INDIANA ALCOHOLIC BEVERAGE COMMISSION (ABC)

Nonrule Policy Document #16

Date: April 3, 2001

Subject: Use of wine retailers permits (type 303 permits, as provided for by IC 7.1-3-14-1 and IC 7.1-3-14-3) as underlying permits for ABC type 210-1 permits (as provided for by IC 7.1-3-20-11.5) is not authorized by Title 7.1.

Statutes Affected:

IC 7.1-3-14-1
IC 7.1-3-20-11.5
IC 7.1-3-22-3
IC 7.1-1-3-27
IC 7.1-3-14-3

The use of wine retailer's permits (as provided for by IC 7.1-3-14-1 and IC 7.1-3-14-3) as the underlying permit for issuance of ABC type 210-1 permits (as provided for by IC 7.1-3-20-11.5) is not authorized by Title 7.1. The past ABC practice of allowing said wine retailer's permits as underlying permits for said type 210-1 permits is hereby rescinded and reversed and the ABC hereby gives express notice that it will not allow such practice.

The ABC has in the past allowed the practice of treating type 303 permits as underlying for 210-1s. IC 7.1-3-20-11.5 states as follows (in relevant part):

"Location in cities or towns with populations of less than twenty thousand – three-way permits – transfer – fees-

a. The commission may issue a three-way permit for the sale of alcoholic beverages, for on-the-licensed-premises consumption only to the proprietor of a restaurant which is located in a city or town that has a population of less than twenty thousand (20,000), if the applicant meets the following requirements:

(1) The establishment is the holder of a one-way or a two-way permit.

(2) The establishment is qualified to hold a three-way permit but for the provisions of IC 7.1-3-22-3.

Further, in IC 7.1-3-22-3, the statute establishing quotas for retail permits, provides (in relevant part):

"The commission may grant only one (1) three-way permit, and one (1) two-way permit, and one (1) one-way permit, in an incorporated city or town for each one thousand five hundred (1,500) persons or fraction thereof, within the incorporated city, town, or unincorporated towns."

ABC statutes define a one-way permit as follows:

"The term 'one-way permit' means beer retailer's permit issued to a permittee [IC 7.1-1-3-27]."

Statute also provides for wine retailer's permit, pursuant to IC 7.1-3-14-3, but strictly limits their authorization. That statute states as follows:

Eligibility. The commission may issue a wine retailer's permit only to the following:

(a) A person who is not the holder of, nor an applicant for, any other permit and who is not disqualified under the special disqualifications and who operates a restaurant patronized by customers who are likely to consume table wine with their meals.

(b) A person who is the holder of a beer retailer's permit; or,

(c) A person who is the holder of a liquor retailer's permit.

[IC 7.1-3-14-3]

Further, IC 7.1-3-14-1 provides:

The commission may issue a wine retailer's permit to a person who desires to sell wine or flavored malt beverages for consumption on the licensed premises.

Based on these relevant statutes and analysis thereof, it is apparent that a wine retailer's permit is not a one-way permit as defined by IC 7.1-1-3-27, but is, in fact, an entity of its own and is not referred to under IC 7.1-3-20-11.5. Further, although the ABC at some point adopted a policy of allowing wine retailer permits to serve as the basis for a 210-1, this practice is not authorized nor consistent with the law under Title 7.1.

Therefore, wine retailer permits, as authorized under IC 7.1-3-14-1, are not one-way permits under the statute and cannot serve as the basis for issuance of a 210-1 permit. The ABC adopts this nonrule policy statement announcing that it will not permit the continuation of the practice of treating wine retailer's permits as "one-way permits".

INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

Title: Open Burning of Motor Vehicles for Firefighter Training

Identification Number: AIR 027 NPD

Date Originally Adopted: April 12, 2001

Date Effective: May 12, 2001

Dates Revised: None

Other Policies Repealed or Amended: None
Brief Description of Subject Matter: Provides guidance for IDEM and fire departments for conditions upon which approval may be granted for open burning of motor vehicles for purposes of firefighter training under 326 IAC 4-1-4.1.
Citations Affected: 326 IAC 4-1-4.1

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 of IDEM. This nonrule policy document shall be used in conjunction with applicable laws. It does not replace applicable laws, and if it conflicts with these laws, the laws shall control. This nonrule policy document may be put into effect by IDEM thirty days after presentation to the appropriate board and after it is made available for public inspection and comment, pursuant to IC 13-14-1-11.5. If the nonrule policy is presented to more than one board, it will be effective thirty 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 procedures of presentation to the board and publication.

Policy: IDEM will review and act expeditiously upon requests for variances under 326 IAC 4-1-4.1 for fire training exercises, including the burning of motor vehicles. IDEM recognizes that an important public service is served by providing fire departments the opportunity for training and, especially with respect to motor vehicles, for learning how to investigate the cause of motor vehicle fires. Balanced against this is the valid policy to minimize the amount of air pollution generated by these activities and, in particular, toxic emissions from tires, foam, plastics, fluids and other materials typically found in motor vehicles.

IDEM will act expeditiously on variance requests for motor vehicle open burning where the motor vehicle has been stripped of tires, foam, plastics, fluids, mercury switches, and other materials that generate air pollution.

For requests to burn motor vehicles that have not been stripped, IDEM will use the following factors in considering whether to issue the variance:

(1) the application for approval of the open burning event is made by a fire department of a local unit (or volunteer fire department) or by a state or regional organization of firefighters for the sole purpose of training firefighters in responding to or investigating vehicle fires;

(2) personnel specifically trained in responding or investigating motor vehicles fires will be present at the burn; and

(3) The number of participants or number of fire districts participating.

IDEM encourages that motor vehicle burns be conducted for the benefit of multiple fire departments concurrently and that only those materials needed for the purpose of the training exercise be left in the motor vehicle. IDEM also encourages that amount of materials burned during motor vehicle burns be minimized to the extent necessary to conduct adequate fire training. IDEM also strongly advises that mercury switches be removed prior to burning unless not reasonably possible. The following web site provides a list of vehicles and information on how to find and remove mercury switches: (http://www.epa.gov/region5/air/mercury/autoswitch.htm)

Following are standard conditions that will apply in any variance from 326 IAC 4-1 for open burning of a motor vehicle for fire training purposes:

(1) No motor vehicle burning shall be conducted during unfavorable meteorological conditions, such as:
  (A) high winds, temperature inversions, or air stagnation;
  (B) when a pollution or ozone action day has been declared.

(2) No motor vehicle burning will be conducted other than in daylight hours and the fire shall be extinguished prior to sunset.

(3) If at any time the fire creates a threat to public health or a nuisance, the fire shall be extinguished.

(4) The health department must be notified at least twenty-four (24) hours in advance of the date, time and location of the motor vehicle burning.

(5) The approval letter shall be made available at the burning site to state and local officials upon request.

(6) No motor vehicle burning will be conducted within 100 feet of any structure or powerline or other aboveground utility or within 300 feet of a fuel storage area, pipeline, frequently traveled road, or property line of the burn site.

(7) The motor vehicle burning will be attended at all times by trained fire personnel until completely extinguished.

(8) All burning must comply with other federal, state, or local laws, regulations, or ordinances.

(9) Mercury switches have been removed from the vehicle and properly recycled or disposed of in a properly permitted municipal solid waste facility, unless the applicant demonstrates that removal is not practicable. It is recommended that the mercury be sent to a local household hazardous waste collection location for recycling or disposal. Please contact your solid waste management district or IDEM (1-800-451-6027) for the location and times for the collection sites. A list of solid waste management districts can be found at (http://www.state.in.us/idem/oppta/recycling/SWMDpage.html)

IDEM will promptly develop an application for open burning approval consistent with this nonrule policy. Questions regarding this nonrule policy document should be directed to the Air Compliance Branch, Office of Air Quality, IDEM, at 317/233-5674 or 1-800/451-6027 ext. 3-5674.

INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

Title: Rejected Load Manifest Signatures, Rejected Load Manifest Distribution, and Rejected Mixed Load Procedures
Identification Number: WASTE-0012-NPD

Date Originally Adopted: June 27, 1997
Dates Revised: April 17, 2001
Other Policies Repealed or Amended: None
Citations Affected: IC 13-22-5
Brief Description of Subject Matter: IC 13-22-5 allows TSD's to reject hazardous waste shipments. It indicates that generators may accept back onto their property hazardous waste which was originally generated by them and rejected by a TSD after the original manifest was signed. A new manifest can be diverted to another TSD or returned to the generator. It is the generator's responsibility to complete a new manifest and follow the instructions found at IC 13-22-5 (also explained in Chapter 3, Section I, of the Manifest Guidance Manual). The Department has received numerous questions regarding procedures to be followed in the event a load is rejected. The following is an IDEM analysis of the rejected load statutes.

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. A revision to this nonrule policy document may be put into effect by IDEM thirty (30) days after the revised nonrule policy document is made available for public inspection and comment and is presented to the Solid Waste Management Board. IDEM will submit revisions to the Indiana Register for publication.

REJECTED LOAD MANIFEST SIGNATURES,
REJECTED LOAD MANIFEST DISTRIBUTION,
and
REJECTED MIXED LOAD PROCEDURES

IC 13-22-5 allows TSD's to reject hazardous waste shipments. It indicates that generators may accept back onto their property hazardous waste which was originally generated by them and rejected by a TSD after the original manifest was signed. A new manifest must be used. The shipment can be diverted to another TSD or returned to the generator. It is the generator's responsibility to complete a new manifest and follow the instructions found at IC 13-22-5 (also explained in Chapter 3, Section I, of the Manifest Guidance Manual). The Department has received numerous questions regarding procedures to be followed in the event a load is rejected. The following is an IDEM analysis of the rejected load statutes.

REJECTED LOAD MANIFEST SIGNATURES

U.S. DOT regulations require that shipping papers (i.e., the manifest for hazardous wastes) contain the certification language and a signature regarding shipping name, marking, and packaging found in item 16. In other words, item 16 must include a signature.

It is clearly stated in the rejected load statute (IC 13-22-5-4) that a TSD that rejects all or part of a shipment shall not be considered a generator of the rejected hazardous waste or be liable for any rejected part of the shipment. It was the intent of the statute that the generator remains responsible for the waste generated at their facility. At Section 6 (a), the rejected load statute requires generators to comply with all of the standards applicable to generators of hazardous waste. This would include signing the generator certification at item 16. In other words, the original generator of the waste is required to sign the new manifest at item 16.

To summarize, the original generator must strike out the words "designated facility" in item 9, insert the word "generator," and complete items 9, 10, and H with the generator information. The generator then signs line 16. In order to do this, the generator may need to physically be present at the TSD. The generator may also make arrangements for the TSD to sign the manifest as their agent or representative, but it is the generator who is certifying that the waste is in proper condition for transport. When the rejected waste and the manifest are received by the generator, the generator should line out the words "Facility Owner or Operator" in item 20 and insert the words "Receiving Generator," and sign and date item 20. In other words, the generator is required to sign item 16 and item 20.

It is recognized that out-of-state generators may not be familiar with Indiana rejected load procedures and that in-state TSD's, and IDEM itself, are limited in their ability to compel out-of-state generators, in certain circumstances, to follow Indiana manifest rules and statutes. IDEM will, when necessary, work with other state regulatory agencies to resolve rejected load issues. TSD's and generators are urged to contact IDEM for guidance on a case-by-case basis when there are questions about specific situations.

DISTRIBUTION OF RETURNING MANIFESTS FROM A REJECTED LOAD

When a new manifest is created to return a rejected load back to the generator the distribution of the manifest copies should be as follows:

Hazardous Waste Handler	Copies Distributed and Retained
Rejecting TSD Facility	Retains one copy sends rest with shipment
	Receives copy from Receiving Generator and keeps for 3 years
Transporters	Retain one copy for 3 years
Receiving Generator	Retains one copy for 3 years
	Mails one copy to Rejecting TSD Facility

REJECTED MIXED LOAD PROCEDURES

There may also be situations where hazardous waste from more than one generator has been mixed together by the transporter, and the waste is rejected by the TSD. Section 11 of the rule requires that the transporter assume all responsibility for proper disposition of the rejected waste. In other words, if hazardous waste is mixed, the transporter becomes the generator of the rejected

waste. Procedures for completing a rejected waste manifest would then be followed as required for generators. The preferred option for managing the rejected waste would be for the entire load to be rejected to an alternate TSD (as discussed in Chapter 3, Section I, of the Manifest Guidance Manual). If the mixed load cannot be forwarded to an alternate TSD within the timeframes specified in the rejecting facility's permit, the next preferred option would be for the rejected load to be manifested back to one of the generators to be managed under 90-day standards. The third, and least preferred, option is to return the mixed load by manifest to a site specified by the transporter (since they are the de facto generator), where all applicable generator rules would apply (site notification requirements, 90-day accumulation limit, waste determinations, manifest rules, container management standards, etc.). In this situation, if the specified site does not have an EPA ID#, the transporter must obtain one prior to transporting the waste. Again, TSD's and generators are advised to contact IDEM staff with questions about specific rejected load situations.

If you need additional information, or have any questions or concerns, please contact staff of the Compliance and Response Branch, Office of Land Quality at 317/308-3103. The IDEM toll-free telephone number is 1-800-451-6027.

INDIANA DEPARTMENT OF INSURANCE

Bulletin 103

May 8, 2001

FULL AND FINAL DISCRETION CLAUSES IN GROUP HEALTH CONTRACTS

This Bulletin is directed to all insurance companies that offer group health insurance in Indiana.

It has come to the attention of the Indiana Department of Insurance that some insurance companies are writing into their group health contracts a provision that purports to give the company full and final discretion in interpreting benefits and administering the contract. Some such provisions state that all determinations by the company are binding and conclusive on all insured persons. Some state that benefits will be paid only if the company decides in its discretion that an insured person is entitled to them. These provisions are often at the end of the contract or booklet, among other general or administrative provisions.

The Department recognizes that these provisions are a response to the decision of the United States Supreme Court in Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101 (1989) and subsequent cases interpreting employee benefit plans under the federal Employee Retirement Income Security Act (29 U.S.C. 1001 *et seq.*) ("ERISA.") *See e.g.,* Southern Indiana Health Operations, Inc. v. George, 696 N.E. 2d 476 (Ind. App. 1998), *transfer denied.* The Department takes no position on these cases or on the interpretation of employee benefit contracts governed by ERISA.

The Department finds, however, that in group accident and sickness insurance policies governed by state law, these provisions are inequitable and deceptive, and tend to mislead consumers. Under state law, an insurance policy is subject to the same rules of interpretation and construction as other contracts, and where the policy is ambiguous or silent, it is construed by courts against the company that drafts it. Meridian Mutual Insurance Co. v. Cox, 541 N.E. 2d 959 (Ind. App. 1989), *transfer denied.* These provisions could lead consumers and companies to believe that the company has the last word on whether benefits will be paid, regardless of other terms in the contract, and contrary to the right of the insured group to have a court interpret the contract.

To the extent that insurers wish to include such language in policies issued to employee benefit plans, they may include a statement substantially similar to the following: "This provision applies only where the interpretation of this Policy is governed by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1001 *et seq.*" Otherwise, forms including a full and final discretion clause will be subject to objection and disapproval by the Department of Insurance under Ind. Code §27-8-5-1.

Indiana Department of Insurance
Sally McCarty, Commissioner

DEPARTMENT OF STATE REVENUE

AUDIT-GRAM NUMBER IR-019

May 7, 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

Prepaid Telephone Calling Card

Authority: IC 6-2.5-4-13

IC 6-2.5-4-13. Sale of prepaid telephone calling card.

A person is a retail merchant making a retail transaction when a person sells:

(1) a prepaid telephone calling card at retail;
(2) a prepaid telephone authorization number at retail;
(3) the reauthorization of a prepaid telephone calling card; or
(4) the reauthorization of a prepaid telephone authorization number.

[1998]

I. GENERAL STATEMENT

A prepaid telephone calling card is a debit card entitling the purchaser to make long distance telephone calls at a flat rate until the card expires or its value is fully depleted.

The prepaid telephone calling card purchaser may initialize a long distance call by dialing a designated telephone number to access the account using a "Personal Identification Number" (PIN) or, in the case of a magnetic strip card, using appropriate equipment provided at the dialing point.

A prepaid telephone authorization number is not evidenced by a physical calling card but rather an access code provided to the service vendor at the time of use.

II. TAXABILITY

Effective July 1, 1998 (P.L.8-1998 § 2) – The entire charge for the purchase of a prepaid telephone authorization number or a calling card is subject to Sales Tax regardless the fact that the subsequent telecommunication service may be provided as either interstate or intrastate communication.

III. OTHER TRANSACTIONS

A. Vending Machine Sales – Sales of prepaid telephone calling cards through vending machines are subject to Sales Tax.

B. Purchases For Use Or Advertising – Purchases of prepaid telephone calling cards to be used by employees or provided free of charge to customers as promotional items are subject to Sales Tax or Use Tax.

C. Sales To Collectors – Sales by vendors of used or expired prepaid telephone calling cards to hobbyists or collectors are subject to Sales Tax unless the purchase is for resale.

DEPARTMENT OF STATE REVENUE
AUDIT-GRAM NUMBER IR-020
May 10, 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

Property Purchased or Used in Indiana

Authority: IC 6-2.5-2-1(a); IC 6-2.5-3-1(b); IC 6-2.5-3-2(a); IC 6-2.5-3-5

IC 6-2.5-2-1. Sales tax imposed.

(a) [T]he state gross retail tax, is imposed on retail transactions made in Indiana.

[1980]

IC 6-2.5-3-2. Use tax imposed.

(a) [T]he use tax, is imposed 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.

[1980]

IC 6-2.5-3-5. Credit against use tax.

