INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

Title: Combined Sewer Overflow (CSO) Long-Term Control Plan Use Attainability Analysis Guidance
Identification Number: Water-003-NRD
Date Originally Effective: December 14, 2001
Dates Revised: None
Other Policies Repealed or Amended: None
Brief Description of Subject Matter: This document fulfills the mandates of Senate Enrolled Act 431 by providing guidance to municipal National Pollutant Discharge Elimination System (NPDES) permittees with combined sewer collection systems. Specifically, the guidance instructs permittees on how to develop a CSO Long-Term Control Plan to address the elimination of impacts to waters of the state from discharges of untreated sewage from CSOs, and how to develop a Use Attainability Analysis to demonstrate the need for a water quality standards revision.
Citations Affected: 327 IAC 2 and 327 IAC 5

This nonrule policy document is intended solely as guidance and does not have the effect of law or represent formal Indiana Department of Environmental Management (IDEM) decisions or final actions. This nonrule policy document shall be used in conjunction with applicable laws. It does not replace applicable laws, and if it conflicts with these laws, the laws shall control. This nonrule policy document may be put into effect by IDEM thirty days after presentation to the appropriate board and after it is made available to public inspection and comment, pursuant to IC 13-14-1-11.5. If the nonrule policy is presented to more than one board, it will be effective thirty days after presentation to the last. IDEM will submit the policy to the Indiana Register for publication. Revisions to the policy will follow the same procedure of presentation to the board and publication.

EXECUTIVE SUMMARY: CSO GUIDANCE

This document is located on the web at www.IN.gov/idem/water/planbr/rules/non-rule.html and can also be obtained by calling Reggie Baker at 317-233-0473. This document is also available for review and copying in the IDEM File Room, located at 100 N. Senate Ave., Indianapolis, IN 46206, room 1201.

DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
Commissioner's Bulletin

Date: December 7, 2001
Subject: Scoring of hazardous substance response sites using the Indiana Scoring Model (ISM).
Authority: Title 329 IAC 7-2-3 Sec. 3 of the Indiana Register sets forth guidelines for publishing sites that have been scored using the ISM.
File Repository: The public may inquire at the Department of Environmental Management, 100 North Senate Avenue, P.O. Box 6015, Indianapolis, Indiana 46206-6015, to review and/or obtain specific information regarding a particular site's scoring package. For further details contact the Office of Land Quality - Site Investigation Section - also located at the aforementioned address.
Introduction: The Indiana Scoring Model (ISM) is a method of prioritizing, for state response actions, those hazardous substances response sites that are not on the National Priorities List (NPL). The ISM serves as the Commissioner's management tool to address those sites which pose the most significant threat to human health and the environment in addition to assuring the department's resources are allocated accordingly.

Hazardous substances response sites that are evaluated utilizing the ISM are assigned a numerical score. Site scoring is a dynamic process and scores may be subject to change based on significant changes in site circumstances, receipt of additional site information, or other relevant factors.

The ISM combines three (3) scores assigned to a hazardous substance response site as follows:

(1) S_M reflects the potential for harm to humans or the environment from the migration of a hazardous substance away from the facility by routes involving groundwater, surface water, or air. It is a composite of separate scores for each of the three (3) routes.

(2) S_{FE} reflects the potential for harm from substances that can explode or cause fires.

(3) S_{DC} reflects the potential for harm from direct contact with hazardous substances at the facility, i.e., no migration need be involved.

The score for each hazardous mode (migration, fire and explosion, and direct contact) or route is obtained by considering a set of factors that characterize the potential of the facility to cause harm. Each factor is assigned a numerical value (on a scale of zero (0) to three (3), five (5), or eight (8)) according to prescribed guidelines. This value is then multiplied by a weighting factor yielding the factor score. The factor scores are then combined and scores within a factor category are added. Then total scores for each factor category are multiplied together to develop a score for groundwater, surface water, air, fire and explosion, and direct contact.

In computing an individual migration route score, the product of its factor category scores is divided by the maximum possible score, and the resulting ratio is multiplied by one hundred (100). The last step puts all route scores on a scale of zero (0) to one hundred (100).

In computing S_{FE} or S_{DC} the product of its factor category divided by the maximum possible score and the resulting ratio is multiplied by ten (10). The last step puts all S_{FE} or S_{DC} scores on a scale of zero (0) to ten (10).

S_M is a composite of the scores for the three (3) possible migration routes:

$$S_M \text{ ' } \frac{1}{1.73}$$

Where: S_{gw} = groundwater route score
S_{sw} = surface water route score
S_a = air route score

The effect of this means of combining the route scores is to emphasize the primary (highest scoring) route in aggregating route scores while giving some additional consideration to the secondary or tertiary routes if they score high. The factor 1/1.73 is used simply for the purpose of reducing S_M scores to a one hundred (100) point scale.

The ISM does not quantify the probability of harm from a facility or the magnitude of the harm that could result, although the factors have been selected in order to approximate both those elements of risk. It is a procedure for ranking facilities in terms of the potential threat they pose by describing:

(1) manner in which the hazardous substances are contained;
(2) route by which they would be released;
(3) characteristics and amount of the harmful substances; and
(4) likely targets.

The multiplicative combination of factor category scores is an approximation of the more rigorous approach in which one would express the hazard posed by a facility as the product of the probability of a harmful occurrence and the magnitude of the potential damage.

Sites may be deleted from the list if the combined score is less than or equal to five (5). For more information on the deletion process see 329 IAC 7-11-1 and 329 IAC 7-11-2.

The following list of sites has been scored using the ISM. The site scores and the corresponding scoring dates are based on the most recent available information.

COMMISSIONER'S BULLETIN

List of hazardous waste sites scored
using the Indiana Scoring Model (ISM)

http://www.in.gov/idem/olq/programs/statecleanup/club.html

County/City Site Name (Type of Facility) Address	score based on potential impact Score Rescore	Score Date Rescore Date	Contaminant Type	Environment Affected	Status
Adams/Berne National Oil Company (Bulk Plant) SR 218 & CR 150W	 20.97 -/-	 May-92	 Fuel	 Soil Surface water	 Investigation in progress
Blackford/Montpelier G.S. Service Corporation (Commercial) 6659 N 450E	 24.60 -/-	 Jun-93	 Metals	 Soil	 Surface waste removed
Delaware/Albany Muncie Race Track (Dump) SR 67 & 700N	 27.70 -/-	 Feb-91	 Metals Solvents PCBs	 Soil Groundwater	 Waste isolated Landfill capped

Delaware/Muncie Stout Storage Battery (Industrial) 2505 West 8th	26.22 11.21	Dec-90 May-99	Lead	Soil	Cleanup Complete
Elkhart/Elkhart Federal Paper Board (Industrial) 600 Division	23.41 -/-	Mar-91	Solvents Fuel	Soil Groundwater Surface Water	Cleanup in progress
Elkhart/Elkhart Lusher Avenue (Landfill) CR 18 & 21st Street	31.00 -/-	Feb-91	Solvents	Soil Groundwater	Residential water filters installed
Elkhart/Elkhart Sycamore Street Site (Drycleaner) 100 Sycamore	13.13 -/-	May-91	Solvents	Groundwater	Alternate water supplied Delisting evaluation proposed 2002
Elkhart/Middlebury Universal Adhesives/Timminco (Industrial) SR 13 South	25.00 -/-	Dec-90	Solvents	Soil Groundwater	Cleanup completed Delisting evaluation proposed 2002
Fayette/Connersville Connersville Landfill (Landfill) SR 121 & Eastern Avenue	44.60 -/-	Feb-91	Solvents Metals	Soil Surface water Groundwater	Waste study in progress
Franklin/Laurel Laurel Dump Site #1 (Dump) 24128 Old US 52	20.89 -/-	Mar-92	Solvents Metals	Soil Surface water Groundwater	Surface waste removed Delisting proposed 2002 Pending USEPA investigation
Gibson/Princeton Indiana Refining (Industrial) US 41 and 350 S	30.03 -/-	Dec-90	Fuel	Soil	Surface waste removed Delisting evaluation proposed 2002
Grant/Marion Grant County Landfill (Landfill) 750 E & SR 18	15.48 -/-	Apr-91	Metals	Soil Groundwater	Ongoing investigation
Hancock/Fortville Meridian Road Landfill (Landfill) CR 1000 N and Meridian	40.16 -/-	Dec-90	Solvents Metals	Soil Groundwater	Investigation complete Cleanup in progress
Hendricks/Clayton Clayton Wells (Commercial) Kentucky Street	27.00 -/-	Dec-90	Solvents	Groundwater	Filters supplied Periodic monitoring
Huntington/Huntington Huntington Terminals (Pipeline) Meridian & Erie Stone	28.90 -/-	Dec-90	Fuel	Groundwater	Alternate water supplied

Jackson/Reddington Texas Eastern (Petroleum pipeline) Southwest of Reddington	26.26 -/-	Dec-90	Fuel	Soil Groundwater	Cleanup in progress under Agreed Order
Jackson/Medora United Plastics (Manufacturing) SR235 & 2nd Street	39.00 -/-	Jan-91	Solvents Metals	Soil Groundwater	Waste removal in progress
Kosciusko/Warsaw Warsaw Chemical (Chem-Manufacturing) Argonne & Durban Street	47.45 -/-	Jan-91	Solvents	Soil Groundwater	Cleanup in progress under Agreed Order
Lake/Hammond Calumet Containers (Industrial) 3631 Stateline Road	16.07 -/-	Dec-90	Solvents	Soil	Removal completed by USEPA Confirmation sampling planned Delisting evaluation proposed 2002
Lake/East Chicago Energy Cooperative Incorporated (Industrial) 3500 Indianapolis Blvd	19.87 -/-	Dec-90	Fuel Lead	Soil Surface water Groundwater	Cleanup in progress under Agreed Order
Lake/Hammond J & L - Amoco (Refinery) Lake Ave & 129 Street	18.59 -/-	Mar-91	Fuel Acid/bases Lead	Soil Groundwater	Cleanup under RCRA Corrective Action
Lake/Cedar Lake Schreiber Oil Company (Petroleum Storage) 10601 W 133rd Street	13.48 -/-	Dec-90	Fuel	Soil	Surface waste removed
Lake/Hammond William Powers (Dump) 119th & Stateline	18.88 -/-	Mar-91	Cyanide Sulfide	Soil Surface water	Confirmation sampling planned Delisting evaluation proposed 2002
Lawrence/Oolitic Oolitic Dump (Dump) Hoosier & 4th Street	48.87 -/-	Jan-91	Fuel	Soil Groundwater	Cleanup in progress under Leaking Underground Storage Tanks
Madison/Anderson Prime Battery (Manufacturing) 230 Jackson	29.52 -/-	Dec-91	Lead	Soil Groundwater	Removal completed Delisting evaluation proposed 2002
Marion/Indianapolis American Lead (Industrial) 2102 Hillside Avenue	21.78 -/-	Jun-99	Lead	Soil	Agreed Order signed Ongoing investigation
Marion/Indianapolis Avanti Corporation (Industrial) South Harris Street	40.05 23.09	May-93 Oct-98	Lead	Soil Groundwater Surface Water	Surface waste removed Cleanup in progress under Superfund

Marion/Indianapolis M Metal Company (Industrial) 1328 Dawson	29.03 9.31	Oct-91 Feb-99	Metals PCBs	Soil	Surface waste removed
Marion/Indianapolis Marathon Rock Island (Industrial) 500W 86th Street	15.22 -/-	Jan-91	Gasoline Metals	Soil Surface water Groundwater	Waste cleanup in progress under EPA RCRA authority
Marion/Speedway Marathon Terminal (Industrial) 1304 Olin	21.04 -/-	Apr-91	Fuel	Soil Surface water Groundwater	Cleanup in progress Multiple recovery wells Soil vapor extraction system in place
Marshall/Bourbon Bourbon & Quad Streets Contamination (Commercial) 211 W Center Street	25.86 -/-	May-92	Solvents Fuel	Soil Groundwater	Cleanup in progress under Leaking Underground Storage Tanks
Montgomery/Crawfordsville Crawfordsville Scrap & Salvage (Dump/Scrap) 419 N Green Street	29.67 -/-	Oct-93	PCBs Lead	Soil Sediments	Entered voluntary remediation program
Montgomery/Crawfordsville P.R. Mallory (Electrical) SR 32 East	22.23 -/-	Sep-91	PCBs	Soil Sediments	Some surface waste removed by USEPA
Montgomery/Crawfordsville Shelly Ditch (Industrial) 1204 Darlington Avenue	24.04 -/-	Aug-99	PCBs	Soil Sediments	Waste study in progress under Superfund
Morgan/Monrovia Davenport Dump (Dump) 6965 Beech Grove Road	28.20 23.20	Dec-90 Jul-00	Solvents	Surface water	Additional investigation planned Pending USEPA investigation
Porter/Wheeler Wheeler Landfill (Landfill) SR 130 & Jones Road	31.19 -/-	Jan-92	Solvents Caustics	Groundwater	Long-term monitoring under RCRA Corrective Action
Randolph/Union City A.O. Smith (Westinghouse) (Industrial) Frank Miller Road	44.67 -/-	Feb-92	PCBs	Soil Groundwater	Surface waste removed by IDEM Cleanup in progress under Superfund
Randolph/Union City Little Mississenewa River (River) Frank Miller Road at Little Mississenewa	31.37 -/-	Jul-99	PCBs	Soil Sediments	Cleanup in progress under Superfund
Randolph/Union City UTA (Industrial) 1425 W Oak	33.70 -/-	Sep-99	PCBs	Soil Groundwater	Cleanup in progress under Superfund

St. Joseph/Granger					
Amoco/Granger	54.76	Dec-90	Fuel	Soil	Cleanup in progress
(Industrial)	26.02	Jan-96	Solvents	Groundwater	Agreed Order signed
Adams Road					
St. Joseph/South Bend					
Allied Signal Corporation	41.75	May-92	Solvents	Soil	Entered voluntary remediation program
(Industrial)	-/-		Fuel	Groundwater	
717 N Bendix Drive					
St. Joseph/South Bend					
ARCO	46.74	Jul-99	Fuel	Soil	Remedial investigation in progress
(Industrial)	-/-			Groundwater	
20630 West Ireland					
St. Joseph/South Bend					
Avanti	27.60	Mar-90	Solvents	Soil	Drum removal complete
(Industrial)	28.28	Mar-92		Groundwater	Remedial investigation in progress
765 S Lafayette Road					
St. Joseph/South Bend					
Chippewa Avenue Well Field	50.38	Aug-99	Solvents	Groundwater	Remedial investigation in progress
(Industrial)	-/-				Cleanup in progress
600 W Chippewa					
St. Joseph/South Bend					
Toro-Wheelhorse	29.89	Mar-93	Solvents	Soil	Entered voluntary remediation program
(Industrial)	-/-		Metals	Groundwater	
515 W Ireland Road					
Shelby/Shelbyville					
Knauf Fiberglass	43.86	Mar-91	Solvents	Groundwater	Cleanup Complete
(Industrial)	17.85	Mar-94		Surface water	No further action
240 Elizabeth					
Shelby/Shelbyville					
IGC/PSI	19.06	Mar-91	Fuel	Soil	Ongoing investigation
(Industrial)	-/-		by-products	Groundwater	
Noble Street			Cyanide		
Shelby/Shelbyville					
Shelbyville Well Field	19.06	Jan-96	Solvents	Groundwater	Well field relocated
(Municipal)	0	Aug-01			To be delisted 01/02/02
Noble and Elizabeth Streets					
Shelby/Shelbyville					
TRW Incorporated	42.83	Dec-90	Solvents	Soil	Risk assessment in progress
(Industrial)	9.17	Mar-94		Groundwater	Cleanup in progress
630 Noble/513 Hendricks					
Spencer/Troy					
Freeman Kline Site/Troy Refinery	31.17	Jun-97	Petroleum	Soil	Immediate removal completed
(Refinery)	-/-			Surface water	Investigation in progress
SR 70 East				Groundwater	
Sullivan/Dugger					
Dugger Electric	25.82	Feb-91	Petroleum	Groundwater	Monitoring
(Commercial)	-/-		PCBs		
First and Main Streets					

