INDIANA DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #3
INCOME TAX
JANUARY, 2001
(Replaces Information Bulletin # 3, dated September, 1997)

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

SUBJECT: PAYMENT OF INDIANA ESTIMATED TAX BY INDIVIDUALS

REFERENCES: IC 6-3-4-4.1; IC 6-3.5-1.1-18; IC 6-3.5-6-22; IC 6-3.5-7-18; IC 6-8.1-3-3

INTRODUCTION:

Estimated income tax payments must be made by an individual who:

(1) receives income from which Indiana adjusted gross income tax, county adjusted gross income tax, county option income tax, or county economic development income tax, is not properly withheld; and

(2) Has an annual income tax liability described under subdivision (1), above, that is four hundred dollars ($400) or more.

Even if an individual does not meet these requirements, the individual may still make estimated payments to reduce the amount that will be due when the annual individual adjusted gross income tax return is filed.

I. ESTIMATED TAX COUPON BOOKLET

Installment payments may be made by using IT-40ES tax vouchers. The Department issues pre-printed estimated tax vouchers in coupon booklet form to those taxpayers. The coupon booklet contains vouchers for each installment period, and a change of name, address, and social security number. Pre-printed vouchers are mailed annually to any taxpayer that made estimated tax payments during the previous year. If a taxpayer makes estimated payments for the first time, vouchers are sent in coupon booklet form after an estimated payment is received or after payment is made with the Form ES-40 contained in the IT-40 booklet.

Taxpayers and tax preparers are encouraged to file estimated tax payments using pre-printed vouchers. If a taxpayer does not receive pre-printed vouchers before the next installment payment is due, the taxpayer may submit payment with Form ES-40. A copy of this form will be provided to the taxpayer upon request, and the form can be downloaded from the Department's Web Site: www.ai.org/dor/.

The four installment payments are due on April 15, June 15, September 15, and January 15 following the last month of the tax year. A person filing on a fiscal year rather than calendar year basis should adjust the due dates to correspond with the appropriate voucher for the fiscal year. If the due date falls on a national or state holiday, Saturday, or Sunday, payment is timely if it is postmarked by the day following the holiday or Sunday.

While an installment payment cannot be changed once it has been made, future payments can be adjusted to reflect a change in the annual estimated tax due. Future installment payments are determined by subtracting the amount of the previous payments from the amount of the estimated payments not yet paid.

Any installment payment received after January 15 for the preceding tax year will be either returned to the taxpayer or credited against the taxpayer's liability for the following year.

II. CALCULATION OF THE QUARTERLY ESTIMATED PAYMENT

The following schedule should be used to determine the amount of estimated tax due:

A. Total Estimated Income for the Tax Year	A. _____
B. Total Exemptions x $1,000 (plus $1,500 per Qualifying Dependent for Tax Year)	B. _____
C. Amount Subject to Indiana Income Tax (Line A minus B)	C. _____
D. Amount of State Income Tax Due (Line C x .034)	D. _____
E. Amount of County Income Tax Due (Line C x County Tax Rate)	E. _____
F. Total Estimated Income Tax (Line D plus Line E)	F. _____
G. Estimated State and County Income Tax Withheld Plus Total of Other Credits	G. _____
H. Amount of Annual Estimated Tax Due (Line F minus Line G)	H. _____
I. Each Installment Amount Due (Line H divided by 4)	I. _____

III. PENALTIES

A taxpayer is subject to penalty for underpayment of estimated tax if the total state and county taxes due after credits exceeds four hundred dollars ($400). The taxpayer will not owe a penalty if each installment payment equals at least one-fourth of the required annual payment. The required annual payment is the lesser of:

(1) 90% of the tax shown on the current year return;

(2) 100% of the tax shown on the previous year return;

(3) 108.6% of the tax shown on the previous year's tax return if the taxpayer is not a farmer or fisherman and the Indiana

adjusted gross income shown on a joint return is more than $150,000; or

(4) 108.6% of the tax shown on the previous year's tax return if the taxpayer is not a farmer or fisherman and the Indiana adjusted gross income shown on the return is more than $75,000 for a taxpayer who is either single or married and filing separately.

If the taxpayer is eligible for any of the exceptions to the penalty listed in (1), (2), (3), or (4) above, they must attach the IT-2210 to the individual income tax return showing that the exception has been met.

If a taxpayer's income is not received evenly during the year, the taxpayer can avoid penalty if the tax is paid in an amount at least equal to the annualized income installment by the due date of the installment. Schedule IT-2210A should be used to compute the annualized income installment amount. This schedule is available upon request or at the Department's Web Site (www.ai.org/dor/). If a penalty is imposed for underpayment of estimated tax, the penalty is ten percent of the underpayment for that period.

IV. UNDERPAYMENT

The underpayment of an installment is the difference between the payment required for the installment (or the annual income statement, if applicable) and the amount paid. If a payment is made after the installment due date, the payment is considered to be made in the following installment period.

V. AVOIDING PENALTY FOR THE FOURTH INSTALLMENT

If a taxpayer files an annual individual adjusted gross income tax return and pays the entire tax due by January 31, the taxpayer will not receive a penalty for the installment payment due January 15. However, payment of the entire estimated tax liability or balance due with the fourth installment or with the filing of the return does not relieve the taxpayer from any penalty for failure to make prior estimated payments in a timely manner during the year.

VI. FARMERS AND FISHERMEN

A penalty is not imposed if:

(1) at least two-thirds of the taxpayer's annual gross income for the current year or preceding year is from farming or fishing;

(2) the taxpayer files Form IT-40 or Form IT-40PNR; and

(3) The taxpayer pays the entire tax due by March 1.

The taxpayer should attach Schedule IT-2210 to the income tax return and complete the portion of the return labeled "Farmers and Fishermen Only". If the farmer or fisherman does not file the return and pay the tax by March 1, the taxpayer should complete Schedule IT-2210 to determine if a penalty applies.

Kenneth L. Miller
Commissioner

INDIANA DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN # 16
INCOME TAX
JANUARY, 2001

(Replaces Information Bulletin #16, dated May, 1984)

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

SUBJECT: USE OF FEDERAL FORM W-2 FOR REPORTING INDIANA STATE AND COUNTY TAXES WITHHELD

REFERENCE: IC 6-3-4-8

INTRODUCTION:

The purpose of this Bulletin is to provide employers with the necessary information to correctly indicate Indiana adjusted gross income tax withheld, and county income tax withheld on the State copy of Federal Form W-2, Wage and Tax Statement.

I. EMPLOYER'S STATEMENT TO EMPLOYEES

Every employer, who has withheld tax from income paid or credited to any taxpayer, is required to provide the taxpayer with a statement of the amount of income paid or credited to him and the amount of tax withheld for him, during the calendar year. For both state and county tax purposes, Federal Form W-2, Wage and Tax Statement, should be used for Indiana withholding purposes.

II. COMPLETING THE STATE COPY OF FORM W-2 FOR STATE AND COUNTY TAX WITHHOLDING

All Indiana State income tax withheld by an employer must be designated in the appropriate boxes of the state copy of the W-2 form. For purposes of identifying Indiana State income tax withheld, the abbreviation IN must be shown in box 16.

State income tax information should be reported in boxes 17 and 18. Box 17 should report the amount of wages subject to

Indiana income tax. Box 18 should report the amount of Indiana income tax withheld.

All Indiana county income taxes withheld by an employer must be designated in the appropriate boxes of state copy of the W-2 form. To identify county tax withheld for the tax year, enter C and the adopting county code in box 19.

County income tax information should be reported in boxes 20 and 21. Box 20 should report the amount of wages subject to county income tax. Box 21 should report the amount of county income tax withheld.

