INDIANA DEPARTMENT OF LABOR
NOTICE OF SIGNIFICANT CHANGES IN ENFORCEMENT
OF INJURY AND ILLNESS RECORD KEEPING REGULATIONS

Beginning January 1, 2002, employers who comply with 29 CFR 1904, as amended effective January 1, 2002, will be deemed in compliance with Indiana's record keeping rules and regulations as presently contained in 610 Indiana Administrative Code 4-4.

Copies of the newly revised federal regulation for recording and reporting occupational injuries and illnesses, 29 CFR 1904, are available at the following:

Indiana Department of Labor
Indiana Government Center-South
402 West Washington Street, Room W195
Indianapolis, Indiana 46204

or on-line at:

www.ai.org/labor

This enforcement policy shall remain in effect until the administrative procedures for state adoption of a record keeping and reporting regulation substantially identical to the amended 29 CFR 1904 are completed and 610 Indiana Administrative Code is officially amended to include such substantially identical regulation.

John P. Griffin
Commissioner
Indiana Department of Labor

INDIANA DEPARTMENT OF LABOR
LOCAL EMPHASIS PROGRAM:
FALL PROTECTION
Policy Document No. 01-02

A. Purpose. This instruction establishes a Local Emphasis Program (LEP) for the construction safety inspections of fall hazards, in accordance with the provisions of the Indiana Field Inspection Reference Manual (IFIRM), Chapter I, B.1.

B. Scope. This instruction applies statewide in the State of Indiana.

C. Action. The Director of Policy, Planning, and Performance, the Deputy Commissioner for IOSHA (Indiana Occupational Safety and Health Administration), and the Director of Construction Safety Compliance shall ensure that the procedures established in this instruction are adhered to in scheduling inspections.

D. References.

1. Occupational Safety and Health Standards for the Construction Industry, Subpart M, 29 CFR 1926.501, .502, .503, and appendices.
2. Occupational Safety and Health Standards for the Construction Industry, Subpart R, 29 CFR 1926.750, .751, and .752.
3. Indiana Field Inspection Reference Manual (IFIRM), the equivalent of OSHA Instruction 2.103, the Field Inspection Reference Manual (FIRM).
4. Chicago Regional Notice CPL 2-1.10G, "Local Emphasis Program for Fall Hazards in Construction."

E. Background. The State of Indiana has experienced significant construction activity in recent years. Accidents relating to falls from elevations are one of the leading causes of serious injuries and fatalities. It is believed that through a local emphasis program that increases awareness and accelerates enforcement activity, injuries and fatalities can be reduced. It is also recognized that a tracking mechanism for these type inspections would prove beneficial in monitoring the area of fall hazards. In the past, many unprogrammed inspections have been conducted through compliance safety and health officer (CSHO) or other referrals, imminent danger complaints, or through accident/fatality investigations. This LEP is designed to increase inspection activity, provide tracking, enhance expertise and formalize procedures.

F. Procedures. The following procedures will be used in targeting, scheduling, and tracking of inspections conducted under this LEP:

1. Hazards related to falls on construction sites are normally transient and of limited duration. This limits the practicality of targeting the site in advance. Therefore, inspections conducted under this LEP would be initiated by the following means: CSHO observance, nonformal complaints, and referrals from other outside sources. The Deputy Commissioner of IOSHA shall determine, as part of the annual plan, the projected number of inspections to be conducted under this LEP during the fiscal year.
2. All work sites where fall hazards are observed by compliance officers will be selected for inspection under this LEP. These sites shall include but shall not be limited to:

(a) Activities which constitute potential fall hazards and fall protection systems are either not in use or are inadequate, and the potentially exposed employees are working from elevations higher than six feet above an adjacent level.

When a job site with fall hazards is noted during travel, the CSHO will notify his/her supervisor with the name of the contractor (if known), the location of the site, and the hazard(s) observed. The supervisor will determine if the site has been inspected within the last 30 days. If the site **has not** been inspected within the past 30 days, permission will be given to inspect the site. If the site **has** been inspected within the last 30 days, an inspection will be authorized only if a serious or imminent danger appears to be present, or at the discretion of the Director of Construction Safety Compliance. These inspections will normally be limited to the observed hazardous situation(s) and plain view items. The CSHO may remain at the site to observe the abatement procedures and/or to assist with abatement methods. CSHOs will record these as planned LEP inspections.

3. A large number of fall hazards are reported via referrals, complaints, and media reports. Formal complaints of fall hazards on construction sites will continue to be scheduled before programmed inspections. Referrals from agencies and other sources, nonformal complaints, and media reports will be handled in accordance with paragraph F.2. above. Inspection history and the scope of the inspection will be handled in the same manner.

G. IMIS Coding. Inspections under this program will be coded as "h. Planned" in item 24; box c. in item 25c will be checked; and the item will be coded "FALL."

H. Full-Service Program Support. The Indiana Department of Labor (IDOL) will develop outreach programs for the support of this enforcement effort. The IDOL will develop and/or maintain existing educational programs and training seminars for increased information dissemination regarding fall hazards. Outreach and education will be conducted for company management and employees, unions, professional organizations, and any other applicable organizations, to increase awareness of the hazards associated with fall hazards and the methods to prevent accidents.

I. Evaluation Procedures. It is important that this program be evaluated in a timely manner in order to assess its potential future value and to make any necessary modifications.

1. The Deputy Commissioner for IOSHA shall submit an evaluation report to the Director of Policy, Planning, and Performance no later than August 1, 2002. The evaluation shall include a brief description of inspections conducted as a result of the LEP and results of the inspections.
2. After receipt of the Deputy Commissioner's inspection evaluation, the Director of Policy, Planning, and Performance will conduct an evaluation of the program in general, prepare a final evaluation report regarding the effectiveness of the program, and make recommendations for modifications and/or continuation of the program to the Commissioner of Labor by August 15, 2002.
3. If approved for continuation by the Commissioner of Labor, the LEP will be forwarded to the Region V Regional Administrator for notification and approval.

INDIANA DEPARTMENT OF LABOR
LOCAL EMPHASIS PROGRAM:
GREY AND DUCTILE IRON FOUNDRIES

Policy Document No. 01-03

A. Purpose. This instruction establishes a Local Emphasis Program (LEP) for the general industry safety and health inspections of grey and ductile iron foundries, in accordance with the provisions of the Indiana Field Inspection Reference Manual (IFIRM), Chapter I, B.1.

B. Scope. This instruction applies statewide in the State of Indiana.

C. Action. The Director of Policy, Planning, and Performance, the Deputy Commissioner for IOSHA (Indiana Occupational Safety and Health Administration), the Information Systems Administrator, the Director of Industrial Safety Compliance, and the Director of Industrial Hygiene Compliance shall ensure that the procedures established in this instruction are adhered to in scheduling inspections.

D. References.

1. Occupational Safety and Health Standards for General Industry, 29 CFR 1910.
2. Indiana Field Inspection Reference Manual (IFIRM), the equivalent of OSHA Instruction 2.103, the Field Inspection Reference Manual (FIRM).
3. The Indiana Department of Labor's 2000 Annual Performance Plan.
4. The 1999 Indiana Harris Industrial Directory.

E. Background. The State of Indiana has identified the grey and ductile iron foundry industry as one of the highest-hazard industries in the state, as evidenced by injury and illness data collected by the Bureau of Labor Statistics. It is believed that through a local emphasis program that increases awareness and accelerates enforcement activity, injuries and fatalities can be reduced. It is also

recognized that a tracking mechanism for these type inspections would prove beneficial in monitoring the hazards of this industry. In the past, programmed and unprogrammed inspections have been conducted through computer-generated planned inspection lists, employee complaints, agency or other referrals, imminent danger complaints, or through accident/fatality investigations. This LEP is designed to increase inspection activity, provide tracking, enhance expertise and formalize procedures.

F. Procedures. The following procedure will be used in targeting, scheduling, and tracking of inspections conducted under this LEP:

1. The Information Systems Administrator will generate a list of those employers who have been listed in the 1999 Harris Directory as having the primary Standard Industrial Classification (SIC) code of 3321. Those employers who were subject to a comprehensive safety or health inspection within the past five years will be screened out, along with employers employing fewer than eleven employees. Of the remaining employers, 20% will be selected for targeted inspection, using random number tables to ensure unbiased selection.

G. IMIS Coding. Inspections under this program will be coded as "h. Planned" in item 24; box c. in item 25c will be checked; and the item will be coded "FOUNDRY."

H. Full-Service Program Support. The Indiana Department of Labor (IDOL) will develop outreach programs for the support of this enforcement effort. The IDOL will develop and/or maintain existing educational programs and training seminars for increased information dissemination regarding foundry hazards. Outreach and education will be conducted for company management and employees, unions, professional organizations, and any other applicable organizations, to increase awareness of the hazards associated with grey and ductile iron foundries and the methods to prevent accidents.

I. Evaluation Procedures. It is important that this program be evaluated in a timely manner in order to assess its potential future value and to make any necessary modifications.

1. The Deputy Commissioner for IOSHA shall submit an evaluation report to the Director of Policy, Planning, and Performance no later than August 1, 2002. The evaluation shall include a brief description of inspections conducted as a result of the LEP and results of the inspections.
2. After receipt of the Deputy Commissioner's inspection evaluation, the Director of Policy, Planning, and Performance will conduct an evaluation of the program in general, prepare a final evaluation report regarding the effectiveness of the program, and make recommendations for modifications and/or continuation of the program to the Commissioner of Labor by August 15, 2002.
3. If approved for continuation by the Commissioner of Labor, the LEP will be forwarded to the Region V Regional Administrator for notification and approval.

INDIANA DEPARTMENT OF LABOR
LOCAL EMPHASIS PROGRAM:
MEAT PRODUCTS PROCESSING FACILITIES

Policy Document No. 01-04

A. Purpose. This instruction establishes a Local Emphasis Program (LEP) for the general industry safety and health inspections of meat products processing facilities, in accordance with the provisions of the Indiana Field Inspection Reference Manual (IFIRM), Chapter I, B.1.

B. Scope. This instruction applies statewide in the State of Indiana.

C. Action. The Director of Policy, Planning, and Performance, the Deputy Commissioner for IOSHA (Indiana Occupational Safety and Health Administration), the Information Systems Administrator, the Director of Industrial Safety Compliance, and the Director of Industrial Hygiene Compliance shall ensure that the procedures established in this instruction are adhered to in scheduling inspections.

D. References.

1. Occupational Safety and Health Standards for General Industry, 29 CFR 1910.
2. Indiana Field Inspection Reference Manual (IFIRM), the equivalent of OSHA Instruction 2.103, the Field Inspection Reference Manual (FIRM).
3. The Indiana Department of Labor's 2000 Annual Performance Plan.
4. The 1999 Indiana Harris Industrial Directory.

E. Background. The State of Indiana has identified the meat products processing industry as one of the highest-hazard industries in the state, as evidenced by injury and illness data collected by the Bureau of Labor Statistics. It is believed that through a local emphasis program that increases awareness and accelerates enforcement activity, injuries and fatalities can be reduced. It is also recognized that a tracking mechanism for these type inspections would prove beneficial in monitoring the hazards of this industry. In the past, programmed and unprogrammed inspections have been conducted through computer-generated planned inspection lists, employee complaints, agency or other referrals, imminent danger complaints, or through accident/fatality investigations. This LEP is designed to increase inspection activity, provide tracking, enhance expertise and formalize procedures.

F. Procedures. The following procedure will be used in targeting, scheduling, and tracking of inspections conducted under this LEP:

1. The Information Systems Administrator will generate a list of those employers who have been listed in the 1999 Harris Directory as having the primary Standard Industrial Classification (SIC) codes of 2011, 2013, or 2015. Those employers who were subject to a comprehensive safety or health inspection within the past five years will be screened out, along with employers employing fewer than eleven employees. Of the remaining employers, 20% will be selected for targeted inspection, using random number tables to ensure unbiased selection.

G. IMIS Coding. Inspections under this program will be coded as "h. Planned" in item 24; box c. in item 25c will be checked; and the item will be coded "MEAT."

H. Full-Service Program Support. The Indiana Department of Labor (IDOL) will develop outreach programs for the support of this enforcement effort. The IDOL will develop and/or maintain existing educational programs and training seminars for increased information dissemination regarding meat processing hazards. Outreach and education will be conducted for company management and employees, unions, professional organizations, and any other applicable organizations, to increase awareness of the hazards associated with meat products processing facilities and the methods to prevent accidents.

I. Evaluation Procedures. It is important that this program be evaluated in a timely manner in order to assess its potential future value and to make any necessary modifications.

1. The Deputy Commissioner for IOSHA shall submit an evaluation report to the Director of Policy, Planning, and Performance no later than August 1, 2002. The evaluation shall include a brief description of inspections conducted as a result of the LEP and results of the inspections.
2. After receipt of the Deputy Commissioner's inspection evaluation, the Director of Policy, Planning, and Performance will conduct an evaluation of the program in general, prepare a final evaluation report regarding the effectiveness of the program, and make recommendations for modifications and/or continuation of the program to the Commissioner of Labor by August 15, 2002.
3. If approved for continuation by the Commissioner of Labor, the LEP will be forwarded to the Region V Regional Administrator for notification and approval.

INDIANA DEPARTMENT OF LABOR
LOCAL EMPHASIS PROGRAM:
SCAFFOLDS

Policy Document No. 01-05

A. Purpose. This instruction establishes a Local Emphasis Program (LEP) for the construction safety inspections of scaffolds (including powered platforms), in accordance with the provisions of the Indiana Field Inspection Reference Manual (IFIRM), Chapter I, B.1.

B. Scope. This instruction applies statewide in the State of Indiana.

C. Action. The Director of Policy, Planning, and Performance, the Deputy Commissioner for IOSHA (Indiana Occupational Safety and Health Administration), and the Director of Construction Safety Compliance shall ensure that the procedures established in this instruction are adhered to in scheduling inspections.

D. References.

1. Occupational Safety and Health Standards for the Construction Industry, Subpart L, 29 CFR 1926.450, .451, .452, .453, .454, and appendices.
2. Indiana Field Inspection Reference Manual (IFIRM), the equivalent of OSHA Instruction 2.103, the Field Inspection Reference Manual (FIRM).

E. Background. The State of Indiana has experienced significant construction activity in recent years. Accidents resulting from improperly constructed scaffolds are one of the leading causes of serious injuries and fatalities. It is believed that through a local emphasis program that increases awareness and accelerates enforcement activity, injuries and fatalities can be reduced. It is also recognized that a tracking mechanism for these type inspections would prove beneficial in monitoring the area of scaffolding. In the past, many unprogrammed inspections have been conducted through compliance safety and health officer (CSHO) or other referrals, imminent danger complaints, or through accident/fatality investigations. This LEP is designed to increase inspection activity, provide tracking, enhance expertise and formalize procedures.

F. Procedures. The following procedures will be used in targeting, scheduling, and tracking of inspections conducted under this LEP:

1. Hazards related to scaffolds on construction sites are normally transient and of limited duration. This limits the practicality of targeting the site in advance. Therefore, inspections conducted under this LEP would be initiated by the following means: CSHO observance, nonformal complaints, and referrals from other outside sources. The Deputy Commissioner of IOSHA shall determine, as part of the annual plan, the projected number of inspections to be conducted under this LEP during the fiscal year.
2. All work sites where fall hazards are observed by compliance officers will be selected for inspection under this LEP. These

sites shall include but shall not be limited to:

(a) Sites where scaffolds or work platforms are observed and potential hazard exposure exists;

(b) Sites where suspended scaffolds are in use and potential hazard exposure exists.

When a job site with scaffolding is noted during travel, the CSHO may notify his/her supervisor with the name of the contractor (if known), the location of the site, and the hazard(s) observed. The supervisor will determine if the site has been inspected within the last 30 days. If the site **has not** been inspected within the past 30 days, permission will be given to inspect the site. If the site **has** been inspected within the last 30 days, an inspection will be authorized only if a serious or imminent danger appears to be present, or at the Director of Construction Safety's discretion. These inspections will normally be limited to the observed hazardous situation(s) and plain view items. The CSHO will remain at the site to observe the abatement procedures and/or to assist with abatement methods. CSHOs will record these as planned LEP inspections.

3. A large number of scaffold hazards are reported via referrals, complaints, and media reports. Formal complaints of scaffolds on construction sites will continue to be scheduled before programmed inspections. Referrals from agencies and other sources, nonformal complaints, and media reports will be handled in accordance with paragraph F.2. above. Inspection history and the scope of the inspection will be handled in the same manner.

G. IMIS Coding. Inspections under this program will be coded as "h. Planned" in item 24; box c. in item 25c will be checked; and the item will be coded "SCAFFOLD."

H. Full-Service Program Support. The Indiana Department of Labor (IDOL) will develop outreach programs for the support of this enforcement effort. The IDOL will develop and/or maintain existing educational programs and training seminars for increased information dissemination regarding scaffold hazards. Outreach and education will be conducted for company management and employees, unions, professional organizations, and any other applicable organizations, to increase awareness of the hazards associated with scaffolds and the methods to prevent accidents.

I. Evaluation Procedures. It is important that this program be evaluated in a timely manner in order to assess its potential future value and to make any necessary modifications.

1. The Deputy Commissioner for IOSHA shall submit an evaluation report to the Director of Policy, Planning, and Performance no later than August 1, 2002. The evaluation shall include a brief description of inspections conducted as a result of the LEP and results of the inspections.

2. After receipt of the Deputy Commissioner's inspection evaluation, the Director of Policy, Planning, and Performance will conduct an evaluation of the program in general, prepare a final evaluation report regarding the effectiveness of the program, and make recommendations for modifications and/or continuation of the program to the Commissioner of Labor by August 15, 2002.

3. If approved for continuation by the Commissioner of Labor, the LEP will be forwarded to the Region V Regional Administrator for notification and approval.

DEPARTMENT OF STATE REVENUE
AUDIT-GRAM NUMBER IR-021
October 12, 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

Qualified Sub Chapter S Subsidiary – QSub or QSSS

Authority: IC 6-2.1-1-2(c); IC 6-2.1-3-24.5; IC 6-3-2-2.6; IC 6-3-2-2.8(2); IRC 332; IRC 368; IRC 381; IRC 1361-1363; IRC 1504

IC 6-3-2-2.8. Exempt organizations.

[T]here shall be no tax on the adjusted gross income of the following:

(2) Any corporation which is exempt from income tax under Section 1363 of the Internal Revenue Code… [1984]

IRC 1361. S Corporation Defined.

(b) Small business corporation.

(3) Treatment of certain wholly owned subsidiaries.

(A) In general…

(i) a corporation that is a qualified subchapter S subsidiary shall not be treated as a separate corporation, and

(ii) all assets, liabilities, and items of income, deduction, and credit of a qualified subchapter S subsidiary shall be treated as… (those)… of the S corporation.

[1997]

I. "S" CORPORATION – GENERAL STATEMENT

A. Effective for tax years beginning prior to January 1, 1997

In general, the shareholders of an eligible [FN 1] domestic corporation may elect to be treated as a federal and thereafter as an Indiana "S" Corporation (S Corp.) as defined in Internal Revenue Code (IRC) Sec. 1363. [FN 2] An S Corp. may have no more than 35 shareholders each of whom is an individual and not a nonresident alien, there is no more than one class of stock, and the corporation is not a member of an affiliated group. [FN 3] An S Corp. is a "pass through" entity which generally pays no income tax. S Corp. shareholders pay income tax on their individual distributions of S Corp. income.

B. Effective for tax years beginning after December 31, 1996

The prior requirements remain the same except that an S Corp. is limited to 75 shareholders and the percentage of ownership of a subsidiary corporation is no longer limited. The S Corp. may elect to treat certain subsidiaries as a Qualified Sub Chapter S Subsidiary (QSub or QSSS).

