relevant. In this case, the workers do rely on Taxpayer to furnish the gaming tables, cards, dice, and other equipment. Taxpayer confirmed this. The furnishing of these tools and equipment by Taxpayer to the dealers is a strong indicator that these are employees. The services provided by the workers are integrated into Taxpayer's business; Taxpayer supplies the gaming equipment and often times also is responsible to provide dealers. The gaming tables and the dealers are an integrated and interconnected part of rendering the event services. Concerning rendering services personally, Taxpayer stated that he calls those who have worked for him before whom he liked the quality of their work, and also has asked if they know others who can work the tables. Calling the person is a request for personal services; asking for referrals for others is common among employers when seeking additional employees.

Taxpayer stated that when the workers arrive and ask where to they need to go, he tells them to find a table they like; he does not assign them to tables. Taxpayer forwards that this practice is indicative that the workers are not given directions by him. As well, Taxpayer stated that he does not set the hours a dealer needs to work when he contacts them, but merely states to them when the event is to begin and to end; they can choose when to arrive and leave. However, implicit in stating the hours of the event is a direction by him as to the hours he expects them to be there.

Taxpayer has acted in good faith to try establish the workers as independent contractors. He has each dealer sign an agreement when arriving to work an event which states:

**1. The undersigned shall be deemed an independent contractor and is not an employee, partner, agent, or engaged in a joint venture with [Taxpayer].**
**2. Consistent with the foregoing, [Taxpayer] shall not deduct withholding taxes, FICA, or any other taxes required to be deducted by an employer, as I acknowledge my responsibility to pay the same as an independent contractor.**
**3. I further acknowledge that I shall not be entitled to any fringe benefits, pension, retirement, profit sharing, or any benefits accruing to employees.**

However, the determination of whether a worker is an employee or independent contractor is not made by the statements and agreements of the parties, but by the substance of the relationship. In GKN Co. v. Magness, 744 N.E.2d 397, 402 (Ind. 2001), the court stated, "Determining whether an employer-employee relationship exists ultimately is a question of fact." Despite Taxpayer setting out and adhering to the formalities of employing independent contractors, these workers are employees. Taxpayer's business is based on a continuous and systematic employment of dealers to work the tables at the events. Despite the fluctuations of business and the turnover of available dealers, Taxpayer's business is integrated to provide gaming equipment and dealers at events. Many dealers have a continuing working relationship with Taxpayer from event to event.

It is understandable based on the fluctuations of business why Taxpayer chose to deeming the dealers as independent contractors. But the substance of the relationship is as employer and employee. Taxpayer pays a set hourly rate to the dealers; the dealers do not submit bids for compensation.

The Department has issued Information Bulletin #52, which outlines the tax withholding requirements from part-time, temporary, or seasonal employees. The Bulletin, in all versions, has stated that withholding agents are required to withhold both state income tax and county income tax from the income of all employees, including part-time, temporary, or seasonal employees. The bulletin as states that the fact that the employee will not earn in excess of their $1,000 exemption has no bearing on the withholding by the withholding agent. As well, the IRS, which allows an employee to waive withholding for federal tax purposes when the income is not expected to exceed the federal filing requirements and income allowances, has no bearing on the withholding of taxes from the income of employees for Indiana tax purposes.

As stated in this letter of findings, the volume and frequency of Taxpayer's business varies. Depending on the size and desires of each event, Taxpayer may need a few gaming tables or many. And each table needs a dealer. As well, the booking of events varies depending upon the time of the year. Taxpayer stated at the hearing, there are times when he has had five events booked for the same day, and at other times, the calendar has had few bookings. But despite the fact that the dealers are employed on a part-time, temporary, or seasonal basis, Taxpayer is required to withhold the state and local income taxes from each employee's wages.

The dealers are employees, not independent contractors; Taxpayer was required to have withheld state and local income taxes and remitted those taxes to the Department.

**FINDING**

For the reasons stated above, Taxpayer's protest is denied.

**DEPARTMENT OF STATE REVENUE**

0420040438.LOF

**LETTER OF FINDINGS NUMBER: 04-0438**
**Sales and Use Tax**
**For the Years 2000-2003**

**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 and Use Tax-Imposition**

**Authority:** IC 6-8.1-5-1 (b), IC 6-2.5-3-2 (a), IC 6-2.5-5-8.

The taxpayer protests the imposition of use tax.

**II. Tax Administration-Penalty**

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

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

**STATEMENT OF FACTS**

The taxpayer is a corporation operating a health food store. The taxpayer offers vitamins, health food, herbs, cosmetics, Swedish massage and dietary counseling. After an audit for the tax period 2001-2003, the Indiana Department of Revenue assessed additional use tax, interest and penalty for the years 2001 and 2002. The taxpayer protested the assessments and a hearing was held. This Letter of Findings results.

**I. Sales and Use Tax-Imposition**

**DISCUSSION**

All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1 (b). Indiana imposes an excise tax on tangible personal property stored, used, or consumed in Indiana when it was purchased in a retail transaction and no sales tax was paid at the time of purchase. IC 6-2.5-3-2 (a).

The department assessed use tax on the taxpayer's payments to credit card companies when the taxpayer was not able to substantiate that sales tax was paid on the purchases or that the purchases had been used in an exempt manner. At the hearing the taxpayer produced copies of many credit card monthly statements. Each of these monthly statements showed that the payments taxpayer made in that month were payments on the account, interest and service fees. These payments did not indicate the purchase and use of tangible personal property at the time the payment was made. Payments on credit card account balances, interest and service fees are not subject to the use tax.

Some of the credit card monthly statements indicated that the taxpayer also purchased tangible personal property such as vitamins along with paying on the account balance, interest and service fees. The taxpayer contended that these items were exempt from the use tax pursuant to IC 6-2.5-5-8 because they were purchased for resale. The taxpayer has the burden of proving that these items were actually resold in the business. The taxpayer failed to produce any documentation substantiating its contention that these items qualified for this exemption. Therefore the taxpayer's protest to the use tax assessed on these items is denied.

The department also assessed use tax on the taxpayer's use of blinds in the store. The taxpayer produced a receipt indicating that sales tax was paid for the blinds at the time of purchase. Therefore, the use tax was improperly imposed on the taxpayer's use of the blinds.

The department also assessed use tax on the taxpayer's use of a magazine subscription. The taxpayer purchased the magazines in a retail transaction, used the magazines in Indiana and did not pay sales tax on them at the time of purchase. Therefore, the use tax was properly imposed.

**FINDING**

The taxpayer's protest is sustained in part and denied in part.

