NATURAL RESOURCES COMMISSION
Information Bulletin #31
Fishing Tournament Organizational Meeting Protocols

1. Introduction

The purpose of this information bulletin is to outline protocols used for the annual organizational meeting of fishing tournaments governed by 312 IAC 8-3. The bulletin should be liberally construed to support efficient administration and equitable treatment of interested persons.

2. Operations

The purpose of the organizational meeting is to allow fishing tournament sponsors to reserve dates for fishing tournaments on properties managed by the department of natural resources, division of state parks and reservoirs, and described in 312 IAC 8-3-6. These are Monroe Lake, Salamonie Lake, Mississinewa Lake, Huntington Lake, Brookville Lake, Hardy Lake, Patoka Lake, Lieber Lake, and Raccoon Lake. Since there is a total fishing tournament boat limit for each of these lakes, the meeting is used to award opportunities equitably.

Any date in the upcoming year not awarded during the organizational meeting is available to a sponsor by subsequently contacting the department representative by mail, telephone, fax, or in person at the division's central office in Indianapolis.

A sponsor drawn for a fishing tournament date and location during the organizational meeting must file a completed application within 30 days after the meeting. Failure to file in a timely manner releases the date and makes it available for reservation by another.

If a sponsor does not seek the maximum watercraft limit for a particular date and lake, the remaining number of watercraft described in 312 IAC 8-3-6 for the lake may be awarded to another sponsor.

3. Meeting date, time, and location

As provided by rule, the meeting is conducted between October 1 and December 15. The meeting is ordinarily held on a weekend date, usually a Saturday. The starting time is 10:00 a.m., EST. The availability of adequate space may be a deciding factor in choosing the date and site, but consideration is also given to significant events that may make attendance more difficult or inconvenient. The department has sought to use the same location in recent years in order to minimize confusion to sponsors. The location is on the lower level of the Indiana State Museum.

4. Pre-meeting orientation and sign-in

As the representatives of tournament sponsors arrive, they are requested to sign-in and indicate the name of any sponsor they represent. An announcement is made several times regarding sign-in, with the final announcement just before the meeting is called to order.

Copies of tournament rules and applications are provided. Representatives of the department are present to answer questions and to receive suggestions.

Each sponsor is assigned a round tag for use in the drawing process. The tag indicates the name of the sponsor and is retained by the department for reuse at subsequent annual meetings. As new sponsors are added, new tags are prepared.

5. Commencement of meeting

The room oriented classroom style with tables and chairs. The department conducts the meeting from a table in front of the room.

At 10:00 a.m. the meeting is called to order. The drawing process is reviewed, and an opportunity is provided for questions concerning the process. Participants that have previously expressed interest in a specific date and tournament location express the interest to others who are present. If another participant dissents, the date and tournament is included in the drawing process. If no participant dissents, this tournament date and location is awarded to the sponsor.

6. Drawing process

A starting point is identified with the first date in March of the upcoming year on which more than one participant wishes to sponsor a tournament at the same location. For this date, a drawing is initiated. The meeting considers subsequent dates in chronological order, and the drawing process is repeated for each date on which more than one participant wishes to sponsor a tournament at the same location.

The department requests a show of hands from tournament sponsors for each date on which a drawing is needed. Each participant in the drawing announces the name of the sponsor. The round tags are collected by the department for those participants. Each tag is read aloud to ensure accuracy and then deposited in a container.

A department representative shakes the container. Another department representative blindly chooses a round tag.

The sponsor chosen is announced by the department and recorded on two separate calendars. Two calendars are maintained to help assure accuracy.

The process is repeated until all desired fishing tournament dates that are subject to 312 IAC 8-3 are chosen. The process is currently done in a two-year format with the upcoming year done first, then the following year.

A sponsor that is awarded a date may announce it wishes to relinquish the date. If the date is within the calendar year then under consideration, the date relinquished is revisited with another drawing.

The department explains at the beginning of the drawing, and again at the conclusion of dates for the first year, that once

selection begins for the second year, first-year dates will no longer be addressed during the drawing process.

After the drawing process is completed for the upcoming two-year period, the department asks whether there are questions or concerns. Questions are answered and concerns addressed.

The process and required timing for filing applications are explained. Included in the discussion is the requirement that a completed application be received within 30 days.

Sponsors who determine to relinquish a tournament date are requested to inform the department representative at the central office of the division in Indianapolis. If the date falls within the upcoming year, the date becomes available on a first-come, first-served basis. Any person may contact the department to check for a cancelled tournament date. If the date falls during the second year, the date will be made available at the next year's fishing tournament organizational meeting.

7. Adjournment

After all questions and concerns are addressed, the meeting is adjourned.

DEPARTMENT OF STATE REVENUE

28940002.LOF

LETTER OF FINDINGS NUMBER: 94-0002 CSET
Controlled Substance Excise Tax
For Tax Periods: 1993

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

1. Controlled Substance Excise Tax – Imposition

Authority: IC 6-7-3-5; IC 6-8.1-5-1(b)

Taxpayer protests the assessment of Controlled Substance Excise Tax.

STATEMENT OF FACTS

Taxpayer was arrested for possession of marijuana. The Indiana Department of Revenue issued a Record of Jeopardy Finding, Jeopardy Assessment Notice and Demand on November 17, 1993 in a base tax amount of $1,752. 00. Taxpayer filed a protest to the assessment. A hearing on the protest was scheduled for December 16, 1998. Taxpayer and Taxpayer's attorney were notified of the hearing. The hearing was continued. On March 15, 2000, Taxpayer's representative withdrew his representation. On February 23, 2001, the Hearing Officer sent taxpayer a letter giving him until March 22, 2001 to present any additional evidence. No evidence was received. Further facts will be provided as necessary.

1. Controlled Substance Excise Tax – Imposition

DISCUSSION

IC 6-7-3-5 imposes the Controlled Substance Excise Tax on the possession of marijuana in the State of Indiana. Taxpayer bears the burden of proving that the assessment of tax is incorrect. IC 6-8.1-5-1(b). The arresting officer's report and Indiana State Police Laboratory report indicate that Taxpayer was in possession of marijuana. Since Taxpayer did not appear at the hearing or offer any evidence to contradict the arresting officer's report or the Indiana State Police Laboratory report, Taxpayer did not sustain his burden of proving that the assessment was incorrect.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

28940874.LOF

LETTER OF FINDINGS NUMBER: 94-0874 CSET
Controlled Substance Excise Tax
For Tax Periods: 1994

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Taxpayer protests the assessment of Controlled Substance Excise Tax.

STATEMENT OF FACTS

Taxpayer was arrested for possession of marijuana. The Indiana Department of Revenue issued a Record of Jeopardy Finding, Jeopardy Assessment Notice and Demand on September 30, 1994, in a base tax amount of $104,644. Taxpayer filed a protest to the assessment. Taxpayer did not appear for a hearing scheduled for January 15, 1999. By letter dated February 27, 2001, Taxpayer was given to March 22, 2001 to submit any evidence. Further facts will be provided as necessary.

1. Controlled Substance Excise Tax – Imposition

DISCUSSION

IC 6-7-3-5 imposes the Controlled Substance Excise Tax on the possession of marijuana in the State of Indiana. Taxpayer bears the burden of proving that the assessment of tax is incorrect. IC 6-8.1-5-1(b). Since Taxpayer never appeared for a hearing nor submitted additional information, this Letter of Findings is based upon the information in the file.

Taxpayer contests the amount of the tax assessment. Specifically, Taxpayer contends that the marijuana involved was less than the 2,616.10 grams on which tax was assessed. Taxpayer did not, however, offer any evidence to support that contention. Therefore, Taxpayer did not sustain her burden of proving that the assessment of Controlled Substance Excise Tax was incorrect.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

28940875.LOF

LETTER OF FINDINGS NUMBER: 94-0875 CSET
Controlled Substance Excise Tax
For Tax Periods: 1994

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Authority: IC 6-7-3-5; IC 6-8.1-5-1(b)

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STATEMENT OF FACTS

Taxpayer was arrested for possession of marijuana. The Indiana Department of Revenue issued a Record of Jeopardy Finding, Jeopardy Assessment Notice and Demand on September 30, 1994, in a base tax amount of $104,644. Taxpayer filed a protest to the assessment. Taxpayer did not appear for a hearing scheduled for January 15, 1999. By letter dated February 27, 2001, Taxpayer was given to March 22, 2001 to submit any evidence. Further facts will be provided as necessary.