A QSub is a corporation that is a 100% owned domestic subsidiary of an S Corp. and is, after its parent's federal election, [FN 4] disregarded as an entity separate from its owner. [FN 5] All QSub assets, liabilities, income, deductions, and credits are reported on the S Corp. federal and Indiana state tax [FN 6] returns as solely those of the S Corp.

A QSub election by its S Corp. parent does not effect the subsidiary corporation's status as an independent separate entity for all other Indiana taxes.

II. INDIANA RETURN AFTER QSUB ELECTION

A. A federal S Corp. which otherwise has no Indiana nexus must file an Indiana S Corp. return if the S Corp. elects to treat a wholly owned subsidiary which has Indiana income as a QSub. The ensuing S Corp. property, payroll, and Indiana destination sales will be included in the numerator of the respective S Corp. apportionment factors.

B. All the assets, liabilities, income, deductions, and credits of a QSub which otherwise has no Indiana nexus must be included in the return of an Indiana S Corp. The property, payroll, and any Indiana destination sales of the former subsidiary will be included in the respective Indiana S Corp. apportionment factors.

III. INDIANA SPECIAL CORPORATION – IC 6-2.1-3-24.5; 45 IAC 1.1-3-11

An Indiana Special Corporation (SC) is a corporation which otherwise qualifies as an S Corp. as defined in IRC § 1361(b) but has not made the required federal election. An Ind. SC is exempt from Indiana Gross Income Tax (GIT).

A corporate subsidiary of an SC that would otherwise qualify as a QSub if its parent had made such a federal election, may not file as an SC. Only a corporation that has made an election to file as a federal S Corp. may make a second federal election to treat its subsidiary as a QSub. [FN 7]

IV. NET OPERATING LOSSES – IC 6-3-2-2.6; IRC 381

A QSub accumulated Indiana net operating loss carryover transferred [FN 8] at the time of an S Corp. QSub election [FN 9] may only be carried forward and applied against S Corp. Indiana income for tax years ending after the date of the election.

V. QSUB ELECTION CONSIDERED TAX FREE LIQUIDATION

A. Adjusted Gross Income Tax – When an S Corp. elects to treat its wholly owned subsidiary as a QSub, the transaction is generally treated as a tax free transaction under either IRC § 332 and 337, "Liquidation", or IRC § 368, "Reorganization". [FN 10] A QSub election generally results in no Indiana Adjusted Gross Income Tax liability.

B. Gross Income Tax – The federal QSub election is exempt from Gross Income Tax as a liquidation of a subsidiary into a parent under IC 6-2.1-1-2(c)(19). [FN 11]

VI. TAXPAYER (EMPLOYER) IDENTIFICATION NUMBER – EIN; TID

After an S Corp. election, a QSub may no longer use its previous federal "Employer Identification Number" (EIN), but instead must use the EIN of its owner. [FN 12] When filing Indiana state and local income and employer withholding returns, a QSub must use the same EIN as that used to file the corresponding federal returns unless the Department's unique "Taxpayer Identification" (TID) is used. All existing Registered Retail Merchants Certificate (RRMC) numbers are unaffected by a QSub election.

[FN 1] Generally all corporations except certain financial institutions, insurance companies, and a DISC.

[FN 2] USCS, Title 26, (Internal Revenue Code) Subtitle A, Chapter 1, Subchapter S, Part I – IV, A/k/a Federal "Small Business Corporation". IC 6- 3-2-2.8(2).

[FN 3] IRC § 1361(b)(2)(A) [Repealed 12/31/96] "Affiliated group" is defined by IRC § 1504. A corporation does not qualify as an S Corp. if it owns 80% or more of a corporate subsidiary.

[FN 4] Temporary Form 966 provided by IRS Notice 97-4, Jan. 13, 1997. Official Form 8869, "Qualified Subchapter S Subsidiary Election" provided Oct. 10, 2000, IRS Notice 2000-58, Nov. 20, 2000.

[FN 5] A/k/a, "Disregarded entity".

[FN 6] Gross Income Tax, Adjusted Gross Income Tax, and Supplemental Net Income Tax.

[FN 7] IRC 1361(b)(3)(B)(ii) The S Corp. must make a written election to treat its subsidiary as a QSub.

[FN 8] As determined by IRC 381 and the IRC 382 special limitations and modified as required by IC 6-3-2-2.6.

[FN 9] 26 CFR1.1361-4(a).
[FN 10] 26 CFR 1.1361-4(a) Viewed under the "general principles of tax law, including the step transaction doctrine." The "step transaction doctrine" requires an analysis of certain transactions directly preceding a QSub election.
[FN 11] Also see 45 IAC 1.1-6-9 and former 45 IAC 1-1-44.
[FN 12] 26 CFR 301.6109-1(i)(2). Notice 99-6, 1999-3 I.R.B. 12. To prevent potential employee confusion, a QSub may elect to retain its EIN for purposes of federal employment taxes only.

DEPARTMENT OF STATE REVENUE
Departmental Notice #2
December 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-month period. A prepayment rate is calculated twice a year by the Department and is effective for the period 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 January 1, 2002, is four and nine-tenths cents ($0.049) per gallon.

Using the most recent retail price of gasoline available (as required by IC 6-2.5-7-14(b)), the Department has determined the statewide average retail price per gallon of gasoline (all grades) to be one dollar and nine cents ($1.09). The most recent retail price of gasoline available was based on August 2001 data contained in the Petroleum Marketing Monthly of November 2001, as published by the Federal Energy Information Administration, Department of Energy.

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

Period			Rate Per Gallon
July 1, 1994	to	December 31, 1994	2.9 cents
January 1, 1995	to	June 30, 1995	3.7 cents
July 1, 1995	to	December 31, 1995	3.3 cents
January 1, 1996	to	June 30, 1996	3.3 cents
July 1, 1996	to	December 31, 1996	3.4 cents
January 1, 1997	to	June 30, 1997	4.0 cents
July 1, 1997	to	December 31, 1997	3.9 cents
January 1, 1998	to	June 30, 1998	4.0 cents
July 1, 1998	to	December 31, 1998	2.9 cents
January 1, 1999	to	June 30, 1999	3.0 cents
July 1, 1999	to	December 31, 1999	2.4 cents
January 1, 2000	to	June 30, 2000	3.6 cents
July 1, 2000	to	December 31, 2000	4.6 cents
January 1, 2001	to	June 30, 2001	4.9 cents
July 1, 2001	to	December 31, 2001	4.9 cents
January 1, 2002	to	June 30, 2002	4.9 cents

Indiana Department of State Revenue
Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #60
Income Tax
September 2001
(Replace Information Bulletin #60, dated December 1987)

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

SUBJECT: TAXATION OF UNEMPLOYMENT COMPENSATION BENEFITS

REFERENCE: IC 6-3-1-3.5; IC 6-3-2-10

INTRODUCTION: All unemployment compensation benefits are taxable at the federal level. However, a federal adjusted gross income threshold of $12,000 for single taxpayers, and $18,000 for married taxpayers, determines the taxability of unemployment compensation benefits in Indiana.

CALCULATION OF DEDUCTION FROM FEDERAL ADJUSTED GROSS INCOME

The following worksheet should be used to calculate the Indiana deduction, if any.

1. Net unemployment compensation received in the taxable year. _____
2. Federal adjusted gross income including net unemployment compensation. _____
3. Enter $12,000 if single or $18,000 if married filing jointly. _____
4. Subtract Line 3 from Line 2. If zero or less, enter zero. _____
5. Enter fifty percent (50%) of the amount on Line 4. _____
6. Taxable unemployment compensation for Indiana purposes: enter the amount from Line 1 or Line 5, whichever is smaller. _____
7. Subtract Line 6 from Line 1. Enter the difference on the appropriate line on Form IT-40 Schedule 1, Form IT-40PNR Schedule D, or on the Indiana Deduction Worksheet on Form IT-40EZ. _____

If you were married but are filing separately and you lived with your spouse at any time during the year, you must enter 0 on Line 3 of the worksheet. However, if you were married but are filing separately and lived apart from your spouse the entire year, you may use the single taxpayer income limitation of $12,000 on Line 3.

The difference between the federal taxable amount and the Indiana taxable amount is taken as an Indiana modification on the Indiana return.

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE

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LETTER OF FINDINGS NUMBER: 96-0518
Use Tax
For the Period: 1993-95

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

The taxpayer disputes assessments of use tax on certain items of tangible personal property. The issue is as follows:

I. Use Tax – Exemptions – Environmental Quality Compliance

Authority: IC §§ 6-2.5-3-4(a)(2), -5-1 to -3(b), -5-5.1(b) and -6, -5-30 and -8.1-5-1(b), 26-1-7-102(1)(h), -204(1) and -403(1)(b) (1993); *Farmers Reservoir & Irrigation Co. v. McComb*, 69 S.Ct. 1274 (U.S.), *reh'g denied* 71 S.Ct. 31 and 32 (1949); *Covalt v. Carey Canada, Inc.,* 860 F.2d 1434 (7th Cir. 1988); *Youngblood v. State,* 515 N.E.2d 522 (Ind. 1987); *Indiana Dep't of State Revenue v. Cave Stone, Inc.,* 457 N.E.2d 520 (Ind. 1983); *H.J. Heinz Co. v. Chavez,* 140 N.E.2d 500 (Ind. 1957); *Day v. Ryan*, 560 N.E.2d 77 (Ind. Ct. App. 1990); *Mumma Bros. Drilling Co. v. Department of Revenue,* 411 N.E.2d 676 (Ind. Ct. App.), *reh'g denied* (1980); *Asbury v. Indiana Union Mutual Insurance Co.* 441 N.E.2d 232 (Ind. Ct. App. 1982); *Indiana Dep't of State Revenue v.*

Commercial Towel & Unif. Serv., 409 N.E.2d 1121 (Ind. Ct. App. 1980); *American Family Mut. Ins. Co. v. Bentley,* 352 N.E.2d 860 (Ind. Ct. App. 1976); *Indiana Dep't of State Revenue v. RCA Corp.*, 310 N.E.2d 96 (Ind. Ct. App. 1974); *Fleckles v. Hille*; 149 N.E. 915 (Ind. App. 1925); *White River Envtl. Partnership v. Department of State Revenue,* 694 N.E.2d 1248 (Ind. Tax 1998); *Indianapolis Fruit Co. v. Department of State Revenue*, 691 N.E.2d 1379 (Ind. Tax 1998); *Mechanics Laundry & Supply, Inc. v. Indiana Dep't of State Revenue,* 650 N.E.2d 1223 (Ind. Tax 1995); *Indiana Waste Sys. of Ind., Inc. v. Indiana Dep't of State Revenue,* 633 N.E.2d 359 (Ind. Tax 1994); *Home Insurance Company v. Aurigemma*, 45 Misc.2d 875, 257 N.Y.S.2d 980 (1965); 45 IAC §§ 2.2-5-1(a), -3(a) and (c)(1), -4(a), -10(k) and -70 (1992); 355 IAC chs. 2-2 to -9 and art. 5 (1992); Sales Tax Information Bulletin No. 9, "Agricultural Production Exemptions" (1992)

The taxpayer claims that the acquisition and use of the items in question was to comply with certain environmental quality regulations, and was therefore exempt from use tax.

STATEMENT OF FACTS

The taxpayer is an Indiana corporation. During the audit period the taxpayer was, and still is, engaged in the business of storing fluid bulk fertilizer and bulk liquid herbicide (hereafter "fertilizer" and "herbicide," respectively) for several nationally and internationally known agricultural chemical manufacturers.

The taxpayer also performed several activities concerning the herbicide. Before an herbicide manufacturer leasing storage space from the taxpayer sold its product to the end consumer, the taxpayer agitated and filtered the herbicide. The taxpayer performed this agitation and filtering to screen out any impurities that had crystallized in the herbicide during shipment to, or while in storage after receipt by, the taxpayer, and to recombine any component chemicals that had separated during storage. Occasionally the taxpayer mixed additives into the herbicide if the end consumer needed them. Lastly, the taxpayer packaged some orders of herbicide into what have come to be called "minibulk" containers, owned by the herbicide manufacturer but transported to the end consumer's premises to facilitate the latter's application of the herbicide. However, the taxpayer performed all of the foregoing actions solely on the respective herbicides of its various manufacturer lessees ancillary to the taxpayer's warehousing operation. The taxpayer did not buy any herbicide that any of its manufacturer lessees had in storage before doing so, and it did not and does not produce any herbicide itself. There is also no evidence in the record before the Department, nor does the taxpayer contend, that it produced any of the additives it sometimes mixed into the herbicide. The taxpayer has also failed to provide the Department with any description or evidence of any activities, other than storage, in which it may have been engaged concerning fertilizer.

Between 1990 and 1995, anticipating an increased demand for agrichemical warehousing, the taxpayer built three buildings to store fertilizer and herbicide and to repackage herbicide (hereafter "the buildings"). In 1991 certain state regulations, discussed below, were promulgated and took effect concerning commercial fertilizer and pesticide (including herbicide) storage. On April 29, 1994 the Office of the Indiana State Chemist and Seed Commissioner (hereafter "the State Chemist"), the promulgating agency, certified in writing that two of the buildings complied with these regulations. The certificate, a copy of which the taxpayer submitted in evidence in this protest, identifies them as Buildings 1 and 2. The taxpayer also submitted photocopies, and summaries, of invoices it paid to the various entities that contributed construction labor and materials to Building 2 and to a Building 3. The taxpayer did not submit any certificate from the State Chemist about Building 3. The State Chemist's certificate indicates that Building 1 contains three fertilizer and thirty-four herbicide tanks, while Building 2 contains fifty fertilizer tanks. There is no evidence in the record clearly indicating the number or type of storage tanks that Building 3 may contain.

In each year of the audit period the taxpayer acquired items of tangible personal property from various suppliers that the field auditor divided into two categories, "Expense Purchases" and "Capital Assets," in the Audit Summary. The auditor assessed tax on the use of all items in both of these categories. The taxpayer timely protested these parts of the assessments. However, it has since restricted its protest to certain specified items in each of these categories, as set out in Exhibit B of the taxpayer's September 12, 2000 affidavit (hereafter "the disputed expense purchases" and "the disputed capital assets," respectively; collectively, "the disputed items"). The disputed expense purchases consist of a CRS shaft, snap rings and tap; belting, steel tubes, a bag filter and accessories related to each of these respective items; a pail unit; an adaptor; a vise and valve; cable; an envelope seal; tubing and mesh; a pneumatic swivel castor; machine screws and washers; and two units of what appears to be sheet metal. The disputed capital assets are six horizontal tanks with four support saddles each; twelve mild steel tanks; two undescribed tanks; pipes, tees and fittings; six above-liquid manway assemblies; one hundred forty-eight (148) loads of fill dirt; five hundred twenty-three (523) tons of stone; and an item described as "material portion of contract."

I. Use Tax – Exemptions – Environmental Quality Compliance

DISCUSSION

A. INTRODUCTION: ISSUE, ANALYTICAL FRAMEWORK AND BURDEN OF PROOF

IC § 6-2.5-3-4(a)(2) (1993) exempts from use tax the storage, use and consumption of any tangible personal property that is wholly or partially exempt from gross retail tax under any part of IC chapter 6-2.5-5 except IC § 6-2.5-5-24(b). The taxpayer argues that the disputed items are exempt from use tax under IC § 6-2.5-5-30 (1993) and its implementing regulation, 45 IAC § 2.2-5-70 (1992) (hereafter collectively "the environmental quality exemption").

It is important to emphasize at the outset that the issue in this protest is whether the taxpayer has complied with IC § 6-2.5-5-30,

not some other tax benefit statute. As noted in the Statement of Facts, the taxpayer submitted in evidence a certificate from the State Chemist that Buildings 1 and 2 complied with the containment regulations. The purpose of the State Chemist's doing so was to enable the taxpayer to qualify these buildings for the deduction that IC § 6-1.1-12-38 provides. This statute deals with a deduction from the assessed value of property in computing property tax, and is under the jurisdiction of the State Board of Tax Commissioners ("Tax Commissioners"). In contrast, IC § 6-2.5-5-30 grants an exemption not from the property tax, but from excise taxes, i.e. the gross retail and use taxes that this Department administers.

Aside from these basic distinctions, the two statutes use materially different language, which impose different requirements. IC § 6-2.5-5-30 is more general, enabling a sales or use taxpayer to obtain an exemption for tangible personal property predominantly used and acquired to comply with any environmental statute, regulation or standard. In contrast, IC § 6-1.1-12-38 is specific, citing only to the commercial fertilizer containment and pesticide containment regulations and the respective statutes authorizing them. A property taxpayer need only file a certified statement from the Tax Commissioners in duplicate, and a certification by the State Chemist of the improvements made, with the county auditor by May 10 of the year before the first year in which the taxpayer will take the deduction. IC § 6-1.1-12-38(b). In contrast, as the Department will discuss below, a sales taxpayer or use taxpayer seeking exemption under IC § 6-2.5-5-30 has the burden of proving that it complied with the statute. As the Department will also detail below, this statute contains several factual elements. Accordingly, whatever conclusive effect the State Chemist's certificate might have in a proceeding before the Tax Commissioners, it is not binding on the Department in this protest, although the Department does consider it to be relevant evidence.

The taxpayer has the burden of proving that its use of each of the disputed items falls under the environmental quality exemption. IC § 6-8.1-5-1(b) (1998) imposes on all protesting persons the burden of proving the assessment to be wrong. It is also well-settled Indiana law that "[t]ax exemptions are strictly construed against the taxpayer and in favor of the state." *Monarch Steel Co. v. State Bd. of Tax Comm'rs,* 669 N.E.2d 199, 201 (Ind. Tax 1996), citing *Greensburg Motel Assocs., L.P. v. Indiana Dep't of State Revenue,* 629 N.E.2d 1302, 1304 (Ind. Tax 1994). Thus, "[w]hen a taxpayer claims entitlement to a tax exemption, the taxpayer bears the burden of showing that the terms of the exemption are met." *Mechanics Laundry & Supply, Inc. v. Indiana Dep't of State Revenue,* 650 N.E.2d 1223, 1227 (Ind. Tax 1995) ("*Mechanics Laundry*") *Accord, White River Envtl. Partnership v. Department of State Revenue,* 694 N.E.2d 1248, 1250 (Ind. Tax 1998) ("*White River Environmental Partnership*"); *Indianapolis Fruit Co. v. Department of State Revenue*, 691 N.E.2d 1379, 1383 (Ind. Tax 1998) ("*Indianapolis Fruit*").

B. THE TAXPAYER'S ARGUMENT

The taxpayer makes three arguments to support its claim that its use of the disputed items falls under the environmental exemption. First, it asserts that these items are entitled to the exemption because the actions the taxpayer performs on or to the herbicide occur during production (i.e., processing, refining or agriculture). Second, it contends that it acquired and used the disputed items to comply with certain regulations the State Chemist promulgated in 1991 concerning commercial fertilizer and pesticide (including herbicide) storage and containment. LSA Doc. # 90-115(F), secs. 3-10, 14 Ind. Reg. 1388, 1389-1400 (1991), codified at 355 IAC chs. 2-2 to -9 (1992) and as amended at *id.* (1996 and Cum. Supp. 1999); LSA Doc. # 90-116(F), 14 Ind. Reg. 1400 (1991), codified at 355 IAC art. 5 (hereafter "the commercial fertilizer containment regulation" and "the pesticide containment regulation," respectively, or collectively "the containment regulations"). Lastly, the taxpayer contends that the facilities were built and equipped to comply with certain other unspecified federal and state environmental quality regulations concerning the handling, secondary containment, and reporting requirements associated with the manufacture and storage of hazardous materials, including herbicides. However, the taxpayer has not cited to any of the other hazardous materials laws or regulations with which it alleges that it was also trying to comply. Accordingly, the Department rules that the taxpayer has waived this last argument and will restrict its discussion to the taxpayer's production and containment regulation arguments.