**II. Tax Administration-Penalty**

The taxpayer protested the imposition of the ten percent (10%) 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 taxpayer had no sales or use tax due for one year of the three year audit and had only a minimal amount of use tax due for the other two years. Examination of the facts and circumstances of the taxpayer's situation indicates that the taxpayer exercised due diligence and was attentive to its duties in the collection and remittance of sales and use taxes to the state.

**FINDING**

The taxpayer's protest is sustained.

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**DEPARTMENT OF STATE REVENUE**

0420040442.LOF

**LETTER OF FINDINGS NUMBER: 04-0442**
**Sales and Use Tax**
**For Tax Years 2004**

**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.

**ISSU**E

**I. Sales and Use—Aircraft Purchase**

**Authority**: Gregory v. Helvering, 293 U.S. 465 (1935); IC 6-2.5-2-1; IC 6-2.5-5-8; IC 6-6-6.5-9; IC 6-8.1-10-4; 45 IAC 2.2-5-15; 45 IAC 2.2-4-27; Horn v. Commissioner of Internal Revenue, 968 f.2d 1229 (D.C. Cir. 1992); Commissioner v. Transp. Trading and Terminal Corp., 176 F.2d 570 ($2^{nd}$ Cir. 1949); Black's Law Dictionary ($7^{th}$ ed. 1999)

Taxpayer protests the imposition of sales tax on the purchase of an aircraft.

**STATEMENT OF FACTS**

Taxpayer purchased an aircraft, but did not pay sales tax on the purchase. Taxpayer claimed that the purchase was exempt from sales tax because the aircraft was to be used for rental or leasing to others. The Indiana Department of Revenue ("Department") conducted an investigation regarding the rental or leasing of the aircraft and determined that there was insufficient evidence to support the claim of rental or leasing as the use of the aircraft. As a result of this investigation, the Department denied the claim for exemption and issued a proposed assessment for use tax on the purchase of the aircraft. Taxpayer protests the assessment. Further facts will be supplied as required.

**DISCUSSION**

**I. Sales and Use—Aircraft Purchase**

Taxpayer purchased an aircraft for two hundred thirty one thousand, six hundred and ninety five dollars ($231,695.00) and claimed a sales tax exemption. The Department compared a non-related aircraft rental company's rate for the same type of aircraft, to the rate taxpayer charged for its aircraft. The rental rate was far below the market rate. The Department determined that taxpayer was not renting the aircraft and denied the exemption. Taxpayer protests the denial.

Taxpayer states that the aircraft was used for rental to others, and therefore was exempt from sales tax under IC 6-2.5-5-8(b), which states:

Transactions involving tangible personal property other than a new motor vehicle are exempt from the state gross retail tax if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of the person's business.

Taxpayer states that it is in the aircraft rental and leasing business. A review of the paperwork taxpayer filed with the Department reveals that the lessee corporation did not register with the Department as a separate entity, but rather as a DBA ("Doing Business As") under the lessor's Taxpayer Identification Number (TID) and Federal Identification Number (FID). In other words, here there was one business with two different names. Renting an aircraft from one branch of a business to another branch of that same business doing business under a different name does not qualify for the exemption provided in IC 6-2.5-5-8(b).

Further guidance is found in 45 IAC 2.2-5-15, which states:

(a) The state gross retail tax shall not apply to sales of any tangible personal property to a purchaser who purchases the same for the purpose of reselling, renting or leasing, in the regular course of the purchaser's business, such tangible personal property in the form in which it is sold to such purchaser.

(b) General rule. Sales of tangible personal property for resale, renting or leasing are exempt from tax if all of the following conditions are satisfied:

(1) The tangible personal property is sold to a purchaser who purchases this property to resell, rent or lease it;

(2) The purchaser is occupationally engaged in reselling, renting or leasing such property in the regular course of his business; and

(3) The property is resold, rented or leased in the same form in which it was purchased

(c) Application of general rule.

(1) The tangible personal property must be sold to a purchaser who makes the purchase with the intention of reselling, renting or leasing the property. This exemption does not apply to purchasers who intend to consume or use the property or add value to the property through the rendition of services or performance of work with respect to such property.

(2) The purchaser must be occupationally engaged in reselling, renting or leasing such property in the regular course of his business. Occasional sales and sales by servicemen in the course of rendering services shall be conclusive evidence that the purchaser is not occupationally engaged in reselling the purchased property in the regular course of his business.

(3) The property must be resold, rented or leased in the same form in which it was purchased.

Taxpayer states that it was in the business of leasing aircraft and therefore qualifies for the exemption provided by 45 IAC 2.2-5-15. 45 IAC 2.2-5-15(b) requires that three conditions be met in order to qualify for the exemption. One condition is 45 IAC 2.2-5-15(b)(2), which states that the purchaser must be occupationally engaged in reselling, renting or leasing such property in the regular course of his business. The Department notes that a single individual signed as both lessee and lessor on the leasing agreement. Combined with the rental rate far below normal market rates, this shows that taxpayer was not occupationally engaged in reselling, renting or leasing the aircraft in the regular course of its business. Under these circumstances, taxpayer does not satisfy 45 IAC 2.2-5-15-(b)(2) and does not qualify for the leasing exemption.

Next, taxpayer explains that its customer paid a lower lease rate because it was paying other expenses which, when added to the lease rate, brought the total customer paid closer to comparable lease rates. Taxpayer explains that, under the "dry lease", the lessee was responsible for paying expenses such as insurance, hangar, fuel, maintenance and crew. This supposedly brought the leasing costs to appropriate levels. 45 IAC 2.2-4-27(d) states in relevant part:

The rental or leasing of tangible personal property, by whatever means effected and irrespective of the terms employed by the parties to describe such transaction, is taxable.

(1) Amount of actual receipts. The amount of actual receipts means the gross receipts from the rental or leasing of tangible personal property without any deduction whatever for expenses or costs incidental to the conduct of the business. The gross receipts include any consideration received from the exercise of an option contained in the rental or lease agreement; royalties paid, or agreed to be paid, either on a lump sum or other production basis, for use of tangible personal property; and any receipts held by the lessor which may at the time of their receipt or some future time be applied by the lessor as rentals.

…

This regulation means that taxpayer was required to collect sales tax on all consideration it received from its customer for lease of the aircraft. Taxpayer was not collecting sales tax on the consideration it received from its customer when the customer paid for insurance, hangar, fuel, maintenance and crew. This is further evidence that taxpayer's relationship with its customer was not a valid lessor/lessee relationship.