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DISCUSSION

IC 6-7-3-5 imposes the Controlled Substance Excise Tax on the possession of marijuana in the State of Indiana. Taxpayer bears the burden of proving that the assessment of tax is incorrect. IC 6-8.1-5-1(b). Since Taxpayer never appeared for a hearing nor submitted additional information, this Letter of Findings is based upon the information in the file.

Taxpayer contests the amount of the tax assessment. Specifically, Taxpayer contends that the marijuana involved was less than the 2,616.10 grams on which tax was assessed. Taxpayer did not, however, offer any evidence to support that contention. Therefore, Taxpayer did not sustain his burden of proving that the assessment of Controlled Substance Excise Tax was incorrect.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

18960643.LOF

LETTER OF FINDINGS NUMBER: 96-0643 FIT
Financial Institutions Tax – Combined/Unitary Reporting
For Tax Periods: 1992 through 1994

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ISSUES

I. Financial Institutions Tax – Combined/Unitary Reporting

Authority: IC 6-5.5-1-18; IC 6-5.5-5-1(b); 45 IAC 17-2-1; 45 IAC 17-3-2; 45 IAC 17-3-5

Taxpayer protests the inclusion of certain subsidiaries in its unitary group for purposes of reporting its Indiana Financial Institutions Tax liabilities.

STATEMENT OF FACTS

Taxpayer, a non-Indiana corporation, operates as a bank holding company with subsidiaries operating in a variety of states. The subsidiaries, as well as taxpayer, are primarily engaged in the business of commercial banking. A few subsidiaries specialize in real estate management and development. Structurally, taxpayer has organized its business along regional lines. That is, taxpayer has created holding companies (100% owned) in those states where taxpayer conducts business. Taxpayer's Indiana holding company, along with two of taxpayer's Indiana banking subsidiaries, filed a combined Indiana Financial Institutions Tax ("FIT") return. Another Indiana subsidiary, a mortgage company, filed a separate Indiana FIT return. After reviewing taxpayer's 1992-1994 Indiana FIT returns, Audit determined that taxpayer's unitary group should have included all of its Indiana and regional subsidiaries. Taxpayer disagrees.

I. Financial Institutions Tax – Combined Unitary Reporting

DISCUSSION

Taxpayer protests Audit's inclusion of taxpayer's non-Indiana subsidiaries in its unitary group for purposes of reporting Indiana FIT. At the time of filing, taxpayer included only those banking subsidiaries with Indiana business activities. Audit contends taxpayer's unitary group should be more inclusive. Specifically, Audit argues that membership in taxpayer's unitary group for purposes of reporting Indiana FIT should include both taxpayer's Indiana as well as non-Indiana subsidiaries.

Taxpayer, in response, believes its non-Indiana subsidiaries cannot be members of its unitary group for purposes of reporting Indiana FIT because "they [these excluded subsidiaries] lack the elements necessary to be classified as a unitary business." Taxpayer's Protest Letter, 11-22-96, p.2. That is, taxpayer and subsidiaries fail to satisfy the unity of operation and unity of use requirements. (See IC 6-5.5-1-18(b) *"Unity is presumed whenever there is unity of ownership, operation, and use…."*). As examples of the non-centralized relationship among taxpayer and its non-Indiana subsidiaries, taxpayer notes the absence of common officers, common customers, and the sharing of common office space. Each entity's officers make autonomous decisions. Additionally, each entity (by state/region) has its own accounting and tax personnel.

Taxpayer also notes that taxpayer and its subsidiaries were organized for federal and state regulatory purposes as separate state holding companies. Taxpayer explains:

> This structure [the organization of holding companies on a state-by-state basis] was mandated by federal regulatory law to prevent interstate banking. [Taxpayer] was constrained to organize their structure along state lines to comply with the federal banking regulations. [Taxpayer] was thus required to establish a separate holding company in each state in which it wanted to conduct banking business.

Id.

From taxpayer's perspective, "[taxpayer] and its subsidiaries hold themselves out to be unitary businesses *by state*…[that is] all the entities in Indiana hold themselves out to be one organization, while all the entities in Florida hold themselves out to be one organization (emphasis added)." Id. at 4.

An excise tax, the Financial Institutions Tax (FIT), is imposed on all entities deemed to be "transacting the business of a financial institution in Indiana." 45 IAC 17-2-1. An entity subject to FIT *must adopt the combined/unitary reporting methodology unless the taxpayer is not a member of a unitary group.* Otherwise, separate (single-entity) reporting is required. Consolidated reporting is never permitted. 45 IAC 17-3-2. For those taxpayer's that are members of a unitary group, the combined return must cover "all the operations of the unitary business and include all taxpayers of the unitary group." 45 IAC 17-3-5(a). "A '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." 45 IAC 17-3-5(c). "Unity 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 a unitary group." Id. However, if a taxpayer determines that reporting on a combined basis fails to accurately reflect its Indiana income, taxpayer may request to file

separate returns. IC 6-5.5-5-1(b).

All parties agree that taxpayer is a member of a unitary group. The parties, however, disagree, as to the makeup of such group. Taxpayer believes membership should be limited to only those entities (the Indiana holding company and its two subsidiaries) conducting banking activities within Indiana. Audit, though, believes all of taxpayer's state holding companies, along with its corporate members, should be part of taxpayer's unitary group.

In this instance, unity of ownership is uncontested. And functionally, taxpayer and its subsidiaries are engaged in the same related lines of business—commercial banking and real estate management and development. With regard to unity of use and operation, the corporate parent provides a variety of corporate systems and services to its regional subsidiaries—e.g., accounts payable, general ledger, fixed assets, audit systems, as well as payroll, legal, marketing, advertising, and human resources, and information management services.

Given the attributes of common ownership, closely related lines of business (banking and real estate), and a sufficient quanta of centralized control and management as evidenced by corporate policies, products, and services—the Department finds that there exists sufficient indicia of unity and "controlled interaction" amongst the entities to conclude that taxpayer's unitary group should have included both its Indiana and non-Indiana subsidiaries.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

01970409.LOF

LETTER OF FINDINGS NUMBER: 97-0409 AGI
Adjusted Gross Income Tax
For Tax Periods: 1989-1993

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

ISSUES

Adjusted Gross Income Tax – Credit for Income Taxes Paid to Another State

Authority: IC 6-3-2-1(a); IC 6-3-3-3(b); IC 6-8.1-1-5(b)

Taxpayer protests the denial of the credit for income taxes paid to another state.

STATEMENT OF FACTS

Taxpayer is a resident of California and received a W-2 wages for services on the Board of Directors of an Indiana corporation. After an investigation, Indiana and county adjusted gross income tax, interest and penalties were assessed. Taxpayer protested the assessment. More facts will be provided as necessary.

Adjusted Gross Income Tax – Credit for Income Taxes Paid to Another State

DISCUSSION

IC 6-3-2-1(a) imposes the Indiana adjusted gross income "on that part of the adjusted gross income derived from sources within Indiana of every nonresident person." As a resident of California, Taxpayer is a nonresident person. Taxpayer's income from his services on the Board of Directors of an Indiana corporation is income which Taxpayer received from a source within Indiana. Therefore it is subject to the Indiana Adjusted Gross Income Tax.

Taxpayer is, however, entitled to a credit against his Indiana tax liabilities equal to the amount of taxes he paid in California pursuant to IC 6-3-3-3(b) because California is a reverse credit state. After the conclusion of the investigation, Taxpayer filed Indiana Adjusted Gross Income Tax returns for each of the years in question. Tax assessments issued by the Indiana Department of Revenue are presumed to be accurate and taxpayers bear the burden of proving that they are inaccurate. IC 6-8.1-5-1(b). Although given ample opportunity to do so, Taxpayer produced a California tax return for the 1989 tax period only.

