INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

Title: Waste Status of CCA Treated Wood
Identification Number: WASTE-0006-NPD
Date Originally Effective: May 9, 1997
Dates Revised: April 2002
Other Policies Repealed or Amended: None
Citations Affected: 40 CFR 261.4(b)(9), 329 IAC 10-2-179(b)(2), 329 IAC 10
Brief Description of Subject Matter: Regulatory classification of and disposal procedures for chromated copper arsenate (CCA) treated wood wastes.

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

WASTE STATUS OF CCA TREATED WOOD

The following information is provided as guidance for the proper disposal of chromated copper arsenate (CCA) treated wood wastes. The U.S. Environmental Protection Agency has determined CCA treated wood waste is exempt from the hazardous waste rules of RCRA, even if it fails the TCLP as a D004 thru D017 waste, if it is generated by persons who utilize the wood for its intended end use [40 CFR 261.4 (b) (9) as corrected in 57 FR 30657-30658, July 10, 1992]. Even though CCA treated wood waste may be exempt from hazardous waste regulations, CCA treated wood waste from manufacturing activities is subject to regulation as a solid waste under 329 IAC 10-2-174(6). Waste from building construction activities may be regulated under the construction/demolition provisions of 329 10-2-37. Prior to disposal in a solid waste landfill or construction/demolition landfill, contact the landfill representative for further disposal requirements.

For more information, contact the Compliance and Response Branch, Office of Land Quality at 317/308-3103.

INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

Title: Equivalent Secondary Containment Devices for Hazardous Waste Tanks Containing Baghouse Dust
Identification Number: WASTE-0050-NPD
Date Originally Effective: June 21, 2002
Dates Revised: None
Other Policies Repealed or Amended: None
Brief Description of Subject Matter: Provides generic variance for secondary containment for silo systems that meet performance standards of 40 CFR 265.193
Citations Affected: 40 CFR 265.193, 329 IAC 3.1

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Equivalent Secondary Containment Devices for Hazardous Waste Tanks Containing Baghouse Dust

The purpose of this document is to approve equivalent containment devices, pursuant to 40 CFR 265.193 which has been adopted by reference at 329 IAC 3.1, for generator hazardous waste tanks containing baghouse dust.

Companies with air pollution control baghouses have connected storage tanks to their baghouses by piping or ductwork. Some of the tanks are placed on legs so trucks can drive under them for loading purposes. These are often referred to as silos. Other tanks are on the ground and the waste is sucked out of the tanks with vacuum trucks. Some facilities have taken the position that the tanks are part of their air pollution control equipment and that the tanks are not regulated under RCRA and the dust is not regulated until the dust exits the tank. IDEM considers generator tanks/silos that receive hazardous dust from baghouses to be regulated hazardous waste storage tanks.

Because secondary containment requirements in the rules are more oriented towards liquids, typical secondary containment requirements applicable to tanks are not relevant for baghouse dust or practical for use of the tanks as loading silos. However, it has

been IDEM's experience that releases from these units are common, particularly during loading of trucks. Fugitive dust from leaks, spillage during unloading, and tire track-out are the most common problems.

The rules currently exempt tanks containing waste with no free liquids, and that are located inside buildings, from secondary containment. IDEM agrees with operators of baghouse dust storage tanks that enclosing these units in buildings or installing the standard containment is not always practical or functionally appropriate. The hazardous waste tank rules at 40 CFR 265.193 provide that the Commissioner may approve an equivalent device that meets the secondary containment requirements.

With this document the Commissioner is approving the use of equivalent devices for secondary containment for generator baghouse storage tanks that meet the following performance standards:

1. Devices, typically concrete or asphalt pads, must be designed, installed and operated to prevent hazardous waste contact with soils. Pavement should be maintained free of cracks and gaps and run-on and run-off should be controlled or prevented. Paving, curbs, and routine sweeping may be utilized to prevent releases to the soil from spills and tire track out.
2. Releases to the air must be prevented or immediately recaptured. IDEM anticipates devices such as windscreens, loading bays with curtains, or vacuums will be utilized to prevent airborne dispersal.
3. Devices must be provided with a means of detecting and removing releases immediately during routine operations, or within 24 hours at the latest. Typically, facilities utilize attendants during loading/unloading operations and daily inspections to satisfy this requirement.
4. The device must be designed to contain 100% of the capacity of the largest tank. An asphalt or concrete pad must be large enough to contain a pile of the baghouse dust if it is accidentally released from a storage tank.

Devices meeting these performance standards are approved in order to ensure flexibility for the regulated community and still fulfill the purpose of secondary containment (to prevent releases to the environment).

If you need additional information, or have any questions or concerns, please contact staff of the Industrial Waste Compliance program at 317-308-3103. The IDEM toll-free telephone number is 1-800-451-6027. Information is also available through the Internet at http://www.IN.gov/idem/olq.

DEPARTMENT OF INSURANCE
Bulletin 110
May 6, 2002
Women's Health and Cancer Rights Act

This Bulletin is directed to all insurance companies and health maintenance organizations that offer individual and group health insurance in Indiana. Pursuant to the federal Women's Health and Cancer Rights Act (WHCRA)[1], a health insurance issuer providing health insurance coverage in connection with a group health plan or in the individual market that provides medical and surgical benefits with respect to a mastectomy shall provide, in a case of a participant or beneficiary who is receiving benefits in connection with a mastectomy and who elects breast reconstruction in connection with such mastectomy, coverage for the following in a manner determined in consultation with the attending physician and the patient:

(1) All stages of reconstruction of the breast on which the mastectomy was performed;
(2) Surgery and reconstruction of the other breast to produce a symmetrical appearance; and
(3) Prostheses and physical complications of the mastectomy, including lymphedemas.

The coverage may be subject to annual deductibles and coinsurance provisions as may be deemed appropriate and as are consistent with those established for other benefits under the policy. In addition, written notice of the availability of this coverage shall be delivered to the participant upon enrollment and annually thereafter.

Group and individual health policies are required to be filed with and approved by the Department of Insurance before use in Indiana. These federal provisions preempt any conflicting provision in state law. Therefore, the Department is reviewing policies for compliance with the WHCRA. Any policy not in compliance with the WHCRA will not be approved for use in Indiana.

The WHCRA was effective for newly issued policies on October 21, 1998, and for existing policies on the first renewal date after October 21, 1998. The Department will adjudicate any inquiries or complaints in accordance with the provisions of the WHCRA.

INDIANA DEPARTMENT OF INSURANCE

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Sally McCarty, Commissioner

[1] Pub. L. 105-277

DEPARTMENT OF STATE REVENUE

IN REGARDS TO THE MATTER OF:
LOYAL ORDER OF MOOSE LODGE NO. 629
DOCKET NO. 29-2001-0361

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.

Petitioner, Loyal Order of Moose Lodge No. 629, was represented by Roger Linville, Treasurer. 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 assessed Petitioner unrelated business income tax, civil penalties, and additional license fees totaling eight thousand four hundred dollars ($8,400). 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 alleges that during the year 1997 the Petitioner purchased and sold gaming supplies without a license.
3) The Department contends that the records supplied by the Petitioner did not match the records subpoenaed from Petitioner's supplier.
4) The Department argues that Petitioner failed to keep accurate financial records thereby underpaying the amount of annual license fees.
5) The Department, during the course of its investigation, discovered several checks written to Mike Abbott. The Department argues that Mike Abbott received remuneration for operating charity gaming events for the Petitioner.

FINDINGS OF FACTS

1) In 1997, the Petitioner purchased and sold gaming supplies without a license.
2) During the hearing, the Department's representative stated, "So is it your testimony here that you did not have a license for early 1997?" The Petitioner's representative responded, "That's correct" (Record at 23).
3) Petitioner did not possess a license to sell gaming supplies.
4) Petitioner did conduct charity gaming during 1997 without a license.
5) As a result of inaccurate record keeping, the Petitioner failed to pay the appropriate fees when renewing its annual bingo license.
6) During the Department's investigation, documentation was obtained allegedly showing that Mike Abbott was paid to operate Petitioner's charity gaming events.
7) The Department produced photocopies of ten (10) checks written to Mr. Mike Abbott and signed by himself and one other person (see Department Exhibit D).
8) The ten (10) photocopied checks in Department's Exhibit D were dated in the months of February and March of 1999.
9) According to the Department's own records, Mr. Mike Abbott was an Operator for the Petitioner during the period of May 1, 2000 to April 30, 2001 (see Department Exhibit A).

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 4-32-9-1 states: A qualified organization may conduct the following activities in accordance with this article:
   (1) A bingo event.
   (2) A charity game night.
   (3) A raffle event.
   (4) A door prize event.
   (5) A festival.
   (6) The sale of pull tabs, punchboards, and tip boards.
3) IC 4-32-9-2 provides: Except as provided in section 3 of this chapter, a qualified organization must obtain a license from the department to conduct an allowable event.