Next, taxpayer states that it also created the leasing corporation in order to avoid liability in the event of a catastrophic loss. While this may or may not be the case, it is ultimately irrelevant since it does not explain why the rental rate was set at a fraction of the rate charged for comparable aircraft in the area. The fact that the rental rate was so low makes it plain that the rental agreement was set up to avoid sales tax, since the rental rate would have nothing to do with potential liabilities from a crash.

In its protest letter and at hearing, taxpayer complained that it was being victimized by its attempts to comply with Indiana tax laws. Taxpayer states, "The taxpayer voluntarily registered the aircraft with the State of Indiana to further prove that it has no intention to comply with all Indiana regulations. It could have chosen to not register the aircraft and very likely escape paying any sales tax on rental revenue to the Indiana Department of Revenue." Taxpayer then claims that it contributes to Indiana's tax base by purchasing aircraft services and aircraft related merchandise in Indiana, and that it has the option of hangaring the aircraft in Illinois. Taxpayer also states, "If the Indiana Department of Revenue continues to be non-business friendly, and prosecute and penalize law abiding taxpayers, ultimately, businesses will relocate out of Indiana and the treasury of the State of Indiana will suffer."

The Department takes a dim view of threats of tax fraud. The Department hereby informs taxpayer that if it does indeed choose to not register an aircraft in an attempt to "escape paying any sales tax on rental revenue", it may be subject to a one hundred percent (100%) fraud penalty on such taxes as it is trying to "escape", as provided by IC 6-8.1-10-4. As for taxpayer's decision concerning where to hangar the aircraft, that is up to taxpayer. The only thing the Department is concerned with in this instance is whether or not taxpayer qualified for the claimed exemption.

Finally, the Department notes that a lease is defined as "[a] contract by which the rightful possessor of personal property conveys the right to use that property in exchange for consideration." Black's Law Dictionary 898 ($7^{th}$ ed. 1999). The parties' agreement reflected the fact that pilot/lessee never expected to pay consideration sufficient to justify recognizing the agreement as a lease. Instead, the lease agreement falls squarely within the definition of a "sham transaction." The "sham transaction" doctrine is long established both in state and federal tax jurisprudence dating back to Gregory v. Helvering, 293 U.S. 465 (1935). In that case, the Court held that in order to qualify for a favorable tax treatment, a corporate reorganization must be motivated by the furtherance of a legitimate corporate business purpose. Id at 469. A corporate business activity undertaken merely for the purpose of avoiding taxes was without substance and "[t]o hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose." Id at 470. The courts have subsequently held that "in construing words of a tax statute which describe [any] commercial transactions [the court is] to understand them to refer to transactions entered upon for commercial or industrial purposes and not to include transactions entered upon for no other motive but to escape taxation." Commissioner v. Transp. Trading and Terminal Corp., 176 F.2d 570, 572 (2nd Cir. 1949), *cert. denied*, 338 U.S. 955 (1950). "[T]ransactions that are invalidated by the [sham transaction] doctrine are those motivated by nothing other than the taxpayer's desire to secure the attached tax benefit" but are devoid of any economic substance. Horn v. Commissioner of Internal Revenue, 968 f.2d 1229, 1236-7 (D.C. Cir. 1992). The rental/lease rate charged by taxpayer for the aircraft in question here can only be considered a "sham transaction". The only reason to charge a fraction of the fair market rate for rental/lease of the aircraft and arrange for alternate compensation is to avoid tax. Since taxpayer was not involved in a valid lease or rental agreement with its sole customer the Department was correct to deny taxpayer's claim for the rental/lease exemption.

In conclusion, taxpayer's reference to IC 6-6-6.5-9(a)(4) is inapplicable since it deals with aircraft licensing tax rather than sales tax. Taxpayer was not occupationally engaged in renting to others and does not qualify for the exemption found in 45 IAC 2.2-5-15. It is irrelevant if the leasing corporation was formed to shield taxpayer from liability in the event of a crash, since that would have no influence on the rental rate. Taxpayer was not collecting sales tax on the consideration it received from its customer when the customer paid for insurance, hangar, fuel, maintenance and crew, as required by 45 IAC 2.2-4-27(d). Taxpayer's relationship with its customer was too close and the terms of the rental agreement too generous to establish an arms-length business relationship. The rental/lease arrangement between taxpayer and its customer constitutes a "sham transaction" entered into for the sole purpose of avoiding taxes, as established in Gregory v. Helvering. Without a valid rental/lease agreement, taxpayer is ineligible for the rental exemption on the purchase of the aircraft.

**FINDING**

Taxpayer's protest is denied.

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**DEPARTMENT OF STATE REVENUE**

0420040452.LOF

**LETTER OF FINDINGS NUMBER: 04-0452**
**Sales and Use Tax**
**For Tax Years 2003**

**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.

**ISSU**E

**I. Sales and Use—Aircraft Purchase**

**Authority**: 45 IAC 2.2-5-15

Taxpayer protests the imposition of sales tax on the purchase of an aircraft.

**STATEMENT OF FACTS**

Taxpayer purchased an aircraft, but did not pay sales tax on the purchase. Taxpayer claimed that the purchase was exempt from sales tax because the aircraft was to be used for rental or leasing to others. The Indiana Department of Revenue ("Department") conducted an investigation regarding the rental or leasing of the aircraft and determined that there was insufficient evidence to support the claim of rental or leasing as the use of the aircraft. As a result of this investigation, the Department denied the claim for exemption and issued a proposed assessment for use tax on the purchase of the aircraft. Taxpayer protests the assessment. Further facts will be supplied as required.

**DISCUSSION**

**I. Sales and Use—Aircraft Purchase**

Taxpayer purchased an aircraft for one hundred ninety four thousand, three hundred and sixty dollars ($194,630.00) and claimed a sales tax exemption. Taxpayer formed a second corporation using taxpayer's Taxpayer Identification number and Federal Identification Number to register with the Department. The second corporation then leased the aircraft to a third party which rented the aircraft, including rentals to the individual who owned both the taxpayer corporation and the related second corporation. The Department also compared a non-related aircraft rental company's rate for the same type of aircraft, to the rate taxpayer was charged for its use of the aircraft. The rental rate was far below the market rate. The Department determined that taxpayer was using the aircraft and denied the exemption. Taxpayer protests the denial.

The exemption is found in 45 IAC 2.2-5-15, which states:

(a) The state gross retail tax shall not apply to sales of any tangible personal property to a purchaser who purchases the same for the purpose of reselling, renting or leasing, in the regular course of the purchaser's business, such tangible personal property in the form in which it is sold to such purchaser.