III. COUNTY CODE LISTINGS

1. Adams	32. Hendricks	63. Pike
2. Allen	33. Henry	64. Porter
3. Bartholomew	34. Howard	65. Posey
4. Benton	35. Huntington	66. Pulaski
5. Blackford	36. Jackson	67. Putnam
6. Boone	37. Jasper	68. Randolph
7. Brown	38. Jay	69. Ripley
8. Carroll	39. Jefferson	70. Rush
9. Cass	40. Jennings	71. St. Joseph
10. Clark	41. Johnson	72. Scott
11. Clay	42. Knox	73. Shelby
12. Clinton	43. Kosciusko	74. Spencer
13. Crawford	44. LaGrange	75. Starke
14. Daviess	45. Lake	76. Steuben
15. Dearborn	46. LaPorte	77. Sullivan
16. Decatur	47. Lawrence	78. Switzerland
17. Dekalb	48. Madison	79. Tippecanoe
18. Delaware	49. Marion	80. Tipton
19. Dubois	50. Marshall	81. Union
20. Elkhart	51. Martin	82. Vanderburgh
21. Fayette	52. Miami	83. Vermillion
22. Floyd	53. Monroe	84. Vigo
23. Fountain	54. Montgomery	85. Wabash
24. Franklin	55. Morgan	86. Warren
25. Fulton	56. Newton	87. Warrick
26. Gibson	57. Noble	88. Washington
27. Grant	58. Ohio	89. Wayne
28. Greene	59. Orange	90. Wells
29. Hamilton	60. Owen	91. White
30. Hancock	61. Parke	92. Whitley
31. Harrison	62. Perry	

Refer to Information Bulletin #32, Income Tax, for additional information concerning state and county taxes.

Kenneth L. Miller
Commissioner

INDIANA DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #33
INCOME TAX
DECEMBER, 2000

(Replaces Information Bulletin #33, dated August 1995)

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

SUBJECT: WITHHOLDING REQUIREMENTS FOR NONRESIDENT EMPLOYEES
REFERENCE: IC 6-3-5-1; 45 IAC 3.1-1-115
INTRODUCTION:

The withholding of income taxes is required for all nonresidents employed in Indiana, except for legal residents of states complying with Indiana's reciprocity statute, IC 6-3-5-1.

Indiana has established reciprocity agreements with Kentucky, Michigan, Ohio, Pennsylvania, and Wisconsin concerning the collection of income tax from nonresidents employed in Indiana. These agreements provide that Indiana will not impose adjusted gross income tax on the salaries, wages, tips and commissions earned by the legal residents of states with reciprocity who work in Indiana.

Indiana residents who work in states with reciprocity will receive identical treatment from those states.

I. REQUIREMENTS OF EMPLOYERS

Because of reciprocity agreements, Indiana employers are not required to withhold Indiana adjusted gross income tax from qualified nonresidents. However, employers are encouraged to withhold the appropriate taxes on behalf of the state where the employee resides.

II. REQUIREMENTS OF NONRESIDENT EMPLOYEES

A qualified nonresident employee who works in Indiana is required to submit a properly completed form WH-47 to the employee's employer. This form identifies the employee's state of legal residence.

III. TAXES NOT AFFECTED

Indiana reciprocity agreements do not affect withholding requirements concerning the Indiana County Adjusted Gross Income Tax (CAGIT), County Economic Development Income Tax (CEDIT), or the County Option Income Tax (COIT).

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE

02960466.LOF

LETTER OF FINDINGS NUMBER: 96-0466
Corporate Income Tax
For Years Ending March 31, 1992, 1993, and 1994

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

ISSUES

I. Corporate Income Tax – Imposition of Gross Income Tax on Sales of Products in Indiana

Authority: Ind. Code § 6-2.1-2-2; Ind. Admin. Code tit. 45, r. 1-1-120; Mueller Brass Company v. Gross Income Tax Division, Indiana State Department of Revenue, 265 N.E.2d 704 (Ind. 1971); Indiana-Kentucky Electric Corp. v. Indiana Department of State Revenue, 598 N.E.2d 647 (Ind. Tax Ct. 1992)

The taxpayer protests the imposition of gross income tax on sales of its products to dealers in Indiana.

II. Tax Administration – Interest

Authority: Ind. Code § 6-8.1-10-1

The taxpayer protests the imposition of interest on the assessed tax liability.

STATEMENT OF FACTS

The taxpayer is a corporation incorporated in the state of Delaware and is the subsidiary of an international corporation located in Japan. The taxpayer's primary business is the sale, lease, and service of copier machines and fax machines. In Indiana, the taxpayer sells its products directly to its customers and also to authorized dealers. The dealers solicit their own customers. The taxpayer employs salespersons who reside out-of-state. Customers either mail or telephone orders to an out-of-state office where the orders are processed. The taxpayer does not have an office in Indiana and its products are shipped into Indiana from out-of-state warehouses.

The taxpayer employs approximately four technicians in Indiana to perform service on, and occasionally install, the taxpayer's products. The technicians reside in Indiana and operate out of their homes. The taxpayer agrees that revenue from services provided by its technicians is taxable income in Indiana. When a technician is not available, the taxpayer will sometimes subcontract with a dealer to service and install the taxpayer's products. The taxpayer was assessed gross income tax on the income from sales of its products to the dealers in Indiana. The taxpayer was also charged interest on the amount of income tax assessed. The income tax audit was completed on April 10, 1996. The taxpayer filed a timely protest and a telephone conference was held on July 14, 2000.

I. Corporate Income Tax – Imposition of Gross Income Tax on Sales of Products in Indiana

DISCUSSION

The taxpayer argues that the sale of its products to Indiana dealers constitutes the sale of goods in interstate commerce and is not subject to Indiana gross income tax. The taxpayer cites Mueller Brass Company v. Gross Income Tax Division, Indiana State Department of Revenue, 265 N.E.2d 704 (Ind. 1971) in support of its position. The Court in Mueller Brass held that sales to customers in northern Indiana that,

> were initiated by personnel residing outside the state, that the goods sold were shipped into Indiana from another state, that the orders that were not given directly to the salesmen were mailed to appellant's out-of-state office, and that the orders were accepted and payment received at offices located outside of Indiana,
>
> were not subject to Indiana gross income tax. Id. at 717.

The Mueller Brass court found, however, that sales into the southern two thirds of the state were subject to taxation due to the fact the company employed a resident sales staff in Indianapolis which "performed local business activities and provided local services." Id. The Court reasoned that the presence of the sales staff and their activities established a nexus with Indiana and thus the proceeds from those sales were subject to gross income tax.

The gross income tax statute, as it applies to nonresidents, reads in relevant part: "(a) An income tax, known as the gross income tax, is imposed upon the receipt of:... (2) the taxable gross income derived from activities or businesses or any other sources within Indiana by a taxpayer who is not a resident or a domiciliary of Indiana." Ind. Code § 6-2.1-2-2. A taxpayer's income has an Indiana source when a taxpayer has an Indiana business situs at which activities related to the transaction giving rise to the income are more than minimal, not remote or incidental to the transaction. Indiana-Kentucky Electric Corp. v. Indiana Department of State Revenue, 598 N.E.2d 647, 662 (Ind. Tax Ct. 1992).

The Administrative Code, applicable for the tax period at issue, provides that:

> As a general rule, income derived from sales made by nonresident sellers to Indiana buyers is not subject to gross income tax unless the seller was engaged in business activity within the State and such activity was connected with or facilitated the sales. Local activity sufficient to subject the seller to taxation may result from his maintenance of a fixed business location in Indiana, or may result from the nature and extent of his business activities in the State.
>
> ...
>
> (1) Nontaxable in-shipments
>
> > (b) Sales made by a nonresident who has a business situs or business activities within the State, but the situs or activities are not significantly associated with the sales, and the goods are shipped directly to the buyer upon receipt of a prior order.... For the sales to be considered as nontaxable under this rule, they must be initiated, negotiated and serviced by out-of-state personnel, and contact with the Indiana business situs or with employees operating within the State must be no more than incidental.
>
> Ind. Admin. Code tit. 45, r. 1-1-120 (1978) (repealed 1999).