C. SUMMARY OF FINDINGS

The Department finds that the taxpayer has failed to satisfy IC § 6-2.5-5-30(2). Specifically, it has failed to prove that its activities are production. The taxpayer also has failed to prove under IC § 6-2.5-5-30(1) that it acquired and used the shower/eye wash for the purpose of complying with the containment regulations.

D. THE ENVIRONMENTAL QUALITY EXEMPTION AND ITS ELEMENTS

1. The Statute

During the audit period and at the time of the audit the relevant portion of IC § 6-2.5-5-30 read as follows:

Sec. 30. Sales of tangible personal property are exempt from the state gross retail tax if:

(1) the property constitutes, is incorporated into, or is consumed in the operation of, a device, facility, or structure *predominantly used and acquired* for the purpose of complying with any state, local, or federal environmental quality statutes, regulations, or standards; and

(2) the person acquiring the property is *engaged in the business* of manufacturing, processing, refining, mining, or agriculture.

Id (emphases added). Title 45 IAC § 2.2-5-70(a), the relevant part of the implementing regulation, combines and is substantially identical to IC § 6-2.5-5-30(1) and (2).

2. The Environmental Compliance Requirement

IC § 6-2.5-5-30(1) and (2) each impose a primary requirement for tangible personal property to qualify for the environmental exemption. First, the "device, facility, or structure" in connection with which the tangible personal property is used must be "predominantly used and acquired for the purpose of complying with any state, local, or federal environmental quality statutes, regulations, or standards[.]" IC § 6-2.5-5-30(1). The Department will hereafter refer to this language as imposing "the environmental compliance requirement."

3. The Production Requirement

Second, "the person acquiring the property [must be] engaged in the business of manufacturing, processing, refining, mining, or agriculture." IC § 6-2.5-5-30(2). This latter paragraph of the statute recites a "laundry list" of economic activities nearly identical to those in the exemption statutes of IC §§ 6-2.5-5-3(b), -5.1(b) and -6 (hereafter collectively "the industrial exemptions"). It was therefore fitting that in *Mechanics Laundry* the Indiana Tax Court interpreted all four of these "laundry lists" harmoniously to make production a prerequisite to receiving any of these exemptions. *Compare* 650 N.E.2d. at 1227-32 (industrial exemptions) *with id*. at 1232 (the environmental quality exemption). The Tax Court repeated this holding as to IC §§ 6-2.5-5-6 and -30 in *White River Environmental Partnership*. 694 N.E.2d at 1250 (quoting *Mechanics Laundry*, 650 N.E.2d at 1228 and *Indianapolis Fruit*, 691 N.E.2d at 1384, which dealt with the exemptions of IC §§ 6-2.5-5-1 and -2 (hereafter "the agricultural exemptions") as well as that of IC § 6-2.5-5-3 for industrial machinery, tools and equipment). The law on this subject is therefore well settled, and the Department will accordingly hereafter refer to IC § 6-2.5-5-30(2) as construed in the foregoing opinions as imposing "the production requirement." Because the Tax Court has made meeting the production requirement a prerequisite to claiming the environmental quality exemption, and because the taxpayer has devoted the majority of its brief to arguing that it is engaged in production, the Department will address this issue first.

E. THE TAXPAYER'S ACTIVITIES WERE NOT PRODUCTION AND DID NOT MEET THE PRODUCTION REQUIREMENT.

1. A Taxpayer Claiming the Environmental Quality Exemption Must Be Engaged in One of the Businesses or Occupations Listed in IC § 6-2.5-5-30(2).

a. The Department Must Interpret the Environmental Quality Exemption Consistently With the Industrial and Agricultural Exemptions.

The taxpayer has argued that the disputed items are exempt because the taxpayer was engaged in production, i.e. that its activities met the production requirement of IC § 6-2.5-5-30(2). Specifically, the taxpayer contends that its actions concerning the herbicide constitute processing, refining or agriculture.

The Department noted earlier in this Discussion that the Tax Court held in *Mechanics Laundry* that the environmental quality exemption of IC § 6-2.5-5-30 must be interpreted consistently with the industrial exemptions of IC §§ 6-2.5-5-3(b), -5.1(b) and -6. 650 N.E.2d at 1232. The logic of this holding also dictates that the Department must interpret IC § 6-2.5-5-30 consistent with the agricultural exemptions of IC §§ 6-2.5-5-1 and -2. "[S]tatutes that apply to the same subject matter must be construed harmoniously…, giving effect, if possible, to every word and clause." *Caylor-Nickel Clinic, P.C. v. Indiana Dep't of State Revenue,* 569 N.E.2d 765, 768 (Ind. Tax 1991), *aff'd* 587 N.E.2d 1311 (Ind. 1992). Accordingly, the environmental quality exemption not only must be construed consistently with the industrial and agricultural exemptions, but the latter two groups of exemptions must be construed consistently with each other in relation to the environmental quality exemption. *See id* (gross income tax exemption opinion).

b. The "Business or Occupation" Test and Its "Continued or Regular Activity" Requirement

(i) The "Business or Occupation" Test.

All of these statutes refer either to a business or an occupation, either explicitly or because the Indiana Tax Court has interpreted them as doing so. IC § 6-2.5-5-30(a)(2) requires that "the person acquiring the [tangible personal] property [claimed as exempt be] engaged in the *business* of manufacturing, processing, refining, mining, or agriculture." *Id* (emphasis added). Similarly, IC § 6-2.5-5-5.1(b) requires that the taxpayer acquire the property for consumption "*in the person's business,*" *id.* (emphasis added), while IC § 6-2.5-5-6 requires that the taxpayer acquire the property to incorporate it into other tangible personal property … for sale *in his business*." *Id* (emphasis added). Although IC § 6-2.5-5-3 does not state that the taxpayer claiming the industrial equipment exemption must be "in business," the Indiana Tax Court has interpreted that exemption as including that requirement; "*like the equipment exemption,* the environmental quality exemption requires the person acquiring the property to be engaged *in a business* within the ambit of subsection (2)." *Indiana Waste Systems of Indiana, Inc. v. Indiana Dep't of State Revenue,* 633 N.E.2d 359, 363 (Ind. Tax 1994) (emphases added) ("*Indiana Waste I*"). Both IC §§ 6-2.5-5-1(2) and -2(b)(2) require that the person acquiring the property [be] *occupationally engaged* in the production of food or commodities which he sells for human or animal consumption or uses for further food or commodity production[.]" *Id* (emphasis added). So do the regulations implementing IC §§ 6-2.5-5-1 and -2. *See* 45 IAC §§ 2.2-5-1(a) and -3(a) (defining "farmers"). *See also* 45 IAC §§ 2.2-5-3(c)(1) and -4(a), which require the taxpayer claiming an agricultural exemption to be "*occupationally* engaged in the *business* of producing food and agricultural commodities

for human, animal, and poultry consumption" for sale or for further use in producing food and commodities for sale (emphases added). The Department will hereafter refer to the "in … business" language in the environmental quality and industrial exemptions and the "occupationally engaged" language in the agricultural exemptions as imposing the "business or occupation test."

(ii) The "Continued or Regular Activity" Requirement

The definitions of "business" and the noun "occupation," from which the adverb "occupationally" derives, both require that the activity in question occur on a continual or regular, as distinguished from an isolated, occasional or incidental, basis. Indiana judicial precedent, the rules of statutory interpretation and published Department policy in existence during the taxpayer's audit period all dictate this result. Most of the Indiana judicial opinions that define these words deal with interpreting the provision typically found in a homeowners insurance policy that excludes from coverage pursuits or property the that policy defines as being "business." In *American Family Mutual Insurance Co. v. Bentley,* 352 N.E.2d 860 (Ind. Ct. App. 1976) ("*Bentley*"), the Court of Appeals said that "the general rule, which we hereby adopt in Indiana, is that an insured is engaged in a business pursuit only when he pursues a *continued or regular* activity for the purpose of earning a livelihood." *Id.* at 865 (emphasis added). In *Asbury v. Indiana Union Mutual Insurance Co.* 441 N.E.2d 232 (Ind. Ct. App. 1982) ("*Asbury*"), the Court of Appeals reaffirmed that "the controlling rule in Indiana is as pronounced in Bentley, that an insured is engaged in business only when he pursues a *continued or regular* activity for the purpose of earning a livelihood." *Id.* at 239 (emphasis added). Before doing so, the Court of Appeals had quoted extensively from *Home Insurance Company v. Aurigemma,* (1965) 45 Misc.2d 875, 257 N.Y.S.2d 980, 985 ("Aurigemma"), which in turn had given several dictionary definitions of "business" and "occupation." The final quoted paragraph summarized these definitions as follows:

> [I]t is clear that two elements are present in almost every definition, either expressly or by implication: first, continuity, and secondly, the profit motive. As to the first, there must be a 'customary engagement' or a 'stated occupation'; as to the latter, there must be shown to be such activity as a 'means of livelihood'; 'gainful employment'; 'means of earning a living'; 'procuring subsistence or profit'; 'commercial transactions or engagements'."

441 N.E.2d at 237, quoting Aurigemma, 257 N.Y.S.2d at 985 (emphases in Aurigemma). The Indiana Supreme Court later adopted *Asbury*'s restatement of the "continuous or regular activity" test in *Youngblood v. State,* 515 N.E.2d 522, 527 (Ind. 1987) ("*Youngblood*"), making it one of the two general definitions of "business" under Indiana law which that opinion gives.

The requirement that a business or occupation be engaged in continuously or regularly also applies as a matter of statutory interpretation to "business" as used in the environmental quality and industrial exemptions and to "occupationally engaged" as used in the agricultural exemptions. Where there is no definition in the Indiana Code, "words and phrases [in that code] will be taken in their plain or ordinary and usual sense unless a different purpose is clearly manifest by the statute itself, …." *Indiana Dep't of State Revenue v. Colpaert Realty Corp.,* 109 N.E.2d 415, 418-19 (Ind. 1952) (quoting a predecessor to IC § 1-1-4-1(1)). The ordinary, contemporary, common meaning of a non-technical word in a statute is the meaning found in English language dictionaries in existence at the time of the statute's enactment. *Perrin v. United States,* 100 S.Ct. 311, 314 (U.S. 1979). The requirement that the taxpayer claiming the environmental quality exemption be "in … business" has existed since 1965 under the industrial consumption and incorporation exemptions, and under the environmental quality exemption since its original enactment in 1980. *See* ch. 232, sec. 7, 1965 Ind. Acts 556, 572 and Pub. L. No. 53, sec. 2, 1980 Ind. Acts 621, 621-22, respectively (each so stating). The requirement of being "occupationally engaged" in farming in order to claim the agricultural exemptions has existed since the Gross Retail and Use Tax Act first became law. *See* ch. 30 (Spec. Sess.), 1963 Ind. Acts 60, 63 (so stating). The definitions of "business" and "occupation" quoted in *Aurigemma* and *Asbury* all come from dictionaries published before these respective enactment dates. The element of "continuity" that those opinions inferred from those definitions for an activity to be a business or occupation therefore must exist for a taxpayer engaging in that activity to claim the agricultural, industrial or environmental quality exemptions.

When the General Assembly in 1980 passed the act that recodified the sales and use tax laws as current IC chapter 6-2.5, it stated that

> [t]his act is intended to be a codification and restatement of applicable or corresponding provisions of the laws repealed by this act. If this act repeals and reenacts a law in the same form or in a restated form, the substantive operation and effect of that law shall continue uninterrupted.

Pub. L. No. 52, subsec. 3(a), 1980 Ind. Acts 590, 620. By doing so, the legislature carried forward into current law the requirement of continuous or regular activity to claim the agricultural and industrial exemptions for tangible personal property used in an occupation. Moreover, in 1976, four years before the recodification, the Court of Appeals in *Bentley* had explicitly defined "business" as being a "continued or regular activity[.]" 352 N.E.2d at 865. The legislature is presumed to be aware of the common law in enacting legislation and is further presumed not to intend to make any change in the common law beyond what it declares either in express terms or by unmistakable implication. *Bartrom v. Adjustment Bureau, Inc.,* 618 N.E.2d 1, 10 (Ind. 1993). The 1980 General Assembly was therefore presumably aware of the definition of "business" that *Bentley* adopted from the majority of common law opinions of other jurisdictions. This awareness included an awareness of the requirement that the activity in question be continued or regular. The legislature used "in… business" language in enacting the environmental quality exemption and left "in … business" and "occupationally engaged" language in the recodified agricultural and industrial exemptions, instead of omitting

such language. By making that choice, the legislature presumably intended that a taxpayer claiming any of these exemptions must engage in the productive activities they describe on a continued or regular basis and that the term "occupationally engaged" and the phrase "in … business" as used in these statutes be considered synonymous. There is nothing in any of these statutes to indicate otherwise. This "continued or regular activity" interpretation is also consistent with an interpretation of the agricultural exemptions the Department had published before the present taxpayer's audit period began equating being "occupationally engaged" with being "regularly engaged." Sales Tax Information Bulletin No. 9, "Agricultural Production Exemptions" at 2 (1992) (so stating).

Accordingly, and consistently with *Bentley, Aurigemma, Asbury* and *Youngblood,* the Department construes the environmental quality, industrial and agricultural exemptions as all requiring that a taxpayer claiming any of them engage in a listed productive activity on a continued or regular basis. Isolated or occasional productive activities, or productive activities engaged in as an incident to another continued or regular activity, will not qualify tangible personal property used in such activities for the environmental quality, industrial or agricultural exemptions.

c. The "Double Direct" Test

IC §§ 6-2.5-5-1, -2, -3(b) and -5.1(b) (the first two of which, as previously noted, explicitly impose an occupational requirement) all impose what reported Indiana judicial opinions have come to call the "double direct" test. The tangible personal property for which a taxpayer claims any of these exemptions must be "*direct[ly] use[d]* in … direct production" of the product in question. IC §§ 6-2.5-5-1(1), -2(a) and -3(b) (emphasis added). In the case of IC § 6-2.5-5-5.1(b), the property must be "direct[ly] consum[ed] … in … direct production[.]" *Id. Indiana Dep't of State Revenue v. Cave Stone, Inc.,* 457 N.E.2d 520 (Ind. 1983) ("*Cave Stone*") established the definitions of "direct use" and "direct production" that are still used to interpret and apply the "double direct" test. The "direct use" (or, in the case of IC § 6-2.5-5-5.1(b), the "direct consumption") to which the exemption in question refers must be "by the purchaser, not some other entity[.]" 457 N.E.2d at 525.

In *Indiana Waste I*, the Tax Court held concerning the industrial equipment exemption that

> [Indiana] Waste Management fails to show it is entitled to the exemption because the minimum threshold requirement of the double direct standard is that the taxpayer who purchases the equipment in question be the entity that uses the equipment "for *his* direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property." IC § 6-2.5-5-3(b) (emphasis added [by the court]). *See Cave Stone,* 457 N.E.2d at 525. Waste Management, though, does not engage in any of the listed activities. It simply transports garbage. That it compresses the garbage is irrelevant: *to have a colorable claim for the equipment exemption, it would have to compress the garbage as part of its own process to produce other tangible personal property, not as part of an alleged process of another taxpayer. If there is an integrated production process involving the garbage that will satisfy the double direct standard of the equipment exemption,..., it is Ogden Martin or Danville RDF* [the companies receiving the garbage] *that employs it, not Waste Management.* [The taxpayer in *Indiana Waste I* compacted and hauled garbage to these two companies for them to sell as generator fuel to electric utilities.]

633 N.E.2d at 362-63 (footnote omitted; second emphasis added). As to the environmental quality exemption the Tax Court said that

> Waste Management fares no better under this exemption than under the equipment exemption. Waste Management is simply not "engaged in the business of manufacturing, processing, refining, mining, or agriculture," as required by subsection [IC § 6-2.5-5-30](2). Rather, Waste Management is engaged in the business of picking up, transporting, and disposing of garbage. Even if either or both Ogden Martin and the corporation that operates Danville RDF are engaged in a business within the ambit of subsection (2), Waste Management cannot claim the benefit; *like the equipment exemption, the environmental quality exemption requires the person acquiring the property to be engaged in a business within the ambit of subsection (2).*

Id. at 363 (emphasis added). The Tax Court read the list of activities in IC § 6-2.5-5-3(b) as also imposing a requirement that a claiming taxpayer be engaged in a business or occupation involving one or more of those activities. The Department similarly construes the environmental quality exemption and all of the industrial and agricultural exemptions as requiring that a taxpayer claiming any of them be engaged in one or more of the businesses or occupations that those statutes respectively list.

2. The Taxpayer Was Not Engaged in Processing or Refining Herbicide.

Contrary to the present taxpayer's assertion, it was not engaged in processing or refining herbicide. In *Mechanics Laundry*, the Tax Court had also used 45 IAC § 2.2-5-10(k), which defines "processing or refining" under IC § 6-2.5-4-2 and makes the two activities synonymous, to define the same words as used in the industrial equipment exemption of IC § 6-2.5-5-3(b). 650 N.E.2d at 1229. That regulation defines "processing" or "refining" as being the "performance *by a business* of an integrated series of operations which places tangible personal property in a form, composition, or character *different from that in which it was acquired.*" *Id* (emphases added). Although the additives did change such herbicide into which they were mixed, the mixing activities failed the "continued or regular activity" requirement of the "business or occupation" test. That is to say, the additive mixing activities were not "continued or regular" as *Bentley, Aurigemma, Asbury* and *Youngblood* use this phrase. The taxpayer has neither claimed nor proved that these activities were more than isolated or occasional. It therefore has not proved that the mixing activities constituted a "business" as these opinions define those words and as the environmental quality and industrial exemptions and 45 IAC § 2.2-5-10(k) all require.

The taxpayer was in the business of warehousing, not processing or refining. The taxpayer stored agricultural supplies for hire. It was therefore a "warehouseman" as IC § 26-1-7-102(1)(h) defines that word, and as such was subject to the same duties that Article 7 of the U.C.C., IC chapter 26-1-7, imposes on all warehousemen. "A warehouseman is liable for damages for loss of or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful man would exercise under like circumstances …." IC § 26-1-7-204(1). *See also* IC § 26-1-7-403(1)(b) (requiring the bailee to deliver the goods to a person entitled under the document of title unless the bailee establishes, among other things, damage, loss, or destruction of the goods for which it is not liable). The taxpayer's agitation, filtration and packaging activities did not change the herbicide, but simply maintained it in the same condition that the taxpayer received it. As such, those activities were no different than the duty imposed on all warehousemen to exercise reasonable care to preserve the goods in their possession from damage or destruction. *Compare Mechanics Laundry,* 650 N.E.2d at 1229-30, in which the court described the taxpayer's laundering of soiled textiles as perpetuation, rather than processing or production, of those textiles. The court in that case denied the taxpayer any refund under the industrial exemptions for gross retail tax it paid on tangible personal property that it used in rendering that service. *Id.* at 1227-32. It also denied the taxpayer any refund of that tax based on the environmental quality exemption, holding that it had to construe the word "processing" in IC § 6-2.5-5-30 as having the same meaning as that word was used in the industrial exemption statutes. *Id.* at 1232. Therefore, viewed from a sales and use tax perspective, the taxpayer's agitation, filtration and packaging activities constituted perpetuation, rather than production, of goods.