(b) General rule. Sales of tangible personal property for resale, renting or leasing are exempt from tax if all of the following conditions are satisfied:

(1) The tangible personal property is sold to a purchaser who purchases this property to resell, rent or lease it;

(2) The purchaser is occupationally engaged in reselling, renting or leasing such property in the regular course of his business; and

(3) The property is resold, rented or leased in the same form in which it was purchased

(c) Application of general rule.

(1) The tangible personal property must be sold to a purchaser who makes the purchase with the intention of reselling, renting or leasing the property. This exemption does not apply to purchasers who intend to consume or use the property or add value to the property through the rendition of services or performance of work with respect to such property.

(2) The purchaser must be occupationally engaged in reselling, renting or leasing such property in the regular course of his business. Occasional sales and sales by servicemen in the course of rendering services shall be conclusive evidence that the purchaser is not occupationally engaged in reselling the purchased property in the regular course of his business.

(3) The property must be resold, rented or leased in the same form in which it was purchased.

Taxpayer states that it was in the business of leasing aircraft and therefore qualifies for the exemption provided by 45 IAC 2.2-5-15. 45 IAC 2.2-5-15(c) explains the application of the rule. One condition is 45 IAC 2.2-5-15(c)(1), which states that the exemption does not apply to purchasers who consume or use the property or add value to the property through the rendition of services or performance of work with respect to such property. The Department notes that the individual who signed as lessor on the leasing agreement used the aircraft twenty four times in a roughly ten month period. Combined with the rental rate far below normal market rates, taxpayer does not satisfy 45 IAC 2.2-5-15-(c)(1) and does not qualify for the leasing exemption.

In its protest letter, taxpayer states that it has gone to extraordinary efforts to comply with the voluminous documents requested by the Department in the course of its investigation. At no point did the Department receive documentation explaining the how the parties arrived at such a low rental rate, or any documentation which would explain that the rental rate was close to the going market rate. Taxpayer states in its protest that it was proactively trying to comply with the Department's regulations and relied on a Revenue Ruling issued by the Department to a non-related party.

The Department notes that Revenue Rulings apply to the taxpayers to whom they are issued and may not be relied upon even by that taxpayer if the facts provided are not correct or if they change. If a taxpayer relies on a Revenue Ruling but has substantially different fact situation in any material respect, the Revenue Ruling offers no protection. In this case, the Revenue Ruling explained that the taxpayer it was issued to would not use the aircraft for its own use, but would exclusively hold the aircraft for rental to others. As previously explained, the taxpayer in this protest did not exclusively rent to others.

In conclusion, taxpayer was using the aircraft itself, not exclusively renting or leasing to others. Also, taxpayer was paying a rental rate far below the going market rate. Taxpayer does not qualify for the exemption found in 45 IAC 2.2-5-15.

**FINDING**

Taxpayer's protest is denied.

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**DEPARTMENT OF STATE REVENUE**

0120050043.LOF

**LETTER OF FINDINGS: 05-0043**
**Indiana Adjusted Gross Income Tax**
**For the Year 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 the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

**I. Proposed Assessment – Indiana Individual Income Tax.**

**Authority**: IC 6-8.1-5-1(b).

Taxpayer argues that he is not responsible for paying individual state income tax.

STATEMENT OF FACTS

Taxpayer is an Indiana resident. Taxpayer did not file an Indiana income tax return for 2001. The Department of Revenue (Department) determined that taxpayer had received federal adjusted gross income during 2001. Therefore, the Department sent taxpayer a "Demand Notice for Payment."

Taxpayer responded with a letter stating that no tax was due. On a form letter provided by the Department, taxpayer checked as his "appropriate response" that there was an "Other reason" for not paying the proposed assessment.

In addition, taxpayer provided numerous "exhibits" purporting to establish that he was not subject to state income tax. Taxpayer concluded that "the Department is using erroneous information supplied to it by the Internal Revenue Service to make tax determinations regarding my case."

Subsequently, the Department responded to taxpayer's request under the "Freedom of Information Act" by providing taxpayer a copy of a form entitled "Income Tax Examination Changes" and a copy of the "Agreement on Coordination of Tax Administration."

Taxpayer's protest was assigned to the Hearing Officer. The Hearing Officer contacted taxpayer February 15, 2005, offering to schedule either an in-person or telephone hearing during which taxpayer would be provided an opportunity to explain the basis for his protest. Taxpayer responded by requesting information regarding the proposed assessment. A second copy of the information already provided taxpayer was forwarded to taxpayer on February 23, 2005. At the same time, taxpayer was again offered the opportunity to schedule an administrative hearing.

Taxpayer replied in a letter dated March 4, 2005, requesting a "point by point rebuttal of the facts" already provided to the Department. Specifically, taxpayer asked for the Department's response to his "Determination letter of August of 2004."

The Hearing Officer responded in a letter dated March 8, 2005, declining to offer a "point by point rebuttal" prior to the hearing. The letter again suggested that the taxpayer schedule a telephone or in-person hearing because "it provides [taxpayer] with an informal opportunity to clarify your objections to the proposed assessment."

Taxpayer declined the opportunity to schedule the hearing, and a letter was sent to taxpayer March 29, 2005, repeating once again the offer to schedule an informal administrative hearing and provide taxpayer with the opportunity to clarify the basis for his protest. On May 18, 2005, taxpayer's attorney sent a letter requesting "copies of any documentation you may have that give rise the Department's inquiry of [taxpayer's] taxable activity." This was the first indication that taxpayer had obtained representation on his behalf. On May 25, taxpayer's attorney was sent "a copy of each item in the [Department's] file" and repeating the offer to schedule a hearing on the matter. On June 15, the Hearing Officer sent taxpayer's attorney a letter again offering "to conduct an administrative hearing on this matter." No response was received. On July 11, the Hearing Officer sent taxpayer's attorney yet another letter offering to schedule an administrative hearing. No response was received; this Letter of Findings was written based upon the documents originally submitted by taxpayer.

DISCUSSION

**I. Proposed Assessment – Indiana Individual Income Tax.**

Taxpayer disputes the assessment of 2001 state adjusted gross income tax. Taxpayer has provided a copy of a letter he received from the Department of the Treasury. Taxpayer apparently regards this letter as conclusive of the proposition that he did not owe 2001 federal income tax. Taxpayer errs. The letter simply states that information regarding taxpayer's 2001 federal tax return is under the jurisdiction of a different IRS office than the office taxpayer originally contacted.

