INDIANA DEPARTMENT OF INSURANCE

Bulletin 109

March 13, 2002

GROUP ACCIDENT AND SICKNESS LOSS HISTORY INFORMATION

This Bulletin is directed to all insurance companies, administrators (as defined by IC 27-1-25-1(a)) and health maintenance organizations (as defined by IC 27-13-1-19) that issue or administer group accident and sickness insurance in the State of Indiana. Group accident and sickness insurance includes coverage provided to employer groups, associations, trusts or any other qualified group. Association and trust products that are marketed to employers or to individuals are group accident and sickness insurance even if the issuer is individually underwriting members of the association or trust. This Bulletin does not apply to group insurance policies of the following types: accident only; credit; dental; vision; Medicare supplement; long term care; or disability income. This Bulletin is intended to replace Bulletin 69 issued on January 31, 1991. Bulletin 69 is hereby withdrawn.

This Department has become aware that many group health plans are continuing to experience difficulties obtaining loss histories for their health plans. This information is essential to these groups to effectively manage health care costs and insurance premiums. The purpose of this Bulletin is to set forth minimum standards for insurers, administrators and health maintenance organizations to meet when responding to requests for loss history information.

From information available, companies should provide loss history information to the group health plan within thirty (30) days of a written request. Reports need not be provided more often than twice annually. At a minimum, groups have a right to expect loss history information from current and former insurers, administrators or health maintenance organizations for any group covering two (2) or more individuals. These reports should be current and available to the group health plan for three (3) years after termination of a policy.

The loss history information provided to the group health plan must include at least the following information based on a calendar year, policy year, or renewal period:

1. Total premium received;
2. Total incurred claims;
3. Total paid claims;
4. Total pending claims; and
5. Description of any large or catastrophic claims exceeding five thousand dollars ($5,000). The Department acknowledges that there are privacy issues to be considered in providing this information. Information should be provided in a format that does not disclose personally identifiable health information unless there is authority to do so.

Information on claims received but not yet processed is not expected to be included. The information provided should be current to thirty (30) days prior to the request.

The Department will monitor and expects compliance with the foregoing guidelines. The Department considers refusal by an insurer, administrator or health maintenance organization to provide loss history information upon the request of a group health plan or an unreasonable delay in providing such information, to be an unfair and deceptive act. Upon notification of such acts the Department will investigate and pursue any appropriate administrative action.

INDIANA DEPARTMENT OF INSURANCE
Sally McCarty, Commissioner

DEPARTMENT OF LOCAL GOVERNMENT FINANCE

To: Assessing Officials
Public Librarians
From: Assessment Division
Date: February 25, 2002
Re: 2nd Amended pages to 50 IAC 2.3

The attached pages shall serve as 2nd amended pages to 50 IAC 2.3 "Real Property Assessment Guidelines".

The following table identifies each amended page and the change that was made (NOTE: this package includes unchanged pages to allow the double-sided pages in the original manual to be replaced as necessary):

Book (1 or 2)	Chapter/Appendix	Page Number	Description of Change
1	3	65	Changed table number from 3-1 to 3-13
1	C	19	Under Chicken, Duck, Turkey Barns change "Add for lighting" to "Included for lighting"
1	C	20	No 2nd amended changes but a clarification on the first amended page – reference to depreciation schedule was also removed for Hog Confinement Facilities in addition to Veal Confinement Facilities and Poultry Confinement Buildings.
2	G	13	Correct cost table base prices inadvertently changed in the first amended page.
2	G	16	Correct cost table base prices inadvertently changed in the first amended page.
2	G	21	Add table labels inadvertently deleted from the first amended page.
2	G	22	Add money vault door price inadvertently deleted from the first amended page. Add "in "Appendix C" under Drive-in Teller Booths cost schedule.
2	G	39	Correct typo under Excellent "A" Specifications.

Solar Heating and Cooling System Types

Table 3-13 lists the types of solar heating and cooling systems.

Table 3-13. Solar Heating and Cooling Systems

This type	Indicates
Type A	A solar collection unit of thirty (30) square feet, a storage medium consisting of either a one hundred twenty (120) gallon tank for a liquid system or a storage vessel with a rock surface area of four hundred (400) square feet for an air system, and an elaborate contractor installed distribution unit that requires minimum occupant involvement on a day-to-day basis. This type of system virtually runs itself through the use of sophisticated monitoring equipment. This type of system is normally designed for and incorporated into the structure at the time of construction.
Type B	A solar collection unit of twenty-five (25) square feet, a storage medium consisting of either an eighty (80) gallon tank for a liquid system or a storage vessel with a rock surface area of three hundred (300) square feet for an air system, and a contractor installed distribution unit that requires limited occupant involvement in the day-to-day operation of the system.
Type C	A solar collection unit of twenty (20) square feet, a storage medium consisting of either a sixty (60) gallon tank for a liquid system or a storage vessel with a rock surface area of two hundred (200) square feet for an air system, and a contractor installed distribution unit that relies on the occupant to make internal adjustments within the system during the day-to-day operation of the system.
Type D	A homemade solar collection unit of less than twenty (20) square feet and a storage medium of either a forty (40) gallon tank for a liquid system or a storage vessel with a rock surface area of two hundred (200) square feet or less for an air system. The Type D system uses the structure's existing base heating and cooling system as the distribution unit for the system. The Type D distribution unit's cost included in the cost schedules reflect the additional cost incurred to hook-up the solar portion of the system to the base heating system included in the structure's calculation of replacement cost.

Appendix C — Residential and Agricultural Cost Schedules

SCHEDULE G.2 (continued)

Farm Buildings and Structures

Barns and Sheds (continued)

(3)-Pole Framed General Purpose Buildings

		All Walls		All Walls Insulated		1 Side Open		No Walls	
Size	Area	14'	+/-2'	14'	+/-2'	14'	+/-2'	14'	+/-2'
60 x 100	6000	6.20	0.20	6.80	0.20	5.85	0.15	5.00	0.15
60 x 120	7200	6.15	0.20	6.65	0.20	5.70	0.15	4.90	0.15
60 x 140	8400	6.10	0.20	6.60	0.20	5.65	0.15	4.90	0.15
60 x 160	9600	6.00	0.20	6.50	0.20	5.55	0.15	4.90	0.15
60 x 180	10800	5.95	0.20	6.50	0.20	5.55	0.15	4.90	0.15
60 x 200	12000	5.95	0.20	6.45	0.20	5.50	0.15	4.90	0.15
60 x 250	15000	5.85	0.15	6.35	0.20	5.40	0.15	4.90	0.15
60 x 300	18000	5.80	0.15	6.30	0.20	5.35	0.15	4.85	0.15
80 x 40	3200	7.10	0.30	7.85	0.30	6.80	0.20	5.35	0.15
80 x 60	4800	6.50	0.20	7.15	0.30	6.20	0.20	5.20	0.15
80 x 80	6400	6.20	0.20	6.80	0.20	5.95	0.15	5.05	0.15
80 x 100	8000	6.10	0.20	6.65	0.20	5.80	0.15	5.05	0.15
80 x 120	9600	5.95	0.20	6.50	0.20	5.65	0.15	5.00	0.15
80 x 140	11200	5.85	0.15	6.45	0.20	5.55	0.15	5.00	0.15
80 x 160	12800	5.80	0.15	6.35	0.20	5.50	0.15	5.00	0.15
80 x 180	14400	5.80	0.15	6.30	0.20	5.50	0.15	4.90	0.15
80 x 200	16000	5.70	0.15	6.20	0.15	5.40	0.15	4.90	0.15
80 x 250	20000	5.65	0.15	6.15	0.15	5.35	0.15	4.90	0.15
80 x 300	24000	5.65	0.15	6.15	0.15	5.35	0.15	4.90	0.15
80 x 350	28000	5.55	0.15	6.10	0.15	5.25	0.15	4.90	0.15
80 x 400	32000	5.50	0.15	6.00	0.15	5.20	0.15	4.85	0.15
100 x 40	4000	7.10	0.30	7.85	0.30	6.80	0.20	5.40	0.15
100 x 60	6000	6.45	0.20	7.10	0.20	6.20	0.20	5.25	0.15
100 x 80	8000	6.15	0.20	6.75	0.20	5.95	0.15	5.10	0.15
100 x 100	10000	6.00	0.15	6.60	0.20	5.80	0.15	5.05	0.15
100 x 120	12000	5.85	0.15	6.45	0.15	5.65	0.15	5.05	0.15
100 x 140	14000	5.80	0.15	6.30	0.15	5.55	0.15	5.00	0.15
100 x 160	16000	5.70	0.15	6.20	0.15	5.50	0.15	5.00	0.15
100 x 180	18000	5.70	0.15	6.15	0.15	5.40	0.15	5.00	0.15
100 x 200	20000	5.65	0.15	6.15	0.15	5.40	0.15	5.00	0.15
100 x 250	25000	5.55	0.15	6.10	0.15	5.35	0.15	4.90	0.15
100 x 300	30000	5.50	0.15	6.00	0.15	5.25	0.15	4.90	0.15
100 x 350	35000	5.50	0.15	5.95	0.15	5.25	0.15	4.90	0.15
100 x 400	40000	5.40	0.15	5.85	0.15	5.20	0.05	4.85	0.15

Included for (deduct if not present):

	All Walls	All Walls Insulated	1 Side Open	No Walls
Stalls & other features		---	---	---
Loft floor	---	---	---	---
Plumbing	---	---	---	---
Lighting	0.20	0.20	0.20	0.20
Concrete floor	2.00	2.00	2.00	2.00
Roof Insulation	---	0.35	---	---

Add for interior finish - shop type (Interior liner, heat, insulation, & up-graded lighting)	3.95
Add for interior finish office area (Wall and ceiling finish, minimal ptns and floor covering)	15.05
Add for milk parlor & milk houses-Type-3	6.95
Add for wood loft floors	3.50
Add per square foot (of bin area) for wood bins	7.05
Add for stable stall walls	2.10
Deduct for Earth floor	2.00

Adjust for quality grade from Schedule F

Barns and Sheds Sound Value Guidelines			
Type-1	$500	to	6200
Type-2	$400	to	5600
Type-3	$100	to	5900

Interpolation Procedures - Type 3 Barns

1. Select the model width and length closest to the subject.
2. Select (or calculate) the square foot rate applicable to each of the two (2) areas immediately smaller than and larger than the subject.
3. Calculate the difference in the whole dollar value applicable to each of the areas selected in step #2.
4. Divide the result from step #3 by the difference in the areas used in step #2.
5. Apply the rate arrived at in step #4 to the difference in the area of the subject and the smaller area of the two (2) used in step #2.
6. Add the result from step #5 to the whole dollar value calculated for the smaller area in step #3 and round the result to the nearest ten dollars ($10.00).

Note: For areas larger than those included in the table, calculate the additive value by following the same procedure (steps #1 to #6) for the two (2) largest representative areas provided.

Chicken, Duck, Turkey Barns

(Typically associated with floor type operations.)

Per square foot, average quality, 12' eaves height

Area	Rate	+/-2	Area	Rate	+/-2
2000	8.05	0.45	7000	5.65	0.30
2400	7.60	0.45	8000	5.40	0.30
2800	7.25	0.35	9000	5.25	0.20
3200	6.95	0.35	10000	5.10	0.20
3600	6.75	0.35	12000	5.00	0.20
4000	6.50	0.35	14000	4.85	0.20
4400	6.35	0.30	16000	4.70	0.20
4800	6.20	0.30	18000	4.55	0.20
5200	6.10	0.30	20000	4.45	0.20
5600	5.95	0.30	22000	4.40	0.20
6000	5.85	0.30	24000	4.30	0.15

Prices are for metal clad, wood or light metal framed buildings with earth floor, minimal lighting and mechanically operated ventilator upper side walls.

Included for lighting	0.20
Add for plumbing	0.20
Add for concrete floor	2.00
Add for roof insulation	0.35
Add for loft floor	3.50

Adjust for quality grade from Schedule F

Appendix G — Commercial and Industrial Cost Schedules

SCHEDULE A.1 (continued)

GCM Base Prices (continued)

Floor Level	Fin Type	Use Type	Flr Hgt	Wall Type	2 Fire Resistant 1	2	3	4	5	6	7	8	9	10	+1	1 Wood Jst (-)	3 Rein Conc (+)	4 F P Steel (+)
First	FD	Country Club	12'	1	54.30	56.90	59.50	62.10	64.70	67.30	69.90	72.45	75.05	77.65	2.59	1.72	8.27	9.92
				2	54.90	58.10	61.30	64.50	67.70	70.90	74.10	77.35	80.55	83.75	3.20	1.72	8.27	9.92
		Funeral Home	12'	1	47.95	50.50	53.05	55.60	58.20	60.75	63.30	65.85	68.40	70.95	2.56	1.72	8.27	9.92
				2	48.55	51.70	54.90	58.05	61.20	64.40	67.55	70.70	73.85	77.05	3.16	1.72	8.27	9.92
		Nursing Home	10'	1	47.10	49.25	51.40	53.55	55.70	57.85	60.00	62.15	64.30	66.50	2.16	1.72	7.94	9.55
				2	47.60	50.25	52.90	55.55	58.25	60.90	63.55	66.20	68.90	71.55	2.66	1.72	7.94	9.55
		Hotel -- Motel Unit	10'	1	49.50	51.65	53.85	56.05	58.20	60.40	62.60	64.80	66.95	69.15	2.19	1.72	7.94	9.55
				2	50.00	52.70	55.35	58.05	60.75	63.45	66.15	68.80	71.50	74.20	2.69	1.72	7.94	9.55
		Apartment	10'	1	34.05	36.20	38.40	40.55	42.70	44.90	47.05	49.20	51.35	53.55	2.16	1.71	7.86	9.46
				2	34.55	37.20	39.90	42.55	45.20	47.90	50.55	53.20	55.90	58.55	2.67	1.71	7.86	9.46
Wall Hgt.	UF	+/-	1'	1	0.35	0.50	0.65	0.75	0.90	1.05	1.20	1.35	1.45	1.60	0.14	0.03	0.21	0.23
				2	0.35	0.55	0.75	0.90	1.10	1.30	1.50	1.70	1.85	2.05	0.19	0.03	0.21	0.23
	SF	+/-	1'	1	0.50	0.65	0.85	1.00	1.20	1.35	1.50	1.70	1.85	2.05	0.17	0.02	0.23	0.25
				2	0.50	0.70	0.90	1.10	1.30	1.50	1.70	1.90	2.10	2.30	0.20	0.02	0.23	0.25
	FO	+/-	1'	1	0.70	0.85	1.00	1.20	1.35	1.50	1.65	1.80	2.00	2.15	0.16	0.01	0.18	0.20
				2	0.75	0.95	1.15	1.40	1.60	1.80	2.00	2.20	2.45	2.65	0.21	0.01	0.18	0.20
	FD	+/-	1'	1	1.05	1.20	1.40	1.55	1.75	1.90	2.05	2.25	2.40	2.60	0.17	0.01	0.16	0.19
				2	1.10	1.30	1.50	1.75	1.95	2.15	2.35	2.55	2.80	3.00	0.21	0.01	0.16	0.19
Upper	UF	Utility	12'	1	14.05	16.25	18.50	20.75	23.00	25.25	27.50	29.75	31.95	34.20	2.24	3.60	6.21	7.53
				2	14.60	17.35	20.15	22.95	25.75	28.55	31.35	34.15	36.90	39.70	2.79	3.60	6.21	7.53
		Parking Garage	10'	1	16.80	18.05	19.30	20.60	21.85	23.10	24.35	25.65	26.90	28.15	1.26	4.90	5.26	6.54
				2	17.25	18.95	20.65	22.40	24.10	25.80	27.55	29.25	30.95	32.65	1.71	4.90	5.26	6.54
				4	15.80	16.10	16.40	16.70	17.00	17.30	17.60	17.90	18.20	18.45	0.29	4.90	5.26	6.54
	FO	Health Club ***	12'	1	46.45	48.40	50.40	52.35	54.30	56.30	58.25	60.20	62.15	64.15	1.96	5.45	6.41	7.95
				2	47.05	49.60	52.20	54.75	57.30	59.85	62.45	65.00	67.55	70.10	2.56	5.45	6.41	7.95
		General Retail	12'	1	27.40	29.80	32.20	34.60	37.00	39.40	41.80	44.15	46.55	48.95	2.39	3.67	6.01	7.60
				2	28.00	31.00	33.95	36.95	39.90	42.85	45.85	48.80	51.80	54.75	2.97	3.67	6.01	7.60
		Mall Shops	14'	1	32.85	35.75	38.70	41.60	44.50	47.45	50.35	53.30	56.20	59.15	2.92	3.67	6.33	7.97
				2	33.40	36.85	40.30	43.75	47.25	50.70	54.15	57.60	61.10	64.55	3.46	3.67	6.33	7.97
		Department Store	14'	1	44.85	47.15	49.45	51.80	54.10	56.45	58.75	61.05	63.40	65.70	2.32	5.27	6.39	8.04
				2	45.50	48.50	51.50	54.50	57.50	60.50	63.50	66.50	69.50	72.50	3.00	5.27	6.39	8.04
		Dinning/Lounge	12'	1	46.00	48.55	51.10	53.60	56.15	58.70	61.25	63.80	66.35	68.90	2.55	3.67	6.01	7.60
				2	46.55	49.70	52.80	55.95	59.05	62.20	65.30	68.45	71.60	74.70	3.13	3.67	6.01	7.60
	FD	Hotel – Motel	12'	1	48.60	51.20	53.80	56.45	59.05	61.65	64.25	66.85	69.50	72.10	2.61	3.98	6.47	8.01
		Service		2	49.20	52.45	55.65	58.85	62.10	65.30	68.50	71.70	74.95	78.15	3.22	3.98	6.47	8.01
		General Office	12'	1	49.90	52.05	54.25	56.40	58.55	60.70	62.85	65.00	67.15	69.30	2.15	5.57	6.70	8.47
				2	50.55	53.35	56.15	58.95	61.70	64.50	67.30	70.10	72.85	75.65	2.79	5.57	6.70	8.47
		Medical Office	11'	1	52.85	55.25	57.65	60.05	62.45	64.85	67.25	69.70	72.10	74.50	2.41	4.00	6.57	8.34
				2	53.40	56.40	59.40	62.40	65.40	68.40	71.40	74.40	77.40	80.40	3.00	4.00	6.57	8.34
		Nursing Home	10'	1	43.60	45.65	47.75	49.80	51.85	53.90	56.00	58.05	60.10	62.15	2.06	3.98	6.13	7.64
				2	44.10	46.70	49.25	51.80	54.40	56.95	59.50	62.10	64.65	67.25	2.57	3.98	6.13	7.64
		Hotel -- Motel Unit	10'	1	46.00	48.10	50.20	52.30	54.40	56.45	58.55	60.65	62.75	64.85	2.09	3.98	6.13	7.64
				2	46.50	49.10	51.70	54.30	56.90	59.50	62.10	64.70	67.30	69.90	2.60	3.98	6.13	7.64
		Apartment	10'	1	30.45	32.55	34.60	36.70	38.75	40.85	42.90	45.00	47.05	49.15	2.07	3.94	6.58	8.06
				2	30.75	33.15	35.50	37.85	40.20	42.55	44.95	47.30	49.65	52.00	2.36	3.94	6.58	8.06
* Add to base price (1st floor) to account for roof deck parking															3.61			
** Adjust base price to account for balconies, per square foot of balcony area															23.11	1.53	2.15	4.29
***Add per court -- racquetball														35,300				
– squash														28,200				
1Add to base price (1st floor) to account for elevated floor construction															4.87	3.84	0.48	1.49