In the instant case, the activities of the taxpayer's technicians are minimal and incidental to the sales of goods from the taxpayer to the Indiana dealers. Sales orders are sent to, and processed by, out-of-state offices; the taxpayer has no office in Indiana; and the goods are shipped into Indiana from out-of-state warehouses. The only direct connection the taxpayer has with the state is the few technicians it employs. This is not sufficient to subject the taxpayer's sales in this state to Indiana gross income tax.

FINDING

The taxpayer's protest is sustained.

II. Tax Administration – Interest

DISCUSSION

The taxpayer protests the imposition of any penalty or interest on the amount of tax assessed. No penalty was assessed by the auditor. The taxpayer was sustained on Issue I, therefore the question of interest on that assessed amount is moot. Regarding any assessment amount not included in Issue I, interest applies and is due. Under Ind. Code § 6-8.1-10-1(a), if a person incurs a deficiency upon a determination by the Department, the person is subject to interest on the nonpayment. The Department has no discretion regarding the imposition of interest.

FINDING

The taxpayer's protest is sustained as far as any interest imposed on the amount assessed in Issue I.

DEPARTMENT OF STATE REVENUE

04970123.LOF

LETTER OF FINDINGS NUMBER 97-0123 ST
Sales And Use Tax
For Tax Periods: 1993 Through 1995

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

of this document will provide the general public with information about the Department's official position concerning specific issues.

ISSUES

1. Sales and Use Tax–Sole Proprietor

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

Taxpayer protests his classification as a sole proprietor.

2. Tax Administration–Best Information Available

Authority: IC 6-8.1-5-4(a), IC 6-8.1-5-4(c), IC 6-8.1-5-1(a)

Taxpayer protests the computation of the tax liability using the best information available.

3. Tax Administration–Penalty

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

Taxpayer protests the imposition of a penalty.

STATEMENT OF FACTS

Taxpayer is a retail merchant and independent used auto dealer. After an audit, Taxpayer was assessed sales and use tax, interest and penalty. Taxpayer protested the assessment and a hearing was held. Additional facts will be provided as necessary.

1. Sales and Use Tax-Sole Proprietor

DISCUSSION

Taxpayer protests the classification of his business as a sole proprietorship. He asserts that he is in a partnership with his brother. Taxpayer has the burden of proving that the assessment and his classification as a sole proprietor is incorrect. IC 6-8.1-5-1(b). Taxpayer provided no information that would establish the existence of a partnership between Taxpayer and his brother. Therefore he did not sustain his burden of proof.

FINDING

Taxpayer's protest is denied.

2. Tax Administration–Best Information Available

DISCUSSION

Taxpayer's second point of protest concerns the calculation of his tax liability based upon the best information available. Taxpayers are required to retain books and records "so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records." IC 6-8.1-5-4(a). Taxpayers also have a duty to present these records to authorized agents of the department in response to reasonable requests. IC 6-8.1-5-4(c). If a taxpayer does not present adequate records for a department auditor to determine the proper tax liability, the department auditor should make a determination of the proper amount of tax liability based upon the best information available. IC 6-8.1-5-1(a).

This audit was based on the best information available at the time of the audit. After the hearing, Taxpayer provided additional documentation.

FINDING

Audit is instructed to examine the documentation and calculate the proper tax liability.

3. Tax Administration–Penalty

DISCUSSION

Taxpayer protests the ten percent negligence penalty imposed 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 reach 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.

In this case, Taxpayer disregarded his duty to keep adequate records and present them to the department representative upon request. This constitutes negligence.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04990143.LOF

LETTER OF FINDINGS NUMBER 97-0143 ST
Sales And Use Tax
For Tax Periods: 1996 Through 1997

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

ISSUES

1. Sales and Use Tax–Sole Proprietor

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

Taxpayer protests his classification as a sole proprietor.

2. Tax Administration–Best Information Available

Authority: IC 6-8.1-5-4(a), IC 6-8.1-5-4(c), IC 6-8.1-5-1(a)

Taxpayer protests the computation of the tax liability using the best information available.

3. Tax Administration–Penalty

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

Taxpayer protests the imposition of a penalty.

STATEMENT OF FACTS

Taxpayer is a retail merchant and independent used auto dealer. After an audit, Taxpayer was assessed sales and use tax, interest and penalty. Taxpayer protested the assessment and a hearing was held. Additional facts will be provided as necessary.

1. Sales and Use Tax–Sole Proprietor

DISCUSSION

Taxpayer protests the classification of his business as a sole proprietorship. He asserts that he is in a partnership with his brother. Taxpayer has the burden of proving that the assessment and his classification as a sole proprietor is incorrect. IC 6-8.1-5-1(b). Taxpayer provided no information that would establish the existence of a partnership between Taxpayer and his brother. Therefore he did not sustain his burden of proof.

FINDING

Taxpayer's protest is denied.

2. Tax Administration–Best Information Available

DISCUSSION

Taxpayer's second point of protest concerns the calculation of his tax liability based upon the best information available. Taxpayers are required to retain books and records "so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records." IC 6-8.1-5-4(a). Taxpayers also have a duty to present these records to authorized agents of the department in response to reasonable requests. IC 6-8.1-5-4(c). If a taxpayer does not present adequate records for a department auditor to determine the proper tax liability, the department auditor should make a determination of the proper amount of tax liability based upon the best information available. IC 6-8.1-5-1(a).

This audit was based on the best information available at the time of the audit. After the hearing, Taxpayer provided additional documentation.

FINDING

Audit is instructed to examine the documentation and calculate the proper tax liability.

3. Tax Administration–Penalty

DISCUSSION

Taxpayer protests the ten percent negligence penalty imposed 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 reach 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.

In this case, Taxpayer disregarded his duty to keep adequate records and present them to the department representative upon request. This constitutes negligence.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

01970192.LOF

LETTER OF FINDINGS NUMBER 97-0192 ST
Income Tax
For Tax Periods: 1987 Through 1995

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

ISSUES

1. Income Tax–Sole Proprietor

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

Taxpayer protests his classification as a sole proprietor.

2. Tax Administration–Best Information Available

Authority: IC 6-8.1-5-4(a), IC 6-8.1-5-4(c), IC 6-8.1-5-1(a)

Taxpayer protests the computation of the tax liability using the best information available.

3. Tax Administration–Penalty

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

Taxpayer protests the imposition of a penalty.

STATEMENT OF FACTS

Taxpayer is a retail merchant and independent used auto dealer. After an audit, Taxpayer was assessed sales and use tax, interest and penalty. Taxpayer protested the assessment and a hearing was held. Additional facts will be provided as necessary.

1. Income Tax–Sole Proprietor

DISCUSSION

Taxpayer protests the classification of his business as a sole proprietorship. He asserts that he is in a partnership with his brother. Taxpayer has the burden of proving that the assessment and his classification as a sole proprietor is incorrect. IC 6-8.1-5-1 (b). Taxpayer provided no information that would establish the existence of a partnership between Taxpayer and his brother. Therefore he did not sustain his burden of proof.

FINDING

Taxpayer's protest is denied.