Tippecanoe/Lafayette					
ALCOA	19.44	Dec-90	PCBs	Soil	Ongoing investigation
(Industrial)	-/-			Sediments	
3131 E Main					
Tippecanoe/Otterbein					
David John Property	43.8	Aug-01	Solvents	Soil	Ongoing Investigation
(Drum Recycling)				Groundwater	
Vandalia Street					
Tippecanoe/Lafayette					
Indiana Gas	44.35	Dec-91	Fuel by-products	Soil	Cleanup complete
(Industrial)	39.65	Jul-99	Cyanide	Groundwater	Long term monitoring
600 N 4th Street					
Tippecanoe/Lafayette					
TRW/Ross Gear	58.54	Dec-90	Solvents	Soil	Cleanup complete under Agreed Order
(Industrial)	42.60	Jan-96		Groundwater	
800 Heath Street					
Vigo/Terre Haute					
J.I. Case	31.77	Dec-90	Solvents	Groundwater	Agreed Order signed
(Industrial)	-/-				Pilot groundwater cleanup project in place
4901 N 13th Street					
Warrick/Booneville					
Booneville Mining Services	12.66	Feb-91	Metals	Soil	Further investigation planned
(Mining)	-/-			Groundwater	Groundwater monitoring in progress
110 W Division Street					
Wayne/Richmond					
Dana/Springwood Park	43.17	Jan-91	Solvents	Groundwater	Cleanup in progress under voluntary
(Industrial)	-/-				remediation and solid waste programs
Williamsburg Pike					
Wells/Petroleum					
Merrill Meyers Property	25.26	Feb-92	PCBs	Soil	Immediate removals investigation pending
(Farm Equipment)	-/-				
SR 1 & CR 900					
White/Monon					
Monon Well Field	28.40	Dec-90	Solvents	Soil	Consent Order signed
(Commercial)	-/-			Groundwater	Air stripper in operation
Main Street					

3 sites were deleted from the Commissioner's Bulletin in 2001
1 site was added to the Commissioner's Bulletin in 2001

INDIANA DEPARTMENT OF LABOR
NOTICE OF CHANGES IN
ENFORCEMENT OF STEEL ERECTION REGULATIONS

The federal Occupational Safety and Health Administration, effective January 18, 2002, has revised the steel erection regulations contained in 29 CFR 1926, Subpart R. Effective 60 days after January 18, 2002, on March 19, 2002, the Indiana Department of Labor will be enforcing those regulations in Indiana.

A number of provisions in the final rule, 29 CFR 1926, Subpart R, address the safety of certain structural components and these provisions are known as "component requirements." Component requirements contain requirements for structural components to

help ensure that the structure can be erected safely. These component requirements consist of the following particular standards: 1926.754(c)(1); 1926.755(a); 1926.756(c)(1); 1926.756(d); 1926.756(e); 1926.757(a)(1)(i); 1926.757(a)(3); 1926.757(a)(8)(i); 1926.758(b); 1926.758(e).

The new effective date, March 19, 2001, for the steel erection standards contained in 1926 Subpart R will be applied to the above component requirements in the following manner:

(1) Where a building permit was obtained before the final rule was published on January 18, 2001, the component requirements listed above will not apply to the work project.

(2) If the steel erection work in question began on or before November 15, 2001, the component requirements of the final rule, listed above, will not be applied.

With regard to all other standards contained in 29 CFR 1926 Subpart R, the effective date for employers in Indiana OSHA's jurisdiction shall remain March 19, 2002. Where building permits, for example, are obtained after January 18, 2001, the component requirements will apply. Where the steel erection work began after November 15, 2001, the component requirements of the final rule will still apply.

John P. Griffin
Commissioner
Indiana Department of Labor

DEPARTMENT OF STATE REVENUE
STATE OF INDIANA

IN REGARDS TO THE MATTER OF:
IMPROVED BENEVOLENT PROTECTIVE
ORDER OF ELKS, LODGE #772, ET AL.
DOCKET NO. 01-0070

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DEPARTMENTAL ORDER

An administrative hearing was held on Thursday, September 13, 2001 in the office of the Indiana Department of State Revenue, 100 N. Senate Avenue, Room N248, Indianapolis, Indiana 46204 before Bruce R. Kolb, an Administrative Law Judge acting on behalf of and under the authority of the Commissioner of the Indiana Department of State Revenue.

Petitioner, Improved Benevolent Protective Order of Elks Lodge #772, was represented by Pat Ragains of Smith & Ragains, 936 Meridian Plaza, Anderson, Indiana 46016. Steve Carpenter appeared on behalf of the Indiana Department of State Revenue.

A hearing was conducted pursuant to IC 4-32-8-1, evidence was submitted, and testimony given. The Department maintains a record of the proceedings. Being duly advised and having considered the entire record, the Administrative Law Judge makes the following Findings of Fact, Conclusions of Law and Departmental Order.

REASON FOR HEARING

On February 14, 2001 the Indiana Department of Revenue determined that an emergency existed that required the immediate termination of Petitioner's gaming operations and a revocation of the organization's charity gaming license. The Department imposed civil penalties and suspended the organization and two individuals from associating with charity gaming for a period of three years each. The Petitioner protested in a timely manner.

SUMMARY OF FACTS

1) Pursuant to IC 4-32-12-2 the Petitioner was assessed a civil penalty for violating IC 4-32-9-15.

2) Petitioner conceded at hearing, that they had violated IC 4-32-9-15 by contracting with an individual to conduct their charity gaming.

3) Pursuant to IC 4-32-12-2 Petitioner was assessed a civil penalty for violating IC 4-32-9-29.

4) Petitioner conceded that they had employed workers who were not members in violation of IC 4-32-9-29.

5) Pursuant to IC 4-32-12-2 the Petitioner was assessed a civil penalty for violating IC 4-32-9-25.

6) The Department assessed the Petitioner civil penalties for paying a total of twelve (12) workers. The Petitioner admitted to paying only two (2) workers. In regards to the question of paying workers, the Hearing Officer is at odds in trying to see why Petitioner's counsel would question a lack of records on the Department's part when their own witness told investigators that there were no records. Does this mean that records did exist, and Petitioner's witness lied to investigators?

7) The Petitioner failed to overcome its burden to prove that they did not pay the other ten workers.

8) Petitioner violated IC 4-32-9-25 by providing operators and workers with remuneration.

9) Pursuant to IC 4-32-12-2 the Petitioner was assessed civil penalties for violating IC 4-32-12-1(a).

10) The operation of thirteen (13) illegal gambling machines by an organization licensed by the State of Indiana to conduct charitable gaming is a violation of IC 4-32-12-1.

11) The Department, pursuant to IC 4-32-12-3, imposed a three (3) year prohibition upon the Petitioner (Improved Benevolent Protective Order of Elks Lodge #772), RT, and LR from conducting or associating with charity gaming.
12) Mr. Russell and the other two operators listed on Petitioner's CG-13 are equally responsible for the above infractions.

FINDINGS OF FACT

1) The Department's investigator testified under oath that the Petitioner entered into an agreement with RT to operate its charity gaming in exchange for payment. The Petitioner's operators RT and LR both told the Department's investigator that the agreement existed. (Record at pgs. 11-13).
2) The Department's Exhibit #3 consisted of a handwritten document dated January 7, 2000. The document appears to be a contract to use the Petitioner's facilities, provide catering, and to conduct gaming between the Petitioner and RV. The only signature on the agreement is Ms. V who is listed as an operator. (Dept. Exhibit #3).
3) The Petitioner conceded during the hearing that, "…there was a contract between RT and LR to operate the bingo operation…" (Record at pgs. 6-7).
4) The Department's investigator testified under oath that individuals who worked charity gaming for the Petitioner were not members. (Record at pg. 13).
5) The Department's investigator testified under oath that during an interview with a former worker, it was verified that she was paid for working the Petitioner's charity gaming events. (Record at pg. 20).
6) Additionally, the former worker testified under oath at the hearing that she personally paid the remainder of the eleven workers, and that the operators paid themselves from the petty cash. (Record at pgs. 21-23).
7) The Petitioner admits that only two workers out of twelve were actually paid. (Record at pg. 44).
8) Petitioner's counsel questioned why the Department was not able to produce records of these payments, and whether a subpoena was issued for those records. (Record at pg. 19). But it was Petitioner's own witness that told investigators initially that there were no payment records. (Record at pg. 19).
9) Petitioner did not call the other eleven workers on the list as witnesses, nor did Petitioner provide simple affidavits from these individuals stating that they did not receive payment.
10) The Department's investigator testified under oath that, she was told by Petitioner's witness, that a total of thirteen (13) gambling machines were at the Petitioner's location. (Record at pg. 18).
11) The Department's other witness also testified under oath, that she had personal knowledge of the machines and that there were a total of thirteen (13). (Record at pg. 23).
12) Petitioner's counsel questioned if the Department's investigator had seen the machines, and their location. (Record at pg. 18).
13) Petitioner's own witness testified that the machines had been removed prior to his conversation with the Department's investigator. (Record at pg. 41).
14) Petitioner first argues that the Department's investigator did not actually see the machines on the premises. Second, Petitioner argues that there were fewer machines than what was described by the Department, but the Petitioner's witness could not remember how many there actually were. (Record at pg. 39).
15) The Petitioner's witness, who was listed on the CG-13 (Dept. Exhibit #1) as an operator, stated that the machines were in the vicinity of the bingo hall. (Record at pg. 40). He also stated that the Lodge had to pay approximately two thousand dollars ($2,000) to the owner of the machines to have them removed from the premises. (Record at pg. 41).
16) Petitioner did have control over the machines, and as an operator was responsible for conducting charity gaming.
17) The Petitioner's witness could not guarantee that the machines were locked in a room at all times. (Record at pg. 37).
18) As a result of the Indiana Department of Revenue's investigation, RT and LR were prohibited from conducting or associating with charity gaming for a period of three (3) years.
19) RT failed to protest the Department's action against her. Her name appears on a handwritten contract entered into with the Petitioner.
20) LR appeared at the hearing and testified under oath on behalf of the Petitioner. As an operator, Mr. Russell is the person of authority on the premises while the charity gaming is taking place.

STATEMENT OF LAW

1) Pursuant to IC 6-8.1-5-1, the Department's findings are prima facie evidence that the Department's findings are correct. The burden of proving that the findings are wrong rests with the person against whom the findings are made. See Portland Summer Festival v. Department of Revenue, 624 N.E.2d 45 (Ind.App. 5 Dist. 1993).
2) IC 4-32-9-15 states, "A qualified organization may not contract or otherwise enter into an agreement with an individual…to conduct an allowable event for the benefit of the organization. A qualified organization shall use only operators and workers meeting the requirements of this chapter to manage and conduct an allowable event."
3) IC 4-32-9-29 states, "A worker must be a member in good standing of a qualified organization that is conducting an allowable event for at least thirty (30) days at the time of the allowable event."
4) The remuneration of operators and workers is illegal pursuant to IC 4-32-9-25.

5) IC 4-32-12-1 states, "The department may suspend…an individual under this article for any of the following: (1) Violation of a provision of this article or of a rule of the department… (5) Conduct prejudicial to the public confidence in the department…".

6) IC 4-32-12-3 provides, "In addition to the penalties described in section 2 of this chapter, the department may do all or any of the following…(3) Prohibit an operator or an individual who has been found to be in violation of this article from associating with charity gaming conducted by a qualified organization."

CONCLUSIONS OF LAW

1) At hearing the Petitioner conceded the fact that it entered into an agreement with RT to operate its charity gaming in exchange for payment, a violation of IC 4-32-9-15.

2) At hearing the Petitioner conceded that fact that individuals who worked charity gaming for the Petitioner were not members, a violation of IC 4-32-9-29.

3) Petitioner paid twelve (12) workers in violation of IC 4-32-9-25.

4) The operation of thirteen (13) illegal gambling machines by an organization that it licensed by the State of Indiana to conduct charitable gaming is conduct that the Department finds prejudicial to the public confidence.

5) An operator is responsible for supervising and directing other people working at the event, and in addition is responsible for making the required financial reports of the event. In light of the above infractions, it is clear that Petitioner failed to conduct charity gaming in a manner consistent with Indiana law.

DEPARTMENTAL ORDER

Following due consideration of the entire record, the Administrative Law Judge recommends the following:

RT is prohibited from conducting or associating with charity gaming for a period of three (3) years. LR is prohibited from conducting or associating with charity gaming for a period of one (1) year. The Petitioner, Improved Benevolent Protective Order of Elks Lodge #772 is prohibited from conducting or associating with charity gaming for a period of three (3) years. All civil penalties imposed upon the Petitioner by the Department are hereby upheld.

1) Under IC 6-8.1-5-1, the organization may request a rehearing. However, rehearings are granted only under unusual circumstances. Such circumstances are typically the existence of facts not previously known that would have caused a different result if submitted prior to issuance of the Letter of Findings.

2) A request for rehearing shall be made within seventy-two (72) hours from the issue date of the Letter of Findings and should be sent to the Indiana Department of Revenue, Legal Division, Appeals Protest Review Board, P.O. Box 1104, Indianapolis, Indiana 46206-1104.

3) Upon receipt of the request for rehearing, the Department will review the respective file and the rehearing request to determine if sufficient new information has been presented to warrant a rehearing.

4) The Department will then notify the organization in writing whether or not a rehearing has been granted. In the event a rehearing is granted, the organization will be contacted to set a rehearing date.

5) If the request for rehearing is denied or a request is not made, all administrative remedies will have been exhausted. The organization may then appeal the decision of the Letter of Finding to the Court of proper jurisdiction.

THIS DEPARTMENTAL ORDER CONSTITUTES THE FINAL ORDER OF THE INDIANA DEPARTMENT OF STATE REVENUE UNLESS OBJECTIONS ARE FILED WITHIN SEVENTY-TWO (72) HOURS FROM THE DATE THE ORDER IS ISSUED.

Dated: _____

_____

Bruce R. Kolb / Administrative Law Judge

STATE OF INDIANA
DEPARTMENT OF STATE REVENUE

IN REGARDS TO THE MATTER OF:
INDIANA BLACK EXPO
ECONOMIC DEVELOPMENT CORPORATION
DOCKET NO. 01-0209

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DEPARTMENTAL ORDER

An administrative hearing was held on Tuesday, September 25, 2001 in the office of the Indiana Department of State Revenue, 100 N. Senate Avenue, Room N248, Indianapolis, Indiana 46204 before Bruce R. Kolb, an Administrative Law Judge acting on behalf of and under the authority of the Commissioner of the Indiana Department of State Revenue.