It has also been held that where the source of a taxpayer's income is rental charges, any services the taxpayer renders in connection with the rental are incidental to the lessee's objective in renting. *Indiana Dep't of State Revenue v. Commercial Towel & Unif. Serv.,* 409 N.E.2d 1121, 1123 (Ind. Ct. App. 1980) ("*Commercial Towel*"). In contrast to *Bentley,* in which the insured was not trying to earn his living from storage charges and who in any case did not receive them long enough to be "continuous or regular," the taxpayer's main source of income was the rent or storage charges paid by its agrichemical manufacturer lessees. Therefore, and aside from the taxpayer's statutory duties as a warehouseman, the Department further views the activities that the taxpayer claims were processing or refining as having been for tax purposes nothing more than services that the taxpayer rendered to its manufacturer lessees incident to their respective storings of herbicide.

The object of all of the taxpayer's previously described incidental services was to preserve and facilitate its lessees' sale and the safe and convenient transportation and application of herbicide. The holdings of *Bentley, Aurigemma, Asbury, Youngblood, Mechanics Laundry* and *Commercial Towel* therefore all dictate that the present taxpayer is not entitled to relief from the assessment on the theory that it is a processor or refiner.

3. The Taxpayer Was Not Engaged in Manufacturing Herbicide.

Nor did the taxpayer's activities concerning the herbicide or additives constitute manufacturing. "Manufacturing," as the industrial and environmental quality exemptions use that word, contemplates resale. *See Mumma Bros. Drilling Co. v. Department of Revenue,* 411 N.E.2d 676, 678 (Ind. Ct. App.), *reh'g denied* (1980) (so holding as to the industrial equipment exemption). However, the taxpayer did not purchase any herbicide from any of its manufacturer lessees, so it could not have resold any herbicide. There is also no evidence before the Department that the present taxpayer prepared the additives itself. Its position is thus distinguishable from that of the taxpayer in *Mechanics Laundry,* in which the court did allow that taxpayer to claim the industrial equipment exemption in connection with its production or manufacturing of the logos and name tags for the uniforms it laundered. 650 N.E.2d at 1230. The holding of *Indiana Waste I* quoted above, 633 N.E.2d at 363, concerning the environmental quality exemption therefore bars the taxpayer from entitlement to this exemption on the theory that it was a manufacturer.

4. The Taxpayer Was Not Engaged in Agriculture.

Lastly, the taxpayer was not engaged in agriculture as Indiana law defined it by 1991, when the containment regulations took effect and the taxpayer was required to comply with them. Well-settled Indiana judicial precedent defined "agriculture" as "the art or science of cultivating the soil, including the planting of seed, the harvesting of crops, and the raising, feeding and management of live stock or poultry." *Fleckles v. Hille,* 149 N.E. 915, 915-16 (Ind. App. 1925) ("*Fleckles*"), adopted in *H.J. Heinz Co. v. Chavez,* 140 N.E.2d 500, 502 n.1 (Ind. 1957) ("*Chavez*"). By 1991, the federal and Indiana appellate courts had both further held that not every kind of work, task or duty related to agriculture is agricultural. In *Farmers Reservoir & Irrigation Co. v. McComb*, 69 S.Ct. 1274 (U.S)., *reh'g denied* 71 S.Ct. 31 and 32 (1949) ("*Farmers Reservoir & Irrigation*"), the U.S. Supreme Court had succinctly observed that "the conclusion that [a type of] work *is necessary* to agricultural production does not require [saying] that it *is* agricultural production." 69 S.Ct. at 1277 (emphases in original). The Court explained this statement later in its opinion as follows:

> [F]unctions which are necessary to the total economic process of supplying an agricultural product, become, in the process of economic development and specialization, separate and independent productive functions operated in conjunction with the agricultural function but no longer part of it. Thus, *the question as to whether a particular type of activity is agricultural is not determined by the necessity of the activity to agriculture* nor by the physical similarity of the activity to that done by farmers in other situations. *The question is whether the activity in the particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity.*

Id. at 1278, quoted in *Day v. Ryan*, 560 N.E.2d 77, 83 (Ind. Ct. App. 1990) (emphases added by the Department). Accordingly, the

Department interprets the mention of "agriculture" in IC § 6-2.5-5-30(2) as referring to "agriculture" as defined by *Fleckles* and *Chavez* and limited by *Farmers Reservoir & Irrigation* and *Ryan*.

The taxpayer did not engage in "the art or science of cultivating the soil, including the planting of seed, the harvesting of crops, [or] the raising, feeding and management of live stock or poultry." *Chavez,* 140 N.E.2d at 502 n.1, quoting *Fleckles,* 149 N.E. at 915-16 (internal quotation marks omitted). Its activities, while necessary to agriculture, were economically independent of it, particularly so given that, as discussed above, the taxpayer did not derive its revenues from farmers, but from the rent or storage charges paid by its manufacturer lessees. Given this circumstance and the scope of the legal definition of "agriculture," the Department finds that the taxpayer was not "engaged in the business of … agriculture" within the meaning of IC § 6-2.5-5-30(2).

5. Summary and Conclusion of Production Requirement Analysis

In short, the taxpayer was not engaged in processing, refining, manufacturing or agriculture concerning its herbicide operation. Moreover, notwithstanding the taxpayer's assertion that it constructed the buildings to comply with both the commercial fertilizer and pesticide containment regulations, the taxpayer discussed in its brief only the actions it performed in connection with herbicide. The Department therefore cannot view taxpayer's discussion of its herbicide activities as also applying to any fertilizer activities in which it may have been engaged, and accordingly rules that the taxpayer has waived any argument as to the latter activities.

The taxpayer was acting as a warehouseman of the herbicide, and the Department has no evidence before it that the taxpayer was not acting as a warehouseman of the fertilizer as well. Warehousing is not listed in IC § 6-2.5-5-30(2) as one of the businesses entitled to claim the environmental quality exemption. Accordingly, the Department finds that the taxpayer has failed to prove the production requirement of IC § 6-2.5-5-30(2). These failures of proof would be enough by themselves for the Department to deny the taxpayer the environmental quality exemption for its use of these items, even if it had satisfied the environmental compliance requirement. However, as the Department will discuss below, the taxpayer has also failed to satisfy that requirement as to one disputed capital asset.

F. THE TAXPAYER'S ACQUISITION AND USE OF THE SHOWER/EYE WASH DOES NOT MEET THE ENVIRONMENTAL COMPLIANCE REQUIREMENT.

The shower/eye wash that the taxpayer bought fails to meet the environmental compliance requirement because it does not protect the environment. Rather, it protects those of the taxpayer's employees who might come into direct contact with discharged fertilizer or herbicide within the operational area. The interior of a workplace is not part of the environment for purposes of the environmental protection laws. *E.g., Covalt v. Carey Canada, Inc.,* 860 F.2d 1434, 1439 (7th Cir. 1988). *Cf. Indiana Dep't of State Revenue v. RCA Corp.*, 310 N.E.2d 96 (Ind. Ct. App. 1974) (denying the industrial equipment exemption to air conditioning equipment the taxpayer used to control internal temperature of its manufacturing plant). The present taxpayer thus could not have acquired or used the shower/eye wash for an environmental protection purpose, and as a result it does not qualify for the environmental quality exemption for this additional reason as well.

G. CONCLUSION

The taxpayer has thus failed to prove that it met the production requirement of IC § 6-2.5-5-30(2) as to any of the items, or the environmental compliance requirement of IC 6-2.5-5-30(1) as to the shower/eye wash. For these reasons, it has failed to sustain its burden of proof under IC §§ 6-2.5-5-30 and 6-8.1-5-1(b) that its use of the disputed items fell under the environmental quality exemption and that the assessment is therefore wrong.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04960522.LOF

LETTER OF FINDINGS NUMBER: 96-0522
Sales and Use Tax
For the Period: 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 a specific issue.

ISSUES

I. Sales/Use Tax – Public Transportation Exemption

Authority: IC 6-2.5-5-27; 45 IAC 2.2-5-61; National Serv-All, Inc. v. Indiana Dept. of State Revenue, 644 N.E.2d 954 (Ind.Tax 1994); Indiana Waste Systems v. Indiana Dept. of State Revenue, 644 N.E.2d 960 (Ind.Tax 1994); Panhandle Eastern Pipeline Co., v. Indiana Dept. of State Revenue, 2001 WL 8920 (Ind.Tax 2001)

The taxpayer protests the assessment of sales/use tax on consumable supplies.

STATEMENT OF FACTS

The taxpayer operates a dairy, two cafeterias, a delivery fleet, and a public transportation company. The taxpayer uses seventy-one (71) pieces of transportation equipment (trucks and trailer units) in its operations. Eight units out of the 71 are used solely for providing public transportation for hire. The taxpayer specifically designates the 8 trucks and trailer units as hauling for hire. They were not used for any other function during the period at issue.

I. Sales/Use Tax – Public Transportation Exemption

DISCUSSION

The auditor assessed use tax on fuel and repair parts relating to trucks that were used to transport bagged ice for another corporation. The auditor concluded that the transportation service taxpayer provided to the other corporation was not the predominant use of the taxpayer's truck fleet. Thus, the taxpayer did not come within the ambit of IC 6-2.5-5-27 and 45 IAC 2.2-5-61, and the auditor deemed the fuel and repair parts consumed by the eight trucks and trailers (hereinafter referred to as "truck units") as taxable. The auditor takes the position that the transportation services provided by the taxpayer must be the predominant use or purpose of the taxpayer's truck fleet.

The taxpayer argues that it is not the overall fleet that is to be analyzed, but the predominant use of the individual vehicles (i.e., the 8 truck units) that should be looked at. The differences in the auditor and the taxpayer can be set out thusly:

Auditor: Predominant use or purpose of the taxpayer's fleet. Since only 8 of the 71 truck units are used for public transportation, the taxpayer fails to be predominantly engaged in public transportation.

Taxpayer: The individual vehicle must be used predominantly in public transportation. Since 8 truck units meet this test (the 8 truck units are used exclusively for public transportation) they meet the predominant use test (in fact they are entirely, not just predominantly used, for public transport).

Some background on the history of the "predominant" test(s) sheds light on the situation.

The Tax Court has addressed the issue of public transportation in several cases. The first two cases involved contract hauling of garbage. In National Serv-All, Inc. v. Indiana Department of State Revenue, 644 N.E.2d 954 (Ind. Tax 1994), the Tax Court stated that although National Serv-All "engaged in 'public transportation' when it hauled Contract garbage," nonetheless National Serv-All did not prove "that its hauling of Contract garbage was the *predominant share* of its use of the items at issue." Id. at 959 (Emphasis in the original). The court concluded: "Although National engaged in the public transportation of property within the meaning of I.C. 6-2.5-5-27 when it hauled Contract garbage, it did not prove it predominantly engaged in public transportation." Id. at 960.

The Tax Court also faced a similar issue (public transportation and Contract garbage hauling) in Indiana Waste Systems of Indiana, Inc. v. Indiana Department of State Revenue, 644 N.E.2d 960 (Ind. Tax 1994). In that case the Court held that:

> Waste Management's maximum annual revenue from public transportation was 17.7 percent of its total revenue, and therefore, the remaining 80 plus percent of its revenue came from non-public transportation. The predominant use of Waste Management's trucks and other items, therefore, is not exempt....

Id. at 962.

The third case dealing with this issue for the Tax Court is Panhandle Eastern Pipeline Co. v. Indiana Department of State Revenue, 2001 WL 8920 (Ind. Tax 2001). Although this case is dissimilar insofar as it dealt with gas pipeline system and not trucks, the public transportation exemption was the issue litigated. The Tax Court, after noting the relevance of its two previous cases on public transportation, stated the following:

> If a taxpayer acquires tangible personal property for predominate use in providing public transportation for third parties, then it is entitled to the exemption. If a taxpayer is not predominately engaged in transporting the property of another, it is not entitled to the exemption.
>
> The Tax Court has set out a two-pronged test:
>
> (1) The taxpayer must be *predominately engaged* in public transportation of the property of another; and
>
> (2) The taxpayer's property must be *predominately used* for providing pubic transportation.

Prong (1) looks at the taxpayer itself—namely, is the taxpayer predominately engaged in public transport (this comports with the holding cited above in Indiana Waste Systems). Prong (2) looks at the individual units to see how they are used. Both prongs must be satisfied.

Under this analysis, the taxpayer is not predominately engaged in public transportation, since only 8 of the 71 truck units are involved with public transportation. Therefore, having failed prong (1), we need not turn to prong (2).

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

02980732.LOF

LETTER OF FINDINGS NUMBER: 98-0732
Gross Income Tax – Scientific Equipment Sales
For Tax Periods: 1993 through 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

Gross Income Tax – Scientific Equipment Sales

Authority: IC 6-8.1-5-1(b); 6-2.1-2-2; 6-2.1-3-3; 45 IAC 1-1-120; *Standard Pressed Steel Co. v. Dept. of Revenue of Washington*, 419 U.S. 560 (1975)

The taxpayer protests the inclusion of its scientific equipment sales in its Low Rate Gross Receipts.

STATEMENT OF FACTS

The taxpayer is a foreign corporation that sells blood gas analyzers and metallographic equipment. Medical facilities purchase the blood analyzers for conducting blood tests, and metal manufacturers purchase the metallographic equipment for use in the quality control process. The taxpayer also sells extended maintenance agreements whereby customers receive maintenance and repairs on equipment purchased. According to the taxpayer's Extended Maintenance Protection Agreement, maintenance and repairs are performed at the customer's business location whenever possible.

The taxpayer employs four employees in Indiana, all of whom work out of their residences. These employees variously facilitate the sale, installation, on-site training and warranty provisions of equipment sold. Three of the employees serve as service and repair representatives. Taxpayer's product brochure provides telephone and facsimile numbers for a "field sales office" purportedly in Indiana.

The Department audited taxpayer's business income for tax years 1993-1996. A deficiency was determined based upon the taxpayer's omission of its equipment sales in its Low Rate Gross Receipts. Taxpayer protested the assessment, and the Department held a hearing on June 17, 1998. Additional facts appear below as necessary.

DISCUSSION

A notice of proposed assessment constitutes prima facie evidence that the Department's claim for unpaid tax is valid. IND. CODE § 6-8.1-5-1(b). The person against whom the proposed assessment is made has the burden of proof that the assessment is wrong. *Id.*

The taxpayer in the instant case advances two main reasons for excluding its Indiana equipment sales from gross income tax. First, it argues that the equipment sales represent sales in interstate commerce. In support of this argument, the taxpayer alleges that its Indiana sales representatives "merely solicit sales" and that all shipping, approvals of orders and customer credit checks take place at or from its corporate headquarters outside of Indiana. (Letter from Taxpayer to Department of 12/18/97 at 1.) Second, the taxpayer states that a prior corporate income tax audit by the Department determined that the aforementioned argument and allegation were "bonafide." *Id.* These arguments will be addressed in turn.

(1) Interstate Commerce Exemption

Indiana Code 6-2.1-2-2 imposes a gross income tax on the gross receipts from a trade or business unless the receipt of gross income qualifies for an interstate commerce exemption. "Business conducted in interstate commerce between the state of Indiana and either another state or a foreign country is exempt from gross income...." IC 6-2.1-3-3.

During the audit period the Department had codified its gross income tax regulation on the interstate sale of goods to Indiana buyers at 45 IAC §1-1-120 (1988) (current version at 45 IAC § 1.1-3-3 (1999)), which read in relevant part as follows:

> Sec. 120. Sales of Goods Originating in Other States to Persons in Indiana. As a general rule, income derived from sales made by nonresident sellers to Indiana buyers is not subject to gross income tax unless the seller was engaged in business activity within the State and such activity was connected with or facilitated the sales. Local activity sufficient to subject the seller to taxation may result... from the nature and extent of his business activities in the State.
>
> The regulation goes on to provide the following examples of taxable in-shipments:
>
> (2)(a) Sales made by a nonresident, when the seller has established a business situs within the State, and the sales originated from, were channeled through or were otherwise connected with the Indiana situs. Depending on the fact situation, a business situs may be an *office... business address, residence used for business purposes, business telephone, or any other kind of fixed establishment identified with the seller's business*.
>
> * * * *

(c) Sales made by nonresidents where the goods are shipped directly to the buyer from an out-of-state business location, but where the seller is conducting *substantial business activities within the State which were connected with the sales.*

(c) Sales made by a nonresident where the goods are shipped by the seller directly from an out-of-state location to the buyers, but where the seller had an *employee or employees working within the State who were responsible for maintaining valuable and long-lasting contractual relations between seller and buyer, from which relations the sales arose.*

45 IAC §1-1-120 (*emphasis added*).

Information provided in the Audit report and by the taxpayer evidences the establishment of an Indiana situs to which equipment sales are connected. First of all, the taxpayer, through use of its Indiana employees' residences, uses several fixed establishments for its Indiana equipment business. Moreover the taxpayer advertises on its brochure an Indiana business telephone number, designated as that of an Indiana "Field Sales Office," which customers may—and likely, do—use to conduct business with an Indiana field representative. As a result, the taxpayer's use and advertising of these facilities for its Indiana employees' business activities establishes a presence in Indiana which mirrors circumstances described in Rule 45 IAC 1-1-120(2)(a). Because these activities fall within the ambit of this rule, the taxpayer's equipment sales facilitated in part through them are subject to gross income tax.

The business activities of taxpayer's Indiana employees themselves further establish Indiana situs and tax liability. Contrary to taxpayer's assertion that its Indiana employees "merely solicit sales," they in fact perform other necessary services once equipment sold is delivered to Indiana buyers. Specific post-delivery duties of these employees variously include installation, training, maintenance, and warranty work on the equipment, usually at the buyer's place of business. These activities, which are directly connected with and are performed as a result of the sale, clearly constitute the performance of services in Indiana. As such, they fall within the ambit of 45 IAC § 1-1-120(2)(b) and subject the taxpayer's equipment sales income to gross income tax.

Lastly, Taxpayer's Indiana activities fall within the ambit of Rule 45 IAC 1-1-120(2)(c). In *Standard Pressed Steel Co. v. Dept. of Revenue of Washington*, 419 U.S. 560 (1974), the United States Supreme Court evaluated a single resident employee's customer relations activities in light of a similar rule. Operating out of his home, the employee primarily consulted with customers on their anticipated equipment needs and requirements, and followed up on difficulties clients encountered with equipment already delivered. 419 U.S. at 561. He at no time took orders for his employer. *Id.* Considering whether these in-state activities created income tax liability for the out-of-state employer, the Court focused on the connection between those activities and the sales realized. 419 U.S. at 564. The Court held that the employee, "with a full-time job within the State, made possible the realization and continuance of valuable contractual relations" between his out-of-state employer and an in-state customer. 419 U.S. at 562-63. Taxation, the Court reasoned, may be thus justified where the providence of such services is "substantial 'with relation to the establishment and maintenance of sales, upon which the tax was measured....'" 419 U.S. at 563 (quoting *General Motors Corp. v. Washington*, 377 U.S. 436, 447 (1964)).

It is the Department's position that Taxpayer's Indiana employee activities are similarly substantial in relation to the equipment sales upon which taxpayer's tax liability is based. While it may be true that taxpayer's Indiana employees do not approve sales, they do perform a variety of other activities within Indiana and directly connected with Indiana equipment sales. In effect, these activities both establish and maintain taxpayer's Indiana income from equipment sales. This income is, therefore, subject to Indiana gross income tax.

(2) Treatment of Prior Audits

The taxpayer sets out a general equitable argument—unsupported by citations to statutory or regulatory authority—that the treatment of taxpayer's sales activities in pre-1992 audits preclude the Department from assessing tax on sales activities in 1992-1994 audits.