(a) A person is entitled to a credit against the use tax… equal to the amount… of sales tax… paid to another state… for the acquisition of that property.

[1980]

I. GENERAL STATEMENT

A. Property acquired or rented in Indiana is subject to the Indiana Sales Tax to be collected by the Indiana vendor.

B. Property acquired or rented outside Indiana for storage, use, or consumption in Indiana is subject to the Indiana Use Tax to be paid by the purchaser either directly to the Department or to a vendor holding an Indiana Registered Retail Merchants Certificate.

II. EXEMPTION FROM SALES TAX OR USE TAX [FN 1]

A. Property acquired or rented in Indiana is not subject to Indiana Sales Tax if the purchaser is allowed an exemption contained in IC 6-2.5 Chapters 4 and 5.

B. Property acquired or rented outside Indiana is not subject to Indiana Use Tax if the property:

1. is not stored, used, or consumed in Indiana, or

2. is stored in Indiana, including no more than incidental handling, and is subsequently transported and used solely outside Indiana [FN 2], or

3. is processed, printed, fabricated, or manufactured into, attached to, or incorporated into tangible personal property in Indiana, and is subsequently transported out of Indiana for use solely outside Indiana. [FN 3]

III. PROPERTY USED "SOLELY OUTSIDE INDIANA" [FN 4]

If property upon which no Indiana Sales Tax has been paid is shipped from a point in Indiana to an out-of-state location for storage and that property is subsequently shipped back to Indiana for use, the property is then subject to the Indiana Use Tax.

IV. CREDIT FOR TAX PAID OUTSIDE INDIANA

A. A purchaser who has acquired or rented property in Indiana upon which Indiana Sales Tax was required to be paid is not allowed a credit for Use Tax paid to another state. A state which imposes a Use Tax upon property used in that state should allow a credit for Sales Tax required to be paid to an Indiana vendor.

B. A purchaser who has acquired or rented property in a transaction occurring outside Indiana upon which the sales tax was required to be paid to a state other than Indiana is allowed a credit in the amount of such tax paid against any Indiana Use Tax due. [FN 5] Such credit shall not exceed the Indiana Use Tax.

_____

[FN 1] The use of a Direct Payment Certificate (IC 6-2.5-8-9) does not constitute an exemption from Sales Tax but only the certificate holder's agreement to pay any tax due directly to the Department.

[FN 2] IC 6-2.5-3-1(b)

[FN 3] IC 6-2.5-3-2(d)

[FN 4] As contained in FN 2 and 3 cites.

[FN 5] IC 6-2.5-3-5(b). Credit is not allowed for purchase of a motor vehicle required to be licensed in Indiana.

DEPARTMENT OF STATE REVENUE
Departmental Notice #2
Effective July 1, 2001
Prepayment of Sales Tax on Gasoline

This document is not a "statement" required to be published in the Indiana Register under IC 4-22-7-7. However, under IC 6-2.5-7-14, the Department is required to publish the prepayment rate in the June and December issues of the Indiana Register. The purpose of this notice is to inform each refiner, terminal operator, and qualified distributor known to the Department to be required to collect prepayments of sales tax on gasoline of the "prepayment rate" effective for the next six (6) month period. A prepayment rate is calculated twice a year by the Department and is effective for the period of January 1 through June 30, or, July 1 through December 31, as appropriate.

The prepayment rate is defined by IC 6-2.5-7-1 as the product of:

(1) the statewide average retail price per gallon of gasoline (excluding the Indiana gasoline tax, the federal gasoline tax, and the Indiana gross retail tax); multiplied by

(2) the state gross retail tax rate (5%), multiplied by

(3) ninety percent (90%); and then

(4) rounded to the nearest one-tenth of one cent ($0.001).

The prepayment rate of sales tax on gasoline for the six (6) month period beginning July 1, 2001, is four and nine-tenths cents ($0.049) per gallon.

Using the most recent retail price of gasoline available, the Department has determined the statewide average retail price per gallon of gasoline (all grades) to be one dollar eight and seven-tenths cents ($1.087). (The 'most recent retail price of gasoline available' was based on January, 2001, data contained in the Petroleum Marketing Monthly of April, 2001, published by the Federal Energy Information Administration, Department of Energy.)

Past prepayment rates for periods beginning July 1, 1994, are set out below:

TIME PERIOD	CENTS PER GALLON
Jul 1, 1994 to Dec 31, 1994	2.9
Jan 1, 1995 to Jun 30, 1995	3.7
Jul 1, 1995 to Dec 31, 1995	3.3
Jan 1, 1996 to Jun 30, 1996	3.3
Jul 1, 1996 to Dec 31, 1996	3.4
Jan 1, 1997 to Jun 30, 1997	4.0
Jul 1, 1997 to Dec 31, 1997	3.9

Jan 1, 1998 to Jun 30, 1998	4.0
Jul 1, 1998 to Dec 31, 1998	2.9
Jan 1, 1999 to Jun 30, 1999	3.0
Jul 1, 1999 to Dec 31, 1999	2.4
Jan 1, 2000 to Jun 30, 2000	3.6
Jul 1, 2000 to Dec 31, 2000	4.6
Jan 1, 2001 to Jun 30, 2001	4.9
Jul 1, 2001 to Dec 31, 2001	4.9

Indiana Department of State Revenue
Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE

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LETTER OF FINDINGS NUMBER: 97-0359
Responsible Officer
Sales Tax and Withholding Tax
For Tax Periods: 1994-1996

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

ISSUES

Sales and Withholding Tax – Responsible Officer Liability

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

The taxpayer protests the assessment of responsible officer liability for unpaid sales and withholding taxes.

STATEMENT OF FACTS

The taxpayer was secretary of a corporation which did not remit the proper amount of sales withholding taxes to Indiana. The taxpayer was personally assessed for the taxes and protested these assessments. More facts will be provided as necessary.

Sales and Withholding Tax – Responsible Officer Liability

DISCUSSION

The proposed sales tax liability was issued under authority of IC 6-2.5-9-3 which provides as follows:

An individual who:

(1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and

(2) has a duty to remit state gross retail or use taxes to the department;

holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

The proposed withholding taxes were assessed against Taxpayer pursuant to IC 6-3-4-8(f), which provides that "In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest."

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

The issue to be determined in this case is whether the taxpayer had the statutory duty to remit the sales and withholding trust taxes to Indiana.

Pursuant to Indiana Department of Revenue v. Safayan 654 N.E. 2nd 270 (Ind.1995) at page 273: "The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that they are paid. " In the Safayan case, the Court determined that Mrs. Safayan was a responsible officer with the duty to remit trust taxes to the state.

The Court enumerated several factors that are relevant in determining who has the duty to see that trust taxes are remitted to the state. First, the Court considered the person's position within the power structure of the organization. Mrs. Safayan was the president of the corporation. This taxpayer was the secretary of the corporation. The Court also considered the actual authority of the officer. As president, Mrs. Safayan had broad ranging authority concerning the daily operation of the corporation and the corporate finances. This taxpayer's duties merely included taking minutes at Board and shareholder meetings. She had no authority to hire or fire employees, manage employees, deal with major suppliers and customers, negotiate material corporate contracts, prepare federal or state tax returns, review federal or state income tax returns or determine the corporation's financial policy. Additionally,

she never owned an interest in or served as a director of the corporation. Finally the Court considered the Articles of Incorporation and the Bylaws of the corporation. In the Safayan case the Articles of Incorporation and Bylaws were not a factor because they simply outlined the general powers of a president. In this case, the Articles of Incorporation and Bylaws are no longer available.

The taxpayer also presented evidence that the Internal Revenue Service investigated her concerning possible responsibility for remittance of federal withholding taxes. The taxpayer was not considered a responsible officer for federal purposes. Although Internal Revenue Service decisions are not binding on the Indiana Department of Revenue, the decision is evidence to be considered in making a determination as to whether a particular person is responsible for the payment of Indiana trust taxes.

The taxpayer sustained her burden of proving that she was not an officer responsible for the remittance of trust taxes to Indiana.

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

1598003MCFT.LOF

LETTER OF FINDINGS NUMBER: 98-0003 MCFT
Motor Carrier Fuel Tax and Surtax
For the Period: 1994 - 1996

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

ISSUES

I. Motor Carrier – Motor Carrier Fuel Tax and Surtax

Authority: IC 6-6-4.1-1 *et seq.*; 45 IAC 13-1-1 *et seq.*

The taxpayer protests the assessment of motor carrier fuel tax and surtax based upon the best information available.

STATEMENT OF FACTS

The taxpayer operates a for hire hauling business that utilizes dump trucks. The taxpayer was contacted by the auditor by certified mail and instructed to make his records available for audit. The taxpayer did not comply with the request. The auditor made proposed assessments of motor carrier fuel tax and surtax based upon the "best information available" for such things as mileage and fuel. That is, absent any taxpayer supplied information, the auditor was required to estimate the taxpayer's mileage and fuel consumption. After the assessment, at the protest stage, the taxpayer retained representation and an administrative hearing date was scheduled for April 9, 1998. The administrative hearing was continued and scheduled for another date. The new hearing date was set for December 18, 1998. The taxpayer, in a letter dated December 17, 1998, requested to submit a brief in lieu of an in-person hearing. The Department granted the motion to file a brief, and stipulated that the brief must be postmarked by January 22, 1999. On February 10, 1999, the Department, in a letter, stated to the taxpayer that the "deadline, plus more than enough time to allow for mailing, has passed, and the Department has received no brief...." The Department never received a brief from the taxpayer.

I. Motor Carrier – Motor Carrier Fuel Tax and Surtax

DISCUSSION

Under Indiana Code 6-8.1-5-1(a), the taxpayer bears the burden of proving that the proposed assessment is wrong. The Department's assessment is "prima facie evidence that the department's claim for the unpaid tax is valid." Further, IC 6-8.1-5-1(c)(2) provides that when a taxpayer requests a hearing but fails to appear, the Department can issue a Letter of Finding and demand payment.

The Indiana Administrative Code, 45 IAC 15-5-3(b)(5) allows the taxpayer to opt for a written brief in lieu of a hearing. If the taxpayer elects to file a brief in lieu of a hearing, the taxpayer has waived the right to an administrative hearing. Taxpayer during the audit failed to provide the Department with pertinent records. The taxpayer's initial protest letter only makes unsubstantiated protestations (e.g., the taxpayer states the proposed assessment is wrong because, among other reasons, the taxpayer's trucks were "very old and in very poor operating condition and used mostly for off-site work."). The Department finds that taxpayer has failed to provide any evidence refuting the initial audit assessment.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

02980004.LOF

02980177.LOF

LETTERS OF FINDINGS NUMBER: 98-0004 and 98-0177
Corporate Income Tax
For Tax Periods: 1993-1994

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. Corporate Income Tax – Consolidated Return

Authority: IC 6-2.1-5-5; IC 6-3-4-14; 45 IAC 3.1-1-110; 45 IAC 1-1-164

Taxpayers protest the deconsolidation of their gross income tax returns.

STATEMENT OF FACTS

Taxpayers are interexchange (long distance) telecommunications carriers which conduct business in Indiana and other states. They are affiliated with several other similar companies. In 1976 the primary Taxpayer elected to file a consolidated return with its Indiana affiliates. Over the years the primary Taxpayer has acquired additional Indiana affiliates including the other Taxpayer. The primary Taxpayer failed to include these new affiliates in its Indiana consolidated group. In the audit, Taxpayers' consolidated return was disallowed and tax was computed based upon individual returns of each affiliate. Taxpayers protest the deconsolidation of its tax return.

1. Corporate Income Tax – Consolidated Return

DISCUSSION

For purposes of gross income tax, affiliated corporations can file consolidated tax returns pursuant to IC 6-2.1-5-5(d) as follows: An affiliated group must elect at the time it files its first annual return whether or not it will file a consolidated gross income tax return or whether each corporate member of the group will file a separate gross income tax return. After this election is made, the group must file gross income tax returns in the same manner as the group's first annual return is filed, unless the department allows the group to change the manner in which it files gross income tax returns.

IC 6-3-4-14(a) provides similarly for the filing of consolidated returns for adjusted gross income taxes. These statutes are clarified by Indiana Regulations found at 45 IAC 3.1-1-110 and 45 IAC 1-1-164. In general, these regulations allow members of an affiliated group conducting business in Indiana to elect consolidated return filing and provide for deconsolidation only upon application to and approval by the Indiana Department of Revenue.

In this situation, the primary Taxpayer elected to file consolidated returns and continued to file consolidated returns as required by the law and regulations. However, the primary Taxpayer failed to include its new affiliates with Indiana source income in their consolidated group. The auditor's remedy for this error was to deconsolidate the returns and compute the tax liability based upon the separate returns of each of the affiliates. At no time did Taxpayers apply for permission to deconsolidate the returns or receive Indiana Department of Revenue approval to deconsolidate the returns. Therefore, Taxpayers' consolidated returns do not meet the requirements for deconsolidation. The appropriate remedy for the primary Taxpayer's failure to include its new affiliated corporation would have been to require the inclusion of all Indiana affiliated group members in the consolidated return.

FINDING

Taxpayers' protests are sustained.

DEPARTMENT OF STATE REVENUE

02980201.LOF

LETTER OF FINDINGS NUMBER: 98-0201
Gross Income Tax
For Tax Periods: 1993-March 24,1995

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. Gross Income Tax – Payments from Joint Venture Partner

Authority: 45 IAC 1-1-58; IC 6-2.1-1-2

Taxpayer disputes the imposition of tax on payments from its partner in a joint venture.

2. Gross Income Tax – Resource Recovery System Depreciation

Authority: IC 6-2.1-4-3; Auburn Foundry v. Tax Commissioners, 628 N.E. 2d 1260 (Ind. Tax 1994); IC 6-1.1-12-28.5(b); IC 6-2.1-4-3; IC 6-8.1-5-1(b)

Taxpayer protests the disallowance of the resource recovery system depreciation deduction.

3. Gross Income Tax – Gain On Accounts Receivable

Authority: Indiana Department of Revenue v. Felix, 571 N.E. 2d 287 (Ind. 1991); IC 6-2.1-2(c)(1)

Taxpayer protests the assessment of gross income tax on the gain on accounts receivable.

4. Gross Income Tax – Enterprise Zone Apportionment

Authority: IC 6-2.1-3-32(c); IC 6-2.1-3-32(d)

Taxpayer disputes the calculation of the enterprise zone exemption.

5. Gross Income Tax – Income Received Pursuant to Memorandum of Understanding

Authority: 45 IAC 1-1-34

Taxpayer disputes the imposition of gross income tax on income received pursuant to a Memorandum of Understanding.

6. Tax Administration – Penalty

Authority: IC 6-8.1-10-2 (a).

Taxpayer disputes the imposition of the negligence penalty.

STATEMENT OF FACTS

Taxpayer is a holding company owning the stock of a manufacturer in Indiana. The manufacturer, which was formerly a division of a large corporation, has manufacturing facilities and performs research and development contracts for the federal government. After a routine audit, additional corporate income tax, penalty and interest were assessed for the tax years ending December 31,1993 through March 24, 1995. Taxpayer timely protested this assessment. More facts will be provided as necessary.

1. Gross Income Tax – Payments from Joint Venture Partner

DISCUSSION

Taxpayer entered into a joint venture with another corporation to provide engineering services for a research and development contract. The purchaser of the services from the joint venture always pays with two checks dividing the income with a check for fifty percent (50%) of the total amount going to each of the two partners. Periodically there is a reconciliation so that each partner receives income in proportion to the services they actually provided. The audit imposed income tax on the payments made by the other partner to Taxpayer to reconcile the accounts. Taxpayer contends that these payments are exempt from gross income tax as capital contributions to a partnership which are exempt pursuant to 45 IAC 1-1-58 as follows:

> Contributions of capital to a corporation, joint venture or partnership are exempt from gross income tax. No gross receipts result to the recipient of the capital and none result to the donee upon his receipt of stock in exchange for the capital.

At hearing, Taxpayer's representatives discussed the reconciliation as payments to make the amounts commensurate with the work each partner actually provides for the contract. In some periods, one partner provides more work than the other. The services provided are very rarely equal in value. The checks are paid on a fifty-fifty basis as a convenience to the purchaser of the product. The reconciliation appears to be to reconcile the income attributable to the services each partner actually provided during the payment period. Therefore the income is payment for services performed rather than a capital contribution. The regulation clearly refers to capital contributions in exchange for a share in the joint venture rather than receipts for services rendered. Therefore the payments received from the other partner in the joint venture do not qualify for exemption pursuant to 45 IAC 1-1-58.

Pursuant to IC 6-2.1-1-2 gross income "means all the gross receipts a taxpayer receives (1) from trades, businesses, or commerce;..." The income in this situation is clearly payment for engineering and other services provided by Taxpayer. As such, these receipts qualify for the imposition of gross income tax.

FINDING

This point of Taxpayer's protest is denied.

2. Gross Income Tax – Resource Recovery System Exemption

DISCUSSION

Taxpayer claimed a deduction on its gross income tax returns for the taxable years ending December 31, 1994 and March 24, 1995 for its resource recovery system. The auditor disallowed the deduction because Taxpayer could not produce an Indiana Department of Environmental Management certification of the system as a resource recovery system or other documentation associated with the deduction.

The denial of the deduction was based on Auburn Foundry v. Tax Commissioners, 628 N.E.2d 1260 (Ind. Tax 1994). That case concerned an Indiana business which attempted to deduct a resource recovery system from its property taxes. The approval of the property tax deduction rests upon the provisions of IC 6-1.1-12-28.5(b) as follows:

> The department of environmental management, upon application by a property owner, shall determine whether a system or device qualifies for a deduction provided by section 28.5, 31,33, or 34 of this chapter. If the department determines that a system or device qualifies for a deduction, it shall certify the system or device and provide proof of the certification to the property owner.