In addition, taxpayer has supplied some 1,000 pages of documents which purport to support taxpayer's argument that he is not subject to state income tax. The collection of documents begins with a lengthy "Determination Letter" citing to various federal authorities such as IRS Manuals, federal statutes, federal regulations, case law, international law, and the United States Constitution.

The remainder of taxpayer's lengthy submission consists of copies of various court decisions, U.S. Treasury letters, federal tax forms, federal tax instructions, copies of the 1929 federal tax code, "highlights" of congressional debates, along with hundreds of pages from the Congressional Record. Taxpayer has not provided an explanation as to the relevancy of any of this material.

Taxpayer appears to expect the Department to evaluate the "Determination Letter" and the hundreds of pages of supporting documentation in order to divine the reason taxpayer is not responsible for paying state income tax. The Department must decline taxpayer's offer.

Indiana tax law provides that, "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid." IC 6-8.1-5-1(b). It is not the Department's responsibility to piece together a coherent argument on taxpayer's behalf. "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Id. Taxpayer has not met that burden. The sheer volume of taxpayer's documentation is not equivalent to a reasoned argument supporting taxpayer's position.

**FINDING**

Taxpayer's protest is denied.

**DEPARTMENT OF STATE REVENUE**

0420050123.LOF

**LETTER OF FINDINGS NUMBER: 05-0123**
**Use Tax**
**For the Periods 2000, 2001, and 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 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. Use Tax—Electronic Database Subscriptions**

**Authority**: IC 6-8.1-5-1(b); IC 6-2.5-3-2; IC 6-2.5-3-5; IC 6-2.5-3-4; IC 6-2.5-5; IC 6-2.5-4-1; IC 6-2.5-1-27; IC 6-2.5-1-24; Sales Tax Information Bulletin #8 (May 2002).

Taxpayer protests the assessment of use tax on its electronic database subscriptions.

**STATEMENT OF FACTS**

Taxpayer is an accounting firm that performs tax preparation and auditing services for its clients. The Department conducted an audit of Taxpayer's business and assessed use tax on its purchases of electronic database subscriptions. Taxpayer filed a protest and a hearing was held.

**I. Use Tax—Electronic Database Subscriptions**

**DISCUSSION**

All tax assessments are presumed to be accurate; the taxpayer bears the burden of proving that an assessment is incorrect. IC 6-8.1-5-1(b). IC 6-2.5-3-2 imposes an excise tax, commonly known as the use tax, on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction. The one storing, using, or consuming is liable to pay the use tax. IC 6-2.5-3-5 gives credit for sales or use tax previously paid. IC 6-2.5-3-4 and IC 6-2.5-5 list the exemptions to use tax liability.

IC 6-2.5-4-1 defines a retail transaction as the transfer of tangible personal property for consideration. Taxpayer purchased database access subscriptions. Using an internet browser, Taxpayer goes to the website of the electronic content provider, enters its password, and is able to search and find articles, cases, statutes, regulations, and other information. After finding the information sought, Taxpayer can read the content online or can save and print the information. Taxpayer pays for access to the database of information. Sales Tax Information Bulletin #8 (May 2002) states that custom-written software programs are not subject to sales or use tax if the software is specifically designed for the purchaser. The bulletin also states that pre-written programs not specifically designed for one purchaser, developed by the seller for sale or lease on the general market are subject to tax; pre-written or canned computer programs are taxable because the intellectual property contained in the canned program is no different than the intellectual property in a videotape or a textbook.

The online content provider sells access to its database to the general public. The purchaser of the subscription service is granted access to transfer information from the provider's database to the purchaser's computer. The "transfer" element of IC 6-2.5-4-1 is satisfied. Because access is restricted to those who have paid for a subscription and because access is conditioned upon payment of a subscription, the "for consideration" element of IC 6-2.5-4-1 is satisfied. IC 6-2.5-1-27 defines prewritten computer software as tangible personal property. Prewritten computer software is defined in IC 6-2.5-1-24 as computer software, including prewritten upgrades, that is not designed and developed by the author or other creator to the specifications of a specific purchaser. Taxpayer doesn't have the database custom written for it; the provider makes the database available to all who pay for that access. All three conditional elements of a retail transaction have been satisfied—the *transfer* of *tangible personal property* for *consideration*.

Page 4 of Sales Tax Bulletin #8, states:

F. Sale of Miscellaneous Data:

The sale of statistical reports, graphs, diagrams or any other information produced or complied by a computer and sold or reproduced for sale in substantially the same form as it is so produced is considered to be the sale of tangible personal property unless the information from which such reports was compiled was furnished by the same person to whom the finished report is sold.

Taxpayer's subscription to access the information on the provider's database meets the situation named above. Taxpayer purchases access to view statistical reports and other information. Taxpayer does not provide the provider with the raw information to be compiled; Taxpayer pays for the privilege to access compiled information. The provider sold tangible personal property to Taxpayer and Taxpayer purchased access to the tangible personal property.

Taxpayer stated it used to purchase access to the information by means of a subscription to books. The books contained organized information. Taxpayer stated that it paid sales or use tax for these books; Taxpayer agreed the books were to have been taxed because viewable print information was transferred to Taxpayer. With improvements in technology, the books were superseded by CD-ROM disks. Taxpayer agreed that the CD-ROMs were to have been taxed because viewable print information was transferred to it. But when the next technological breakthrough appeared, the searchable, online access subscription, Taxpayer argues that this is not taxable because nothing was transferred to it. Taxpayer is mistaken. Taxpayer still receives viewable print information that is transferred to it. Despite the fact that books do not lose information when you close them because the print remains, and despite the fact that a CD-ROM does not lose the encoded information upon it when ejected from a computer, the fact that the onscreen information is lost when the browser is closed and the computer is turned off does not change the fact that information is transferred to Taxpayer. The question isn't how long a purchaser retains what it has purchased; the question is whether something is transferred to the purchaser. In this case, articles, cases, statutes, regulations, and other information are transferred to Taxpayer when it accesses the provider's database.

**FINDING**

For the reasons stated above, Taxpayer's protest is denied.

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**DEPARTMENT OF STATE REVENUE**

0420050176.LOF

**LETTER OF FINDINGS NUMBER: 05-0176**
**Sales and Use Tax**
**For the Tax Period 2001-2003**

**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 and Use Tax- Imposition of Sales Tax on Docks and Cattle Crossings**

**Authority:** IC 6-8.1-5-1 (b), IC 6-2.5-2-1, 45 IAC 2.2-3-8, 45 IAC 2.2-3-9(b), Sales Tax Information Bulletin #60.

The taxpayer protests the assessment of sales tax on the sale of certain docks and cattle crossings.