2. Tax Administration–Best Information Available

DISCUSSION

Taxpayer's second point of protest concerns the calculation of his tax liability based upon the best information available. Taxpayers are required to retain books and records "so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records." IC 6-8.1-5-4 (a). Taxpayers also have a duty to present these records to authorized agents of the department in response to reasonable requests. IC 6-8.1-5-4 (c). If a taxpayer does not present adequate records for a department auditor to determine the proper tax liability, the department auditor should make a determination of the proper amount of tax liability based upon the best information available. IC 6-8.1-5-1 (a).

This audit was based on the best information available at the time of the audit. After the hearing, Taxpayer provided additional documentation.

FINDING

Audit is instructed to examine the documentation and calculate the proper tax liability.

3. Tax Administration–Penalty

DISCUSSION

Taxpayer protests the ten percent negligence penalty imposed 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 reach 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.

In this case, Taxpayer disregarded his duty to keep adequate records and present them to the department representative upon request. This constitutes negligence.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04980269.LOF

LETTER OF FINDINGS NUMBER 98-0269
Sales Tax
For Tax Periods: 1995-1996

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

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

1. Sales and Use Tax – Cold Storage

Authority: IC 6-2.5-3-2(a), 45 IAC 2.2-5-1(g)

Taxpayer protests the assessment of tax on its cold storage facility.

2. Sales and Use Tax – Lump Sum Contracts

Authority: IC 6-2.5-4-9

Taxpayer protests the assessment of tax on a lump sum contracts.

STATEMENT OF FACTS

Taxpayer is in the business of rendering public transportation and the storage of frozen commodities. After an audit, Taxpayer was assessed additional use tax. Taxpayer timely protested the assessment. Further facts will be provided as necessary.

1. Sales and Use Tax – Cold Storage

DISCUSSION

Taxpayer uses refrigerated trucks it owns or it contracts for on behalf of the customer to transport frozen food commodities from a location designated by Taxpayer to its cold storage facilities. At a later date, upon the receipt of further shipping instructions, Taxpayer will transport the goods from its storage facilities to the location designated by Taxpayer. The customer pays an arranged fee for the transportation services. Taxpayer's cold storage facilities are used to warehouse the customer's goods. Warehousing of specific goods is usually for no longer than a week or two, but sometimes will last for a few months. A warehousing fee, separate from the transportation fee, is imposed on the customer. The warehousing fee is a monthly fee. If the customer warehouses goods for any period of time during the month, the monthly fee is charged. Fees are not prorated. Many customers will use the space to warehouse a rotation of goods being stored for short periods. Taxpayer protests the assessment of use tax on tangible personal property and electricity used in the cold storage facility.

Indiana imposes a use tax on the "storage, use, or consumption of tangible personal property in Indiana." IC 6-2.5-3-2 (a). There are several statutory exemptions to the use tax. Taxpayer contends that these items qualify for exemption pursuant to IC 6-2.5-5-27 as follows:

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

This statute is further explained at 45 IAC 2.2-5-61 (g) as follows:

Storage facilities and equipment.... tangible personal property directly used for temporarily storing persons or property being transported is exempt from tax because temporary storage is considered to be an integral part of rendering transportation.

The regulation gives several examples of temporary storage facilities which would qualify for exemption from the gross retail tax. Some of these examples include facilities to store airline passengers' luggage until it can be loaded on a plane and a carrier temporarily storing property until it can be loaded for further shipment. In each of these cases there is no additional charge for the storage.

In Taxpayer's situation the storage is significantly more than the temporary type of storage which would be exempt pursuant to the statute and regulation. This is not storage to facilitate the routine transfer of the goods or to deal with unexpected delays. This storage is a separate and distinct business activity. The customers request the storage for their own benefit and pay for the service.

FINDING

Taxpayer's protest is denied.

2. Sales and Use Tax - Lump Sum Contracts.

DISCUSSION

During the tax period, Taxpayer entered into several lump sum contracts for improvements to realty. Since Taxpayer routinely gave out exemption certificates, tax was assessed on the total value of the lump sum contracts.

Contractors are liable for gross retail tax when the contractor converts materials into realty pursuant to a lump sum contract unless they receive an exemption certificate from the purchaser. IC 6-2.5-4-9. Two of the contractors received exemption certificates from the purchaser. Therefore, Taxpayer owes the gross retail tax on those contracts. There is no evidence in this case that Taxpayer gave an exemption certificate to any of the other contractors. Therefore those contractors are liable for the gross retail tax due on the lump sum contracts for improvements to realty.

FINDING

Taxpayer's protest is sustained in part and denied in part.

DEPARTMENT OF STATE REVENUE

04990063.LOF

LETTER OF FINDINGS NUMBER: 99-0063
Sales and Use Tax
Calendar Years 1995, 1996, and 1997

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

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

ISSUE

I. Tax Administration – Penalty

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

The taxpayer protests the negligence penalty.

STATEMENT OF FACTS

The negligence penalty was assessed on a sales and use tax assessment resulting from a Department audit conducted for the calendar years 1995, 1996, and 1997.

The taxpayer operates a golf course and country club. Income is derived from green fees, golf cart rentals, range fees (driving range), membership fees, party room rentals, and the sale of food and alcoholic beverages at the bar/restaurant operated by the taxpayer. In addition, the taxpayer operates a golf pro shop which sells golf equipment & accessories. The taxpayer files as a Subchapter S Corporation for income tax purposes with four Indiana resident shareholders.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer argues the negligence penalty should be waived as the taxpayer's error was not intentional. The Department points out the taxpayer has a bad payment history.

45 IAC 15-11-2(b) states, "Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer."

The Department finds the taxpayer was inattentive of tax duties. Inattention is negligence and negligence is subject to penalty. As such, the Department finds the penalty proper and denies the penalty protest.

FINDING

The taxpayer's penalty protest is denied.

DEPARTMENT OF STATE REVENUE

03990078P.LOF

LETTER OF FINDINGS NUMBER: 99-0078P
Withholding Tax
Calendar Years 1995, 1996, and 1997

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

ISSUE

I. Tax Administration – Penalty

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

The taxpayer protests the negligence penalty.

STATEMENT OF FACTS

The negligence penalty was assessed on a withholding tax assessment resulting from a Department audit conducted for the calendar years 1995, 1996, and 1997.

The taxpayer operates a golf course and country club. Income is derived from green fees, golf cart rentals, range fees (driving range), membership fees, party room rentals, and the sale of food and alcoholic beverages at the bar/restaurant operated by the taxpayer. In addition, the taxpayer operates a golf pro shop which sells golf equipment & accessories. The taxpayer files as a Subchapter S Corporation for income tax purposes with four Indiana resident shareholders.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer argues the negligence penalty should be waived as the taxpayer's error was not intentional. The Department points out the taxpayer has a bad payment history.

45 IAC 15-11-2(b) states, "Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness,

thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer."

The Department finds the taxpayer was inattentive of tax duties. Inattention is negligence and negligence is subject to penalty. As such, the Department finds the penalty proper and denies the penalty protest.

FINDING

The taxpayer's penalty protest is denied.

DEPARTMENT OF STATE REVENUE

01990144.LOF

LETTER OF FINDINGS NUMBER 99-0144 ST
Income Tax
For Tax Periods: 1996 Through 1997

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

ISSUES

1. Income Tax–Sole Proprietor

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

Taxpayer protests his classification as a sole proprietor.

2. Tax Administration–Best Information Available

Authority: IC 6-8.1-5-4(a), IC 6-8.1-5-4(c), IC 6-8.1-5-1(a)

Taxpayer protests the computation of the tax liability using the best information available.

3. Tax Administration–Penalty

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

Taxpayer protests the imposition of a penalty.

STATEMENT OF FACTS

Taxpayer is a retail merchant and independent used auto dealer. After an audit, Taxpayer was assessed sales and use tax, interest and penalty. Taxpayer protested the assessment and a hearing was held. Additional facts will be provided as necessary.