Specifically, the taxpayer argues that it is entitled to rely upon the fact that a prior corporate income tax audit by the Department "determined that reason's [sic] number 1 and 2 listed above were bonafide." (Letter from Taxpayer to Department of 12/18/97 at 1). By "reasons 1 and 2" the taxpayer means that its "equipment sales represent sales in interstate commerce" and that its "Indiana sales representatives merely solicit sales," with shipping, order approvals and customer creditworthiness taking place outside of Indiana." *Id.*

Conclusions reached in prior audits about the nature or extent of a taxpayer's Indiana business activities may not, however, be used to estop the Department from reaching different conclusions in subsequent audit periods based on facts ascertained during that period. The Department considers each audit period separately, based upon the particular facts and circumstances contained therein. Absent evidence of factual similarities between taxpayer's pre-1992 commercial activities and those between 1992 and 1996, the Department finds the taxpayer's assertion unpersuasive.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

02990151.LOF

LETTER OF FINDINGS NUMBER: 99-0151 FIT
Gross Income Tax
For Tax Periods: 1994 through 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. Gross Income Tax – Leasing Activities

Authority: *Indiana-Kentucky Elec. Corp. v. Indiana Dept. of State Revenue*, 598 N.E.2d 647, (Ind.Tax Ct. 1992); *First National Leasing v. Indiana Dept. of State Revenue*, 598 N.E.2d 640 (Ind.Tax Ct. 1992); 45 IAC 1-1-17; 45 IAC 1-1-49; 45 IAC 1-1-51

Taxpayer protests the characterization of certain receipts as Indiana gross income.

II. Gross Income Tax – Depreciation Deduction

Authority: *Associated Insurance Companies, Inc., v. Indiana Dept. of State Revenue*, 655 N.E.2d 1271 (Ind.Tax Ct. 1995); IC 6-2.1-4-3; IC 6-2.1-5-5(b), (c); IC 6-2.1-4-1(d); IC 6-2.1-4-6(a)

Taxpayer protests the disallowance of depreciation deductions claimed by its consolidated group.

STATEMENT OF FACTS

The Department conducted an audit of taxpayer—a Delaware corporation who, along with its subsidiaries, file one consolidated gross income tax return with the State of Indiana—for tax periods 1994 through 1996. The audit resulted in proposed assessments of Indiana gross income tax. The proposed assessments involve issues relating to two of the corporate members of taxpayer's affiliated group. Taxpayer now protests these proposed assessments.

I. Gross Income Tax – Leasing Activities

DISCUSSION

One member of taxpayer's consolidated group ("Dealer") operates vehicle dealerships in Indiana. The Dealer's customers may either purchase or lease their desired vehicle. Among the many financing options available to the Dealer's customers is the leasing of the vehicle through HLC, a leasing company. HLC is an out-of-state corporation and another member of taxpayer's consolidated group. (HLC is a wholly-owned subsidiary of NFC, which is a wholly-owned subsidiary of taxpayer.) HLC has no employees in Indiana.

The HLC leasing option is one of many financing options the Dealer can offer its customers. If a customer of Dealer is interested in HLC's services, he/she fills out a credit application at the dealership. The application is forwarded to one of NFC's district offices in either Illinois or Ohio. If the customer passes the credit check, the district office sends to the Dealer a finance sales proposal to give to the customer. The Dealer informs the district office of the customer's final decision regarding the proposal. In all instances, the leases are signed and accepted by HLC, by its parent company NFC, in Illinois. HLC sends all bills to lessees from Illinois, and all lease payments are sent by lessees to HLC in Illinois.

Audit contends the income received by HLC from leases made to Indiana customers should be included in taxpayer's consolidated Indiana gross income (high rate). Taxpayer argues this income should be excluded from its Indiana gross income because the lendor/lessor (HLC) has no "tax situs" in Indiana with regard to this income.

45 IAC 1-1-17 provides in pertinent part that: "'gross income' and 'gross receipts' mean the entire amount of gross income received by a taxpayer. This includes all income actually or constructively received." Here, the income in question is the lease income received by HLC for financing and leasing vehicles located in Indiana. Lease income is considered an intangible for gross income tax purposes. *See* 45 IAC 1-1-51. Intangible means a personal property right, which exists only in connection to something else. *Id*. In general, receipts derived from an intangible are included in gross income unless the intangible does not form an integral part of a trade or business situated and is not regularly carried on at a business situs in Indiana, and the taxpayer's commercial domicile is located outside Indiana. *Id*. Both taxpayer and HLC are commercially domiciled outside of Indiana.

Determining the taxability of income from intangibles is a two part test. 45 IAC 1-1-51. (Emphasis added). The first test, the "business situs" test, provides that if the taxpayer has established a business situs in Indiana, and "the intangible forms an integral part of a business regularly conducted at [that] situs," then the intangible has an Indiana situs for tax purposes. *Id*. The second test, termed the "commercial domicile" test, holds that if the taxpayer has established its commercial domicile in Indiana, "all of the income from intangibles will be taxed... except that income which may be directly related to an integral part of a business regularly conducted at a 'business situs' outside Indiana." *Id*. If the taxpayer has established its commercial domicile in another state, then "no income from intangibles will be taxed... unless the taxpayer has also established a business situs in Indiana and the intangible income derived therefrom forms an integral part of that Indiana activity." *Id*.

Pursuant to 45 IAC 1-1-49, a taxpayer may establish a business situs in ways including, but not limited to, the following:

(1) Use, occupancy or operation of an office, shop, construction site, store, warehouse, factory, agency route or other place where the taxpayer's affairs are carried on;

(2) Performance of services;

...

(5) Acceptance of orders without the right of approval or rejection in another state;

(6) Ownership, leasing, rental or other operation of income-producing property (real or personal);...
45 IAC 1-1-49.

Taxpayer concedes that it has a business situs in Indiana. HLC has an investment in real estate located in northern Indiana whereby HLC leases real estate to taxpayer. However, we find that taxpayer has a second business situs in Indiana. Taxpayer, through HLC, leases and takes an ownership interest in income-producing property in Indiana, *i.e.*, the leased vehicles. Therefore, as provided by 45 IAC 1-1-49(6), taxpayer has business situses in Indiana related to its leasing of real estate and its leasing of vehicles.

Although taxpayer, through HLC, has a business situs in Indiana related to the leasing of vehicles in the state, it must be determined whether HLC's business situs is also the "tax situs" or "source" of its income from the leasing activities. *See Indiana-Kentucky Elec. Corp. v. Indiana Dept. of State Revenue*, 598 N.E.2d 647, 662 (Ind. Tax Ct. 1992) (finding that Ohio corporation was not subject to imposition of gross income tax for sales of electricity to Indiana customers, where Ohio corporation had no tax situs within Indiana). We do this by examining whether the transactions giving rise to the intangible income are an integral part of HLC's Indiana business activities.

In support of its contention that the HLC leasing income should be excluded from its Indiana gross income because HLC has no "tax situs" in Indiana with regard to this income, taxpayer cites *First National Leasing v. Indiana Dept. of State Revenue*, 598 N.E.2d 640 (Ind.Tax Ct. 1992). Taxpayer believes its situation is the same as in *First National Leasing*.

In that case, First National Leasing leased train derailment equipment to 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.

In *First National Leasing*, the Indiana Tax Court specifically held that the income earned by an out-of-state corporation from leasing train derailment equipment to its wholly owned out-of-state subsidiary, who in turn, independently located the equipment in Indiana, was not derived from Indiana sources. The subsidiary did not make a lease payment to First National Leasing from Indiana. Here, by contrast, the taxpayer is not leasing to its out-of-state subsidiary, but rather, is the out-of-state subsidiary leasing to Indiana customers.

Furthermore, HLC's primary business is financing and leasing vehicles. The vehicles are delivered to the lessees at the dealerships. The leases are for over-the-road trucks that must be titled and licensed in Indiana for road use. HLC requires information from its lessees each year regarding the location of the leased vehicles for property tax purposes. As such, the income in question is directly connected with the leasing and financing of the vehicles in Indiana. Since the vehicles that are financed or leased are generally located in Indiana, the lease income represents an integral part of taxpayer's Indiana business activities. Thus, taxpayer has not demonstrated a lack of business situs or that the lease income is not an integral part of the income derived from its Indiana activities. The Department, therefore, finds that taxpayer's Indiana-based vehicles also represent an Indiana tax situs for purposes of imposition of Indiana's gross income tax.

FINDING

Taxpayer's protest is denied.

II. Gross Income Tax – Depreciation Deduction

DISCUSSION

ICC, a wholly-owned subsidiary of taxpayer, is a member of taxpayer's consolidated filing group for gross income tax reporting purposes. In computing its Indiana gross income, ICC deducted all sales involved in interstate commerce as well as all sales made to the parent of its consolidated group (as inter-company sales). These deductions effectively eliminated all of ICC's taxable income for gross income tax purposes. ICC, however, also was entitled to a depreciation deduction for a resource recovery system pursuant to IC 6-2.1-4-3. Since ICC had no taxable Indiana gross income, this depreciation deduction was used to offset Indiana gross income generated by other members of the consolidated group. Audit disallowed the deduction. Audit contends the deduction may be used only by ICC and not by the consolidated group. Taxpayer, in response, argues that the depreciation deduction may be applied against the full amount of its consolidated gross income tax liability.

A depreciation deduction is allowed for qualified resource recovery systems. Specifically, IC 6-2.1-4-3 provides:

> 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... the taxpayer is entitled to a deduction from his gross income for that same taxable year. The amount of the deduction equals the total depreciation deductions that the taxpayer is allowed, with respect to the system, for that taxable year under Sections 167 and 179 of the Internal Revenue Code.

All parties agree that ICC was entitled to this depreciation deduction. The parties, however, are at odds with regard to the application of this deduction. Audit believes the deduction may be used only to offset income attributable to ICC; taxpayer asserts the deduction may be used to offset income attributable to the consolidated group.

The Indiana Tax Court has addressed a similar issue with regard to the application of an income tax credit against consolidated gross income tax liability. In *Associated Insurance Companies, Inc. v. Indiana Dept. of State Revenue*, 655 N.E.2d 1271 (Ind.Tax

Ct. 1995), the Court found that individual affiliated group members were entitled to apply their income tax credits against the entire consolidated gross income tax liability of the affiliated group. The Court reasoned that since the affiliated group—and not its individual members—represented a singular taxpayer, "the credit must apply to the full amount of the affiliated group's consolidated gross income tax liability." *Id*. at 1275. In reasoning that an affiliated group should be treated as a single taxpayer, the Court commented:

> The spirit and intent of the gross income tax consolidated filing statute is to treat an affiliated group as a single taxpayer. The individual provisions evidence this spirit and intent. For example, the corporations collectively file only one return. IC 6-2.1-5-5(b). The affiliated group is allowed only one standard deduction, rather than one standard deduction per corporation. IC 6-2.1-4-1(d). Each corporation is jointly and severally liable for the gross income tax liability of the entire group. IC 6-2.1-5-5(c). Additionally, transactions between corporations in the group are not counted toward gross income. IC 6-2.1-4-6(a).

Id. at 1273-1274.

With regard to deductions, this same logic compels a similar conclusion. If one is to treat "an affiliated group as a single taxpayer", then deductions properly attributable to any consolidated group member should be used to offset income earned by the consolidated group.

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

03990170.LOF

LETTER OF FINDINGS NUMBER 99-0170
Responsible Officer
Sales Tax and Withholding Tax
For Tax Periods: 1993-1997

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

ISSUES

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) at page 273

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

STATEMENT OF FACTS

The taxpayer was a shareholder and officer of a corporation that did not remit the proper amount of sales and withholding taxes to Indiana. The taxpayer was personally assessed for the taxes. The taxpayer protested these assessments and a hearing was held. 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 that 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).

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. The factors considered to determine whether a person has such authority are the following:

1. The person's position within the power structure of the Corporation;
2. The authority of the officer as established by the Articles of Incorporation, By-laws or employment contract; and
3. Whether the person actually exercised control over the finances of the business including control of the bank account, signing checks and tax returns or determining when and in what order to pay creditors.

Id. At 273.

The taxpayer was the vice-president of the corporation. Vice-presidents often have significant control over financial affairs of corporations. The taxpayer was also the largest individual shareholder in the corporation with thirty-one (31) shares.

The Secretary of State's office provided a copy of the Articles of Incorporation. There was no listing of officers or designation of duties of the various officers. No copy of the corporate By-laws was available.

The final indicium concerns the actual control over the finances of the corporation. Corporate records indicate that the taxpayer was vice-president of the corporation. Affidavits from three former employees of the corporation indicate that from May, 1993 until February, 1996, the taxpayer held himself out as president of the corporation and indicated that he was in complete control of the operation. The taxpayer hired and paid the employees during this period. Checks recovered from this period were signed by the taxpayer. Corporate bank statements were mailed to the taxpayer's home address. The taxpayer, as president, filed the April-June, 1993 "Indiana Department of Employment & Training Services Quarterly Contribution Report." No remit sales and use and withholding tax returns were filed during this period. The totality of the evidence indicates that the taxpayer had adequate actual control over the finances of the corporation to be determined a person with the duty to remit trust taxes to Indiana. This supports the assessment of the trust taxes personally against the taxpayer.

Finally, the taxpayer alleges that another officer was actually the person responsible for the remittance of taxes. The law does not require, however, that only one person be considered a person with a duty to remit taxes to the state. In the Safayan case, the corporate president was held to be a responsible person even though the day to day operations were specifically delegated to a vice-president in his employment contract as manager. "A party may be liable for trust taxes without having exclusive control over the corporation's funds." Safayan at 274. Another officer's possible responsibility for the remittance of taxes does not absolve the taxpayer from responsible officer liability.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

02990400.LOF

LETTER OF FINDINGS NUMBER: 99-0400
State Corporate Income Tax
For 1991, 1992, 1993, 1994, and 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. Income Tax – Apportionment Calculations

Authority: 45 IAC 3.1-1-53; IC 6-3-2-2(e); *Blue v. Beach et al.,* 155 Ind. 121; 56 N.E. 89; S.C. IN 1900

Taxpayer protests the addition of gross receipts from the out of state sale and out of state delivery of tangible property to its adjusted gross income apportionment sales factor.

STATEMENT OF FACTS

Taxpayer, a supplier of natural gas located in Indiana, entered into contracts with various entities to supply them with natural gas. These transactions consisted of the taxpayer purchasing the gas at an out of state entity and transporting it by interstate pipelines to the purchaser at a separate out of state location. The audit report added the income from these transactions to the numerator of the taxpayer's adjusted gross income apportionment sales factor. Taxpayer filed a timely protest to these adjustments.

I. Income Tax – Apportionment Calculations

DISCUSSION

Audit report cited 45 IAC 3.1-1-53, Example #6 as the basis for this adjustment. This regulation, in relevant part, states:

When Sales of Tangible Personal Property Are in This State. Gross receipts from the sales of tangible personal property (except sales to the United States Government-See Regulation 6-3-2-2(e)… are in this state: (a) if the property is delivered or shipped to a purchaser within this state regardless of the F.O.B. point or other conditions of sales; or (b) if the property is shipped from an office, store, factory, or other place of storage in this state, and the taxpayer is not taxable in the state of the purchaser….

Examples:

….

(6) If a taxpayer whose salesman operated from an office located in Indiana makes a sale to a purchaser in another state in which the taxpayer is not taxable and the property is shipped directly by a third party to the purchaser, the sale will be attributed to the state from which the property is shipped if the taxpayer is taxable in that state. *If the taxpayer is not taxable in the state from which the property is shipped, then the property will have been deemed to have been shipped from Indiana and the sale is attributed to Indiana. (Emphasis added)*

The statute cited in and construed by the above regulation is IC 6-3-2-2(e), which states in relevant part:

(2) Gross receipts from the sale of tangible personal property (except sales to the United States Government) are in this state:

(a) if the property is delivered or shipped to a purchaser within this state regardless of F.O.B. point or other condition of sale; or

(b) if the property is shipped from an office, store, factory, or other place of storage in this state, and the taxpayer is not taxable in the state of the purchaser.

Taxpayer argument centers on the construed statute's explicit requirement for the tangible property in question to either originate in or be delivered to Indiana and the expansion of that requirement by the regulation. Taxpayer cites to *Blue v. Beach et al.,* 155 Ind. 121; 56 N.E. 89; (S.C. IN 1900), which states in relevant part:

The rule in respect to the delegation of legislative power is admirably stated in Locke's Appeal, 72 Pa. 491, 13 Am. Rep. 716 (1873) as follows: "Then, the true distinction, I conceive, is this: The legislature can not delegate its power to make a law; *but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.* To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend, which can not be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation." *(Emphasis added)*

Taxpayer's contention that an expansion of a statute's scope by an administrative regulation is not permitted is correct, although, as the court notes the clarification of a statute's scope is a delegateable power of the legislature, which has been done in IC § 6-8.1-3-3(a); which states:

The department shall adopt, under IC 4-22-2, rules governing:

(1) the administration, collection, and enforcement of the listed taxes;

(2) the *interpretation of the statues* governing the listed taxes;

(3) the procedures relating to the listed taxes; and

(4) the methods of valuing the items subject to the listed taxes.

(Emphasis added)

Gross receipts from the sale of tangible property are defined by the statute as in this state and are to be added to the numerator of the apportionment formula when they are either (a) delivered or shipped to a purchaser within this state regardless of F.O.B. point or other condition of sale; or (b) if the property is shipped from an office, store, factory, or other place of storage in this state, and the taxpayer is not taxable in the state of the purchaser. (IC 6-3-2-2(e)(2))

IC-6-3-2-2 (e)(2)(a) requires delivery or shipment to "a purchaser within this state." This is not the case in this situation and thus not applicable.

Taxpayer concedes that taxpayer is not taxed, or taxable, in the states where the transactions at issue occur and thus the gross receipts are eligible under the second half of IC-6-3-2-2(e)(2)(b)-"and the taxpayer is not taxable in the state of the purchaser." However the first half of this requirement, "the property is shipped from an office, store, factory, or other place of storage in this state," is not established. The two halves of this requirement are joined by the conjunction "and," requiring both be fulfilled before the definition is met, which is not the result under these facts.

The precept of 45 IAC 3.1-1-53 paraphrases IC-6-3-2-2(e) with the preceding analysis of IC-6-3-2-2 (e)(2) applicable.

45 IAC 3.1-1-53, Example 6, states in relevant part, "If the taxpayer is not taxable in the state from which the property is shipped, then the property will have been deemed to have been shipped from Indiana and the sale is attributed to Indiana." By taxpayer's admission to the non-taxability of the transaction by the state where the purchase was made and the tangible goods were shipped from, the gross receipts from this transaction should be added to the numerator of the taxpayer's adjusted gross income apportionment sales factor.

Inasmuch as the regulation is dealing with an issue not explicitly covered by the statute, i.e. income unattributable to any state under the existing apportionment statute, the regulation relied on by the Department does not constitute an expansion of the statute, rather a permissible and anticipated clarification of the statute as is required of the Department by IC § 6-8.1-3-3(a). Consequently, Example 6 is authorized to address the apportionment of the taxpayer's income from nontaxable transactions involving the out of state purchase, shipment, and delivery of tangible property.

FINDING

Taxpayer protest denied.

DEPARTMENT OF STATE REVENUE

02990428.LOF

LETTER OF FINDINGS NUMBER: 99-0428 ITC
Gross Income Tax
For Years 1995, 1996, and 1997

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

ISSUE

I. Gross Income Tax – Constructive Receipt

Authority: 45 IAC 1-1-10; IC § 6-1.1-2-4; *Board of Tax Commissioners v. Jewell Grain Co*., 556 N.E.2d 920 (Ind. Supreme Court, 1990)

Taxpayer protests the assessment Gross Income tax on the value of property taxes paid for taxpayer's property by tenant.

STATEMENT OF FACTS

Out-of-state taxpayer owns tangible property in Indiana which is leased to the user of the property. Taxpayer was assessed gross income tax on the property tax paid by the tenant pursuant to taxpayer's contract with tenant. Taxpayer protests this assessment on the basis that it did not constitute constructive receipt of the payments by taxpayer.