1 These rates represent an amount of increased cost to elevate a floor over and above what is included in the model for a floor. For instance, most if not all of our first floor models, have included a concrete floor. These costs represent the increased cost to suspend (based on the framing types) a floor higher than the existing floor. An example of this type of entity would be a raised area in a department store, where a set of 3 or 4 steps is required to raise the customer onto a more specialized or exclusively priced area of the store. The raising of a floor over and above what is included in the models could occur in any of the GCM first floor models.

These rates are only applicable to the area that is raised within a structure. If less than 100% of the structure or building section includes this feature, then the appropriate rate is multiplied by the percentage of the building or section that has this feature to determine the applicable adjustment.

SCHEDULE A.3 (continued)

GCR Base Prices (continued)

					1 Wood Joist										
Floor Level	Fin Type	Use Type	Flr Hgt	Wall Type	1	2	3	4	5	6	7	8	9	10	+1
First	FD	Motel Units	9'	1	37.40	38.90	40.35	41.85	43.30	44.80	46.30	47.75	49.25	50.75	1.48
				2	37.90	39.85	41.85	43.80	45.80	47.80	49.75	51.75	53.70	55.70	1.98
		Funeral Home	12'	1	44.10	46.05	47.95	49.85	51.75	53.65	55.55	57.45	59.35	61.30	1.91
				2	44.75	47.35	49.90	52.45	55.00	57.55	60.10	62.70	65.25	67.80	2.56
		Nursing Home	10'	1	49.75	51.35	52.95	54.55	56.15	57.75	59.35	60.95	62.55	64.15	1.60
				2	50.30	52.45	54.60	56.75	58.90	61.05	63.20	65.35	67.50	69.65	2.15
		Apartment	9'	1	29.30	30.75	32.25	33.75	35.20	36.70	38.20	39.65	41.15	42.65	1.48
				2	29.80	31.75	33.75	35.70	37.70	39.65	41.65	43.65	45.60	47.60	1.98
Upper	FO	Motel Service	12'	1	39.65	41.45	43.25	45.05	46.85	48.65	50.50	52.30	54.10	55.90	1.81
				2	40.25	42.75	45.20	47.65	50.10	52.55	55.00	57.45	59.90	62.35	2.45
		Dinning/Lounge	12'	1	40.65	42.40	44.20	46.00	47.80	49.55	51.35	53.15	54.95	56.75	1.79
				2	41.25	43.70	46.10	48.55	50.95	53.40	55.80	58.25	60.65	63.10	2.42
	FD	Motel Units	9'	1	32.05	33.45	34.85	36.25	37.65	39.05	40.45	41.85	43.25	44.65	1.40
				2	32.55	34.40	36.30	38.20	40.05	41.95	43.85	45.75	47.60	49.50	1.89
		Apartment	9'	1	23.95	25.35	26.75	28.15	29.55	30.95	32.35	33.75	35.15	36.55	1.40
				2	24.40	26.30	28.20	30.10	31.95	33.85	35.75	37.65	39.50	41.40	1.89
		Nursing Home	10'	1	44.35	45.95	47.50	49.10	50.70	52.30	53.90	55.45	57.05	58.65	1.59
				2	44.90	47.00	49.15	51.30	53.45	55.60	57.70	59.85	62.00	64.15	2.14

SCHEDULE A.4

GCK Base Rates

Light preengineerd steel and pole framed buildings (used for C/I occupancies)
Per square foot, average quality, 12' eaves height

	Perimeter/Area Ratio										
	1	2	3	4	5	6	7	8	9	10	+1
Light metal/wood siding, pole frame	8.55	8.95	9.35	9.75	10.20	10.60	11.00	11.40	11.85	12.25	0.41
Add per P/A ratio:											
Exterior sheathing	0.10	0.20	0.30	0.40	0.50	0.60	0.70	0.80	0.90	1.00	0.10
Insulation	0.75	0.80	0.85	0.95	1.00	1.05	1.15	1.20	1.25	1.35	0.07
Steel girts and purlins	0.50	0.55	0.60	0.65	0.70	0.75	0.80	0.85	0.90	0.95	0.05
Aluminum siding and roofing	0.40	0.50	0.55	0.60	0.65	0.75	0.80	0.85	0.90	1.00	0.06
Interior liner (1)	1.45	1.60	1.80	1.95	2.15	2.30	2.45	2.65	2.80	3.00	0.17
Heavy gauge siding and roofing (2)	1.45	1.60	1.75	1.90	2.05	2.20	2.30	2.45	2.60	2.75	0.14
Plastic panel siding	0.35	0.75	1.10	1.45	1.80	2.20	2.55	2.90	3.30	3.65	0.36
Sandwich paneling	3.90	4.45	5.00	5.55	6.15	6.70	7.25	7.80	8.35	8.95	0.56
Interior finish (3)											
Unfinished occupancies (UF)	3.35	3.35	3.35	3.35	3.35	3.35	3.35	3.35	3.35	3.35	
Semi-finished occupancies (SF)	7.05	7.05	7.05	7.05	7.05	7.05	7.05	7.05	7.05	7.05	
Finished open occupancies (FO)	16.15	16.50	16.90	17.25	17.60	17.95	18.35	18.70	19.05	19.40	0.36
Finished divided occupancies (FD)	28.60	28.95	29.35	29.70	30.05	30.40	30.80	31.15	31.50	31.85	0.36
Add per square foot of floor area for frame variations:											
Steel post and beam	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	
Rigid steel frame construction	1.55	1.55	1.55	1.55	1.55	1.55	1.55	1.55	1.55	1.55	
Deduct per square foot of floor area for abscence:											
Concrete floor	3.35	3.35	3.35	3.35	3.35	3.35	3.35	3.35	3.35	3.35	

Add or deduct 2% (against the total rate) per foot of wall height variation.
Deduct 2% (against the total rate) for low profile (1:12 or less pitch) roof construction.
Adjust for quality grade from Schedule F.
Note (1) Liner is included with manufactured sandwich paneling
Note (2) 24 to 20 gauge steel; .032" to .050" thick aluminum.

Note (3) Interior Components:	Walls/ LF	Flooring	Ceiling	Ptns&OF	Lighting	Heating	Add A/C	Sprk
Unfinished occupancies (UF)	----	----	—	0.80	1.55	1.00	1.90	6
Semi-finished occupancies (SF)	----	0.60	0.50	1.55	3.20	1.20	1.90	6
Finished open occupancies (FO)	36.10	2.35	2.10	4.40	4.60	2.35	2.25	4
Finished divided occupancies (FD)	36.10	3.35	2.75	12.35	6.20	3.60	5.10	3

Appendix G Commercial and Industrial Cost Schedules

SCHEDULE E
GC Special Features

Mezzanines

Per square foot, including, soffit finish, lighting, heating and plumbing unless noted.

	Frame Type			
	1	2	3	4
Unfinished				
Light Util/Storage	8.30	11.95	12.50	13.45
Heavy Util/Storage	10.30	14.50	14.65	15.90
Semi - Finished				
Light Mfg	12.75	16.35	16.95	17.90
Heavy Mfg	14.75	18.95	19.05	20.30
Finished Open				
Retail	20.50	24.20	24.70	25.70
Lobby, Access Way	25.35	29.35	29.70	30.80
Office	26.60	30.55	30.95	32.00
Finished Divided				
Dinning/Lounge	31.75	35.45	35.95	36.95
Office	32.65	36.65	37.00	38.10

Add for air conditioning and sprinkler.

Penthouses

Per square foot

ELEVATORS AND STAIRWELLS

	Area			
	50	75	100	150
Metal or Light Wood Frame	42.20	35.75	31.90	27.35
Concrete Block or Equal	82.80	69.55	61.65	52.30
Brick or Equal	96.90	81.05	71.65	60.45

Mall Concourse Areas

Per square foot.

Costs include paving, ramps, stairs, lighting and typical permanent focal elements, and architectural treatment, such as built-in seating, planters, etc.

OPEN MALL

Open air pedestrian concourse areas, generally referred to as an arcade or courtyard.

COVERED MALL

Covered common areas, consisting of roof cover and open entrance areas. Minimal protection from weather conditions. Typical roof finishes include mansards or canopies. Apply costs to covered area only.

ENCLOSED MALL

Enclosed common concourse areas, completely climatized typical of modem shopping malls where concourse area is bordered on all sides by shops and stores.

Per S. F., average quality construction.

Type	Construction	Rate	
Open		7.30	
Covered	Wood Frame	23.10	
	Steel Frame	26.90	
	Reinforced Concrete	31.95	
	F.P. Steel Frame	38.15	
Enclosed		First	Upper
	Wood Frame	37.80	31.35
	Steel Frame	40.80	36.80
	Reinforced Concrete	48.50	42.70
	F.P. Steel Frame	49.95	44.35
*Additive for walls		3.25	

Price basements from appropriate model in Schedule A. Adjust for quality grade from Schedule F in Appendix C.

NOTE: That the above rates are based on a zero (0) P/A ratio, add for walls by applying the additive rate to the subject P/A ratio, and adjusting the result to account for the percentage of walls priced with the shop enclosures. For example, a "T" shaped concourse area 60' x 200' and 60' x 100' x 20' high with shops 16' high would have a perimeter of 720 L/F and a P/A ratio of 4 (720 L/F / 18,000 SF) with 180 L/F of walls full height and 540 L/F clerestory walls 4' high. This amounts to an average of 40% wall coverage (.25 x 100% + .75 x 20%). The additive for walls would therefore be calculated as 4 x the additive rate x 40%.

MECHANICAL ROOMS

	Area									
	200	400	600	800	1000	1200	1400	1600	1800	2000
Metal or Light Wood Frame	24.60	19.45	17.20	15.80	14.90	14.20	13.65	13.25	12.90	12.60
Concrete Block or Equal	46.70	36.15	31.50	28.70	26.80	25.40	24.30	23.40	22.70	22.05
Brick or Equal	53.75	41.15	35.55	32.20	29.95	28.25	26.95	25.90	25.05	24.30

NOTE: Price larger structures off of the GCI utility/storage upper floor model.

SCHEDULE E (continued)

GC Special Features

Banking Features

Cost per square foot of floor area, based on an average 8' ceiling height, exclusive of floor and doors but including lighting, ventilation, and interior finish.

Type	Low Cost	Average	Good
Money Vault	99.30	130.25	161.20
Record Storage	39.70	47.30	54.90

Add for money vault doors (thickness of steel plating w/o locking mechanism)

Thickness	Rectangular	Circular
2"	5500	---
3"	7900	---
4"	14600	---
6"	21000	---
8"	26500	96900
10"	32100	103700
12"	39700	110700
14"	44400	118600
16"	53700	126700

Add for record storage vault doors

1/2 hour fire rating	1300
1 hour fire rating	2600
2 hour fire rating	3000
3 hour fire rating	3200
4 hour fire rating	3300
6 hour fire rating	4200

Drive-up/walk-up teller windows, each	9200
Vision window only, per station	1500
Night depositories, each	11200

Autotellers
Complete with receptacle box, pneumatic tube, and intercom, each 17300

Tellervues
Complete with receptacle box, pneumatic tube, 2-way screen and intercom, each 41500

NOTE: The pneumatic tube described above refers to in-ground permanent type construction.

ATM Enclosures, per square foot, average quality

# of ATM	w/o Lobby	w/Lobby
1	479.00	225.00
2	272.00	165.00

Add for canopy, per square foot 18
Adjust for quality grade from Schedule F in Appendix C.

DRIVE-IN TELLER BOOTHS
Per square foot including finish, lighting, heating, air conditioning (average quality construction) add for drive-in windows, adjust for quality grade from Schedule F in Appendix C.

	P/A Ratio								
Wall Hgt.	35.0	40.0	45.0	50.0	55.0	60.0	65.0	70.0	+/-
8'	93.45	101.95	110.45	118.95	127.45	135.95	144.45	152.95	1.70
9'	100.75	110.25	119.75	129.25	138.75	148.25	157.75	167.25	1.90
10'	108.00	118.50	129.00	139.50	150.00	160.50	171.00	181.50	2.10
Add per canopy, per square foot				18.10	28.70				

Atriums

Typical of those found in contemporary office buildings, hotels and high rise apartments

Equivalent		Perimeter Area Ratio							
No. Stories		0	1	2	3	4	5	6	+1
12'	1	61.45	63.45	65.45	67.45	69.45	71.45	73.45	2.00
22'	2	66.60	70.30	74.00	77.70	81.40	85.10	88.80	3.70
32'	3	71.75	77.15	82.55	87.95	93.35	98.75	104.15	5.40
42'	4	76.90	84.00	91.10	98.20	105.30	112.40	119.50	7.10
52'	5	82.05	90.85	99.65	108.45	117.25	126.05	134.85	8.80
62'	6	87.20	97.70	108.20	118.70	129.20	139.70	150.20	10.50
72'	7	92.35	104.55	116.75	128.95	141.15	153.35	165.55	12.20
82'	8	97.50	111.40	125.30	139.20	153.10	167.00	180.90	13.90
Add per add'l floor		5.15	6.85	8.55	10.25	11.95	13.65	15.35	1.70

Per square foot for average quality structural, glazed and fireproofed steel frame construction, adjust for variations in quality grade from Schedule F in Appendix C. It should be noted, however, that typical atrium construction is characterized by good quality materials, workmanship and features.

Sprinkler system is priced from Group 4 of the sprinkler schedule. Air conditioning in atrium areas is considered overflow from the main structure and no separate square foot pricing is required to adjust the atrium value.