FINDING

Taxpayer's protest is sustained for the 1989 tax year and denied for the other tax years.

DEPARTMENT OF STATE REVENUE

02980035.LOF

LETTER OF FINDINGS NUMBER: 98-0035 ITC
Gross Income Tax
For Years 1991, 1992, and 1993

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ISSUES

I. Adjusted Gross Income Tax – Business Income

Authority: 45 IAC 3.1-1-29; 45 IAC 3.1-1-41(4); 45 IAC 3.1-1-60(6); IC § 6-3-1-20; IC § 6-3-1-21; *Allied-Signal Inc. v. Director Div. of Taxation*, 112 S. Ct. 2251 (1992)

Taxpayer protests the proposed classification of nonbusiness income as business income.

II. Adjusted Gross Income Tax – Deconsolidation

Authority: 45 IAC 3.1-1-110; 45 IAC 3.1-1-111; 45 IAC 3.1-1-8; IC § 6-3-3-14; 45 IAC 3.1-1-38; 45 IAC 3.1-1-42; IC § 6-3-4-14; *Wisconsin Department of Revenue v. Wrigley*, 112 S. Ct. 2447, (1992); *Wabash, Inc., v. Department of State Revenue*, 729 N.E. 2d 620 (Ind. Tax Court 2000); *Department of Revenue v. Kimberly-Clark Co*., 275 Ind. 378, 416 N.E.2d 1264, 1268 (1981)

Taxpayer protests the proposed deconsolidation of taxpayer's Indiana filing.

III. Adjusted Gross Income Tax – Sales Factor Reduction for Out-of-State Sales

Authority: 45 IAC 3.1-1-64; IC § 6-3-2(e)(2); *First Chicago NBD Corp. v. Department of State Revenue*, 708 N.E.2d 631 (Ind. Tax Court 1999)

Taxpayer requests sales factor reduction for out-of-state sales.

IV. Adjusted Gross Income Tax – Indiana Research Expense Credit

Authority: IC § 6-3.1-4

Taxpayer protests the denial of the Indiana research expense credit.

V. Adjusted Gross Income Tax – Negligence Penalty

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

Taxpayer protests the imposition of a negligence penalty.

STATEMENT OF FACTS

Taxpayer is a publicly held, multistate corporation organized under the laws of Delaware, with its corporate headquarters in New York. It is a research based global health care company whose main areas of operation are the development, manufacture, and sale of pharmaceuticals, animal health products, and consumer health and over-the-counter medications.

In the early 1990's, Taxpayer sought to refocus on its core health care businesses. Accordingly, in 1992, the company reorganized its specialty minerals business, which was not involved in health care, so that the business could be sold. In that reorganization, Taxpayer contributed the assets of its specialty minerals business to a new corporation, a wholly owned subsidiary. As so constituted, the new corporation was a company that developed, produced, and marketed world-wide a broad range of specialty mineral, mineral based, and synthetic mineral products used in the paper, steel, building materials, polymers, ceramics, paints and coatings, and glass industries.

In October 1992, Taxpayer sold approximately 60% of its stock in the new corporation through an initial public offering. After the offering, the stock of the new corporation was publicly held and listed on the New York Stock Exchange. The status of the initial public offering is not at issue inasmuch as taxpayer treated this income as business income. Because of poor market conditions at the time of the initial public offering, taxpayer retained 40% of the new corporation stock with the hope that market conditions would improve. The market did improve, and six months after the initial public offering, taxpayer had the opportunity to make a significant profit on the sale of its remaining interest in the new corporation. In April 1993, taxpayer sold its remaining 40% interest in the stock of the new corporation. On its Indiana income tax return, taxpayer treated the gain on the stock as nonbusiness income. However, the auditor included the gain as part of taxpayer's business income, and assessed a deficiency for that year.

I. Adjusted Gross Income Tax – Business Income

DISCUSSION

"Business income" and "nonbusiness income" are defined by the Indiana Code as follows:

Sec. 20. The term "business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitutes integral parts of the taxpayer's regular trade or business operations.

Sec. 21. The term "nonbusiness income" means all income other than business income. IC § 6-3-1-20 and 6-3-1-21.

The terms are similarly defined by the Indiana Administrative Code:

Sec. 29. "Business Income" Defined. "Business Income" is defined in the Act as income from transactions and activity

in the regular course of the taxpayer's trade or business, including income from tangible and intangible property if the acquisition, management, or disposition of the property are integral parts of the taxpayer's regular trade or business.

Nonbusiness income means all income other than business income.

The classification of income by the labels occasionally used, such as manufacturing income, compensation for services, sales income, interest, dividends, rents, royalties, gains, operating income, non-operating income, etc., is of no aid in determining whether income is business or nonbusiness income. Income of any type or class and from any source is business income if it arises from transactions and activity occurring in the regular course of a trade or business. Accordingly, the critical element in determining whether income is "business income" or "nonbusiness income" is the identification of the transactions and activity which are the elements of a particular trade or business. 45 IAC 3.1-1-29.

At one time, the specialty minerals business was a division of taxpayer, was managed by taxpayer's Board of Directors, and was an integral part of taxpayer's regular trade or business. However, taxpayer's Board of Directors adopted a policy of divestiture to enable the company to focus on its core health-care business. As a result, taxpayer transferred all of its specialty minerals business to the newly formed corporation.

After taxpayer established the new corporation as a separately incorporated enterprise, taxpayer sold a majority of the new corporation stock in 1992 through an initial public offering. In 1993, when taxpayer liquidated its remaining interest in the new corporation, it was a minority stockholder in a publicly traded company. From that point forward, taxpayer argues it was no longer in the specialty minerals business and it was not in the regular business of buying, holding, or selling the stock of other corporations. Taxpayer maintains that the taxpayer was "simply a minority stockholder" and that the taxpayer is not in the business of selling stock.

Taxpayer favorably compares its situation to the following illustration from the Indiana Administrative Code describing when property should be removed from the property factor:

(4) The taxpayer ceases to operate one of the divisions of its business, but holds part of the property of such division solely for investment purposes. It does not thereafter use the property in the regular course of business. At the time the property is converted to investment property, it is removed from the property factor. Any income from the use of the property as an investment is nonbusiness income. 45 IAC 3.1-1-41(4).

Taxpayer notes that its new corporation was segregated not merely as a separate division of taxpayer, but as an entirely separate, stand-alone corporation. Taxpayer argues that it retained a minority stock interest in the new corporation solely as an investment and not as a part of taxpayer's regular business.

Taxpayer then cites as analogous another illustration in the Indiana Administrative Code describing when dividends are considered to be nonbusiness income:

(6) The taxpayer is engaged in a multistate glass manufacturing business. It also holds a portfolio of stock for investment purposes, the acquisition and holding of which are unrelated to the manufacturing business. The dividends received are nonbusiness income. 45 IAC 3.1-1-60(6).

45 IAC 3.1-1-60 is relevant to this fact pattern, unlike 45 IAC 3.1-1-41, which deals with situations where property will be removed from the property factor calculation. 45 IAC 3.1-1-60, which deals with nonbusiness income, states in relevant part:

Dividends. Dividends are nonbusiness income if the stock with respect to which the dividends are received did not arise out of or was not acquired in the regular course of the taxpayer's trade or business operations or where the purpose for acquiring and holding the stock is not related to or incidental to such trade or business operation.

While neither regulation directly discusses the stock sales situation at issue, the classification of the income from the stock is made contingent on the underlying circumstances behind the acquisition of the stock by taxpayer.