4) Pursuant to IC 4-32-9-25: (a) 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.
5) According to IC 4-32-12-1: (a) The department may suspend or revoke the license of or levy a civil penalty against a qualified organization or an individual under this article for any of the following:
(1) Violation of a provision of this article or of a rule of the department.
(2) Failure to accurately account for:
(A) bingo cards;
(B) bingo boards;
(C) bingo sheets;
(D) bingo pads;
(E) pull tabs;
(F) punchboards; or
(G) tip boards.
(3) Failure to accurately account for sales proceeds from an event or activity licensed or permitted under this article.
(4) Commission of a fraud, deceit, or misrepresentation.
(5) Conduct prejudicial to public confidence in the department.
(b) If a violation is of a continuing nature, the department may impose a civil penalty upon a licensee or an individual for each day the violation continues.
6) IC 4-32-12-2 states: 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.

CONCLUSIONS OF LAW

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.
2) In 1997, the Petitioner purchased and sold gaming supplies without a license in violation of IC 4-32-9-1 and 2.
3) As a result of inaccurate record keeping, the Petitioner failed to pay the appropriate fees when renewing its annual bingo license.
4) The Department did show that Petitioner paid Mr. Abbott; however, it did not meet its burden of proof in showing that Petitioner paid Mr. Abbott for conducting charity gaming events while he was an Operator for the Petitioner.

DEPARTMENTAL ORDER

Following due consideration of the entire record, the Administrative Law Judge orders the following:
The Petitioner's appeal is denied in part and sustained in part. The Petitioner was found to have purchased and sold gaming supplies without a license in violation of Indiana law. The Petitioner also failed to pay the appropriate fees when renewing its annual bingo license as a result of inaccurate record keeping. In addition, Mr. Abbott was found not to have received remuneration from the Petitioner for conducting its gaming operations.

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

02950401.LOF

LETTER OF FINDINGS NUMBER: 95-0401
Indiana Corporate Income Tax
For the Tax Years 1989, 1990, and 1991

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 regarding a specific issue.

ISSUES

I. Applicability of the Adjusted Gross Income Tax and Gross Income Tax – Taxpayer's Income from Licensing Intellectual Property

Authority: U.S. Const. art. I, § 8, cl. 3; U.S. Const. amend. XIV, § 8; IC 6-2.1-2-2; IC 6-3-1-1 et seq.; IC 6-3-2-2(a); 45 IAC 1-1-51; 45 IAC 3.1-1-55; Quill Corp. v. North Dakota, 504 U.S. 298 (1992); Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977); Int'l Harvester Co. v. Wisconsin Department of Taxation, 322 U.S. 435 (1944); Wheeling Steel Corp. v. Fox, 298 U.S. 193 (1936); Indiana Dept. of State Revenue v. Bethlehem Steel Corp., 639 N.E.2d 264 (Ind. 1994); Hoosier Energy v. Dept. of State Revenue, 572 N.E.2d 481 (Ind. 1991); Geoffrey, Inc. v. South Carolina Tax Commission, 437 S.E.2d 13 (S.C. 1993); Del. Code Ann. tit. 30 § 1902(b)(8)

Taxpayer protests the characterization of certain income received from the licensing of intangible patents, trademarks, and intellectual property.

II. Apportionment of Taxpayer's Income Derived from Licensing Intellectual Property

Authority: IC 6-3-2-2(a); 45 IAC 3.1-1-55

Taxpayer argues that – in the event it is determined that it has an Indiana business situs – that the income derived from the licensing of intellectual property should be apportioned to those states in which the ultimate sale of the licensed goods are sold.

III. Ten Percent Negligence Penalty

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

Taxpayer requests that the Department of Revenue (Department) exercise its discretion to abate the ten percent negligence penalty made against taxpayer's additional corporate income tax assessment.

STATEMENT OF FACTS

Taxpayer is a wholly owned subsidiary of Indiana parent company. Parent company is an Indiana based manufacturer of transmission parts. As a manufacturer, the parent company owns valuable patents, trademarks, and certain other intellectual property (hereinafter "intellectual property"). The taxpayer was first incorporated in Delaware after parent company was purchased by a New York holding company.

Taxpayer has, as its physical location, an office in Delaware. Taxpayer has no physical presence in Indiana. It has no office, no employees, and no tangible personal property in Indiana.

Shortly after taxpayer was incorporated in Delaware, taxpayer and Indiana parent company entered into an agreement whereby Indiana parent company assigned all of its intellectual property to the taxpayer. Taxpayer states that the agreement was entered into at the direction of New York holding company. According to taxpayer, this decision was made "to insulate and protect [the intellectual property] from the day-to-day operational and financial risks of [Indiana parent company's] business as a manufacturer." In exchange for the assignment of the intellectual property, Indiana parent company received all of taxpayer's issued and outstanding common stock. Simultaneously with that stock transfer, taxpayer and Indiana parent company received the exclusive right to make use of the intellectual property.

As consideration for the right to use the intellectual property, Indiana parent company paid taxpayer an initial fee of $500,000 and agreed to pay additional yearly fees consisting of five percent of the annual gross sales of certain products manufactured and sold by Indiana parent company. On the same date that taxpayer received the $500,000 initial fee from Indiana parent company, taxpayer paid a $500,000 dividend to Indiana parent company. Thereafter, taxpayer engaged in the regular practice of loaning to

Indiana parent company the same amounts as Indiana parent company paid in royalties to taxpayer. Consequently, Indiana parent company received a deduction for the payments made to taxpayer. This deduction had the effect of reducing Indiana parent company's taxable Indiana gross income. In contrast, taxpayer has never filed Indiana income tax returns. Delaware does not tax income derived from "patents, patent applications, trademarks, trade names and similar types of intangible assets...." Del. Code Ann. tit. 30 § 1902(b)(8).

The audit has proposed adjusted gross income taxes on the amounts taxpayer received from Indiana parent company for 1989, 1990, and 1991. The audit came to this conclusion believing that the facts indicated taxpayer was established by the Indiana parent company as a vehicle to shield a percentage of Indiana parent company's income from state income taxes. In support of this conclusion, the audit cites to the following:

The Indiana parent company owns 100 percent of taxpayer.

Taxpayer's income producing assets consist solely of Indiana parent company's intellectual property.

Taxpayer licenses the intellectual property exclusively to Indiana parent company.

Taxpayer, Indiana parent company, and New York holding company share common officers and directors.

All of taxpayer's income derived from Indiana parent company's royalties, bank interest on the royalty income, and Indiana parent company's loan interest payments. There was no evidence that the loan was ever repaid.

The royalty payments – made by Indiana parent company to taxpayer – were returned to Indiana parent company by the terms of the parties' loan agreement.

The Indiana parent company – even subsequent to the purported assignment of the intellectual property to taxpayer – continued to exercise ownership control over the intellectual property. These ownership rights are evidenced by the Indiana parent company's practice, on multiple occasions, of using the intellectual property as security in order to obtain additional financing from unrelated third parties. Audit determined that Indiana parent company, on at least four occasions, assigned rights to the intellectual property to three different financing entities. In each case the security interest was assigned after the Indiana parent company had purportedly made a definitive assignment of the same intellectual property rights to taxpayer.

In summary, the audit concluded that the Indiana parent company continues to own and control the intellectual property, Indiana is the business situs of the intellectual property, and that the income derived from the use of the intellectual property is Indiana source income and properly taxable to the state of Indiana. Additionally, the audit argued that Indiana is entitled to ignore taxpayer's separate corporate existence and to treat, for purposes of determining the parties' corporate income tax liability, taxpayer and its Indiana parent company as a single entity.

DISCUSSION

I. Applicability of the Adjusted Gross Income Tax and Gross Income Tax

A. Adjusted Gross Income Tax

Indiana imposes an adjusted gross income tax on income derived from sources within the state. The adjusted gross income tax, IC 6-3-1-1 et seq., is an apportioned tax specifically designed to reach income derived from interstate transactions. Indiana Dept. of State Revenue v. Bethlehem Steel Corp., 639 N.E.2d 264, 266 n. 4 (Ind. 1994). The legislature has defined "adjusted gross income" as follows:

(1) income from real or tangible property located in this state; (2) income from doing business in this state; (3) income from a trade or profession conducted in this state; (4) compensation for labor or services rendered within this state; and (5) income from stocks, bonds, notes, bank deposits, patents, copyrights, secret processes and formulas, good will, trademarks, trade brands, franchises, and other intangible personal property if the receipt from the intangible is attributable to Indiana under section 2.2 of this chapter. IC 6-3-2-2(a).

IC 6-3-2-2 was amended January 1, 1990, midway through taxpayer's audit cycle. However, the amendment only affected the attribution of interest and dividend income and did not touch upon or affect other income sources – including income attributable to intellectual property – previously and currently listed within IC 6-3-2-2(a)(5). Because the legislature made no change in the language regarding the tax treatment of income attributable to intellectual property when it amended IC 6-3-2-2(a)(5), there is no reason to presume that Department regulation 45 IAC 3.1-1-55, and its reference to the business situs of intangible personal property, does not continue to apply with full force.