NOTE: The zero (0) perimeter-to-area ratio is applicable to those areas that have no perimeter walls and therefore must not include an allowance for walls in the square foot rate. These areas are typically found in high rise atriums where structural walls forming the perimeter of concourse shops, offices, hotel units and other such occupancies should be valued as part of that space by applying the appropriate model rather than part of the atrium proper.

Appendix G Commercial and Industrial Cost Schedules

SCHEDULE G (continued)

Yard Improvements

Mobile Home Parks

General Specifications

EXCELLENT "A"
The excellent mobile home park provides deluxe accommodations for the largest single and double wide homes. It will have complete and various recreational facilities of top quality and feature generous amounts or landscaping, sprinkler systems, etc.

GOOD 'B'
The typical good park is one catering to the larger, permanent mobile home. It will accommodate a limited quantity of double wides and will feature complete recreational facilities. All utilities are underground and may include cable TV systems.

AVERAGE 'C'
This type of park is built more for permanent occupancy and will have spaces to accommodate the manufactured home up to sixty (60) feet but few if, any, double wide versions. They will have utility buildings, office and possibly recreational facilities, electrical costs include underground service and telephone to most sites as well as street lighting.

LOW COST "D"
Developed for transient or semi-permanent occupancy, these parks usually have car-drawn trailers up to forty-five feet (45) long. They feature limited planning and facilities and have sewer or septic system hook-ups and water, but not gas hook-ups, except to utility buildings and electrical service is overhead.

CHEAP 'E'
Typical of sites developed in outlying rural areas where there is minimal or no building code enforcement. There will be close spacing and few facilities and are designed for smaller mobile homes. They feature water service to common hydrants with no trailer hook-ups.

COST PER SITE

Quality Grade	A		B		C		D		E	
*Site Size (Sq. Ft.)	2700 –	5100	2000 –	4700	1700 –	3700	1000 –	2900	700 –	2400
**Cost Range ($)	9860 –	10910	7110 –	8320	4670 –	5770	3190 –	4130	1630 –	2410
Components of above cost										
Engineering	970 –	1080	720 –	840	480 –	590	330 –	420	160 –	240
Site Grading	930 –	1030	650 –	770	410 –	510	260 –	340	130 –	190
Street Paving	1440 –	1590	1060 –	1240	700 –	870	530 –	690	320 –	470
Patios and Walks	1240 –	1370	810 –	950	530 –	650	350 –	450	180 –	260
Sewers	940 –	1040	770 –	900	580 –	720	420 –	540	250 –	370
Water	920 –	1010	700 –	820	480 –	590	350 –	450	200 –	300
Electric	1540 –	1700	1140 –	1330	760 –	940	520 –	670	270	400
Gas	600 –	670	420 –	490	260 –	320	160 –	210	– –	–
Misc. (landscaping, recreation, facilities, etc.)	1280 –	1420	840 –	980	470 –	580	270 –	360	120 –	180
Total	9860 –	10910	7110 –	8320	4670 –	5770	3190 –	4130	1630 –	2410

*Site size refers to the average of the actual site on which the mobile home is situated, exclusive of access drives, recreation areas, and service areas.

**The cost range per site includes all of the components shown above, naturally, if the sites being appraised do not include all of the above components, proper deductions should be made according to the above schedule.

NOTE: In appraising mobile home parks through the use of this schedule, complete the following steps:

1. Enter the number of sites and proper rate in the SUMMARY OF IMPROVEMENTS section and calculate replacement cost.
2. Apply proper depreciation considering age and condition (use residential guidelines)
3. Appraise other structures (i.e. garages, community rooms, laundry buildings, etc.) from appropriate schedules.

NOTE: This schedule is NOT to be used for recreational vehicle parks.

DEPARTMENT OF STATE REVENUE
AUDIT-GRAM NUMBER IR-015
March 12, 2002
(Replacing previous issue dated March 24, 2000 published at 23 IR 2148)

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

ISSUE

Public Transportation – Qualifying for the Exemption

Authority: IC 6-2.5-5-27; 45 IAC 2.2-5-61, 62, 63; Info. Bull. No. 12, Aug. 1991; *National Serv-All, Inc.*, Ind. Tax Court (1994); *Indiana Waste Syst.*, Ind. Tax Court (1994); *Panhandle Eastern Pipeline*, Ind. Tax Court (2001)

IC 6-2.5-5-27 Transactions involving tangible personal property - Use in providing public transportation.

[P]roperty and services are exempt from state gross retail tax, if the person acquiring the property or service directly uses or consumes it in providing public transportation for persons or property. [1980]

45 IAC 2.2-5-61 Public transportation; acquisitions.

(b) [P]ublic transportation shall mean and include the movement, transportation, or carrying of persons and/or property for consideration … [1987]

I. GENERAL STATEMENT

The purchase or rental of tangible personal property is exempt from Sales Tax provided the purchaser is both predominantly engaged in the business of providing public transportation, and such property is itself both predominantly and directly used by the purchaser in the business of public transportation.

The Indiana Tax Court in its January 3, 2001 decision in *Panhandle Eastern Pipeline Company* has set out a two-pronged test to determine if a particular business qualifies for the public transportation exemption. Both prongs must be satisfied for the taxpayer to qualify for the public transportation exemption.

II. PUBLIC TRANSPORTATION – THE "TWO-PRONGED TEST"

Tangible personal property is exempt from Sales Tax if the following two tests, applied consecutively, are met.

A. The First Prong – The Predominant Business Test.

If the ratio of the annual sum of public transportation operating income exceeds 50% of the annual sum of all operating income, that person is deemed to be predominantly engaged in the business of public transportation.

B. The Second Prong – The Predominant Use Test.

1. If after having satisfied the first test, property is determined to be exclusively and directly used in providing public transportation, it is exempt from Sales Tax.

2. If after having satisfied the first test, property is determined to be both directly used in providing public transportation and also used in other activities, the exemption from Sales Tax will be determined as follows:

a) determine the time the property is directly used in a productive activity,
b) determine the time the property is directly used in both productive and nonproductive activities,
c) calculate a percentage determined by the quotient of a) divided by b),
d) if the percentage exceeds 50%, the property is entirely exempt,
e) if the percentage is 50% or less, the property is entirely taxable.

At the time of purchasing property, it is often difficult to determine a reasonable percentage of time to be spent in productive and nonproductive activities. If a reasonable percentage cannot be determined at the time of purchase, the purchase will be taxable. A refund may be claimed if the time spent in a productive activity is determined to be predominant, based on experience. A percentage determined from prior experience with similar property engaged in similar activities will be considered reasonable.

III. DEFINITIONS

The following definitions are composed for purposes of this document only.

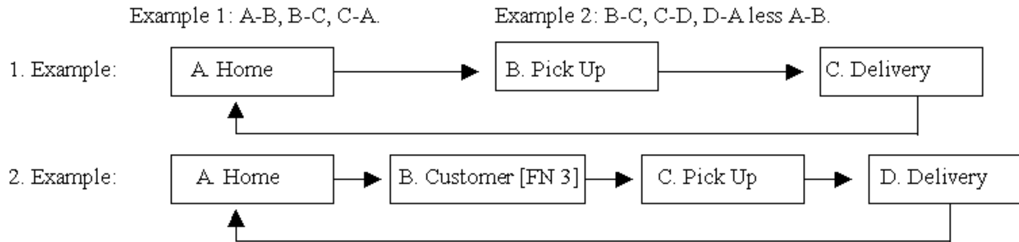
A. Public Transportation – The term means the activity of transporting persons or property for consideration.

B. Property – The word means tangible personal property either owned or leased unless the word is immediately preceded by the word "real".

C. Predominant; Predominantly – The words describe an activity that occurs more than fifty percent (50%) of the time. [FN 1]

D. Directly Used – Property is "directly used" if its use is reasonably necessary in the activity of providing public transportation. [FN 2]

E. Productive Activity – The term describes a public transportation activity and includes both the time required to reach the location where a productive activity begins and the time required to return to a location where property is again available for a productive activity. Examples of productive activity are illustrated as follows:



F. Operating Income – The term means gross receipts from business operations but does not include dividends, interest, rents, royalties, capital gain or loss, or other receipts not directly attributable to business operations. The amount of "operating income" generally equals that amount of gross receipts less returns and allowances reported on the Federal Income Tax return. [FN 4]

G. Public Transportation Operating Income – The term means gross receipts earned from a public transportation productive activity.

H. Time – The word includes any convenient unit, which will reasonably measure an activity or the relationship of dissimilar activities. The term includes measures of, distance, volume, [FN 5] weight, revenue, [FN 6] or periods of time. [FN 7] The term does not include maintenance time, or any similar unproductive time during which the property is not available for productive activity. "Time" is usually measured over an annual period or over the useful life of a operating asset.

IV. EXCERPT FROM RELEVANT COURT DECISION

Panhandle Eastern Pipeline Company
and Trunkline Gas Company
v.
Indiana Department of State Revenue [FN 8]
Indiana Tax Court, January 3, 2001

FACTS AND PROCEDURAL HISTORY

Panhandle…owns a gas pipeline system that runs through Indiana… (and)… mainly transported gas that belonged to various third parties…

…

[T]he Department… prorated the exemption… to reflect the actual percentage of gas publicly transported for third parties. *See footnote*

ANALYSIS AND OPINION

Discussion

…

The court finds that the public transportation exemption provided by section 6-2.5-5-27 is an all-or-nothing exemption. If a taxpayer acquires … property for predominant use in providing public transportation for third parties, then it is entitled to the exemption. [FN 9] If a taxpayer is not predominantly engaged in transporting the property of another, it is not entitled to the exemption. [FN 10]

CONCLUSION

[T]he court finds that Panhandle is entitled to summary judgement in its favor.

Footnote: The percentages of third party gas transported by Panhandle were … (each year exceeded 50%)

[FN 1] As that word is defined in 45 IAC 2.2-4-13(e); 45 IAC 2.2-5-24(a)
[FN 2] 45 IAC 2.2-5-61(c); Sales Tax Information Bulletin 12, Aug. 1991; *US Air, Inc*., Ind. S. Court, 1991.
[FN 3] Property owned by the carrier delivered to the carrier's customer.
[FN 4] Federal form 1120, 1065, and 1120S, line 1c. Federal form 1040, Schedule C, Part I, line 3.
[FN 5] *Panhandle Eastern Pipeline*, Ind. Tax Ct. (2001) at Footnote 4. "[P]ercentages of third-party gas …"
[FN 6] *Panhandle Eastern* quoting *Calcar Quarries*, Ind. App, (1979) "[C]rushed stone sales." Also *Indiana Waste Systems of Indiana, Inc.* Ind. Tax Court, 1994. "[P]ercent of its income … ". Also 25 IR 1754.
[FN 7] *Waste Systems* at Footnote 4 "[E]ven viewing predominant use in terms of time or volume …"
[FN 8] Request for transfer to the Indiana Supreme Court denied June 20, 2001, without opinion.
[FN 9] The Department's interpretation: The "second prong" of the public transportation test.
[FN 10] The Department's interpretation: The "first prong" of the public transportation test.

DEPARTMENT OF STATE REVENUE

IN REGARDS TO THE MATTER OF:
CONSORTIUM FOUNDATION
DOCKET NO. 29-20010241

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DEPARTMENTAL ORDER

An administrative hearing was held on Thursday, January 10, 2002 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, Consortium Foundation, was represented by Joe Salinas, Attorney at Law, 3635-B East Raymond Street, Indianapolis, Indiana 46203. Attorney 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 September 10, 2001 the Indiana Department of Revenue issued an emergency revocation of Petitioner's Charity Gaming License. The Petitioner protested in a timely manner. A hearing was conducted pursuant to IC § 4-32-8-1.

SUMMARY OF FACTS

1) On September 5, 2001, the Indiana Department of Revenue's Agent from the Criminal Investigation Division (CID) went to the North Michigan road location where the Petitioner conducts its gaming events.
2) The Department's investigation revealed that the Petitioner has consistently used workers and operators who were not "members" as required by IC 4-32-1-1 *et seq*.
3) On September 10, 2001 the Indiana Department of Revenue determined that an emergency existed that required the immediate termination of the Petitioner's charity gaming license.
4) The Department, determining that an emergency existed, revoked Petitioner's charity gaming license on September 10, 2001.
5) The issues under consideration are (1) whether Petitioner's conduct on or before September 10, 2001 constituted an emergency as defined by 45 IAC 18-6-3(c), and if so, (2) did it require the immediate termination of the Petitioner's charity gaming license, and (3) whether the Department exceed its statutory authority in revoking Petitioner's license to conduct charity gaming.

FINDINGS OF FACTS

1) The Department's investigation revealed that the Petitioner has consistently used workers and operators who were not "members" as required by IC 4-32-1-1 *et seq*.
2) On September 10, 2001 the Indiana State Police filed a Probable Cause Affidavit in support of a Search Warrant in the Superior Court of Marion County Criminal Division Room III (Department's Exhibit D).
3) A Search Warrant, based upon the Probable Cause Affidavit, was issued by the Marion County Superior Court Criminal Division, Room III on September 4, 2001 (Department's Exhibit E).
4) The Warrant was executed on September 5, 2001, by the Marion County Sheriff's Department (Department's Exhibit E).
5) The Probable Cause Affidavit and Search Warrant were filed with the Marion County Clerk's Office on September 10, 2001. (See Department's Exhibits D and E).
6) On September 10, 2001 the Indiana Department of Revenue determined that an emergency existed that required the immediate termination of the Petitioner's charity gaming license.
7) The Department, determining that an emergency existed, revoked Petitioner's charity gaming license on September 10, 2001. (Record at 5).
8) The Department stated that its emergency revocation was based upon the Department's own investigation, in addition to the information contained in the Probable Cause Affidavit. (Record at 7).
9) Petitioner's charity gaming license expires on March 31, 2002.

STATEMENT OF LAW

1) 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).
2) IC 4-32-9-4 states, "Each organization applying for a bingo license…must submit to the department a written application…The application must include the following: (7) The name of each proposed operator and sufficient facts relating to the proposed operator to enable the department to determine whether the proposed operator is qualified to serve as an operator. (8) A sworn statement signed by the presiding officer and secretary of the organization attesting to the eligibility of the organization for a license…"
3) IC 4-32-9-26 provides, "An individual may not be an operator for more that one (1) qualified organization during a calendar month…"

4) IC 4-32-9-27 states, "An operator or a worker may not directly of indirectly participate, other than in a capacity as operator or worker, in an allowable event…"
5) 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."
6) According to IC 4-32-9-29, "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."
7) IC 4-32-12-3 states, "In addition to the penalties described in section 2 of this chapter, the department may do all or any of the following: (1) Suspend or revoke the license…"
8) 45 IAC 18-6-3 (b) provides, "The department may determine at any time that an emergency exists that requires the immediate termination of a license. Effective with the receipt of the department's decision to terminate its license, a licensee must cease all operations that were previously authorized under the license.
9) An emergency requiring the immediate termination of a license will be deemed to exist under any of the circumstances found in 45 IAC 18-6-3(c).
10) 45 IAC 18-6-3(c) provides, "An emergency requiring the immediate termination of a license will be deemed to exist under any of the following circumstances:

(1) The information provided on the application for license is found to false or misleading.
***
(11) An operator or worker does not meet the requirements of IC 4-32.
***
(13) An other violation of IC 4-32 or this article considered to be of a serious nature by the department."

CONCLUSIONS OF LAW

1) The Department's determined that Petitioner had consistently used workers and operators who were not "members" as is defined by Indiana law.
2) 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.
3) The Petitioner's representative stated, "…I frankly don't see how the Department could have acted in any other way…I would have done it too…". (Record at 11 and 22 respectively).
4) An emergency requiring the immediate termination of a license will be deemed to exist under any of the circumstances found in 45 IAC 18-6-3(c).
5) The Department having determined that Petitioner violated several provision of 45 IAC 18-6-3 an emergency requiring the immediate termination of Petitioner's charity gaming license existed.
6) The Department following the mandate set forth in 45 IAC 18-6-3 revoked Petitioner's charity gaming license pursuant to Indiana Law.

DEPARTMENTAL ORDER

Following due consideration of the entire record, the Administrative Law Judge holds the following:
Petitioner's appeal is denied. The actions taken by the Indiana Department of Revenue on September 10, 2001 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 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

IN REGARDS TO THE MATTER OF:
MR. MIKE ABBOTT
DOCKET NO. 29-20010360

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DEPARTMENTAL ORDER

An administrative hearing was held on Wednesday, February 6, 2002 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.

The Petitioner, Mr. Mike Abbott, appeared *Pro Se*. Attorney 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 December 18, 2001 the Indiana Department of Revenue notified the Petitioner that he was prohibited from having any connection with Charity Gaming as described in IC 4-32-1-1 for a period of five (5) years and fined him one thousand dollars ($1,000). The Petitioner protested in a timely manner. A hearing was conducted in accordance with IC § 4-32-8-1.