The Auburn case concerns a deduction from property tax and specifically requires a certification from the Indiana Department of Environmental Management. The statute itself states that the certification requirement applies to applications for deduction pursuant to certain sections of the property tax law. It clearly does not apply to applications for deduction from gross income tax.

Taxpayer claimed the income tax resource recovery system deduction pursuant to the following provisions of IC 6-2.1-4-3:

> If for federal income tax purposes a taxpayer is allowed a depreciation deduction for a particular taxable year with respect to a resource recovery system, and if the resource recovery system processes solid waste or hazardous waste, the taxpayer is entitled to a deduction from his gross income for the same taxable year.

The language of this statute does not require a certification by the Indiana Department of Environmental Management as a prerequisite to claiming a resource recovery system deduction. The fact that the property tax resource recovery system deduction requires a certification by the Indiana Department of Environmental Management does not mean that such a prerequisite can be inserted into the statute authorizing a gross income tax resource recovery system deduction. Taxpayer still bears the burden of proving, however, that it purchased a system which functioned as a resource recovery system and qualifies for a depreciation deduction from its federal income tax. IC 6-8.1-5-1 (b). Taxpayer failed to offer any evidence to substantiate that it bought such a system. Therefore, Taxpayer does not qualify for this exemption.

FINDING

Taxpayer's protest of the denial of the resource recovery system deduction is denied.

3. Gross Income Tax – Gain On Accounts Receivable

DISCUSSION

Taxpayer purchased another corporation. The acquisition resulted in a revaluation of certain assets, including accounts receivables. Subsequent receipts received in excess of basis were reported by Taxpayer as "other income" on its federal return. Audit proposed additional assessments of Indiana gross income tax on these amounts. Taxpayer protests these additional assessments.

The purchased corporation was an accrual taxpayer and paid the tax due on the sales represented by the accounts receivable prior to the transfer to the new owner, Taxpayer. Taxpayer argues that any additional tax would result in double taxation which the law must avoid pursuant to the findings in Indiana Department of State Revenue v. Felix, 571 N.E.2nd 287 (Ind. 1991). Taxpayer further argues that once the sale was complete and the receipts were realized and recognized, the repayment of the accounts receivables was a repayment of debt which is excluded from gross income pursuant to IC 6-2.1-1-2(c)(1).

In actuality a new entity, Taxpayer, received the income from the payment of the remainder of the monies owed on the accrual based accounts. Taxpayer, however, contends that this figure does not fairly represent the income since it was merely an arbitrary allocation of income. That does not change, however, the fact that Taxpayer specifically reported this income in this manner on its federal return.

This situation is analogous to the situation covered in 45 IAC 1-1-45 as follows:

> When promissory notes, retail installment or conditional sales contracts are accepted as the basis under which payment is to be made, the full amount (except included insurance premiums or finance charges) of the intangible derived from selling, providing, repairing or servicing tangible personal property or derived from real property, less existing mortgages is taxable upon receipt of the note or contract. Moreover, income from the sale of such intangibles is also taxable to the extent that the tax has not been previously paid thereon.

The purchased corporation posted payment for these sales on an accrual basis. Thus, intangible assets, the accounts receivable, were created. Taxpayer then acquired these accounts receivable when it purchased the corporation. Audit is not attempting to tax the income from the sale of the intangible asset. Rather the audit imposes gross income tax on the income Taxpayer receives from the collection of the accounts receivable in excess of the basis. This is the income received from the intangible after the sale of the intangible. This is analogous to the taxable gross income subject to the gross income tax as discussed in 45 IAC 1-1-45.

FINDING

Taxpayer's protest denied.

4. Gross Income Tax – Enterprise Zone Apportionment

DISCUSSION

Taxpayer has claimed an exemption from their gross income tax returns for the taxable years ending December 31, 1994 and March 24, 1995 for a qualified increase in enterprise zone gross income. The exemption from gross income tax for a qualified increase in enterprise zone income is stated at IC 6-2.1-3-32. The exemption is equal to the amount by which gross income derived from sources within an enterprise zone exceeds the gross income derived from sources within an enterprise zone during a base period.

Taxpayer claimed the exemption for its Evansville facility. The facility was not in existence during the base period. Therefore all the qualified gross income received by the Evansville facility is exempt from the gross income tax. The issue is to determine the amount of the qualified gross income attributable to the Evansville facility for the taxable periods ending December 31, 1994 and March 24, 1995.

IC 6-2.1-3-32(c) defines "gross income derived from sources within an enterprise zone" as including the following elements.

(1) gross income from real or tangible personal property located in an enterprise zone;

(2) income from doing business in an enterprise zone;

(3) income from a trade or profession conducted in an enterprise zone;

(4) compensation for labor or services rendered within an enterprise zone; and

(5) income from stocks, bonds, notes, bank deposits, patents, copyrights, secret processes and formulas, good will, trademarks, trade brands, franchises, and other intangible personal property having a situs in an enterprise zone.

Taxpayer's receipts from the Evansville facility qualify under this definition as income derived from the enterprise zone since its gross receipts derive from sale of products manufactured at the Evansville facility.

Taxpayer contends that these gross receipts do not fairly represent its business income from the Evansville facility. Rather, Taxpayer argues that it qualifies under IC 6-2.1-3-32 (d) to use an apportionment method to determine the income from the enterprise zone since the income derived from sources within the enterprise zone cannot be separated from the business income derived from sources outside the enterprise zone. Taxpayer argues that it cannot produce a profit and loss statement or net income statement from the Evansville facility books and records without including data from other facilities. Further Taxpayer argues that patents, trade brands and other intangibles with a business situs outside the Evansville facility produce income for the Evansville facility.

Taxpayer's arguments do not change the fact that the gross income tax is a gross receipts tax. Taxpayer's books clearly indicate the gross receipts attributable to its production of a product at the Evansville facility. The contention that Taxpayer cannot prepare a profit and loss or net income statement for the Evansville facility alone is irrelevant since this is a gross receipts tax, rather than a net receipts tax. Further, Taxpayer failed to show that any income from intangibles with a business situs outside of the Evansville facility affects the receipts from the Evansville facility in any way. Taxpayer's gross receipts from the Evansville facility can be separated from income derived from outside the enterprise zone.

FINDING

This point of Taxpayer's protest is denied.

5. Gross Income Tax – Income Received Pursuant to Memorandum of Understanding

DISCUSSION

Taxpayer received payments from another corporation pursuant to a Memorandum of Understanding. The Department imposed gross income tax on those receipts as taxable receipts pursuant to a contract which is separate and distinct from Taxpayer's original purchase agreement from the other corporation. Taxpayer contends that these receipts are in actuality a refund of a portion of the purchase price pursuant to the following provisions of 45 IAC 1-1-34:

Refunds are not subject to gross income tax in the hands of the recipient and are deductible from taxable gross receipts by the payor if the amount of the refund was included by him in his total gross receipts.

The word "refund" includes amounts representing overpayments, the value of property returned to the seller, and adjustments by the seller to the selling price of property or services received either in cash or in the form of credits.

Taxpayer purchased its facilities, assets and business in an extremely large and complicated transaction. To be refunds, the payments would have to represent overpayments under the original contract. The receipts in question, however, were received in exchange for goods and or services pursuant to Memorandums of Understanding which constitute a subsequent contract. As such, these payments are not refunds exempt from the gross income tax. Rather the payments are income subject to the gross income tax.

FINDING

Taxpayer's protest is denied.

6. Tax Administration – Penalty

DISCUSSION

Taxpayer also protests the imposition of the negligence penalty pursuant to IC 6-8.1-10-2(a), which states as follows:

If a person fails to... pay the full amount of tax shown on his return on or before the due date for the return or payment, incurs, upon examination by the department, a deficiency which is due to negligence,... the person is subject to a penalty.

Evidence indicates that Taxpayer failed to establish a system to insure the reporting of all its gross receipts. The breach of the duty to properly report gross receipts constitutes negligence.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

02980339.LOF

LETTER OF FINDINGS NUMBER: 98-0339
Gross Income Tax
For Tax Years 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 a specific issue.

ISSUES

I. Gross Income Tax – Leased Equipment

Authority: First National Leasing and Financial Corp. v. Indiana Dept. of State Revenue, 598 N.E.2d 640 (Ind.Tax 1992); IC 6-2.1-2-2; IC 6-8.1-5-1; 45 IAC 1-1-28; 45 IAC 1-1-49

Taxpayer protests imposition of Gross Income Tax on leased equipment located in Indiana.

II. Tax Administration – Negligence Penalty and Interest

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

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

STATEMENT OF FACTS

Taxpayer leases equipment to Indiana customers. The Department of Revenue conducted an audit for the years in question, and issued assessments on income from the leased equipment. Taxpayer protests that it does not have an Indiana business situs and that the income has no connection to Indiana. Further facts will be supplied as necessary.

I. Gross Income Tax – Leased Equipment

Taxpayer, an out-of-state corporation, leases equipment to Indiana customers. After an audit, the Department issued assessments for the years in question on the income from the rental of this equipment. Taxpayer protests that it did not pay Gross Income Tax on the income because it was following a decision by the Indiana Tax Court.

Taxpayer believes its situation is the same as in First National Leasing v. Indiana Dept. of Revenue. First National Leasing and Financial Corp. v. Indiana Dept. of State Revenue, 598 N.E.2d 640 (Ind.Tax 1992) In that case, First National Leasing leased train derailment equipment to a Hulcher Corporation, a wholly owned subsidiary. The equipment was used to place railroad cars and locomotives back on the tracks after a derailment. The lessee had a base in Indiana at which it stored some of the leased equipment. The Court decided that the taxpayer did not owe Indiana income tax on the income from the leases in that case because First National Leasing (taxpayer-lessor) had no control over the equipment. As the Court explained:

> The sole activity First National has in Indiana is ownership of equipment that is located in Bluffton independently of any direction, consent, or, often times, knowledge by First National. The critical transaction in this case is the leasing of property. First National executed its leases in Illinois and Texas, not in Indiana. The leases were not negotiated in Indiana; and the lease payments are not made or received in Indiana. Consequently, none of First National's activities related to the lease contract itself are conducted in Indiana.
>
> First National Leasing, 644-5.

Regarding whether or not First National had a business situs in Indiana, the Court in First National Leasing explained:

> Consequently, although First National owns the equipment that Hulcher leases, locates, and uses in Indiana and elsewhere, the activities related to the lease formation and execution and the purpose of the lease, the use and possession of the equipment are overwhelmingly in quantity and quality activities conducted by Hulcher, not First National. The court therefore finds that First National's ownership of equipment located in Indiana is an activity that is not more than minimal, but is remote and incidental to the lease transaction from which its income is derived. Ownership alone is therefore not the degree of activity contemplated by the Indiana gross income tax statute.
>
> First National Leasing, at 645.

In the instant case, taxpayer claims that its situation is exactly like that of First National Leasing. The leases are negotiated outside of Indiana, payments are made to a location outside of Indiana, and the equipment is located in Indiana. The Department determined through the audit that taxpayer's situation is different from that of First National Leasing since the equipment in question is not mobile and the leases require the customers to notify taxpayer when the equipment is moved. Taxpayer states that, even though its leases require the lessee to notify taxpayer when the equipment is moved, it does not conduct inventories and is not aware of such moves unless the lessee notifies it.

The equipment in First National Leasing, was mobile in nature, and was used in many states besides Indiana. Taxpayer claims that

the equipment it leases is mobile, but in First National Leasing the equipment had to be mobile in order to travel to the scene of the derailment, whether in Indiana or any other state. The base in Indiana was little more than a parking lot for the equipment while waiting for the next derailment, at which point the equipment would be moved to any part of the country. After clearing the derailment, the equipment might be brought back to the Bluffton base or stored at another base outside of Indiana. The location of the equipment was determined at Hulcher's discretion and without notice or approval of First National.

First National's ownership of leased equipment located in Indiana was remote and incidental. Taxpayer in the instant case claims that the equipment can be moved without its approval, but has not established that its situation is exactly like that of First National, where the equipment was routinely moved out of Indiana for use without notification or approval of First National. Taxpayer submitted no documentation to support its position, despite repeated invitations to do so.

Taxpayer states that its rental income is not derived from sources within Indiana as described in IC 6-2.1-2-2(a)(2), which provides:

(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.

The Department refers to 45 IAC 1-1-28, which states in relevant part:

Rental income is any payment, in cash or other form, for the possession or use of real or tangible personal property for a limited period of time. The gross receipts, without any deductions, derived from the lease or rental of real or tangible personal property, whether actually or constructively received, are taxable at the higher rate under IC 6-2-1-3(g) *[Repealed by P.L.77-1981, SECTION 22.]*. The same rules apply to the gross receipts derived from subleasing.

Taxpayer states that the ownership of leased tangible personal property located in Indiana does not in and of itself create business situs in Indiana. In the audit report, the Department referred to 45 IAC 1-1-49, which states in part:

For purposes of these regulations *[45 IAC 1-1]*, a taxpayer may establish a "business situs" in ways including but not limited to, the following

....

(6) Ownership, leasing, rental or other operation of income-producing property (real or personal)

Taxpayer leased income-producing property in Indiana, therefore taxpayer did have a business situs in Indiana, as provided by 45 IAC 1-1-49(6). Unlike the circumstances in First National Leasing, the equipment in this case did not end up in Indiana by coincidence. Taxpayer knew that it was leasing equipment to Indiana lessees. Unlike the train derailment equipment in First National Leasing, which had to be mobile to get to the point of the derailment, the equipment in this case is not mobile in nature. Taxpayer has not established that its situation is the same as in First National Leasing. The Department therefore finds that taxpayer's Indiana-based equipment also represents an Indiana tax situs for purposes of imposition of Indiana's Gross Income Tax.

FINDING

Taxpayer's protest is denied.

II. Tax Administration – Penalty and Interest

DISCUSSION

Taxpayer protests the imposition of a ten percent (10%) negligence penalty and interest. Regarding the negligence penalty, the relevant regulation is 45 IAC 15-11-2(c), which states in part:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-2.1] if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying our or failing to carry out a duty giving rise to the penalty imposed under this section.

In this case, taxpayer has demonstrated that it exercised ordinary business care and prudence in carrying out its duty to pay income tax. Therefore, taxpayer has affirmatively established reasonable cause, and the negligence penalty shall be waived. Regarding the interest imposed, IC 6-8.1-10-1(e) provides that the Department may not waive interest.

FINDING

Taxpayer's protest is sustained in part. The negligence penalty will be waived. The Department is not permitted to waive interest.

DEPARTMENT OF STATE REVENUE

02980429.LOF

LETTER OF FINDINGS NUMBER: 98-0429
Indiana Corporation Income Tax
For Years 1994, 1995, and 1996

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication.

It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Foreign Source Dividends Expenses

Authority: IC 6-3-2-12

The taxpayer protests the Department's determination to apply expenses related to foreign source dividends to that dividend income in order to fairly reflect the taxpayer's Indiana activities. The taxpayer argues that no authority supports this adjustment and that foreign source dividend expenses should not be included within the taxpayer's income.

II. Equitable Adjustment to Sales Factor Denominator – Exclusion of Certain Gross Receipts from the Sales Factor Denominator

Authority: 45 IAC 3.1-1-50

The taxpayer protests the Department's determination that certain dividends and U.S. interest income should be excluded from the denominator of taxpayer's Indiana sales factor thereby resulting in additional tax liabilities. The taxpayer argues that this action is in direct contrast to actions taken by the prior auditor and that the inclusion of all gross receipt items within the sales factor denominator is consistent with the Indiana statutes and does not result in an arbitrary division of income.

III. Addback of State Taxes Based On or Measure by Income – Michigan Single Business Tax

Authority: IC 6-3-1-3.5(b); IC 6-3-2-1(b); First Chicago NBD Corp. v. Dept. of State Revenue, 708 N.E.2d 631 (Ind. Tax Ct. 1999); 45 IAC 45 IAC 3.1-1-8(3)(a)

Taxpayer protests the auditor's determination that the Michigan Single Business Tax is a tax sufficiently based on or measured by income such that the tax must be added back for purposes of determining taxpayer's liability under Indiana's adjusted gross income tax. Taxpayer argues that the tax does not meet the definition of a tax based on or measured by income and therefore, no addback of the Michigan Single Business Tax is required to calculate taxpayer's adjusted gross income.

IV. Equitable Abatement of Accumulated Interest

Authority: IC 6-8.1-10-1

The taxpayer argues that, based upon the lengthy delay in responding to the taxpayer's protest, the Department should exercise its powers to abate the accumulated interest on any tax liability found due.

STATEMENT OF FACTS

The taxpayer is a large, out-of-state, manufacturer of candy. Taxpayer markets its products throughout the United States but does not operate a plant or business location in Indiana. Taxpayer's Indiana employees, operating out of their homes, contact customers and potential customers. Taxpayer's Indiana assets consist of vehicles provided to its employees and to small amounts of inventory held by the individual employees.

DISCUSSION

I. Foreign Source Dividends Expenses

Taxpayer argues that the Department erred in requiring it to adjust its gross income by adding back foreign source dividend expenses. The taxpayer maintains that no legal authority supports such a requirement.

The auditor determined that these expenses should be applied to the foreign source dividend income to "fairly reflect Indiana adjusted gross income as required by the Department." Audit Summary, p. 5.

Pursuant to IC 6-3-2-12, taxpayer deducted foreign source dividend income from its Indiana adjusted gross income. The audit disagreed with the taxpayer's method of doing so and adjusted the deduction to take into account expenses associated with the accumulation of that foreign source dividend income.