In order for Indiana to tax the income derived from an intangible, the intangible – such as taxpayer's intellectual property – must have acquired a "business situs" within the state. 45 IAC 3.1-1-55 states that "[t]he situs of intangible personal property is the commercial domicile of the taxpayer... unless the property has acquired a "business situs" elsewhere. 'Business situs is the place at which intangible personal property is employed as capital; or the place where the property is located if possession and control of the property is localized in connection with a trade or business so that substantial use or value attaches to the property."

It is apparent that the taxpayer's intellectual property has acquired a "business situs" within Indiana. Taxpayer licenses the intellectual property for the exclusive use by the Indiana parent company which conducts its manufacturing activity within the state. The value taxpayer derives from the exploitation of the intellectual property is attributable entirely to activities occurring within the state of Indiana. The value of the intellectual property to the taxpayer consists solely of the ability to "place" that intellectual property

within the state and to derive the consequent economic benefits attributable entirely to the intellectual property's Indiana business situs. As the regulation itself states, "'Business situs' is the place at which [the] intangible personal property is employed as capital...." 45 IAC 3.1-1-55. The place at which "value attaches to the [intellectual] property" is within the state of Indiana. Id.

In addition, the fact that taxpayer's intellectual property has acquired a business situs within the state is evidenced by Indiana parent's company's independent exploitation of that same intellectual property. In transactions entirely unrelated to the taxpayer's licensing of the intellectual property for use within the state, Indiana parent company has, on multiple occasions, assigned the intellectual property as security interest to unrelated third parties. Again, the regulation states that the business situs of intangible property is that place where "the property is located if possession and control of the property is localized in connection with a trade or business so that substantial use or value attaches to the property." Id. Indiana parent's exercise of ownership rights over the intellectual property indicates that "possession and control of the property is localized" within the state.

It cannot be denied that the value of the intellectual property to the taxpayer derives entirely from the ability to assign the intellectual property to Indiana parent company and for taxpayer to reap the benefits derived from exploiting the intellectual property through activities occurring entirely within the state. It would be a meaningless and unprofitable exercise in formalistic property rights for taxpayer to husband the intellectual property entirely within Delaware.

However, taxpayer interposes several constitutional arguments which would have the effect of limiting Indiana's ability to tax the income attributable to the intellectual property. Taxpayer states that "[t]he imposition of taxation on [taxpayer] as a foreign corporation violates the Commerce Clause and the Due Process Clause of the U.S. Constitution." Taxpayer is correct in its assertion that both the Due Process Clause, U.S. Const. amend. XIV, § 8, and the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, require that there exist a minimum connection between a state and the object of the tax and that those constitutional requirements must be met before Indiana can exercise taxing authority over taxpayer's income.

In Quill Corp. v. North Dakota, 504 U.S. 298, 306 (1992), the Supreme Court stated that "[t]he Due Process Clause 'requires some definite link, some minimum connection between a state and the person, property or transaction it seeks to tax.'" However, the Court concluded that the due process requirement is satisfied "if a foreign corporation purposefully avails itself of the benefits of an economic market in the forum state.... even if the [the taxpayer] has no physical presence in the state." Id. at 307. Although taxpayer's physical existence – measured by its business location, employees, and corporate existence – may be confined within Delaware's boundaries, taxpayer has directed its activities at the residents of Indiana and at the benefits conferred by Indiana in making it possible for taxpayer to conduct business within the state. Taxpayer has not been unwillingly brought into contact with Indiana by the unforeseen and unilateral actions of an independent third-party. To the contrary, there is every indication that taxpayer directed its activities toward licensing the intellectual property to Indiana parent company and received substantial income from the use of the intellectual property within the state. The fact that Indiana confers protection, benefits, and opportunities upon taxpayer is apparent from taxpayer's simple ability to derive income from conducting business within the state. Therefore, under the standards set out in the Quill decision, the Due Process Clause does not prevent Indiana from taxing the income derived by taxpayer in availing itself of the Indiana business situs.

Taxpayer argues that Indiana may not tax its income by virtue of the protections afforded under the Commerce Clause. In Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977), the Supreme Court outlined a four-part test for determining whether a state's exercise of its taxing authority is offensive to the Commerce Clause. The Court stated the exercise of the state's taxing authority would survive a constitutional challenge "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." Id. Taxpayer argues that the proposed tax violates the Commerce Clause because taxpayer does not have a "substantial nexus" with Indiana and because the tax is not "fairly apportioned."

Taxpayer claims that it does not have a "substantial nexus" with Indiana because it is not commercially domiciled in Indiana, does not have a business situs in Indiana, conducts no business in Indiana, derives no services from Indiana, and has no employees or property within the state. However, as the court in Geoffrey, Inc. v. South Carolina Tax Commission, 437 S.E.2d 13, 23 (S.C. 1993), *cert. denied,* 510 U.S. 992 (1993), noted, "It is well settled that the taxpayer need not have a tangible, physical presence in a state for income to be taxable there. The presence of intangible property is sufficient alone to establish nexus." That determination echoed the standard set out by the Supreme Court in Int'l Harvester Co. v. Wisconsin Department of Taxation, 322 U.S. 435, 441-442 (1944) when the Court stated that, "A state may tax such part of the income of a non-resident as is fairly attributable either to property located in the state or to events or transactions which, occurring there, are subject to state regulation and which are within the protection of the state and entitled to the numerous other benefits which it confers." (*See also* Wheeling Steel Corp. v. Fox, 298 U.S. 193 (1936) "The rule that the taxable situs of intangibles is at the technical domicile of the owner is but a mere fiction, and will not be followed when the fact is clear that the intangible property has a situs elsewhere.") The contractual relationship between taxpayer and Indiana parent company creates the requisite "substantial nexus" with Indiana necessary for Indiana to subject taxpayer to its adjusted gross income tax. By virtue of that licensing agreement, Indiana parent company uses the intellectual property to enhance the value of the products manufactured within the state and to generate the sales which form the basis upon which the taxpayer receives a continuous stream of royalty income.

In addition, the taxpayer argues that the proposed tax violates the Commerce Clause because the tax is not "fairly apportioned." Taxpayer apparently argues that the income at issue should "apportioned" back to the state of Delaware. As the court in Hoosier Energy v. Dept. of State Revenue, 572 N.E.2d 481, 485 (Ind. 1991) stated, "As a general proposition, a state tax on interstate commerce must be fairly apportioned to prevent excessive taxes on such sale as each state takes its bite out of the interstate transaction as it passes through each taxing state." Therefore, in order for a tax to meet the Complete Auto "fairly apportioned" requirement, the state must demonstrate that the taxpayer's income is not consumed by multiple states exercising successive taxing authority over the same income in a manner which offends the Commerce Clause. However, taxpayer has presented no evidence indicating that the income is in anyway potentially subject to multiple taxation. The only other state which could conceivably exercise taxing authority over the income is Delaware which is where taxpayer is physically located. There is simply no indication that Delaware has or will subject the income to its taxing authority. To the contrary, Del. Code Ann. tit. 30 § 1902(b)(8) would seem to specifically exempt income derived from intellectual property from the state's taxing authority. The statute states, in relevant part that:

> The following corporations shall be exempt from taxation under this chapter: (8) Corporations whose activities within this State are confined to the maintenance and management of their intangible investments... and the collection and distribution of the income from such investments.... For purposes of this paragraph, "intangible investments" shall include, without limitation, investments in... patents, patent applications, trademarks, trade names and similar types of intangible assets....

In the absence of any indication whatsoever that taxpayer's income would be subject to successive taxation by multiple states, taxpayer's "fairly apportioned" argument must fail. To the contrary, the evidence supports the conclusion that the imposition of the state's adjusted gross income tax meets the apportionment requirements set forth in Complete Auto.

Accordingly, because taxpayer's intellectual property has acquired an Indiana "business situs," and because Indiana's exercise of taxing authority over the income derived from that property does not offend either the Due Process Clause or the Commerce Clause, taxpayer's income is properly subject to the state's adjusted gross income tax scheme.

B. Gross Income Tax

In addition to the adjusted gross income tax, Indiana imposes a tax, known as the "gross income tax," on the "taxable gross income" of a taxpayer who is a resident or domiciliary of Indiana and on the taxable gross income from Indiana sources by a taxpayer who is not a resident or domiciliary of Indiana. IC 6-2.1-2-2.

Under the regulations governing the gross income tax, "taxable gross income" includes income that is derived from "intangibles." 45 IAC 1-1-51. The term "intangibles" includes:

> notes, stocks in either foreign or domestic corporations, bonds, debentures, certificates of deposit, accounts receivable, brokerage and trading accounts, bills of sale, conditional sales contracts, chattel mortgages, "trading stamps," final judgments, leases, royalties, certificates of sale, choses in action *and any and all other evidences of similar rights capable of being transferred, acquired or sold.* (*Emphasis added*). Id.

In order for Indiana to impose the gross income tax on income derived from taxpayer's intangibles, the Department must determine that the income is derived from a "business situs" within the state. Id. The regulation states that taxpayer has established a "business situs" within the state "[i]f the intangible or the income derived therefrom forms an integral part of a business regularly conducted at a situs in Indiana...." Id. Once the taxpayer has established a "business situs" within the state, "and the intangible or the income derived therefrom is connected with that business, either actually or constructively, the gross receipts of those intangibles will be required to be reported for gross income tax purposes." Id.