SUMMARY OF FACTS

1) The Petitioner is purported to have received remuneration while acting as an Operator in violation of IC 4-32-9-25.
2) Petitioner allegedly acted as an Operator for two qualified organizations at the same time in violation of IC 4-32-9-26.
3) Petitioner is alleged to have sold gaming supplies without a license as provided by IC 4-32-7-4.
4) Pursuant to IC 4-32-12-2 the Petitioner was assessed a civil penalty and was fined One Thousand Dollars ($1,000) for violating IC 4-32-7-4.
5) On December 18, 2001 the Indiana Department of Revenue prohibited Petitioner from having any connection with Charity Gaming for a period of five (5) years pursuant to IC 4-32-12-3.

FINDINGS OF FACTS

1) The Petitioner was listed as an Operator on the Loyal Order of Moose Lodge No. 629 (Osgood) form CG-13 (Annual Bingo License) for the period May 1, 2000 to April 30, 2001 (Department's Exhibit A).
2) The Petitioner was listed as an Operator on the C.B. Helping Hand Club, Inc. (C.B.) form CG-13 (Annual Bingo License) for the period October 1, 1999 to September 30, 2000 (Department's Exhibit B).
3) The Petitioner was also listed as an Operator on the C.B. form CG-2R (Annual Bingo Renewal Application) dated September 30, 1999.
4) Petitioner was listed as an Operator for Osgood and C.B. during the same time.
5) Petitioner testified on his own behalf.
6) The Department produced photocopies of ten (10) checks written to the Petitioner and signed by himself and one other person (see Department Exhibit C).
7) The ten (10) photocopied checks in Department's Exhibit C were dated in the months of February and March of 1999.
8) According to the Department's own records, the Petitioner was an Operator for Osgood for the period of May 1, 2000 to April 30, 2001 (see Department Exhibit A).
9) The Department produced no records showing payments made to Petitioner during the time he was an Operator for Osgood.
10) The Department's investigator stated that she had interviewed employees of Hamilton Merchandising LLC and they confirmed selling gaming supplies to Petitioner.
11) The Department's investigator also testified that Petitioner sold gaming supplies to Osgood as evidenced by the photocopied checks of payment to Petitioner (see Department's Exhibit C).
12) Petitioner testified under oath that he was employed by an individual by the name of Paul Schwartz and used his license to purchase gaming supplies.
13) Petitioner stated that he did not know that Mr. Schwartz was not licensed by the State of Indiana as a distributor.
14) Petitioner contends that he used a copy of the license given to him by Mr. Schwartz in order to purchase and sell gaming supplies.
15) Petitioner argued that he complied with all the Department's requests for documents and cooperated fully in the investigation.
16) Petitioner states that he ceased selling gaming supplies when he was notified, by the Department's investigator, that his sales were violating Indiana law.
17) Petitioner testified that he received 10% of the proceeds from each sale he made for Mr. Schwartz.

STATEMENT OF LAW

1) 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).

2) IC 4-32-9-25 provides, "Except as provided in subsection (b), an operator or a worker may not receive remuneration for:

(1) preparing for;
(2) conducting;
(3) assisting in conducting;
(4) cleaning up after; or
(5) taking any other action in connection with;
an allowable event.
(b) A qualified organization that conducts an allowable event may:
(1) provide meals for the operators and workers during the allowable event; and
(2) provide recognition dinners and social events for the operators and workers;
if the value of the meals and social events does not constitute a significant inducement to participate in the conduct of the allowable event.

3) IC 4-32-9-26 states, "An individual may not be an operator for more than one (1) qualified organization during a calendar month. If an individual has previously served as an operator for another qualified organization, the department may require additional information concerning the proposed operator to satisfy the department that the individual is a bona fide member of the qualified organization."

4) IC 4-32-7-4 provides, "The department has the sole authority to license entities under this article to sell, distribute, or manufacture the following:

(1) Bingo cards.
(2) Bingo boards.
(3) Bingo sheets.
(4) Bingo pads.
(5) Any other supplies, devices, or equipment designed to be used in playing bingo designated by rule of the department.
(6) Pull tabs.
(7) Punchboards.
(8) Tip boards.
(b) Qualified organizations must obtain the materials described in subsection (a) only from an entity licensed by the department.(c) The department may not limit the number of qualified entities licensed under subsection (a).

5) Pursuant to IC 4-32-12-2 the department may impose upon a qualified organization or an individual the following civil penalties:

(1) Not more than one thousand dollars ($1,000) for the first violation.
(2) Not more than two thousand five hundred dollars ($2,500) for the second violation.
(3) Not more than five thousand dollars ($5,000) for each additional violation.

6) According to IC 4-32-12-3, "In addition to the penalties described in section 2 of this chapter, the department may do all or any of the following:

(1) Suspend or revoke the license.
(2) Lengthen a period of suspension of the license.
(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.
(4) Impose an additional civil penalty of not more than one hundred dollars ($100) for each day the civil penalty goes unpaid.

CONCLUSIONS OF LAW

1) The Petitioner was an Operator for both Osgood and C.B. at the same time in violation of IC 4-32-9-26.
2) Petitioner purchased gaming supplies for resale to qualified organizations without a license in violation of IC 4-32-7-4.
3) Qualified organizations must obtain the materials described in IC 4-32-7-4 only from an entity licensed by the department.

DEPARTMENTAL ORDER

Following due consideration of the entire record, the Administrative Law Judge holds the following:
The One Thousand Dollars ($1,000) civil penalty for violating the provisions of IC 4-32-7-4 is hereby upheld. Petitioner was an Operator for both Osgood and C.B. at the same time in violation of IC 4-32-9-26. Pursuant to IC 4-32-12-3, Petitioner is hereby prohibited from having any connection with Charity Gaming for a period of two (2) years.
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

01980516.LOF

LETTER OF FINDINGS NUMBER: 98-0516
Individual Income Tax
Calendar Years 1991-1996

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

ISSUE(S)

I. Adjusted Gross Income – Unreported Income

Authority: IC 6-3-2-9; IC 6-3-2-1; IC 6-3-1-3.5; 45 IAC 3.1-1-2; 45 IAC 3.1-1-19

Taxpayer protests the assessment.

STATEMENT OF FACTS

Taxpayer was audited for individual income tax, a majority of the adjusted gross income being derived from the one hundred percent ownership and operation of a Sub Chapter S Corporation. Taxpayer is an Indiana resident subject to tax on its adjusted gross income. The starting point for computing Indiana adjusted gross income is federal adjusted gross income as defined with modifications. From 1991 through 1996, the taxpayer received rental payments from real estate owned personally by it and used by the taxpayer's S-corporation. Rental income received from the S-corporation is includable in federal adjusted gross income. Adjustments were made to subject these receipts to tax. For the period 1992 through 1996, the taxpayer received no wages from its business and failed to provide documentation on how personal living expenses were paid. The majority of the taxpayer's personal assets were sold to satisfy business debts, which filed for bankruptcy during 1993. No documentation was provided at audit or at hearing that other sources of funds were available to pay personal expenses. Adjustments were made to increase taxable income to average amounts in the county in which taxpayers lived. Personal living expense figures were obtained from the Bureau of Labor statistics, census data and Chamber of Commerce surveys.

At audit it was determined that the taxpayer failed to file returns and the auditor utilized the federal adjusted gross income with modifications and rental payments received from real estate owned personally by them and used by taxpayer's business. The auditor utilized 1993 through 1996 averages for county "A" for wages and the personal living expense figures were obtained from the Bureau of Labor Statistics, Census Data, and the Chamber of Commerce because no audit trail was available.

I. Adjusted Gross Income – Unreported Income

DISCUSSION

Taxpayer merely states she does not owe the money. Taxpayer failed to provide information to allow the department to make adjustments to its individual income tax returns that were based upon best information available.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04980688.LOF

LETTER OF FINDINGS NUMBER: 98-0688
Retail Sales Tax, Withholding Tax
For the Tax Periods: 1995, 1996

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

ISSUE

I. Retail Sales Tax – Responsible Officer Liability

Authority: IC 6-2.5-2-1, IC 6-2.5-2-2, IC 6-2.5-9-3, IC 6-3-4-8, *Indiana Department of Revenue v. Safayan*, 654 N.E.2d 270, 273 (Ind. 1995)

The Taxpayer disputes the determination that he had a duty to remit the corporation's retail sales tax and withholding tax.

STATEMENT OF FACTS

Taxpayer was assessed for retail sales and withholding taxes as a responsible officer. Taxpayer was president of the company. A receiver was appointed for the company on February 23, 1996. More facts will be provided as necessary.

I. Retail Sales Tax – Responsible Officer

DISCUSSION

A gross retail (sales) tax is imposed on retail transactions made in Indiana. IC 6-2.5-2-1. While this sales tax is levied on the purchaser of retail goods, it is the retail merchant who must "collect the tax as agent for the state." IC 6-2.5-2-2. Individuals may be held personally responsible for failing to remit any sales tax. Pursuant to IC 6-2.5-9-3:

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.

Also, an income tax is assessed on wages that employers pay to their employees. The employer is responsible, and liable, for deducting, retaining, and paying "the amount prescribed in [the] withholding instructions." IC 6-3-4-8(a). Like the sales tax, employers hold the withholding tax in trust for the state. IC 6-3-4-8(f) states in relevant part:

All money deducted and withheld by an employer shall immediately upon such deduction be the money of the state, and every employer who deducts and retains any amount of money under the provisions of IC 6-3 shall hold the same in trust for the state of Indiana….

Pursuant to *Indiana Department of Revenue v. Safayan*, 654 N.E.2d 270, 273 (Ind. 1995): " The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that they are paid". The court also stated, "where the individual was a high ranking officer, we presume that he or she had sufficient control over the company's finances to give rise to a duty to remit the trust taxes." *Id.*

Taxpayer was President of the company. However, in February, 1996, Taxpayer was obligated to turn over all records to a receiver who was appointed to oversee the operation of the business. Taxpayer offers no argument for periods prior to receivership.

From the cited facts, the Department finds Taxpayer had sufficient authority or requisite control to give rise to a duty to remit trust taxes collected on behalf of the state prior to the appointment of the receiver. However, upon the appointment of the receiver, Taxpayer did not maintain the requisite control or authority, and thus, did not have a duty to remit trust taxes.

FINDING

The Taxpayer's protest is sustained in part and denied in part. Taxpayer did not have a duty to remit trust taxes after February 23, 1996. However, Taxpayer did have a duty to remit prior to this date and is responsible for the trust tax prior to the receivership.

DEPARTMENT OF STATE REVENUE

04990650.LOF

LETTER OF FINDINGS NUMBER: 99-0650
Sales and Use Tax
For the Period: 1995 - 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. Sales and Use Tax – Repairing/Recutting Process

Authority: IC 6-2.5-5-4; Rotation Products Corp. v. Indiana Dept. of State Revenue, 690 N.E.2d 795 (Ind. Tax 1998); IC 6-2.5-5-3; IC 6-2.5-5-5.1

The taxpayer protests the assessment of tax on die repair equipment, materials and consumables.

STATEMENT OF FACTS

The taxpayer's business is twofold: (1) the taxpayer manufactures dies; and (2) the taxpayer "repairs/re-cuts" dies of its customers. The protest turns on whether the "die repair equipment, materials and consumables" used in the latter "repairing/recutting" process is tax exempt.

I. Sales and Use Tax – Repairing/Recutting Process

DISCUSSION

The taxpayer cites the case Rotation Products Corp. v. Indiana Dept. of State Revenue, 690 N.E.2d 795 (Ind. Tax 1998) as germane in the analysis of its repair/recutting process. Before examining Rotation Products, it will be useful to set out the applicable exemption statutes—namely, the so-called "industrial/manufacturing exemptions":

IC 6-2.5-5-3:

(b) Transactions involving manufacturing machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for *direct use in the direct production, manufacture, fabrication, assembly... processing, refining, or finishing of other tangible personal property.* (Emphasis added)

And the "consumption" exemption, IC 6-2.5-5-5.1:

(b) Transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for *direct consumption as a material to be consumed in the direct production of other tangible personal property in the person's business of manufacturing*.... (Emphasis added)

Turning to Rotation Products, the case involved a company that was "engaged in the repair and remanufacture of roller bearings" owned by Rotation's customers. That is, Rotation's customers (steel and paper mills) brought their unusable roller bearings to Rotation for "remanufacturing." The Court held that,

Because RPC's [Rotation] remanufacturing of roller bearings constitutes production within the meaning of the equipment exemption and the consumption exemption, the equipment and materials used in that process are exempt from sales and use taxes.

Id. at 805.

The Tax Court arrived at that holding by analyzing four factors: (1) the substantiality and complexity of the work done on the existing article and the physical changes to the existing article; (2) a comparison of the value of the article before and after the work on it; (3) the performance of the article versus that of new articles of the same kind; and (4) whether the work performed on the article is contemplated as part of the normal life cycle of the existing article. Id. at 803.

The question before the Department is the following: Is the taxpayer "remanufacturing" or is it simply repairing? The four-factor test outlined in Rotation Products is applicable to that question. And as the Tax Court noted in Rotation Products, the analysis of each factor will turn on a "fact sensitive inquiry." Id. at 802.

The taxpayer argues that each of the four-factors is met:

(1) Substantiality and complexity of the work done on the existing article and the physical changes to the existing article;

The taxpayer does not make an explicit argument with regard to the first factor. However the following quote from the taxpayer's brief is relevant:

Diamond dies wear down and eventually lose their precise cut. … [W]hen a die loses its precise cut, it is sent back to [the taxpayer] for a recut.

[Further in the brief] The first step in the recutting process is cleaning the die with an ultrasonic cleaner to remove oils and lubricants. Then the die is inspected for any damage and to make sure that it can be recut to the new size desired. If the diamond is broken or there is not enough diamond left to enlarge the hole, the diamond can not be recut. … [I]f recuttable, the die goes to the wire machines in the finishing department. They undergo the same process as the new diamond does. The die is placed on a wire machine and a wire is drawn back and forth through the die to cut it to the new size desired. Diamond powder is placed on the wire to create the cutting process The die is inspected with a microscope and a wire is pulled through to verify the hole size. The new die size is stamped on the die and old die size is removed.

According to the taxpayer, the manufacturing process (as opposed to the recutting/repairing process) involves the following: Steel rod is cut to the desired size. A hole is drilled and a diamond is mounted in the hole. The die goes [to an out of state plant] where a laser machine cuts a hole in the diamond. The die is returned to [Indiana]. There the die is placed on a wire machine in the finishing department. Wire machines draw a wire back and forth through the die to cut it to the desired size. Diamond

powder is placed on the wire to create the cutting process. The dies are then inspected with microscopes to ensure that they meet desired specifications. The die is stamped with a die size and shipped to the customer.

From the taxpayer's description of the recutting process and the manufacturing process, the recutting process tracks many of the steps of the manufacturing process (wire machinery is used, diamond powder, inspection, etc.). The taxpayer's recutting process seems to be as substantial and complex as the "grinding and polishing" that took place in Rotation Products.

The second factor:

(2) A comparison of the value of the article before and after the work on it;

Taxpayer asserts that the diamond dies have no market value as diamond dies before the recutting. The taxpayer argues that an unusable product with little or no market is transformed into a marketable product

The third factor:

(3) A comparison of the performance of the remanufactured article with the performance of a newly manufactured article of its kind;

Taxpayer argues that the recut diamond die is as good as a new diamond die, and the auditor agrees.

The final factor:

(4) Is the work performed on the article contemplated as part of the normal life cycle of the existing article?;

The taxpayer argues that its customers do not know when they send their dies for recutting whether the dies can be salvaged at all (due to a broken diamond, or a diamond that is not big enough to allow an enlarged hole). Additionally, according to the taxpayer, "Normal repair would return the die to its original desired hole size. In this case, the recutting process produces a new die with a new hole size." And further, the taxpayer states "Eventually, [the diamond die] can no longer be recut and becomes useless."

The auditor notes that diamond dies are on average recut 6 to 8 times (though some dies can last up to twenty cuts). The auditor argues that when diamond dies are purchased it is anticipated that they will have to be recut.

The Tax Court states that fourth factor prevents "work that merely perpetuates existing products from qualifying for an industrial exemption." Id. at 803. With regards to the facts of Rotation, the Tax Court noted that "grinding" cannot be seen as a "normal part" of a life cycle of a roller bearing. Id. at 803. Likewise, the recutting creates a *different* diamond die hole size, and thus the diamond die will not be the same as the original.