Petitioner, Indiana Black Expo Economic Development Corporation, was represented by Charles Guynn, President and CEO. Steve Carpenter appeared on behalf of the Indiana Department of State Revenue.

A hearing was conducted pursuant to IC 4-32-8-1, evidence was submitted, and testimony given. The Department maintains a record of the proceedings. Being duly advised and having considered the entire record, the Administrative Law Judge makes the following Findings of Fact, Conclusions of Law and Departmental Order.

REASON FOR HEARING

The Petitioner's CG-1 and CG-2 (Indiana Charity Gaming Qualification Application and Indiana Department of Revenue Annual Bingo Application) were received by the Department on May 11, 2001. The Department denied Petitioner's Indiana Charity Gaming License Application in a letter dated August 24, 2001. The Petitioner protested in a timely manner. A hearing was conducted pursuant to IC § 4-32-8-1.

SUMMARY OF FACTS

1) Petitioner listed five individuals on its CG-2 who were not members of the organization in violation of IC 4-32-9-28.
2) Petitioner's application failed to provide sufficient information for the Department to determine that the organization was a qualified organization pursuant to 45 IAC 18-2-1.
3) The Department required that the Petitioner provide three (3) different documents for 1996 through 2001.
4) The instruction page of the Form CG-1 lists the acceptable documents.
5) The Department stated that the Petitioner was required to provide one (1) internal document, and two (2) external documents for the years at issue.
6) Petitioner failed to sign its CG-1 and CG-2 violating IC 4-32-9-5(b).
7) The lease provided by Petitioner places liability on the lessee. This could cause the lessee to exceed the rent limitation as provided in IC 4-32-9-20.
8) Petitioner failed to clarify on its CG-2 whether it leased, owned or had equipment donated to it for charity gaming.

FINDINGS OF FACTS

1) On June 19, 2001, a Department of Revenue investigator met with a representative of Petitioner's organization in order to review a current membership roster. (Record at 10).
2) The membership list turned over to the Department was originally obtained from the Petitioner's bookkeeper. (Record at 10).
3) A total of five (5) individuals listed on Petitioner's application to conduct charity gaming were not on the Petitioner's membership roster. (Dept. Exhibit C).
4) The Department's witness stated that the lease entered into by the Petitioner contains a damage clause. Thus, according to the Department, any damage done to the leased premises may result in the rental payment for that month to exceed the statutory limit. (Record at 26).
5) Additionally, the lease contains no beginning and ending date, and was not signed by the lessee. (Record at 26).
6) The Department required Petitioner to submit one (1) internal document and two (2) external documents for each year to prove its continuous existence. (Record at 27-28).
7) The taxpayer contends that it had been in existence for at least five (5) years at the time the application was filed. However, Petitioner stated during the hearing, regarding the information submitted with its application, "…we're speaking of the license, the operation allowed, and I guess that entails information showing that we were in existence for more than five years. After I looked through the information, I guess you needed more information about our existence."(Record at 45).
8) The Petitioner's CG-1 (Indiana Charity Gaming Qualification Application) and CG-2 (Annual Bingo License Application) were not signed or dated. (Record at 26).
9) Additionally, Petitioner answered "NO" to the questions contained on lines 7 and 8 of its CG-2. Question 7 states, "Is any tangible personal property (i.e. tables, chairs, bingo blowers, etc.) being leased or donated to you for this event? Question 8 states, "Does your organization own bingo equipment? (Record at 25).
10) Petitioner's charity gaming equipment was donated by Indiana Black Expo, Inc., and is the equipment Indiana Black Expo used when they conducted gaming at location called Southwest Bingo. (Record at 50).

STATEMENT OF LAW

1) Pursuant to IC 4-32-9-20, if a facility is leased for an allowable event the rent may not exceed two hundred dollars ($200) per day.
2) IC 4-32-9-28 states, "An operator must be a member in good standing of the qualified organization that is conducting an allowable event for at least one (1) year at the time of the allowable event."
3) IC 4-32-9-29 states, "A worker must be a member in good standing of a qualified organization that is conducting an allowable event for at least thirty (30) days at the time of the allowable event."
4) Pursuant to IC 6-8.1-5-1, the Department's findings are prima facie evidence that the Department's claim is valid. The burden of proving that the findings are wrong rests with the person against whom the findings are made. See Portland Summer Festival v. Department of Revenue, 624 N.E.2d 45 (Ind.App. 5 Dist. 1993).

5) According to page three of the Department's form CG-1, the relevant facts in determining continuous existence could include a combination of the following items:

Indiana Forms IT-35 AR and IT-20NP;
Federal Form 990 and/or 990T if applicable;
minutes of meetings;
bank statements;
dated newspaper articles;
any type of dated state or local licensing permits, such as alcoholic beverage licenses and registration with the Secretary of State's office;
account payables, including copies of dated invoices;
account receivables, including copies of dated invoices;
utility bills;
dated leases;
canceled checks (representing each of the five years);
bylaws that are dated;
dated articles of incorporation;
affidavits or letters of confirmation from the national or parent organization on organization letterhead; and
descriptions and results of fund-raising activities for the last five years.

6) 45 IAC 18-2-1 states: (a) To obtain a license to operate an allowable event, a qualified organization must submit a written application on a form prescribed by the department.(b) The application shall include the following information: * * * Sufficient facts for the department to determine that the organization is a qualified organization, including, but not limited to, the following: (C) **Proof that the organization has been in existence for five (5) or more years**. (Emphasis added).

7) Indiana Code section 4-32-6-20 states that the organization must be "operating". The Department gives this word its ordinary and plain meaning. Operating is defined by Webster's Dictionary as, "adj. of, relating to, or used for or in operations." The word "operate" means, "1: to bring about: EFFECT 2 a: to cause to function: WORK b: to put or keep in operation..." Webster's New Collegiate Dictionary (1979).

CONCLUSIONS OF LAW

1) The Petitioner's representative conceded in hearing that additional information supporting its claim of five years of continuous existence should have been provided with its application when he stated, "…After I looked through the information, I guess you needed more information about our existence."(Record at 45).

2) The lack of detailed information supporting the Petitioner's claim of five years of continuous existence in conjunction with the fact that Petitioner's officers failed to sign its applications were sufficient to support the denial the Petitioner's application.

3) It is clear that the Petitioner was lax in its attention to detail. These oversights may seem trivial to the Petitioner, but the information gathered on the CG-1 and CG-2 is vital in qualifying an organization to conduct gaming.

4) However, the missing information can be provided and the application resubmitted again in its completed form.

5) The mere fact that Petitioner's rent ***may*** exceed the $200 limitation is not enough to justify a denial.

6) A damage clause in a rental agreement is standard legal language, and is a basic component of common law. This simple clause meant to protect the owner of the property from incurring expenses for damage occurring to his property may not be used to deny a license.

7) If damage occurs in the future, on a regular basis, and the amount of rent charged is in excess of the actual costs of repair then the Department may have justification to investigate whether or not the rental limitation is exceeded, but not until then.

8) The Department's arbitrary requirement of one (1) internal document and two (2) external documents is neither based upon the code or regulation. Either the applicant provides sufficient documentation to support its claim of five (5) years existence or not. The Department's denial cannot be based upon criteria wholly unsupported by Indiana law.

9) The seemingly inconsistent answers to questions 7 and 8 of the Petitioner's CG-2 is trivial in nature, and was easily explained by the Petitioner.

DEPARTMENTAL ORDER

Following due consideration of the entire record, the Administrative Law Judge recommends the following:

Petitioner's appeal is denied.

1) Under IC 6-8.1-5-1, the organization may request a rehearing. However, rehearings are granted only under unusual circumstances. Such circumstances are typically the existence of facts not previously known that would have caused a different result if submitted prior to issuance of the Departmental Order.

2) A request for rehearing shall be made within seventy-two (72) hours from the issue date of the Departmental Order and should be sent to the Indiana Department of Revenue, Legal Division, Appeals Protest Review Board, P.O. Box 1104, Indianapolis, Indiana 46206-1104.

3) Upon receipt of the request for rehearing, the Department will review the respective file and the rehearing request to determine if sufficient new information has been presented to warrant a rehearing.

4) The Department will then notify the organization in writing whether or not a rehearing has been granted. In the event a rehearing is granted, the organization will be contacted to set a rehearing date.

5) If the request for rehearing is denied or a request is not made, all administrative remedies will have been exhausted. The organization may then appeal the decision of the Department to the Court of proper jurisdiction.

THIS DEPARTMENTAL ORDER SHALL BECOME THE FINAL ORDER OF THE INDIANA DEPARTMENT OF STATE REVENUE UNLESS OBJECTIONS ARE FILED WITHIN SEVENTY-TWO (72) HOURS FROM THE DATE THE ORDER IS ISSUED.

Dated: _____

Bruce R. Kolb / Administrative Law Judge

DEPARTMENT OF STATE REVENUE

4296019IFTA

LETTER OF FINDINGS NUMBER: 96-019 IFTA
IFTA
For the Period: 1993 and 1994

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

ISSUES

I. Motor Carrier – Leases

Authority: IC 6-6-4.1 *et seq.*; IFTA; Mason Metals Company, Inc. v. Indiana Dept. of State Revenue, 590 N.E.2d 672 (Ind. Tax 1992)

The taxpayer protests the inclusion of mileage from the State of Illinois in the assessment.

STATEMENT OF FACTS

The taxpayer operates a trucking company and leases vehicles. The taxpayer also does general hauling. More facts will be provided as needed.

I. Motor Carrier – Leases

DISCUSSION

Indiana imposes a tax (the Motor Carrier Fuel Tax) "on the consumption of motor fuel by a carrier in its operations on highways in Indiana." IC 6-6-4.1-4(a). The Indiana Code sets out the following method of determining the amount of fuel consumed by a carrier on Indiana highways:

> The amount of motor fuel consumed by a carrier in its operations on highways in Indiana is the total amount of motor fuel consumed in its entire operations within and without Indiana, multiplied by a fraction. The numerator of the fraction is the total number of miles traveled on highways in Indiana, and the denominator of the fraction is the total number of miles traveled within and without Indiana.
>
> IC 6-6-4.1-4(b).

Audit contends the taxpayer excluded certain miles from the aforementioned fraction. Audit argues that the taxpayer deducted from its Indiana mileage summaries miles that it claimed belonged to another company (hereinafter "Company A"). The taxpayer claims the miles in question were those of Company A's vehicles. To that end, the taxpayer has provided the Department with a number of documents (e.g., State of Illinois Common Motor Carrier of Property Certificate for Company A, Shipper's Manifests) which purport to show that the questioned miles and fuel were reported by another permit holder, namely Company A.

The taxpayer states that:

> [T]he fact that [the taxpayer] did not hold Illinois authority in 1993 and 1994... [means that] any movements made by vehicles owned by [the taxpayer], within the state of Illinois during 1993 and 1994, would have been during the time [its vehicles] were leased to [Company A], who held Illinois intrastate authority.
>
> [The taxpayer] advised the auditor of the fact that any miles traveled in Illinois by [the taxpayer] were in vehicles leased to [Company A]. All of the freight bills, and shipping documents were made available to the auditor.

As noted, the taxpayer claims that the deducted miles and fuel belonged to Company A and that Company A reported and paid the appropriate taxes on Company A's returns. The taxpayer never submitted documentation to the Department that the tax due and owing was paid. Regarding the "lease" between the two companies (taxpayer and Company A), the taxpayer appears to be arguing

that the "lessee" (Company A) is responsible under the lease agreement for the taxes in question. But the taxpayer has not even shown a lease existed—no written lease has been provided to the Department. (It should be noted that IFTA requires that the taxpayer make such leases available upon request).

The Department has requested information regarding Company A to no avail:

This letter is to request additional information concerning the audit that I am conducting on [taxpayer]. As previously requested [Company A's information] needs to be provided to complete the audit. This information is needed to verify that the miles were deducted from the [taxpayer's] summaries and assigned to [Company A] were reported. If verification is not supplied the miles will be included in the audit as [taxpayer's] miles. (Letter from the Field Auditor to taxpayer, dated July 5, 1996)

And again the Department asked for the pertinent documentation:

The two bills that you enclosed with your letter simply substantiate that [Company A] was conducting business in Illinois. The Department requires documentation to verify that [Company A] held a motor carrier permit during the audit period and that [Company A] did in fact report those questioned miles and fuel on their motor carrier return. The auditor explained this … at the time of the audit …. (Letter from Audit Protest/Review to taxpayer, dated November 20, 1996)

Turning to the "lease" between taxpayer and Company A, the Indiana Tax Court has dealt with the issue of the lessor/lessee relationship and adopted as precedent a six-factor test. (*See* Mason Metals Company, Inc., v. Indiana Dept. of State Revenue, 590 N.E.2d 672 (Ind. Tax 1992) (quoting the six factor test enumerated in Indiana Dept. of State Revenue v. Indianapolis Transit System, Inc., 356 N.E.2d 1204 (Ind.App. 1976)). The court stated that the purported existence of a lessor/lessee relationship "is a factual question dependent on the lessee's possession and control over the leased property." Mason Metals at 675. The six-factor test is as follows:

(1) The employment of the driver.
(2) The right to direct movement of the [vehicle].
(3) Obligation to pay costs and repairs.
(4) Obligation to pay fuel costs.
(5) The responsibility of garaging the vehicle.
(6) Payment of insurance and license fees.

The six factors are used to determine whether or not the lessee had possession and control of the vehicles. In the case at hand, no written lease has been proffered, nor has any proof of a lessor/lessee relationship—beyond the Shipper's Manifests and Bills of Lading—been provided to the Department. No documentation has been provided to allow the Department to make a determination consistent with the IFTA rules (e.g., the length of the lease is relevant under IFTA) and the six-factor test. The wealth of documents that the taxpayer has provided merely show that Company A was doing business in Illinois. Thus the taxpayer has not met its burden of proof.

It should also be noted that the taxpayer in one of the original letters sent to the Department stated that in addition to the above tax issue, it was also protesting "the additional assessment of tax." The taxpayer was assessed a negligence penalty of 10%--but the taxpayer has made no arguments regarding the negligence penalty beyond the rather cryptic sentence quoted above. Assuming that the taxpayer was also protesting penalty too, the taxpayer has not met its burden of proof. Thus the taxpayer is denied on the penalty issue too.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

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LETTER OF FINDINGS NUMBER: 98-0594
Sales and Use Tax
For Tax Periods: 1995 through 1997

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

ISSUES

1. Sales and Use Tax – Rental of Tangible Personal Property

Authority: IC 6-2.5-2-1(a); IC 6-2.5-4-10; IC 6-2.5-3-2(a); IC 6-2.5-3-2(b); IC 6-2.5-4-10; IC 6-2.5-5-8; IC 6-8.1-5-1(b); First National Leasing and Financial Corporation v. Indiana Department of State Revenue, 598 N.E.2nd 640 (Ind. Tax 1992)

The taxpayer protests the imposition of use tax on an airplane and parts for airplanes.

2. Sales and Use Tax – Advertising

Authority: IC 6-2.5-2-1(a), Sales Tax Information Bulletin #14

The taxpayer protests the imposition of tax on certain advertisements.