IC 6-3-2-12(b) states that "A corporation that includes any foreign source dividend in its adjusted gross income for a taxable year is entitled to a deduction from that adjusted gross income. The amount of the deduction equals the product of the amount of the foreign source dividend included in the corporation's adjusted gross income for the taxable year; multiplied by the percentage prescribed in subsection (c), (d), or (e), as the case may be."

The aforementioned subsections (c), (d), and (e) allow corporate taxpayers to receive a one hundred percent deduction for foreign source dividends received from corporations in which a taxpayer has an eighty percent (80%) or larger ownership interest; an eighty-five percent (85%) deduction for dividends received from corporations in which a taxpayer has a fifty to seventy-nine percent (50% to 79%) ownership interest; and a fifty percent (50%) deduction for dividends received from corporations in which the taxpayer has less than a fifty percent (50%) ownership interest. IC 6-3-2-12(c)-(e).

The statutory language is straightforward. IC 6-3-3-12 authorizes pro rata deductions (based upon the percentage ownership of the payor by the payee) of certain foreign source dividend income.

FINDING

Taxpayer's protest is sustained.

II. Equitable Adjustment to Sales Factor Denominator

In determining the taxpayer's adjusted gross income, the auditor determined that certain gross receipts should be excluded from the sales factor denominator. This determination had the result of increasing taxpayer's tax liabilities for the years at issue. The

auditor predicated the decision upon the provisions contained within 45 IAC 3.1-1-50 stating that the particular gross receipts should be disregarded in order "to effectuate an equitable apportionment." Audit Summary, p. 5.

The receipts in question consisted of "Domestic Dividends Subject to 70% Deduction, Dividends 30% not excluded treated as non business income, Wholly Owned Foreign [subsidiaries] Subject to 100% Deduction, Foreign Dividend Gross Up, [and] Interest on U.S. Obligations." Audit Summary, p. 13.

A three-factor (property, payroll, and sales) apportionment formula is used to determine Indiana's taxable share of a multi-state taxpayer's adjusted gross income. 45 IAC 3.1-1-37 et seq. In computing the taxpayer's Indiana sales – both numerator and denominator – only income (receipts) included within a taxpayer's federal gross income and subject to Indiana's adjusted gross income tax may be used. 45 IAC 3.1-1-8. That is, only taxable income may be included in computing the sales apportionment factor.

In this instance, the receipts at issue are not included in the taxpayer's Indiana adjusted gross income. As with all excluded income, such receipts must be excluded from taxpayer's Indiana sales apportionment factors. Specifically, these receipts should not have been included in taxpayer's sales denominator. The auditor correctly determined to exercise the authority, vested within 45 IAC 3.1-1-50(5), to exclude from the taxpayer's Indiana sales denominator the particular receipts at issue within the taxpayer's protest. Accordingly, audit's decision to exclude those receipts serves to "effectuate an equitable apportionment." Id.

FINDING

The taxpayer's protest is respectfully denied.

III. Addback of State Taxes Based On or Measured by Income – Michigan Single Business Tax

In calculating the taxpayer's adjusted gross income, the auditor determined that, for purposes of calculating the taxpayer's liability, taxpayer was required to add back the amount of Michigan Single Business Tax the taxpayer previously paid.

Indiana adjusted gross income tax is imposed upon the adjusted gross income of a corporation that is derived from Indiana sources. IC 6-3-2-1(b). Indiana adjusted gross income is the same as "taxable income" as defined by I.R.C. § 63 and adjusted according to IC 6-3-1-3.5(b). One of those adjustments requires the taxpayer to "[a]dd an amount equal to any deduction or deductions allowed or allowable pursuant to Section 63 of the Internal Revenue Code for taxes based on or measured by income and levied at the state level by any state of the United States." IC 6-3-1-3.5(b)(3). *See also* 45 IAC 3.1-1-8(3)(a). The taxpayer argues that the Michigan Single Business Tax does not meet the definition of taxes based on or measured by income.

The taxpayer is correct. In First Chicago NBD Corp. v. Dept. of State Revenue, 708 N.E.2d 631 (Ind. Tax Ct. 1999), the court held that the Michigan Single Business Tax was a value added tax which used taxable income as one component in its base calculation. Id. at 633-34. However, because of the extensive adjustments which were made to the individual taxpayer's taxable income in arriving at the Michigan Single Business Tax, the tax "becomes an entirely different tax, one that cannot be fairly read to fit under the 'based on or measured by income' language chosen by the Indiana General Assembly." Id. at 635.

FINDING

Taxpayer's protest is sustained.

IV. Equitable Abatement of Accumulated Interest

The taxpayer argues that, based upon the purported lengthy delay in responding to the taxpayer's protest letter, it is entitled to have accumulated interest equitably abated.

IC 6-8.1-10-1 imposes upon the taxpayer interest on the amount of unpaid taxes stating that if the taxpayer "incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment." In the absence of any statutory, regulatory, or equitable authority to abate the interest which has accumulated during the pendency of the taxpayer's protest, the Department must decline the opportunity to do so.

FINDING

The taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

01980734.LOF

LETTER OF FINDINGS NUMBER: 98-0734
Individual Income Tax
Calendar Years 1994, 1995, and 1996

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

ISSUE(S)

I. Adjusted Gross Income – Best Information Available (BIA)

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

Taxpayer protests the assessment based upon best information available.

STATEMENT OF FACTS

Taxpayers are husband and wife who own and operate one each of two licensed package liquor stores. During the audit, numerous requests were made by the auditor for adequate records to complete an accurate audit. Despite numerous requests, by both the auditor and the hearing officer, only a fraction of records normally examined were made available. The auditor completed "best information available" audits for two locations. Letters of Findings were issued denying taxpayer as no evidence to rebut the assessment was made available.

At hearing, taxpayer's CPA provided additional facts, observations, and conclusions he reached to support the reconstruction of taxpayer's 1994 through 1996 records in a memorandum dated June 20, 2000 which was basically the same as those provided the auditor on February 16, 1999. No detailed information or distributor records were made available at hearing as previously requested.

In plain straightforward language, IC 6-8.1-5-1(a), authorizes the Department, if it reasonably believes that a taxpayer has not reported the proper amount of tax due, to make a proposed assessment of unpaid tax on the basis of the best information available to the department. Audit's BIA determinations were made necessary by taxpayer's failure to maintain or provide pertinent information, records, or invoices.

I. Adjusted Gross Income – Best Information Available

DISCUSSION

Taxpayer protests the assessment and states its records were incomplete because it experienced a basement flood in 1995, which destroyed some of the records. Taxpayer's CPA states that it has reconstructed taxpayer's records and provided a memorandum dated June 20, 2000.

Taxpayer admits that he "may" owe additional taxes. However, taxpayer protests the means by which audit determined the amount of income tax owed. Taxpayer disagrees with audit's determination of the base amount of its gross retail income and error factors. Taxpayer contends that the mark ups in an economically depressed area never generated the quantity of sales estimated by the auditor. Further, taxpayer contends that the calculated error factor determined by audit is a wholly unrealistic estimate of the actual sales of its business.

The Department's proposed assessment, under IC 6-8-1-05-1(b), is deemed to be "prima facie evidence that the department's claim for the unpaid tax is valid." That same section of the Indiana Code goes on to state that "the burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Taxpayer has not provided proof that the assessments are in error.

Under IC 6-8.1-5-4(a), "Every person subject to a listed tax must keep 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." The records referred to "include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and cancelled checks."Taxpayer has not provided records or source documents.

The audit was conducted in the absence of taxpayer's sales, purchases and expense records. Minimum business records were supplied to the auditor after numerous attempts. By failing to present any viable or substantive evidence, the taxpayer has failed to meet its burden of proof, imposed under IC 6-8.1-5-1(b), to rebut the presumptive validity afforded the Department's proposed Income tax assessments.

The taxpayer asserts that no adjustment was made for overhead and other expenses. Rather than adjusting for other expenses (which the taxpayer had deducted on schedule C) the appropriate remedy is to increase reported income by the *additional sales* assessed in the sales tax audit less the cost of goods sold associated with those sales. The auditor erroneously arrived at net income by reducing *total sales* by *total cost of goods sold* and giving credit for income reported. The department finds that taxpayer has submitted documentation to substantiate the adjustment.

FINDING

Taxpayer's protest is partially sustained and partially denied.

DEPARTMENT OF STATE REVENUE

04980736.LOF

LETTER OF FINDINGS NUMBER: 98-0736
Sales Tax
Calendar Years 1994, 1995, and 1996

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

ISSUE(S)

I. Sales Tax – Assessment: Best Information Available (BIA)

Authority: IC 6-2.5-2-1; IC 6-2.5-3-2: IC 6-2.5-3-6(b),(c); IC 6-2.5-4-1(b); IC 6-2.5-6 et seq., IC 6-8.1-5-1(a); IC 6-8.1-5-1(b); IC 6-8.1-5-4(a); 45 IAC 2.2-2-2

Taxpayer protests the auditor's BIA method of calculating gross retail income and the auditor's BIA determination of the rate of markup used in calculating taxable sales.

STATEMENT OF FACTS

Taxpayers are husband and wife who own and operate one each of two licensed package liquor stores. During the audit, numerous requests were made by the auditor for adequate records to complete an accurate audit. Despite numerous requests, by both the auditor and the hearing officer, only a fraction of records normally examined were made available. The auditor completed a "best information available" audit.

Included among records examined were purchase invoices (cost of goods sold only for 1995 and 1996, bank records (1995 only and incomplete), and income tax returns with supporting schedules, (1994 IT-40 only, no Federal information, 1995, and 1996). Also used in the audit were sales records made available from a liquor distributor and published ratios from the ***Almanac of Business and Industrial Financial Ratios*** authored by Leo Troy, Ph.D., 1997 Edition, Prentice Hall.

The auditor calculated an error factor based upon records from one of the taxpayer's liquor distributors and the taxpayer's records for 1995 and 1996. No records were made available for 1994; therefore, an average of 1995 and 1996 was utilized. (Basis and reasons for the calculation is contained on page 5-6 of the audit report) Taxpayer's records did not coincide with the "reporting distributor's" amounts. Auditor states that the taxpayer insisted that all purchases were made solely at one location, however, the distributor's records indicate otherwise.

It was necessary for audit to extrapolate the information provided by year to determine net income by year and to account for months in which no information was available.

Because the taxpayer had no purchase invoices available for review, the audit proposed an adjustment to cost of goods sold based on items purchased during the audit period by utilizing a vendor's information and calculating the error factor for those purchases with taxpayer's records for that one vendor.

The records would indicate that the auditor employed, in a conscientious and professional manner, the best available records and source materials to produce the BIA assessments. Taxpayer was repeatedly invited to contribute additional substantive information or to rebut the audit's conclusions with concrete information. Taxpayer's CPA, instead states it has reconstructed taxpayer's records.

I. Sales Tax – Best Information Available

DISCUSSION

Taxpayer protests the assessment and states its records were incomplete because it experienced a basement flood in 1995, which destroyed some of the records. At hearing, Taxpayer's CPA stated he can provide additional facts, observations, and conclusions he reached to support the reconstruction of taxpayer's 1994 through 1996 records and provided the hearing officer with a memorandum dated June 20, 2000.

Taxpayer admits that he "may" owe additional taxes. However, taxpayer protests the means by which audit determined the amount of income tax owed. Taxpayer disagrees with audit's determination of the base amount of its gross retail income and error factors. Taxpayer contends that the mark-up in an economically depressed area never generated the quantity of sales estimated by the auditor. Further, taxpayer contends that the calculated error factor determined by audit is a wholly unrealistic estimate of the actual sales of its business.

No detailed information or distributor records were made available at hearing. At hearing, a spreadsheet was provided that showed sales for both taxpayer's locations at $366,182, $445,417, and $525,714 for 1994, 1995, and 1996 respectively. The spreadsheet shows an overpayment of sales tax in 1994 in the amount of $1,175. No proof regarding the overpayment was provided.

In plain straightforward language, IC 6-8.1-5-1(a), authorizes the Department, if it reasonably believes that a taxpayer has not reported the proper amount of tax due, to make a proposed assessment of unpaid tax on the basis of the best information available to the department. Audit's BIA determinations were made necessary by taxpayer's failure to maintain or provide pertinent information, records, or invoices.

Under IC 6-8.1-5-4(a),"Every person subject to a listed tax must keep 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." The records referred to "include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and cancelled checks."

The audit was conducted in the absence of taxpayer's sales, purchases and expense records. Minimum business records were supplied to the auditor after numerous attempts.

In attempting to rebut the assessment, taxpayer stated that audit's determination and methods were "grossly misrepresentat [ive]" inaccurate and based upon standards that were inapplicable to this taxpayer. Taxpayer stated that his own investigation found that the markup was highly overstated. Taxpayer provided no information to substantiate the estimate other than a statement that the taxpayer is in an economically depressed area. Taxpayer has failed to provide any evidence that would assist the Department in making an alternative determination of taxpayer's liabilities.

By failing to present any viable or substantive evidence, the taxpayer has failed to meet his burden of proof, imposed under IC 6-8.1-5-1(b), to rebut the presumptive validity afforded the Department's proposed sales tax assessments. In addition, the Department cannot rely on taxpayer's recalculations.

The Department's proposed assessment, under IC 6-8-1-5-1(b), is deemed to be "prima facie evidence that the department's claim for the unpaid tax is valid." That same section of the Indiana Code goes on to state that "the burden of proving that the

proposed assessment is wrong rests with the person against whom the proposed assessment is made."

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04980737.LOF

LETTER OF FINDINGS NUMBER: 98-0737
Sales Tax
Calendar Years 1994, 1995, and 1996

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

ISSUE(S)

I. Sales Tax – Assessment: Best Information Available (BIA)

Authority: IC 6-2.5-2-1; IC 6-2.5-3-2; IC 6-2.5-3-6(b), (c); IC 6-2.5-4-1(b); IC 6-2.5-6 et seq.; IC 6-8.1-5-1(a); IC 6-8.1-5-1(b); IC 6-8.1-5-4(a); 45 IAC 2.2-2-2

Taxpayer protests the auditor's BIA method of calculating gross retail income and the auditor's BIA determination of the rate of markup used in calculating taxable sales.

STATEMENT OF FACTS

Taxpayers are husband and wife who own and operate one each of two licensed package liquor stores. During the audit, numerous requests were made by the auditor for adequate records to complete an accurate audit. Despite numerous requests, by both the auditor and the hearing officer, only a fraction of records normally examined were made available. The auditor completed a "best information available" audit.

Included among records examined were purchase invoices (cost of goods sold only for 1995 and 1996, bank records (1995 only and incomplete), and income tax returns with supporting schedules, (1994 IT-40 only, no Federal information, 1995, and 1996). Also used in the audit were sales records made available from a liquor distributor and published ratios from the ***Almanac of Business and Industrial Financial Ratios*** authored by Leo Troy, Ph.D., 1997 Edition, Prentice Hall.

The auditor calculated an error factor based upon records from one of the taxpayer's liquor distributors and the taxpayer's records for 1995 and 1996. No records were made available for 1994; therefore, an average of 1995 and 1996 was utilized. (Basis and reasons for the calculation is contained on page 5-6 of the audit report) Taxpayer's records did not coincide with the "reporting distributor's" amounts. Auditor states that the taxpayer insisted that all purchases were made solely at one location, however, the distributor's records indicate otherwise.

It was necessary for audit to extrapolate the information provided by year to determine net income by year and to account for months in which no information was available.

Because the taxpayer had no purchase invoices available for review, the audit proposed an adjustment to cost of goods sold based on items purchased during the audit period by utilizing a vendor's information and calculating the error factor for those purchases with taxpayer's records for that one vendor.

The records would indicate that the auditor employed, in a conscientious and professional manner, the best available records and source materials to produce the BIA assessments. Taxpayer was repeatedly invited to contribute additional substantive information or to rebut the audit's conclusions with concrete information. Taxpayer's CPA, instead states it has reconstructed taxpayer's records.

I. Sales Tax – Best Information Available

DISCUSSION

Taxpayer protests the assessment and states its records were incomplete because it experienced a basement flood in 1995, which destroyed some of the records. At hearing, Taxpayer's CPA stated he can provide additional facts, observations, and conclusions he reached to support the reconstruction of taxpayer's 1994 through 1996 records and provided the hearing officer with a memorandum dated June 20, 2000.

Taxpayer admits that he "may" owe additional taxes. However, taxpayer protests the means by which audit determined the amount of income tax owed. Taxpayer disagrees with audit's determination of the base amount of its gross retail income and error factors. Taxpayer contends that the mark-up in an economically depressed area never generated the quantity of sales estimated by the auditor. Further, taxpayer contends that the calculated error factor determined by audit is a wholly unrealistic estimate of the actual sales of its business.

No detailed information or distributor records were made available at hearing. At hearing, a spreadsheet was provided that showed sales (for two locations) were $366,182, $445,417, and $525,714 for 1994, 1995, and 1996 respectively. The spreadsheet shows an overpayment of sales tax in 1994 in the amount of $1,175. No proof regarding the overpayment was provided.

In plain straightforward language, IC 6-8.1-5-1(a), authorizes the Department, if it reasonably believes that a taxpayer has not reported

the proper amount of tax due, to make a proposed assessment of unpaid tax on the basis of the best information available to the department. Audit's BIA determinations were made necessary by taxpayer's failure to maintain or provide pertinent information, records, or invoices.

Under IC 6-8.1-5-4(a),"Every person subject to a listed tax must keep 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." The records referred to "include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and cancelled checks."

The audit was conducted in the absence of taxpayer's sales, purchases and expense records. Minimum business records were supplied to the auditor after numerous attempts.

In attempting to rebut the assessment, taxpayer stated that audit's determination and methods were "grossly misrepresentat [ive]" inaccurate and based upon standards that were inapplicable to this taxpayer. Taxpayer stated that his own investigation found that the markup was highly overstated. Taxpayer provided no information to substantiate the estimate other than a statement that the taxpayer is in an economically depressed area. Taxpayer has failed to provide any evidence that would assist the Department in making an alternative determination of taxpayer's liabilities.