In *Allied-Signal Inc. v. Director Div. of Taxation*, 112 S. Ct. 2251 (1992), the U.S. Supreme Court recognized that in some limited instances, a transaction that serves an operational function may be apportioned even though the parties to the transaction are not engaged in the same unitary business. The *Allied-Signal* case explained that "stock investments" may be apportionable as operational activities if they constitute "interim uses of idle funds 'accumulated for the future operations of [the taxpayer's]... business [operation],'..." *Id*. at 2263 quoting *Asarco*, 102 S. Ct. at 3133 n. 21. The Court also stated that a capital transaction may be considered an operational function rather than an investment function if it "amounted to a short-term investment of working capital analogous to a bank account or certificate of deposit." *Allied-Signal*, 112 S. Ct. at 2264.

Similarly, taxpayer's minority interest in the new corporation stock was a short-term investment of working capital analogous to a bank account or certificate of deposit. The October 22, 1992 minutes of the taxpayer Board indicate that the decision to retain a minority interest in the new corporation stock was simply an interim use of idle funds:

... due to weakening market conditions and other factors a majority of the outstanding shares could not be sold at the minimum price of $18 per share set by the Board. *[Speaker] reviewed the situation and compared a sale of a majority of the outstanding shares at $16 per share with other alternatives, including retaining 100% of the business*. He noted that for both financial reasons as well as considerations of morale of the employees in this business and the commitment of management time to it that would be required he would recommend that the Board grant authority to the Pricing Committee to agree to the sale of a majority of [the new corporation] shares at a minimum price of $16 per share or at least 60% of [the new corporation] shares at a minimum price of $15.50 per share.... They discussed the fact that a substantial minority of the shares are being retained

which provides the Company with the possibility of appreciation in value should the business continue to grow and prosper. *(Emphasis added)*

The original nature of the stock acquisition was, ultimately, to sell 100% of these business assets. While 40% of the stock was briefly retained, and then sold for a profit, the underlying transaction focused on divestiture of the business, not investment.

As taxpayer correctly determined in its initial sale of stock, the stock was sold to divest taxpayer of the business. Sixty percent of the stock was sold immediately. This resulted in proceeds from stock acquired as part of its business operations which were treated as business income by taxpayer. The determination by the board to retain the remaining 40% of the stock and delay the final sale of the remaining stock until a more favorable price could be obtained did not establish an investment function as the underlying circumstances behind the ***acquisition*** of this stock and taxpayer's retention of the 40% share for only six months is too short a time period- especially given taxpayer's motivation for creating/acquiring such stock-to warrant characterization of the sale proceeds as passive nonbusiness investment income. The remainder of the proceeds from this transaction must be classified as business income.

FINDINGS

Taxpayer protest is denied.

II. Adjusted Gross Income Tax – Deconsolidation

DISCUSSION

Subsidiary was a wholly owned division of taxpayer that distributed blood monitoring equipment and supplies in Indiana and other states. Subsidiary was registered to do business in Indiana during the audit period. Pursuant to Indiana Code 6-3-3-14, taxpayer elected to file consolidated returns for its affiliated group of corporations, including subsidiary. 45 IAC 3.1-1-110 then required taxpayer to continue filing on a consolidated basis unless taxpayer requested and received permission from the department to file otherwise. The auditor deconsolidated subsidiary for the 1993 report year, stating: "The company had at the end of 1993 no property in Indiana, a nominal $1,000 in inventory, no rent or Indiana payroll and a nominal interstate sales to Indiana of $25,953." The auditor concluded that subsidiary; "lacks Indiana adjusted gross income and nexus."

The Indiana Code authorizes an affiliated group of corporations to file a consolidated return provided that each corporation has adjusted gross income derived from sources within Indiana:

(a) An affiliated group of corporations shall have the privilege of making a consolidated return with respect to the taxes imposed by IC § 6-3....

(b) For the purposes of this section the term "affiliated group" shall mean an "affiliated group" as defined in Section 1504 of the Internal Revenue Code with the exception that the affiliated group *shall not include any corporation which does not have adjusted gross income derived from sources within the state of Indiana*. IC § 6-3-4-14 (emphasis added).

The Indiana Administrative Code further clarifies that "adjusted gross income" may include income or losses:

Sec. 111. Affiliated Group. The Adjusted Gross Income Tax Act adopts the definition of "affiliated group" contained in Internal Revenue Code section 1504, except that no member of the affiliated group may be included in the Indiana return unless it has adjusted gross income derived from sources within the state, as that phrase is defined in IC § 6-3-2-2. For purposes of this subsection, "Adjusted Gross Income derived from sources within the state" means either *income or losses* derived from activities within the state. 45 IAC 3.1-1-111 (emphasis added).

The auditor cited 45 IAC 3.1-1-8, which provides that "adjusted gross income" is determined by subtracting income exempt from tax under the Constitution and statutes of the United States. Thus, the return for 1993 was deconsolidated because subsidiary "lacks Indiana adjusted gross income and nexus" for that year, and-presumably-was exempt from Indiana taxes under the Constitution and statutes of the United States.

If subsidiary was "doing business" in the State, it was not exempt from tax under the Constitution and statutes of the United States, and it was eligible for consolidation. The Indiana Administrative Code includes the following examples of doing business in the State:

(1) Maintenance of an office or other place of business in the state.
(2) Maintenance of an inventory of merchandise or material for sale distribution, or manufacture, or consigned goods
(3) Sale or distribution of merchandise to customers in the state directly from company-owned or operated vehicles where title to the goods passes at the time of sale or distribution
(4) Rendering services to customers in the state
(5) Ownership, rental or operation of a business or of property (real or personal) in the state
(6) Acceptance of orders in the state
(7) Any other act in such state which exceeds the mere solicitation of orders so as to give the state nexus under P.L.86-272 to tax its net income. 45 IAC 3.1-1-38.

The record shows that subsidiary had property valued at $2,350 at the beginning of 1993 and $1,000 at the end of 1993. The United States Supreme Court has held that "a stock of gum worth several thousand dollars" was nontrivial. *Wisconsin Department of Revenue v. Wrigley*, 112 S. Ct. 2447, 2460 (1992). Subsidiary had Indiana sales of $23,953. Indiana sales represent almost two percent of subsidiary's total sales.

Subsidiary's sales representatives in Indiana, in addition to soliciting sales, serviced and calibrated the blood monitoring

equipment and trained hospital personnel on the use of the equipment. The United States Supreme Court has held that "employing salesmen to repair or service the company's products" will create nexus. *Id*. at 2457.

As was noted in *Wabash, Inc., v. Department of State Revenue*, 729 N.E. 2d 620 (Ind. Tax Court 2000) pg. 624; "The Indiana Supreme Court has stated that particular emphasis should be placed upon the totality of the business activities of a company within Indiana when interpreting PL 86-272. See *Department of Revenue v. Kimberly-Clark Co*., 275 Ind. 378, 416 N.E.2d 1264, 1268 (1981)." The following table illustrates taxpayer's subsidiary's activities in the State in the surrounding years, which created nexus in those years, and as the tax court noted in Wabash, is relevant as to the totality of business activity by the subsidiary.

	1991	**1992**	**1993**	**1994**	**1995**
Payroll	$264,785	$109,454	0	$40,158	$34,000
Tangible Property-Beginning Balance	$30,577	$16,947	$2,350	$1,000	$13,450
Tangible Property-Ending Balance	$16,947	$2,350	$1,000	$13,450	0
Sales	$1,378,523	$256,786	$25,953	$24,062	$9,320

The consolidated reporting of subsidiary for all the audit years follows the Department's policy of consistent reporting from year to year. See 45 IAC 3.1-1-42 (consistency among reports). Subsidiary was doing business in the State during 1993, its income was apportionable to the State, and it qualified for the consolidated tax return.

When the subsidiary is included in the consolidated return, the issue of apportionment is raised. Taxpayer would apportion the income using the standard three factor apportionment formula, while the Department advocates, citing IAC 45-3.1-1-39, using a stacked method to compute the taxes— computing the subsidiary's income separately from the remainder of the taxpayer's return. In *Wabash, Inc., v. Department of State Revenue*, 729 N.E. 2d 620 (Ind. Tax Court 2000), the court, in rejecting the stacked method, notes "The spirit and intent of a consolidated adjusted gross income tax return is to treat an affiliated group as a single taxpayer. (Cite omitted)" pg. 626. The court also notes that "Having raised this issue, the Department bears the burden of proving that Wabash's Indiana income does not fairly reflect Indiana-sourced income." pg. 624. Consistent with the Court's and the Department's preference for using the standard three factor apportionment formula, such methodology should be used by taxpayer in computing its Indiana Adjusted Gross Income.