3. Sales and Use Tax – Property Used in Provision of a Service
Authority: IC 6-2.5-5-2-1(a); IC 6-2.5-3-2(a)
The taxpayer protests the imposition of use tax on property used in the provision of a service.
4. Sales and Use Tax – Rental of Real Estate
Authority: IC 6-2.5-4-4(a)
The taxpayer protests the imposition of tax on several instances of the rental of real estate.
5. Sales and Use Tax – Sales Tax on Gasoline
Authority: IC 6-8.1-5-1(b)
The taxpayer protests the imposition of tax on gasoline.
6. Sales and Use Tax – Miscellaneous Transactions
Authority: IC 6-2.5-2-1(a); IC 6-8.1-5-1(b)
The taxpayer protests the imposition of tax on several miscellaneous transactions.
7. Sales and Use Tax – Credit for Sales Taxes Collected
Authority: IC 6-2.5-6-13
The taxpayer requests a credit for sales taxes collected and remitted to the state.
8. Tax Administration – Penalty
Authority: IC 6-8.1-10-2.1; 45 IAC 15-11-2(b)

STATEMENT OF FACTS

The taxpayer is a realty company that provides general realty and other services. After an audit, additional sales and use taxes, penalty and interest were assessed for 1995-1997. The taxpayer protested the assessment and a hearing was held by telephone. More facts will be provided as necessary.

1. Sales and Use Tax – Rental of Tangible Personal Property

DISCUSSION

Pursuant to the provisions of IC 6-2.5-2-1(a), the Indiana sales tax is imposed on "retail transactions made in Indiana." IC 6-2.5-4-10 defines the rental of tangible personal property as a retail transaction subject to the sales tax.

Pursuant to IC 6-2.5-3-2(a), Indiana imposes an excise tax on tangible personal property that was purchased in a retail transaction and "stored, used, or consumed in Indiana..." Aircraft purchased in an occasional sale is also subject to the use tax. IC 6-2.5-3-2(b). IC 6-2.5-4-10 defines the rental of tangible personal property as a retail transaction subject to the sales tax and use taxes. IC 6-2.5-5-8 exempts from sales and use taxation "tangible personal property …if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of his business without changing the form of the property."

Assessments made by the Indiana Department of Revenue are presumed to be correct and the taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1(b).

On September 30, 2001, the taxpayer purchased a 1967 Cessna airplane without paying the sales tax on the purchase. The auditor assessed use tax on the use of the airplane and repair parts for that and other airplanes because they were tangible personal property purchased in a retail transaction and used in Indiana. The taxpayer contends that the purchase and use of the airplane and repair parts for the airplanes qualified for exemption because they were purchased for the purpose of renting the airplanes to another entity. In support of its contention, the taxpayer submitted copies of leases for the rental of the 1967 Cessna and other aircraft to another business entity.

The submission of leases is not dispositive of the issue of whether or not the aircraft were purchased for rental in the regular course of the taxpayer's business. It is established Indiana law that the substance rather than the form of a transaction determines the tax consequences. First National Leasing and Financial Corporation v. Indiana Department of State Revenue, 598 N.E.2nd 640, (Ind. Tax 1992). For rentals to occur, market rate rents must be consistently collected. In this situation, the taxpayer did not consistently collect the rents specified by the leases. Further, the lease contracts state that the lessee is to maintain the aircraft. If the parties had actually followed these terms, the taxpayer would not have had to purchase repair parts for the aircraft. Also, according to the leases, the lessee should have paid the hangar rental. The taxpayer stated that he oftentimes paid the hangar rental for the airplanes. The substance of these transactions clearly indicates that the taxpayer did not actually lease the airplanes to the other entity. Rather, the taxpayer owned the airplanes and allowed the other entity to use them. This use of the 1967 Cessna aircraft and repair parts for the aircraft does not qualify for exemption from the use tax.

FINDING

The taxpayer's protest to the assessment of use tax on the 1967 Cessna airplane and repair parts for the airplanes is denied.

2. Sales and Use Tax – Advertising

DISCUSSION

Sales Tax Information Bulletin #14 clarifies the application of sales and use tax in the advertising situation. Pursuant to this

clarification, advertising services are not subject to sales and use taxes. The transfer of tangible personal property, however, is subject to tax.

During the audit period, the taxpayer purchased three types of advertising; ads in a magazine for the sale of airplanes, airplane towing of an advertising banner over a collegiate football game, and booklets with information on real estate listings for distribution to prospective real estate buyers. The first advertisement was a service that is not subject to the Indiana sales tax. No assessment was in the audit for a tax on the airplane towing of an advertising banner.

The purchase of the real estate booklets is, in actuality, the transfer of tangible personal property in a retail transaction. As such, it is subject to the sales tax. IC 6-2.5-2-1(a).

FINDING

The taxpayer's protest to the purchase of advertising in a magazine is sustained. The taxpayer's protest to the tax imposed on advertising booklets is denied.

3. Sales and Use Tax – Property Used in Provision of a Service

DISCUSSION

Indiana sales tax is imposed on property transferred in a retail transaction in Indiana. IC 6-2.5-2-1(a). The provision of services is not subject to the Indiana sales tax. The use of tangible personal property in the provision of services is subject to the use tax. IC 6-2.5-3-2(a).

The taxpayer's primary business was the offering of real estate agent services. The taxpayer purchased miscellaneous hardware, mail order merchandise, office equipment and supplies, software and realty signs that it then used in the provision of these services. The taxpayer used these items in the provision of real estate agent services to clients. Therefore the use tax was properly imposed on these items.

FINDING

The taxpayer's protest to the assessment of use tax on items used in the provision of services is denied.

4. Sales and Use Tax – Rental of Real Estate

DISCUSSION

During the audit period, the taxpayer rented hotel rooms and meeting rooms for its use, office space to other corporations and airplane hangars to house its airplanes. The sales and use taxability of these transactions is governed by IC 6-2.5-4-4(a) as follows:

> A person is a retail merchant making a retail transaction when the person rents or furnishes rooms, lodgings, or other accommodations, such as booths, display spaces, banquet facilities, and cubicles or spaces used for adult relaxation, massage, modeling, dancing, or other entertainment to another person:
>
> (1) if those rooms, lodgings, or accommodations are rented or furnished for periods of less than thirty (30) days; and
>
> (2) if the rooms, lodgings, and accommodations are located in a hotel, motel, inn, tourist camp, tourist cabin, gymnasium, hall, coliseum, or other place, where rooms, lodgings, or accommodations are regularly furnished for consideration.

The rooms that the taxpayer rented for meetings or to house pilots who were flying its planes for an overnight trip clearly fall within the category of rentals of real estate considered subject to the sales and use tax. There was no evidence that any of these rentals of real estate qualified for any of the statutory exemptions from the use tax.

The taxpayer owned real estate and rented rooms in that real estate to other corporations for use as office space. No assessments on these items were found in the audit.

The taxpayer contends that audit reference numbers 2609, 3623, 2664, 2692 and 2711 represent rentals of airplane hangars. The taxpayer does not, however, offer any evidence in support of his contention that these reference numbers represent rentals of airplane hangars. Therefore, the taxpayer does not sustain his burden of proof that these were exempt transactions.

FINDING

The taxpayer's protest to the use tax on these transactions is denied.

5. Sales and Use Tax – Sales Tax on Gasoline

DISCUSSION

The taxpayer also protests the imposition of use tax on gasoline that the taxpayer purchased for its airplanes. The taxpayer argues that he paid the sales tax on the gasoline when it was purchased. The taxpayer bears the burden of proving that the assessment is incorrect. IC 6-8.1-5-1(b). The invoices and statements that the taxpayer presented in support of his argument do not have a separate listing for the sales tax. The invoices also do not indicate whether the sale took place through a metered pump that included sales tax in the per gallon price. Rather they have the amount of gallons and total price. These documents do not sustain the taxpayer's burden of proof that he paid the sales tax on the gasoline purchases.

FINDING

This point of the taxpayer's protest is denied.

6. Sales and Use Tax – Miscellaneous Transactions

DISCUSSION

The taxpayer also protests the imposition of use tax on several miscellaneous transactions. These include payments for pilot

services, landing fees, seminars and loan interest payments. The pilot services and seminars qualify as purchases of services rather than sales of tangible personal property. Sales and use taxes are imposed on the transfer of tangible personal property rather than the provision of services. IC 6-2.5-2-1(a). Therefore no tax is due on these transactions.

The taxpayer did not substantiate the landing fees or loan and interest payments. Without any documentation, the taxpayer is unable to sustain his burden of proving that the assessment is incorrect. IC 6-8.1-5-1(b).

FINDING

The taxpayer's protest to the tax imposed on the payments for pilot services and seminars is sustained. The taxpayer's protest to the assessment of tax on landing fees and purported loan payments is denied.

7. Sales and Use Tax – Credit for Sales Taxes Collected

DISCUSSION

The taxpayer incorrectly collected and remitted some sales taxes. The taxpayer contends that he should be given a credit against his liability for these taxes. The proper party to claim a refund or credit for sales taxes improperly collected and remitted from the state is the party who actually paid those taxes to the collecting agent or retail merchant. IC 6-2.5-6-13. The taxpayer has no standing to claim a refund or credit for the sales taxes in this situation.

FINDING

The taxpayer's protest is denied.

8. Tax Administration – Penalty

DISCUSSION

Taxpayer's final point of protest concerns the imposition of the ten per cent negligence penalty pursuant to IC 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2(b) clarifies the standard for the imposition of the negligence penalty as follows:

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

In this instance, the taxpayer confused his personal and business records and did not keep adequate documentation of his transactions. The taxpayer also failed to pay use tax on clearly taxable items such as office supplies. These breaches of the taxpayer's duty to properly report and remit sales taxes constitute negligence.

FINDING

The taxpayer's protest to the imposition of the negligence penalty is denied.

DEPARTMENT OF STATE REVENUE

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LETTER OF FINDINGS NUMBER: 98-0721
Income Tax
For Tax Periods 1994-1996

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

ISSUES

I. Income Tax – Combined Filing

Authority: ANR Pipeline v. Indiana Department of State Revenue, 672 N.E.2d 91 (Ind.Tax 1996); IC 6-3-2-2; IC 6-8.1-4-2; 45 IAC 3.1-1-62

Taxpayer protests the denial of permission to file a combined return.

II. Tax Administration – Negligence Penalty

Authority: 45 IAC 15-11-2

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

STATEMENT OF FACTS

Taxpayer is the parent company for numerous corporations engaged in the publishing and broadcasting business. One of these corporations is in business as a television station in Indiana. Another of the corporations is in business as a television station in a neighboring state, with its transmission towers located in Indiana. In 1995, the second corporation purchased and began operating

an independent television station in Indiana. These are the only two members of the parent company's affiliated group that have an Indiana business situs or any activities in Indiana subjecting them to Indiana taxation.

In 1994, taxpayer sought the Indiana Department of State Revenue's ("Department") approval to file a combined return in Indiana. The Department approved the combined return, contingent on several factors. The Department conducted an audit in 1998, which resulted in denial of permission to file a combined return. Taxpayer protests this denial.

I. Income Tax – Combined Filing

DISCUSSION

Taxpayer protests the Department's retroactive denial of permission to file a combined return. The denial resulted from an audit covering the years 1994 through 1996, in which the Department found what it believes was a material error in taxpayer's petition to file a combined return. The material error referred to by the Department was taxpayer's assertion that combined filing was necessary to accurately reflect taxpayer's Indiana income. Taxpayer believes the audit report did not provide adequate explanation of why the combined return was disallowed.

The Department's March 19, 1994 letter to taxpayer approved its request to file a combined return, but listed several contingencies on that approval. Contingency number five (5) states, "This approval is subject to revocation if the facts subsequently established by the Department disclose material error or misrepresentation to the facts set forth in this petition." The Department conducted an audit for the tax years at issue, and concluded that combined filing was not necessary to fairly reflect taxpayer's Indiana income.

The Department's approval letter stated that the Department agreed that the companies concerned did meet the major tests to be considered a unitary group. The approval letter also explains that Indiana law imposes one additional hurdle, in that a unitary return should only be used if the adjusted gross income attributable to Indiana cannot be fairly reflected through some other method. Taxpayer believes that significant intercompany transactions make it necessary to file a combined return to accurately reflect Indiana income. The audit report explains that the existence of the intercompany transactions does not constitute proof that Indiana income cannot be fairly reflected by standard allocation and apportionment provisions.

The audit report explains that the combined filing was disallowed under the authority of 45 IAC 3.1-1-62, which states:

> Special Formulas for Division of Income. All corporations doing business in more than one state shall use the allocation and apportionment provisions described in Regulations 6-3-2-2(b)-(k) *[45 IAC 3.1-1-37—45 IAC 3.1-1-61]* unless such provisions do not result in a division of income which fairly represents the taxpayer's income from Indiana sources. In such case the taxpayer must request in writing or the Department may require the use of a more equitable formula for determining Indiana income. However, the Department will depart from use of the standard formula only if the use of such formula works a hardship or injustice upon the taxpayer, results in an arbitrary division of income, or in other respects does not fairly attribute income to this state or other states. It is anticipated that these situations will arise only in limited and unusual circumstances (which ordinarily will be unique and nonrecurring) when the standard apportionment provisions produce incongruous results.

Taxpayer asserts that standard allocation and apportionment provisions do not fairly reflect the Indiana income for the unitary group. The standard formula is described in IC 6-3-2-2(b), which states in part:

> Except as provided in subsection (l), if business income of a corporation or a nonresident person is derived from sources within the state of Indiana and from sources without the state of Indiana, then the business income derived from sources within this state shall be determined by multiplying the business income derived from sources both within and without the state of Indiana by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, the denominator of which is three (3).

The parent company provides services such as strategic planning, securing corporate debt, cash management, financial reporting, tax services and risk management to its subsidiaries. The parent contends that it is unable to properly allocate the expenses associated with these services to its subsidiaries. Taxpayer believes that the companies in question do form a unitary group, therefore the only way to fairly account for the services being provided but not adequately charged for is to allow a combined return. Therefore, taxpayer believes that the Department must look at the activities and income of the group as a whole in order to obtain an accurate reflection of income.

The Department refers to IC 6-3-2-2(l), which states:

> If the allocation and apportionment provisions of this article do not fairly represent the taxpayer's income derived from sources within the state of Indiana, the taxpayer may petition for or the department may require, in respect to all or part of the taxpayer's business activity, if reasonable:
>
> (1) separate accounting;
>
> (2) the exclusion of any one (1) or more factors;
>
> (3) the inclusion of one (1) 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.

The use of the word "may" in the above language establishes that the Department is not compelled to deviate from the standard allocation formula upon request. The Department may do so if deviation from the standard formula is reasonable. Here, taxpayer has stated that the parent company is unable to properly allocate its expenses for providing services to the subsidiaries, and this

inability necessitates combined filing in order to combat inaccuracies in filing. Taxpayer believes the non-arms length intercompany transactions are significant, and are not accurately reflected by the parent company's charges, and the term "significant" does not necessarily imply that the amount of the charges between the companies is considerable.

Taxpayer states that its situation appears similar to ANR Pipeline, in that the Department has subsequently made an alternative determination in revoking the original approval for a taxpayer to file its income tax return on a combined basis. ANR Pipeline v. Indiana Department of State Revenue, 672 N.E.2d 91, (Ind. Tax 1996). That case explains, "This Court holds that the first LOF was a final determination of the Department and that the subsequent LOF was, therefore, void and legally invalid." Id. at 95. The taxpayer in that case filed a petition with the Department to file a combined return. That petition was approved and later revoked as a result of an audit.