By failing to present any viable or substantive evidence, the taxpayer has failed to meet his burden of proof, imposed under IC 6-8.1-5-1 (b), to rebut the presumptive validity afforded the Department's proposed sales tax assessments. In addition, the Department cannot rely on taxpayer's recalculations.

The Department's proposed assessment, under IC 6-8-1-5-1 (b), is deemed to be "prima facie evidence that the department's claim for the unpaid tax is valid." That same section of the Indiana Code goes on to state that "the burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

18990145.LOF

LETTER OF FINDINGS NUMBER: 99-0145
Financial Institutions Tax
For the 1992, 1993, 1994, 1995, and 1996 Tax Years

NOTICE: Under 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 regarding a specific issue.

ISSUES

I. Whether I.R.C. § 265 Expenses Should Be Deducted From the Denominator of the Apportionment Factor

Authority: IC 6-5.5-2-4; I.R.C. § 265

The taxpayer argues that, for purposes of calculating the apportionment denominator, its income should not have been adjusted downward for I.R.C. § 265 expenses.

II. Whether I.R.C. § 291 Expenses Should Be Deducted From the Denominator of the Apportionment Factor

Authority: IC 6-5.5-2-4; I.R.C. § 291

The taxpayer argues that, for purposes of calculating the apportionment denominator, its income should not have been adjusted downward for I.R.C. § 291 expenses.

III. Whether Foreign Exchange Income Should Be Deducted From the Denominator of the Apportionment Factor for Purposes of Determining the Financial Institutions Tax

Authority: IC 6-5.5-1-10; I.R.C. § 61

The taxpayer argues that, for purposes of calculating the apportionment denominator, its income should not have been adjusted downward based upon the receipt of foreign exchange income.

IV. Whether Taxpayer, As a Bank Holding Company and Its Various Subsidiaries, Constitute a Unitary Group

Authority: IC 6-5.5-1-18; 45 IAC 17-3-5(d)

The taxpayer argues that the taxpayer and its various constituent subsidiaries are separate and do not constitute a unitary entity for the purpose of calculating the state's Financial Institutions Tax.

V. Constitutionality of the Application of the Apportionment Method for Unitary Groups Filing a Combined Return

Authority: IC 6-5.5-2-4

The taxpayer challenges the method of apportioning to Indiana the income of resident taxpayers regardless of the jurisdiction in which that income is derived. Taxpayer argues that this apportionment methodology results in resident and nonresident taxpayers being treated differently and that the methodology does not reflect the true nature of the taxpayer's in-state activities.

VI. Abatement of the Ten Percent Negligence Penalty

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

The taxpayer requests that the Department exercise its statutory authority to abate the ten percent negligence penalty. Taxpayer argues that any failure on its part to adhere to Indiana statutes and the Department's regulations was based upon reasonable cause and was not due to negligence.

STATEMENT OF FACTS

Taxpayer is a bank holding company registered as such under the Bank Holding Company Act of 1956. Several of the taxpayer's subsidiaries conducted the business of financial institutions within the state of Indiana and were required to file a unitary Financial Institution Tax Return.

DISCUSSION

I. Whether I.R.C. § 265 Expenses Should Be Deducted From the Denominator of the Apportionment Factor

Taxpayer protests the netting of I.R.C. § 265 expenses against municipal income added back for determining the amount of income included in the denominator of the apportionment factor. The Department apportioned the taxpayer's income in accordance with IC 6-5.5-2-4. IC 6-5.5-2-4(2)(B) defines the denominator as including "the receipts of all the members of the unitary group from transacting business in all taxing jurisdictions." There is no statutory provision for netting I.R.C. § 265 expenses.

FINDING

The taxpayer's protest is sustained.

II. Whether I.R.C. § 291 Expenses Should Be Deducted From the Denominator of the Apportionment Factor

Taxpayer protests the netting of I.R.C. § 291 expenses against municipal income added back for determining the amount of income included in the numerator and denominator of the apportionment factor. The Department apportioned the taxpayer's income in accordance with IC 6-5.5-2-4. IC 6-5.5-2-4(2)(B) defines the denominator as including "the receipts of all the members of the unitary group from transacting business in all taxing jurisdictions." There is no statutory provision for netting I.R.C. § 291 expenses.

FINDING

The taxpayer's protest is sustained.

III. Whether Foreign Exchange Income Should Be Deducted From the Denominator of the Apportionment Factor for Purposes of Determining the Financial Institutions Tax

The taxpayer protests the deduction of foreign exchange income from the denominator of the apportionment factor. For the exclusive and limited purpose of determining the taxpayer's Financial Institutions Tax, under IC 6-5.5-1-10 "'Gross income' means gross income (as defined in Section 61 of the Internal Revenue Code) for federal income tax purposes." The issue becomes not whether this type of income constitutes an "actual receipt" but whether the income is a "receipt" as defined within I.R.C. § 61. The term "receipts" is defined in I.R.C. § 61 with no adjustment downward for foreign exchange income. Accordingly, for the limited purpose of determining the taxpayer's Financial Institutions Tax, the taxpayer's foreign exchange income should have been included within the denominator of the apportionment factor.

FINDING

The taxpayer's protest is sustained.

IV. Whether Taxpayer, As a Bank Holding Company and Its Various Subsidiaries, Constitute a Unitary Group

The taxpayer protests the determination that, for purposes of the Financial Institution Tax, the taxpayer, consisting of a bank holding company and its subsidiaries, should be treated as a unitary business. The taxpayer argues that it "has separate management, accounting, executive force... for every entity." Taxpayer Protest Letter, March 18, 1999, p. 4. The taxpayer adds, "any inter-company transactions are set up at arms length as mandated by the federal reserve." Id.

The definition of "unitary business" is set forth in IC 6-5.5-1-18 which states that "'Unitary business' means business activities or operations that are of mutual benefit, dependent upon, or contributory to one another, individually or as a group, in transacting the business of a financial institution." IC 6-5.5-1-18(a). In making that determination, the statute states that "[u]nity is presumed whenever there is a unity of ownership, operation, and use evidenced by centralized management or executive force, centralized purchasing, advertising, accounting, or other controlled interaction among entities that are members of the unitary group...." IC 6-5.5-1-18(b). In attempting to overcome the statutory presumption, taxpayer has set forth a bare assertion that its subsidiaries operate under individual management, accounting systems, executive control, and that inter-company transactions are conducted at arms length. However, taxpayer has failed to set forth – to any quantifiable or substantive degree – the degree of independence which is afforded the individual subsidiaries or the amount of discretion under which those subsidiaries are permitted to operate. Quite simply, the taxpayer has failed to overcome the presumption, that it operates a "unitary business," mandated under IC 6-5.5-1-18(b). Consequently, having failed to overcome the statutory presumption, taxpayer comes within the purview of 45 IAC 17-3-5(d) which states that "if one (1) member of a unitary group is conducting the business of a financial institution in Indiana, then all members of the unitary group engaged in a unitary business must filed a combined return, even if some of the members are not transacting business in Indiana." Accordingly, taxpayer is required to file on a unitary basis under the state's Financial Institutions Tax.

FINDING

Taxpayer's protest is respectfully denied.

V. Constitutionality of the Application of the Apportionment Method for Unitary Groups Filing a Combined Return

Taxpayer protests the method of apportionment as set out in IC 6-5.5-2-4. That code provision states that:

For a taxpayer filing a combined return for the unitary group, the group's apportioned income for a taxable year consists of: (1) the aggregate adjusted gross income, from whatever source derived, of the resident taxpayer members of the unitary group and the nonresident members of the unitary group; multiplied by (2) the quotient of: (A) all the receipts of the resident taxpayer members of the unitary group from whatever source derived plus the receipts of the nonresident taxpayer members of the unitary group that are attributable to transacting business in Indiana; divided by (B) the receipts of all the members of the unitary group from transactions business in all taxing jurisdictions.

The taxpayer argues that apportionment methodology has the effect of "inflating the apportionment percentage, thus apportioning income to Indiana in excess of the State's fair and appropriate share," (Taxpayer Protest Letter, March 18, 1999, p. 4) and that the "Code discriminates against unitary groups filing combined returns." Id.

Presumably, the taxpayer challenges the Financial Institutions Tax on equal protection grounds. However, given the paucity of the taxpayer's argument, the presumption of constitutionality afforded state statutes, and the fact that an administrative hearing in the Indiana Department of Revenue is not the proper forum to challenge the constitutionality of the Financial Institutions Tax, the Department must decline the opportunity to address this issue.

FINDING

The taxpayer's protest is respectfully denied.

VI. Abatement of the Ten Percent Negligence Penalty

Taxpayer protests the imposition of the ten percent negligence penalty and requests that the penalty, assessed pursuant to IC 6-8.1-10-2.1 be abated. Under 6-8.1-10-2.1(d), the Department is empowered to waive the ten percent negligence penalty if the taxpayer can establish that his failure to pay the deficiency was due to reasonable cause and not due to willful neglect. Under 45 IAC 15-11-2(c), in order to establish reasonable cause, the taxpayer must demonstrate that he exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed. Ignorance of the listed tax laws, rules, and/or regulation is treated as negligence. 45 IAC 15-11-2(b).

Factors which may be considered in determining reasonable cause include the nature of the tax involved, judicial precedents set by Indiana courts, judicial precedents established in jurisdictions outside of Indiana, published Departmental instructions, information bulletins, letters of findings, rulings, and letters of advice. 45 IAC 15-11-2(c).

Taxpayer asked that the Department exercise its discretion to abate the ten percent negligence penalty. Taxpayer argues that it was undergoing its first audit under the Financial Institutions tax, was not attempting to evade taxes, and that there was limited authority or guidance available to assist the taxpayer in preparing its Financial Institution Tax returns.

Taxpayer is a substantial and sophisticated business fully capable of determining its tax liabilities. Because taxpayer has failed to set out substantive, specific reasons for reaching the decisions that it did, the Department must decline the opportunity to abate the ten percent negligence penalty.

FINDING

The taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

02990237.LOF

LETTER OF FINDINGS NUMBER: 99-0237
Adjusted Gross Income 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(S)

I. Adjusted Gross Income – Add Back Property Taxes

Authority: 45 IAC 3.1-1-8

Taxpayer protests the addback of property taxes assessed in Florida.

STATEMENT OF FACTS

Taxpayer, an Indiana corporation with corporate offices located in Indiana, leases real estate in Florida and rents personal property in Indiana.

Tenants reimburse the taxpayer the amount of real estate taxes paid to Florida. Taxpayer reduced its real estate tax account by the amount of tax reimbursed from its tenants in each year of the audit. The amount of real estate taxes collected from the tenants is actually additional rental income to the taxpayer. The amount of real estate and personal property taxes paid by the taxpayer is as follows: $86,021, $82,560, and $80,617 for 1995, 1996, and 1997 respectively.

At hearing, taxpayer was advised to obtain information in regard to whom the property tax was assessed. Taxpayer believes the tenants are addressees of the property tax billings. On June 8, 2000 and February 16, 2001, the department asked for the additional information and advised the taxpayer that the Letter of Findings would be written based upon information already in the file if no response was submitted by February 28, 2001.

No response has been received and the department must assume that the property tax was billed to the taxpayer and subject to addback.

I. Adjusted Gross Income – Addback Property Taxes

DISCUSSION

Taxpayer at hearing protested the property tax addback and advised the hearing officer that he would verify to whom the assessments were billed. The taxpayer failed to respond, therefore, the department assumes that the audit was correct in adding back property taxes paid in Florida.

Taxpayer did not provide additional information to allow adjustment to the audit.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

02990591.LOF

LETTER OF FINDINGS NUMBER: 99-0591
Gross Income Tax – Sale of Assets in Indiana
Tax Administration – Penalty
For 1995

NOTICE: Under Indiana 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. Gross Income Tax-- Sale of Assets in Indiana

Authority: IC 6-2.1-1-2(a)(3); 45 IAC 1-1-20; IC 6-2.1-1-10; 45 IAC 1-1-21; IC 6-2.1-1-11(2); 45 IAC 1-1-49; IC 6-2.1-2-2(a)(2); 45 IAC 1-1-107; 45 IAC 1-1-7; 45 IAC 1-1-113; 45 IAC 1-1-19; 45 IAC 1-1-114

II. Tax Administration-- Penalty

Authority: IC 6-8.1-10-2.1(a)(3); 45 IAC 15-11-2(b); IC 6-8.1-10-2.1(d); 45 IAC 15-11-2(c); IC 6-8.1-10-2.1(e)

STATEMENT OF FACTS

The taxpayer is a corporation which manufactured consumer and industrial packaging products such as potato chip and candy bags, coaxial cable steel, and paper and vinyl wire coatings. The Indiana manufacturing plant was sold on March 19, 1995 as part of a corporate dissolution. The taxpayer filed a final return for Indiana on October 15, 1995.

The Department contacted the taxpayer to perform an audit for the final tax return, but was unable to do so when informed by the taxpayer that an audit could not be facilitated at the taxpayer's location. Based on the best information available, the Department assessed gross income tax on the proceeds of the sale of the plant, and the taxpayer timely protested. The taxpayer thereafter waived his rights to a hearing. Further information will be provided as needed.

DISCUSSION

I. Gross Income Tax – Sales of Assets in Indiana

The taxpayer protests the imposition of gross income tax on the proceeds of the sale of its Indiana manufacturing plant. The taxpayer argues that none of the proceeds were received in Indiana and therefore, there was no need to report the proceeds for gross income tax purposes. Further, the taxpayer argues that since the sale was negotiated and closed outside Indiana by two non-resident corporations, no gross income tax is owed on the proceeds from the sale. Finally, the taxpayer argues that since the corporation has been entirely liquidated, and the sale proceeds at issue were part of the liquidation process, no gross income tax is owed.

The taxpayer's arguments are misplaced. Taxpayer sold its Indiana business assets—i.e., real and personal property. These assets physically reside in Indiana—both prior to and after transfer. Consequently, given taxpayer's establishment of a business situs (location) and tax situs (relationship between business situs and transaction), the fact that sale negotiations were conducted and paperwork completed out-of-state does not transform this intrastate sale of assets into an exempt interstate transaction.

Indiana Code section 6-2.1-1-2(a)(3) defines "gross income" as "all the gross receipts a taxpayer receives from the sale, transfer, or exchange of property, real or personal, tangible or intangible." The Indiana manufacturing plant represents "real property" and "tangible personal property" within the meaning of the statute. Subsection (c) excludes a number of items from "gross income;" none of the exclusions apply. Indiana Code section 6-2.1-1-10 defines "receipts" as applied to a taxpayer as "the gross income in cash, notes, credits, or other property that is received by the taxpayer... for the taxpayer's benefit." The taxpayer cannot argue that the sale was not for its own benefit because it was liquidating corporate assets and received in excess of $20 million dollars for the plant.

Indiana Code section IC 6-2.1-1-11 defines "receives," as applied to a taxpayer, as (1) the actual coming into possession of, or the crediting to, the taxpayer, of gross income; or (2) the payment of a taxpayer's expenses, debts, or other obligations by a third party for the taxpayer's direct benefit."

Indiana Code section 6-2.1-2-2 (a)(2) imposes gross income tax "upon the receipt of (1) 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." The proceeds of a sale of a manufacturing plant falls within the statutory definition. Therefore the proceeds of the sale are gross income and should have been included in the taxpayer's 1995 final return for gross income tax purposes. This finding is also consistent with the Department's regulations.

Indiana Administrative Code regulations in effect at the time of the 1995 audit closely track the statutory language cited above. For example, 45 IAC 1-1-49 defines a business situs away from the owner/taxpayer's domicile. The taxpayer established a business situs in Indiana through the operation of its manufacturing plant in Indiana, and by maintaining an inventory of goods "for sale, distribution, or manufacture." Similarly, 45 IAC 1-1-17 defines gross income as "the entire amount of gross income received by a taxpayer. This includes all income received. Amounts received or credited include not only cash and checks, but notes or other property of any value or kind and receipts in any form received or credited to the taxpayer in lieu of cash." The gross income attributable to the taxpayer due to the sale of the Indiana plant falls squarely within this definition and does not fall within any exemptions under 45 IAC 1-1-114 or IC 6-2.1-1-2.

FINDING

The taxpayer's protest is denied.

II. Tax Administration – Penalty

The taxpayer protests the imposition of the 10% negligence penalty. The Department will analyze why the penalty should be assessed against the taxpayer for failure to pay gross income tax on the proceeds of the sale of the Indiana manufacturing plant.

Indiana Code 6-8.1-10-2.1(a)(3) authorizes the Department to impose a penalty on a taxpayer if he "incurs, upon examination by the department, a deficiency that is due to negligence." Indiana Administrative Code, Title 15, Rule 11-2(b) provides in pertinent part:

> "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.

Indiana Code 6-8.1-10-2.1(d) allows the taxpayer to "show that the failure to... pay the deficiency... was due to reasonable cause and not due to willful neglect." If the taxpayer meets this burden, "the department **shall** waive the penalty. (emphasis added).

The taxpayer erroneously assumed because negotiations concerning the sale of the Indiana manufacturing plant did not occur in Indiana, and transfer of the proceeds did not involve Indiana domiciliaries, the proceeds of the sale were not gross income and therefore not subject to Indiana's gross income tax. However, taxpayer sold Indiana property. The statutes cited in section I, supra, could not be clearer. The statutory language establishes an affirmative duty on taxpayers conducting business within the state of Indiana to pay all applicable taxes. Taxpayer failed to do so.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120000182.LOF

LETTER OF FINDINGS NUMBER: 00-0182
Individual Income Tax
Calendar Years Ended 12/31/96, 12/31/97, and 12/31/98

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. Adjusted Gross Income – Nonfiler IT-40

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

Taxpayer protests the assessment.