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

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LETTERS OF FINDINGS NUMBERS: 00-0349; 00-0350; 00-0351; 00-0352
State Gross Retail Tax
For Tax Periods 1994-1996

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. State Gross Retail Tax – Exemption Certificates; Nonexempt Items

Authority: IC § 6-8.1-1-1; 45 IAC 2.2-5-1(b); IC § 6-8.1-3-4; 45 IAC 2.2-5-3; IC § 6-2.5-2-1(a); 45 IAC 2.2-5-4; IC § 6-2.5-8-8; 45 IAC 2.2-8-12; 45 IAC 2.2-8-13; 45 IAC 15-3-3(a)

Taxpayer protests proposed assessments of Indiana's gross retail tax which were based on the Department's determination that taxpayer used improper exemption certificate forms. The Department also determined that even if taxpayer's forms were acceptable, certain retail sales did not qualify as exempt transactions.

STATEMENT OF FACTS

Taxpayer operates a chain of small retail stores located throughout the Midwest, with four locations in Indiana. Taxpayer sells farm and home merchandise, treating all sales as taxable unless the customer states the transaction is exempt. If the customer so states, the particular item is sold exempt from Indiana's gross retail tax. The customer is then required to sign a receipt and provide his exemption number. The Department audited taxpayer for tax years 1994-1996, finding that taxpayer's clerical staff was not following taxpayer's record keeping system for exempt transactions. Additionally, the audit determined that many items purchased

exempt from the gross retail tax did not qualify for the statutory and regulatory exemptions. In advance of the hearing, taxpayer obtained proper exemption certificates from customers making the purchases at issue in the audit. These forms were sent to the Hearing Officer for review.

Gross I. Retail Tax—Exemption Certificates; Exempt vs. Non-Exempt Items

DISCUSSION

Taxpayer protests proposed assessments of Indiana's gross retail tax which were based on the Department's determination that taxpayer used improper exemption certificate forms. Taxpayer did not use forms the Department expressly provides for the purpose of recording and tracking the state's gross retail tax. The agricultural exemption certificate (Form ST – 104) must be completed by purchasers of tangible personal property that "will be directly used in the direct production of agricultural products for resale." The transactions at issue in the audit were sales of fencing materials. Taxpayer's "exemption certificates" were on the back of every sales invoice; they asked for the purchaser's name and social security number. The purchaser then signed the back of the invoice "under penalty of perjury."

Form ST – 104 requires more information: the type of article purchased, the purchase price, a description of how the item is to be used, the date, purchaser's name, address, and signature, plus the purchaser's social security number or FID number. The purchaser certifies "under penalties of perjury" that the property purchased "by the use of this exemption certificate will be directly used in the direct production of agricultural products for resale." Obviously, State Form ST – 104 requires that more information be provided to the seller before the seller is relieved of his statutory duty to collect and remit Indiana's gross retail tax. Further, the form sets forth the specific strictures providing the exemption in the first instance: direct use in the direct production of agricultural products the purchaser sells.

As a preliminary matter, it should be noted that under IC § 6-8.1-5-1(b), 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." The substantive statutory requirements are relatively straightforward. IC § 6-2.5-2-1(a) imposes "the state gross retail tax" on "retail transactions made in Indiana." Subsection (b) states that the purchaser is liable for the tax and must pay it to the retail merchant who "**shall** collect the tax as agent for the state." (emphasis added) IC § 6-8.1-3-4 expressly states that the Department "has the sole authority to furnish forms used in the administration and collection of the listed taxes." Listed taxes include the state gross retail tax. (IC § 6-8.1-1-1).

There are many retail transactions which are exempt from the state gross retail tax; *see*, IC §§ 6-2.5-5-1 *et seq*. and 45 IAC 2.2-5-1 *et seq*. Sales to farmers and others "occupationally engaged in the business of producing food and agricultural commodities for human, animal, or poultry consumption" are exempt under certain circumstances not relevant here. In order for a retail merchant to be relieved of his duty to collect and remit Indiana's gross retail tax as agent for the state of Indiana, the transaction must fall within one of the exemptions outlined in Rule 5, Section 2.2 of Title 45 of Indiana's Administrative Code (45 IAC 2.2-5-1 *et seq*). In addition, the transaction must have the proper documentation substantiating the purported exemption. Pursuant to 45 IAC 2.2-8-12(d), "[u]nless the seller receives a properly completed exemption certificate, the merchant must prove that sales tax was collected and remitted to the state **or** that the purchaser actually used the item for an exempt purpose." (emphasis added)

With respect to the validity of taxpayer's exemption certificates, IC § 6-2.5-8-8 provides in pertinent part:

> (a) A person, authorized under subsection (b), who 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. The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.
>
> (b) The following are the only persons authorized to issue exemption certificates:
>
> (1) retail merchants, wholesalers, and manufacturers, who are registered with the department under this chapter.
>
> * * *
>
> (3) other persons who are exempt from the state gross retail tax with respect to any part of their purchases.

See also, 45 IAC 2.2-8-12 and 45 IAC 2.2-8-13. The former mandates that "[e]xemption certificates may be issed *[sic]* only by purchasers authorized to issue such certificates by the Department of Revenue." Authorized purchasers include retail merchants, manufacturers, and wholesalers who must register as such with the Department. "All persons or entities not required to register... and who are exempt under this Act {such as farmers} with respect to all or a portion of their purchases are authorized to issue exemption certificates with respect to exempt transactions provided an exemption number has been assigned by the Department of Revenue, or provided that the Department of Revenue has specifically provided a form and manner for issuing exemption certificates without the need for assigning an exemption certificate." Subsection (d) requires that a seller receive a "properly completed exemption certificate;" if not, the "merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose." Further, subsection (f) expressly states as follows: "An exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed." 45 IAC 2.2-8-13 describes 3 classifications of "persons authorized to issue exemption certificates, including "persons who are exempt from the state gross retail tax with respect to any part of their purchases," such as farmers

purchasing items specified in other regulations for particular purposes. Finally, 45 IAC 15-3-3(a) requires that "[a]ll returns and information required by the provisions of the listed taxes **must be submitted on forms furnished by the department**." (emphasis added). Subsection (c) expressly states that "[r]eprints and reproductions and **nonstandard forms which do not meet the requirements mentioned above cannot be filed in lieu of the official forms.**" (emphasis added) As taxpayer did not receive "properly completed exemption certificate[s]," taxpayer must prove either the gross retail tax was collected and remitted, or the "purchaser actually used the item for an exempt purpose."

The Department was correct in determining that taxpayer's own exemption certificates were insufficient to relieve taxpayer of his statutory duty to collect and remit Indiana gross retail taxes due on the transactions at issue. Therefore, taxpayer must prove the disputed tax was collected and remitted, **or** that the purchaser used the items for an exempt purpose. Taxpayer admits the disputed tax was not collected or remitted. Taxpayer has since provided the Department with properly executed exemption certificates for the disputed transactions which indicate the purchasers used the items for exempt purposes.

Under IC § 6-2.5-5-1 and IC § 6-2.5-5-2, certain specified items of tangible personal property associated with agricultural activities are exempt from the state gross retail tax if "(1) the person acquiring the property acquires it for his direct use in the direct production of food or commodities for sale or for further use in the production of food or commodities for sale; and (2) the person acquiring the property is occupationally engaged in the production of food or commodities which he sells for human or animal consumption or uses for further food or commodity production."

Indiana's Administrative Code provides the specific parameters of the general language of the cited statutes. 45 IAC 2.2-5-3(d)(5) states that [p]urchases of fences, fencing material, gates, posts, fence stretchers and electric fence chargers are taxable." Subsection (e)(3) states that the items listed in 45 IAC 2.2-5-3(d)(5) "are exempt only if the same are purchased for use in confining livestock during the production processes of breeding, gestation, farrowing, calving, nursing or finishing." If the items are used to confine animals not used in agricultural production, they are taxable. If the items are used as a "partition fence between adjoining landowners or as a means to keep wildlife, stray animals, or trespassers from entering cropland or farm premises," then the items are also taxable.

Further, 45 IAC 2.2-5-4 states that agricultural exemption certificates "may be used only if the purchaser is occupationally engaged in the business of producing food or commodities for human, animal, or poultry consumption for sale or for further use in such production." Subsection (b) defines those "persons" for Indiana's state gross retail and use tax purposes as "only those persons, partnerships, or corporations whose intention it is to operate a farm at a profit and not those persons who intend to operate a farm for pleasure as a hobby."

The properly executed exemption certificates do not specifically state how the fencing materials were used. However, when taxpayer sent copies of ST – 104 forms to purchasers of the fencing materials for completion, a cover letter was included. This cover letter provides in relevant part:

> The Indiana Department of Revenue has completed an audit of our sales records, and the auditors have determined that your tax-exempt purchase of fencing related materials needs to be documented with your signature on an official ST – 104 Indiana sales tax exemption form. If your purchase of fencing related materials was tax-exempt based on Indiana sales tax code, 45IAC 2.2-5-3(e)(3), then please sign the enclosed Indiana sales tax exemption form and return it to me.... Your signature, social security number and date are required on Form ST – 104
>
> Please note that Indiana sales tax code, 45IAC 2.2-5-3(e)(3), states that fences, fencing materials, gates, posts, and electric fence charges are exempt only if the same are purchased for use in confining livestock during the production processes of breeding, gestation, farrowing, calving, nursing, or finishing. Fencing materials are taxable if...

It is reasonable to infer from the above that the fencing material purchases at issue qualify as exempt transactions. Therefore, that part of the audit adjusting gross retail tax due from taxpayer is reversed. Because taxpayer has no similar facts or documents substantiating exempt purchases of grease, repair parts, heating, and cooling equipment, that part of the audit adjusting gross retail tax due from taxpayer is upheld. The Department requested further information from taxpayer regarding the alleged exempt status of the wood-burning furnaces, asking for more specific information. Taxpayer was unable to supply documentation specific enough to overcome the presumption that the Audit Division's original assessment was correct. The applicable regulation, 45 IAC 2.2-5-3(e) is very specific: to qualify for the exemption, "heating... equipment" qualifies when it is "directly used in the production process, i.e., has an immediate effect on the article being produced." Taxpayer has been unable to demonstrate to the Department's satisfaction that the wood-burning stoves qualify for the exemption.

FINDING

Taxpayer's protest is partially sustained and partially denied, subject to audit's review of the submitted documentation.

DEPARTMENT OF STATE REVENUE

0220000434.LOF

LETTER OF FINDINGS NUMBER: 00-0434
Indiana Adjusted Gross Income Tax
Tax Administration – Penalty
For Tax Years 1996-1999

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

ISSUES

I. Indiana Adjusted Gross Income Tax – Applicability of the Throwback Rule

Authority: IC § 6-3-1-3.5; 45 IAC 1-1-119; IC § 6-3-2-1; 45 IAC 3.1-1-53; IC § 6-3-2-2; 45 IAC 3.1-1-64; IC § 6-8.1-5-1(b); Public Law 86-272 (15 USCS § 381); *Wisconsin Department of Revenue v. William Wrigley, Jr. Co.*, 505 U.S. 214; 112 S. Ct. 2447; 120 L.Ed.2d 174 (1992)

Taxpayer protests the "throwback" to Indiana of sales of goods delivered to Kentucky.

II. Tax Administration – Penalty

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2.1

Taxpayer protests the imposition of the 10% negligence penalty.

STATEMENT OF FACTS

Taxpayer is a retail merchant who manufactures wooden skids for sale at wholesale to other manufacturers who use the skids to ship finished goods to their customers. Taxpayer also sells the skids to customers for their own use. Taxpayer's commercial domicile is in Indiana. Taxpayer ships the skids in-state and out-of-state on common carriers or on vehicles from its company fleet. The Department audited taxpayer for tax years 1996-1999 and determined that sales to Kentucky should be "thrown back" to Indiana because Kentucky had no jurisdiction to tax the sales under Public Law 86-272 (15 USCS § 381) and relevant case law. Taxpayer timely protested and an administrative hearing was held. Additional facts will be provided as necessary.

I. Indiana Adjusted Gross Income Tax – Applicability of the Throwback Rule

DISCUSSION

Taxpayer protests the "throwback" to Indiana of receipts from sales of goods shipped to Kentucky. The issue in this case is whether or not taxpayer is taxable in Kentucky based on the sale and shipment of goods manufactured in Indiana, or must the receipts be "thrown back" for inclusion in the numerator of the taxpayer's sales factor for purposes of the Indiana Adjusted Gross Income Tax. Taxpayer already files tax returns in Kentucky.

Under IC § 6-8.1-5-1(b), 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."

IC § 6-3-1-3.5, subsection (b), defines "adjusted gross income" for corporations as "the same as 'taxable income' (as defined in Section 63 of the Internal Revenue Code)" with four adjustments not at issue here. IC § 6-3-2-1 establishes the rate of the tax imposed on adjusted gross income; IC § 6-3-2-2 defines "adjusted gross income derived from sources in Indiana." Subsection (n) states that a "taxpayer is taxable in another state if:

(1) in that state the taxpayer is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax; or

(2) that state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not.

With respect to Indiana's adjusted gross income tax statute, 45 IAC 3.1-1-53 provides in pertinent part:

When Sales of Tangible Personal Property Are in This State. Gross receipts from the sales of tangible personal property (except sales to the United States Government—See Regulation 6-3-2-2(e)(050) *[45 IAC 3.1-1-54]* are in this state: (a) if the property is delivered or shipped to a purchaser within this state regardless of the F.O.B. point or other conditions of sales; or (b) if the property is shipped from an office, store, factory, or other place of storage in this state, and the taxpayer is not taxable in the state of the purchaser.

Subsection (5) provides in pertinent part:

If the taxpayer is not taxable in the state of the purchaser, the sale is attributed to this state if the property is shipped from an office, store, warehouse, factory, or other place of storage in this state. Such sale is termed a "Throwback" sale.

45 IAC 3.1-1-64 defines "taxable in another state" as "when such state has jurisdiction to subject it to a net income tax. This test applies if the taxpayer's business activities are sufficient to give the state jurisdiction to impose a net income tax under the Constitution and laws of the United States. **Jurisdiction to tax is not present where the state is prohibited from imposing the tax by reason of the provision of Public Law 86-272, 15 U.S.C.A. § 381-385.**" **(Emphasis added).** Taxpayer argues Kentucky

has jurisdiction to tax the gross receipts from sales to its Kentucky customers. Taxpayer has alleged it has filed Kentucky tax returns and paid Kentucky taxes on the sales at issue.

During the hearing, taxpayer's representative was asked to provide additional facts in order to determine whether Kentucky has jurisdiction to tax such that the receipts from sales to Kentucky customers do not fall within the ambit of Indiana's throwback rule. Taxpayer's representative has provided the requested additional information.

Taxpayer delivers wooden skids to 2 customers in Kentucky. One receives product 2-3 times per week. (Customer X). The other (Customer Y) has changing production lines, so the skids need to be redesigned to fit the new production lines. One of taxpayer's employees goes to Y's place of business to gather information in order to redesign the skids, every time it is necessary. The driver delivering skids to X takes inventory each time he makes a delivery, and taxpayer determines what and when X needs more product, based on that inventory. Also, one of taxpayer's drivers will take a forklift to X's place of business to move and straighten out the inventory when necessary.

Taxpayer also performs the following at both Kentucky customers' business locations, and in Kentucky generally:

1. Making repairs or providing maintenance or service to the property sold or to be sold.
2. Providing technical assistance
3. Investigating, handling and assisting in resolving customer complaints
4. Owning, using, or maintaining property in the taxing state (trailers on site for warehousing and company owned forklifts used in taxing state.)
5. Transport and replacement of damaged product.
6. Product delivered into Kentucky by company owned vehicles, "irrespective of whether a shipment or delivery fee or other charge is imposed, directly or indirectly, upon the purchaser."