The taxpayer in ANR Pipeline did not argue that the initial approval letter was a final determination of the Department. The Court in that case did not rule that the initial approval was a final determination of the Department. The focus of that case was the initial Letter of Finding (LOF), not the initial approval. In the instant case, taxpayer is arguing that the initial approval is the final determination of the Department. The Court's opinion in ANR Pipeline does not support taxpayer's position.

The approval letter contained the explanation that it would be revoked if there was a material error or misrepresentation. Taxpayer agrees that the approval letter stated it was granted on the contingency that if a material error or misrepresentation was discovered the ruling could be revoked, but protests that the letter did not say that it was contingent upon verification by the Audit division. IC 6-8.1-4-2 states, in part:

(a) The division of audit may:

(1) have full prompt access to all local and state official records;

(2) have access, through the data processing offices of the various state agencies, to information from government and private sources that is useful in performing its functions;

(3) inspect any books, records, or property of any taxpayer which is relevant to the determination of the taxpayer's tax liabilities;

(4) detect and correct mathematical errors on taxpayer returns;

(5) detect and correct tax evasion; and

(6) employ the use of such devices and techniques as may be necessary to improve audit practices.

Since the Audit division is authorized to inspect any books, records, or property of any taxpayer which is relevant to the determination of the taxpayer's tax liabilities, an audit is an acceptable method of discovering material error or misrepresentation. The fact that the initial approval letter did not specifically state that an audit could be a method for discovering material error or misrepresentation is not determinative.

The audit discovered additional information unavailable in the initial approval process. Upon review, the Department concludes that the original approval was in error, but was not the result of a material error or misrepresentation in the application process. The appropriate remedy is for taxpayer's combined filings for the years in question to be allowed, while permission to file combined returns for years following the audit period should be denied.

The Department is unpersuaded that the standard formula for apportionment results in an injustice, arbitrary division or does not fairly attribute income to this state or others. Taxpayer has not provided documentation to deviate from standard apportionment. The decision in ANR Pipeline does not establish that the initial approval letter was a final determination of the Department. The audit was an appropriate method for verification of the combined filing contingencies, as set forth in IC 6-8.1-4-2(a).

FINDING

Taxpayer's protest is sustained. Taxpayer's combined returns for tax years in question will be allowed. However, permission to file combined returns for tax years following the audit report in question is revoked.

II. Tax Administration—Negligence Penalty

DISCUSSION

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

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

In this case, taxpayer has demonstrated that it exercised ordinary business care and prudence in carrying out its duty to pay income tax. Therefore, taxpayer has affirmatively established reasonable cause, and the negligence penalty shall be waived.

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

04990117.LOF

LETTER OF FINDINGS NUMBER: 99-0117
Use Tax
For Tax Years 1995 through 1997

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

ISSUES

I. Use Tax – Tangible Personal Property

Authority: IC 6-2.5-3-2; IC 6-2.5-5-8

Taxpayer protests imposition of use tax on tangible personal property.

II. Use Tax – Returnable Containers

Authority: IC 6-2.5-5-9; 45 IAC 2.2-5-16

Taxpayer protests imposition of use tax on returnable shipping containers.

III. Tax Administration – Negligence Penalty

Authority: IC 6-8.1-5-4; 45 IAC 15-11-2

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

STATEMENT OF FACTS

Taxpayer manufactures parts for the automotive industry. During the audit period, taxpayer bought tangible personal property and other equipment from out-of-state suppliers. The Department assessed use tax on these transactions and a ten percent (10%) negligence penalty. Taxpayer protests the assessments and penalty. Further facts will be supplied as required.

I. Use Tax—Use Tax Assessments

DISCUSSION

Taxpayer protests the Department's assessments of use tax on various items. The Department assessed use tax on tangible personal property that taxpayer acquired from vendors and then transferred to its own customer. Taxpayer states that the tangible personal property was located outside of Indiana when the sales occurred. Taxpayer also argues that much of the assessments pertain to equipment (tangible personal property) for research and development and is exempt from Indiana use tax under the resale exemption. The relevant statute for the resale exemption is IC 6-2.5-5-8, which states in relevant part:

> Transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of his business without changing the form of the property.

The Department assessed those of taxpayer's accounts which included costs of samples, including prototype samples from which tooling would be produced for the manufacture of products. The fact that some of these accounts were for research and development costs does not mean that they are exempt from use tax. The resale exemption applies to tangible personal property acquired for resale, rental or lease in the ordinary course of business without changing the form of the property.

During the audit, taxpayer explained that copies of the invoices received by taxpayer were generally forwarded to taxpayer's parent companies, which may or may not reimburse taxpayer for these costs. Taxpayer was unable to produce documentation establishing which, if any, costs were for transactions involving tangible personal property acquired for resale, rental, or leasing in the ordinary course of its business without changing the form of the property.

At the time of the audit, taxpayer was unable to provide records establishing the location and ownership of the tangible personal property. As IC 6-2.5-3-2(a) explains:

> An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

The Department based its assessments on the best information available. As part of this protest, taxpayer has now provided the Department with documentation showing that approximately eighty-five percent (85%) of the tangible personal property in question was located out of state. Unfortunately, the documentation does not cover the audit period, but rather it covers years after the audit period.

Taxpayer has not provided documentation showing that the requirements of IC 6-2.5-5-8 (the resale exemption) were satisfied. The documentation provided did not cover the audit period. Therefore, the tangible personal property in question does not qualify for the resale exemption.

FINDING

Taxpayer's protest is denied.

II. Use Tax – Returnable Containers

DISCUSSION

The Department also assessed use tax on shipping containers owned by taxpayer and used by various suppliers to transport goods to the taxpayer's manufacturing plant. Taxpayer states that these containers either are owned by its customer or are exempt from use tax as returnable containers. Taxpayer refers to IC 6-2.5-5-9, which states:

(a) As used in this section, "returnable containers" means containers customarily returned by buyer of the contents for reuse as containers.

(b) Sales of returnable containers are exempt from the state gross retail tax if the transaction constitutes selling at retail as defined in IC 6-2.5-4-1 and if the returnable containers contain contents.

(c) Sales of returnable containers are exempt from the state gross retail tax if the containers are transferred empty for the purpose of refilling.

(d) Sales of wrapping material and empty containers are exempt from the state gross retail tax if the person acquiring the material or containers acquires them for use as nonreturnable packages for selling the contents that he adds.

Taxpayer believes that the containers qualify for this exemption. The Department refers to 45 IAC 2.2-5-16, which states in part:

(d) Application of general rule.

(1) Nonreturnable wrapping material and empty containers. To qualify for this exemption, nonreturnable wrapping materials and empty containers must be used by the purchaser in the following way:

(A) The purchaser must add contents to the containers purchased; and

(B) The purchaser must sell the contents added.

(2) Returnable containers sold at retail with contents. To qualify for this exemption, the returnable containers must be:

(A) Sold in a taxable transaction of a retail merchant constituting selling at retail; and

(B) Billed as a separate charge by the retail merchant to his customer. If there is a separate charge for such containers, the sale of the container is exempt from tax under this regulation *[45 IAC 2.2]*.

(3) Returnable containers sold empty. To qualify for this exemption the returnable container must be resold with the purpose of refilling. The sale of returnable containers to the original or first user thereof is taxable.

The exemption provided by IC 6-2.5-5-9 establishes that the initial purchaser of the containers, in this instance the taxpayer, pays tax on the initial acquisition of the containers. After that, additional sales of returnable containers are exempt, provided the sales meet the requirements of 45 IAC 2.2-5-16(d)(2)(B). In either circumstance, the exemption is not available since taxpayer has not provided documentation to establish that the returnable containers are billed as a separate charge in a retail transaction, as required by 45 IAC 2.2-5-16(d)(2)(B). As to taxpayer's alternative argument, taxpayer has not provided documentation establishing that the containers belong to its customer. Therefore, the returnable shipping containers are properly subject to use tax.

FINDING

Taxpayer's protest is denied.

III. Tax Administration – Negligence Penalty

DISCUSSION

Taxpayer protests the imposition of a ten percent (10%) negligence penalty. Taxpayer states that the assessments in question are insignificant when compared to its total business activity and the amount of tax correctly paid. The relevant regulation is 45 IAC 15-11-2(b), which 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 person. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed on it 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.

Taxpayer believes that its facts and circumstances warrant dismissal of the negligence penalty. The Department refers to IC 6-8.1-5-4(a), which states:

Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.

Also, IC 6-8.1-5-4(c) states:

A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times.

In this case, taxpayer failed to keep records for the auditor to review in order to determine the amount, if any, of the taxpayer's liability. While taxpayer was eventually able to produce some documentation, which may partially supports its position, this

documentation was not available until it was provided in this protest. Taxpayer failed to comply with the record keeping requirement of IC 6-8.1-5-4, and was therefore negligent as described in 45 IAC 15-11-2(b). If this documentation had been available during the audit, much of the time and effort for taxpayer and the Department could have been saved. Therefore, the assessments will be subject to the ten percent (10%) negligence penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220000008.LOF

LETTER OF FINDINGS NUMBER: 00-0008
Gross Income Tax
For Tax Years 1995 through 1997

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

ISSUES

I. Gross Income Tax – Tooling Sales

Authority: IC 6-2.1-3-3

Taxpayer protests imposition of Gross Income Tax on income from sales of tooling during audit period.

II. Gross Income Tax – High Rate Tax

Authority: IC 6-8.1-5-1; IC 6-8.1-5-4; 45 IAC 1-1-21

Taxpayer protests imposition of high rate income tax on tooling.

III. Tax Administration – Negligence Penalty

Authority: IC 6-8.1-5-4; 45 IAC 15-11-2

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

STATEMENT OF FACTS

Taxpayer manufactures parts for the automotive industry. The auditor assessed gross income tax on income from the sales of tooling taxpayer bought from out-of-state suppliers and sold to its in-state customer. Taxpayer protests the assessments. Further facts will be supplied as required.

I. Gross Income Tax – Tooling Sales

DISCUSSION

As a result of a gross income tax audit, the Department of Revenue issued assessments on income generated by sales of tooling by the taxpayer to its Indiana customer. Taxpayer protests that the sales of tooling took place outside of Indiana. Taxpayer was unable to produce documentation to support that position during the audit. The Department proceeded to issue the assessments based on the best information available.

Taxpayer contends the Department proposed assessments because taxpayer and its customer are both located in Indiana, and the sale of the tooling represents a sale between two Indiana corporations subject to Indiana Gross Income Tax. This is not the Department's position. The Department's position is that the tooling was in Indiana when taxpayer sold it to its customer, and therefore the sale of the tooling subjects taxpayer to the Gross Income Tax. During the audit, the Auditor asked taxpayer to provide documentation verifying the location of the tooling, but taxpayer did not provide any. As part of this protest, taxpayer did provide documentation verifying the location of the tooling after the audit period.

In its protest, taxpayer raises the Commerce Clause and Due Process Clause of the United States Constitution. IC 6-2.1-3-3 states:

> Gross income derived from business conducted in commerce between the state of Indiana and either another state or a foreign country is exempt from gross income tax to the extent the state of Indiana is prohibited from taxing that gross income by the United States Constitution.

Taxpayer's arguments rely on where the tooling was located. At hearing taxpayer provided documentation showing that approximately eighty-five percent (85%) of the tooling was located outside of Indiana after the audit period. Taxpayer has not established that the tooling was outside of Indiana during the audit period.

FINDING

Taxpayer's protest is denied.

II. Gross Income Tax – High Rate Income Tax

DISCUSSION

As a result of the audit for the tax years at issue, the Department issued its assessments of the tooling sales at the high rate of tax. Taxpayer protests that the tooling which is subject to Indiana Gross Income Tax is subject to the low rate of tax. Taxpayer states that it does not capitalize the cost of the tooling. Taxpayer reported the sale of the tooling as gross receipts on its 1997 Federal return. Taxpayer asserts that despite this, the tooling does not satisfy the definition of a capital asset as it is not a depreciable asset to taxpayer.

The regulation defining capital assets for the tax years in question was 45 IAC 1-1-21, which states in part:

The term "capital assets" as used in this Act *[IC 6-2.1]* includes all assets except stock-in-trade of a retail merchant held primarily for sale to a customer in the regular course of a trade or business (see Regulations 6-2-1-1(j)(010) *[45 IAC 1-1-13]* and 6-2-1-3(c)(010) *[45 IAC 1-1-88]*), inventory held as raw materials, goods-in-process, or finished goods for use in the production of a product eventually to be sold as provided in IC 6-2-1-3(a) *[Repealed by P.L. 77-1981], SECTION 22.]* of the Gross Income Tax Act. Receipts from the sale of capital assets are taxed at the higher rate without any deductions for cost, loss or expenses with the exception of a mortgage held on real estate.

The Department based its assessments on the best information available during the audit. As part of this protest, taxpayer provided documentation supporting its position. In this case, given the taxpayer's acquisition methods and use of the tooling, the Department does not consider the sale of tooling as the sale of a capital asset. The Department agrees that the sale of the tooling in this case is subject to the lower rate.

FINDING

Taxpayer's protest is sustained.

III. Tax Administration – Negligence Penalty

DISCUSSION

Taxpayer protests the imposition of a ten percent (10%) negligence penalty. Taxpayer states that the assessments in question are insignificant when compared to its total business activity. Taxpayer argues that the amount of taxes assessed is relatively insignificant compared to the amount of transactions involved and the amount of tax correctly paid. Taxpayer also states that taxing authorities have never demanded absolute perfection in accounting procedures to avoid negligence penalties, and that Federal courts have noted that a few inaccuracies in bookkeeping do not amount to negligence. The relevant regulation is 45 IAC 15-11-2(b), which 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 person. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed on it 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.

Taxpayer believes that its facts and circumstances warrant dismissal of the negligence penalty. The Department refers to IC 6-8.1-5-4(a), which states:

Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.

Also, IC 6-8.1-5-4(c) states:

A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times.

In this case, taxpayer failed to keep records for the auditor to review in order to determine the amount, if any, of the taxpayer's liability. While taxpayer was eventually able to produce documentation supporting its position, this documentation was not available until it was provided in this protest. Taxpayer failed to comply with the record keeping requirement of IC 6-8.1-5-4, and was therefore negligent as described in 45 IAC 15-11-2(b). If this documentation had been available during the audit, much of the time and effort for taxpayer and the Department could have been saved. Therefore, all assessments remaining after audit verification on Issues 1 and 2 will be subject to the ten percent (10%) negligence penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420000208.LOF

LETTER OF FINDINGS NUMBER: 00-0208
Sales and Use Tax
For the Tax Years 1996, 1997, and 1998

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

ISSUES

I. Assessment of Use Tax on the Purchase of Annual Reports and Proxy Statements

Authority: IC 6-2.5-3-2; 45 IAC 2.2-3-21

Taxpayer protests the assessment of use tax on the purchase of reports acquired from an out-of-state vendor and shipped to out-of-state locations.

II. Assessment of Use Tax on the Purchase of Videotapes

Authority: IC 6-2.5-2-1; IC 6-2.5-4-1(b); 45 IAC 2.2-3-4; 45 IAC 2.2-4-2; Information Bulletin #34

Taxpayer argues that its purchase of videotapes is not subject to the gross retail tax on the ground that it was actually purchasing a service from the supplier and the transfer of the actual videocassette was incidental to the service transaction.