STATEMENT OF FACTS

Taxpayer, at hearing states he is a self-employed carpenter and his wife was responsible for filing all tax returns. Taxpayer provided the hearing officer with his now ex-wife's address and place of employment. Upon checking with the employer, the hearing officer found that she was no longer employed as of February 19, 2001. The department has been unable to find a tax return with the wife's name and/or the taxpayer's name.

The department issued BIA billings for 1996, 1997, and 1998 because the taxpayer failed to file returns. At hearing, taxpayer provided no records in order to rebut the assessments.

I. Adjusted Gross Income – Nonfiler

DISCUSSION

Taxpayer, at hearing, states his ex-wife was responsible for filing tax returns. However, no records of any return existed for the years 1996, 1997, and 1998.

IC 6-8.1-5-1(a) states in pertinent part:

The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid, and the burden of proving that the proposed assessment is wrong rests with the person against whom the assessment is made.

In this case, the department billed the taxpayer income tax based upon the best information available.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420000201.LOF

LETTER OF FINDINGS NUMBER: 00-0201
Sales and Withholding Taxes – Responsible Officer
Various 1992 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 a specific issue.

ISSUE(S)

I. Responsible Officer Liability – Duty to Remit Sales, Use, and Withholding Taxes

Authority: IC 6-2.5-9-3; IC 6-3-4-8; ***Indiana Department of Revenue v. Safayan*** (1995) 654 N.E.2nd 270

Taxpayer protests the tax assessments.

STATEMENT OF FACTS

Taxpayer is listed as a responsible officer of RELI. On April 26, 2000 the department received a protest via FAX. In a letter dated September 13, 2000, the department asked the taxpayer to provide proof that it was not the responsible officer of RELI and on February 28, 2001 the department scheduled a hearing for March 20, 2001.

RELI filed late and "no remit" sales and withholding tax returns including several returned checks that reached warrant stages. RELI's account indicates it is in bankruptcy. The Indiana Department of Revenue timely assessed the corporation for withholding and sales taxes unpaid to the state for various tax periods. The corporation did not remit these taxes and the Indiana Department of Revenue assessed the liabilities against the taxpayer as a responsible officer of the corporation. Taxpayer protested the assessments. Taxpayer is an officer of the corporation. More facts will be provided as necessary.

I. Responsible Officer Liability – Duty to Remit Sales and Withholding Taxes

DISCUSSION

The proposed sales tax liability was issued under authority of IC 6-2.5-9-3 that provides as follows:

An individual who is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and has a duty to remit state gross retail or use taxes to the department; holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

The proposed withholding taxes were assessed against Taxpayer pursuant to IC 6-3-4-8 (f), which provides that

"In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest."

Pursuant to ***Indiana Department of Revenue v. Safayan*** (1995) 654 N.E.2nd 279, page 273: "The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that they are paid."

Taxpayer did not provide additional information regarding its liabilities nor has he made a statement that he is not the responsible officer. The majority of the assessment was for the failure to remit tax with the tax returns and returned checks that had reached the warrant stage incurring additional costs.

Taxpayer's representative provided information indicating that taxpayer was neither an owner nor an officer of RELI prior to April 1993. The department found that the taxes assessed from returns prior to April 1993 should be removed from the responsible officer liability.

FINDING

Taxpayer's protest is partially sustained and partially denied.

DEPARTMENT OF STATE REVENUE

0420000209.LOF

LETTER OF FINDINGS NUMBER: 00-0209
State Gross Retail Tax – Manufacturing Exemption
For Tax Years 1996 through 1998

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

ISSUES

I. State Gross Retail Tax – Manufacturing Exemption

Authority: *Chrome Deposit Corp. v. Indiana Dept. of State Revenue*, 557 N.E.2d 1110 (Ind.Tax 1990); aff'd, 578 N.E.2d 643 (Ind. 1991); IC 6-2.5-2-1; IC 6-2.5-5-3(b); 45 IAC 2.2-5-8(c); 45 IAC 2.2-5-8(g); 45 IAC 2.2-5-12(a)

Taxpayer protests assessments of Indiana sales tax on its use of polypropylene resin, maintaining that this item qualifies for the manufacturing exemption.

II. Tax Administration – Records

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

Taxpayer disputes the dollar figure used by the Indiana Department of Revenue's auditor to determine the use tax assessed against the polypropylene resin.

III. Tax Administration – Abatement of Penalty

Authority: IC 6-8.1-10-2.1(d); IC 6-8.1-10-4; 45 IAC 15-11-2; 45 IAC 15-11-2(b); 45 IAC 15-11-2(c)

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

STATEMENT OF FACTS

Taxpayer, an out-of-state corporation with a plant location in Indiana, produces high performance thermoplastic resins. Taxpayer refines the effects of base resins through electrical and thermal activity, lubricity, structural strength, dimensional stability, and color accuracy. Taxpayer's customers in turn use the resins as raw material in the manufacturing of plastic parts.

The Department of Revenue conducted an audit for the years in question, and issued assessments on the low-grade polypropylene resin used to purge production equipment between production runs. Taxpayer maintains that the use of the low-grade resin is a material part of the production process.

I. State Gross Retail Tax – Manufacturing Exemption

DISCUSSION

Taxpayer protests the auditor's determination that the low-grade resin used to purge production equipment between production runs does not qualify for the manufacturing exemption available under 45 IAC 2.2-5-14 because the low-grade resin is not used in the production process and does not constitute a material or integral part of taxpayer's finished product. Taxpayer maintains that its

use of the low-grade resin is a material part of the manufacturing process and is, therefore, exempt from the state gross retail tax.

Pursuant to IC 6-2.5-2-1, a sales tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. Under IC 6-2.5-5-3(b), 45 IAC 2.2-5-12(a), an exemption from the state gross retail tax is provided for transactions involving manufacturing machinery, tools, and equipment if the person acquiring that property acquires it for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property. (Emphasis added). 45 IAC 2.2-5-8(c) defines "direct use" as use having an immediate effect on the article being produced. Property has such an immediate effect if it is an essential and integral part of an integrated process that produces tangible personal property. 45 IAC 2.2-5-8(g).

In *Chrome Deposit Corp. v. Indiana Dept. of State Revenue*, 557 N.E.2d 1110 (Ind.Tax 1990); aff'd, 578 N.E.2d 643 (Ind. 1991), the court found that cleaning supplies were exempt from Indiana sales and use tax pursuant to IC 6-2.5-5-3 when they were found to be an essential and integral part of the production process. *Id*. at 1118. In that case, the taxpayer manufactured layered hard chromium metal (a chromium sleeve) that was applied to customers' work rolls. Prior to application, the work rolls were "placed into a 'scrub tank' and physically scrubbed with sponges, water, and a special cleaning material that removed surface impurities." *Id*. The court held that "[t]hese cleansing items [were] an essential and integral part of the integrated process by which the hard chromium metal is produced and applied to the work rolls." *Id*. For these reasons, the court found that Chrome Deposit could take advantage of the industrial exemptions for its cleaning supplies. *Id*.

The court in *Chrome Deposit* did not find cleaning supplies exempt because they were used in cleaning activities, as there is nothing intrinsic in cleaning to transform supplies used - supplies normally taxable - into exempt items. Rather, the court found that because these particular cleaning activities were essential and integral to Chrome Deposit's integrated manufacturing process, the items used and consumed qualified for the industrial exemptions.

In the instant case, taxpayer presented evidence that continuous production runs subject high-grade resins to electrical and thermal activity to produce special plastic pellets. Taxpayer maintains that its use of the low-grade polypropylene resin to purge production equipment between production runs is a material part of the overall manufacturing process. However, the Department agrees with Audit's conclusion that the purge performed between production runs constitutes a cleaning activity that is separate from the manufacturing process. The low-grade resin is used to clean the production equipment so that the materials from any prior production runs do not contaminate the following production run. After being run through the production equipment, the resin is discarded. The amount of low-grade resin used to purge the production equipment is independent of the size of the production run. When cleaning activities are performed between jobs, such use represents post-production maintenance activities. As such, the low-grade resin used and consumed in those activities does not qualify for the manufacturing exemption.

FINDING

Taxpayer's protest is denied.

II. Tax Administration – Records

DISCUSSION

Taxpayer further maintains that the dollar figure that the Department's auditor used to determine the use tax assessed on the low-grade resin is incorrect. According to taxpayer, the low-grade resin is used functionally in two ways: (1) as an essential and integral part of the manufacturing process; and (2) as a cleaning agent to purge the production equipment between production runs. Taxpayer opines that the dollar figure used by the Department's auditor incorporates low-grade resin used in the manufacturing process when it should have included only that low-grade resin which was used to purge the production equipment between production runs.

IC 6-8.1-5-1 provides in pertinent part that:

> If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department.... 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.

At the time of the audit, no information was available to the Department's auditor to reflect the amount of resin used to purge the production equipment. As such, the auditor used the best information available to determine the cost of the purge resin. At the hearing, taxpayer pointed to the evidence that it submitted with its protest letter, including invoices for the low-grade resin used to purge the production equipment (which invoices carry a specific company code denoting purge resin); and invoices for resins used in the manufacturing process (which invoices carry a different company code denoting resin used in the manufacturing process). Taxpayer's documentation shows that as part of taxpayer's regular course of business, taxpayer makes a distinction between purge resin and resin used in the manufacturing process.

FINDING

The taxpayer's protest is partially sustained on this issue to the extent that the low-grade resin is used in the manufacturing process. The auditor used the best information available at the time of the audit to determine the use tax assessment. However, in light of the evidence presented by taxpayer at hearing, the audit division is requested to review its findings and taxpayer's supplemental information to determine a more accurate percentage upon which to base its use tax assessment.

III. Tax Administration – Abatement of Penalty

DISCUSSION

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

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

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

Here, the taxpayer maintains that its failure to remit sales tax was due to purchasing personnel's lack of knowledge as to which items in a manufacturing environment are subject to the Indiana sales tax; that taxpayer now understands what constitutes exempt status; and, that taxpayer will be hereafter in compliance for all future purchases. The Department determined that imposition of the negligence penalty was appropriate because taxpayer made no attempts to understand regulations governing taxable purchases in a manufacturing environment; issued exemption certificates for numerous purchases that were determined upon audit to be taxable; and submitted annual sales/use tax filings showing no tax due.

Although taxpayer is an out-of-state corporation and is subject to its first audit by the Department, taxpayer has, nevertheless, failed to demonstrate that, in those areas of concern raised by the Department, it exercised the degree of reasonable care required to justify waiving the ten percent negligence penalty. Waiver of the penalty is inappropriate.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0420000337.LOF

LETTER OF FINDINGS NUMBER: 00-0337
Sales and Use Taxes
Calendar Years 1998 and 1999

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

ISSUE(S)

I. Use Tax – Equipment Given Away

Authority: IC 6-2.5-3-1; IC 6-2.5-3-2; IC 6-2.5-4-6; IFB #40

Taxpayer protests use tax assessed on equipment giveaways.

STATEMENT OF FACTS

Taxpayer operates a retail cellular phone and accessories store. The taxpayer sells telephones and accessories while A or B provides service. Upon signing a contract for a year of service, taxpayer gives the customer a free cellular telephone and provides upgrades of cellular telephones for an additional year of contract. Taxpayer also sells pagers and prepaid phone cards.

I. Use Tax – Equipment Given Away

DISCUSSION

Taxpayer was assessed use tax on telephone equipment it provided free to customers that signed a service contract. The telephones are given to its customers for a one-year contract for service with company A or company B. Taxpayer receives commissions for obtaining the contracts.

Taxpayer protests the use tax on equipment given to its customers. Taxpayer further states that if the Department finds the use tax due, it wants to collect and remit the tax after the fact.

The use tax "is imposed 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." IC 6-2.5-3-2(a). The term, use, "means the exercise of any right or power of ownership over tangible personal property." IC 6-2.5-3-1 (a). The taxpayer purchased the telephones from its supplier in a retail transaction and gave them to its customers as an incentive to

sign a one-year contract with companies A or B.

Sales/Use Tax Information Bulletin #40 states that whenever a person, company, or organization gives away tangible personal property as free gifts, such person, company, or organization becomes the ultimate consumer thereof for sales/use tax purposes. Therefore, the company, person or organization giving away the merchandise or prizes must pay sales tax on the purchase thereof. If the person, company or organization originally purchased such merchandise exempt from sales tax, it must pay use tax on the purchase price of such merchandise or other tangible personal property directly to the Indiana Department of Revenue.

The Department finds that the taxpayer is the ultimate consumer of the telephones used as promotional merchandise. Therefore, taxpayer must accrue use tax on the telephone. Since taxpayer did not sell the telephones to its customers, no sales tax was due from its customers.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

2920000391.LOF

LETTER OF FINDINGS NUMBER: 00-0391 CG
Charity Gaming
Denial of Charity Gaming License

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. Charity Gaming – Lease of facilities and personal property

Authority: IC § 4-32-9-20; IC § 6-8.1-5-1; Portland Summer Festival v. Department of Revenue, 624 N.E.2d 45 (Ind.App. 5 Dist. 1993)

Petitioner protests Department's denial of license based on the amount Petitioner is paying per evening's rental of the bingo location.

II. Charity Gaming – Continuous Existence

Authority: 45 IAC 18-2-1; IC § 4-32-6-20; IC § 6-8.1-5-1; Portland Summer Festival v. Department of Revenue, 624 N.E.2d 45 (Ind.App. 5 Dist. 1993)

Petitioner protests Department's denial of license based on Department's finding that the organization was not in existence for the prerequisite 5 years.

III. Charity Gaming – Operator Membership Requirements

Authority: IC § 4-32-9-28; IC § 6-8.1-5-1; Portland Summer Festival v. Department of Revenue, 624 N.E.2d 45 (Ind.App. 5 Dist. 1993)

Petitioner protests Department's denial of license based on Department's finding that operators on Petitioner's application did not meet the statutory requirements.

STATEMENT OF FACTS

Petitioner, Concerned Senior Citizens –Friends of Charity, applied for a Charity Gaming license on August 20th, 2000. Petitioner was notified by Department's letter of August 31st, 2000 that the application was denied. Petitioner resubmitted the application for a Charity Gaming license with additional documentation and corrections and Petitioner was again denied by the Department by letter dated September 27, 2000. Petitioner filed a timely appeal of this denial and a hearing was held on January 23rd, 2001.

I. Charity Gaming – Lease of facilities and personal property

DISCUSSION

The Petitioner protests the Department's denial of their license application for exceeding the rent limitation.

Pursuant to IC § 4-32-9-20, if a facility is leased for an allowable event the rent may not exceed two hundred dollars ($200) per day. Based upon the lease submitted by the organization, the per day lease is $250 exceeding the two hundred dollars limitation by $50 per bingo day.

The Petitioner only offered a statement in the hearing that the lease amount included tables and chairs as well as the hall, and it was his understanding that an additional $50 can be charged per night's rental in this instance. The lease (Department's Exhibit B) does include a requirement for the Lessor to provide tables and chairs in the hall, but does not segregate this use from the property rental, nor is the $250 rental amount itemized to reflect petitioner's contention. Petitioner does not cite any statutory support for petitioner's contention that the $200 cap can be contravened by the lease of equipment in conjunction with the property lease.

The Department finds that the Petitioner exceeded the limitation on rental fees as imposed by IC § 4-32-9-20. Pursuant to IC

§ 6-8.1-5-1, the Department's findings are prima facie evidence that the Department's claim is valid. The burden of proving that the findings are wrong rests with the person against whom the findings are made. See Portland Summer Festival v. Department of Revenue, 624 N.E.2d 45 (Ind.App. 5 Dist. 1993).

FINDING

The Petitioner's protest is denied.

II. Charity Gaming – Continuous Existence

DISCUSSION

The Petitioner protests the Department's revocation of its qualification application for an Indiana Charity Gaming License based upon the Department's determination that the Petitioner had not been in continuous existence for at least five years pursuant to IC § 4-32-6-20(1)(c). The Petitioner contends that it had been in existence for at least five (5) years at the time their application was filed.

45 IAC 18-2-1 states:

(a) To obtain a license to operate an allowable event, a qualified organization must submit a written application on a form prescribed by the department.

(b) The application shall include the following information:

* * *

(6) Sufficient facts for the department to determine that the organization is a qualified organization, including, but not limited to, the following:

(C) **Proof that the organization has been in existence for five (5) or more years**. (Emphasis added).

Indiana Code section 4-32-6-20(a) states:

(a) "Qualified organization" means:

(1) a bona fide religious, educational, senior citizens, veterans, or civic organization ***operating*** in Indiana that:

(A) operates without profit to the organization's members;

(B) is exempt from taxation under Section 501 of the Internal Revenue Code; and

(C) has been continuously in existence in Indiana for at least five (5) years or is affiliated with a parent organization that has been in existence in Indiana for at least five (5) years; ….***(emphasis added)***

The Department gives the term "operating" its ordinary and plain meaning. Operating is defined by Webster's Dictionary as, "adj. of, relating to, or used for or in operations." The word "operate" means, "1: to bring about: EFFECT 2 a: to cause to function: WORK b: to put or keep in operation..." Webster's New Collegiate Dictionary (1979).