It is apparent that the income derived from the taxpayer's licensing of the intellectual property, is income derived from a "business situs" within Indiana and is properly subject to the state's gross income tax scheme. The intellectual property is exclusively licensed to Indiana parent company. The intellectual property is "localized" within the state in the sense that the Indiana parent company employs the property to enhance the value of goods manufactured within the state. Taxpayer would derive no income from the intellectual property except for the fact that the intellectual property was licensed for use within Indiana and then actually used within Indiana in conjunction with manufacturing activities themselves occurring within the state.

Accordingly, because the intangible intellectual property has acquired a business situs within the state and because the income at issue is "connected with that business, either actually or constructively," the income is subject to the state's gross income tax.

FINDING

Taxpayer's protest is respectfully denied.

II. Apportionment of Taxpayer's Income Derived from Licensing Intellectual Property

Taxpayer has submitted an additional argument relevant in the event that the Department determines that taxpayer has a taxable presence within the state.

Taxpayer entered into an agreement to license certain intellectual property back to parent company. Parent company paid taxpayer for the privilege of using that intellectual property. Parent company used the intellectual property in the construction of its engines. Parent company sold its engines to customers located in Indiana and other states.

Taxpayer argues that the source of its income was derived from the sale of parent company's engines to the ultimate consumers of those engines. Because parent company sold most of its engines to out-of-state customers, the income producing "events"

occurred in those out-of-state locations and – as a result – the income attributable to the out-of-state "events" may not be apportioned to Indiana. Specifically, because only .4 percent (four-tenths of one percent) of parent company's sales were made in Indiana, only.4 percent of taxpayer's licensing and royalty income could be apportioned to Indiana. As a consequence, 99.6 percent of taxpayer's income would be apportioned to out-of-state sources.

Indiana imposes the adjusted gross income tax on income derived from sources within this state. The legislature has defined "adjusted gross income" as "(1) income from real and tangible or tangible personal property located in this state; (2) income from doing business in this state; (3) income from a trade or profession within this state; (4) compensation for labor or services within this state; and (5) income from stocks, bonds, notes, bank deposits, patents, copyrights, secret processes and formulas, good will, trademarks, trade brands, franchises, and other intangible property if the receipt from the intangible is attributable to Indiana under section 2.2 of this chapter...." IC 6-3-2-2(a).

The regulations provide that Indiana may not tax the income derived from intangible property unless the intangible property has acquired a situs within the state. Specifically, the regulation states:

> The situs of intangible personal property is the commercial domicile of the taxpayer (i.e., the principal place from which trade or business of the taxpayer is directed or managed), unless the property has acquired a "business situs" elsewhere. "Business situs" is the place at which intangible personal property is employed as capital; or the place where the [intangible] property is located if possession and control of the property is localized in connection with a trade or business so that substantial use or value attaches to the property. 45 IAC 3.1-1-55.

Therefore, Indiana may not apportion to itself income from intangible personal property unless the taxpayer has a commercial domicile within the state or the intangible property has acquired a "business situs" within the state. Clearly, taxpayer's commercial domicile is Delaware because Delaware is the location from which taxpayer directs and manages its trade or business. Therefore the issue becomes whether the intangible personal property – taxpayer's intellectual property – has acquired a "business situs" within Indiana.

Taxpayer maintains that the "business situs" of the intellectual property is the location of the ultimate sale of each of parent company's engines. Under the scenario proposed by taxpayer, if parent company sold 1,000 engines, taxpayer's intellectual property would have acquired a "business situs" in 1,000 different locations.

Taxpayer misapprehends the application of the apportionment regulation. Taxpayer has entered into a mutually beneficial agreement with parent company which enables parent company to employ taxpayer's intellectual property to construct its engines. The fact that the completed engines are then shipped to multiple in-state and out-of-state locations, and then sold to at those multiple locations, is an irrelevancy when determining the "business situs" of the intellectual property. Because Indiana is the location of the "trade or business [where] substantial value attaches to the [intellectual] property" (45 IAC 3.1-1-55), Indiana is the "business situs" of that intellectual property. Clearly, Indiana parent company is the place where "possession and control of the property is localized." Id. If one of Indiana parent company's numerous out-of-state engine customers reverse engineered that engine, used the patented techniques to produce its own line of competing engines, and attached parent company's trade mark to that line of engines, parent company would be entitled to protest the out-of-state customer's transgression of its intellectual property. The out-of-state trespasser – making the initial purchase of parent company's engine – did not acquire any rights to the intellectual property because the "possession and control of the property is localized" with Indiana parent company. The mere fact that taxpayer's income is, in part, *measured* by the number of engines parent company sells to both in-state and out-of-state customers, does not change the fact that taxpayer's licensing agreement was *with* Indiana parent company and that possession and control of the intellectual property was invested exclusively with Indiana parent company.

Conversely, taxpayer's argument would possibly have a certain cogency had taxpayer entered into multiple agreements – for the same intellectual property – with different licensees of that property. If taxpayer had licensed the property to an Indiana, Wisconsin, and Connecticut licensor, Indiana would be entitled to apportion to itself only that income derived from the agreement entered with the Indiana licensee.

Taxpayer cites to the Department's own administrative rulings in support of its argument. In the cited Letter of Findings, the Department found that the income an out-of-state franchisor received from agreements with Indiana franchisees was – for purposes of the state's adjusted gross income tax scheme – Indiana source income. As that earlier Letter of Findings determined, "what the taxpayer sells and the franchisee purchases, is the right to vigorously exploit the intangible asset." However, in the same way that the out-of-state franchisor received Indiana source income from entering into franchise agreements with the individual franchisees, taxpayer has received Indiana source income after it entered into an agreement with Indiana parent company. That the Indiana franchisees may have occasionally sold their food products – labeled with out-of-state franchisor's brand name – to out-of-state customers, was irrelevant. That the taxpayer's parent company sold the majority of its engines – labeled with taxpayer's licensed trade name and built with taxpayer's patents – to out-of-state customers is equally irrelevant.

Taxpayer entered into a licensing agreement with Indiana parent company. The agreement placed the licensed intellectual property within the control and possession of Indiana parent company. Substantial value attached to the intellectual property when the property was "localized" with Indiana parent company. The income paid as consideration for the right to possess, control, and exploit that that property derived from placing that property at an Indiana business situs and is entirely attributable to Indiana.

FINDING

Taxpayer's protest is respectfully denied.

III. Ten Percent Negligence Penalty

Taxpayer has requested that the Department exercise its statutory discretion to abate the ten percent negligence penalty assessed under authority of IC 6-8.1-10-2.1(a). The penalty was assessed against the taxpayer's additional corporate income tax liabilities determined for the years 1989, 1990, and 1991.

IC 6-8.1-10-2.1(d) provides potential relief from imposition of the penalty. The statute states that if a person – subject to the negligence penalty imposed under IC 6-8.1-10-2.1(a) – can demonstrate that the failure to file a tax return, pay the full amount of tax shown on the person's return, timely remit tax held in trust, or pay a 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 the "reasonable care, caution, or diligence, as would be expected of an ordinary reasonable taxpayer." Negligence results from a "taxpayer's carelessness, thoughtlessness, disregard, or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations."

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

The Department finds that the taxpayer has established "reasonable cause" sufficient to warrant abating the ten percent negligence penalty.

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

04970379.LOF

LETTER OF FINDINGS NUMBER: 97-0379 ST
Sales and Use Tax
For Tax Periods: 1994 through 1996

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

ISSUES

I. Sales and Use Tax – Delivery Charges

Authority: IC 6-2.5-2-1, IC 6-2.5-4-1(b), IC 6-2.5-4-1(e)(2), IC 26-1-2-401(2), 45 IAC 2.2-4-3(b)(3), 45 IAC 2.2-4-3(a)

The taxpayer protests the imposition of sales tax on delivery charges.

STATEMENT OF FACTS

The taxpayer is a wholesale building materials distributor with two Indianapolis locations. The taxpayer also manufactures doors and frames. During the tax period, the taxpayer provided delivery services for certain materials sold to its customers. Delivery was made with trucks either owned or leased by the taxpayer. The taxpayer separately listed the delivery charges on invoices submitted to customers relating to goods purchased by them. The taxpayer did not collect or remit sales taxes on the deliveries. In a routine audit, the Indiana Department of Revenue (department) assessed sales tax on the delivery charges. The taxpayer protested the assessment and a hearing was held. Further facts will be provided as necessary.

I. Sales and Use Tax – Delivery Charges

DISCUSSION

Retail transactions made in Indiana are subject to sales tax. IC 6-2.5-2-1. A retail transaction is defined generally as the acquiring and subsequent selling of tangible personal property. IC 6-2.5-4-1(b). Except for certain enumerated services, sales of services are generally not retail transactions and are not subject to sales tax. Delivery prior to the transfer of title to the purchaser is, however, one of the enumerated services that is specifically subjected to sales tax. IC 6-2.5-4-1(e)(2).