1. Income Tax–Sole Proprietor

DISCUSSION

Taxpayer protests the classification of his business as a sole proprietorship. He asserts that he is in a partnership with his brother. Taxpayer has the burden of proving that the assessment and his classification as a sole proprietor is incorrect. IC 6-8.1-5-1 (b). Taxpayer provided no information that would establish the existence of a partnership between Taxpayer and his brother. Therefore he did not sustain his burden of proof.

FINDING

Taxpayer's protest is denied.

2. Tax Administration–Best Information Available

DISCUSSION

Taxpayer's second point of protest concerns the calculation of his tax liability based upon the best information available. Taxpayers are required to retain books and records "so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records." IC 6-8.1-5-4 (a). Taxpayers also have a duty to present these records to authorized agents of the department in response to reasonable requests. IC 6-8.1-5-4 (c). If a taxpayer does not present adequate records for a department auditor to determine the proper tax liability, the department auditor should make a determination of the proper amount of tax liability based upon the best information available. IC 6-8.1-5-1 (a).

This audit was based on the best information available at the time of the audit. After the hearing, Taxpayer provided additional documentation.

FINDING

Audit is instructed to examine the documentation and calculate the proper tax liability.

3. Tax Administration–Penalty

DISCUSSION

Taxpayer protests the ten percent negligence penalty imposed 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 reach 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.

In this case, Taxpayer disregarded his duty to keep adequate records and present them to the department representative upon request. This constitutes negligence.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

03990475.LOF

LETTER OF FINDINGS NUMBER 99-0475
INDIANA GROSS INCOME TAX / WITHHOLDING LIABILITY
For Years 1996, 1997, and 1998

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

ISSUES

I. Withholding Gross Income Tax for Nonresident Contractors–Interstate Commerce Exemption

Authority: IC 6-2.1-3-3; IC 6-2.1-6-1(a); IC 6-2.1-6-1(b); IC 6-8.1-5-1(b); Indiana Dept. of State Revenue v. Brown Boveri Corp., 439 N.E.2d 561 (Ind. 1982); Reynolds Metals Co. v. Indiana Dept. of State Revenue, 433 N.E.2d 1, 8 (Ind. Ct. App. 1982); 45 IAC 1-1-49; 45 IAC 1-1-49(1); 45 IAC 1-1-84; 45 IAC 1-1-213; 45 IAC 1.1-1-24(b)(1)

Taxpayer protests the assessment of withholding tax liability for twelve nonresident contractors who performed work at taxpayer's Indiana engine manufacturing facility.

II. Request for Abatement of the Negligence Penalty

Taxpayer has requested that the ten-percent negligence penalty, assessed for its failure to comply with the taxpayer's obligation to withhold the state gross income tax, be abated.

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

STATEMENT OF FACTS

The taxpayer is a multinational publicly held corporation with headquarters located outside Indiana. The taxpayer has divided its operation into two major business segments. The first business segment is involved in the design, manufacture, and marketing of construction, excavation, and transportation machinery. The first segment's activities include sales directed into Indiana and sales made directly from the taxpayer's Indiana warehouse facility. The second business segment is involved in the design, manufacture, and marketing of engines for earthmoving, construction, agricultural, electrical generation, railroad, marine, and other applications. One of taxpayer's two Indiana locations is part of the second business segment. Although that location manufactures various large engines on an assembly line basis, the engines are not manufactured until the customer has determined the exact specifications for an individual engine and has placed an order for that engine.

I. Withholding Gross Income Tax for Nonresident Contractors–Interstate Commerce Exemption

DISCUSSION

The taxpayer protests the assessment of withholding tax liability for various nonresident contractors who performed work and provided services at taxpayer's Indiana large engine facility.

Taxpayer asserts it was not required to withhold gross income tax on behalf of twelve contractors who performed work at the taxpayer's Indiana large engine facility. The taxpayer cites 45 IAC 1-1-213 which states in relevant part that, "Indiana gross income tax is required to be withheld from any and all payments made to a nonresident contractor for performance of any work or services *which are taxable to the State of Indiana*." (Emphasis added). The taxpayer asserts that the transactions were not subject to Indiana tax quoting Indiana Dept. of State Revenue v. Brown Boveri Corp., 439 N.E.2d 561 (Ind. 1982) for the proposition that where the local activities of a foreign corporation, including installing, testing, and adjusting, are intrinsically related to and inherently part of a sale in interstate commerce, the transaction is seen as one continuing transaction, protected as interstate commerce, and exempt from the state gross income tax. In summary, taxpayer argues that the proposed assessment is clearly in violation of the U.S. Const. art. I, § 8.

The audit determined that the twelve contractors, performing work at taxpayer's Indiana location, had established an actual situs

in Indiana during the time the work was performed as defined within 45 IAC 1-1-49. Because the contractors performed services within Indiana, they were brought into the grip of taxation for Gross Income. Additionally, the twelve nonresident contractors had not filed Indiana income tax returns and were not registered with the Indiana Secretary of State to conduct business within Indiana. Therefore, after granting each nonresident contractor the statutory $1000 exemption, the audit assessed tax due on the entire amount of the invoice computed at the rate of 1.2 percent.

In order to prevail in its protest, the taxpayer is required to carry its burden of proof by demonstrating that the proposed tax has been incorrectly assessed. IC 6-8.1-5-1(b) states in relevant part that "[t]he notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Further, because the taxpayer asserts that the transactions at issue are not subject to the Gross Income Tax by virtue of the protection afforded under the Interstate Commerce Clause, as "[t]he party claiming an interstate commerce exemption, or... the danger that he is subject to the risk of multiple taxation, bears the burden of establishing such facts, and any doubt should be resolved in favor of the tax." Reynolds Metals Co. v. Indiana Dept. of State Revenue, 433 N.E.2d 1, 8 (Ind. Ct. App. 1982).

45 IAC 1-1-84 authorizes the imposition of Indiana's Gross Income Tax on income generated by nonresidents. "The gross income tax is levied upon the total gross receipts of nonresident taxpayers which are derived from activities or businesses in the state or other Indiana sources." Therefore, "the tax on nonresidents is limited basically to receipts from activities connected with a business situs." 45 IAC 1-1-84. The manner in which a nonresident contractor establishes a business situs is defined in 45 IAC 1-1-49 which states that "a taxpayer may establish a 'business situs' in ways including but not limited to... [the] [p]erformance of services." 45 IAC 1-1-49(1).

An exception is provided for specific nonresidents under the provisions of IC 6-2.1-6-1(a), which exempts nonresident contractors which are "qualified to do business in Indiana."

Once a foreign entity is determined to be a "nonresident contractor," and to have established a business situs within the state of Indiana, 45 IAC 1-1-213 imposes upon the entity making the contract payment a duty to withhold gross income tax. "Indiana gross income tax is required to be withheld from any and all payments made to a nonresident contractor for performance of any work or services which are taxable to the state of Indiana." 45 IAC 1-1-213. Even though the burden of paying the tax remains with the out-of-state contractor, the local entity has the burden of withholding that tax.

Therefore, the taxpayer, as the Indiana entity, was required to withhold the gross income tax on payments made to its out-of-state contractors. By performing work within the state of Indiana, the out-of-state contractors established a business situs within Indiana. Because the out-of-state contractors were not registered with the Indiana Secretary of State of state, the contractors were not "qualified to do business in Indiana" as defined within IC 6-2.1-6-1(a).