The Department's witness stated under oath, the Petitioner has not been continuously operating for a period of five years as is required. The Petitioner's testimony and minutes of the organization's meetings are available to support the Petitioner's protest. The Petitioner filed with its CG-1 (Department's Exhibit B) the following documentation to support its contention of existence:

Minutes from Concerned Senior Citizen's Meeting- February 18th, 1995

Minutes from Concerned Senior Citizen's Meeting- May 18th, 1999

Minutes from Concerned Senior Citizen's Meeting- March 23rd, 2000

Minutes from Concerned Senior Citizen's Meeting- August 24th, 2000

This documentation, submitted as Department's exhibit B, shows this organization was organized on February 18th, 1995 with the intention to "further the causes of health and well being of seniors 55 years and older." Concerned Senior Citizens-Friends of Charity, constitution, article 4 (Department's Exhibit B). Aside from the adoption of the constitution and election of officers, the only business conducted at this organizational meeting was the delegation of three members to look into the legal requirements for the organization to conduct charity gaming, with the subsequent meeting's minutes consistently discussing as the only substantial order of business the initiation of a charity gaming operation. As can be seen in the chronology above, after the group came into existence, no meetings took place for four years. The three meetings in the organization's 4th and 5th year of existence concerned themselves with the required legal filings for obtaining a charitable gaming license-demonstrating that the organization's existence was solely for the purpose of charity gaming operations. Furthermore, in the hearing of January 23rd, 2001, petitioner stated:

Petitioner: We had one [a meeting] scheduled in '97, like I said, but we did not hold it because we couldn't find a place to have the meeting.

Q. What about 1996 or 1997 or '98?

Petitioner: There was no reason to have a meeting. We had nothing to discuss.

Q. Okay. So you carried on no charitable purpose, you had no meetings, you did nothing—

Petitioner: No sir.

Q. –for those three years?

Petitioner: No.

Transcript of January 23rd, 2001 hearing, page 27.

Therefore, the Department finds that the Petitioner was not operating for the requisite period as provided by Indiana law. Pursuant to IC § 6-8.1-5-1, the Department's findings are prima facie evidence that the Department's claim that the entity does not

qualify for a license is valid. The burden of proving that the findings are wrong rests with the person against whom the findings are made. See Portland Summer Festival v. Department of Revenue, 624 N.E.2d 45 (Ind.App. 5 Dist. 1993).

FINDING

The Petitioner's protest is denied.

III. Charity Gaming – Operator Membership Requirements

DISCUSSION

One of the operators listed on the CG-2 application of August 20th, 2000 was listed as an operator even though she had not been a member for at least one (1) year as is required by IC § 4-32-9-28. Indiana Code section 4-32-9-28 states, "An operator must be a member in good standing of the qualified organization that is conducting the allowable event for at least one (1) year at the time of the allowable event."

Pursuant to IC § 6-8.1-5-1, the Department's findings in this matter constitute prima facie evidence that the Department's findings are valid. The burden of proving that the findings are wrong rests with the person against whom the findings are made. See Portland Summer Festival v. Department of Revenue, 624 N.E.2d 45 (Ind.App. 5 Dist. 1993).

Petitioner does not provide any evidence either written or oral to contradict the Department's findings that the Petitioner's proposed operator has not been a member of the organization for at least one (1) year in violation of IC § 4-32-9-28.

FINDING

The Petitioner's protest is denied.

DEPARTMENT OF STATE REVENUE

0120000461.LOF

LETTER OF FINDINGS NUMBER: 00-0461
Indiana Individual Income Tax
For the 1999 Tax Year

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. Social Security Benefits Subject to Indiana Individual Income Tax

Authority: IC 6-3-1-3.5(a); IC 6-3-1-3.5(a)(12)

Taxpayer disputes the purported taxation of his Social Security Income.

II. Demand for Abatement of Interest

Authority: IC 6-8.1-10-1

Taxpayer has protested the imposition of interest on assessed taxes and requests that the interest, which has accumulated on those taxes, be abated.

STATEMENT OF FACTS

Taxpayer filed IT-40 Individual Income Tax Form for the 1999 tax year. On line one, taxpayer reported approximately $66,000 in Federal Adjusted Gross Income. On line six, taxpayer listed approximately $14,000 in Indiana deductions resulting in Indiana Adjusted Gross Income of $52,000. The Department determined that taxpayer had overstated the amount of Indiana deductions by $2,000 and assessed the taxpayer for the taxes due on that amount. Taxpayer maintains that the $2,000 consists of Social Security Benefits and is not subject to Indiana individual income tax. Other related and unrelated issues raised by the taxpayer within taxpayer's original protest have been waived by taxpayer.

DISCUSSION

I. Social Security Benefits Subject to Indiana Individual Income Tax

IC 6-3-1-3.5(a) provides the starting point for determining taxpayer's taxable income. That code section states "[w]hen used in IC 6-3, the term 'adjusted gross income' shall mean the following: (a) In the case of all individuals 'adjusted gross income' (as defined by Section 62 of the Internal Revenue Code)...." Once the taxpayer's Indiana adjusted gross income is determined, that amount is subject to certain adjustments, one of which is relevant here.

IC 6-3-1-3.5(a)(12) allows the Indiana taxpayer to "[s]ubtract an amount equal to the amount of federal Social Security and Railroad Retirement benefits included in the taxpayer's federal gross income...."

Taxpayer is correct in his assertion that he received $14,000 in Social Security benefits and that none of the $14,000 is subject to the state's individual income tax. Where taxpayer errs is in his application of the Indiana Code provisions regarding the specific tax treatment of those Social Security benefits. When taxpayer prepared his federal return – for reasons not relevant here – taxpayer was only required to report $12,000 of the $14,000 in Social Security. Therefore, from that point forward, the unreported $2,000 was

"off the table" for any further state or federal tax consideration. Because the $2,000 was in tax limbo from the time that taxpayer prepared his federal returns, the $2,000 could not be considered – either to increase or decrease his liability – in any calculation of taxpayer's Indiana individual income tax.

When taxpayer reported $66,000 in Federal adjusted gross income on his Indiana return, the $2,000 was not part of the calculus. The $66,000 on taxpayer's federal return only contained the $12,000 in Social Security benefits that were subject to federal income tax.

Taxpayer properly reported the $66,000 – including the $12,000 in social security benefits – on line one of his Indiana return. Thereafter, on line six taxpayer was entitled to an Indiana deduction for the $12,000 in Social Security Benefits included within the $66,000. What taxpayer attempted to do was deduct the original $14,000 in Social Security Benefits. Taxpayer is not entitled to retrieve the $2,000 - never part of the calculation and never part of taxpayer's federal adjusted gross income – and make a second Indiana deduction for that amount. The $2,000 was never contained within the $66,000 and may not be removed from that amount. Metaphorically speaking, taxpayer cannot remove an apple from the basket when the apple was never in the basket to begin with. IC 6-3-1-3.5(a)(12) permits the taxpayer to "subtract an amount equal to the amount of federal Social Security... benefits *included* in the taxpayer's federal gross income...." (Emphasis added).

FINDING

Taxpayer's protest is respectfully denied.

II. Demand for Abatement of Interest

Taxpayer protests the imposition of interest on his assessed taxes and requests that the interest that has accumulated on those taxes be abated. Under IC 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. Under IC 6-8.10 the accumulated interest is not abated for any reason and the Department must decline taxpayer's invitation to do so.

FINDING

Taxpayer's protest and request for abatement is respectfully denied.

DEPARTMENT OF STATE REVENUE

0320010006P.LOF

LETTER OF FINDINGS NUMBER: 01-0006P
Withholding Tax
Calendar Year 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 a registered retail merchant specializing in the sale of discounted merchandise at locations throughout the United States and abroad. Upon audit it was discovered that the taxpayer failed to withhold from unregistered out of state contractors, which has been an issue in the prior two audits. Taxpayer did not withhold income tax from any disbursements made to subcontractors. Supplemental audit includes only companies that were not registered to do business in Indiana.

Taxpayer protests the penalty assessed on an audit completed on August 2, 2000.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer requests the department waive its negligence penalty because it enters into numerous contracts and includes a clause in each contract to hold the subcontractor responsible for all tax requirements related to its contract.

The taxpayer failed to withhold tax from out of state contractors that were not registered with the department as required by statute and taxpayer has not provided reasonable cause for failing to do so.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420010011.LOF

LETTER OF FINDINGS NUMBER: 01-0011
Use Taxes
For the 1998 Tax Year

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 Indiana Use Tax on Construction Materials Purchased Out-of-State

Authority: IC 6-2.5-2-1; IC 6-2.5-3-2; 45 IAC 2.2-3-16; Ill. Admin. Code tit. 86, § 130.605(a)(1)-(2); Ill. Admin. Code tit. 86, § 130.605(b); Ill. Admin. Code tit. 86, § 130.605(d)

The taxpayer protests the Department's decision to assess use tax on construction materials purchased in Illinois, transported to Indiana, and used to construct a building within the state.

II. Abatement of the Ten Percent Negligence Penalty

Authority: IC 6-8.1-5-1(b); IC 6-8.1-10-2.1; IC 6-8.1-10-2.1(d); 45 IAC 15-11-2(b); 45 IAC 15-11-(c)

The taxpayer has asked that the Department exercise its discretionary authority to abate the ten percent negligence penalty.

III. Request for Abatement of Interest

Authority: IC 6-8.1-10-1; IC 6-8.1-10(a)

Taxpayer has protested the imposition of interest on assessed taxes and requests that the interest that has accumulated on those taxes be abated.

STATEMENT OF FACTS

Taxpayer is a general contractor headquartered in Illinois. The taxpayer builds hotels in Indiana on behalf of various franchisees. Taxpayer purchased construction materials – described as a "basic framing package and loose lumber" – from an Illinois vendor. The vendor transported the construction materials to the Indiana site. The invoice for the supplies indicates that the F.O.B. point was at the site of the Illinois vendor.

DISCUSSION

I. Applicability of the Indiana Use Tax on Construction Materials Purchased Out-of-State

The taxpayer protests the imposition the state's use tax on the purchase of building materials acquired in Illinois, transported into Indiana, and used to construct a building located in the state. The taxpayer argues that, because it paid Illinois sales tax, it should not be responsible for Indiana use tax.

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 6-2.5-2-1.

The imposition of the use tax, on purchases occurring outside the state, is qualified pursuant to 45 IAC 2.2-3-16 which allows an Indiana credit 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."

The taxpayer has provided documentary evidence, consisting of a copy of a check issued to taxpayer's Illinois vendor, which substantiates payment of the vendor's original invoice. That invoice, and taxpayer's corresponding cancelled check, conforms to the amount billed for the construction materials and for the amount of Illinois sales tax assessed against the purchase of those construction materials.

The taxpayer has also provided information purporting to establish that the Illinois sales tax (Retailers' Occupation Tax) was due and payable for taxpayer's purchase of construction materials. Pursuant to Ill. Admin. Code tit. 86, § 130.605 (2000), "Where tangible personal property is located in this State at the time of its sale... and then delivered in Illinois to the purchaser, the seller is taxable if the sale is at retail. 1) the sale is not deemed to be in interstate commerce if the purchaser or his representative receives the physical possession of such property in this State. 2) This is so notwithstanding the fact that the purchaser may, after receiving physical possession of the property in this state, transport or send the property out of the state for use outside the State or for use in the conduct of interstate commerce." Ill. Admin. Code tit. 86, § 130.605(a)(1)-(2).

However that same administrative code also makes exceptions for certain purchases made within Illinois. Pursuant to Ill. Admin. Code tit. 86, § 130.605(b), "The tax does not extend to gross receipts from sales in which the seller is obligated, under the terms of his agreement with the purchaser, to make physical delivery of the goods from a point in [Illinois] to a point outside [Illinois], not to be returned to a point within [Illinois]." Under the terms of taxpayer's agreement, the Illinois vendor was obligated to transport the construction materials to the Indiana construction site. The fact that the parties designated Illinois as the F.O.B. point is irrelevant in this analysis because, under Ill. Admin. Code tit. 86, § 130.605(d), "[t]he place at which title to the property passes to the purchaser is immaterial" Accordingly, taxpayer's purchase of construction materials, designated for delivery and ultimate consumption within the state of Indiana, was not subject to the Illinois sales tax because "[s]ales of the type described in [Ill. Admin. Code tit. 86, §

130.605(b)] are deemed to be within the protection of the Commerce Clause of the Constitution of the United States." Ill. Admin. Code tit. 86, § 130.605(d).

Therefore, because Illinois sales tax was not due and payable on taxpayer's purchase of the construction materials destined for Indiana, taxpayer is not entitled to an Indiana credit under 45 IAC 2.2-3-16. Instead, the purchase of the construction materials is subject to Indiana use tax under IC 6-2.5-3-2 because the construction materials constituted tangible personal property used or consumed in Indiana.

FINDING

Taxpayer's protest is respectfully denied.

II. Abatement of the Ten Percent Negligence Penalty

The taxpayer has requested that the ten-percent negligence penalty, assessed by audit under authority of IC 6-8.1-10-2.1, be abated. The Department's regulations provide guidance in determining those instances in which imposition of the ten-percent negligence penalty is appropriate. 45 IAC 15-11-2(b) defines negligence as "the failure to use reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." The taxpayer's negligence may be inferred from its "carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations." Id. IC 6-8.1-10-2.1(d) requires that the Department waive the penalty upon a showing that the taxpayer's failure to pay the tax delinquency was due to "reasonable cause and not due to willful neglect." 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 or failing to carry out a duty giving rise to the penalty imposed...."

The taxpayer has failed to set forth any basis whatsoever establishing that it exercised the degree of care statutorily imposed upon an ordinarily reasonable taxpayer. Taxpayer's bare assertion, requesting that the penalty be abated, is insufficient to overcome the presumption of correctness afforded the audit's determination under IC 6-8.1-5-1(b).

FINDING

Taxpayer's protest is respectfully denied.

III. Request for Abatement of Interest

Taxpayer protests the imposition of interest on assessed taxes and request that the interest that has accumulated on those taxes be abated. Under IC 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. Under IC 6-8.1-10-1, interest is not abated for any reason.

FINDING

Taxpayer's protest and request for abatement is respectfully denied.

DEPARTMENT OF STATE REVENUE

0420010031P.LOF

LETTER OF FINDINGS NUMBER: 01-0031P
Use Tax
Calendar Years 1998 and 1999

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer protests the penalty assessed on an audit completed on November 3, 2000.

Taxpayer is an Indiana corporation that maintained its headquarters in Indiana until the year 2000. Taxpayer's corporate headquarters moved out of state. Taxpayer failed to self-assess use tax on clearly taxable purchases such as office supplies, publications, coffee cups, and other miscellaneous items.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer's audit report revealed that it failed to self assess use tax for various clearly taxable items.

Taxpayer requests a waiver of penalties because the sales tax law is complicated and some of the errors were due to positions taken by vendors, which were based on a reasonable interpretation of the law. Finally the taxpayer states that as a percentage of invoices processed, the error rate was low, probably less than.1% and in a busy office in a competitive industry it is impossible to achieve 100% accuracy.

Taxpayer failed to self assess use tax on clearly taxable purchases for both years of the audit. Although the taxpayer made improvements, it failed to self assess and remit use tax due on 61% and 21% of its taxable purchases for calendar years 1998 and 1999 respectively.

The taxpayer was negligent in failing to self-assess and remit use tax on clearly taxable purchases and has not shown reasonable cause for failing to do so.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420010032P.LOF

LETTER OF FINDINGS NUMBER: 01-0032P
Use Tax
Calendar Years 1997, 1998, and 1999

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer protests the penalty assessed on an audit completed on August 29, 2000.

Taxpayer is incorporated in Indiana. Taxpayer was assessed a negligence penalty because it failed to have a use tax accrual system in place.

I. Tax Administration – Penalty

DISCUSSION

At issue is whether the taxpayer was negligent in failing to remit use tax due.

Taxpayer failed to remit use tax on clearly taxable items and had no use tax accrual system in place. Taxpayer states that it was in a significant growth project and misunderstood that the assets acquired would not be considered used directly in the production process and therefore not exempt. Taxpayer requests an abatement of penalties.

Taxpayer has not provided reasonable cause for failing to comply with Indiana Sales and Use Tax statutes. Failure to make itself aware of Indiana tax laws when doing business in the state is considered negligent.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120010042.LOF

LETTER OF FINDINGS NUMBER: 01-0042
Individual Income Tax
Calendar Year Ended 12/31/99

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. Adjusted Gross Income – Indiana County Tax

Authority: IC 6-3.5-1; IC 6-3.5-1.1-2

Taxpayer protests the assessment of County Income Tax.

STATEMENT OF FACTS

Taxpayer filed its 1999 IT-40 without including County Income Tax on his return.

I. Adjusted Gross Income – Indiana County Tax

DISCUSSION

Taxpayer, at hearing, protested that he never received a proper explanation regarding the additional assessment that has been paid. Taxpayer wanted to know why he was assessed CAGIT when his employer did not withhold the tax and why it took the

department so long to advise him of the underpayment and caused additional interest to be charged him.

Taxpayer's employer did not withhold county tax and the taxpayer failed to report it on his return.

IC 6-3.5-1.1-2 authorizes the tax and (f) states that

"If a county's adjusted gross income tax is continued under this subsection, then the tax shall be treated as if it had been imposed under this chapter and is subject to rescission or reduction as authorized in this chapter."

The IT-40 Instruction Booklet clearly outlines the requirement and the rates of tax.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420010045P.LOF

LETTER OF FINDINGS NUMBER: 01-0045P
Use Tax
Calendar Years 1997, 1998, and 1999

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer protests the penalty assessed on an audit completed on September 11, 2000.

Taxpayer is an Indiana corporation that maintained its headquarters in Indiana until the year 2000. Taxpayer's corporate headquarters moved out of state. Taxpayer failed to self-assess use tax on clearly taxable purchases such as office supplies, concrete and stone, maintenance supplies, fixed assets, and other miscellaneous items.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer's audit report revealed that it failed to self assess use tax for various clearly taxable items.