FINDINGS

Taxpayer protest sustained.

III. Adjusted Gross Income Tax – Sales Factor Reduction for Out-of-State Sales

DISCUSSION

Sales shipped to out-of-state purchasers are normally not considered Indiana sales to be included in the numerator of the sales factor unless (A) the purchaser is the United States Government, or (B) the taxpayer is not taxable in the state of the purchaser, IC § 6-3-2(e)(2). Taxpayer contends that sales "thrown back" to the state of Indiana should not include sales to Kansas, Michigan, and South Carolina because subsequent to the Indiana audit taxpayer was found taxable in these states. The Department concurs.

Taxpayer was taxable in South Carolina. Taxpayer provided a copy of February 14, 1994 correspondence from the South Carolina Department of Revenue and Taxation showing the results of the audit for the period from 1990 to 1992, as well as a copy of taxpayer's 1991 South Carolina Corporation Income Tax Return and taxpayer's 1992 South Carolina Corporation Income Tax Return.

Taxpayer was taxable in Kansas. Taxpayer provided a copy of the June 27, 1996 correspondence from the Kansas Department of Revenue showing the results of the income tax audit for the period from 1991 to 1994, as well as a copy of taxpayer's 1991 Kansas Corporation Income Tax Return.

Taxpayer was taxable in Michigan. Taxpayer provided a copy of a tax statement from the State of Michigan showing substantial taxes to Michigan. The actual incidence of an income tax is not required to avoid the throwback rule. 45 IAC 3.1-1-64 only requires Michigan to have jurisdiction to subject taxpayer to a net income tax regardless of whether Michigan actually imposes such a tax.

Taxpayer's showing of taxability in the states at issue is sufficient.

FINDINGS

Taxpayer protest sustained.

IV. Adjusted Gross Income Tax – Indiana Research Expense Credit

DISCUSSION

Taxpayer provided additional information to support taxpayer's contention that it qualifies for the Indiana Research Expense Credit authorized in IC § 6-3.1-4. Taxpayer provided a copy of its Schedules IT-20REC for the tax years ending in 1991, 1992, and 1993, confirming the amount at issue as a research expense.

FINDINGS

Taxpayer protest is sustained pending audit verification.

V. Adjusted Gross Income Tax – Negligence Penalty

DISCUSSION

Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. IC § 6-8.1-10. The Indiana Administrative Code further provides:

(b) "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.

(c) The department shall waive the negligence penalty imposed under IC § 6-8.1-10-1 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 out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

(1) the nature of the tax involved;
(2) judicial precedents set by Indiana courts;
(3) judicial precedents established in jurisdictions outside Indiana;
(4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
(5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case. 45 IAC 15-11-2.

Taxpayer requests a waiver of the negligence penalty for report year 1993. Taxpayer presents several arguments in support of waiving the negligence penalty; however, taxpayer has failed to demonstrate that it exercised ordinary business care and prudence in carrying out its duties. The penalty is not waived.

FINDINGS

Taxpayer protest is denied.

DEPARTMENT OF STATE REVENUE

04990124.LOF

LETTER OF FINDINGS NUMBER: 99-0124 RST
Sales and Use Tax
For Years 1991 through 1995

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

ISSUES

I. Sales and Use Tax –Projection of Prior Audit Results

Authority: IC 6-8.1-3-17

The taxpayer protests the projection of prior audit results without modification to current tax years.

II. Sales and Use Tax – PAL Equipment and Leaflets

Authority: IC 6-2.5-2-1; IC 6-2.5-5-3(b); IC 6-2.5-5-6; 45 IAC 2.2-2-1; 45 IAC 2.2-5-8

The taxpayer protests the imposition of sales tax on its purchase of items used in its Prescription Access Link (PAL) leaflets.

III. Use Tax – Sensormatic Labels

Authority: IC 6-2.5-3-1; IC 6-2.5-4-1(a)(3); IC 6-2.5-3-2(a); 45 IAC 2.2-3-13; IC 6-2.5-4-1(a)(2); 45 IAC 2.2-5-8; 45 IAC 2.2-3-3; 45 IAC 2.2-5-8

The taxpayer protests the imposition of sales tax on its purchase of Sensormatic labels.

IV. 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)

The taxpayer protests the imposition of the 10% negligence penalty.

STATEMENT OF FACTS

The taxpayer is a corporation licensed to sell prescription pharmaceuticals, health and beauty aids, foods, and miscellaneous other items at retail in Indiana. On March 31, 1994, the taxpayer and another corporation entered into an agreement whereby the successor corporation acquired all of the taxpayer's common stock; the taxpayer became a wholly owned subsidiary of the successor. The transaction was completed on July 14, 1994. The word "taxpayer" will refer to the merged entities.

The current audit (1991 through 1995) resulted in proposed assessments of sale and use tax and a 10% negligence penalty. The taxpayer filed a timely protest and an administrative hearing was held on November 11, 2000. Additional information will be provided as necessary.

I. Sales and Use Tax: Projection of Prior Audit Results: The $25,000 Settlement

DISCUSSION

The taxpayer protests the fact that a $25,000 settlement reached for prior tax periods (1988-1990) did not change the projection formula that was subsequently carried forward and used in the current audit period (1991-1995). Taxpayer contends Audit's refusal to modify the projection formula results in an overstatement of taxpayer's current sales and use tax liabilities. The following letter summarizes this prior settlement:

> Thank you very much for your assistance in helping to resolve [the taxpayer's] Indiana Sales and use tax audit. [Taxpayer] agrees to the settlement we discussed on the telephone this morning. It is our understanding that the audit liability will be reduced for (1) sales of food products made pursuant to a doctor's prescription, (2) the average store or department sales discount, and (3) a fixed amount of $25,000 of tax.

The Department agreed to reduce its 1988-1990 assessments of tax on the nutritional supplements sold by taxpayer by $25,000. There is no other documentation in the file regarding the nature of this agreement.

The Explanation of Adjustment accompanying the current audit provides in pertinent part:

> **This audit** will utilize the results of the prior audit as determined in the [1993] Letter of Finding as the best information available for the period 1/1/91 through 1/14/94. In addition, prior audit taxable sales of nutrition supplements are reduced for doctors' prescriptions at 12.7% and average sales discounts at 1.3%
>
> * * * *
>
> **This audit** does not allow a requested reduction of $25,000 from prior audit taxable nutrition supplements.

(1997 Audit Summary; emphasis added).

Under IC 6-8.1-3-17(a), the commissioner may settle "any tax liability dispute if a substantial doubt exists as to:

(1) the constitutionality of the tax under the Constitution of the State of Indiana;

(2) the right to impose the tax;

(3) the correct amount of tax due;

(4) he collectibility of the tax; or

(5)whether the taxpayer is a resident or nonresident of Indiana.

The $25,000 at issue was a one-time allowance in settlement at the Commissioner's discretion and was intended only to apply to the taxable years 1988-1990. To assume, as the taxpayer apparently does, that the $25,000 one-time settlement should apply to subsequent audit cycles would result in a legal absurdity. The plain meaning of the emphasized phrase "this audit" refers to the current assessments for audit years 1991-1995. The projection of prior audit capital purchases cannot incorporate the $25,000 reduction as there were no specific transactions associated with this amount. The $25,000 settlement simply represented a generalized adjustment to taxpayer's prior nutritional liabilities, nothing more.

FINDING

The taxpayer's protest is denied.