The taxpayer maintains that separately stated delivery charges where no F.O.B. has been established are non taxable. The taxpayer bases this conclusion upon 45 IAC 2.2-4-3(b)(3) which states, "[d]elivery charge[s] separately stated where no F.O. B. has been established [are] non taxable." The taxpayer's reliance on F.O.B. designations is misplaced. F.O.B. designations are applicable only when public transportation companies deliver the product.

There are two prerequisites for separately stated delivery charges to be subject to sales tax. The Regulations state these prerequisites as "[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 of property not owned by the buyer." 45 IAC 2.2-4-3(a). In this instance the delivery of the goods is made by or on behalf of the taxpayer.

The application of sales tax to these delivery charges, then, depends upon when title to the goods transferred to the buyer. The Indiana law concerning the passing of title of goods to the buyer states that, "Unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods... " IC 26-1-2-401(2). The taxpayer offered no evidence indicating that title to the goods passed to the buyer at any point prior to delivery of the goods. The taxpayer's fact situation, then, meets the requirements of 45 IAC 2.2-4-3(a). The delivery charges are subject to Indiana sales tax.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04980426.LOF

LETTER OF FINDINGS NUMBER: 98-0426
Sales Tax
Calendar Years 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(S)

I. Sales Tax – Unreported Sales

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, consisting of two fifty percent (50%) owners, is a used car lot that was audited for sales tax compliance. A BMV printout showed that sales tax was collected under the taxpayer's dealer number in 1996 but not remitted. The auditor found that the dealers license was not renewed for calendar year 1996 and what appeared to be part of 1995. The BMV printout lists the taxpayer's name, dealer number and account number and based upon this information, the auditor attributed the tax to the corporation.

Taxpayer failed to file sales tax returns and information contained in the audit was obtained from the BMV printout.

I. Sales Tax – Unreported Sales

DISCUSSION

Taxpayer merely states he does not owe the money. Taxpayer failed to provide information to allow the department to make adjustments to the sales tax audit. The information was provided by the BMV.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04990034.LOF

LETTER OF FINDINGS NUMBER: 99-0034
Sales Tax
Calendar Years 1994, 1995, 1996, 1997, and Partial Year Ended 04-30-98

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. Selling at Retail – Delivery Charges

Authority: 45 IAC 2.2-4-3; 45 IAC 2.2-4-27

Taxpayer protests tax on delivery charges.

STATEMENT OF FACTS

Taxpayer has two business locations in Kentucky and is primarily in the business of renting commercial and industrial equipment including forklifts, cranes, manlifts, welders, compressors, backhoes, loaders, generators, and other miscellaneous items. Taxpayer also rents smaller, non-commercial items that are not delivered but picked up by its customers. Taxpayer normally does not furnish an operator with the equipment rental. The taxpayer delivers the heavy equipment to locations in Indiana. Taxpayer's customers are primarily construction contractors. Taxpayer also buys and sells some equipment that they do not deliver. The customers always pick up these items. Taxpayer also does service work.

Taxpayer submitted a protest dated January 4, 1999 with copies of invoices that it claimed were exempt. The file was returned to the auditor for verification. The auditor returned the file to the legal division without resolution. The Legal Division asked for additional information in letters dated May 16, 2001, and July 2, 2001 which also explained the reasons for the assessment. On September 21, 2001 a hearing was scheduled for October 9, 2001 which the taxpayer cancelled on September 26, 2001. The hearing officer verified the cancellation with a letter sent the same date and allowed an additional twenty days for proof of exemption. No response was received and the Department scheduled another hearing for February 5, 2002. The taxpayer did not call or appear at the hearing. The decision is based upon information contained in the file.

The audit assessed sales tax on taxable Indiana rentals including delivery charges. Taxpayer was not registered to collect sales tax.

I. Selling at Retail – Delivery Charges

DISCUSSION

Taxpayer states that delivery is exempt.

All elements of consideration are included in gross retail income subject to tax. 45 IAC 2.2-4-3 states that separately 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 of property not owned by the buyer. 45 IAC 2.2-4-27 (c) states that gross receipts are subject to tax, i.e.; the amount of actual receipts means the gross receipts from the rental or leasing of tangible personal property without any deductions whatsoever for expenses or costs incidental to the conduct of the business.

In reviewing the audit report, the hearing officer found that the taxpayer was assessed sales tax on rental items plus delivery costs in accordance with 45 IAC 2.2-4-27(a)(1) that states that the amount of actual receipts means the gross receipts from the rental or leasing of tangible personal property without any deductions whatsoever for expenses or costs incidental to the conduct of the business. Taxpayer is partially sustained where tax was assessed on pickup and denied to the extent that sales tax was charged on delivery.

FINDING

Taxpayer's protest is partially sustained and partially denied.

DEPARTMENT OF STATE REVENUE

02990402.LOF

LETTER OF FINDINGS NUMBER: 99-0402
Gross and Adjusted Gross Income Tax
Calendar Years Ended 12/31/93, 12/31/94, and 12/31/95

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer protests the penalty assessed because the overall audit resulted in a net refund to the taxpayer. Taxpayer states that it was audited by the IRS and no penalty was assessed. Further it believes that a penalty on a procedural issue that does not impact overall tax paid is extremely punitive to a compliant taxpayer.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer states the penalty was incorrectly assessed because an affiliate's gross income is being reduced by the same amount. To charge penalty on a procedural issue that does not impact overall tax paid is extremely punitive to a compliant taxpayer.

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 pay approximately forty-four percent (44%) and fourteen percent (14%) of its tax due for calendar years 1993 and 1994, respectively, which consisted of gross income for sales made to affiliated members and various adjustments to adjusted gross income. Each year of the audit stand on its own merits and the taxpayer has not provided reasonable cause to allow a penalty waiver.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04990413.LOF

LETTER OF FINDINGS NUMBER: 99-0413
Sales Tax
Calendar Years 1995, 1996, and 1997

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

ISSUE(S)

I. Selling at Retail – Unreported Taxable Sales

Authority: 45 IAC 2.2-6-8

Taxpayer protests tax on unreported sales.

STATEMENT OF FACTS

Taxpayer was in the business of buying and selling used motor vehicles. No records were made available to the auditor and reliance was placed upon the accuracy of the ST-108 recap data obtained from the Bureau of Motor Vehicles. Taxpayer filed a return for January 1995 only and submitted no further returns. Billings were issued by the Department based on the best information available prior to audit.

Taxpayer submitted a protest for the 1995 year that was received by the Indiana Department of Revenue on July 27, 1999. Taxpayer's attorney submitted a written brief dated May 16, 2001 explaining that an assistant manager stole the proceeds.

I. Selling at Retail – Unreported Taxable Sales

DISCUSSION

Taxpayer states its assistant manager ran off with the money, therefore she is not liable.

In reviewing the audit report, it is noted that the assessment stems solely from a schedule of "Dealer Title Transactions". The auditor replaced the taxpayer's "best information" billings with those of the actual title transactions.

Taxpayer was negligent in failing to monitor its associates' activities and should have been aware that no ST103's were filed. Taxpayer had billings before the onset of the audit and has not provided proof that the assessment is in error.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

02990446.LOF

LETTER OF FINDINGS NUMBER: 99-0446
Gross and Adjusted Gross Income Tax
Calendar Years Ended 12/31/93 and 12/31/94

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 states that it was audited by the IRS and no penalty was assessed. Further it believes that a penalty on a procedural issue that does not impact overall tax paid is extremely punitive to a compliant taxpayer.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer states the penalty was incorrectly assessed because an affiliate's gross income is being reduced by the same amount. To charge penalty on a procedural issue that does not impact overall tax paid is extremely punitive to a compliant taxpayer.

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 approximately twenty-one percent (21%) and thirty-four percent (34%) of its gross income for calendar years 1993 and 1994, respectively, which consisted of gross income for sales made to affiliated members. Taxpayer also failed to include sales of promotional and non-food sales. The taxpayer has not provided reasonable cause to allow a penalty waiver.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04990497.LOF

LETTER OF FINDINGS NUMBER: 99-0497
Sales and Use Tax
For the Period: 1995 through 1998

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

ISSUES

I. Sales/Use Tax – Pallet Labels

Authority: IC 6-2.5-5-6; 45 IAC 2.2-5-14

The taxpayer protests the assessment of sales/use tax.

II. Sales/Use Tax – Forklifts

Authority: 45 IAC 2.2-5-8

The taxpayer protests the assessment of sales/use tax.

III. Tax Administration – Penalty/Interest

Authority: IC 6-8.1-10-2.1; 45 IAC 15-11-2; IC 6-8.1-10-1

The taxpayer protests the assessment of a negligence penalty and interest.

STATEMENT OF FACTS

The taxpayer is a book publishing company with a distribution center in Indiana. More facts will be provided below.