**II. Tax Administration- Ten Percent (10%) Negligence Penalty**

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

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

**STATEMENT OF FACTS**

The taxpayer is a corporation that engages in the sale and rental of tangible personal property. The taxpayer also acts as a contractor in certain situations. After an audit, the Indiana Department of Revenue (department) assessed additional sales and use tax for the tax period 2001-2003. The taxpayer agreed with some of the assessed items and protested the remainder of the assessment. A hearing was held and this Letter of Findings results.

**I. Sales and Use Tax-Imposition of Sales Tax on Docks and Cattle Crossings**

**DISCUSSION**

The taxpayer's first protest concerns the imposition of tax on certain docks sold by the taxpayer. The auditor described these docks as follows:

> One group of items was of special interest. The taxpayer had fabricated and then sold what were referred to as "docks" to a tenant of "A"[name redacted for confidentiality purposes] that was/is leasing several storage units known as "igloos." These docks allow the tenant to use a forklift for the loading and unloading of materials from their truck to the igloo and are nothing more than a ramp or "dock leveler." The ten foot by ten foot concrete slab immediately outside the door of the igloo is the loading/un-loading dock. The item being sold by the taxpayer merely facilitates their customer's use of forklifts rather than other means of transporting materials to and from their storage units to tractor trailers. It is not permanently affixed to the building or to the concrete loading dock, but is merely staked into the ground to reduce movement if it is bumped by the tractor trailer which is being loaded or unloaded.
>
> The items above are distinctively different from the "portable" docks which the taxpayer leases to tenants of "A". These items are equipped with hitches and wheels to allow for them to be moved to lessees' location with ease.

The taxpayer contends that the items are real property because he was acting as a contractor when he had the docks/ramps built, the customer was billed a "guaranteed price" and that they would be difficult to relocate. Even so, they do not become real property, but remain tangible personal property and are subject to tax as such.

The taxpayer agreed with the department's descriptions of the "docks". However, the taxpayer argued that the items were not personal property as argued by the department. Rather, the taxpayer contended that the docks became part of the real property. Customers requested the building of the subject docks because the concrete docks were a different height than the back of the trucks. The improvements to the concrete docks accommodated the higher loading/unloading height of the trucks.

The taxpayer also protested the assessment of sales tax on its sales of cattle crossings. These are steel grates that cows refuse to walk on. The crossings are attached to the road at a point where the gate on a fence would open.

All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1 (b).

Indiana imposes a sales tax on the transfers of tangible personal property for consideration by retail merchants in Indiana unless the transfer qualifies for a statutory exemption. The sellers of the property are required to collect the sales tax from the purchasers and remit that tax to the state. IC 6-2.5-2-1. Pursuant to this statute, the department assessed sales tax on the taxpayer's sales of certain docks and cattle crossings. The taxpayer contended that the department erred in imposing the sales tax on these sales because they were incorporated into and became a permanent part of the real estate.

The application of the sales tax to tangible personal property is discussed at 45 IAC 2.2-3-8 as follows:

(a) In general, all sales of tangible personal property are taxable, and all sales of real property are not taxable. The conversion of tangible personal property into realty does not relieve the taxpayer from a liability for owing and unpaid state gross retail tax or use tax with respect to such tangible personal property.

(b) All construction material purchased by a contractor is taxable either at the time of purchase, or if purchased exempt (or otherwise acquired exempt) upon disposition unless the ultimate recipient could have purchased it exempt.

The Regulations explain the responsibility of a contractor concerning the payment of sales tax on tangible personal property at 45 IAC 2.2-3-9(b) as follows:

A contractor who purchases construction material exempt from the state gross retail tax or otherwise acquires construction material "tax-free", is accountable to the Department of Revenue for the state gross retail tax when he disposes of such property.

For the purposes of the imposition of sales tax on tangible personal property, an improvement to real estate is defined in Sales Tax Information Bulletin #60 as follow:

E. 'Improvements to real estate' means that personal property has been incorporated into and becomes a permanent part of the real property. To accomplish this, the personal property generally takes on an immovable character. An immovable fixture is characterized by three elements:

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

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

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

Examples of installations that constitute improvements to realty are: doors, garage doors, garage door openers, windows, cabinets, garbage disposals, water heaters, water softeners, alarms, furnaces, central air conditioning units, gutters, and carpeting.

Examples of installations that do not constitute improvements to realty are: personal computers, home stereos, televisions, refrigerators, stoves, dishwashers, garbage compactors, washers, dryers, and window air conditioning units.

The taxpayer provided substantial documentation that the tangible personal property was incorporated into realty pursuant to a construction contract. The property became a permanent and an immovable part of the real estate. It would pass with the real property on sale.

The taxpayer acted as a contractor in the attachment of the protested docks and cattle crossings to the customers' real estate. The taxpayer acquired the tangible personal property without paying tax on the purchase. Also, the taxpayer did not charge sales tax on the tangible personal property sold to its customers. Therefore, pursuant to the provisions of 45 IAC 2.2-3-9(b), the taxpayer is accountable to the department for the sales tax on tangible personal property it incorporated into its customers' real estate.

**FINDING**

The taxpayer's protest is denied.

**II. Tax Administration- Ten Percent (10%) Negligence Penalty**

**DISCUSSION**

The taxpayer protests the imposition of the ten percent (10%) 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 taxpayer disregarded the law and department instructions to pay sales or use tax on clearly taxable items such as copiers, cleaning supplies, mulch and a tractor mower. These breaches of the taxpayer's duty constitute negligence.

**FINDING**

The taxpayer's protest to the imposition of the ten per cent penalty is denied.

**DEPARTMENT OF STATE REVENUE**

0420050177.LOF

**LETTER OF FINDINGS: 05-0177**
**Use Tax**
**For the Years 2001 through 2003**

**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. Advertising Materials – Use Tax.**

**Authority**: IC 6-2.5-3-1; IC 6-2.5-3-2; IC 6-2.5-3-5(a); 45 IAC 2.2-3-16; Ky. Rev. Stat. Ann. § 139.310.

Taxpayer challenges the audit's decision imposing Indiana use tax on the cost of various advertising materials purchased by taxpayer for use within Indiana.

**STATEMENT OF FACTS**

Taxpayer is an Indiana corporation organized to operate a franchise restaurant located in Indiana. Taxpayer is co-owned by an Indiana resident and by a Kentucky resident. The Department of Revenue (Department) conducted an audit review of taxpayer's business records. The audit review resulted in the assessment of additional Indiana use tax. Taxpayer disagreed with the assessment and lodged a protest to that effect. Declining the opportunity to take part in an administrative hearing on the matter, taxpayer agreed to permit resolution of the protest based upon the contents of its written submission to the Department. This Letter of Findings results.