I. Gross Income Tax – Constructive Receipt

DISCUSSION

The Department's assessment was based on 45 IAC 1-1-10, which states:

"Gross income" defined

(a) Except as otherwise provided in this article, "gross income" means the entire amount of receipts received by a taxpayer, actually or constructively, without any deductions of any kind or nature except as specifically allowed under IC 6-2.1-4.

(b) Amounts included in gross income are:

(1) cash and checks;

(2) notes or other property of any value or kind;

(3) anything else of value received by or credited to the taxpayer in lieu of cash.

(c) The term does not include any amounts specifically excluded by IC 6-2.1-1.

Taxpayer protest is based on the proposition that taxpayer was not responsible for the taxes at issue and that payment of these taxes by the tenant did not constitute constructive receipt of income to the Taxpayer. Taxpayer cites IC § 6-1.1-2-4, which states:

(a) The owner of any tangible property on the assessment date of a year is liable for the taxes imposed for that year on the property.

(b) A person holding, possessing, controlling, or occupying any tangible property on the assessment date of a year is liable for the taxes imposed for that year on the property unless:

(1) He establishes that the property is being assessed and taxed in the name of the owner; or

(2) The owner is liable for the taxes under a contract with that person.

When a person other than the owner pays any property taxes as required by this section, that person may recover the amount paid from the owner, unless the parties have agreed to other terms in a contract.

The taxpayer argues this statute allows a shift of responsibility for the property tax and that by the taxpayer transferring the responsibility for payment of these taxes to the tenant taxpayer is no longer liable for them. The Indiana Supreme Court ruled in *Board of Tax Commissioners v. Jewell Grain Co*., 556 N.E.2d 920 (Ind. Supreme Court, 1990) at 922:

We find this statute unambiguous. Under the ordinary meaning of the words chosen by the legislature, the Board has the discretion to tax either the owner or the possessor unless the possessor can prove the owner is being taxed, or the owner has accepted liability for the tax under contract. The statute does not clearly indicate any order of priority. The statute does not place primary tax liability on a possessor, because its provisions allow the possessor to escape liability by establishing that the property is being assessed and taxed to the owner, and to recover the amount paid from the owner unless the parties agreed to other terms in a contract. [Cite omitted]

The statute, as held by the court, imposes the tax on the property in question with the issue of who is paying being regulated but irrelevant to the underlying issue of taxation of the property in question. Indeed, pursuant to the Court's decision, the tenant

[possessor] is entitled to "recover the amount paid from the owner unless the parties agreed to other terms in a contract." *ibid.* Here, absent proof of an assumption of the duty to pay the taxes, the tenant [possessor] is not responsible for the payment.

The statute and court make explicit reference to a contract being the only defense for the owner of the property in the event of a lawsuit by the tenant to recover the tenant's payment of the property tax. A contract- by definition-requires a *quid pro quo* between the parties; thus the requirement that something of value be provided by both parties identifies the payment of the property tax by the tenant as something of value to the owner of the property.

Furthermore, if taxpayer's tenant does not pay the property tax at issue, IC 6-1-24 outlines the procedure for the seizure and sale of real property for failure to pay the taxes in question. Although- if the tenant had not already vacated the property- the tenant could lose the use of the property as a consequence of the seizure; the state's actions would be directed and limited to the seizure of taxpayer's property.

The avoidance of the seizure of taxpayer's property and the statutorily required contract to shift liability for the tax from the property owner both establish the "anything else of value received by or credited to the taxpayer in lieu of cash," identified in 45 IAC 1-1-10(b)(3) as gross income.

Taxpayer also argues the adjusted gross income statute IC § 6-3-1-3.5 does not treat this as constructive receipt of income. Taxpayer does note that this applies to the adjusted gross income tax, not the gross income tax at issue. The Department finds that in this instance there is no link between the respective sections of the code.

Consequently the Department finds that the payment of the property taxes, either by taxpayer or tenant, constitutes a value to taxpayer and the payment by the tenant of these taxes constitutes constructive receipt of gross income to taxpayer.

FINDINGS

The taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

02990593P.LOF

LETTER OF FINDINGS NUMBER: 99-0593P
Income Tax
Calendar Year 1997

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

ISSUE

I. Tax Administration – Penalty

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

The taxpayer protests the negligence penalty.

II. Tax Administration – Interest

Authority: IC 6.8-1-10.1

The taxpayer protests the interest assessment.

STATEMENT OF FACTS

The negligence penalty and interest were assessed on an income tax assessment that resulted from a Department system generated billing for the calendar year 1997.

The taxpayer is an information technology company.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer argues the negligence penalty should be waived as the taxpayer mistakenly calculated the correct amount of tax due. This miscalculation was the result of a shortage of personnel.

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

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

FINDING

The taxpayer's penalty protest is denied.

II. Tax Administration – Interest

DISCUSSION

The taxpayer protests the interest assessed.

IC 6.8-1-10.1 does not allow the waiver of interest. As such, the Department finds the assessment of interest proper and denies the interest protest.

FINDING

The taxpayer's interest protest is denied.

DEPARTMENT OF STATE REVENUE

0220000400.LOF

LETTER OF FINDINGS NUMBER: 00-0400
Income Tax
Calendar Year Ended December 31, 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 – Application of Payment

Authority: IC 6-8.1-5-1

Taxpayer protests the assessments.

STATEMENT OF FACTS

Taxpayer was assessed $550 tax, plus penalty, and interest for failure to remit all of its tax due by the due date of the return.

Taxpayer's representative states that the Department's estimated payments do not agree with those of the taxpayer. Taxpayer submitted copies of two checks, each in the amount of $275.00, and states that this should resolve the issue. The issue dates of the checks are April 14, 1999 and June 10, 1999.

Upon review by the hearing officer, it was determined that the Department refunded $275.00 plus $10.58 interest on January 28, 2000 for an overpayment on the 1998 tax return for the check issued on April 14, 1999. Departmental records also indicate that the taxpayer never questioned the refund, accepted and cashed it. The $275.00 was never applied to 1999.

The June 1999 payment in the amount of $275.00 was applied to the Taxpayer's account after the payment was erroneously mailed to the Internal Revenue Service. A revised billing was issued reducing the original tax assessment from $550.00 to $275.00 plus penalty and interest.

I. Tax Administration – Application of Payment

DISCUSSION

Taxpayer's only response and argument is that the company ceased business in the year 2000 and is administratively dissolved.

Taxpayer submitted copies of two checks in the amount of $275.00 each dated April 14, 1999 and June 10, 1999 and states they should resolve the issue.

The hearing officer found that the taxpayer cashed a refund check in the amount of $275.00 plus $10.58 interest for an overpayment in tax for calendar year 1998. The $275.00 was not applied to 1999, therefore, this balance is due. The second check in the amount of $275.00 was misapplied, corrected, and a revised billing issued.

Taxpayer has not provided additional evidence to negate or reduce the remaining assessments.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120000407.LOF

LETTER OF FINDINGS NUMBER: 00-0407
Individual Income 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. Individual Income Tax – Failure to File Returns

Authority: 45 IAC 3.1-1-1

Taxpayer protests the audit assessment.

II. Tax Administration – Penalty

Authority: IC 6-8-10-1-2.1; 45 IAC 15-11-2

The Department addresses the penalty.

STATEMENT OF FACTS

Taxpayer, at hearing on May 10, 2001, failed to provide documentation that would allow the department to make an adjustment to the audit. Taxpayer was given thirty days (30) to obtain bank statements for his personal and business accounts and other pertinent information and to take them to the district office and the auditor would use the information to supplement the audit. The taxpayer provided minimal records that could not be verified for accuracy. Taxpayer provided conflicting information, both to the hearing officer and the auditor. The determination is made based upon information contained in the audit file, taxpayer's protest letter dated October 7, 2000, information at hearing on May 10, 2001, and auditor's remarks dated August 7, 2001.

Taxpayer is a sole proprietor of a travel agency and vending machines from which he sells prepaid telephone calling cards. Taxpayer is the sole shareholder of an S-corporation that owned two sandwich shops, both of which were sold during the audit period. Taxpayer also owns rental property in Indiana and has not filed tax returns since 1996. Other audits relating to the taxpayer are contained in Audit Control Numbers 270032-08, 268638-04, 269659-02, 271118-04, and 272157-00.

The auditor states, that documentation provided appeared to have been generated on a home computer and no viable data from outside sources to substantiate taxpayer's claim of minimal income. The source documents were never made available.

The taxpayer filed no individual income tax returns for the years at audit.

On May 11, 2001 the file was returned to the auditor because the taxpayer stated that it had additional information to negate a portion of the assessment. On August 7, 2001 the auditor returned the file to the Legal Division without resolution.

I. Individual Income Tax – Failure to File Returns

DISCUSSION

Taxpayer's letter dated October 7, 2000 states it does not owe what the department determined and he has additional information to negate a portion of the assessment. Taxpayer, however, did not provide documentation to allow the department to make adjustments to the audit.

FINDING

Taxpayer's protest is denied.

II. Tax Administration – Penalty

DISCUSSION

Although the taxpayer did not specifically protest the penalty assessed, the department addresses the penalty. Taxpayer failed to file IT-40 returns as required.

Taxpayer has not provided reasonable cause for the failure to file returns.

FINDING

Taxpayer's protest is denied.

CONCLUSION

Taxpayer's protest is denied for issues I and II.

DEPARTMENT OF STATE REVENUE

0220000408.LOF
0220000409.LOF

LETTER OF FINDINGS NUMBERS: 00-0408; 00-0409
Indiana Gross Income Tax
For the Tax 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 the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Applicability of the State Gross Income Tax to Taxpayers' Procurement and Transfer of Steel Products

Authority: IC 6-2.1-1-2; IC 6-2.1-1-2(a); IC 6-2.1-2-2; 45 IAC 1.1-3-3(d)(1); 45 IAC 1.1-3-3(d)(2); 45 IAC 1.1-3-3(d)(7)

Taxpayers enter into various transactions for the procurement of steel on behalf of third-party customers. The exact nature of the transactions being at issue, taxpayers protest the imposition of the state's gross income tax on those transactions. Audit characterized the transactions as the purchase and sale of steel. Taxpayers argue that they are merely performing services indirectly related to the procurement of the steel. Taxpayers argue that because they do not take title to the steel, do not take possession of the steel, have no responsibility for loss or damage to the steel, taxpayers should not be subject to the gross income tax.

STATEMENT OF FACTS

Taxpayers are sister corporations involved in the procurement of commodities. Taxpayer One is incorporated in New York and maintains branch offices in various parts of the country. It does not maintain a branch office in Indiana. When a third-party customer decides to purchase a commodity, third-party customer deals directly with Taxpayer One for the procurement of that commodity.

Taxpayer Two is incorporated in Delaware but maintains its only office in New York City. Taxpayer Two specializes in the procurement of steel and steel-related products. Taxpayer Two, in effect, acts as the steel procurement arm for Taxpayer One.

When third-party customer wishes to obtain steel, it makes contact with Taxpayer One. Taxpayer One transfers the "order" to Taxpayer Two which, in turn, deals directly with the steel mill. Both Taxpayer's charge a fee for their services. Ultimately, the invoice for the steel purchase – together with both Taxpayers' fees – is sent to the third-party customer by Taxpayer One.

The audit determined that Taxpayers were in the business of buying and selling steel. Audit imposed the gross income tax on the amounts recorded as "sales" from Taxpayer Two to Taxpayer One and from Taxpayer One to Indiana customer. Taxpayers disagree, characterizing themselves as merely service providers facilitating the purchase of steel on behalf of third-party customers.

DISCUSSION

I. Applicability of the State Gross Income Tax to Taxpayers' Procurement and Transfer of Steel Products

Taxpayers enter into various transactions for the procurement of steel. Two types of transactions are at issue. The first type of transaction may be characterized as follows.

Transaction One:

Indiana third-party customer, interested in acquiring steel, approaches Taxpayer One which accepts customer's order. For the purpose of this illustration, customer wishes to purchase $100 worth of steel. For purposes of this illustration, the fees charged by Taxpayers are representations only and are not intended to illustrate the actual fee structure of either Taxpayer.

Taxpayer One turns the order over to its sister corporation, Taxpayer Two, which deals directly with Indiana steel mill. Taxpayer Two places an order for $100 worth of steel. Taxpayer Two, having performed a service on behalf of third-party customer, adds a percentage fee to the cost of the steel. At this point, the steel will cost third-party customer $104.

Taxpayer Two, having completed initial procurement of the steel, invoices Taxpayer One for $104. Subsequently, Taxpayer One, having performed a service on behalf of third-party customer adds its own service fee. The steel will now cost third-party customer $105. The $105 represents the initial cost of the steel, Taxpayer Two's fee, and Taxpayer One's fee. Taxpayer One invoices third-party customer $105.

Third-party customer now deals directly with Indiana steel mill for the purpose of transporting and acquiring possession of the steel. Neither Taxpayer provides for the transport of the steel.

Both taxpayers maintain that they are merely service providers. Both taxpayers maintain that they do not take title to the steel, do not take possession of the steel, and do not bear the risk of loss for the steel. Taxpayers see themselves as service providers outside the actual "purchase" and "sale" of the steel products.

Audit disagrees, characterizing these various transactions as the buying and selling of steel and that the income realized by these transactions is subject to the state's gross income tax.

Transaction Two:

Taxpayers enter into a second type of transaction which is also the subject of this protest. Taxpayer Two characterizes this

second transaction as its "Single Billing Business."

Out-of-state customer decides to purchase coated steel. Out-of-state customer approaches Taxpayer One and places an order to acquire a specified amount of coated steel.

Taxpayer One turns the order over to Taxpayer Two. Taxpayer Two, operating from its Chicago office, deals directly with out-of-state steel mill and places an order for uncoated steel.

The uncoated steel is transported to a coating plant located in Indiana. It is not disputed that, at this point, Taxpayer Two has acquired the uncoated steel and maintains that steel in its own inventory.

Once the steel has been coated, out-of-state customer arranges to take possession of the steel at the coating plant site. It is not disputed that a "sale" of the coated steel from Taxpayer Two to out-of-state customer has occurred and that this transaction is subject to the state's gross income tax.

Taxpayer Two records a "purchase" of steel from the mill and a "sale" to Taxpayer One. Taxpayer One records a "purchase" from taxpayer Two and a "sale" to out-of-state customer. Taxpayer Two invoices Taxpayer One and Taxpayer One invoices out-of-state customer. Because out-of-state customer receives one invoice – which includes the original cost of the raw steel, cost of the steel coating, and both taxpayers' fees – Taxpayer Two calls this its "Single Billing Business."

What is in dispute is whether Taxpayer One has entered into a transaction for which the receipts are subject to the gross income tax.

DISCUSSION

I. Applicability of the State Gross Income Tax to Taxpayers' Transfer of Steel Products

With respect to non-resident taxpayers, the Indiana gross income tax is imposed under the authority of IC 6-2.1-2-2(a) which states that "[a]n income tax, known as the gross income tax, is imposed upon the receipt of... 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 definition of "gross income" is provided for in IC 6-2.1-1-2. As relevant to taxpayers' particular circumstances, that statute states "'gross income' means all the gross receipts a taxpayer receives... from the sale, transfer, or exchange of property, real or personal, tangible or intangible." IC 6-2.1-1-2(a).

Taxpayer argues that it is not "selling" the steel products. Taxpayer takes the position that it is acting as a facilitator for the transfer of the steel products between the steel mill and the ultimate consumer of those products. According to taxpayer, because their various fees – earned from facilitating the transfer of the steel from the steel mill to the third-party customer – are earned from activities occurring entirely out-of-state, those fees are not subject to the state's gross income tax. According to taxpayer, because the cost of the steel is a liability incurred by third-party customer in favor of the steel mill, that cost is not subject to the state's gross income tax.

Taxpayers' own records, the form and nature of the steel transactions, and the simple realities of those transactions, contradict taxpayers' assertions. Taxpayers books these transactions as "sales" and "purchases" in their own records. Taxpayers record their gross sales each year and calculate a gross profit based on those sales. Taxpayers record an ending inventory in their accounts each year. Each sale is invoiced and the sale is recorded as a gross sale in taxpayers' accounts. Taxpayers' various fees and the price of the steel is included as part of the taxpayers' "cost of goods sold" recorded on taxpayers' Federal Income Tax returns. The invoices issued between the parties are indistinguishable from a simple combined invoice for services, tangible personal property, and related fees.

Taxpayers argue that they do not take physical possession of the steel, do not arrange for the conveyance of the steel, and do not bear the risk of loss or damage for the steel. However such qualifications and distinctions are insufficient to avoid the conclusion that taxpayers are purchasing steel, "marking up" the cost of that steel, and transferring ownership of the steel to third-party customers.

Under the circumstances as described in "Transaction One," Taxpayer Two invoiced Taxpayer One after Taxpayer One initially acquired the steel. The gross receipts from those transactions are subject to the gross income tax under 45 IAC 1.1-3-3(d)(2). That regulation states that:

> "[g]ross income derived from the sale of tangible personal property in interstate commerce is subject to the gross income tax if the sale is completed in Indiana. The following examples are situations where a sale is completed in Indiana prior to or after shipment in interstate commerce.... a sale to a non resident where the goods become the property of the buyer but are kept within Indiana by the seller until they are resold by the buyer...."

Similarly, under the circumstances as described in "Transaction One," Taxpayer One invoiced Indiana third-party customer for the steel that Indiana third-party customer had originally ordered. The gross receipts from those transactions are subject to the gross income tax because, under 45 IAC 1.1-3-3(d)(7), the sale was made to "an Indiana buyer by a nonresident seller [and the sale] was channeled through; or... was otherwise connected with; an Indiana business situs established by the seller."

Under the circumstances as described in "Transaction Two," Taxpayer Two records a purchase of steel from the mill and conducts a sale to Taxpayer One. The gross receipts from those transactions are subject to the gross income tax under the provisions set out in 45 IAC 1.1-3-3(d)(2).

Under the circumstances as described in "Transaction Two," Taxpayer One records a purchase from Taxpayer Two and invoices out-of-state third-party customer. The gross receipts from those transactions are subject to the gross income tax under the

provisions of 45 IAC 1.1-3-3(d)(1) which states that the gross income tax is imposed on "[a] sale to a nonresident where the goods are picked up in Indiana by the buyer via its own carrier."

Conceivably, taxpayers could structure their business transactions in such a way that taxpayers would be function simply as disinterested brokers. In such a theoretical setting, taxpayers would match interested buyers with willing sellers and charge the participants a fee for brokering the resulting transaction. However, for the transactions here at issue, taxpayers' business is indistinguishable from the straightforward purchase and sale of steel commodities.

FINDING

Taxpayers' protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0420010085.LOF

LETTER OF FINDINGS NUMBER: 01-0085
Sales 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. Gross Retail Tax – Uncollected Sales Tax

Authority: IC 6-2.5-2-1

Taxpayer protests the inclusion of sales tax not collected.

STATEMENT OF FACTS

Taxpayer has two business locations, one in Indiana and one in Kentucky. Revenue is derived from the retail sale of telephone, pagers and accessories, airtime fees and repair fees. Upon audit, it was determined that the taxpayer failed to remit sales tax on airtime fees billed to Indiana customers.

In June of 1999, the taxpayer realized it must charge sales tax to airtime and began remitting the tax.

I. Gross Retail Tax – Uncollected Sales Tax

DISCUSSION

Taxpayer states its sales are to Kentucky and Indiana and requests the department tax fifty percent of its airtime sales.