II. Sales and Use Tax- PAL Equipment and Leaflets

DISCUSSION

The taxpayer protests the imposition of Indiana sales and use tax on its Prescription Access Link (PAL) equipment and the leaflets generated when dispensing prescribed medications. The items covered by the tax include toner cartridges, blank leaflet forms, and a laser jet printer. The taxpayer argues that these items are exempt from the tax because they are related to the production of the PAL leaflet; the taxpayer claims the leaflet is part of the prescription drug product sold. The leaflet, containing information on the patient, the medication, directions for use, etc., is stapled to the prescription bag. The leaflet itself is a blank form filled out according to "canned" software on the pharmacy's computer system. Indiana Code Section 6-2.5-2-1(a) mandates the imposition of "the state gross retail tax" on "retail transactions made in Indiana." Similarly, IC 6-2.5-3-2(a) mandates the imposition of the use tax "on the storage, use, or consumption of tangible personal property...." Subsection (d)(2) exempts property delivered in Indiana for the sole purpose of being processed, printed, fabricated, or manufactured into, attached to, or incorporated into other tangible personal property...." IC 6-2-2.5-3-7(a) establishes a rebuttable presumption of taxability.

The taxpayer argues that the equipment and blank forms at issue fall under the exemptions provided for in IC 6-2.5-5-1 et seq, specifically IC 6-2.5-5-3(b). This section provides in pertinent part:

> Transactions involving manufacturing machinery, tools, and equipment are exempt from the state gross retail tax **if** the person [the taxpayer] acquiring that property acquires it for **direct use** in the **direct production, manufacture, fabrication, assembly... or finishing** of other tangible personal property.

(Emphasis added)

The leaflet is stapled to the prescription bag containing the customer's medications; it is not produced for sale, but merely for the customer's information and convenience.

Exemptions under IC 6-2.5-5-1 and IC 6-2.5-5-6 cover property directly used in the direct production of food or commodities for sale or consumption. The taxpayer is not engaged in the direct production of food and commodities for sale; the taxpayer is a retail merchant. The taxpayer does not produce, manufacture, fabricate, assemble, or otherwise finish tangible personal property within the meaning of the exemption statutes. The taxpayer loads blank forms into a printer, presses a few buttons, and a canned program

generates the information printed on the leaflet. These leaflets are not "incorporated as a material part of a product manufactured for sale." Removing the leaflet from the prescription bag does not materially affect any of the medications sold.

Similarly, to the extent the laser jet printer and the toner cartridges are used to create these leaflets, the printer and cartridges are not used in the "direct production of tangible personal property."

FINDING

The taxpayer's protest is denied.

III. Use Tax- Sensormatic Labels

DISCUSSION

The taxpayer protests the assessments of use tax on its purchase of Sensormatic labels. According to the taxpayer, Sensormatic labels are purchased for the purpose of reselling them as part of the product they are affixed to.

The Department disagrees. These labels are in reality inventory tags attached to merchandise to aid the taxpayer in detecting attempted thefts from their stores. They are magnetic security devices that the sales clerk at the cash register demagnetizes so the customer may exit the store without setting off the alarm. As such, the labels are part of a security system and do not fall within the ambit of the exemptions outlined in IC 6-2.5-5-3 or IC 6-2.5.5.5.1

FINDING

The taxpayer's protest is denied.

IV. Tax Administration- Penalty

The taxpayer protests the Department's imposition of the 10% negligence penalty.

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." Subsection (d) provides in pertinent part:

> If a person subject to the penalty imposed under this section can show that the failure to...pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department **shall** waive the penalty.

(Emphasis added)

Indiana Administrative Code, Title 45, Article 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.

In determining whether or not to assess the 10% penalty, the Department looks for indicia of negligence as well as indicia of due diligence. Under IC 6-8.1-5-4, the taxpayer has an affirmative duty to maintain "books and records so that the department can determine the amount, if any, of the person's liability by reviewing those books and records." Since the taxpayer did not use reasonable care or caution in maintaining the predecessor's records during its acquisition by the successor, negligence has occurred under 45 IAC 15-11-2(b).

The taxpayer has not met its burden of affirmatively demonstrating that its failure to pay its tax deficiency "was due to reasonable cause."

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

02990197.LOF

LETTER OF FINDINGS NUMBER: 99-0197
Adjusted Gross Income Tax
For Tax Periods: 1993-1995

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.

ISSUE

Adjusted Gross Income Tax – Payroll Factor

Authority: IC 6-3-2-2(d); 45 IAC 3.1-1-47

The taxpayer protests the Indiana Department of Revenue's computation of the payroll factor.

STATEMENT OF FACTS

The taxpayer is a public transportation provider. After an audit, the Indiana Department of Revenue assessed additional adjusted gross income tax, interest and penalty against the taxpayer. The taxpayer timely protested the issue concerning the payroll factor. Further facts will be provided as necessary.

Adjusted Gross Income Tax – Payroll Factor

DISCUSSION

On August 24, 1992, the taxpayer, the lessee, entered into a "Driver Lease Agreement" with another corporation, the lessor. Pursuant to the terms of this agreement, the taxpayer leased the services of drivers from the lessor. The leased drivers operated taxpayer's equipment. The lessor hired the drivers, provided all administrative services pertaining to the drivers including the payment of all income and social security taxes and the payment of unemployment and disability insurance to the proper governmental authorities. The drivers were under the control of the lessor. This agreement was renewed annually and was in effect throughout the audit period.

In determining its Indiana income, the taxpayer included the payments to the lessor for drivers as compensation in the payroll factor for the apportionment of the taxpayer's Indiana income subject to the adjusted gross income tax. The Indiana Department of Revenue audit disallowed the inclusion of those amounts in the payroll factor. The taxpayer protested this disallowance.

The payroll factor for apportionment of Indiana income is found at IC 6-3-2-2 (d) as follows:

> The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the taxable year by the taxpayer for compensation, and the denominator of which is the total compensation paid everywhere during the taxable year.

This statute is clarified at 45 IAC 3.1-1-47 as follows:

> The payroll factor shall include the total amount paid by the taxpayer for compensation during the tax period....
>
> The term "compensation" means wages, salaries, commissions, and any other form of remuneration paid to employees for personal services. Payments made to an independent contractor or any other person not properly classifiable as an employee are excluded.
>
> Only amounts paid directly to employees are included in the payroll factor...

The taxpayer contends that the payments qualified to be included in the adjusted gross income tax income factor because the terms of the lease were not actually followed and the taxpayer actually controlled the work of the drivers. Therefore, the taxpayer avers that the drivers were in reality the taxpayer's employees.

The regulation is clear. For income to be included in the payroll factor, the income must represent payments to taxpayer's Indiana employees However, in this instance, the drivers are employees of the lessor, not the taxpayer/lessee. The taxpayer's "payroll" outlays actually represent payments to the lessor, not payments to taxpayer's employees. These payments were not made directly to taxpayer's "employees" for driving trucks. Consequently, these transfers do not meet the definition of "compensation" for purposes of including them in the taxpayer's payroll factor.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04990465.LOF

LETTER OF FINDINGS NUMBER: 99-0465
Responsible Officer
Sales Tax and Withholding Tax
For Tax Period: 1997

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

ISSUE

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); IC 6-8.1-10-1

The taxpayer protests the assessment of responsible officer liability for penalty and interest.

STATEMENT OF FACTS

The penalties and interest were assessed to the taxpayer as a responsible officer. More facts will be provided as necessary.

Sales and Withholding Tax – Responsible Officer Liability

DISCUSSION

The taxpayer was the responsible officer of a corporation. In 1997, the corporation paid a sales tax liability and a withholding tax liability with checks that were returned due to non-sufficient funds. The Criminal Investigation Division of the Indiana Department of Revenue instituted an investigation of the matter. The criminal investigation was closed after the taxpayer satisfied the underlying sales and withholding tax liabilities. The penalties and interest attributable to those liabilities were subsequently assessed against the taxpayer as the responsible officer.

The taxpayer does not dispute that he was a responsible officer of the corporation and as such was personally liable for the trust tax liabilities. Nor does he dispute the amount of the penalty and interest. The taxpayer does dispute the assessment of penalty and interest attributable to a trust tax against him as a responsible officer after he satisfied the underlying liabilities.