I. Sales/Use Tax – Pallet Labels

DISCUSSION

Books are sent from out-of-state to the taxpayer's distribution center in Indiana. At the Indiana distribution center, books are "stickered according to customer requests/specifications and packaged according to the customer's orders of assortments." (Per the taxpayer the types of stickers include: price stickers, UPC coding, and department store coding). In order to keep track of books in the stickering/sorting process, the taxpayer places labels on its pallets:

> [T]hroughout the various stickering and sorting processes the product is placed into and removed from racks set up to temporary store the incomplete product. To identify where product is in the process and what still remains to be done, *pallet*

labels are placed on all pallets of product and each time the pallet is removed from temporary storage and something is added or removed from the pallet a new pallet label is attached. (Emphasis added)

The pallet labels at issue are not incorporated into the product (they are not a material part of the books), and are simply used for inventory/tracking by the taxpayer. Thus the labels do not meet the requirements of IC 6-2.5-5-6, which states that:

Transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for incorporation as a material part of other tangible personal property which the purchaser manufactures, assembles, refines, or processes for sale in his business.

Also, 45 IAC 2.2-5-14 states that regarding incorporation the "material must be physically incorporated into and become a component of the finished product." Again, that is not the case with the pallet labels, which are used for inventory control purposes for the taxpayer's convenience.

FINDING

The taxpayer's protest is denied.

II. Sales/Use Tax – Forklifts

DISCUSSION

Taxpayer argues that a large percentage of its forklift usage is to move product within the manufacturing process. The auditor notes that the taxpayer receives a finished product (viz., books) and stickers, assorts, and reboxes the product.

The Indiana Administrative Code (45 IAC 2.2-5-8(f)) specifically deals with forklift usage, noting that a forklift used "exclusively to move work-in-progress from a temporary storage area in a plant and to transport it to a production machine for processing" is exempt usage, whereas a forklift used "exclusively to move finished goods from a storage warehouse and to load them on trucks for shipment to customers" is taxable usage. 45 IAC 2.2-5-8(f)(5) allows that one forklift can be used in an exempt and a non-exempt manner, and thus allows for a percentage exemption based on the usage. In the case at hand, the taxpayer argues that it is entitled to a percentage exemption.

Taxpayer describes its process, and forklift usage, as follows: product (books) is made out-of-state, and shipped in bulk to the Indiana distribution center. Once the books arrive at the distribution center, forklifts are used to remove the books from the trucks. The books (on pallets) are taken to a temporary storage area. At a later point, the books are moved from temporary storage (again by forklift) and taken to a conveyor line where they will be stickered according to vendor requirements. The forklifts will again move the books back to storage (at this point, for a variety of reasons). Finally, the books are shrink-wrapped and a forklift is used to take them to the shipping area for loading onto trucks to go to the designated vendor.

In order for the forklift usage to be exempt, even on a percentage basis, the taxpayer has to be engaged in production. The auditor contends that the taxpayer's distribution center is not engaged in production. A finished product (books) is brought to the distribution center, and depending on the vendor, a specific sticker is placed on the books. The sticker amounts to a price tag or a price label that is affixed to the final, finished product. The same analysis that was used in finding that the pallet labels are not exempt is applicable here: the pricing stickers are not a material or integral part of the finished product. Given that the stickering of the books does not constitute production, the forklift usage is not exempt.

FINDING

Taxpayer's protest is denied.

III. Tax Administration – Penalty/Interest

DISCUSSION

The taxpayer protests the imposition of the ten percent (10%) negligence penalty. The Indiana Code section 6-8.1-10-2.1 imposes a penalty if the tax deficiency was due to the negligence of the taxpayer. Department regulation 45 IAC 15-11-2 states that negligence is "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer."

Subsection (d) of IC 6-8.1-10-2.1 allows the penalty to be waived upon a showing that the failure to pay the deficiency was due to reasonable cause. In order to establish this, the taxpayer must show that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed...." 45 IAC 15-11-2(c).

Taxpayer argues that "The understatements of Use Tax were the result of bona fide interpretations of the tax statute" and not the result of negligence or intentional disregard of the law. This was the taxpayer's first audit; also, the taxpayer did have a self-assessment system for use tax on out of state purchases.

The taxpayer also protests the imposition of interest. Pursuant to IC 6-8.1-10-1(e) the Department may not "waive the interest imposed under this section." Taxpayer's argument on this issue turns on the fact that it has filed bankruptcy (twice). The taxpayer states that "[I]nterest cannot be assessed during the period [the taxpayer] is under bankruptcy protection." Under Indiana law, the interest cannot be waived.

FINDING

The taxpayer's protest of the penalty is sustained; the protest of the interest is denied.

DEPARTMENT OF STATE REVENUE

02990552.LOF

LETTER OF FINDINGS NUMBER: 99-0552
Income Tax
For Tax Year 1995

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ISSUES

I. Adjusted Gross Income Tax – Unitary (Combined) Filing Status

Authority: *Mobil Oil Corporation v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 100 S.Ct. 1223 (1980); *Exxon Corp. v. Department of Revenue of Wisconsin*, 447 U.S. 207, 100 S.Ct. 2109 (1980); *ASARCO, Inc. v. Idaho State Tax Commission*, 458 U.S. 307, 102 S.Ct. 3103 (1982); *F.W. Woolworth v. Taxation and Revenue Department of New Mexico*, 458 U.S. 354, 102 S.Ct. 3128 (1982); *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768, 112 S.Ct. 2251 (1992); *Container Corp. v. Franchise Tax Board*, 463 U.S. 159, 180, n. 19, 103 S.Ct. 2933, 2948, n. 19 (1983); IC 6-2.1-5-5(b); IC 6-3-2-2(l); IC 6-3-2-2(q); 35 ILCS 5/1501(a)(27); Tenn.Code Ann. § 67-4-2004(25)(B)

Taxpayer protests Tax Policy's 1996 decision denying taxpayer permission to file unitary combined tax returns, and requests that we revisit Tax Policy's 1996 decision.

II. Adjusted Gross Income Tax – Consolidated Returns

Authority: *Indiana Department of State Revenue v. Continental Steel Corp*., 399 N.E.2d 754 (Ind.App. 1980); *Gilmore Steel Corporation v. Indiana Department of State Revenue*, 9 OTR 210; *Chattanooga Glass Co. v. Strickland*, 244 Ga. 603, 261 S.E.2d 599 (1979); *Miles Laboratories v. Department of Revenue*, 274 Ore. 395, 546 P.2d 1081 (1976); IC 6-3-2-2; IC 6-3-2-2(a)(2); IC 6-3-2-2(a)(5); IC 6-3-4-14; 45 IAC 3.1-1-38; 45 IAC 3.1-1-111; 15 USC §§ 381-384 (1999) (P.L. 86-272)

Taxpayer claims that if taxpayer and its four affiliated members do not qualify to file on a unitary basis with taxpayer for Indiana tax purposes, then alternatively taxpayer and the four members do qualify to file on a consolidated basis. As such, taxpayer protests the Audit Division's determination that four members of taxpayer's affiliated group should have been removed from taxpayer's consolidated adjusted gross income tax return because they did not have adjusted gross income from sources within Indiana.

STATEMENT OF FACTS

Taxpayer is an Indiana corporation and holding company and parent of numerous wholly owned subsidiaries. Taxpayer operates under its parent corporation, a European based multi-national corporation (hereinafter, "Parent"). Taxpayer is responsible for securing financing for all United States based subsidiary corporations. Taxpayer is also responsible for providing its Parent with consolidated financial information, as well as other financial information regarding the United States based operations. In December 1995, taxpayer requested permission from the Tax Policy division of the Department of Revenue to file unitary combined tax returns with its subsidiaries, effective for the tax year 1995. In a letter dated February 1996, Tax Policy denied taxpayer permission to file on a unitary basis.

For its tax year 1995, taxpayer filed a consolidated Indiana return (Form IT-20) with its subsidiaries, *i.e.*, the members of its affiliated group, for gross income and adjusted gross income tax purposes. A tax assessment resulted when the auditor excluded four subsidiaries from the taxpayer's Indiana consolidated return for income tax purposes because the subsidiaries where neither incorporated in nor qualified to do business in Indiana. The auditor then added to taxpayer's taxable gross income the inter-company receipts that were deducted under the consolidated return. The auditor also disallowed the taxpayer's consolidated filing for adjusted gross income tax purposes, with respect to the four subsidiaries, because the subsidiaries did not have sufficient nexus with Indiana to qualify for consolidated filing status. Specifically, the auditor noted that she excluded the subsidiaries on the basis that the subsidiaries did not have adjusted gross income derived from Indiana sources. Additional facts appear below as necessary.

I. Adjusted Gross Income Tax – Unitary (Combined) Filing Status

DISCUSSION

Taxpayer concedes that it overlooked Indiana's requirement that members of an affiliated group be incorporated in the state of Indiana or authorized to do business in the state of Indiana to file a consolidated return for gross income tax purposes. *See* IC 6-2.1-5-5(b). Nevertheless, taxpayer asks the Department to revisit Tax Policy's determination that taxpayer may not file unitary combined returns.

In addressing the question of whether Tax Policy erred in denying taxpayer permission to file on a unitary basis, we first examine whether a unitary relationship actually exists between taxpayer and its subsidiaries. If we find that a unitary relationship exists, we then determine whether filing a combined return would more fairly represent the taxpayer's and subsidiaries' Indiana income.