Taxpayer requests a waiver of penalties because many vendors sell both taxable and nontaxable items depending on the job classification and periodically the vendors use the wrong account that is not caught internally. Finally the taxpayer states that as a percentage of invoices processed, the error rate was low, probably less than.1% and in a busy office in a competitive industry it is impossible to achieve 100% accuracy. Taxpayer states it has modified its procedures.

Taxpayer failed to self assess use tax on clearly taxable purchases in all years of the audit. Although the taxpayer made improvements from one year to the next, it failed to self assess and remit use tax due on 98.5%, 56.3%, and 23.4% for calendar years 1997, 1998, and 1999 respectively.

The taxpayer was negligent in failing to self-assess and remit use tax on clearly taxable fixed assets and miscellaneous purchases and has not shown reasonable cause for failing to do so.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420010046P.LOF

LETTER OF FINDINGS NUMBER: 01-0046P
Use Tax
Calendar Years 1997, 1998, and 1999

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer protests the penalty assessed on an audit completed on August 25, 2000.

Taxpayer is an Indiana corporation that maintained its headquarters in Indiana until the year 2000. Taxpayer's corporate headquarters moved out of state. Taxpayer failed to self-assess use tax on clearly taxable purchases such as office supplies, publications, copier rental, storage trailer rental, maintenance supplies, equipment rental, and other miscellaneous items. In some cases the taxpayer marked the invoice as taxable for Indiana use tax but the taxpayer did not accrue and remit the use tax. The department gave credit in the audit for items where no tax should have been paid.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer's audit report revealed that it failed to self assess use tax for various clearly taxable items.

Taxpayer requests a waiver of penalties because the sales tax law is complicated and some of the errors were due to positions taken, which were based on a reasonable interpretation of the law. In addition, many vendors sell both taxable and nontaxable items depending on the job classification and periodically the vendors use the wrong account that is not caught internally. Finally the taxpayer states that as a percentage of invoices processed, the error rate was low, probably less than.1% and in a busy office in a competitive industry it is impossible to achieve 100% accuracy.

Taxpayer failed to self assess use tax on clearly taxable fixed assets and other miscellaneous purchases in all years of the audit. Although the taxpayer made improvements, it failed to self assess and remit use tax due on 51.3%, 22.3%, and 10.1% for calendar years 1997, 1998, and 1999 respectively.

The taxpayer was negligent in failing to self-assess and remit use tax on clearly taxable fixed assets and miscellaneous purchases and has not shown reasonable cause for failing to do so.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420010054P.LOF

LETTER OF FINDINGS NUMBER: 01-0054P
Sales and Use Tax
Calendar Years 1996, 1997, 1998, and 1999

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer protests the penalty assessed on an audit completed on September 8, 2000.

Taxpayer is an Indiana corporation with its parent filing a consolidated income tax return in Indiana. Upon audit it was discovered that the taxpayer collected sales tax in 1996 and failed to remit approximately twenty-five percent of the tax collected. Taxpayer had no use tax accrual system in place for 1996 and remitted 57.4% and 48.9% of its use tax in 1997 and 1998 respectively. In 1999, taxpayer had no use tax accrual system in place.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer's audit report revealed that it was inconsistent in remitting its use tax due.

Taxpayer requests a waiver of penalties because it prepared its monthly sales and use tax returns and made timely payments of its liabilities. In addition it fully cooperated with the auditor and the deficiency assessment is part of human error in gathering information to file the returns plus misinterpretation of the Indiana sales and use tax rules on software licensing agreements.

Taxpayer had no use tax accrual system in place for 1996 and 1999 and remitted approximately fifty percent (50%) of its use tax due in 1997 and 1998. Taxpayer has not provided reasonable cause for its failure to properly remit tax.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220010055P.LOF

LETTER OF FINDINGS NUMBER: 01-0055P
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 Michigan and has several distribution centers located out of state. It owns land and buildings in Indiana and maintains trucks in the state. Taxpayer's goods are brought from the distribution centers via double trailers and dropped off at the truck locations for delivery to convenience stores, drug stores, grocery stores, supermarkets, mass merchandisers, and petroleum retailers throughout Indiana.

Taxpayer protests the penalty and states that it relied on a computerized system to generate the sales information used to complete the Indiana Gross Earnings calculation. The sales information did not reflect the total Indiana sales for 1997 and its personnel had no reason to think that the information used in the 1997 gross earnings calculation was incorrect because the Indiana sales volume had been consistent with prior year totals and the overall computation appeared reasonable.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer was assessed a negligence penalty for underreporting gross income in 1997 and for failure to include leased vehicles in the property factor. Taxpayer also failed to include interest income and gross proceeds from the sale of assets in the denominator of the sales factor.

Taxpayer, in two letters both dated January 15, 2001, protested penalties assessed because there was no negligence or intentional disregard of Indiana tax regulations.

The audit indicates that the 1997 gross income tax calculation was inconsistent with the prior year. Taxpayer indicates the Indiana sales volume had been consistent with the prior year's totals. Taxpayer reported $4,800,000 in 1996 and only $2,900,000 in 1997, which is not consistent. In addition, taxpayer made errors in determining adjusted gross income for the apportionment factors.

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

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220010075P.LOF

LETTER OF FINDINGS NUMBER: 01-0075P
Gross Income Tax
Calendar 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 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 Florida and has two Indiana business locations. Taxpayer was acquired by company X in December 1997.

Taxpayer incorrectly reported services income in low rate income. Company X protests the penalty because it was unaware the returns were improperly prepared. Company X further states it correctly reports its income at the high rate of tax since acquisition.

At audit it was determined that the taxpayer reported high rate income at the lower rate. The audit assessed a ten-percent negligence penalty.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer was assessed a negligence penalty for failure to report receipts at the high rate of tax. Company X, a successor corporation, protested penalties assessed against an acquired corporation. Company X states it has correctly reported receipts at the high rate of tax since it acquired taxpayer in December 1997 and was unaware that taxpayer's previous accounting firm improperly classified the income as low rate income on the 1996 and 1997 returns.

Delegation of authority does not relieve the taxpayer of the duty to monitor the delegated functions. Company X as successor, is liable to taxpayer's previous errors and omissions.

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

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE
Revenue Ruling #2001-01 ST
March 23, 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

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

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

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

1. The taxpayer's purchase, storage, use or consumption of all items that would be treated as production plant or power production expenses according to the Uniform System of Accounts for electric utilities, including without limitation all power generation equipment (such as turbines and generators) and consumables (such as natural gas and fuel oil, including such items purchased from an affiliate), will be exempt from Indiana sales and use tax.
2. The taxpayer's wholesale sales of electricity will not be subject to Indiana sales and use tax.
3. The wholesale sales of electricity by the taxpayer's affiliate will not be subject to Indiana sales and use tax.

STATEMENT OF FACTS

The taxpayer is a limited liability company organized and existing under the laws of Delaware and authorized to do business in Indiana. The taxpayer is indirectly owned by a publicly traded, major energy services company with worldwide operations. The taxpayer was formed for the sole purpose of constructing and operating a new electric power generating station in the Midwest.

The proposed generating station will be capable of generating up to 640 megawatts of electric power, utilizing natural gas as its principal fuel. The facility will be a peaking plant that generates electricity only during times of peak demand. It is anticipated that the generating station's generation of electric power will be seasonal, serving primarily the summer peak demand period.

The generating station will be operated as a "merchant" plant, dedicated to the generation and sale of electricity at wholesale. All sales of electricity will be for resale. The generating station will be interconnected with an existing utility's transmission system and will have no transmission facilities of its own, other than limited interconnection equipment.

It is anticipated that most of the taxpayer's sales of electricity will be made to its power-marketing affiliate for resale. The affiliate will, in turn, resell the electricity to investor-owned utilities, electric cooperatives, municipal electric generators, other power marketers, and other entities for resale. Any other sales of electricity by the taxpayer will be made at wholesale to other entities, including investor-owned and municipal utilities. The taxpayer also expects to obtain its requirements for natural gas and possibly fuel oil from its affiliate.

The taxpayer intends to file an application with the Federal Energy Regulatory Commission (FERC) for a determination that it will be an Exempt Wholesale Generator (EWG). As an EWG, the taxpayer will be prohibited from making retail sales.

The taxpayer also intends to apply to FERC for authorization to sell electricity at wholesale rates subject to FERC's jurisdiction and standards. Specifically, the taxpayer will file a request with FERC for authorization to sell power at market based rates. The price or rate that the taxpayer charges its wholesale electricity customers, however, will not be subject to specific FERC approval. If FERC grants its request, the taxpayer will be a public utility within the meaning of the Federal Power Act and be subject to regulation as such. The taxpayer will be required to comply with certain reporting requirements with respect to (i) its power sale arrangements (e.g., submitting informational filings on the terms of its power sale agreements), (ii) acquisitions of new generation and (iii) its affiliations with entities owning generation or transmission facilities. FERC will impose these reporting requirements so that it can monitor whether the taxpayer continues to satisfy the criteria for generating plants receiving market rate authority (e.g., it lacks transmission and generation market power). In addition, as a Federal Power Act public utility, the taxpayer will be required to seek approvals for certain (a) dispositions or acquisitions of FERC jurisdictional facilities, (b) corporate reorganizations, and (c) financing transactions. As an EWG, the taxpayer will also be required to report to FERC certain material changes in its operations so that FERC can monitor whether it still qualifies for EWG status.

The taxpayer also filed a petition with the Indiana Utility Regulatory Commission (the "IURC") to determine its status as a utility under the Public Service Commission Act. The IURC entered an order on the taxpayer's petition on March 7, 2001, ruling that the taxpayer is a public utility within the meaning of the Indiana Public Service Commission Act and, thus, subject to regulation by the IURC, but, pursuant to IC 8-1-2.5-5, the IURC declined to exercise its regulatory authority over the taxpayer subject to certain exceptions, conditions and requirements as set forth in the order.

The taxpayer agrees and plans for its accounting for the generating station to conform with the requirements of the Uniform System of Accounts prescribed by FERC and the IURC for electric utilities.

STATEMENT #1 – DISCUSSION

IC 6-2.5-5-10 states:

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

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

(2) the person acquiring the property is:

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

IC 6-2.5-4-5 states:

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

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

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

The IURC has ruled that the taxpayer is a "public utility" pursuant to IC 8-1 thus making the taxpayer "subject to" IURC regulation and, in addition, the taxpayer will be subject to regulation as a public utility by FERC under the Federal Power Act, therefore, the taxpayer is a "public utility" for purposes of both IC 6-2.5-4-5 and IC 6-2.5-5-10 and within the meaning of 45 IAC 2.2-4-11. As a "public utility" all of the taxpayer's machinery, equipment and other tangible personal property that is treated as

production plant or power production expenses according to the Uniform System of Accounts for electric utilities are exempt from Indiana sales/use tax.

STATEMENT #1 – RULING

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

STATEMENT #2 - DISCUSSION

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

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

...

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

For the purpose of the imposition of sales tax under IC 6-2.5-4-5(c) the Department has determined that "a person engaged as a public utility" includes anyone selling utility services. The "sales for resale" (wholesale sales) by the taxpayer, therefore, are exempt from sales tax as the purchasers of the electricity, also, meet the definition of "public utility".

STATEMENT #2 – RULING

The taxpayer's wholesale sales of electricity will not be subject to Indiana sales and use tax.

STATEMENT #3 – DISCUSSION

As discussed in above "Statement #2", the Department has determined that for the purpose of the imposition of sales tax under IC 6-2.5-4-5(c) "a person engaged as a public utility" includes anyone selling utility services. Here then, both the taxpayer's affiliate and the purchasers of the electricity sold by the taxpayer's affiliate are "public utilities", hence, the sales of electricity by the taxpayer's affiliate are not subject to sales tax.

STATEMENT #3 – RULING

The wholesale sales of electricity by the taxpayer's affiliate will not be subject to Indiana sales and use tax.

CAVEAT

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

DEPARTMENT OF STATE REVENUE
Revenue Ruling #2001-02 ST
March 23, 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

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

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

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

1. The taxpayer's purchase, storage, use or consumption of all items that would be treated as production plant or power production expenses according to the Uniform System of Accounts for electric utilities, including without limitation all power generation equipment (such as turbines and generators) and consumables (such as natural gas and fuel oil, including such items purchased from an affiliate), will be exempt from Indiana sales and use tax.
2. The taxpayer's wholesale sales of electricity will not be subject to Indiana sales and use tax.
3. The wholesale sales of electricity by the taxpayer's affiliate will not be subject to Indiana sales and use tax.

STATEMENT OF FACTS

The taxpayer is a limited liability company organized and existing under the laws of Delaware and authorized to do business in Indiana. The taxpayer is indirectly owned by a publicly traded, major energy services company with worldwide operations. The taxpayer was formed for the sole purpose of constructing and operating a new electric power generating station in the Midwest.

The proposed generating station will be capable of generating up to 620 megawatts of electric power, utilizing natural gas as its fuel. The facility will be a combined cycle plant, meaning that it will have both natural gas and steam-driven turbines, and is expected to operate year-round.

The generating station will be operated as a "merchant" plant, dedicated to the generation and sale of electricity at wholesale. All sales of electricity will be for resale. The generating station will be interconnected with an existing utility's transmission system and will have no transmission facilities of its own, other than limited interconnection equipment.

It is anticipated that most of the taxpayer's sales of electricity will be made to its power-marketing affiliate for resale. The affiliate will, in turn, resell the electricity to investor-owned utilities, electric cooperatives, municipal electric generators, other power marketers, and other entities for resale. Any other sales of electricity by the taxpayer will be made at wholesale to other entities, including investor-owned and municipal utilities. The taxpayer also expects to obtain its requirements for natural gas from its affiliate.

The taxpayer intends to file an application with the Federal Energy Regulatory Commission (FERC) for a determination that it will be an Exempt Wholesale Generator (EWG). As an EWG, the taxpayer will be prohibited from making retail sales.

The taxpayer also intends to apply to FERC for authorization to sell electricity at wholesale rates subject to FERC's jurisdiction and standards. Specifically, the taxpayer will file a request with FERC for authorization to sell power at market based rates. The price or rate that the taxpayer charges its wholesale electricity customers, however, will not be subject to specific FERC approval. If FERC grants its request, the taxpayer will be a public utility within the meaning of the Federal Power Act and be subject to regulation as such. The taxpayer will be required to comply with certain reporting requirements with respect to (i) its power sale arrangements (e.g., submitting informational filings on the terms of its power sale agreements), (ii) acquisitions of new generation and (iii) its affiliations with entities owning generation or transmission facilities. FERC will impose these reporting requirements so that it can monitor whether the taxpayer continues to satisfy the criteria for generating plants receiving market rate authority (e.g., it lacks transmission and generation market power). In addition, as a Federal Power Act public utility, the taxpayer will be required to seek approvals for certain (a) dispositions or acquisitions of FERC jurisdictional facilities, (b) corporate reorganizations, and (c) financing transactions. As an EWG, the taxpayer will also be required to report to FERC certain material changes in its operations so that FERC can monitor whether it still qualifies for EWG status.

The taxpayer has also filed a petition with the Indiana Utility Regulatory Commission (the "IURC") to determine its status as a utility under the Public Service Commission Act. IURC hearings on that petition have been completed. While the IURC has not yet entered an order on the taxpayer's petition, the taxpayer anticipates that the IURC will rule that the taxpayer is a public utility within the meaning of the Indiana Public Service Commission Act and, thus, subject to regulation by the IURC, but, pursuant to IC 8-1-2.5-5, the IURC will decline to exercise its regulatory authority over the construction and operation by the taxpayer of the generating station. The taxpayer anticipates, however, that the IURC will impose reporting requirements on the taxpayer or its publicly-held affiliate. As soon as an order is entered by the IURC, it will be supplied to the Department.

The taxpayer agrees and plans for its accounting for the generating station to conform with the requirements of the Uniform System of Accounts prescribed by FERC and the IURC for electric utilities.

STATEMENT #1 – DISCUSSION

IC 6-2.5-5-10 states:

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

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

(2) the person acquiring the property is:

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

IC 6-2.5-4-5 states:

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

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

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

It is anticipated that the IURC will rule that the taxpayer is a "public utility" pursuant to IC 8-1 thus making the taxpayer "subject to" IURC regulation and, in addition, it is anticipated that the taxpayer will be subject to regulation as a public utility by FERC under the Federal Power Act, therefore, the taxpayer is a "public utility" for purposes of both IC 6-2.5-4-5 and IC 6-2.5-5-10 and within the meaning of 45 IAC 2.2-4-11. As a "public utility" all of the taxpayer's machinery, equipment and other tangible personal property that is treated as production plant or power production expenses according to the Uniform System of Accounts

for electric utilities are exempt from Indiana sales/use tax.

STATEMENT #1 – RULING

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

STATEMENT #2 - DISCUSSION

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

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

...

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

For the purpose of the imposition of sales tax under IC 6-2.5-4-5(c) the Department has determined that "a person engaged as a public utility" includes anyone selling utility services. The "sales for resale" (wholesale sales) by the taxpayer, therefore, are exempt from sales tax as the purchasers of the electricity, also, meet the definition of "public utility".

STATEMENT #2 – RULING

The taxpayer's wholesale sales of electricity will not be subject to Indiana sales and use tax.

STATEMENT #3 – DISCUSSION

As discussed in above "Statement #2", the Department has determined that for the purpose of the imposition of sales tax under IC 6-2.5-4-5(c) "a person engaged as a public utility" includes anyone selling utility services. Here then, both the taxpayer's affiliate and the purchasers of the electricity sold by the taxpayer's affiliate are "public utilities", hence, the sales of electricity by the taxpayer's affiliate are not subject to sales tax.

STATEMENT #3 – RULING

The wholesale sales of electricity by the taxpayer's affiliate will not be subject to Indiana sales and use tax.

CAVEAT

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