Public Law 86-272 provides in pertinent part:

No State... shall have power to imposes, for any taxable year..., a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1)

15 USCS § 381(a).

The United States Supreme Court, in *Wisconsin Department of Revenue v. William Wrigley, Jr. Co.,* 505 U.S. 214, 112 S.Ct. 2447, 120 L.Ed.2d 174 (1992), construed the above statutory language to hold that a business's in-state activities could subject it to that state's taxing jurisdiction if those activities involved more than the "mere solicitation of orders" and more than *de minimis* contact in connection with the solicitation of orders. The Court set forth a method of analysis by which to determine whether or not a business's in-state activities cause it to lose the tax immunity 15 USCS § 381 confers: "Section 381 was designed to increase... the connection that a company could have with a State before subjecting itself to tax. Accordingly, whether in-state activity other than 'solicitation of orders' is sufficiently *de minimis* to avoid loss of the tax immunity conferred by § 381 depends upon whether that activity establishes a nontrivial additional connection with the taxing State." Unless activities are "ancillary to" ordering product or *de minimis*, then a business can be taxed in another jurisdiction without that jurisdiction violating § 381. The activities taxpayer engages in—customizing skids for customer Y; handling customer complaints on-site, conducting repairs, maintenance, service, and technical assistance on site; maintaining property (trailers and forklifts) in Kentucky; and using company owned vehicles rather than common carriers to transport products into Kentucky— are activities that are not ancillary to processing orders, and they create much more than a "non trivial connection with the taxing state" of Kentucky. Taken together, these activities exceed the *de minimis* standard set by § 381 and explicated by *Wrigley*. Taxpayer is taxable in Kentucky and therefore receipts from sales to customers in Kentucky are not subject to Indiana's throwback rule.

FINDING

Taxpayer's protest concerning the applicability of Indiana's throwback rule to receipts from sales to Kentucky customers is sustained.

II. Tax Administration – Penalty

Taxpayer protests the imposition of the 10% negligence penalty. Taxpayer argues that it had reasonable cause for its failure to pay the appropriate amount of tax due; the failure was based solely on taxpayer's interpretation of the relevant statutes and regulations.

Indiana Code Section 6-8.1-10-2.1(d) states that if a taxpayer subject to the negligence penalty imposed under this section can show that the failure to file a return, pay the full amount of tax shown on the person's return, timely remit tax held in trust, or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty. Indiana Administrative Code, Title 45, Rule 15, section 11-2 defines negligence as the failure to use reasonable care,

caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence results from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by Indiana's tax statutes and administrative regulations.

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

In the present case, as to the successfully protested items, taxpayer's reliance on the law was reasonable; however, taxpayer presented no arguments or evidence as to the remaining items.

FINDING

Taxpayer's protest concerning the 10% negligence penalty assessed on the successfully protested items is rendered moot by the prior finding in this Letter of Findings. The remainder of the penalty stands.

DEPARTMENT OF STATE REVENUE

0420010018P.LOF

LETTER OF FINDINGS NUMBER: 01-0018P
Sales Tax
Calendar Years 1997, 1998, & 1999

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

ISSUE

I. Tax Administration – Penalty

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

The taxpayer protests the negligence penalty.

STATEMENT OF FACTS

The negligence penalty was assessed on a sales tax assessment resulting from a Department audit conducted for the calendar years 1997, 1998, and 1999.

The taxpayer has two distinct product lines. One product line is the rental and sale of video tapes. The taxpayer operates approximately 150 video stores in seven states. Five of these stores are in Indiana. The second product line is real estate management. The taxpayer's domicile is out-of-state.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer argues the penalty should be waived as the error was unintentional.

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

The Department finds the taxpayer did not act with reasonable care in that the taxpayer was inattentive to tax duties. Inattention is negligence and negligence is subject to penalty. As such, the taxpayer's penalty protest is denied.

FINDING

The taxpayer's penalty protest is denied.

DEPARTMENT OF STATE REVENUE

0220010019P.LOF

LETTER OF FINDINGS NUMBER: 01-0019P
Income Tax
Fiscal Years Ending February 28, 1997, February 28, 1998, and February 28, 1999

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

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

ISSUE

I. Tax Administration – Penalty

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

The taxpayer protests the negligence penalty.

STATEMENT OF FACTS

The negligence penalty was assessed on an income tax assessment resulting from a Department audit conducted for the fiscal years ending February 28, 1997, February 28, 1998, and February 28, 1999.

The taxpayer has two distinct product lines. One product line is the rental and sale of video tapes. The taxpayer operates approximately 150 video stores in seven states. Five of these stores are in Indiana. The second product line is real estate management. The taxpayer's domicile is out-of-state.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer argues the penalty should be waived as the error was unintentional.

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

The Department finds the taxpayer did not act with reasonable care in that the taxpayer
was inattentive to tax duties. Inattention is negligence and negligence is subject to penalty. As such, the taxpayer's penalty protest is denied.

FINDING

The taxpayer's penalty protest is denied.

DEPARTMENT OF STATE REVENUE

0420010020P.LOF

LETTER OF FINDINGS NUMBER: 01-0020P
Sales Tax
Calendar Years 1997, 1998, and 1999

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

ISSUE

I. Tax Administration – Penalty

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

The taxpayer protests the negligence penalty.

STATEMENT OF FACTS

The negligence penalty was assessed on a sales tax assessment resulting from a Department audit conducted for the calendar years 1997, 1998, & 1999.

The taxpayer operates seventeen department stores located around Indiana. The taxpayer's headquarters are out-of-state.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer argues the penalty should be waived as the error was immaterial in relation to the total sales and use tax paid to the state.

The Department points out the use tax error was 15% of the total use tax liability which the Department considers to be material. Furthermore, the error was an issue in the prior audit.

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

the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer."

The Department finds the taxpayer did not act with reasonable care in that the taxpayer was inattentive to tax duties. Inattention is negligence and negligence is subject to penalty. As such, the taxpayer's penalty protest is denied.

FINDING

The taxpayer's penalty protest is denied.

DEPARTMENT OF STATE REVENUE

0120010212.LOF

LETTER OF FINDINGS NUMBER: 01-0212
Individual Income Tax
Calendar Year 1999

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

II. Tax Administration – Interest

Authority: IC 6-8.1-10-1

Taxpayer protests the interest assessed.

STATEMENT OF FACTS

Taxpayer, in a telephone conference on January 31, 2002 requested an abatement of the penalty and interest. Taxpayer's Illinois employer erroneously deducted Illinois tax instead of Indiana tax. Taxpayer filed a claim with Illinois upon preparation of his Indiana tax return. Illinois refunded the taxpayer $1,431 on November 13, 2000. The taxpayer remitted $1,431 to the Indiana Department of Revenue on November 30, 2000. Taxpayer filed his return on October 16, 2000. Taxpayer did not have the money to pay Indiana until he was refunded. Taxpayer, however, did not pay county option tax and should have been aware that the tax is due. The county option tax due with the return was in excess of $600.

Taxpayer filed its return late with a tax balance due of $2,426 on October 16, 2000. Taxpayer did not remit payment with the return. Taxpayer made no payments until after the due date of the return and states it filed an automatic extension of time to file with the Federal government and included a copy of forms 4868 and 2668 with its return. Taxpayer states he was waiting for a refund from Illinois. IC 6-8.2-6-1 (c) states in part that the person must pay at least ninety percent (90%) of the Indiana income tax that is reasonably expected to be due on the original due date by that due date, or he may be subject to the penalties imposed for failure to pay the tax.

Taxpayer did not remit at least ninety percent (90%) of the tax due by the original due date. Taxpayer also failed to pay the tax with his return and was assessed a penalty for the underpayment of estimated taxes.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer states that his employer deducted Illinois instead of Indiana taxes and he was not aware that the wrong taxes were deducted until he began filing his return.

Taxpayer remitted fifty-seven percent (57%) of the tax by the due date of the return. Taxpayer filed extensions. However, an extension to file at a later date is not an extension to make payment. Taxpayer made a payment in the amount of $1,431 after Illinois refunded him, Even with that payment, taxpayer remitted only eighty-two percent (82%) of his tax due. Taxpayer made no attempt to pay the balance due at the time of filing his return.

FINDING

Taxpayer's protest is denied.

II. Tax Administration – Interest

DISCUSSION

Taxpayer protests the interest assessed.

The department has no authority to waive interest.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420010248.LOF

LETTER OF FINDINGS NUMBER: 01-0248
Use Tax
July 12, 1998

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

ISSUE(S)

I. Use Tax – Case backhoe

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

Taxpayer protests the assessment of use tax on equipment used on the farm.

STATEMENT OF FACTS

Taxpayer waived a hearing scheduled for January 22, 2002 and submitted a letter dated January 14, 2002 to be utilized in lieu of the hearing in addition to a protest letter submitted by the taxpayer's POA.

Taxpayer issued an agricultural exemption certificate to purchase a Super L Model 580 backhoe with two buckets. Taxpayer believes he is exempt from sales or use tax on the equipment because it is used on the farm and not on the public streets. Taxpayer states the backhoe is used to tile ditch, pick up rocks out of fields, and used in the fence rows. Taxpayer states he was told by the Indiana Department of Revenue that this type of equipment is exempt when he purchased one in 1987.

I. Use Tax – Case backhoe

DISCUSSION

Taxpayer's representative and the taxpayer both merely state that the equipment is used on the farm. Taxpayer further states that the backhoe is used in the direct production of crops. A backhoe cannot be used in the tilling of land as stated by the taxpayer's representative. It should be noted that tax exemptions "are strictly construed against the taxpayer" and that the taxpayer bears the burden of demonstrating entitlement to an exemption.

Taxpayer has not provided proof that he is entitled to an exemption.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120010250P.LOF

LETTER OF FINDINGS NUMBER: 01-0250P
Individual Income Tax
For the Calendar Years 1997 and 1998

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer's representative, in a letter dated September 18, 2001, protested the penalty assessed. Taxpayer states the liabilities were generated from an IRS audit that disallowed a Net Operating Loss carryback amount and the original tax was paid entirely and timely. The taxpayer filed amended returns with the Indiana Department of Revenue that the Department refunded in good faith. After the Internal Revenue Service notified the Indiana Department of Revenue of its disallowance of amended returns, the Department billed the taxpayer. Taxpayer did not notify the Department of the IRS denial.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer states that the liabilities were associated with an application for refund that was later denied. The Indiana Department of Revenue issued refunds for both years on October 25, 2000 based upon taxpayer's amended returns. The Department was later

notified by the IRS that the amended returns were disallowed and billed the taxpayer for the monies refunded earlier plus penalty and interest.

Taxpayer failed to notify the Department of the IRS denial and has not provided reasonable cause to allow the Department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120010257.LOF

LETTER OF FINDINGS NUMBER: 01-0257 AGI
Adjusted Gross Income Tax
For Tax Periods: 1999-2000

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

ISSUES

Adjusted Gross Income Tax – Imposition

Authority: IC 6-3-2-1 (a), IC 6-3-2-2 (a), *State Election Board v. Evan Bayh*, 521 N.E.2d 1212, (Ind. 1988)

Taxpayer protests the imposition of the adjusted gross income tax.

STATEMENT OF FACTS

The taxpayers are a married couple who own an Indiana home. The husband also owns a Florida condo. The husband is the family wage earner. They filed a 1999 Indiana Part-Year or Full-Year Nonresident Individual Income Tax Return and requested a refund. Upon routine review, the Indiana Department of Revenue, "department", determined that the taxpayers understated their Indiana income. The department adjusted the return and assessed additional tax. Therefore, the department issued a smaller refund check. The taxpayers did not address the reduced refund at that time. Again in 2000, the taxpayers filed an Indiana Part-Year or Full-Year Nonresident Individual Income Tax Return and requested a refund. Again the department determined that they understated their Indiana income, assessed additional tax and issued a reduced refund check to the taxpayers. The taxpayers originally protested the additional assessments for both 1999 and 2000. On November 2, 2001 the taxpayers withdrew their protest to the additional taxes assessed for 1999. Further facts will be provided as necessary.

Adjusted Gross Income Tax – Imposition

DISCUSSION

Indiana imposes an adjusted gross income tax pursuant to the following provisions of IC 6-3-2-1 (a):

> Each taxable year, a tax at the rate of three and four-tenths percent (3.4%) of adjusted gross income is imposed upon the adjusted gross income of every resident person, and on that part of the adjusted gross income derived from sources within Indiana of every nonresident person.

The department assessed adjusted gross income tax on the taxpayer's income as an Indiana resident. The taxpayer contends that he earned the income as a nonresident of Indiana and is not subject to the imposition of the tax. The issue to be determined is whether or not the taxpayer was an Indiana resident for purposes of Indiana adjusted gross income taxation during the 2000 tax year.

For purposes of adjusted gross income tax, IC 6-3-1-12 defines the term "resident" as "any individual who was domiciled in this state during the taxable year." In accordance with this definition, the taxpayer would be considered an Indiana resident and subject to tax on income earned during the period when he was domiciled in Indiana.

Indiana tax assessments are presumed to be correct and taxpayers bear the burden of proving that any particular assessment is incorrect. IC 6-8.1-5-1 (b).

The Indiana Supreme Court considered the issue of the meaning of domicile in *State Election Board v. Evan Bayh*, 521 N.E.2d 1212, (Ind. 1988). In that case, Mr. Bayh desired to run for governor of the state. Pursuant to public discussion concerning whether Mr. Bayh met the residency requirements for governor, Mr. Bayh sought a declaratory judgment determining that he met the residency requirement. The Indiana Supreme Court affirmed the trial court's decision that the standard for residency was whether or not Mr. Bayh had an Indiana domicile. It also affirmed that Mr. Bayh was domiciled in Indiana.

Domicile in Indiana is defined as "the place where a person has his true, fixed, permanent home and principal establishment, and to which place he has, whenever he is absent, the intention of returning." *State Election Board* at page 1317. Once established, a person's domicile is presumed to continue until the person's actions provide adequate evidence that along with moving to another jurisdiction, the person intends to establish a domicile in the new residence. Whether or not the person has successfully established

a new domicile is a question of fact to be determined by the trier of fact. *Id.* at page 1317. Some of the facts considered were that Mr. Bayh paid in-state tuition at Indiana University, out -of -state tuition at the University of Virginia law school and voted in the elections in Vigo County, Indiana. He also registered for the draft from Indiana. The Supreme Court considered these acts adequate evidence to prove that Mr. Bayh intended to return to Indiana and retained his Indiana domicile even though he had lived outside the state for several years.

The taxpayer withdrew his protest to the taxes assessed for 1999, thus agreeing that he was domiciled in Indiana through December 31, 1999. During the year 2000, the taxpayer maintained both Indiana and Florida residences. His family resided at the Indiana home. He filed a homestead exemption, however, only on his Indiana residence. He never filed a Florida Declaration of Domicile or Florida intangibles tax return. He renewed his Indiana driver's license on March 15, 2000 and received a Florida driver's license on May 18, 2000. On September 20, 2000, the taxpayer told a department employee that he intended to vote from his Indiana address in the fall, 2000 election. The taxpayer registered to vote in Florida on October 10, 2000. He voted in Florida on November 7, 2000. The totality of these actions and failures to act do not clearly evidence that taxpayer intended to change his domicile to Florida.

The taxpayer did not meet his burden of proving that he changed his domicile from Indiana to Florida.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420010271P.LOF

LETTER OF FINDINGS NUMBER: 01-0271P
Sales Tax
Calendar Years 1998 & 1999

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

ISSUE

I. Tax Administration – Penalty

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

The taxpayer protests the negligence penalty.

STATEMENT OF FACTS

The negligence penalty was assessed on a sales tax assessment resulting from a Department audit conducted for the calendar years 1998 and 1999.

The taxpayer's main activity is that of a retail merchant manufacturing product for sale at wholesale and retail nationally and inter-nationally. The taxpayer's automotive and marine product lines include: gasoline and diesel engines, stern drives, transmissions, transfer cases, differentials, rear axle assemblies, axle housings, and subassemblies. The taxpayer is headquartered in Indiana. The taxpayer has three locations in Indiana. There are no locations out-of-state.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer argues the penalty should be waived as the errors in the audit are infrequent and immaterial. In 1998, part of the error was due to expansion of operations to a new plant and the purchase of an aircraft engine. In 1999, part of the error was due to the purchase of pallets and labels which may or may not be taxable. In conclusion, the taxpayer argues the error is insignificant as the use tax error is about 1% of the total purchases.

For 1998, the Department points out the expansion of operations to a new plant is not considered an infrequent type of occurrence. The Department does agree the purchase of the aircraft engine is infrequent, but the aircraft engine is only 18% of the total use tax liability.

For 1999, the purchase of pallets and labels was deemed taxable according to the audit report. Furthermore, the total amount of purchase for the pallets and labels were only a small fraction of the total use tax liability.

To continue, the Department finds the use tax error to be material. For each year the use tax error was approximately 50% of the total use tax liability due.

45 IAC 15-11-2(b) states, "Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance

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

The Department finds the taxpayer did not act with reasonable care in that the taxpayer
was inattentive to tax duties. Inattention is negligence and negligence is subject to penalty. As such, the taxpayer's penalty protest is denied.

FINDING

The taxpayer's penalty protest is denied.