The Supreme Court over the years has developed a three-part test in determining whether a unitary relationship exists: common ownership, common management, and common use or operation. *See*, *e.g.*, *Mobil Oil Corporation v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 100 S.Ct. 1223 (1980); *Exxon Corp. v. Department of Revenue of Wisconsin*, 447 U.S. 207, 100 S.Ct. 2109 (1980); *ASARCO, Inc. v. Idaho State Tax Commission*, 458 U.S. 307, 102 S.Ct. 3103 (1982); *F.W. Woolworth v. Taxation and Revenue Department of New Mexico*, 458 U.S. 354, 102 S.Ct. 3128 (1982); *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768, 112 S.Ct. 2251 (1992). The first item to be considered under this three-part test is common ownership. As a general rule, at least fifty percent (50%) of a corporation's stock must be commonly owned (either directly or indirectly) in order for a corporation to be considered part of a unitary business. *See*, *i.e.*, 35 ILCS 5/1501(a)(27) and Tenn.Code Ann. § 67-4-2004(25)(B). The information in taxpayer's file shows that during the audit period, taxpayer owned one hundred percent (100%) of the stock of the members of the affiliated group. The evidence of file is sufficient to establish common ownership.

The second criteria to be considered is common management. Common management is shown when the parent corporation provides a management role that is grounded in the parent's own operation expertise and overall operational strategy. *See*, *e.g.*, *Container Corp. V. Franchise Tax Board*, 463 U.S. 159, 180, n. 19, 103 S.Ct. 2933, 2948, n. 19 (1983).

Here, the taxpayer has supplied evidence which shows that taxpayer exercised control and influence over its subsidiaries. Taxpayer's upper management consisted of five officers, the Chairman, the Deputy Chairman, the President/Chief Executive Officer, and the Secretary/Treasurer/Chief Financial Officer. Each one of taxpayer's subsidiaries was headed by a Chief Executive Officer. Taxpayer's executive officers were in constant communication with the Presidents of the subsidiaries, the executive officers provided executive decision-making for the subsidiaries. Taxpayer's executive officers, though they maintained offices in Indiana, made most of the executive decisions for the subsidiaries. Specifically, the officers reviewed and approved requests for capital expenditures and customer credit limits; frequently participated in monthly operational meetings; reviewed monthly financial statements; assisted in the preparation, review, and approval of annual operating budgets; and, negotiated and entered into legal contracts on behalf of the subsidiaries. We find that common management existed between taxpayer and its subsidiaries.

The third test is that of common operation or use. Evidence of a common operation exists where certain functions are performed for the group by the parent (such as purchasing, financing, advertising, marketing, research, tax compliance, insurance, and pension plan management) which independent companies would perform for themselves.

In taxpayer's case, information was supplied which shows that many of the administrative, management, and financing functions for taxpayer's subsidiaries were centralized. Taxpayer's Treasurer/Chief Financial Officer (CFO) coordinated all banking matters for the subsidiaries, and maintained a centralized banking system whereby each subsidiary's bank balance was swept nightly into taxpayer's main "sweep" account. Taxpayer's CFO was also responsible for obtaining loans to finance the subsidiaries' working capital and capital expenditure needs, and investing cash for the subsidiaries. Taxpayer provided administrative and management assistance to the subsidiaries with their respective insurance and benefit plans. Taxpayer's CFO coordinated the writing of all insurance policies protecting the operations and assets of all of the subsidiaries. These policies included worker's compensation insurance; general, auto and product liability, property and casualty coverage; and, business interruption coverage. Taxpayer's human resources manager obtained health, dental, life and disability insurance coverage for all subsidiary employees. Taxpayer also served as plan sponsor and plan administrator of a profit sharing and 401(k) plan and trust in which employees of the subsidiaries were eligible to participate. Taxpayer's tax manager handled all of the corporate income tax and franchise tax matters for all of the subsidiaries, including making tax payments, filing returns, and coordinating tax audits.

Furthermore, taxpayer provided documentation that shows that one of the subsidiaries provided assistance to two other subsidiaries in establishing credit for customers and evaluating customers' credit-worthiness. However, if a customer of a subsidiary required credit exceeding one hundred thousand dollars ($100,000), credit approval had to come from an officer of taxpayer.

Based on the forgoing, the Department finds that taxpayer has sufficiently established that a unitary relationship existed between taxpayer and its subsidiaries for the 1995 tax year. There exists the elements of common ownership and common management; and, there exists a flow of value between the members of the affiliated group.

We now turn to the next point of analysis and the question of whether requiring taxpayer to use a standard apportionment filing method, instead of combined return filing, resulted in a distortion of the income taxpayer and its subsidiaries reported as Indiana source income. Although IC 6-3-2-2(q) allows a parent corporation to petition the Department to file a combined return, it also incorporates by reference the restrictions imposed on alternative methods of reporting adjusted gross income by subsection (l) of that same section. Subsection (l) states in pertinent part:

> If the allocation and apportionment provisions of this article do not fairly represent the taxpayer's income derived from sources within the state of Indiana, the taxpayer may petition for or the department may require, in respect to all or any part of the taxpayer's business activity, if reasonable:
>
> ...
>
> (4) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

It is clear from the language in subsection (l) that the standard apportionment filing method is a preferred method of representing a taxpayer's income derived from Indiana sources. Other methods of income allocation and apportionment (including

the combined reporting method) should only be allowed when those provided for by IC 6-3-2-2 do not fairly reflect a taxpayer's Indiana income. As stated in a more concise manner, if the Indiana source income in the instant case can be fairly represented on the basis of standard apportionment or separate accounting, then such filing methods should be used.

Despite the unitary relationship between taxpayer and its subsidiaries, it does not appear that the operations of the businesses were so integrated to the point where the filing of separate returns would lead to a distortion of income. From the evidence of file, it appears that each business operation in the affiliated group operated independently of the others. Taxpayer and each of the subsidiaries had their own employees that performed the work assigned to the particular business facility. Each business operation in the affiliated group received orders and completed the production cycle of raw material to finished product within its respective facility. Although some of the subsidiaries shared common officers who provided executive decision-making, there was no flow of product between taxpayer and the subsidiaries. Moreover, taxpayer assessed an "inter-company finance charge" to each subsidiary. The finance charge was intended to cover the cost of the services taxpayer provided to the subsidiaries on a "cost pass-through" basis.

The documentation presented by taxpayer does not convince us that the business operations of taxpayer and the subsidiaries was so interconnected that it becomes impossible to accurately determine the Indiana source income attributable to the respective subsidiaries.

FINDING

Taxpayer's protest is denied.

II. Adjusted Gross Income Tax – Consolidated Returns

DISCUSSION

Taxpayer next protests the Audit Division's determination that four members of taxpayer's affiliated group should have been excluded from taxpayer's consolidated adjusted gross income tax return because the four members did not have adjusted gross income from sources within Indiana. In reaching its determination, the auditor found specifically that: "[N]one of the companies [has] property (land, buildings, other equipment, rental property) or inventory located in Indiana. Also, none of the companies [has] any employees located in Indiana (no Indiana payroll)." *Explanation of Adjustments*, Page 4.

Taxpayer maintains that two of the four excluded members of the affiliated group derived adjusted gross income from sources within Indiana and should be allowed to file consolidated tax returns with taxpayer. The gravamen of taxpayer's argument is two-fold. Taxpayer maintains that the two affiliated members had sufficient nexus with the state of Indiana because (1) they were doing business in Indiana; and (2) they had intangibles attributable to Indiana in that their respective company funds were swept daily into a concentration account maintained at an Indiana bank. *See* IC 6-3-2-2(a)(2) and IC 6-3-2-2(a)(5).

An affiliated group of corporations may file a consolidated return provided that each member corporation has adjusted gross income derived from sources within the state of Indiana and that each member corporation consents to all provisions of the consolidated return regulations defined under Internal Revenue Code Section 1502. IC 6-3-4-14. The term "adjusted gross income derived from sources within the state of Indiana" is defined under IC 6-3-2-2, in relevant part, as follows:

> Sec. 2. (a) With regard to corporations and nonresident persons, 'adjusted gross income derived from sources within Indiana', for the purposes of this article, shall mean and include:
>
> (1) income from real or tangible personal property located in this state;
>
> (2) income from doing business in this state;
>
> ...
>
> (4) compensation for labor or services rendered within this state; and
>
> (5) income from stocks, bond, notes, bank deposits, [etc.]... other intangible personal property if the receipt from the intangible is attributable to Indiana under section 2.2 of this chapter.