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 proposed penalty and interest liability attributable to a 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 penalty and interest attributable to withholding taxes were assessed against the 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."

Each of these statutes clearly states that penalties and interest attributable to the particular trust tax can be assessed directly against a taxpayer as a responsible officer.

The taxpayer contends that he understood that the payment of the underlying assessments through the Criminal Investigation Division would satisfy the non-sufficient funds matter as well as the underlying sales and withholding tax liabilities. Those liabilities and the non-sufficient funds matter were satisfied for both criminal and civil purposes. The current assessments against the taxpayer are for the penalties and interest attributable to those underlying assessments. These are civil liabilities which are separate from the criminal investigation carried out by the Indiana Department of Revenue.

On January 28, 1998, the supervisor of the Criminal Investigation Division of the Indiana Department of Revenue sent the taxpayer a letter stating that "restitution of the check does not release you from the statutory obligations that regulate the Indiana Department of Revenue in Civil matters."

The criminal investigation was closed on September 22, 1998 after the filing of an Investigative Summary Report. That report concluded that the "total amount remitted to redeem this check, along with a check under liability number 97-0038687 was $2,617.58, penalty and interest connected with both liabilities remain outstanding."

Even if the Indiana Department of Revenue wished to waive the interest, it would not be able to pursuant to the provisions of IC 6-8.1-10-1.

The taxpayer did not sustain his burden of proving that the assessment is incorrect.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

02990607.LOF

LETTER OF FINDINGS NUMBER: 99-0607
State Gross Income Tax
For Tax Years 1993, 1994, 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 the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Applicability of the State's Gross Income Tax to Out-of-State Taxpayer's Indiana Source Income

Authority: IC 6-2.1-2-1-13; IC 6-2.1-2-2; IC 6-2.1-2-2(a); IC 6-2.1-2-2(c)(6); Ind. Dept. of State Revenue v. Frank Purcell Walnut Lumber, Co., 282 N.E.2d 336 (Ind. Ct. App. 1972); Uniden America v. Dept. of State Revenue, 718 N.E.2d 821 (Ind. Tax Ct. 1999)

Out-of-state taxpayer is protesting the audit's determination to subject sales, derived from transactions with its Indiana customers, to imposition of the state's gross income tax.

II. Abatement of the Ten Percent Negligence Penalty

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

Taxpayer has asked that the Department exercise its discretion to abate the ten percent negligence penalty. Taxpayer seeks abatement of the penalty not only for the contested gross income tax assessment, but also for all relevant income tax liabilities determined during the audit.

STATEMENT OF FACTS

Taxpayer is an out-of-state manufacturing business headquartered in Michigan but incorporated in Indiana. Taxpayer manufactures fabricated metal products. During the tax period at issue, taxpayer did not maintain and Indiana business location. During the 1997 tax year, taxpayer purchased and operated an Indiana manufacturing facility. Taxpayer operated that Indiana facility for six months before relocating the entire facility to Michigan. Taxpayer filed an Indiana corporate income tax return for the year 1997. Taxpayer maintains a force of sales representatives, headquartered in Michigan, who travel into Indiana to solicit purchases of its products. The resulting sales orders are received, approved, and executed at the taxpayer's Michigan location.

DISCUSSION

I. Applicability of the State's Gross Income Tax to Out-of-State Taxpayer's Indiana Source Income

Taxpayer protests the audit's determination that it was subject to the state's gross income tax – other than for the year 1997 – during the tax years addressed during the audit. The audit subjected taxpayer's sales, made into Indiana, to the gross income tax. According to taxpayer, audit cited Ind. Dept. of State Revenue v. Frank Purcell Walnut Lumber, Co., 282 N.E.2d 336 (Ind. Ct. App. 1972) as the basis for determining that taxpayer was subject to the state's gross income tax. Taxpayer maintains that the holding in Uniden America v. Dept. of State Revenue**,** 718 N.E.2d 821 (Ind. Tax Ct. 1999) superseded the Purcell holding such that taxpayer, as an out-of-state manufacturer, is not subject to the state's gross income tax for sales made into the state of Indiana.

Indiana imposes a gross income tax pursuant to IC 6-2.1-2-2. That statute states, in relevant part that "[a]n income tax, known as the gross income tax, is imposed upon the receipt of: (1) the entire taxable gross income of a taxpayer who is a resident or a domiciliary of Indiana; (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." IC 6-2.1-2-2(a). The taxpayer's gross income includes all gross income not specifically exempted. IC 6-2.1-1-13. IC 6-2.1-1-2(c)(6) provides an exemption from the statute's definition of gross income. That section states that "[t]he term 'gross income' does not include... gross receipts received by corporations incorporated under the laws of Indiana from a trade or business situated and regularly carried on at a legal situs outside Indiana or from activities incident to such trade or business."

In Uniden, the tax court determined that taxpayer's Indiana source receipts were not subject to the state's gross income tax. Uniden, 718 N.E.2d at 829. Uniden was an out-of-state corporation, headquartered in Texas, and incorporated in Indiana. Id. at 823. Uniden made substantial sales in Indiana, which the Department determined were subject to the state's gross income tax because the income was derived from Indiana sources. Id. at 825. The court determined that, based upon an intervening recodification adopting IC 6-2.1-1-2(c)(6) and omitting the phrase "sources outside the state of Indiana," the Department's position, based upon the holding in Purcell, was erroneous as inconsistent with the intent of the legislature's 1981 recodification. Id. at 829. In effect, the court held that the gross receipts earned by the non-resident taxpayer, through interstate sales of products to Indiana residents, were not subject to the gross income tax because the Indiana destination sales "were not connected with Indiana in any significant manner." Id. at 825. Uniden's Indiana sales were derived from trade or business situated and regularly carried out at a legal situs outside Indiana and were not "gross income" for purposes of the tax. Id. at 825-26. Uniden's corporate headquarters and commercial domicile was in Texas, Indiana orders were sent to Texas for acceptance, upon receipt and acceptance the Indiana orders were shipped from out-of-state warehouses to Indiana. Id. at 825.

Taxpayer has submitted information which purports to establish that its own situation parallels that of the taxpayer in Uniden. The taxpayer, although incorporated in Indiana, has its headquarters and manufacturing facility located in Michigan. Other than for the 1997 tax year, taxpayer has never maintained manufacturing, office, warehousing, or distribution facilities in Indiana. Taxpayer maintains a sales force which solicits business from new and existing Indiana customers. All Indiana source orders are sent to taxpayer's Michigan office for approval and fulfillment. The sales personnel are controlled from and headquartered out of the taxpayer's Michigan offices. Goods sent to Indiana customers originate in Michigan because taxpayer does not maintain an Indiana warehouse or distribution facility. Taxpayer supplies personnel to provide repair and modification services for its Indiana customers.

Taxpayer has presented information sufficient to establish that its Indiana source income, accumulated during the relevant tax years, is not "gross income" and is not subject to the state's gross income tax under the provisions of IC 6-2.1-1-2(c)(6). The taxpayer's Indiana source income was derived from "a trade or business situated and regularly carried on in a legal situs outside Indiana." IC 6-2.1-1-2(c)(6). The taxpayer's corporate headquarters and commercial domicile were located in Michigan. Orders for taxpayer's goods were sent to, received at, and approved in Michigan. Once those orders were received and approved, the goods were shipped from the taxpayer's Michigan location into Indiana. Taken together, these facts are sufficient to establish that taxpayer's Indiana source income was derived from business activities carried on at a location outside of Indiana and, consequently, is not subject to the state's gross income tax.

FINDING

Taxpayer's protest is sustained.

II. Abatement of the Ten Percent Negligence Penalty

Taxpayer has requested that the ten percent negligence penalty, imposed the authority of IC 6-8.1-10-2.1(a), be abated for all of the taxpayer's income tax liabilities assessed during the years encompassed within the audit period. Taxpayer maintains that any mistakes it made, with regard to its income tax liabilities, were made in good faith, without negligence, and were partially attributable

to the taxpayer's reliance upon the advice of its previous tax advisor.