DEPARTMENT OF STATE REVENUE

0420010308P.LOF

LETTER OF FINDINGS NUMBER: 01-0308P
Sales Tax
For October 1999 through April 2000

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer was assessed late payment penalties for several sales tax returns that were not timely filed. Taxpayer has four locations.

Taxpayer, in letters dated October 11, 2001 and November 29, 2001 requests that the department waive the late payment penalties because it has overpaid tax in the months of May through November 2000 in the amount of $19,021.30 and the department has not yet refunded the monies. In addition it was not aware until too late that the person responsible for filing the returns did not do so.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer was assessed a ten percent (10%) penalty because it paid its tax after the due date for several returns for several locations between October 1999 and April 2000.

Taxpayer states there was a problem with the accounting staff who was not fulfilling the responsibilities assigned her. Taxpayer further states that he suspected some weaknesses within her performance and asked its accountants to make inquiries in preparation for its fiscal year end. Taxpayer did not file the returns until two delinquency letters were sent. The Department issued late filing and payment penalties on August 2001 after the taxpayer filed the returns.

Taxpayer was negligent in failing to monitor the work of its employees.

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

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020003P.LOF

LETTER OF FINDINGS NUMBER: 02-0003P
Income Tax Penalty
Fiscal Year Ending 06-30-2000

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

ISSUE(S)

I. Tax Administration – Penalty
Authority: IC 6-8.1-10-2.1(d); 45 IAC 15-11-2

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer, in a letter dated December 14, 2001 protested the penalty assessed.

I. Tax Administration – Penalty

DISCUSSION

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

Taxpayer states that prior to the preparation of the extended tax return for fiscal year ended June 30, 2000, it inadvertently omitted certain information that was needed to accurately calculate the tax liability. Taxpayer further states it was not aware that certain information was required until its CPA made the discovery. Taxpayer requests the penalty be considered for abatement.

Taxpayer was several months late in paying all of its tax liability. Approximately sixty percent (60%) of the tax due was not paid until after the original due date of the tax return. An extension to file is not an extension for payment and taxpayer has not provided reasonable cause to allow a waiver of the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020031P.LOF

LETTER OF FINDINGS NUMBER: 02-0031P
Sales Tax
For August 2001

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

ISSUE(S)

I. Tax Administration – Penalty
Authority: IC 6-8.1-10-2.1(d); 45 IAC 15-11-2

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer paid its August 2001 sales tax late and was assessed a late payment penalty. In a letter dated December 19, 2001, taxpayer protests the penalty assessed because it has been in business approximately twenty-one years. Taxpayer states that its business has steadily decreased making it difficult to meet the bills and states it has never gone past the month that taxes are due. Taxpayer feels it extremely unfair to continually receive notices in a declining economy. Taxpayer states that she has always made her payments in the month the tax was due.

Taxpayer is an early filer with payment due on the twentieth of the month. Taxpayer had remitted tax on several occasions after the early filing date and incurred late payment penalties. Taxpayer remitted the penalties for other late returns except the one indicated in the letter of findings.

The department has reviewed the account and found that the taxpayer had several other late sales tax payments in addition to late withholding tax payments.

Taxpayer, in a letter dated December 19, 2001 requests that the department waive the late payment penalty.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer was assessed a ten percent (10%) penalty because it paid its tax after the due date of the return for August 2001. Taxpayer is an early filer.

Taxpayer, in a letter dated December 19, 2001 protested the penalty assessed and stated that it was unfair to penalize someone in a declining economy and it has always made its payment within the month it was due.

Taxpayer has several other late payments on record including late filing and payments for withholding tax. Taxpayer has not provided reasonable cause to allow a waiver of the penalty assessed.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020040P.LOF

LETTER OF FINDINGS NUMBER: 02-0040P
Use Tax
Calendar Years 1998, 1999, and 2000

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer is an out-of-state corporation that leases space in Indiana where a showroom for its lines of wood doors and windows is displayed and sales orders are written. Taxpayer was previously audited on April 22, 1992. At audit, it was determined that the taxpayer failed to self assess and remit use tax for clearly taxable fixed assets purchases. Taxpayer had no use tax accrual system in place.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it submitted the tax payment to the State of Illinois instead of Indiana. It acted in good faith in paying the tax and does not feel it should be penalized for an honest error.

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

Taxpayer failed to self assess and remit use tax on one hundred percent (100%) of its taxable fixed assets and has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020041P.LOF

LETTER OF FINDINGS NUMBER: 02-0041P
Use Tax
Calendar Years 1998, 1999, and 2000

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer is a contractor. Taxpayer performs work both on a lump sum and a time and material basis. Taxpayer performed work for several Indiana companies in Indiana during the audit period.

At audit, it was determined that the taxpayer failed to self assess and remit use tax for clearly taxable items such as small tools, consumable supplies, and material incorporated into realty. The auditor allowed $18,400 in tax credit for items the taxpayer erroneously paid.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that the underpayment was inadvertent and it fully intended to pay the correct tax due.

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

Taxpayer failed to self assess and remit use tax on more than fifteen percent of its purchases and has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020043P.LOF

LETTER OF FINDINGS NUMBER: 02-0043P
Sales Tax
Calendar Years 1998, 1999, and 2000

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer operates a retail store in Indiana and specializes in the sale of audio and video systems for homes. Taxpayer also has several commercial customers and provides installation in homes and automobiles. At audit, it was determined that the taxpayer failed to remit all of its sales tax and had no use tax accrual system in place.

Taxpayer's CPA, in a letter dated December 5, 2001 requests abatement of penalties due to reasonable cause, specifically that the bookkeeper did not tell the owner that the taxes were not filed and paid.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer states that the bookkeeper did not tell the owner that the taxes were not filed and paid. Taxpayer further states that the business is shut down at December 31, 2001.

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

The Department finds the bookkeeper's inability or failure to remit tax does not insulate the taxpayer from the negligence penalty. Taxpayer failed to remit all of the sales tax collected and had no use tax accrual system in place. In this case, taxpayer's failure to remit the tax was not the result of reasonable cause.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020044.LOF

LETTER OF FINDINGS NUMBER: 02-0044
Use Tax
Calendar Year 1998

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

ISSUE

I. Use Tax – Agricultural Equipment Exemption

Authority: 45 IAC 2.2-5-6; 45 IAC 2.2-3-4; IC 6-2.5-5-2

The taxpayer protests the assessment of use tax on its backhoe.

DISCUSSION

The taxpayer protests the Department's assessment of use tax on a used Case 580 Backhoe, 2-wheel drive. Taxpayer was billed the sales tax on April 20, 1998 but provided the seller with an exemption certificate on April 28, 1998. The taxpayer contends that the backhoe is used in farming and, therefore, qualifies for an exemption.

45 IAC 2.2-5-3 (b) states:

In general purchases of tangible personal property by farmers is taxable. The exemptions provided by this regulation [45 IAC 2.2] apply only to seeds, fertilizers, fungicides, insecticides, and other tangible personal property to be directly used by the farmer in the direct production of food and agricultural commodities. This exemption is limited to "farmers."

45 IAC 2.2-5-3(d)(8) states that transportation of animals, poultry, feed fertilizer, etc. to the farm for use on farming; is taxable.

45 IAC 2.2-5-4(c) does not allow exemption for graders, ditchers, front-end loaders, or similar equipment (except equipment to haul animal waste).

45 IAC 2.2-5-4(e) further states:

The fact that an item is purchased for use on the farm does not necessarily make it exempt from sale [sic.] tax. The farmer in the direct production of agricultural products must directly use it. The property in question must have an immediate effect on the article being produced. Property has an immediate effect on the article being produced if it is an essential and integral part of an integrated process that produces agricultural products. The fact that a piece of equipment is convenient, necessary, or essential to farming is insufficient in itself to determine if it is used directly in direct production as required to be exempt.

45 IAC 2.2-5-3(d)(4) exempts implements used in the tilling of land and harvesting of crops therefrom, including tractors and attachments.

45 IAC 2.2-5-3(d)(9) exempts equipment designed to haul waste.

Taxpayer states the backhoe is only used in farming such as aiding in foundation and erection work in building a barn, scraping of horse stalls, trenching for drainage field tile, lifting hay to higher reaches, etc. Taxpayer believes that the item is exempt because it has not been used off the property nor has he made money by using this unit commercially.

45 IAC 2.2-5-3(d)(7) states:

Tangible personal property purchased by a farmer for use in general farm maintenance of taxable items is taxable.

45 IAC 2.2-5-4(c) taxes all tools including forks, shovels, hoes, welders, power tools, and hand tools; graders, ditchers, front end loaders, or similar equipment (except equipment designed to haul animal waste).

FINDINGS

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020049P.LOF

LETTER OF FINDINGS NUMBER: 02-0049P
Sales and Use Tax
Calendar Years 1998, 1999, and 2000

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

ISSUE(S)

I. Tax Administration – Penalty
Authority: IC 6-8.1-10-2.1(d); 45 IAC 15-11-2
Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer is a manufacturer and a contractor. At audit, it was determined that the taxpayer failed to self assess and remit use tax for clearly taxable items. Taxpayer's prior audit, completed on October 2, 1992, allowed a penalty waiver. Taxpayer failed to charge sales tax to several customers for whom no exemption certificates could be obtained. Taxpayer also failed to accrue use tax on clearly taxable items such as maintenance supplies, janitorial supplies, smoke detectors, office furniture, and other miscellaneous items. Taxpayer was given credit in the audit for items it erroneously self-assessed use tax.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it has always made a concerted effort to pay all Indiana taxes in a timely manner and it did not intentionally under pay any taxes due.

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

The taxpayer failed to remit sales tax on seventy-seven percent (77%) of its taxable sales and did not assure that its clients had tax exemption certificates. Audit allowed a credit where the taxpayer erroneously self-assessed use tax upon materials billed on a lump sum basis to tax-exempt customers which was in the amount of $63,847 in use tax. Taxpayer made other errors and has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020050P.LOF

LETTER OF FINDINGS NUMBER: 02-0050P
Adjusted Gross Income Tax
For Calendar Years 1997, 1998, and 1999

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

ISSUE(S)

I. Tax Administration – Penalty
Authority: IC 6-8.1-10-2.1(d); 45 IAC 15-11-2
Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer is an insurance company. Although the taxpayer is not subject to gross income tax, it is liable for an apportioned amount of adjusted gross income tax because it has inventory in the state of Indiana.

Taxpayer filed a penalty protest letter dated December 18, 2001.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it originally took a credit against the supplemental income tax for premium taxes paid. Upon audit, the credit was denied which resulted in tax due. Taxpayer states it was unaware that it could not take a credit against the supplemental income tax for premium taxes paid and it was always its intention to meet its tax-filing obligations. Accordingly, it requests a waiver of the penalty.

The taxpayer took a credit against supplemental income tax for premium taxes paid. Domestic insurance companies have the option of either paying premium tax or gross income tax. Regardless of which option they choose, they are subject to supplemental net income tax. There are provisions to reduce taxes by Guarantee Association credits as well as Indiana Comprehensive Health

Insurance Association Credit, however, no provision exists to reduce taxes by premium tax paid. An adjustment to disallow this credit was made in accordance with IC 6-3-8-2(c). Taxpayer incorrectly calculated supplemental net income tax

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

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

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020051P.LOF

LETTER OF FINDINGS NUMBER: 02-0051P
Use Tax
Calendar Years 1998 and 1999

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer has two manufacturing plants in Indiana and a machine shop. Taxpayer was previously audited on August 15 1993. Upon audit it was determined that the taxpayer failed to remit use tax on over fifty percent of its taxable purchases, most of which are clearly taxable. The items consist of rental table and chairs, rental accommodations under thirty days, raw material tags and scrap tags, subscriptions, cranes and fork trucks used to remove raw materials from storage prior to the introduction into the production process, maintenance supplies, and other miscellaneous items. Taxpayer was given credit in the audit for items it erroneously paid tax.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it has always attempted to fully comply with the laws of Indiana by filing quarterly returns, paying tax to various in-state vendors and accruing and remitting use tax to Indiana on a monthly basis.

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

The taxpayer failed to self-assess and remit use tax on more than fifty percent (50%) of its clearly taxable purchases and has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120020065P.LOF

LETTER OF FINDINGS NUMBER: 02-0065P
Individual Income Tax
Calendar Year 2000

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

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalties assessed.

STATEMENT OF FACTS

Taxpayer's representative, in a letter dated November 6, 2001, requested an abatement of the penalty and interest. Taxpayer is a medical specialist in the medical field, and has no knowledge or expertise of tax law and filing requirements. Taxpayer relied on the advice of the accountant retained by her previous employer/practice.

Taxpayer filed its return late with a tax balance due of $6,131 or seventy-two percent (72%) of the total tax. Taxpayer's representative requests the department abate the penalty and interest because the taxpayer relied on a professional.

Taxpayer was assessed a late payment penalty and an underpayment penalty. Taxpayer failed to pay the estimated tax shown on its IT-9 extension that automatically extended the filing of the return until June 15, 2001. The return was not filed until August 3, 2001.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer's representative merely states that the taxpayer relied on a professional to complete the tax return and requests a waiver of the penalties and interest assessed.

Taxpayer remitted twenty-eight percent (28%) of its tax by the due date of the return. An extension to file at a later date is not an extension to make a late payment. Taxpayer made no attempt to pay at least one hundred percent (100%) of the prior year tax. Taxpayer paid a mere thirty-eight percent (38%) of the prior year's tax by the due date. Taxpayer failed to remit the extension payment tax and filed the return after the extended filing date.

The Department finds the penalties appropriate.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020066P.LOF

LETTER OF FINDINGS NUMBER: 02-0066P
Gross and Adjusted Gross Income Tax
Calendar Years Ended 12/31/97, 12/31/98, and 12/31/99

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer leases mobile office and storage units in the United States and Canada. Taxpayer also sells new and previously leased mobile office units and provided delivery, installation, and other ancillary products and services. At audit it was determined that the taxpayer failed to report its lease income at the high rate of tax. Taxpayer did include it in the low rate. Taxpayer reported no revenue at the high rate. Taxpayer also failed to add back property taxes and made errors in its apportionment detail.

Taxpayer filed a penalty protest letter dated October 30, 2001 and a hearing was scheduled for Tuesday, February 19, 2002 at 9:00 a.m. Taxpayer failed to appear and a determination is made based upon information contained in the audit file.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it makes every good faith effort to pay all taxes in an accurate, complete and timely manner. Taxpayer further states that despite its best efforts, it apparently did not fully understand and comply with the regulations in calculating Gross Income Tax and the errors were simply a misunderstanding of the complex regulations covering the Indiana Gross Income Tax Calculation.

45 IAC 15-11-2(b) states, "Negligence, on behalf of the taxpayer is defined as the failure to use such reasonable care, caution,

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

Taxpayer failed to report clearly taxable high rate income at the high rate of tax, or more than fifty percent (50%) of its tax for all years at audit and has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020073P.LOF

LETTER OF FINDINGS NUMBER: 02-0073P
Gross and Adjusted Gross Income Tax
Short Period 09/01/99 to 12/31/99

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer filed a short period return late and was assessed a penalty. Taxpayer's tax liability was $27,629.84 of which it remitted $7,050 timely. Taxpayer remitted the balance after the due date of the return. An extension to file is not an extension for payment and the taxpayer was assessed a late payment penalty.

Taxpayer filed a penalty protest letter dated January 2, 2002.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it timely filed its return on October 16, 2000. Taxpayer requests a penalty waiver that due to the time of acquisition, resources were not in place to accurately remit estimated taxes. As a result, the taxpayer did not remit accurate estimated taxes for the 1999 short period.

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

Taxpayer failed to remit more than seventy percent (70%) of its tax for the short year ended December 31, 1999 and has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120020075P.LOF

LETTER OF FINDINGS NUMBER: 02-0075P
Individual Income Tax
Calendar Year 2000

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

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer's representative protests the penalty assessed and states that he prepared the taxpayer's Indiana State Income Tax return. Due to an oversight, he did not compute the county tax. Taxpayer's representative further states that he advised the client to make the payment and request a refund for the penalty.

I. Tax Administration – Negligence Penalty

DISCUSSION

Taxpayer's representative requests that the Department waive the penalty assessed because there was an oversight in computing the county tax.

Taxpayer's representative was negligent in failing to verify the information contained on the prepared IT-40 before mailing it to the Department.

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

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020078P.LOF

LETTER OF FINDINGS NUMBER: 02-0078P
Use Tax
Calendar Years 1998, and 1999

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer is an S-corporation that runs an auto body shop, paints buses and RV's, and designs graphic decals. Upon audit it was discovered that the taxpayer had no use tax accrual system in place and failed to self assess and pay tax for consumable supplies such as visqueen, tape, coveralls, brushes, rags, floor dry, buffing pads, polishing paste, office supplies, and other miscellaneous items. Taxpayer had no use tax accrual system in place.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that the underpayment was not intentional but due to a misunderstanding regarding the taxability of certain items. Taxpayer further states it has instituted corrective measure to assure it is fully compliant in the future.