However, the taxpayer invokes the Interstate Commerce Clause as providing a blanket exemption on behalf of the twelve out-of-state contractors. IC 6-2.1-3-3 exempts from the Indiana tax "[g]ross income derived from business conducted in commerce between the state of Indiana and either another state or a foreign country... to the extent the state of Indiana is prohibited from taxing that gross income by the United States Constitution." The application of IC 6-2.1-3-3, and specifically the Interstate Commerce exemption (U.S. Const. art. I, § 8), has been set out in Indiana Dept. of State Revenue v. Brown Boveri Corp., 439 N.E.2d 561 (Ind. 1982). Boveri stands for the proposition that when the local activities of an out-of-state company are intrinsically and inherently related to a transaction taking place in interstate commerce, the entire transaction is shielded by the Interstate Commerce Clause and, necessarily, exempt from the state gross income tax. Id. at 564.

For eleven of the twelve contractors at issue, the taxpayer has failed to meet its burden of demonstrating that the contractors' local activities were so intrinsically related to the interstate transaction as to be exempt from the Indiana's Gross Income Tax and the taxpayer's consequent obligation to withhold that tax under 45 IAC 1-1-213. Statutorily, taxpayer, has the "burden of showing that the proposed assessment is wrong." IC 6-8.1-5-1(b). Specifically, a claim of exemption under the Interstate Commerce Clause requires that the taxpayer "bear[] the burden of establishing such facts, and any doubt should be resolved in favor of the tax." Reynolds, 433 N.E.2d at 8. Because taxpayer has failed to meet its burden of proof, taxpayer's protest, so far as it relates to the eleven contractors located in other states, is denied.

As to the transaction with the remaining twelfth contractor, the taxpayer has supplied information that suggests the transaction may indeed be analogous to the facts set forth in Indiana Dept. of State Revenue v. Brown Boveri Corp., 439 N.E.2d 561 (Ind. 1982). However, intriguing as the taxpayer's argument may be, it is essentially not the taxpayer's argument to make. The taxpayer is setting forth a defense to the imposition of gross income tax which may be made by a nonresident contractor but not by taxpayer because the taxpayer's duty to withhold does not turn on whether the transaction is or is not subject to the gross income tax. Under IC 6-2.1-6-1(b), "each individual, firm, organization, or governmental agency *of any kind* who makes payments to a nonresident contractor for performance of any contract, except contracts of sale, *shall withhold* from such payments the amount of gross income tax owed upon the receipt of those payments." (Emphasis added). Under 45 IAC 1.1-1-24(b), the taxpayer is a "withholding agent" for the state of Indiana because that "term includes a person or entity making payments to a non-resident contractor." As a designated withholding agent, the taxpayer was obligated to withhold taxes from the performance of a "[a] construction contract of any kind." 45 IAC 1.1-1-24(b)(1).

Therefore, because the taxpayer lacks the standing to set forth the aforementioned defense to the imposition or withholding of

gross income taxes, the taxpayer's protest must be denied in total.

FINDING

Taxpayer's protest is respectfully denied.

II. Request for Abatement of the Negligence Penalty

DISCUSSION

The taxpayer has protested the imposition of the ten-percent negligence penalty assessed under authority of IC 6-8.1-10-2.1. Departmental Regulation 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." IC 6-8.1-10-2.1(d) allows the negligence penalty to be waived upon a showing that the failure to pay the delinquency was due to "reasonable cause." In order to establish "reasonable cause," 45 IAC 15-11-2(c) requires that the taxpayer demonstrate that it "exercised ordinary business care and prudence in carrying out a duty or failing to carry out a duty giving rise to the penalty imposed."

The taxpayer has failed to demonstrate that it exercised reasonable care in meeting its obligation to withhold taxes. The taxpayer is a large, sophisticated, business entity fully capable of either determining its tax obligations independently or in consultation with the Department concerning those obligations of which it is uncertain. There is no evidence that the taxpayer investigated to determine whether the individual contractors were registered to do business in Indiana. In addition, the identical issues raised in the instant protest have been raised by the identical taxpayer before the Department in the past. Taxpayer cannot complain that it was unaware of its obligations to withhold Gross Income Tax for out-of-state contractors or the parameters used to determine the applicability of the Interstate Commerce Clause exemption.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0120000324.LOF

LETTER OF FINDINGS NUMBER: 00-0324 AGI
Adjusted Gross Income Tax
For Tax Periods: 1998

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

ISSUES

Adjusted Gross Income Tax–Imposition

Authority: United States Constitution, Amendment XIV, IC 6-3-2-1, IC 6-3-1-3.5, 26 U.S.C.A. Sec. 61 (a), 26 U.S.C.A. Sec. 63, IC 6-3-1-3.5 (b), U.C.C. Sec. 1-207, 8 U.S.C.A. Sec. 481, Cooper Industires, Inc., Cooper CPS Corporation, Cooper Poweer Systems, Inc., McGraw Edison Company, and Cooper Turbocompressor, Inc. v. Indiana Department of Revenue, 673 N.E. 2d 1209.

Taxpayer protests the imposition of the adjusted gross income tax.

STATEMENT OF FACTS

Taxpayer protested an assessment of adjusted gross income tax for the year 1998. A hearing was held by telephone with her representative. More facts will be provided as necessary.

Adjusted Gross Income Tax–Imposition

DISCUSSION

For the year 1998, Taxpayer filed a federal 1040NR-EZ, "U.S. Income Tax Return for Certain Nonresident Aliens With No Dependents." Taxpayer indicated on that return that she had no reportable federal adjusted gross income. Since Taxpayer reported no federal adjusted gross income on her federal tax return, she reported no federal adjusted gross income on her state return. Pursuant to Taxpayer's computation of her tax, Taxpayer had no tax liability and was owed a refund of monies withheld by her employer and remitted to the Indiana Department of Revenue. Taxpayer did include with her federal return a "Statement of Foreign Earned Income" on which she stated that she earned $4025.13 as a waitress. The Indiana Department of Revenue computed her Indiana tax based upon those wages and sent her a proposed assessment for additional tax, interest and penalty. Taxpayer protested the assessment.

An income tax is imposed upon the adjusted gross income of all Indiana residents. IC 6-3-2-1. Indiana adjusted gross income is defined at IC 6-3-1-3.5 as federal adjusted gross income as defined in Section 62 of the Internal Revenue Code with certain modifications. The computation of federal adjusted gross income begins with the determination of a taxpayer's gross income, which is defined by section 61(a) of the Internal Revenue Code as follows:

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

The issue to be determined is whether a taxpayer uses its actual federal adjusted gross income or the figure reported on the federal income tax return to determine the Indiana adjusted gross income. The Indiana Tax Court dealt with this issue in Cooper Industries, Inc., Cooper CPS Corporation, Cooper Power Systems, Inc., McGraw Edison Company, and Cooper Turbocompressor, Inc., v. Indiana Department of Revenue, 673 N.E.2d 1209. In that case, the Indiana Department of Revenue asserted that petitioner needed to use the number reported on the federal tax return rather than the actual federal adjusted gross income in computing its Indiana tax liability. The taxpayer in that case was a corporation rather than an individual as in the protest hearing. That is not, however, a significant difference since the provisions concerning the determination of the Indiana adjusted gross income are identical. The Court found that taxpayers are to use their actual federal adjusted gross income in the computation of state tax liabilities rather than the numbers reported on their federal tax returns. The Court stated this succinctly at page 1211 as follows:

> The Department's argument that the taxpayer must begin calculating its Indiana adjusted gross income with the precise amount the taxpayer reported as taxable income on its federal return misses the mark. The Indiana Code provides that 'the term 'adjusted gross income' shall mean... in the case of corporations, the same as 'taxable income' as defined in Section 63 of the Internal Revenue Code,' subject to four adjustments that are not applicable here. Ind. Code Ann. Sec. 6-3-1-3.5 (b). This definition is plain and unambiguous. Indiana adjusted gross income begins with federal taxable income as defined by I.R.C. Sec. 63, not as reported by the taxpayer.