STATEMENT OF FACTS

The taxpayer is an Indiana corporation with its commercial domicile in Indiana. Taxpayer sells items of clothing having 16 retail outlets in Indiana with other outlets located across the country. In its original protest letter, taxpayer also challenged the imposition of use tax on certain software maintenance contracts. During the hearing, the taxpayer withdrew that particular portion of its protest.

DISCUSSION

I. Assessment of Use Tax on the Purchase of Annual Reports and Proxy Statements

Taxpayer arranged with an out-of-state vendor to prepare and print proxy statements and annual reports. Taxpayer specified that copies of the reports would be shipped by the vendor to recipients located both within Indiana and outside the state.

Under IC 6-2.5-3-2, "[a]n excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." The Department's regulations specify that certain transactions in which the taxpayer acquires tangible personal property outside the state are also subject to imposition of the use tax. 45 IAC 2.2-3-21 states that, "All purchases of tangible personal property which are accepted by the purchaser outside the state of Indiana but which are stored, used, or otherwise consumed in Indiana are subject to the use tax."

Taxpayer acquired copies of its annual reports and proxy statement from its out-of-state vendor. Taxpayer's agreement with and specific directions to the vendor indicated that certain of those annual reports and proxy statements would be shipped to locations within the state of Indiana. Those items of tangible personal property were properly subject to use tax under IC 6-2.5-3-2 because, although the items were acquired in Kentucky, they were shipped to and consumed within the state. However, those annual reports and proxy statements, which were sent to out-of-state locations, were not subject to the use tax because those items were neither acquired, consumed, stored, nor used within the Indiana.

Accordingly, to the extent that taxpayer acquired copies of annual reports and proxy statements outside the state and then arranged to have those same items consumed, used, or stored outside the state, taxpayer's protest is sustained.

FINDING

Taxpayer's protest is sustained.

II. Assessment of Use Tax on the Purchase of Videotapes

Taxpayer arranged for vendors to prepare, script, edit, and produce advertising materials. These materials were transferred to videocassette with the taxpayer purchasing multiple copies of that original cassette. Taxpayer refers to the multiple copies as "dubs." The taxpayer was billed for each "dub." In most cases, the "dubs" were sent directly to radio and television stations for eventual broadcast. The audit determined that the "dubs" which were sent to Indiana locations were subject to the use tax. The taxpayer disagrees arguing that the vendors are furnishing the taxpayer with a service, that the tangible personal property – in the form of the individual videocassettes – is incidental to the vendors' services, the cost of the videocassette is inconsequential to the service charge, and that the vendors pays retail or use tax on the purchase of the cassettes at the time it acquires those cassettes.

45 IAC 2.2-3-4 states that "[t]angible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase."

It is not disputed that the videocassettes constitute tangible personal property. It is not disputed that the videocassettes, which

that the audit determined were subject to use tax, were "stored, used, or otherwise consumed in Indiana." Id. It is not disputed that the vendors did not charge sales tax upon taxpayer's original purchase of the videocassettes. Accordingly, taxpayer's challenge to the assessment of use tax is necessarily predicated upon the assertion that its initial purchase of the videocassettes was not subject to sales tax.

Under IC 6-2.5-2-1, Indiana imposes a gross retail (sales) tax on retail transactions made within the state. A retail transaction, the pre-requisite to the imposition of the tax, is the transfer, in the ordinary course of business, of tangible personal property for consideration. IC 6-2.5-4-1(b). 45 IAC 2.2-4-2 describes those situations in which a service provider conducting transactions involving the transfer of tangible personal property, is liable for sales tax on those transactions. The regulation states that '[w]here, in conjunction with rendering professional services, personal services, or other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail...." 45 IAC 2.2-4-2(a).

Taxpayer purchased videocassettes from its vendors. Notwithstanding the fact that the preparation and duplication of the cassettes required the vendors to exercise various skills, the sales transactions were subject to the state's gross retail tax because the taxpayer's primary objective was the receipt of tangible personal property. The vendors' duplication of videocassettes is analogous to the duplication of photographic prints described in Information Bulletin #34. That bulletin states, "In making additional photographic prints from an original negative or photograph, the photographer is producing and selling tangible personal property and the [sales] tax applies to the selling price of the prints...." Undoubtedly, a certain skill and knowledge is involved in duplicating either photographic prints or videotape cassettes. However, the objective of either duplicating photographic prints or videotape cassettes is the transfer of tangible personal property. Therefore, because the initial transfer of the videotape cassettes was subject to sales tax and because the sales tax was never paid, the audit properly determined that taxpayer's "dubs" were subject to the state's use tax.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0420010025.LOF

LETTER OF FINDINGS NUMBER: 01-0025
Sales and Use Tax
For the Tax 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 the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Applicability of the State's Gross Retail Tax to Taxpayer's Rental of Customized Mailings Lists

Authority: IC 6-2.5-3-2; 45 IAC 2.2-4-2; Sales Tax Information Bulletin #8

Taxpayer protests the imposition of use tax on its rental of customized mailing lists arguing that taxpayer is contracting for a service and not renting tangible personal property.

II. Prospective Treatment of Gross Retail Tax Liability

Authority: City Securities Corp. v. Dept. of State Revenue, 704 N.E.2d 1122 (Ind. Tax Ct. 1998); IC 6-8.1-3-3

Taxpayer argues that, upon a determination that it is responsible for paying use tax on the rental of mailing lists, it is entitled to prospective treatment of that liability.

III. Abatement of the Ten Percent Negligence Penalty

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

Taxpayer argues that because the applicability of the gross retail tax to the purchase of customized mailing lists is a "gray" area of the law, the Department of Revenue (Department) should exercise its discretion to abate the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is in the business of conducting industrial training seminars. In order to attract customers for those seminars, taxpayer sends out periodic mailings targeted to those persons and business entities which would be likely customers. To assure that the mailings are appropriately directed, taxpayer deals with a direct mail list broker. Taxpayer provides the list broker with various criteria in order to allow the broker to prepare an appropriate mailing list. Taxpayer provides criteria including – but not limited to – business type, number of employees, sales volume, location, warehouse square footage, internet access, title, and buying authority.

Once the list broker receives the criteria, it conducts an electronic search of its database. The broker prepares the mailing list

– based upon the taxpayer's specifications – and reduces the list to magnetic tape. The list broker then transfers the magnetic tape to an independent mailing house which prepares and arranges for the delivery of the mailing. Under its agreement with the list broker, taxpayer is entitled to use the mailing list once. According to taxpayer, it never acquires possession of the rented magnetic tape and is never aware of the contents of the magnetic tape.

The issue raised by the taxpayer is whether the rental of the mailing list is subject to the state's gross retail tax. The audit determined that the transaction was essentially one for the sale of information and that the sale was subject to use tax. Taxpayer disagrees with this characterization and argues that when the list broker rents the mailing list to the taxpayer, the list broker is renting information supplied by the taxpayer itself.

DISCUSSION

I. Applicability of the State's Gross Retail Tax to Taxpayer's Rental of Customized Mailings Lists

Taxpayer protests the assessment use tax on the rental of mailing lists. Under IC 6-2.5-3-2, "[a]n excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC 6-2.5-3-2(a).

45 IAC 2.2-4-2 distinguishes the purchase of tangible personal property from the purchase of services which are not subject to the tax. The regulation states that "[p]rofessional services, personal services, and services in respect to property not owned by the person rendering such services are not 'transactions of a retail merchant constituting selling at retail', and are not subject to gross retail tax."

Taxpayer believes that when it rented the mailing lists, it was simply acquiring the services of the list broker delivered in the form of a tax-exempt computer program. The audit believes that the rental of the mailing lists was the rental of tangible personal property and was properly subject to the gross retail tax.

Sales Tax Information Bulletin #8 states that the purchase of certain computer software is not subject to the state's gross retail tax. The Bulletin states that "transactions involving computer software are not subject to Indiana Sales or Use Tax provided the software is in the form of a custom program specifically designed for the purchaser." Sales Tax Information Bulletin #8, II, B. Taxpayer believes that the purchase of the mailing lists, encoded on magnetic tape, falls within this provision.

However, the Bulletin also states that other computer software is subject to the tax.

> Pre-written programs, not specifically designed for one purchaser, developed by the seller for sale or lease on the general market in the form of tangible personal property and sold or leased in the form of tangible personal property are subject to tax irrespective of the fact that the program may require some modification for a purchaser's particular computer. Pre-written or canned computer programs are taxable because the intellectual property contained in the canned program is no different than the intellectual property in a videotape or a textbook. Id.

However, even more relevant to the issues raised by taxpayer is provision in the same bulletin which states that;

> the sale of statistical reports, graphs, diagrams or any other information produced or compiled by a computer and sold or reproduced in substantially the same form as it is so produced is considered to be the sale of tangible personal property.... Id. at II, F.

Taxpayer argues that the rental of the mailing lists is analogous to a computer programmer writing a specific program for one of the programmer's customers. According to taxpayer, because the specifications it provides to the list broker are of such complexity and specificity, the list broker is acting as a designer of specialized computer software and is crafting a "one-time" computer program. However, taxpayer's characterization of the mailing list rentals assigns those transactions a level of complexity which is unnecessary for understanding the nature or tax consequences of the transactions. The list broker owns a "bank" of addresses which have been carefully categorized. Taxpayer approaches the list broker with a set of explicit requirements and, in effect, tells the list broker which of those addresses it wishes to acquire. The list broker then assembles those addresses, transfers that information into the form of magnetic tape, and makes the addresses – albeit indirectly – available for the taxpayer's one-time use. Certainly a great deal of effort goes into establishing the parameters of that mailing list, but that creative effort is the taxpayer's and not the list brokers. The actual transaction between taxpayer and the list broker is straightforward; the list broker owns a substantial amount of information and taxpayer contracts to acquire some of that information delivered in the form of magnetic tape.

As described in Sales Tax Information Bulletin #8, II, F, a transaction involving the sale of information compiled by a computer is considered to be the sale of tangible personal property. Under IC 6-2.5-3-2, the use tax was properly assessed on transactions involving the rental of tangible personal property in the form of magnetic tapes containing mailing lists.

FINDING

Taxpayer's protest is respectfully denied.

II. Prospective Treatment of Sales Tax Liability

Taxpayer argues that the Department – having found that the rental of mailing lists is subject to use tax – should impose that tax liability on a prospective basis only. Taxpayer believes that it would be inequitable for the Department to apply the use tax, penalties, and interest retroactively because it was never placed on notice that the transactions were subject to tax. Because it did not include the tax as part of its cost of doing business, assessment of the tax, penalties, and interest would subject the taxpayer to financial hardship.

Under IC 6-8.1-3-3, the Department is without authority to reinterpret a taxpayer's tax liability without promulgating and publishing a regulation giving taxpayer notice of that reinterpretation. IC 6-8.1-3-3(b) states that "[n]o change in the department's interpretation of a listed tax may take effect before the date the change is: (1) adopted in a rule under this section; or (2) published in the Indiana Register...."

In City Securities Corp. v. Dept. of State Revenue, 704 N.E.2d 1122 (Ind. Tax Ct. 1998), plaintiff taxpayer argued that the Department could not impose gross income tax on the gain realized from the sale of tax exempt bonds, because that gain had been treated as exempt for 42 years. Id. at 1128. Plaintiff taxpayer argued that, in the absence of a new rule or regulation, the Department's assessment of gross income taxes against the gain realized from the sale of bonds was invalid. Id. at 1129. The Tax Court found that, despite the intervening adoption of regulations to the contrary, the Department could not impose the additional taxes when the Department had permitted plaintiff taxpayer to claim an exemption from the taxes subsequent to the adoption of the intervening regulations. Id. However, the Tax Court also held that plaintiff taxpayer, having been placed on notice of its additional tax liability, was responsible for paying the tax on a prospective basis. Id.

Taxpayer believes that it is in the same situation as plaintiff taxpayer in City Securities and, as a consequence, is entitled to the same prospective treatment of its own tax liability. In support of its position, taxpayer cites to three documents previously issued by the Department – a published Revenue Ruling, a published Letters of Findings, and an unpublished Letter of Findings – which purportedly placed taxpayer in the "perplexing position of uncertainty as to the taxability of these transactions." However, setting aside questions regarding taxpayer's interpretation and application of those documents, taxpayer has failed to demonstrate that it any way relied upon those documents when it initially reached a decision that the mailing list transactions were not subject to the gross retail tax. Unlike the plaintiff taxpayer in City Securities, which for five years relied on the Department's specific determination that the gross income tax was inapplicable to gain realized from the sale of the tax-exempt bonds, taxpayer has provided no information indicating that it relied upon a regulation, ruling, interpretation, in determining its liabilities under the state's gross retail tax scheme. Rather, the statutes, regulations, and information bulletin setting forth that liability were fully in place at the time the mailing list transactions occurred.

Absent any information that the Department has altered its interpretation of the taxpayer's gross retail tax liabilities subsequent to the time taxpayer incurred those liabilities, taxpayer is not entitled to prospective treatment of that liability pursuant to IC 6-8.1-3-3.

FINDING

Taxpayer's protest is respectfully denied.

III. Abatement of the Ten Percent Negligence Penalty

Taxpayer has requested that the ten percent negligence penalty, imposed under authority of IC 6-8.1-10-2.1(a), be abated with respect to the additional gross retail taxes assessed against transactions involving the rental of mailing lists. Taxpayer argues that imposition of the tax, interest, and the ten percent penalty is inequitable because taxpayer was never placed on notice that the mailing list transactions would ever be subject to tax.

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

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

Taxpayer's general equitable arguments notwithstanding, taxpayer has provided the Department no basis upon which to determine that its failure to pay or even consider its potential gross retail tax liabilities was due to "reasonable cause." Taxpayer is a substantial and sophisticated business entity fully capable of carefully considering its various state tax liabilities. Absent any substantive, statutory, or factual basis upon which to predicate such a determination, the Department must decline taxpayer's request to abate the ten percent negligence penalty.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0420010145.LOF

LETTER OF FINDINGS NUMBER: 01-0145
Gross Retail Tax
For the 1998 and 1999 Tax Years

NOTICE: Under IC 4-23-7-7, 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. Imposition of Sales Tax on the Sale of School Photographs

Authority: IC 6-2.5-2-1; IC 6-2.5-4-1(b); IC 6-2.5-8-8; 45 IAC 2.2-2-2; 45 IAC 2.2-3-3; 45 IAC 2.2-3-3(2); 45 IAC 2.2-5-25; 45 IAC 2.2-5-25(a); 45 IAC 2.2-8-12(b)

Taxpayer is of the opinion that it should not be responsible for collecting sales tax on its sales of school photographs.

II. Prospective Treatment of Sales Tax Liability

Authority: City Securities Corp. v. Dept. of State Revenue, 704 N.E.2d 1122 (Ind. Tax Ct. 1998); IC 6-8.1-3-3

Taxpayer argues that if it is determined that it is responsible for collecting sales tax on its sales of school photographs, that determination should be given only prospective effect.

STATEMENT OF FACTS

Taxpayer takes and sells photographs. At issue in this protest, is the taxpayer's sale of "panoramic" (group) school photographs. Audit determined that the taxpayer should have been collecting sales tax on each sale of a photograph and assessed taxpayer for the uncollected taxes. Taxpayer maintains that it selling the photographs to schools and, because taxpayer holds exemption certificates from these schools, it was not responsible for the collection of the sales tax.