**DISCUSSION**

**I. Advertising Materials – Use Tax.**

The Department's audit concluded that taxpayer owed use tax on the price of advertising materials destined for use within Indiana. Taxpayer disagrees.

The restaurant franchisor prepared advertising materials suitable for use by its individual franchisees. Taxpayer – as one of the individual franchisees – took advantage of these materials using them to promote taxpayer's Indiana restaurant business.

In taxpayer's case, the franchisor's support service ships the materials to a Kentucky mail service. According to taxpayer, "The title of these inserts is assumed by [taxpayer] or its designee in Kentucky. The mailer then adds the coupons/flyers to its other inserts and mails them to various locations in the state of Indiana." Taxpayer thereafter pays franchisor for the cost of the advertising materials. The audit based the use tax assessment on the cost of the advertising materials delivered into Indiana.

Taxpayer points out that it remitted Kentucky sales tax each time it paid an invoice for the advertising materials. Taxpayer contends that the proposed assessment of Indiana use tax "would result in double taxation at the Indiana franchisee level and would appear to violate the fundamental constitutional principals against double taxation."

Indiana imposes a use tax on the "storage, use, or consumption of tangible personal property in Indiana... regardless of the location of that transaction or of the retail merchant making that transaction." IC 6-2.5-3-2. The tax is imposed on transactions that occur outside of Indiana that would be taxable if they occurred within Indiana but only if property is stored, used or consumed in Indiana. IC 6-2.5-3-1. However, IC 6-2.5-3-5(a) provides:

> 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.

The imposition of the use tax, on purchases occurring outside the state, is qualified under IC 6-2.5-3-5(a). The Department's regulation, 45 IAC 2.2-3-16, reiterates the principal stating that a credit shall be given for "the amount of any sale, purchase, or use tax paid to any other state... with respect to the tangible personal property on which Indiana use tax applies."

Taxpayer has provided approximately 25 original invoices indicating that that taxpayer paid Kentucky sales tax on the purchase of advertising materials which were sent into and used in Indiana. It is taxpayer's contention that it is entitled to a credit against the

Indiana use tax assessment; taxpayer errs.

It is the Department's conclusion that the IC 6-2.5-3-5(a) use tax credit is not available when the corresponding out-of-state sales tax was imposed in error. Ky. Rev. Stat. Ann. § 139.310 states that the Kentucky use tax "is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased... for storage, use, or other consumption *in this state*...." (*Emphasis added*). The Indiana use tax law states that the Indiana use tax is imposed on the "storage, use, or consumption of tangible personal property *in Indiana*...." IC 6-2.5-3-2. (*Emphasis added*). Although the advertising materials were prepared in and sent from Kentucky, the materials were *used* in Indiana. The Kentucky use tax is inapplicable while the audit's assessment of Indiana use tax was entirely appropriate.

Taxpayer's double taxation fears are not entirely unwarranted. However, the solution is not to gloss over the undisputed fact that the advertising materials were used in Indiana, but for taxpayer to seek a refund of the taxes paid to Kentucky in error.

**FINDING**

Taxpayer's protest is respectfully denied.

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**DEPARTMENT OF STATE REVENUE**

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**LETTER OF FINDINGS NUMBER: 050239P**
**Sales and Use Tax**
**For the Years 2002-2003**

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**ISSUE**

**I. Tax Administration- Ten Percent (10%) Negligence Penalty**

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

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

**STATEMENT OF FACTS**

The taxpayer operates video games, pinball machines, pool tables and dart machines in more than 250 locations. They also recondition, sell and service older machines for home entertainment. After an audit, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional sales and use tax, interest, and penalty. The taxpayer protested the imposition of the ten percent (10%) negligence penalty. The taxpayer requested that the Letter of Findings be based on the information in the file.

**I. Tax Administration- Ten Percent (10%) Negligence Penalty**

**DISCUSSION**

The taxpayer protests the imposition of the ten percent (10%) 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 taxpayer computed its monthly sales tax liability by taking its gross sales, backing the tax out and reporting net sales on the ST-103. The law and all published departmental instructions indicate that the merchant is to compute the sales tax due by multiplying the gross retail income by the percentage of sales tax due. The retail merchant is not allowed to absorb the customer's sales tax on a sale. Further, in clear contradiction of the law and published departmental instructions, the taxpayer failed to collect sales tax on parts sold during service calls. The taxpayer's failure to read and follow the published departmental instructions constitutes negligence.

**FINDING**

The taxpayer's protest is denied.

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**DEPARTMENT OF STATE REVENUE**

0420050241.LOF

**LETTER OF FINDINGS NUMBER: 05-0241**
**Sales and Use Tax**
**For 2004**

**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. Sales and Use Tax—Renting and Leasing**

**Authority**: IC 6-8.1-5-1(b); IC 6-2.5-2-1; IC 6-2.5-4-1; IC 6-2.5-5-8(b); IC 6-2.5-8-8; IC 6-2.5-4-10(b); Department of Revenue v. Interstate Warehousing, 783 N.E.2d 248 (Ind. 2003).

Taxpayer protests the assessment of sales and use tax due on the purchase of an aircraft Taxpayer asserts was rented and leased.

**STATEMENT OF FACTS**

Taxpayer is a single member LLC that purchased an aircraft with the intentions of renting and leasing to a flight school. The Department sought documentation to substantiate the rental and leasing exemption. The documentation did not adequately substantiate that Taxpayer was renting and leasing, so Taxpayer was assessed use tax due on the purchase of the aircraft. Taxpayer filed a protest and a hearing was held.

**I. Sales and Use Tax—Renting and Leasing**

**DISCUSSION**

All tax assessments are presumed to be accurate; the taxpayer bears the burden of proving that an assessment is incorrect. IC 6-8.1-5-1(b). Taxpayer purchased a new aircraft from an Indiana dealer and when Taxpayer submitted Form 7695 to the Department to register the aircraft, Taxpayer claimed a sales and use tax exemption for rental or lease to others. As required on Form 7695, Taxpayer entered its Retail Merchants Number in the exemption section.