Taxpayer's representative provided faxed copies of Kentucky and Indiana returns. In reviewing the returns, the hearing officer determined that apportioned income to Indiana amounted to $110,000 in 1998 and $90,000 in 1999. The audit adjustments showed $111,850.26 in 1998 and $89,518.09 in 1999. Sales in Kentucky were considerably larger.

The auditor correctly taxed Indiana sales according to taxpayer's own records.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420010184P.LOF

LETTER OF FINDINGS NUMBER: 01-0184P
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 is a restaurant chain with several restaurants in the state of Indiana.

Upon audit it was discovered that the taxpayer failed to remit use tax on clearly taxable purchases such as water heaters, baby changing tables, locks, interior decorations, vacuums, computer equipment, signs, curtains, sinks, shelving, security cameras, doors, tables, chairs, etc. The audit allowed credit for items upon which sales tax was paid in error at point of purchase, i.e., items that are tax exempt.

I. Tax Administration – Penalty

DISCUSSION

At issue is whether the taxpayer was negligent in reporting its use taxes. A review of the audit report indicates that clearly taxable items were not self-assessed tax. Approximately twenty-five percent (25%) of the tax due (net of credits) was not self-assessed in calendar year 1999.

Taxpayer protests the penalty based upon reasonable cause, primarily, that it did not maliciously avoid payment of sales tax and has done the best job possible with its limited resources.

The penalty is appropriate as the taxpayer failed to self assess use tax on clearly taxable items, primarily capital assets, and has failed to provide reasonable cause for the failure to remit the tax.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220010187P.LOF

LETTER OF FINDINGS NUMBER: 01-0187P
Gross and Adjusted Gross Income Tax
Fiscal Years Ended 06/30/97, 06/30/98, and 06/30/99

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. 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 holds ownership interest in a joint venture that conducts distribution activity within the state of Indiana. Upon audit it was discovered that the taxpayer failed to correctly report its partnership distributive share of income for two years of the audit.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer was assessed a penalty for failure to correctly report all of its partnership distributive share income in 1997 and 1998.

Taxpayer, in a letter dated May 14, 2001 protested penalties assessed because it has been a diligent corporate citizen filing returns and submitting tax liabilities consistently and timely. Further it continues to assist Indiana in all corporate tax matters relating to its business. It requests consideration in abating the penalty.

The audit revealed that the taxpayer failed to remit twenty three percent (23%) and thirty three percent (33%) in gross income tax for fiscal years 1997 and 1998, respectively, 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

0120010205P.LOF

LETTER OF FINDINGS NUMBER: 01-0205P
Individual Income Tax
Calendar 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.

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's representative protests the penalty assessed and states that he prepared the taxpayer's Indiana State Income tax Return. Due to a software transfer error, the tax software used failed to compute the County tax and the representative failed to catch the error that resulted in the underpayment of tax.

Taxpayer's IT-40 shows no county tax calculation although his W-2 had tax deducted.

I. Tax Administration – Negligence Penalty

DISCUSSION

Taxpayer's representative requests that the department waive the penalty assessed because there was a software problem and he failed to catch the error that resulted in the underpayment of tax. Taxpayer's W-2 clearly shows county tax deducted and prior year returns clearly have the county tax calculated and deducted. Taxpayer's representative was negligent in failing to verify the information contained on the prepared IT-40 before mailing it to the Department.

Taxpayer has not provided reasonable cause to allow a waiver of the negligence penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120010218P.LOF

LETTER OF FINDINGS NUMBER: 01-0218P
Individual Income Tax
For the Calendar 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.

ISSUE(S)

I. Tax Administration – Penalty

Authority: IC 6-8.1-10-2.1(d); IC 6-8.10-5; 45 IAC 15-11-2

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer was assessed a penalty for failure to remit tax timely. In a letter postmarked on August 3, 2001, taxpayer requested a penalty waiver because the payroll department did not deduct the correct amount and he could not afford to pay at the time the tax was due.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer requests the penalty be abated because he cannot afford to pay tax at the time the demand notice was issued on July 30, 2001.

The issue is the late payment of income tax. Taxpayer's tax return indicates that $ 2,882 in tax was due with a credit of $1,523. The resulting balance of $1,359 in tax was not remitted with the return. The Department issued its billing for the tax, penalty, and interest on July 30, 2001.

Taxpayer has not shown reasonable cause to allow a penalty waiver.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220010219P.LOF

LETTER OF FINDINGS NUMBER: 01-0219P
Income Tax
Fiscal Year Ended January 29, 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.

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 was assessed a penalty for the late payment of income taxes. Taxpayer filed its original return after the original due date with a payment of $5,244.00 in tax due. The late payment generated a ten percent (10%) penalty and updated interest.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed because it reduced its Indiana Apportionment Percentage during 2000 and estimated payments. Unfortunately, it remitted eighty seven percent (87%) of its total tax liability. Taxpayer requests a refund of the penalty and updated interest it paid.

The penalty was assessed because less than ninety percent (90%) of the expected tax due was paid by the original due date.

IC 6-8.1-6-1 clearly states that at least ninety percent (90%) of the tax that is reasonably expected to be due must be paid on or before the due date or penalties may be imposed for failure to pay the tax. More than twelve percent (12%) of the tax due was paid after the due date, which incurs a late payment penalty.

Taxpayer has not provided reasonable cause to allow a waiver of the penalty. Ninety percent of the tax due was not paid by the due date of the return.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420010220P.LOF

LETTER OF FINDINGS NUMBER: 01-0220P
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 is a manufacturer of industrial filtration and engine products. In Indiana, it consists of a manufacturing plant, a warehouse, and two sales offices. At audit, it was determined that the taxpayer failed to pay tax on fixed assets located in Indiana and general purchases. The assessment amounted to more than eighty percent (80%) of use tax due for each year of the audit.

Taxpayer failed to remit use tax on clearly taxable fixed assets and general expense purchases although it had a use tax accrual system in place.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer's audit report revealed that it failed to remit use tax on fixed assets and general purchases.

Taxpayer states it inadvertently misclassified one of its facilities as a manufacturing facility, an inadvertent error, not an overt

act of negligence. It has implemented a program to pick up items of the nature included in the audit report. A penalty waiver is requested.

Taxpayer failed to assess use tax on taxable fixed assets and general purchases primarily for its warehouse location. The assets and general purchases for which no use tax was accrued or paid amounted to over eighty percent (80%) of the use tax due for each year of the audit.

Taxpayer's reasoning is not reasonable cause to allow a waiver of the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220010221P.LOF

LETTER OF FINDINGS NUMBER: 01-0221P
Gross and Adjusted Gross Income Tax
Calendar Year 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 California and was assessed a penalty for failing to remit its tax by the due date of the tax return. Taxpayer remitted fifty percent (50%) of its tax liability after the original due date and was assessed a ten-percent penalty.

Taxpayer protests the penalty and states that it had made a large-scale acquisition and little information was available to its tax department for making an accurate assessment of what the 1998 tax liability would be. Due to unfamiliarity with the acquired company's activities and the Indiana Gross Receipts Tax, a large amount of tax was due with the return on 10/15/99. Estimated payments and the extension were made on a timely basis.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer was assessed a penalty for failure to remit tax timely. Taxpayer remitted 50.39% of its tax through estimated payments by the original due date of the return. 49.61% was paid with the filing of the extended return on October 14, 1999.

Taxpayer, in a letter dated February 20, 2001, faxed on August 24, 2001, protested the penalty assessed because it acquired a company in December 1997 and was unaware of its 1998 tax liability. Taxpayer further states that the information made available to them caused them to make an inaccurate assessment of its 1998 tax liability.

Taxpayer remitted almost fifty percent of its tax on October 14, 1999, the extended due date. An extension to file is not an extension to pay. A review of the prior tax return indicates a tax liability in excess of two million dollars. To avoid the penalty, a taxpayer must remit at least ninety percent (90%) of the tax due by the due date or one hundred percent (100%) of the prior year's tax. Taxpayer remitted less than thirty percent (30%) of the prior year's tax liability by the due date.

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

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120010222P.LOF

LETTER OF FINDINGS NUMBER: 01-0222P
Individual Income Tax
Calendar 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.

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.

II. Tax Administration – Interest

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

Taxpayer protests the interest assessed.

STATEMENT OF FACTS

Taxpayer's representative protests the penalty and interest assessed and states that she prepared the taxpayer's Indiana State Income tax Return. Due to a software transfer error, the tax software used failed to compute the county tax and the representative had no idea about the county tax. Taxpayer's representative further states that had her clients known about the county taxes owed, they would have been paid timely.

I. Tax Administration – Negligence Penalty

DISCUSSION

Taxpayer's representative requests that the Department waive the penalty assessed because there was a software problem and she was unaware of a county tax.

Taxpayer has previously filed Indiana tax returns with remittances for county taxes. Taxpayer's representative was negligent in failing to verify the information contained on the prepared IT-40 before mailing it to the Department.

Taxpayer has not provided reasonable cause to allow a waiver of the negligence penalty.

FINDING

Taxpayer's protest is denied.

II. Tax Administration – Interest

DISCUSSION

Taxpayer requests a refund for interest paid.

FINDING

The Indiana statute does not allow a waiver of interest.

DEPARTMENT OF STATE REVENUE

04970614.SLOF

SUPPLEMENTAL LETTER OF FINDINGS NUMBER: 97-0614
Responsible Officer
Sales Tax and Withholding Tax
For Tax Periods: 1993-1997

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

ISSUES

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) at page 273

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

STATEMENT OF FACTS

The taxpayer was a shareholder and officer of a corporation that did not remit the proper amount of sales and withholding taxes to Indiana. The taxpayer was personally assessed for the taxes and timely protested these assessments. A hearing was held. 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 that 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).

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. The factors considered to determine whether a person has such authority are the following:

1. The person's position within the power structure of the Corporation;
2. The authority of the officer as established by the Articles of Incorporation, By-laws or employment contract; and
3. Whether the person actually exercised control over the finances of the business including control of the bank account, signing checks and tax returns or determining when and in what order to pay creditors.

Id. At 273.

The taxpayer was the president of the corporation at the time of its incorporation. He contends, however, that he resigned as president on September 23, 1993. In support of this contention, the taxpayer submitted a copy of a letter to the Board of Directors of the corporation that informed them that he resigned his "positions as officer and director" of the corporation. The bill of sale for the corporation indicates that the taxpayer was the president again on February 18, 1997.

The Secretary of State's office provided a copy of the Articles of Incorporation. Those Articles listed the taxpayer as the registered agent of the corporation. There was no listing of officers or designation of duties of the various officers. No copy of the corporate By-laws was available. The Indiana Department of Revenue must consider that presidents generally have the ultimate control and responsibility for any corporation.

The final indicium concerns the actual control over the finances of the corporation. The taxpayer alleges that he did not control the finances during the period when the tax liabilities accrued. Three former employees submitted affidavits indicating that the taxpayer was not actively involved in the management of the corporation during the period from May, 1993 through January, 1996. Other documentation such as bank statements, a tax return and checks indicated that another officer actually ran the corporation and controlled the corporate finances during that period. The taxpayer admits, however, the he reentered the management of the corporation by February, 1996. Evidence indicates that after that date he dealt with the suppliers, wrote corporate checks, inquired of the Indiana Department of Revenue to determine the outstanding corporate trust tax liability, prepared and filed tax returns and negotiated the sale of the corporation on February 18, 1997. During that final year of the corporation's operation, the taxpayer had actual knowledge of the corporate trust tax liability and chose to pay other creditors. Based upon the taxpayer's business expertise and certification as a C.P.A., the taxpayer is charged with the knowledge that he was personally responsible for the corporate sales and withholding tax liabilities. He was clearly an officer with the duty to remit the corporate trust taxes to Indiana.

Finally, the taxpayer alleges that another officer was actually the officer responsible for the remittance of taxes. The law does not require, however, that only one person be considered the person with a duty to remit taxes to the state. In the Safayan case, the corporate president was held to be a responsible person even though the day to day operations were specifically delegated to a vice-president in his employment contract as manager. "A party may be liable for trust taxes without having exclusive control over the corporation's funds." Safayan at 274. Another officer's possible responsibility for the remittance of taxes does not absolve the taxpayer from responsible officer liability.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

02980084.SLOF

SUPPLEMENTAL LETTER OF FINDINGS NUMBER: 98-0084
Indiana Corporate Income Tax
For the 1990, 1991, 1992, and 1993 Tax Years

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. Verification of Interest Derived from Government Student Loan Marketing Association Obligations

Authority: IC 6-2.1-3-1; IC 6-3-1-3.5(b)(1); Department of Revenue Information Bulletin #19

Taxpayer has submitted information purportedly verifying that interest payments received during the tax years at issue were the results of its investment in a Student Loan Marketing Association.

II. Apportionment of Taxpayer's Payroll Based on Mileage

Authority: IC 6-3-2-2(l); Indiana Dept. of State Revenue v. E.W. Bohren, Inc., 178 N.E.2d 438 (Ind. 1961)

Taxpayer argues the determination that it could not apportion the payroll factor based upon mileage driven within the state of Indiana was erroneous.

III. Application of the Throw-Back Rule to Income Received by Taxpayer's Subsidiaries

Authority: 15 U.S.C.S. § 381; IC 6-3-2-2(f); IC 6-3-2-2(n); Indiana Dept. of State Revenue v. Continental Steel Corp., 399 N.E.2d 754 (Ind. Ct. App. 1980); Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co., 112 S.Ct. 2447 (1992); 45 IAC 3.1-1-64

Taxpayer argues the Department's decision to adjust the sales numerators of two of the taxpayer's subsidiaries was based upon an erroneous understanding of the facts.

STATEMENT OF FACTS

Taxpayer and its subsidiaries operate a number of businesses primarily related to the provision of specialized transportation services. The taxpayer maintains an out-of-state headquarters but owns real and personal property within Indiana and conducts business within the state.

DISCUSSION

I. Verification of Interest Derived from Government Student Loan Marketing Association Obligations

During its original audit, the taxpayer was not permitted to deduct certain interest income received from investments in a "student loan marketing association." The taxpayer asserted that the Department erred in making the disallowance arguing that the interest was exempt because it was derived directly from United States government obligations. IC 6-2.1-3-1 exempts from the state's corporate income tax government securities stating that "Interest or other earnings paid upon bonds or other securities issued by the United States are exempt from the gross income tax to the extent the United States Constitution prohibits the taxation of that gross income." The state's provision for its adjusted gross income contains a parallel provision at IC 6-3-1-3.5(b)(1) which permits corporations to adjust their taxable income by "[s]ubtract[ing] income that is exempt from taxation under IC 6-3 by the Constitution and statutes of the United States."

Additionally, the issue raised by the taxpayer is specifically addressed within the Department's Indiana Income Tax Information Bulletin #19. That Bulletin states that "For purposes of the Gross Income Tax and the Adjusted Gross Income Tax Act, obligations issued by the following organizations are considered direct United States Government obligations specifically exempted from state income taxation by federal law." Included within the listing of exempt obligations which follows is a reference to "Student Loan Marketing Association" (SLMA) obligations. The original Letter of Findings sustained the taxpayer "to the extent that the interest [could] be verified to be from SMLA interest. At the rehearing, taxpayer presented extensive documentation which purportedly substantiates the income as derived from SMLA obligations. That documentation includes taxpayer's records – referred to as the taxpayer's "investment system" - for the 1990, 1991, and 1992 tax years. That documentation includes a memo from the taxpayer's assistant treasurer for cash administration which certifies that securities described by a "SLMA, SLMAD, SMA or any variance of the letters SLMA" describe "the purchase of Student Loan Marketing Association discount notes, otherwise known as Sallie Mae Notes." Taxpayer Memo, Jan. 24, 2001.

Although the documentation offered by the taxpayer may indeed substantiate the taxpayer's assertion, examination of that documentation and verification of taxpayer's "investment system" notations is not a legal issue coming within the purview of a Supplemental Letter of Findings. Accordingly, the taxpayer is left with the determination found within the original Letter of Findings and must await the results of a supplemental audit.

FINDING

The taxpayer is sustained to the extent that the interest can be verified as derived from government SLMA obligations.

II. Apportionment of Taxpayer's Payroll Based on Mileage

The taxpayer originally protested the Department's determination that two of its subsidiaries were not entitled to apportion their payroll using a mileage percentage. Following the original administrative hearing and the original Letter of Findings affirming that determination, the taxpayer has raised the identical issue arguing that taxpayer's subsidiaries should be permitted to apportion their payroll pursuant to 45 IAC 3.1-1-63 or 45 IAC 3.1-1-49. In the alternative, the taxpayer argues that the Department should exercise its discretion and allow the taxpayer to apportion their payroll pursuant to IC 6-3-2-2(l).

Taxpayer operates as a licensed common carrier to provide moving and specialized transportation services for its customers. Once an agreement is reached with a customer to provide those services, taxpayer arranges with one of its two subsidiaries – depending on the nature of the transportation required – to provide the driver and equipment needed to implement the agreement. The subsidiaries are not independently licensed to operate as common carriers. Taxpayer is the single entity responsible for providing freight insurance for its customers and is liable to the customers if a shipment is lost, damaged, or fails to reach its destination. The subsidiaries do not share in this responsibility to taxpayer's customers and do not provide insurance coverage. Taxpayer compensates its subsidiaries by paying a fixed mileage cost to cover the cost of the subsidiaries' drivers and equipment.

45 IAC 3.1-1-63(C) requires that "[t]he total revenue dollars from transportation (both intrastate and inter-state) are to be assigned to states traversed on the basis of class or category mileage in each state in which or through the freight or passengers move."

45 IAC 3.1-1-49(c) provides that "[e]mployees engaged in the transportation of persons and/or materials as part of the taxpayer's regular business activities, i.e., truck or bus drivers, shall have their wages assigned to this state based on miles traveled in this state."

However, much as taxpayer may attempt to define, explain, or characterize the nature of its subsidiaries' business operations, it cannot get past the conclusion reached with the original Letter of Findings. Taxpayer's subsidiaries are not "transportation companies" as contemplated within the purview of either 45 IAC 3.1-1-63 or 45 IAC 3.1-1-49. Consistent with this conclusion is the fact that the subsidiaries are not licensed common carriers and are not responsible to customers in the event of a lost or damaged shipment. If a potential customer wished to purchase transportation services, it would not be able to do so by dealing directly with taxpayer's subsidiaries. If taxpayer's subsidiaries spontaneously decided to provide transportation services to a client, they would be unable to do so because the subsidiaries are limited to providing a driver and certain equipment neither of which, together or alone, is sufficient to provide the desired transportation service. Taxpayer's subsidiaries are more properly characterized as leasing companies than as providers of transportation services. This distinction is made plain by the citation, within the original Letter of Findings, to Indiana Dept. of State Revenue v. E.W. Bohren, Inc., 178 N.E.2d 438 (Ind. 1961) in which the court stated that "appellee's income is not derived from operating a truck line or carrier in interstate commerce, but rather the receipts are received as a result of the appellee's property and equipment under a contract or lease to an interstate carrier." Id. at 440. Even given the taxpayer's objections to the applicability of Bohren – that Bohren involved the application of the state's gross income tax rather than its adjusted gross income tax – the inescapable conclusion, that taxpayer's subsidiaries are not in the business of providing transportation services, remains.