Taxpayer admits that she is a citizen of Indiana. She contends, however, that she is a nonresident alien for federal purposes and entitled to utilize the nonresident alien federal return to report her income for federal tax purposes. Pursuant to Webster's II New Riverside University Dictionary (1988), p. 92, an "alien" is a person "owing allegiance to another country or government" …or an unnaturalized foreign resident of a country." Taxpayer admits that she was born in the United States of America. The United States Constitution, Amendment XIV, Section 1 provides for United States Citizenship as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

Since Taxpayer was born in the United States of America, she is a United States citizen unless she revokes her citizenship. Taxpayer contends that she revoked her citizenship pursuant to the U.C.C Sec. 1-207. The Uniform Commercial Code is a model code concerning the regulation of commercial transactions. Provisions of the Uniform Commercial Code have no bearing on the national status of American citizens. Therefore Taxpayer could not revoke her American citizenship by invoking provisions of the Uniform Commercial Code.

The means by which United States citizens can revoke their citizenship are listed at 8 U.S.C.A. Sec. 1481. Those methods include such actions as accepting employment by the government of another nation, conviction of treason, signing a statement of revocation on the forms provided by the U. S. Department of State and filing such revocation at an American Embassy, American Consulate or the U.S. Department of State or enrolling in a foreign military force and fighting against the United States. There was no evidence that Taxpayer used any of these means to revoke her United States Citizenship. Since Taxpayer never effectively revoked her citizenship, she is a United States Citizen and is ineligible to determine her federal tax liability according to the rules for nonresident aliens.

Taxpayer admits in her documentation that she is an Indiana resident and received wages for her work as a waitress in Indiana. Wages are compensation for services rendered As such, Taxpayer's wages are includable in Taxpayer's gross income pursuant to Section 61 (a) of the Internal Revenue Code. The Indiana Department of Revenue properly used this figure in computing Taxpayer's Indiana tax liability. computed her Indiana tax liability.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120000325.LOF

LETTER OF FINDINGS NUMBER: 00-0325 AGI
Adjusted Gross Income Tax
for Tax Periods: 1998

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

ISSUES

Adjusted Gross Income Tax–Imposition

Authority: United States Constitution, Amendment XIV, IC 6-3-2-1, IC 6-3-1-3.5, 26 U.S.C.A. Sec. 61 (a), 26 U.S.C.A. Sec. 63, IC 6-3-1-3.5 (b), U.C.C. Sec. 1-207, 8 U.S.C.A. Sec. 481, Cooper Industires, Inc., Cooper CPS Corporation, Cooper Poweer Systems, Inc., McGraw Edison Company, and Cooper Turbocompressor, Inc. v. Indiana Department of Revenue, 673 N.E. 2d 1209.

Taxpayer protests the imposition of the adjusted gross income tax.

STATEMENT OF FACTS

Taxpayer protested an assessment of adjusted gross income tax for the year 1998. A hearing was held by telephone with his representative. More facts will be provided as necessary.

Adjusted Gross Income Tax–Imposition

DISCUSSION

For the year 1998, Taxpayer filed a federal 1040NR-EZ, "U.S. Income Tax Return for Certain Nonresident Aliens With No Dependents." Taxpayer indicated on that return that he had no reportable federal adjusted gross income. Since Taxpayer reported no federal adjusted gross income on his federal tax return, he reported no federal adjusted gross income on his state return. Pursuant to Taxpayer's computation of her tax, Taxpayer had no tax liability and was owed a refund of monies withheld by her employer and remitted to the Indiana Department of Revenue. Taxpayer did include with his federal return a "Statement of Foreign Earned Income" on which he stated that he earned $103,693.19 as disability income. The Indiana Department of Revenue computed his Indiana tax based upon that income and sent him a proposed assessment for additional tax, interest and penalty. Taxpayer protested the assessment.

An income tax is imposed upon the adjusted gross income of all Indiana residents. IC 6-3-2-1. Indiana adjusted gross income is defined at IC 6-3-1-3.5 as federal adjusted gross income as defined in Section 62 of the Internal Revenue Code with certain modifications. The computation of federal adjusted gross income begins with the determination of a taxpayer's gross income, which is defined by section 61(a) of the Internal Revenue Code as follows:

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

The issue to be determined is whether a taxpayer uses its actual federal adjusted gross income or the figure reported on the federal income tax return to determine the Indiana adjusted gross income. The Indiana Tax Court dealt with this issue in Cooper Industries, Inc., Cooper CPS Corporation, Cooper Power Systems, Inc., McGraw Edison Company, and Cooper Turbocompressor, Inc., v. Indiana Department of Revenue, 673 N.E.2d 1209. In that case, the Indiana Department of Revenue asserted that petitioner needed to use the number reported on the federal tax return rather than the actual federal adjusted gross income in computing its Indiana tax liability. The taxpayer in that case was a corporation rather than an individual as in the protest hearing. That is not, however, a significant difference since the provisions concerning the determination of the Indiana adjusted gross income are identical. The Court found that taxpayers are to use their actual federal adjusted gross income in the computation of state tax liabilities rather than the numbers reported on their federal tax returns. The Court stated this succinctly at page 1211 as follows:

> The Department's argument that the taxpayer must begin calculating its Indiana adjusted gross income with the precise amount the taxpayer reported as taxable income on its federal return misses the mark. The Indiana Code provides that 'the term 'adjusted gross income' shall mean... in the case of corporations, the same as 'taxable income' as defined in Section 63 of the Internal Revenue Code,' subject to four adjustments that are not applicable here. Ind. Code Ann. Sec. 6-3-1-3.5 (b). This definition is plain and unambiguous. Indiana adjusted gross income begins with federal taxable income as defined by I.R.C. Sec. 63, not as reported by the taxpayer.

Taxpayer admits that he is a citizen of Indiana. He contends, however, that he is a nonresident alien for federal purposes and entitled to utilize the nonresident alien federal return to report his income for federal tax purposes. Pursuant to Webster's II New Riverside University Dictionary (1988), p. 92, an "alien" is a person "owing allegiance to another country or government" …or an unnaturalized foreign resident of a country." Taxpayer admits that she was born in the United States of America. The United States Constitution, Amendment XIV, Section 1 provides for United States Citizenship as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

Since Taxpayer was born in the United States of America, he is a United States citizen unless he revokes his citizenship. Taxpayer contends that he revoked his citizenship pursuant to the U.C.C Sec. 1-207. The Uniform Commercial Code is a model code concerning the regulation of commercial transactions. Provisions of the Uniform Commercial Code have no bearing on the national status of American citizens. Therefore Taxpayer could not revoke his American citizenship by invoking provisions of the Uniform Commercial Code.

The means by which United States citizens can revoke their citizenship are listed at 8 U.S.C.A. Sec. 1481. Those methods include such actions as accepting employment by the government of another nation, conviction of treason, signing a statement of revocation on the forms provided by the U. S. Department of State and filing such revocation at an American Embassy, American Consulate or the U.S. Department of State or enrolling in a foreign military force and fighting against the United States. There was no evidence that Taxpayer used any of these means to revoke his United States Citizenship. Since Taxpayer never effectively revoked his citizenship, he is a United States Citizen and is ineligible to determine his federal tax liability according to the rules for nonresident aliens.

Taxpayer admits in his documentation that he is an Indiana resident and received disability income from his Indiana employer. Disability income paid pursuant to premiums provided by an employer are compensation for services rendered As such, Taxpayer's disability income is includable in Taxpayer's gross income pursuant to Section 61 (a) of the Internal Revenue Code. The Indiana

Department of Revenue properly used this figure in computing Taxpayer's Indiana tax liability.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220000363P.LOF

LETTER OF FINDINGS NUMBER: 00-0363P
Income Tax Penalty
Fiscal Year Ended September 30, 1998

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer, in a letter received on September 13, 2000, protested the penalty assessed for fiscal year 1998.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer was assessed a negligence penalty for failure to timely pay its entire tax liability by the due date of the return.