After taking a photograph of a group of students, taxpayer provides the school with envelopes to be sent home with the students. In most instances, the envelope states the price of each photograph. In some instances, the envelope omits the price of the photograph thereby permitting the school to determine the cost of the photograph.

The students are instructed that, if they wish to purchase a photograph, they should return the envelope to the school and include the payment with the envelope. After accumulating the returned envelopes, the school forwards the orders to taxpayer. In some instances the school will retain any cash payments and write a single check to taxpayer in lieu of the retained cash. In most instances, the school will give the taxpayer the accumulated student checks.

The schools earn money from taxpayer's sale of the photographs. For those sales in which taxpayer establishes the price of the photographs, the school receives a percentage of the total sales. For those sales in which the school establishes the price of the photographs, the school receives a flat fee – established by the school itself – for each photograph.

What is not at issue are those sales in which the school directly purchases a number of photographs the number of which is not determined by student orders. In these particular instances, the school "gives" the photograph to each member of a student group (for example, members of the senior class). Alternatively, the school simply resells the photographs to its students. In either case, the school bears the risk of loss for any unused or unsold photographs. Also not at issue, are those instances in which the taxpayer sells a photograph to the school for use in the school's student annual.

What is at issue are those sales which, on the surface, the school is acting as a disinterested agent for the taxpayer in taking orders from, and then distributing the photographs to, individual members of the student body. Taxpayer predicates its claim based upon the receipt of exemption certificates from the various schools.

DISCUSSION

I. Imposition of Sales Tax on the Sale of School Photographs

Under IC 6-2.5-2-1, Indiana imposes a gross retail (sales) tax on retail transactions made within the state. A retail transaction, the pre-requisite to the imposition of the sales tax, is defined as the transfer, in the ordinary course of business, of tangible personal property for consideration. IC 6-2.5-4-1(b).

45 IAC 2.2-2-2 imposes on "retail merchants" the responsibility for collecting sales tax. The regulation states in relevant part that a "retail merchant, acting as an agent for the state of Indiana, must collect the tax."

45 IAC 2.2-3-3 defines "retail merchants" responsible for collecting sales tax. The regulation states that "retail merchants" includes:

> Any retail merchant engaged in selling at retail for use, storage, or consumption in Indiana and having any representative, agent, salesman, canvasser, or solicitor operating in Indiana under the authority of the retail merchant or its subsidiary for the purpose of selling, delivering, or taking orders for the sale of any tangible personal property for use, storage, or consumption in Indiana. 45 IAC 2.2-3-3(2).

Under the relevant statutory and regulatory authority, taxpayer is a retail merchant engaged in the process of selling tangible

personal property to students. In effect, the various schools are acting as the taxpayer's agent in what is essentially a "pass-through" transaction between taxpayer and its student customers. This conclusion is justified by the simple realities of the transactions at issue. Taxpayer is soliciting students to purchase the photographs; taxpayer is not soliciting schools to purchase these photographs. The success or failure of taxpayer's decision to invest the time and effort to take the original photograph is entirely dependent upon the students' discretionary decision to purchase the photographs. When taxpayer sends out an envelope soliciting photograph orders, it is directing that solicitation at the students and not at the schools. The schools bear no risk of loss for the purchase of the photographs; there is no possibility that the schools will be left holding unsold and unwanted photographs. If the student is dissatisfied with the finished photograph, the students are required to deal with the taxpayer and not with the school because, in reality, it was the taxpayer who sold the photographs to the students and not the schools.

Accordingly, the taxpayer is acting as a "retail merchant" in authorizing the various schools to act as taxpayer's agents for the purpose of taking orders for the sale of tangible personal property, and is responsible to the state for collecting the sales tax.

Taxpayer argues that it is entitled to rely upon the exemption certificate it collected from the various schools. Taxpayer solicited the exemption certificates – in certain cases after the photograph sales had occurred – by letter stating that taxpayer was updating its files and requesting the exemption certificate from each school.

45 IAC 2.2-5-25 permits schools to make certain purchases without paying the sales tax. The regulation states that "only the purchase of tangible personal property used by the governmental agency in connection with a governmental function may be purchased exempt from sales tax." 45 IAC 2.2-5-25(a).

IC 6-2.5-8-8 allows exempt organizations to issue a certificate when the organization is exempt from paying sales tax on a particular purchase. In relevant part, IC 6-2.5-8-8 states that an authorized organization "[which] makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax." Under 45 IAC 2.2-8-12(b), "Retail merchants are required to collect the sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used by the purchaser for an exempt purchase."

Taxpayer is correct in its initial assertion. A retail merchant is entitled to rely upon the customers' exemption certificate when the customers are making exempt purchases. However, taxpayer's argument fails when – upon closer examination of the facts regarding the purchases here at issue – it is plainly not the exempt schools which are purchasing the photographs. Having solicited sales from, and accepted payment from individual students, taxpayer may not ignore the simple realities of the transactions and rely upon an exemption certificates issued by its disinterested sales agents.

FINDING

Taxpayer's protest is respectfully denied.

II. Prospective Treatment of Sales Tax Liability

Taxpayer sets out a general equitable argument – unsupported by citations to statutory or regulatory authority – that the Department, having found that the sale of school photographs is subject to the sales tax, should impose that tax liability on a prospective basis only.

Under IC 6-8.1-3-3, the Department is without authority to reinterpret a taxpayer's tax liability without promulgating and publishing a regulation giving taxpayer notice of that reinterpretation. IC 6-8.1-3-3(b) states that "[n]o change in the department's interpretation of a listed tax may take effect before the date the change is: (1) adopted in a rule under this section; or (2) published in the Indiana Register...."

In City Securities Corp. v. Dept. of State Revenue, 704 N.E.2d 1122 (Ind. Tax Ct. 1998), plaintiff taxpayer argued that the Department could not impose gross income tax on the gain realized from the sale of tax exempt bonds, because that gain had been treated as exempt for 42 years. Id. at 1128. Plaintiff taxpayer argued that, in the absence of a new rule or regulation, the Department's assessment of gross income taxes against the gain realized from the sale of bonds was invalid. Id. at 1129. The Tax Court found that, despite the intervening adoption of regulations to the contrary, the Department could not impose the additional taxes when the Department had permitted plaintiff taxpayer to claim an exemption from the taxes subsequent to the adoption of the intervening regulations. Id.

Taxpayer argues that it was entitled to rely upon a prior audit, covering the years 1990 through 1992, in which taxpayer's sales of photographs were apparently not assessed sales tax even though that earlier audit did assess sales tax on those particular sales for which taxpayer failed to provide auditor with a valid exemption certificate. Based upon the scanty information contained within the earlier audit, it is possible to arrive at a conclusion that sales transactions – similar to those transactions here at issue – undertaken during the 1990 through 1992 tax years, were not assessed sales tax. However, there is no indication that the earlier audit ever considered in any detail whatsoever, the nature of the sales made to the schools. There is no indication that the sales conducted some ten years ago were in any way similar to the manner in which taxpayer currently solicits the purchase of school photographs or collects the payment from those sales. There is no indication that the Department arrived at a "determination" or "interpretation" that taxpayer's sales of student photographs were not subject to imposition of sales tax.

Unlike the plaintiff taxpayer in City Securities, taxpayer is unable to point to a prior court case, letter of findings, or Department advisory letter indicating that the sale of school photographs was exempt from sales tax. City Securities at 1129. Rather,

the statutory and regulatory authority supporting imposition of the gross retail tax on the sale of school photographs was fully in place at the time of taxpayer's earlier audit. Absent any indication that the Department has changed its interpretation of the gross retail tax since taxpayer's previous audit, IC 6-8.1-3-3 does not require the Department to give affect to taxpayer's sales tax liabilities on a prospective basis. Absent any requirement to do otherwise, the Department has no independent authority whatsoever to grant taxpayer's equitable request for prospective treatment of its sales tax liabilities.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0120010157.LOF

LETTER OF FINDINGS NUMBER: 01-0157
Income Tax
For Tax Period: 1997 through 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 specific issues.

ISSUE

Income Tax – Discharge in Bankruptcy

Authority: 11 U.S.C. 507; IC 6-3-2-1; IC 6-8.1-5-1(b)

The taxpayers contend that their income tax liability was discharged in bankruptcy.

STATEMENT OF FACTS

The taxpayers are a married couple. After an audit of a business that the taxpayers operated as a sole proprietorship, the taxpayers were assessed additional adjusted gross income tax, interest and penalty. The taxpayers protested the assessment and a hearing was held. Additional facts will be provided as necessary.

Income Tax – Discharge in Bankruptcy

DISCUSSION

An adjusted gross income tax is imposed upon all Indiana residents. IC 6-3-2-1. Assessments by the Indiana Department of Revenue are presumed to be correct. The taxpayers bear the burden of proving that any assessment is incorrect. IC 6-8.1-5-1(b). Since they did not offer any evidence that the assessment was incorrect, the taxpayers did not sustain their burden.

The taxpayers contend that they discharged their adjusted gross income tax liability in their bankruptcy proceeding. Pursuant to 11 U.S.C. 507, state adjusted gross income taxes are dischargeable in bankruptcy if the proceedings are filed more than three years after the due date of the taxes. The tax periods at issue are 1997, 1998 and 1999. These taxes would be due to Indiana on April 15, 1998, April 15, 1999 and April 15, 2000 respectively. The taxpayers filed their bankruptcy action on February 6, 2001. None of the tax liabilities at issue were three years old at the time of the filing of the bankruptcy action. Therefore, these tax liabilities were not discharged by the United States Bankruptcy Court, Southern District of Indiana.

FINDING

The taxpayers' protest is denied.

DEPARTMENT OF STATE REVENUE

0420010227.LOF

LETTER OF FINDINGS NUMBER: 01-0227
Responsible Officer
Sales Tax and Withholding Tax
For Tax Periods: July 1995

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

ISSUES

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

On August 13, 1995, the taxpayer became president of three corporations that owned or managed restaurants. Prior to that time he was a shareholder in the companies. The corporations did not remit the proper amount of sales and withholding taxes to Indiana for the tax period 1994 through 1996. The Indiana Department of Revenue personally assessed those taxes against the taxpayer. He protested that assessment. A Letter of Findings, issued on November 11, 1999, found that the taxpayer "was not a responsible officer before August 13, 1995, and is not liable for sales and withholding tax owed by the companies prior to that date." On July 2, 2001, the Indiana Department of Revenue personally assessed the corporations' sales and withholding taxes for the July 1995 tax period against the taxpayer. Those taxes were due to the Indiana Department of Revenue on August 20, 1995. The taxpayer protested the assessments. Further 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 the taxpayer pursuant to IC 6-3-4-8(f), which provides that "In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest."

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 previous Letter of Findings determined that the taxpayer became an officer with the duty to remit on August 13, 1995. The taxpayer agreed that he became president of the corporations and the books and financial records were delivered to him on that date. He contends, however, that he is not responsible for the July 1995 trust taxes since that is before the August 13, 1995 date when he became the president and had a duty to remit the taxes. The July 1995 tax returns were due to the Indiana Department of Revenue on August 20, 1995. The taxpayer was the officer who determined which bills would be paid on August 20, 1995. He chose not to remit the corporations' trust taxes to the Indiana Department of Revenue. Therefore, the personal assessment against him for the July 1995 trust taxes is proper.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420000236.SLOF
0420000237.SLOF

SUPPLEMENTAL LETTER OF FINDINGS NUMBERS: 00-0236 AND 00-0237
Gross Retail and Use Tax
For Tax Years 1996-1998

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

ISSUE

I. Gross Retail and Use Tax – Characterization of Restaurant Equipment under Rehearing Standard of Review

Authority: IC § 6-8.1-5-1(f); 45 IAC 15-5-3(8); 45 IAC 15-5-5*; Indianapolis Fruit Co., v. Department of State Revenue, 691 N.E.2d 1379 (Ind.Tax 1998); Sales Tax Information Bulletin #55*

Taxpayer originally protested, among other items, Audit's characterization of 2 different kinds of restaurant equipment as ineligible for partial production process exemptions. The original Letter of Findings denied taxpayer's protest, and taxpayer timely requested a rehearing on just 2 items. Taxpayer's request was granted and a rehearing held.

STATEMENT OF FACTS

Taxpayer owns and operates 2 restaurants in the state of Indiana. An examination of taxpayer's invoices for the calendar years 1996, 1997, and 1998 showed that taxpayer failed to pay sales tax on certain items of tangible personal property for which no exemption applied. The audit resulted in proposed assessments of use tax. Taxpayer protested these assessments, and a hearing was held on April 3, 2001, and the original Letter of Findings was issued on June 15, 2001. Taxpayer timely requested a rehearing which was granted and held on September 18, 2001. Additional facts will be supplied as necessary.

I. Gross Retail and Use Tax – Characterization of Restaurant Equipment under Rehearing Standard of Review

DISCUSSION

Taxpayer, in its previous protest, had questioned Audit's characterization of some of its restaurant equipment for purposes of determining the percentage of electricity consumed in its production process. Specifically, taxpayer had contended that a large walk-in refrigeration unit and an exhaust filter system should have been characterized as production equipment for purposes of computing percentages of exempt utility consumption.

Taxpayer had presented the following facts at the original hearing: taxpayer cuts and "ages" its own steaks. The aging process requires restaurant personnel to store purchased beef in a refrigeration unit prior to final cutting and cooking. Taxpayer still believes the refrigeration unit is an essential and integral part of its production process. The "aging process" at issue consists of placing meat in a controlled refrigerated environment. Cold storage allows natural enzymes already contained in the beef to break down the hard, connective tissues. The result of this biochemical process is a tender, more flavorful steak. Given the refrigerator's utility, and its impact on marketing strategy, taxpayer still contends the unit is essential to its integrated production process.

The Letter of Findings the Department issued after the original hearing cited *Indianapolis Fruit Co., v. Department of State Revenue,* 691 N.E.2d 1379 (Ind.Tax 1998) as authority for rejecting taxpayer's argument because the Tax Court, in *Indianapolis Fruit*, heard and rejected similar arguments. In *Indianapolis Fruit*, the taxpayer had argued that tomatoes were ripened and made more marketable through storage "in a tightly controlled environment," much like the instant taxpayer's refrigeration unit. (*Id*. At 1385). The Tax Court rejected this argument and found that tomato ripening did not constitute production "within the meaning of any of the exemption provisions." *Id.* The Court went on to state unequivocally that the transformation of the tomatoes into a "more marketable" product was not caused by anything Indianapolis Fruit did to them: "Instead, [Indianapolis Fruit] passively awaited the ripening of the tomatoes. The ripening was not actively induced by Indianapolis Fruit and was merely incidental to the proper storage of the tomatoes." (*Id*. at 1385-86).

In the case at bar, the Department, in the original Letter of Findings, determined the rule and rationale announced in *Indianapolis Fruit* precluded the Department from arriving at a different result in taxpayer's case. Taxpayer's "aging" of beef did not represent a production activity because taxpayer did not actively induce the changes caused by the aging process. Very similar to the taxpayer in *Indianapolis Fruit*, the present taxpayer merely waited for the process to complete itself. This is biochemistry, not production; the aging "event", similar to the tomato ripening "event," is "merely incidental to the proper storage of the" beef. (*Id.*) Audit's original refusal to characterize the refrigeration unit as production equipment was deemed correct.