IC 6-8.1-10-2.1(d) states that if a person, subject to the negligence penalty, imposed under IC 6-8.1-10-2(a) 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(b) 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, the taxpayer must prove that its failure to pay the full amount of tax due was due to reasonable cause. 45 IAC 15-11-2(c). 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...." Id. In determining whether reasonable cause exists, the Department may consider the nature of the tax involved, previous judicial precedents, previous Department instructions, and previous audits. Id.

Taxpayer has provided no substantive, statutory, or factual basis upon which the Department can justifiably be expected to find a reasonable cause for taxpayer's failure to pay the assessed tax deficiency. The taxpayer's various assertions – even taken together – do not rise to the level of "reasonable cause" sufficient to permit the Department to waive the negligence penalty assessed against an otherwise substantial and sophisticated taxpayer.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0420000335.LOF

LETTER OF FINDINGS NUMBER 00-0335
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)

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

STATEMENT OF FACTS

The taxpayer was president 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).

At the hearing, the taxpayer agreed that he was responsible for the remittance of the corporate trust taxes.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

4420000457.LOF

LETTER OF FINDINGS NUMBER: 00-0457 PUF
Fuel Tax
For Year 2000

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

Authority: IC § 6-6-2.5-64; IC § 6-8.1-5-1

Taxpayer protests state's assessment of penalty for use of red dye fuel.

STATEMENT OF FACTS

Taxpayer's truck was stopped and the officer inspected the fuel, observing that it was very black in color, due in part to an engine oil burn-off system on taxpayer's vehicle. A fuel sample was taken and submitted for analysis with the results showing red dye concentration and high sulfur content-evidence of use of non-taxed fuel. Taxpayer protested the assessed fine and the Department notified taxpayer by first class mail on January 29th, 2001 of a hearing set for 10:00 am on February 27, 2001. In telephone calls prior to hearing date, Taxpayer stipulated to the written documentation already submitted as the protest. Thus, this Letter of Findings was prepared based on taxpayer's written protest and documentation provided by both taxpayer and the Special Fuel Tax Division of the Department.

I. Fuel Tax – Civil Penalty

DISCUSSION

IC § 6-6-2.5-64 imposes civil fines of varying amounts (based on the number of prior violations) for the use of non-taxed fuel-identified by red dye- in vehicles operated on Indiana's roads.

IC § 6-8.1-5-1(b) states in relevant part:

…. 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.

Taxpayer argues that the fuel used was darkened by the use of a motor oil burn-off system, i.e. a system where a portion of used engine oil is mixed with the fuel to be burned while fresh engine oil replaces it from a reservoir. Taxpayer correctly asserts that this system is in compliance with federal environmental regulations. The substance at issue, red-dye, is not part of engine oil and while the fuel was darkened by the legitimate inclusion of engine oil for burn-off, thus masking the appearance of the red dye in the fuel, the lab results showing both red dye and a high sulfur concentration (which is characteristic of off-road fuel) demonstrate the presence of untaxed fuel. Taxpayer's argument, while explaining the darkness and high pollutant content of the sample, does not refute the lab results and fails to overcome the statutory burden of proof in IC § 6-8.1-5-1(b).

FINDINGS

Taxpayer protest denied.

DEPARTMENT OF STATE REVENUE

0120010069P.LOF

LETTER OF FINDINGS NUMBER: 01-0069P
Individual Income Tax
For the Calendar Year 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, in a letter dated January 26, 2001 protested the penalty and interest assessed. Taxpayer states it does not owe the penalty.

In the last quarter of 1999, taxpayer relocated to a temporary address and assumed a new position with a company in northern Kentucky. Taxpayer filed a full year Indiana resident tax return and was assessed a civil penalty for failure to pay quarterly estimated income taxes.

Taxpayer failed to properly prepare Form 2210 by indicating that the prior year's tax was only $368 while it was actually $3,518.57 which requires a minimum estimated quarterly installment of $879.64. Taxpayer made no estimated payments and relied on her employer's withholding.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer states that it does not owe the penalty and prepared Schedule IT-2210 showing no estimated tax due. A review of the form, however, indicates that the taxpayer erred by showing the prior year's tax to be $368 instead of $3,518. This failure caused the taxpayer to underpay her estimated income tax.

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

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220010084P.LOF

LETTER OF FINDINGS NUMBER: 01-0084P
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 Indiana and provides research and development of electronics products for its parent. Upon audit it was discovered that the taxpayer failed to correctly report its gross income at the high rate of tax for services it performs in Indiana. Other errors in taxpayer's filing are also noted in the audit report.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer was assessed a penalty for failure to correctly report all of its income and to report service income at the high rate of tax.

Taxpayer's representative, in a letter dated March 29, 2001 protested penalties assessed because the taxpayer is in good standing and always pays its taxes on a timely basis. It requests consideration in abating the penalty.

The audit revealed that the taxpayer failed to remit over forty percent (40%) in tax for all years of the audit for issues that are

clear in the Indiana code and Departmental Regulations. Further, taxpayer has not provided reasonable cause to allow the Department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220010089P.LOF

LETTER OF FINDINGS NUMBER: 01-0089P
Gross and Adjusted 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 under the laws of Minnesota and has one business location in Indiana. Upon audit it was discovered that the taxpayer failed to correctly report its gross and adjusted gross income. Other errors in taxpayer's filing are also noted in the audit report.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer was assessed a penalty for failure to correctly report thirty-two percent (32%) of its income in 1997. The primary issue is the reclassification of nonbusiness income to business income for interest and royalty income.

Taxpayer, in a letter dated September 26, 2000 protested penalties assessed because it feels it had reasonable authority for taking the positions it did. Taxpayer states that its filing positions do not suggest negligence or an attempt to willfully avoid its filing responsibilities. It requests consideration in abating the penalty.

The audit revealed that the taxpayer failed to remit approximately thirty-two percent (32%) in tax for 1997. The primary issue is the royalty business income that the taxpayer classified as nonbusiness income. Although other adjustments were minimal due to the size of the corporation, several errors netted out major differences. Taxpayer has not provided reasonable cause to allow the Department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE
Revenue Ruling #2001-03 ST
May 4, 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 – Purchase of Low Vision Systems

Authority: IC 6-2.5-5-18; Rule 45 IAC 2.2-5-28

The taxpayer requests the Department to rule on the application of sales tax to the purchase of Low Vision Systems by its customers.

STATEMENT OF FACTS

The taxpayer relates that many older people develop macular degeneration as a part of the body's natural aging process. While it does not cause complete blindness it does deprive one of their central vision. Statistically, of those over 65 about 20% will encounter this form of vision loss in one or both eyes.

The taxpayer manufactures and markets Low Vision Systems to customers who have developed macular degeneration and who can again read with big screen high magnification systems. The Low Vision System includes:

- A high magnification color television
- A24″ X 48″ Folding leg table
- Fluorescent lamp
- Surge protector
- VHS-C color camera
- An adjustable table mounted camera support

The taxpayer, in an effort to reduce the cost of Low Vision Systems, utilizes "off the shelf" electronics, i.e., 20, 25 or 27 inch television sets and suitable camcorders modified to function in this application.

DISCUSSION

IC 6-2.5-5-18(a) states:

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

Rule 45 IAC 2.2-5-28(h) provides:

The term "medical equipment, supplies or devices", as used in this paragraph, are those items, the use of which is directly required to correct or alleviate injury to, malfunction of, or removal of a portion of the purchaser's body.

It is clear then, for the purchase of medical equipment to be exempt from sales tax it must be both prescribed by a person licensed to issue the prescription, and its use must be directly required to correct or alleviate injury to, malfunction of, or removal of a portion of the purchaser's body.

Here, the Low Vision System's use is directly required to correct the malfunction of the taxpayer's customer's vision, hence, to the extent the Low Vision System is prescribed by a person licensed to issue the prescription, the purchase of the Low Vision System is not subject to sales tax.

RULING

The Department rules that the purchase of Low Vision Systems by the taxpayer's customers is not subject to sales tax to the extent the purchase is prescribed by a person licensed to issue the prescription.

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