Taxpayer states that it was involved in a merger that resulted in the complete turnover of its Tax Department during this time which made compliance processes and record keeping extremely difficult to maintain. In spite of these obstacles, it paid in estimated payments of $11,200 during the year, which was nearly three times the total tax liability of the previous tax year. Taxpayer requests a waiver of the penalty assessed because it clearly is not a case of willful neglect on its part. Taxpayer further states it seems unduly harsh to assess the penalty when contrasted with the taxpayer's history of making timely payments and filing timely returns.

Taxpayer was several months late in paying all of its tax liability. Ninety percent of the tax due was not paid by the due date of the return, i.e. January 15, 1999. IC 6-8.1-10-2.1, IC 6-3-4-4.1(b) is reference that a ten percent (10%) penalty will be assessed when the taxpayer fails to file a return, fails to pay the full amount of taxes due by the due date, incurs a tax deficiency due to negligence, fails to timely remit any tax held in trust for the state, or fails to make a required electronic fund transfer or payment by overnight courier or personal delivery.

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

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220000414P.LOF

LETTER OF FINDINGS NUMBER: 00-0414P
Gross and Adjusted Gross Income Tax
Calendar Years 1996, 1997, and 1998

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer is incorporated in Delaware and has an Indiana service center. Taxpayer manufactures and sells knives and saws and provides grinding services in Indiana. Upon audit it was discovered that the taxpayer failed to file to report income at the high rate of gross income tax.

1. Tax Administration – Penalty

DISCUSSION

Taxpayer was assessed a penalty for failure to correctly report gross income from Indiana sources. Taxpayer's principal business activity is as a service center that provides grinding services as well as knife and saw repair. In all years of the audit, the taxpayer reported service receipts at the low rate of tax. Gross income from services of any character is taxable at the higher rate (45 IAC 1-1-96).

Taxpayer's representative, in a letter dated September 15, 2000 protested penalties assessed because it believed the business activity to be considered industrial processing and subject to the lower rate of tax. Further, based upon the findings in ***Jefferson Smurfit Corporation v. Indiana Department of State Revenue, 681 N.E.2d 806 (Ind. Tax Ct. 1997)*** it believed this to be a reasonable interpretation of the statute.

Taxpayer, however, utilizes a national accounting firm that should be aware of the differences between Smurfit and the taxpayer's services rendered in Indiana.

Taxpayer did not show reasonable cause for its failure to report income at the high rate of tax.

FINDING

Taxpayer's protest is denied.

INDIANA DEPARTMENT OF STATE REVENUE
Revenue Ruling #2000-05 IT
December 4, 2000

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

ISSUES

I. Gross Income Tax – Limited Partnership Electing to be Treated as a Corporation for Federal Income Taxation

Authority: IC 6-2.1-3-25

The taxpayer requests the Department to rule on the application of gross income tax to the gross income of a limited partnership electing to be treated as a corporation for federal income taxation.

II. Adjusted Gross Income Tax and Supplemental Net Income Tax - Limited Partnership Eligibility for Consolidated Filing

Authority: IC 6-3-4-14, IRC Section 1504, Treas. Reg. 301.7701-(1-3), IRC 7701

The taxpayer requests the Department to rule whether or not a limited partnership electing to be treated as a corporation for federal income taxation is eligible to participate in an Indiana consolidated adjusted gross income tax and supplemental net income tax return.

STATEMENT OF FACTS

The taxpayer, a publicly traded corporation, is engaged in the sale and distribution of wireless communication products and accessories around the world including North America.

The taxpayer has a wholly-owned subsidiary (subsidiary) that, also, engages in the sale and distribution of wireless communication devices in North America.

The taxpayer and its subsidiary would like to combine their North American business operations into a single entity. They intend to form a limited partnership (partnership) under Delaware law for this purpose. The taxpayer will contribute all of its North American Division operations to the partnership (the taxpayer will not contribute, however, the Latin American Division nor the Corporate Division operations). The subsidiary will contribute all of its business operations and transfer all of its employees to the partnership. The taxpayer's subsidiary will be the general partner and the taxpayer will be the limited partner of the partnership holding 100% of the partnership interests between them. For federal tax purposes, the partnership will elect to be treated as a corporation under Section 7701 of the Internal Revenue Code and the regulations promulgated thereunder. Specifically, the partnership will make an election pursuant to Treasury Regulation 301.7701-(1-3) to be classified as an association and taxed as a corporation.

ISSUE #1 - DISCUSSION

IC 6-2.1-3-25 provides that gross income received by a partnership is exempt from Indiana gross income taxation unless the gross income is received by a publicly traded partnership that is treated as a corporation for federal income tax purposes under Section 7704 of the Internal Revenue Code. The Indiana Gross Income Tax Code does not contain provisions that address the applicability of gross income tax to the gross income of a partnership that has elected to be treated as a corporation for federal income tax purposes. The aforementioned IC 6-2.1-3-25, therefore, is the authority for determining the applicability of gross income tax to the gross income of partnerships regardless of the treatment of the partnership at the federal level, i.e., the federal election has no impact on the gross income taxation of partnerships.

In the instant case then, the partnership will not be a public-traded partnership that is treated as a corporation under Section 7704 of the Internal Revenue Code, therefore, the partnership will be exempt from Indiana gross income taxation.

ISSUE #1 - RULING

The Department rules that the gross income received by the partnership will not be subject to Indiana gross income tax.

ISSUE #2 – DISCUSSION

IC 6-3-4-14 provides that an affiliated group of corporations shall have the privilege of making a consolidated adjusted gross income tax return. The term "affiliated group" means an "affiliated group" as defined in Section 1504 of the Internal Revenue Code with the exception that the affiliated group shall not include any corporation which does not have adjusted gross income derived from sources within the State of Indiana. Internal Revenue Section 1504 states that "affiliated group" means;

(a)(1)(A)-1 or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation, but only if –

(B)(i) the common parent owns directly stock meeting the requirements of paragraph (2) in at least 1 of the other includible corporations, and

(ii) stock meeting the requirement of paragraph (2) in each of the includible corporations (except the common parent) is owned directly by 1 or more of the other includible corporations.

(2) 80-percent voting and value test. – The ownership of stock of any corporation meets the requirement of this paragraph if it -

(A) possesses at least 80 percent of the total voting power of the stock of such corporation, and

(B) has a value equal to at least 80 percent of the total value of the stock of such corporation.

Here, the taxpayer and its subsidiary are part of an "affiliated group" as defined by Internal Revenue Code Section 1504. The partnership, electing to be classified as an association and taxed as a corporation [Treas. Reg. 301.7701(1-3)], also, is part of the taxpayer's Internal Revenue Code Section 1504 "affiliated group" as the term "corporation" includes associations and the term "stock" includes shares in associations pursuant to Internal Revenue Code Section 7701. As a result, to the extent that the taxpayer, its subsidiary and the partnership have adjusted gross income derived from sources within the State of Indiana, the taxpayer, its subsidiary and the partnership are eligible to participate in an Indiana consolidated adjusted gross income tax and supplemental net income tax return (IC 6-3-8-2).

ISSUE #2 – RULING

The Department rules that the taxpayer, its subsidiary and the partnership are eligible to participate in an Indiana consolidated adjusted gross income tax and supplemental net income tax return to the extent all members of the affiliated group have adjusted gross income derived from sources within the State of Indiana.

CAVEAT

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