IC 6-2.5-2-1 imposes sales tax on retail transactions made in Indiana and a retail merchant is required to collect the tax as agent for the state. IC 6-2.5-4-1 defines a retail transaction as the acquisition of tangible personal property for resale to a customer for consideration. When tangible personal property is transferred to a customer, sales tax is to be calculated and collected. Sales of aircraft in Indiana are subject to the imposition of sales tax. Exemptions to the imposition of sales tax exist. IC 6-2.5-5-8(b) grants a sales tax exemption for tangible personal property acquired for resale, rental, or leasing in the course of business. Taxpayer purchased the aircraft and claimed the exemption when registering the aircraft with the Department. Because IC 6-2.5-2-1 requires a merchant to impose and collect sales tax when a sale is made, Taxpayer would have given the dealer a Tax Exemption Certificate, as required by IC 6-2.5-8-8. Under the statute, only retail merchants, wholesalers, manufacturers, and others registered with the Department may issue an exemption certificate and not have sales tax imposed and collected by the seller. Taxpayer was a registered retail merchant with the Department when it claimed the exemption.

Taxpayer entered into a non-exclusive rental and lease contract with a flight school. The flight school intended to rent the aircraft to students for flying lessons toward pilot certification. IC 6-2.5-4-10(b) defines renting and leasing as a retail transaction upon which sales tax is to be collected on the consideration paid. Taxpayer was to have collected sales tax from the flight school on all consideration paid to Taxpayer, both monetary consideration and exchanges and credits. Taxpayer did not collect sales tax from the flight school—as required by IC 6-2.5-2-1. Taxpayer asserted at the hearing that the contract with the flight school was written to acknowledge that the flight school intended to resell use of the aircraft to students. Taxpayer asserted that the flight school was entitled to the sales tax exemption for resale/renting and leasing. The Department asked Taxpayer for a copy of the sales tax exemption certificate submitted by the flight school, as required by IC 6-2.5-8-8. Taxpayer stated that the flight school had not given Taxpayer an exemption certificate. For the record, the flight school was not registered with the Department and was not legally able to have given Taxpayer a sales tax exemption certificate.

A review of reconciliation log provided to Taxpayer by the flight school of rental transactions indicated that the sole member of Taxpayer LLC used the aircraft along with others. No sales tax or use tax was submitted to the Department for the member's use of the aircraft. Taxpayer stated at the hearing that the aircraft was used in an effort to solicit additional business for renting and leasing. Nonetheless, use of the aircraft by the Taxpayer required that use tax have been paid by Taxpayer. Taxpayer has merged its personal use of the aircraft with the rental and leasing use of the aircraft.

The Indiana Supreme Court has held that exemption statutes are strictly construed against a taxpayer; a taxpayer has the burden of establishing its entitlement to an exemption. Department of Revenue v. Interstate Warehousing, 783 N.E.2d 248, 250 (Ind. 2003). Taxpayer has not substantiated a qualified exempt use.

**FINDING**

For the reasons stated above, Taxpayer's protest is denied.

**DEPARTMENT OF STATE REVENUE**
**Revenue Ruling #2005-12ST**
**September 23, 2005**

**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**

**Sales and Use Tax- Application of Sales Tax to Dental Restorations**
**Authority**: IC 6-2.5-4-9, 45 IAC 2.2-4-22 (d), (e).

The taxpayer requests that the department rule on how the sales tax applies to a variety of fixed and removable dental restorations.

**STATEMENT OF FACTS**

The taxpayer is a group of dental laboratories. They sell a variety of fixed and removable dental restorations including crowns, bridges, cosmetic restorations, partial dentures, full dentures, implants, orthodontics, snoring and sleep apnea appliances and TMJ appliances. They also repair removable prosthetics and splints. In every case the taxpayers' sales are made to dentists. The specific product lines are as follows:

**1. Removable appliances**

Commonly known as dentures, this product line encompasses full and partial appliances manufactured to a specific prescription issued by a practicing dentist. Partial dentures replace one or more natural teeth. Full dentures replace all upper teeth, all lower teeth or all teeth. The most pervasive characteristic of this product line is that they are removable prosthetics.

**2. Splints**

An occlusal splint is an appliance, usually of all acrylic construction but may incorporate metal clasps and screws. Splints are used for many purposes. These appliances are not prosthetics, however as with removable appliances, they are manufactured to a specific prescription issued by a practicing dentist. Examples: (1) Temporomandibular joint disorder treatment; (2) Bruxism (grinding wear of natural teeth); and (3) For protection of expensive porcelain restorations (crowns and bridges).

**DISCUSSION**

Indiana imposes a gross retail or sales tax on retail sales in Indiana. IC 6-2.5-2-1. A retail sale is a transfer of tangible personal property for consideration. IC 6-2.5-4-1(b)(2). Wholesale sales are specifically defined as retail sales subject to the sales tax. IC 6-2.5-4-2(b)(1). Except for certain enumerated services, the provision of services is not subject to the Indiana sales tax.

Certain items of medical equipment are exempted pursuant to IC 6-2.5-5-18(a) as follows:

> Sales of durable medical equipment, prosthetic devices, artificial limbs, orthopedic devices, dental prosthetic devices, eyeglasses, contact lenses, and other medical supplies and devices are exempt from the state gross retail tax, if the sales are prescribed by a person licensed to issue the prescription.

The term "prosthetic device" is defined at IC 6-2.5-1-25 as follows:

> "Prosthetic device" means a replacement, corrective, or supportive device, including repair and replacement parts for the device, worn on or in the body to:
> (1) artificially replace a missing part of the body;
> (2) prevent or correct physical deformity or malfunction; or
> (3) support a weak or deformed part of the body.

The statute sets out a two pronged test for a sale to qualify for exemption from the Indiana sales and use tax. First, the item must be one of the listed items. Secondly, the item must be prescribed by a person licensed to issue the prescription.

The dentures produced by the taxpayer qualify as a dental prosthetic device because they artificially replace the patient's missing teeth. The splints made by the taxpayer fit the statutory definition of a dental prosthetic device because they are used to prevent or correct physical deformities or malfunctions or support a weak or deformed part of the mouth. The repairs to the dentures and appliances produced by the taxpayer qualify as prosthetic devices because they are repairs and replacement parts for the dental prosthetic devices produced by the taxpayer.

All of the dental prosthetic devices, including the repairs and replacement parts, are prescribed by a dentist licensed to prescribe such items and repairs.

Since the taxpayer's products are dental prosthetic devices that are prescribed by a dentist, they meet the requirements to qualify for exemption from the Indiana sales and use tax pursuant to IC 6-2.5-5-18(a).

**RULING**

The Department rules that the taxpayer's sales of dentures, splints and repairs to and replacement parts for the dentures and splints are not subject to the 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 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.