Taxpayer reasserts an alternative argument, that the Department should permit taxpayer to apportion its subsidiaries' payroll factor based on mileage, under the provisions set forth in IC 6-3-2-2(l). Under that statutory provision, "[I]f the allocation and apportionment provisions of this article do not fairly represent the taxpayer's income derived within the state of Indiana, the taxpayer may petition for or the department may require, if reasonable: (1) separate accounting; (2) the exclusion of any one... or more of the factors; (3) the inclusion of one... or more additional factors which will fairly represent the taxpayer's income derived from sources within the state of Indiana; or (4) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income." Other than stating that it could have structured its business interests in such a way as to take advantage of the apportionment provisions available under 45 IAC 3.1-1-63 or 45 IAC 3.1-1-49, taxpayer has not established in what manner the determination within the original Letter of Findings results in an allocation of the taxpayer's income which "[does] not fairly represent the taxpayer's income derived from sources within the state of Indiana...." IC 6-3-2-2(l). In the absence of a substantive demonstration on the part of the taxpayer that its subsidiaries' income has been distorted, that its has been subjected to a double taxation, or that its subsidiaries' income has been inequitably apportioned, the Department must decline the opportunity to exercise its discretion available under the provisions of IC 6-3-2-2(l).

FINDING

The taxpayer's protest is respectfully denied.

III. Application of the Throw-Back Rule to Income Received by Taxpayer's Subsidiaries

The first of taxpayer's subsidiaries (hereinafter "Subsidiary One") provides distribution, warehouse, and staging activities for third-party customers. The second of taxpayer's subsidiaries (hereinafter "Subsidiary Two") provides sales and computer services to the taxpayer's local agents. Subsidiary Two sells both computer hardware and software to these agents. The audit made adjustments to the Subsidiary One and Subsidiary Two's sales numerators stating that neither subsidiary has "payroll or property in any state except Indiana" and that the subsidiaries' income should be attributed to Indiana. The original Letter of Findings affirmed that determination.

Taxpayer argues that the original Letter of Findings improperly determined that the state's throw-back rule was applicable to certain of its subsidiaries' sales to out-of-state locations. The taxpayer maintains that the throw-back rule should not apply because the out-of-state activities of the subsidiaries exceeded the "mere solicitation" standard set out in Indiana Dept. of State Revenue v. Continental Steel Corp., 399 N.E.2d 754 (Ind. Ct. App. 1980). According to the taxpayer, its subsidiaries' out-of-state activities included "extensive customer service, maintenance, and marketing activities." Taxpayer Memo, Jan. 24, 2001, p. 5. Alternatively, the taxpayer argues that not all of its subsidiaries' sales income should be attributed to the state of Indiana under the provisions of IC 6-3-2-2(f).

15 U.S.C.S. § 381 (Public Law 86-272) prohibits all states from imposing a net income tax on a foreign taxpayer if the foreign taxpayer's only business activity within that state is the solicitation of sales. A state may not impose an income tax on income derived from business activities within that state unless those activities exceed the mere solicitation of sales. 15 U.S.C.S § 381(a), (c). The effect of the throw-back rule is to revert sales receipts back to the state from where the goods were shipped in those situations where 15 U.S.C.S. § 381 deprives the purchaser's own state of the power to impose a net income tax. 45 IAC 3.1-1-64. In effect, 15 U.S.C.S. § 381 permits Indiana

to tax out-of-state business activities, without violating the Commerce Clause and without the possibility of subjecting taxpayer to double taxation, because Indiana's right to tax those out-of-state activities is derivative of the foreign state's own taxing authority. In every sales transaction, at least one state has the authority to tax income derived from the sale of tangible personal property; if the state wherein the sale occurred is forbidden to do so by 15 U.S.C.S. § 381, then the income is "thrown-back" to the originating state.

Taxpayer argues that the original Letter of Findings failed to properly apply the apportionment standard set out in IC 6-3-2-2(n) which provides that "[f]or purposes of allocation and apportionment of income... a taxpayer is taxable in another state if: (1) in that state the taxpayer is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax; or (2) that state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not." Taxpayer argues that the original Letter of Findings failed to address IC 6-3-2-2(n)(2), because, even though the taxpayer's subsidiaries did not pay taxes to the foreign states, the subsidiaries were *subject* to the foreign state's taxing authority. Taxpayer asserts that it was subject to "several" foreign states' taxing authority because it established nexus within those "several" states by "performing extensive customer service, maintenance, and marketing activities." Taxpayer Memo, Jan. 24, 2001, p. 5. In addition, the taxpayer argues that taxpayer's subsidiaries "[had] payroll and property in states other than Indiana." Id.

Subsidiary One provides certain warehousing services to third-party customers. Because taxpayer does not own warehousing space itself, Subsidiary One is essentially selling customers its expertise and experience in the moving, storage, and marshalling of customer's goods. Subsidiary One's on-site activities consist of storing, tracking, marshalling, and delivery services performed on behalf of the third-party customer. A typical transaction is one in which Subsidiary One locates and takes possession of warehouse space appropriate to the needs of a customer, assumes continuing management of the warehouse space, and arranges for the transfer of customer's goods to that warehouse. Upon delivery of customer's goods, Subsidiary One may – at customer's discretion – provide certain additional services such as assembly, installation, damage inspection, and repair.

Subsidiary One has provided, based upon the taxpayer's own internal review, an apportionment of the amount of time Subsidiary One's employees spend on sales and other activities. According to the taxpayer, Subsidiary One's employees activities can be apportioned as follows: 20 percent sales, 10 percent pickup and delivery of goods, 35 percent warehousing and staging, and 35 percent setup services. Taxpayer Letter, Feb. 12, p. 2.

Subsidiary Two is constituted to provide computer and computer related services to the taxpayer's own local agents. All of Subsidiary Two's sales are "in-house" sales made to taxpayer's 850 nationwide local agents. Subsidiary Two sells computers, software developed by Subsidiary Two, and software produced by unrelated third-party vendors. Taxpayer maintains that its out-of-state activities exceed the "mere solicitation" standard because, owing to the nature of the Subsidiary Two's business, simple solicitation would be insufficient to fully complete a customer transaction. According to the taxpayer, an initial transaction involves an on-site visit to assist with installation and the provision of on-site customer services. Taxpayer asserts that it provides additional on-site services as both hardware and software upgrades become available. In addition, taxpayer maintains that Subsidiary Two provides its customers (local agents) continuous on-site assistance to the extent that its customer experience problems with Subsidiary Two's various products.

Taxpayer has attempted to quantify Subsidiary Two's representative's activities. According to taxpayer, Subsidiary Two's employee's activities can be apportioned as follows: 20 percent sales, 15 percent hardware installation, 20 percent software installation, 10 percent software upgrades, and 35 percent support services. Taxpayer Letter, Feb. 12, p. 3. Taxpayer support services can be further apportioned to on-site and off-site support services. Three-quarter's of taxpayer's services are provided to customer by phone while the remaining one-quarter is allocable to actual, on-site support services. Taxpayer email, March, 5, 2001.

The taxpayer is correct in its assertion that Continental, 399 N.E.2d 754, defines those activities which do and do not exceed the 15 U.S.C.S. § 381 "mere solicitation standard." In that case, the court held that, "solicitation should be limited to those generally accepted or customary acts in the industry which lead to the placing of orders not those which follow as a natural result of the transaction, such as collections, servicing complaints, technical assistance and training...." Id. at 759. Further, "solicitation must be limited to those acts which lead to the placing of orders and does not include those acts which follow as a result of the transaction." Id. The court set out examples of activity which exceeded "mere solicitation" including "giving spot credit, accepting orders, collecting delinquent accounts and picking up returned goods within the taxing state, pooling and exchanging technical personnel in a complex mutual endeavor, maintaining personal property [] and associated local business activity for purposes not related to soliciting orders within the taxing state." Id.

In Continental, the court held that the taxpayer's activities within the foreign state exceeded solicitation because taxpayer's activities "[did] not lead to the placing of orders but follow[ed] as a natural result of the transaction." Id. Those activities included the taxpayer's "salesmen making adjustment on complaints, [and] salesmen giving customers technical assistance...." Id.

The "mere solicitation" standard was refined by the Supreme Court in Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co., 112 S.Ct. 2447 (1992). The Court concluded that "although solicitation covered more than what was strictly essential to making requests for purchases, the fact that an activity is performed by salespersons does not automatically convert that activity into solicitation." Id. at 2456-57. The Court held that whether the taxpayer's in-state activity was sufficiently de minimis to avoid the loss of taxpayer immunity, conferred by 15 U.S.C.S. § 381, depended on whether the activity establishes a "non-trivial additional connection with the taxing State." Id. at 2458. In Wrigley, the Court determined that the taxpayer's sales representatives' activities,

consisting of replacing stale gum at retail locations, was an activity outside 15 U.S.C.S. § 381 immunity. Id. at 2458-59. The Court held that although the representatives' activity could be said to facilitate the sales, it did not facilitate the *requesting* of sales and was not ancillary to the solicitation of sales. Id. at 2459 (Emphasis added). Therefore, because taxpayer's practice of having its representatives rotate stocks of stale gum was an activity outside the solicitation of sales, taxpayer brought itself outside the scope of 15 U.S.C.S. § 381 immunity and subjected itself to the local net income tax. Id. at 2460.

Taxpayer contends that Subsidiary One's out-of-state activities consist of locating warehouse space, securing warehouse space, managing that warehouse space and its customer's goods, as well as performing other activities related to the care and ultimate disposition of warehoused goods. Specifically, Subsidiary One...

> ... provides for and manages the complete warehousing process for the customer. When the goods are ready for delivery[y], as part its services, [Subsidiary One]... provides delivery and customer setup including such on-site services as assembly, installation, damage inspection, and repair.

Taxpayer argues that these out-of-state activities exceed the "mere solicitation" protections of, and the de minimis exceptions to P.L. 86-272. Consequently, any income derived from these activities should be apportioned to the states where the activities are performed and not "thrown-back" to Indiana.

Audit rejected taxpayer's contention that this income was derived from the performance of out-of-state activities *because Audit was unable to identify any Subsidiary One employees, income-producing property, or other indicia of income producing activities by Subsidiary One within these other states*. Consequently, Audit characterized the income received by Subsidiary One as commission income – i.e., income properly apportioned to Indiana.

In this instance, the absence of payroll and property factors, alone, is not dispositive. At hearing, taxpayer provided information suggesting that activities performed out-of-state by Subsidiary One were sufficient to create nexus – and to establish reporting requirements – in other states. Audit, therefore, will examine the newly submitted materials, and any other information deemed relevant, to determine whether Subsidiary One's employees, or agents, were engaged in income-producing activities in these other states.

Subsidiary Two's out-of-state activities, however, do clearly exceed the "mere solicitation" of orders for its computer services. The initial solicitation of the order is the first step in an ongoing, complex, collaborative endeavor whereby Subsidiary Two provides substantial on-site, installation, update, and training services. These activities - all of which are ancillary to the initial solicitation of customer's business - take place over an extended period of time and involve extensive on-site activities by Subsidiary Two's representatives.

FINDING

With regards to Subsidiary One's out-of-state activities, taxpayer's protest is sustained subject to audit verification. With regard to Subsidiary Two, taxpayer protest is sustained.

INDIANA DEPARTMENT OF STATE REVENUE
Revenue Ruling #2001-10 IT
October 11, 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 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

Gross Income Tax, Adjusted Gross Income Tax and Supplemental Net Income Tax – Nexus

Authority: IC 6-2.1-2-2, Rule 45 IAC 1.1-1-3, IC 6-2.1-3-24.5, IC 6-8.1-9-1, IC 6-3-2-1, IC 6-3-2-2, Rule 45 IAC 3.1-1-38, IC 6-3-8-2

The taxpayer requests the Department to rule whether or not:

1. The taxpayer is subject to Indiana gross income tax;
2. The taxpayer would be eligible for Indiana special corporation status retroactively and prospectively if it is determined that it is subject to Indiana gross income tax;
3. The taxpayer is subject to Indiana adjusted gross income tax and supplemental net income tax; and
4. Assuming all other facts are the same, the taxpayer would be subject to Indiana gross income tax, adjusted gross income tax or supplemental net income tax if it were incorporated outside Indiana.

STATEMENT OF FACTS

The taxpayer is a supplier of lumber, lumber components, and manufactured roof trusses to manufactured housing and recreational vehicle manufacturers. The taxpayer is eligible to make an election to be a Subchapter S corporation but has elected not to do so. The taxpayer is a closely held corporation and was incorporated in Indiana in 1989. Shortly after incorporating in Indiana, the taxpayer received a certificate of authority to conduct business in Michigan and moved its corporate offices to that state soon thereafter. The taxpayer has six individual shareholders, all of which are Indiana residents.

All physical property of the taxpayer, including the taxpayer's manufacturing and administrative facilities, as well as its sales

offices, are located in Michigan. Occasionally, the taxpayer contracts with third party subcontractors in Indiana to manufacture certain products for the taxpayer. As part of this arrangement, the taxpayer then ships inventory to the subcontractors for performance of the contracts. The taxpayer retains ownership of the inventory throughout the performance of the contract.

Approximately 97% of the taxpayer's sales are to manufacturers for use in the products they manufacture. The remaining three percent of the taxpayer's sales are "direct sales." "Direct sales" are sales of product that the taxpayer distributes but does not manufacture. The taxpayer will instruct their supplier to drop ship goods directly to the taxpayer's customers.

A significant portion of the taxpayer's sales are to Indiana customers. The taxpayer has five full time sales employees and one part-time employee that solicit sales orders. The taxpayer has two full-time inside sales representatives to assist the customers and sales employees with the processing of the sale and coordinating the sale through the manufacturing and shipping process. All sales employees are based in Michigan, spending most of their time traveling to customer sites in several states, including Indiana. The sales staff have regular customer routes throughout Indiana in which they travel on a weekly basis. The taxpayer participates in local advertising both within and without Indiana (e.g., via golf outings and Yellow Pages).

The taxpayer also maintains a managed inventory program whereby the taxpayer's sales force work with customers to manage the customer's inventory level. For a majority of its customers, the sales personnel monitor the inventory levels/production plans of the customer and make purchasing recommendations to their customer's purchasing agent based on the sales personnel's observations. The customer then reviews and accepts the order proposed by the sales person. Either the customer or the sales person will then send the order by fax or phone to be approved by the taxpayer's inside sales representative in Michigan for processing. Upon review and approval, the order is scheduled for manufacturing and/or shipment.

The taxpayer's products are delivered daily to Indiana customers primarily by a fleet of trucks leased or owned by the taxpayer. Third party contract carriers are typically hired for delivery distances which exceed two hours or when the taxpayer's shipping capacity limits their ability to timely ship local deliveries. The customer unloads the product from the truck and approves receipt of the product. Occasionally, the taxpayer's trucks will pick up product that has been approved by the taxpayer's manager as a return.

The taxpayer manufactures products to the customer's specifications and designs. The taxpayer uses Computer Aid Designers (based at the taxpayer's headquarters) to review the prints and develop in-house drawings used for the taxpayer's manufacturing process. It is rare for the taxpayer to perform work on its product at a customer location. Usually, the product is repaired by the customer or returned.

DISCUSSION AND RULINGS

Issue #1: Whether or not the taxpayer is subject to Indiana gross income tax

IC 6-2.1-2-2 provides that gross income tax is imposed upon the receipt of taxable gross income derived from activities or businesses or any other sources within Indiana by a taxpayer. Rule 45 IAC 1.1-1-3 defines "business situs", which if established by a taxpayer, gives nexus to the taxpayer in Indiana and subjects the taxpayer to gross income tax.

Rule 45 IAC 1.1-1-3 states:

(a) A "business situs" arises where possession and control of a property right have been localized in some business or investment activity away from the owner's domicile.

(b) A taxpayer may establish a business situs in ways, including but not limited to, the following:

(1) Use, occupancy, or operation of an office, shop, construction site, store, warehouse, factory, agency route, or other place where the taxpayer's affairs are conducted.

(2) Performance of services.

(3) Maintenance of an inventory or stocks of goods for sale, distribution, or manufacture.

(4) Sale or distribution of merchandise from company-owned vehicles where title to the goods passes at the time of sale or distribution.

(5) Acceptance of orders without the right of approval or rejection in another state.

(6) Ownership, leasing, rental, or other business activities connected with income-producing property (real or personal).

(7) Ownership (in whole or part) of a partnership doing business in Indiana unless the ownership is that of a limited partner who does not participate in the control of the business.

(8) Other business or investment activities, other than de minimis, performed on behalf of the taxpayer by an employee of the taxpayer. These activities shall be considered together, not in isolation, in deciding if they are de minimis.

In the instant case, the taxpayer by virtue of having, on occasion, inventory in Indiana, providing a managed inventory program for Indiana customers, delivery of its products by its trucks to Indiana customers, occasional pick up of its products by its trucks from Indiana customers and occasional repair of its products at customer locations in Indiana has established nexus in Indiana for gross income tax purposes, pursuant to the above statute and regulation, therefore, is subject to Indiana gross income tax.

Ruling #1

The Department rules that the taxpayer is subject to Indiana gross income tax.

Issue #2: Whether or not the taxpayer would be eligible for Indiana special corporation status retroactively and prospectively if it is determined that it is subject to Indiana gross income tax

IC 6-2.1-3-24.5 states:

(a) For purposes of this section, "small business corporation" has the same definition that the term has in Section 1361(b) of the Internal Revenue Code. However, a corporation is a small business corporation for the purposes of this section even if one (1) of its shareholders is a qualified trust that forms a part of an employee stock ownership plan under Section 401(a) of the Internal Revenue Code.

(b) Except as provided in subsection (c), gross income received by a small business corporation is exempt from gross income tax.

(c) A small business corporation is not exempt from gross income tax under this section for a taxable year if for that taxable year twenty-five percent (25%) or more of the small business corporation's gross income consisted of passive investment income (as defined in Section 1362(d)3(C) of the Internal Revenue Code).

(d) Upon request of the department, a corporation that claims an exemption under this section shall provide the department with proof, on forms provided by the department, that the corporation was a small business corporation during the taxable year for which the exemption is claimed.

To the extent the taxpayer falls within the ambit of the above statute retroactively and prospectively, and to the extent the provisions of IC 6-8.1-9-1 (statute of limitations) are satisfied the taxpayer will be eligible for Indiana special corporation treatment retroactively as well as prospectively.

Ruling #2

The Department rules that the taxpayer is eligible for Indiana special corporation status, both retroactively and prospectively, to the extent the taxpayer falls within the ambit of IC 6-2.1-3-24.5 and to the extent that the provisions of IC 6-8.1-9-1 are satisfied.

Issue #3: Whether or not the taxpayer is subject to Indiana adjusted gross income tax and supplemental net income tax.

IC 6-3-2-1 imposes adjusted gross income tax on adjusted gross income derived from sources within Indiana. IC 6-3-2-2(a) provides that adjusted gross income derived from sources in Indiana includes income from "doing business" in Indiana. Rule 45 IAC 3.1-1-38, interpreting IC 6-3-2-2, provides that for apportionment purposes, a taxpayer is "doing business" in Indiana if it operates a business enterprise or activity in Indiana including, but not limited to:

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

Here, the taxpayer by virtue of having, on occasion, inventory in Indiana, providing a managed inventory program for Indiana customers, delivery of its products by its trucks to Indiana customers, occasional pick up of its products by its trucks from Indiana customers and occasional repair of its products at customer locations in Indiana has established nexus in Indiana for adjusted gross income tax and supplemental net income tax (IC 6-3-8-2) purposes, pursuant to the above statutes and regulation, therefore, is subject to Indiana adjusted gross income tax and supplemental net income tax.

RULING #3

The Department rules that the taxpayer is subject to Indiana adjusted gross income tax and supplemental net income tax.

Issue #4: Assuming all other facts are the same, whether or not the taxpayer would be subject to Indiana gross income tax, adjusted gross income tax or supplemental net income tax if it was incorporated outside Indiana

Assuming all other facts are the same, the state of incorporation of a taxpayer is not determinative of whether or not it is subject to Indiana gross income tax, adjusted gross income tax or supplemental net income tax.

RULING #4

The Department rules that the taxpayer would be subject to Indiana gross income tax, adjusted gross income tax and supplemental net income tax if it was incorporated outside Indiana.

CAVEAT

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