Taxpayer argued in its original protest that an exhaust filter system should have been characterized as production equipment. At the original hearing, taxpayer's description of the system and how it functioned was sufficient to reveal the health and safety nature of the system. Audit's determination that the production exemption should not apply was upheld in the original Letter of Findings.

Pursuant to IC § 6 –8.1-5-1(b) and 45 IAC 15-5-3(8), a "notice of proposed assessment is *prima facie* evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Therefore, the burden remains with the taxpayer to overcome the presumption that a duly promulgated tax assessment is correct. In addition, the standards on rehearing are more restrictive than those followed in an original taxpayer protest hearing.

The Department, in original taxpayer protest hearings, always explains the standards for granting requests for rehearing. Pursuant to IC § 6-8.1-5-1(f), a taxpayer who "disagrees with a decision in a letter of finding may request a rehearing" within 30 days of the Letter of Findings' issuance. The Department "shall consider the request and may grant the rehearing." Under 45 IAC 15-5-5(b), rehearings are not held "*de novo* unless abuse of discretion is alleged." If taxpayer alleges such an abuse, "the evidence will not be reweighed." In such cases where abuse of discretion is alleged, the Department only considers "evidence most favorable to the department's position" and reverses the original letter of finding's determinations "only if the decision is clearly against the logic and effect of the facts and circumstances." If a taxpayer on rehearing "presents new and relevant evidence as a grounds for reversal, the new evidence will be weighed in light of all relevant facts and circumstances."

At the rehearing, taxpayer voiced several objections to the original Letter of Findings, i.e., the lack of particular findings regarding the functions of the walk-in refrigeration unit and the exhaust system. Specifically, taxpayer argued that the meat aging

process is only one function of the uses of the unit; taxpayer also argued that the exhaust system is not analogous to the HVAC system on which the original Letter of Findings relied.

Taxpayer emphasized the unique nature of the product his restaurants sell for public consumption:

1. **Steaks**—Taxpayer purchases meat in bulk, carves it into steaks of various kinds and sizes, and then stores them in the unit until customers order. At that point, staff move inventory from the unit to the kitchen where the steaks are stored until grilled on the open flame grill. Steaks are stored in the unit in sealed trays which are moved to the kitchen as required by customer volume.

2. **Salads**—Taxpayer purchases typical salad ingredients whole and in bulk, not prepackaged. In particular, taxpayer purchases heads of lettuce, cores them, washes, dries, and shreds them, placing the resulting product in sealed plastic bags and storing them in the unit with tomatoes, etc, until they are moved to the salad "station" where the ingredients are combined into the different salad varieties customers may order.

3. **Bread and rolls**—Taxpayer purchases all ingredients for bread and rolls, mixes them up into dough, and stores the dough in plastic bags in the unit until needed for processing into freshly baked goods to fill customer orders.

4. **Ground beef**—Taxpayer takes meat and fat leftover from the steak carving process, grinds them up, rolls them into balls, and stores them in the unit until customers order dishes such as hamburgers, ground steak, etc.

Taxpayer argued that his steak products and their accompanying salads and rolls, as produced now, could not be produced without the operation of the walk-in refrigerator and the exhaust system. Taxpayer maintains that his restaurants offer customers a dining experience that is harder and harder to find these days—freshly prepared food from freshly purchased ingredients, stored and prepared in a unique way.

In support of his contentions, taxpayer played a videotape of kitchen staff cooking steaks to order. No unusual activity occurred; staff removed various cuts of steaks from kitchen storage (not the walk-in cooler) and tossed them onto the open flame grill. Smoke rose up and disappeared into the exhaust system for venting outdoors. There is nothing special about taxpayer's preparation or storage processes that would require the Department to classify steaks, dough, and salad ingredients as works in progress.

Taxpayer presented nothing at the rehearing to challenge Audit's original determination and the first Letter of Findings. *Indianapolis Fruit* and Sales Tax Bulletin # 55 still apply. Taxpayer's arguments do nothing to impugn Audit's original determination, or to discredit the original Letter of Finding's denial of taxpayer's protest on these issues. Rather, the videotape and taxpayer's arguments on rehearing merely serve to emphasize taxpayer's original facts and arguments: Taxpayer's restaurants create a unique product which qualify them, if the Department truly understood, for a greater percentage of electricity used in its production process. The Department, while understanding taxpayer's point of view, and product, declines taxpayer's invitation to expand the statutory and regulatory definitions delineating production processes to increase exempt electrical usage.

FINDING

Taxpayer's protest was properly denied in the original Letter of Findings.

INDIANA DEPARTMENT OF STATE REVENUE
Revenue Ruling #2001-11 IT
November 8, 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 – Satellite Television Programming Services

Authority: Rule 45 IAC 1.1-3-3; IC 6-2.1-2-2; Rule 45 IAC 1.1-1-3; Rule 45 IAC 1.1-2-5

The taxpayer requests the Department to rule whether or not:

1. The receipts received by the taxpayer relating to the sale of monthly programming guides to Indiana residents are subject to gross income tax;

2. The receipts received by the taxpayer relating to the direct sale of satellite dishes and receivers to Indiana residents are subject to gross income tax; and

3. The receipts received by the taxpayer relating to satellite television programming services provided to Indiana residents (a) were subject to gross income tax before the taxpayer began offering local network programming and renting satellite dishes and receivers to Indiana customers in the Spring of 2000, and (b) the receipts received by the taxpayer relating to satellite television programming services provided to Indiana residents are subject to gross income tax after the taxpayer began offering local network programming and renting satellite dishes and receivers to Indiana customers in the Spring of 2000.

STATEMENT OF FACTS

The taxpayer is a non-Indiana corporation headquartered outside Indiana. The taxpayer delivers direct broadcast satellite ("DBS") television products and services to customers nationwide. A related corporation headquartered outside Indiana, purchases satellite dishes and receivers from third party vendors, and subsequently sells the satellite dishes and receivers to independent dealers. A related corporation headquartered outside Indiana, provides satellite dish and receiver installation services. Although independent dealers normally install the satellite dishes and receivers, the related installation corporation will perform the installation function in the event that an independent dealer does not employ or contract installers.

The taxpayer's DBS system, comprised of six operational satellites and the Digital Uplink Center ("Uplink Center"), gives the taxpayer the capacity to offer customers over 500 channels of digital video and CD-quality audio programming. DBS utilizes frequency allocation and wide spacing between satellites to provide higher-powered transmissions that allow the taxpayer's customers to receive programming directly from taxpayer satellites with an 18 to 24 inch satellite dish. The Uplink Center, located outside Indiana, receives video, audio, and data information containing national entertainment, news, sports, pay-per-view and regional, independent, and local network programming from broadcasting stations via fiber optic cables or satellites. Local network programming is optional and offered in addition to the taxpayer's basic programming packages for $4.99 per month. While national, regional, and independent television programming is sent by fiber optic cables directly from the broadcasting stations to the Uplink Center, local network programming is first gathered by use of off-air antennas, or by direct feeds from broadcasting stations to a small equipment rack located at a local long distance carrier's Indiana facilities. The equipment racks are the property of the taxpayer and a non-resident taxpayer employee provides maintenance on a monthly basis. The employee only spends approximately 2-3 days per month working in Indiana. The local network programming is subsequently transmitted from the equipment racks to the Uplink Center by fiber optic cables. The taxpayer began offering local network programming to Indiana residents in April 2000, and placed the equipment rack in service on or about that date.

The Uplink Center combines and converts the various programming, as well as special programs produced by the taxpayer's own studios, from the multiple analog and digital transmissions into a single digital stream and uplinks this information to the taxpayer's six direct-to-home satellites. These satellites then directly relay the programming streams to taxpayer customers nationwide. The following example illustrates the path of television programming from its originating source to taxpayer customers in Indiana: An Indiana local network affiliate (CBS, ABC, NBC, or FOX) sends its programming by direct feeds from its broadcasting station to the small equipment rack located at the local long distance carrier. The Uplink Center subsequently receives the local network programming via fiber optic cables from the equipment rack in Indiana, combines it with all other programming received, and convents it into a single digital stream. This digital stream is sent from the Uplink Center to the taxpayer's six satellites, which directly relay the digital programming stream to customers' satellite dishes and receivers in Indiana. (Note: Prior to April 2000, the taxpayer had no employees or equipment located in Indiana because local network programming was not available to subscribers.)

The taxpayer uses conditional access technology to encrypt the programming, and controls access to authorized programming through the use of "smart cards," which are access cards implanted with a microchip and inserted into the satellite receivers. The smart cards, which resemble the physical characteristics of a credit card, only work in the receivers with which they were purchased, and ensure that taxpayer customers only receive the programming that they have actually purchased. As part of the Residential Customer Agreement, the taxpayer retains a property interest in the smart cards for the purpose of allowing the taxpayer to monitor the cards and protect the technology that authorizes the reception of programming from unauthorized piracy and tampering. Because the physical properties of the smart cards are without value, the taxpayer does not book the value of the smart cards as an asset on its books, and destroys, or does not require customers to return, the smart cards upon termination of service.

The taxpayer has been providing national, regional, and independent television programming services to Indiana customers since 1996, and local network programming since April 2000. The taxpayer's satellite programming activities take place at the Uplink Center. As any necessary installation, service, or repairs requested by customers is provided by independent dealers or related corporations, the taxpayer has no resident employees or salespersons in Indiana. The satellite dishes and receivers necessary to receive the satellite television programming are generally purchased from independent dealers, who purchase the satellite dishes and receivers at wholesale prices from the related sales corporation. The taxpayer also directly sells satellite dishes and receivers via its website and toll-free phone number to approximately 7% of its new subscribers. Beginning in May 2000, customers have had the option to rent, in lieu of purchasing, the satellite dish and receiver as part of the taxpayer's programming packages.

Whenever a customer subscribes to "Plan A" or "Plan B", the retailer charges the customer a nonrefundable activation fee, and installs the satellite dish and receiver in the customer's home. Thereafter, the taxpayer purchases the satellite dish and receiver from the retailer and subsequently rents the satellite dish and receiver to the customer. The customer pays both a monthly programming fee and a rental fee. In contrast, the traditional "Plan A" and "Plan B" which require customers to purchase the satellite dish and receiver, have programming fees only.

In addition to the above activities, the taxpayer engages in the sale of monthly programming guides to its customers. The taxpayer uses a "fulfillment house" located in Wisconsin to print and mail (via the U.S. Postal Service) the guides directly to the

taxpayer's customers. The taxpayer reimburses the fulfillment house for the full purchase price of the guides and, in turn, receives a commission from the fulfillment house based on the number of programming guides sold.

DISCUSSION & RULINGS

Issue #1: Whether or not the receipts received by the taxpayer relating to the sale of monthly programming guides to Indiana residents are subject to gross income tax

Rule 45 IAC 1.1-3-3 provides that gross income derived from the sale of tangible personal property in interstate commerce is not subject to gross income tax if the sale is not completed in Indiana. Rule 45 IAC 1.1-3-3, further, provides that a sale to an Indiana buyer by a nonresident with an in-state business situs or activities but the situs or activities are not significantly associated with the sale because it was initiated, negotiated, and serviced by out-of-state personnel, and the goods are shipped from out-of-state, is not a sale completed in Indiana.

In the instant case, the taxpayer does not have sales personnel in Indiana, rather the sale of the programming guides is initiated, negotiated, and serviced by sales personnel from the taxpayer's headquarters located outside Indiana and the programming guides are shipped directly from the fulfillment house in Wisconsin. The sale of programming guides, therefore, is defined as a sale in interstate commerce, consequently, is not subject to gross income tax.

RULING #1

The Department rules that receipts received by the taxpayer relating to the sale of monthly programming guides to Indiana residents are not subject to gross income tax.

Issue #2: Whether or not the receipts received by the taxpayer relating to the direct sale of satellite dishes and receivers to Indiana residents are subject to gross income tax

Rule 45 IAC 1.1-3-3 provides that gross income derived from the sale of tangible personal property in interstate commerce is not subject to gross income if the sale is not completed in Indiana. Rule 45 IAC further provides that a sale to an Indiana buyer by a nonresident with an in-state business situs or activities but the situs or activities are not significantly associated with the sale because it was initiated, negotiated, and serviced by out-of-sate personnel, and the goods are shipped from out-of-state, is not a sale completed in Indiana.

Here, the taxpayer makes direct sales of satellite dishes and receivers to Indiana residents via its website or toll-free phone number from its headquarters located outside Indiana and the satellite dishes and receivers are shipped directly from the taxpayer's warehouses, also, located outside Indiana. The direct sale of satellite dishes and receivers to Indiana residents, therefore, is initiated, negotiated, and serviced by sales personnel from the taxpayer's headquarters located outside Indiana and the satellite dishes and receivers are shipped from out-of-state. The direct sale of satellite dishes and receivers to Indiana residents, hence, is defined as a sale in interstate commerce, consequently, is not subject to gross income tax.

RULING #2

The Department rules that receipts by the taxpayer relating to the direct sale of satellite dishes and receivers to Indiana residents are not subject to gross income tax.

Issue #3(a): Whether or not the receipts received by the taxpayer relating to satellite television programming services provided to Indiana residents were subject to gross income tax before the taxpayer began offering local network programming and renting satellite dishes and receivers to Indiana customers in the Spring of 2000

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.

Further Rule 45 IAC 1.1-2-5 specifically states that gross income derived from the provision of a service of any character within Indiana is subject to gross income tax. Rule 45 IAC 1.1-2-5, also, states that the sale of advertising time or space by Indiana publishers and broadcasters, even though the buyer is a nonresident, is an example of services performed within Indiana.

It is clear then from the above statute and regulations, that the sale of advertising time or space by Indiana publishers and broadcasters is subject to gross income tax, however, the sale of advertising time or space by publishers and broadcasters located outside Indiana is not subject to gross income tax.

Rule 45 IAC 1.1-2-5 specifically states that the sale of telecommunications, including telephone, telegraph, and noncable television, if the telecommunications originates or terminates in Indiana and is charged to an Indiana address, and the charges are not taxable under the laws of another state is an example of services being performed within Indiana. This regulation, in conjunction with the previously cited IC 6-2.1-2-2 and Rule 45 IAC 1.1-1-3, results in the taxpayer's satellite television programming services provided to Indiana residents being subject to gross income tax.

RULING #3(a)

The Department rules that receipts received by the taxpayer from the sale of advertising time in Indiana are not subject to gross income tax.

The Department, further, rules that receipts received by the taxpayer from the sale of satellite television programming services provided to Indiana residents are subject to gross income tax.

Issue #3(b): Whether or not the receipts received by the taxpayer relating to satellite television programming services provided to Indiana residents are subject to gross income tax after the taxpayer began offering local network programming and renting satellite dishes and receivers to Indiana customers in the Spring of 2000

As established in above Issue #3(a), the taxpayer's sale of satellite television programming services is subject to gross income tax. Likewise, the sale by the taxpayer of local network programming to Indiana residents is subject to 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, also, specifically states that the leasing/rental of income-producing property (real or personal) establishes a business situs in Indiana, therefore, the taxpayer's leasing/rental of satellite dishes and receivers to Indiana residents is subject to gross income tax.

RULING #3(b)

The Department rules that receipts by the taxpayer from the sale of local network programming to Indiana residents are subject to gross income tax.

The Department, further, rules that receipts received by the taxpayer from the leasing/rental of satellite dishes and receivers to Indiana residents are subject to gross income tax.

CAVEAT

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