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

Taxpayer had no use tax accrual system in place and has failed to provide reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0320020079P.LOF

LETTER OF FINDINGS NUMBER: 02-0079P
Withholding Tax
Calendar Year 12/31/98

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer was assessed a penalty for failing to withhold the non-resident county tax for non-resident employees. Taxpayer states that its payroll is processed by an outside service that has been made aware of the issue. Proper corrections have been made. Taxpayer requests the department waive the penalty assessed against it.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer had an outsourcing company whom it trusted to know the rules and regulations related to its business of processing payroll and paying the correct payroll taxes. Taxpayer requests a penalty waiver.

Taxpayer's agent prepared payroll for several employees and failed to deduct and remit the county tax for three non-resident employees. Taxpayer and its agent are responsible to assure tax is correctly deducted and remitted to the State of Indiana. Taxpayer has not provided reasonable cause for its failure to withhold and remit the tax.

The Department finds the penalty appropriate.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420010025.SLOF

SUPPLEMENTAL LETTER OF FINDINGS: 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 Rental of Mailing Lists

Authority: IC 6-2.5-3-2; 45 IAC 2.2-4-2; 45 IAC 2.2-4-2(b); 45 IAC 2.2-4-3; 45 IAC 2.2-4-3(a)

Upon rehearing, taxpayer argues that certain items, included within its invoices for the rental of mailing lists, are not subject to the state's gross retail tax.

II. Prospective Treatment of Gross Retail Tax Liability

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

Having determined that charges for the rental of mailing lists are subject to the gross retail tax, taxpayer argues that it is entitled to prospective treatment of any additional assessment.

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 renews its argument that it is entitled to abatement of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer conducts industrial training seminars. In order to attract participants to those seminars, taxpayer sends information to targeted individuals. Taxpayer deals with a list broker to assemble the names of individuals who would be likely participants in its seminars. The list broker acquires the raw address data from "list managers." The list broker then processes that raw data – sorting

and assembling addresses which meet the taxpayer's specification and eliminating duplicative addresses – and transmits the completed address information to an independent mailing house.

The taxpayer originally protested the assessment of sales tax on the invoices it received from the list broker. The original Letter of Findings determined that the rental of the customized mailing lists was subject to the gross retail tax; that the taxpayer was not entitled to prospective treatment of the additional assessments; and that the taxpayer was not entitled to abatement of the ten percent negligence penalty assessed at the time of the original audit.

The taxpayer submitted a request for rehearing in which the taxpayer maintained that it could present new evidence relative to the determinations made within the original Letter of Findings. The request for rehearing was granted, and this Supplemental Letter of Findings revisits certain of the issues.

DISCUSSION

I. Applicability of the State's Gross Retail Tax to Rental of Mailing Lists

Taxpayer deals with a list broker to acquire lists of names which meet the taxpayer's specific criteria. The original Letter of Findings determined that the taxpayer's rental of mailing lists, delivered in the form of magnetic tape, was subject to the state's gross retail tax. The Letter of Findings found that the taxpayer contracted with the list broker for the purchase of "tangible personal property." Whatever services were performed by the list broker were subsumed within the cost of each mailing list invoice rendering the entire transaction taxable.

The invoices received by taxpayer from the list broker detail various costs. Those costs include: mailing addresses; data processing; inbound and outbound freight costs; and magnetic tape – the means by which the completed mailing address is transmitted to the independent mailing house.

The fact that the purchase of the mailing addresses is subject to the gross retail tax is uncontested. However, taxpayer now argues that the cost of the list broker's services can be differentiated from the cost of the mailing lists. According to taxpayer, the charges for those services are not subject to the gross retail tax.

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."

List Broker's Service Charges: However, 45 IAC 2.2-4-2 distinguishes the sale 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." Clearly then, the bare purchase of a service does not fall within the ambit of the gross retail tax.

It is also apparent that the invoices, received by taxpayer from the list broker, differentiate charges for the mailing addresses from services which are performed as an adjunct to the delivery of those addresses.

However, even though the services are clearly delineated on the invoices, those service charges are also subject to the gross retail tax. The regulation states in relevant part "[s]ervices performed or work done in respect to property and performed prior to delivery to be sold by a retail merchant must however, be included in taxable gross receipts of the retail merchant." 45 IAC 2.2-4-2(b). Accordingly, because the charges are made for services integral to preparation of the mailing addresses and are performed "prior to delivery" of the addresses, the cost of services – such as "data processing" – are subject to the gross retail tax.

Delivery Costs: The address broker included on the invoices presented to taxpayer the costs for inbound and outbound freight. Presumably the inbound freight costs are the costs of shipping the addresses from the list managers – the originators of the raw address data – to the list broker. The outbound freight costs are those costs incurred by the list broker in sending the processed lists to the independent mailing house. The list broker has passed along both the inbound and outbound freight costs to the taxpayer.

The inbound freight charges are subject to the gross retail tax because they are costs incurred by the list broker in acquiring, managing, processing, and preparing the address information. The regulation states "[s]eparately stated delivery charges are considered part of selling at retail and subject to sales and use tax if the delivery is made by or on behalf of the seller or property not owned by the buyer." 45 IAC 2.2-4-3(a). In effect, the inbound freight charges are integral to creation of the finished mailing lists and represent a portion of the costs incurred in preparing those completed lists.

The outbound freight costs are indicated on taxpayer's invoices as "shipping and handling" charges. These outbound freight costs do not fall within the ambit of any exception to the gross retail tax. *See* 45 IAC 2.2-4-3. The phrase "shipping and handling" charges indicates freight and preparation costs incurred by the list broker in forwarding the completed mailing lists to the independent mailing house and are merely one of the numerous costs incurred by the list broker. The audit properly determined that the outbound freight costs were subject to the gross retail tax.

Magnetic Tape: The list broker billed taxpayer for the cost of the magnetic tape used to transfer the completed address lists to the independent mailing house. Taxpayer argues that the cost of the magnetic tape represents a service performed by the list broker, on behalf of taxpayer, and that the cost is not subject to the gross retail tax. However, even if the cost of the magnetic tape somehow represents a "service," that "service" falls within the purview of 45 IAC 2.2-4-2(b). The list broker's transfer of the encoded mailing

addresses to magnetic tape, the cost of the magnetic tape itself, and the cost incurred in shipping the magnetic tape to the independent mailing house are all "[s]ervices performed or work done in respect to property... performed prior to delivery... [and] included in the taxable gross receipts of the retail merchant." 45 IAC 2.2-4-2(b). The magnetic tape is analogous to the blank paper used to produce a book. There can be no dispute that a book publisher's blank paper costs – the means by which the written material is transferred – are properly included in the taxable price of the book. The mere fact that the publisher could potentially sever its blank paper costs, would not render those costs a non-taxable service.

List Broker's Markup Charge: Taxpayer argues that 20 percent of the mailing address costs are not subject to the gross retail tax. When taxpayer places an order with the list broker, the list broker turns to "list managers" to acquire unprocessed and unsorted mailing addresses. The list broker purchases – on behalf of taxpayer – certain of this raw data. It is then the list broker's responsibility to process, organize, and arrange that raw address data into the form specified by taxpayer. In the final invoice, the list broker passes along the costs of purchasing the raw data from the list mangers. In that final invoice, the list broker marks up its original costs by 20 percent. For example, if the list broker purchased $ 1,000 in raw data from a list manager, the list broker will charge the taxpayer $1,200 for that same data. The $1,200 is distinct from the additional costs charged for data processing, freight costs, and magnetic tape. Taxpayer argues that the 20 percent markup – in this example, $ 200 – represents a "service" performed by the list broker and is not subject to the gross retail tax. In effect, the taxpayer argues that it is entitled to accumulate the downstream "service" costs and to exclude those costs from the tax.

IC 6-2.5-3-2 imposes the tax "on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction...." In taxpayer's situation, the previous Letter of Findings determined that the rental of the mailing lists constituted the acquisition of tangible personal property, and the transaction was subject to the gross retail tax. Indisputably, the price charged for the mailing lists represents an accumulation of various expenses. However, there is simply no legal basis upon which *any* taxpayer is entitled to parse out the components of a final purchase price, exempt those components which represent a service, and pay the tax on only those components which possess an inherent physicality. In the same way that the purchaser of an automobile must pay sales tax on the price of the automobile and not simply on the nuts, bolts, and sheet metal which form that vehicle, taxpayer is liable for use tax on the rental price *it* pays for the mailing lists.

FINDING

Taxpayer's protest is respectfully denied.

II. Prospective Treatment of Gross Retail Tax Liability

Taxpayer argues that any additional assessment of gross retail tax should be given prospective effect only. Taxpayer states that it is entitled to prospective treatment because it was unaware of its gross retail tax liability in the past and that it would be inequitable for the Department to impose the tax "after-the-fact." Taxpayer argues that no one in the training seminar industry was aware of sales tax being imposed on the rental of mailing lists. Given the apparent novelty of attributing sales tax liability on the rental of mailing lists, taxpayer maintains that the Department had a responsibility to inform members of the training seminar industry of that potential liability.

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...." However, taxpayer is unable to point to any change by the Department, in its interpretation or application of the gross retail tax, during the time in which taxpayer's liability accrued. Absent any indication that the Department has altered the tax regulations upon which the taxpayer depended, or that the Department has reinterpreted those regulations, the Department – under IC 6-8.1-3-3 – is without any authority to impose the gross retail tax assessment on a prospective basis. *See* City Securities Corp. v. Dept. of State Revenue, 704 N.E.2d 1122 (Ind. Tax Ct. 1998).

Despite taxpayer's purported good faith past efforts to comply with the tax regulations, and despite taxpayer's assertion that "no one has ever heard of [mailing lists] being taxable," the Department is unable to accede to taxpayer's request for prospective treatment of the gross retail tax assessment.

FINDING

Taxpayer's protest, requesting prospective treatment of the gross retail tax assessment, is respectfully denied.

III. Abatement of the Ten percent Negligence Penalty

The original Letter of Findings determined that the taxpayer was not entitled to abatement of the ten percent negligence penalty.

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.

At the rehearing level, the taxpayer has asked that the Department review the issue and agree to abatement of the penalty. The taxpayer’s argument is based on its assertion that its failure to pay gross retail tax was not attributable to its carelessness, thoughtlessness, or inattention to duties placed on it by the Indiana Code or the Department’s regulations. Instead, the taxpayer was unaware of any potential liability and the Department failed to inform members of the training seminar industry of their potential liability for use tax.

Taxpayer fails to set out any basis entitling it to abatement of the negligence penalty. As 45 IAC 15-11-1 in relevant part states, “Ignorance of the listed tax laws, rules and/or regulations is treated as negligence.”

FINDING

Taxpayer’s protest is respectfully denied.

DEPARTMENT OF STATE REVENUE INDIANA

Revenue Ruling #2002-04 ST

March 12, 2002

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 the information about the Department’s official position concerning a specific issue.

ISSUE

Sales/Use Tax – Application of State Sales Tax to Certain Proposed Transactions of an Indiana Not-for-Profit Corporation

Authority: IC 6-2.5-4-1; IC 6-2.5-2-1; IC 6-2.5-5-26; IC 6-2.5-8-1

The taxpayer requests the Department to rule whether:

1. The sale of consigned tangible personal property at an annual event by the taxpayer is exempt from the payment and collection of Indiana sales tax.
2. The taxpayer is required to obtain an Indiana retail merchant’s certificate in order to sell the consigned tangible personal property at the annual event.
3. Following the completion of the sales of the consigned tangible personal property at the annual event, will the taxpayer’s payments to the Consignors for the consigned tangible personal property be exempt from the collection and payment of Indiana sales tax?
4. If the taxpayer’s payments to the Consignors of the funds received from the purchases of the consigned tangible personal property sold at the annual event are exempt from the collection and payment of Indiana sales tax, must the taxpayer complete, sign and provide Exemption Certificates to the Consignors?
5. If the acquisition of the consigned tangible personal property from the Consignors is exempt from the collection and payment of Indiana sales tax and the taxpayer is required to provide Exemption Certificates to Consignors, which line on each Exemption Certificate should be marked by the taxpayer?

STATEMENT OF THE FACTS

1. The taxpayer is an Indiana not-for-profit, public benefit corporation with an exempt organization determination letter from the Internal Revenue Service pursuant to Section 501(c) of the Internal Revenue Code. The taxpayer is an organization, which has been granted a gross income tax exemption under IC 6-2.1-3-20. The taxpayer has also registered with the Department and has received a Not-For-Profit Registration Number.
2. The taxpayer proposes to sell tangible personal property at an annual event at a location in Indiana. The taxpayer plans to engage in similar sales of tangible personal property at each subsequent years’ annual event.
3. The taxpayer’s sales of tangible personal property at the event will be a fund raising activity to raise funds to further its qualified not-for-profit purposes.
4. The taxpayer’s sales of tangible personal property at the event will be carried on for a total of not more than twenty-one (21) days. The taxpayer does not contemplate engaging in any other sales of tangible personal property in this or subsequent years.
5. The taxpayer will receive the tangible personal property to be sold at the event on a consignment basis from various for-profit commercial vendors (hereinafter referred to as either “Vendors” or “Consignors”).

DISCUSSION & RULINGS

ISSUE #1:

Whether the sale of consigned tangible personal property at an annual event by the taxpayer is exempt from the payment and collection of Indiana sales tax.

IC 6-2.5-4-1 (a) provides: A person is a retail merchant making a retail transaction when he engages in selling at retail. Subsection (b)

further provides that a person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he: (1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration.

IC 6-2.5-2-1 (b) provides that the person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as an agent for the state.

IC 6-2.5-5-26 provides that sales of tangible personal property are exempt from the state gross retail tax, if: (1) the seller is an organization which is granted a gross income tax exemption under... IC 6-2.1-3-20...; (2) the organization makes the sale to make money to carry on the not-for-profit purpose for which it receives its gross income tax exemption; and (3) the organization does not make those sales during more than thirty (30) days in a calendar year.

RULING #1

The Department rules that the sales are retail sales and subject to sales tax. The Vendors are required to collect sales tax pursuant to IC 6-2.5-4-1 and IC 6-2.5-2-1. The taxpayer would qualify for an exemption under IC 6-2.5-5-26 as a not-for-profit organization if the taxpayer were selling the tangible personal property on its own behalf. However, the taxpayer is selling the tangible personal property on consignment for the Vendors, therefore, the taxpayer must collect the sales tax as an agent for the Vendors.

ISSUE #2:

Whether the taxpayer is required to obtain an Indiana retail merchant's certificate in order to sell the consigned tangible personal property at the annual event.

IC 6-2.5-8-1 provides that retail merchants may not make retail transactions in Indiana, unless they have applied for a registered retail merchant's certificate.

In the instant case, pursuant to IC 6-2.5-8-1, the Vendor must acquire the necessary registered retail merchant's certificate, however, the taxpayer is not required to do so.

RULING #2

The Department rules that the taxpayer is not required to obtain an Indiana retail merchant's certificate in order to sell the consigned tangible personal property, but the Vendor must possess a registered retail merchant certificate. Further, the Vendor must remit the retail tax to the Department under their issued registered retail merchant certificate number.

ISSUE #3:

Whether, following the completion of the sales of the consigned tangible personal property at the annual event, the taxpayer's payments to the Consignors for the consigned tangible personal property will be exempt from the collection and payment of Indiana sales tax.

RULING #3

Notwithstanding the two preceding issues and rulings, the Department rules that the taxpayer is exempt from paying an additional sales tax to the Consignors. As stated above, the taxpayer will have collected the tax as an agent for the Consignors and, as such, shall remit the tax to the Consignor to be submitted to the Department under the Consignor's registered retail merchant certificate number.

ISSUE #4:

If the taxpayer's payments to the Consignors of the funds received from the purchases of the consigned tangible personal property sold at the annual event are exempt from the collection and payment of Indiana sales tax, must the taxpayer complete, sign and provide Exemption Certificates to the Consignors?

RULING #4

This issue is not applicable. See Issue #1.

ISSUE #5:

If the acquisition of the consigned tangible personal property from the Consignors is exempt from the collection and payment of Indiana sales tax and the taxpayer is required to provide Exemption Certificates to Consignors, which line on each Exemption Certificate should be marked by the taxpayer?

RULING #5

This issue is not applicable as the taxpayer is required to collect the tax as an agent for the Consignor. See Issue #1.

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.