45 IAC 3.1-1-38 defines the phrase "doing business" as follows:

> For apportionment purposes, a taxpayer is 'doing business' in a state if it operates a business enterprise or activity in such state including but not limited to:
>
> (1) Maintenance of an office or other place of business in the state
>
> (2) Maintenance of an inventory of merchandise or material for sale distribution, or manufacture, or consigned goods
>
> (3) Sale or distribution of merchandise to customers in the state directly from company-owned or operated vehicles where title to the goods passes at the time of sale or distribution
>
> (4) Rendering services to customers in the state
>
> (5) ownership, rental or operation of a business or of property (real or personal) in the state
>
> (6) Acceptance of orders in the state
>
> (7) Any other act in the state that exceeds mere solicitation or orders that is exempted from income taxation by P.L. 86-272 to tax its net income.
>
> ... [C]orporations doing business in Indiana as well as other states are subject to the allocation and apportionment provisions of IC 6-3-2-2(b)-(n).

The above language is not ambiguous. It provides that an affiliated group may file an Indiana consolidated return if it meets the requirements of IC 6-3-4-14(b) (*i.e.*, that the affiliated group meet the Internal Revenue Code's definition of an affiliated group found in Section 1504, and further, that the group may include only those member corporations which have Indiana adjusted gross income). 45 IAC 3.1-1-111 also adopts this view, and further clarifies that Indiana adjusted gross income "means either income or losses derived from activities within the state."

PENNSYLVANIA SUBSIDIARY

The evidence before us establishes that one of the subsidiaries was a Pennsylvania corporation with manufacturing facilities and offices located in Pennsylvania (the "Pennsylvania Subsidiary"). Pennsylvania Subsidiary manufactured vinyl framed mobile home windows. During the audit year, both subsidiaries in question shared common executive officers. As was stated above, these officers maintained offices in Indiana and made most of the executive decisions for the subsidiaries, such as: reviewed and approved requests for capital expenditures, reviewed and approved customer credit limits, participated in monthly operational review meetings, reviewed monthly financial statements, assisted in the preparation, review and approval of annual operating budgets, and negotiated and entered into various legal contracts on behalf of the subsidiaries.

The evidence of file further establishes that approximately twenty-one percent (21%) of Pennsylvania Subsidiary's total sales were to Indiana customers in the form of made-to-order product that was sold and shipped to an Indiana based member of the affiliated group. The product was warehoused at the business site of the Indiana based affiliate until such time as the Indiana based affiliate sold the product to its customers. Additionally, according to taxpayer, Pennsylvania Subsidiary employees (or a representative of Pennsylvania Subsidiary that was actually employed by another member of taxpayer's affiliated group) at times traveled to Indiana to perform quality checks and provide technical assistance on the product that was sold to the Indiana customers.

Finally, Pennsylvania Subsidiary maintained a policy by which at the end of each business day, Pennsylvania Subsidiary swept its bank balance into a centralized concentration account that was maintained by the affiliated group and held by an Indiana bank. The concentration account earned interest income.

Given the facts of the instant case, neither the activities of the executive officers nor the interest income earned from the Indiana concentration account with respect to Pennsylvania Subsidiary exceeded mere solicitation of sales as said term is defined by 15 USC §§ 381-384 (1999) (P.L. 86-272). The executive officers were employees of taxpayer, not Pennsylvania Subsidiary. The services that said officers provided for Pennsylvania Subsidiary were services that parent corporations ordinarily provide for subsidiaries. Although employees of the Indiana based subsidiary were "loaned" to the Pennsylvania Subsidiary to supervise production of the product, the evidence of file before the Department does not establish that taxpayer's executive officers were involved in the day-to-day operations of Pennsylvania Subsidiary. Likewise, the fact that Pennsylvania Subsidiary's bank balance was swept nightly into a concentration account located at a bank in Indiana does not place Pennsylvania Subsidiary into a category of unprotected activity reaching beyond the mere solicitation of sales.

OHIO SUBSIDIARY

The Ohio Subsidiary was an Ohio corporation with manufacturing facilities and offices located in Ohio. Like the Pennsylvania Subsidiary, most of the executive decisions for the Ohio Subsidiary were made by the executive officers of the two subsidiaries who maintained offices in Indiana. As was previously stated, the individuals that make up the executive officers for the subsidiaries were located in Indiana.

Approximately forty-five percent (45%) of Ohio Subsidiary's total sales were to Indiana customers, which included an Indiana based subsidiary that was a member of taxpayer's affiliated group. Acceptance of orders from Indiana customers took place both in Indiana and Ohio. An Ohio Subsidiary salesman calling upon an Indiana customer had the authority to accept an order "on the spot". Once or twice per month, Ohio Subsidiary sent an employee (*i.e.*, a production manager or quality control manager) into Indiana to perform quality checks on product sold to Indiana customers. Employees of Ohio Subsidiary traveled to Indiana on a regular basis to answer customer complaints, provide technical assistance to the Indiana customers, and pick up or replace damaged or returned product.

Here, unlike the Pennsylvania Subsidiary, Ohio Subsidiary's activities in Indiana rose above mere solicitation when it offered technical assistance and remedied customer complaints regarding previously purchased products. A corporation's salesman does more than solicit orders in a state when he services complaints and gives technical assistance. *See Miles Laboratories*, 274 Ore. at 400, 546 P2d at 1083.

FINDING

Taxpayer's protest is partially sustained. The Department finds that whereas the Pennsylvania Subsidiary's activities failed to rise above mere solicitation as defined under P.L. 86-272, the activities of the Ohio Subsidiary did rise above mere solicitation. We further find that the Ohio Subsidiary did business in Indiana under 45 IAC 3.1-1-38(4). Since forty-five percent (45%) of Ohio Subsidiary's sales were attributable to Indiana, said subsidiary had income derived from Indiana sources under IC 6-3-2-2. As such, taxpayer should have been allowed to include the Ohio Subsidiary in its consolidated adjusted gross income tax filing, but not the Pennsylvania Subsidiary.

DEPARTMENT OF STATE REVENUE

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LETTER OF FINDINGS NUMBER: 00-0129
Responsible Officer
Sales Tax and Withholding Tax
For Tax Periods: 1982-1989

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

ISSUES

Sales and Withholding Tax – Responsible Officer Liability

Authority: IC 6-2.5-9-3, IC 6-3-4-8 (f), IC 6-8.1-5-1 (b), 11 USC 523

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

STATEMENT OF FACTS

The taxpayer was the sole proprietor of a photography business. The taxpayer failed to remit sales and withholding taxes to Indiana during the tax period 1982-1989. The taxpayer was personally assessed for the taxes and protested these assessments. A hearing was scheduled for February 27, 2002. The taxpayer did not appear for the hearing. Therefore, this decision is based upon the evidence in the file. More facts will be provided as necessary.

Sales and Withholding Tax – Responsible Officer Liability

DISCUSSION

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

An individual who:

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

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

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

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

The taxpayer first contends that some of the assessments are for his individual income taxes. The taxpayer failed, however, to offer any evidence that any of the assessments were for his individual income tax. Indiana Department of Revenue assessments are prima facie evidence that the assessed taxes are owed by the taxpayer who has the burden of proving that the assessment is incorrect. IC 6-8.1-5-1 (b). With no evidence to substantiate his claim, the taxpayer failed to sustain his burden of proof.

Secondly the taxpayer argues that the sales and withholding tax liabilities were discharged in bankruptcy on April 4, 1999 by the United States Bankruptcy Court, Southern District of Indiana. In support of this contention, the taxpayer cites from the "Discharge of Debtor(s)" as follows:

Any judgement heretofore or hereafter obtained in any court other than this court is null and void as a determination of the personal liability of the debtor(s) with respect to the following:

(a) debts dischargeable under 11 U.S.C. 523.

Sales and withholding taxes are not among the taxes that are dischargeable purusant to 11 U.S.C. 523. Therefore they were properly assessed against the taxpayer pursuant to the previously cited Indiana law.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

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LETTER OF FINDINGS NUMBER: 00-0171
International Fuel Tax Agreement (IFTA) and
International Registration Plan (IRP)
For Years 1996, 1997, and 1998

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

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

ISSUES

I. IFTA – Record Keeping

Authority: IC 6-6-4.1-14; IC 6-8.1-3-14; IFTA P560.100; IFTA P560.300; IFTA P510.100; IFTA P530.100; IFTA R1210.100; IFTA R1210.200; IFTA A550.200; IFTA Article VIII R820

Registrant/Licensee protests auditor's assessment based on insufficient record keeping.

II. IRP – Record Keeping

Authority: IC 6-6-4.1-14; IC 6-8.1-3-14; IRP 1500; IRP 1502; IRP Audit Procedure Manual 603

Registrant/Licensee protests auditor's assessment in which 100% of the miles driven were allocated to Indiana.

STATEMENT OF FACTS

Registrant/Licensee operates a petroleum refinery in Indiana. It also has terminals at four Indiana locations. Registrant/Licensee refines distillates and gasoline, and sells these products from its terminals. It also purchases and sells these commodities by barge load. The refinery and one of the terminals are connected to the barge facilities by a proprietary pipeline. There is a proprietary pipeline linking the refinery and terminals. The refinery and terminals receive products via barge, pipeline and truck. Much of the crude oil is received from small local oil wells and delivered to the refinery by Registrant/Licensee's own vehicles and via a proprietary pipeline. Upon multiple requests the Registrant failed to provide auditors with documentation of fuel purchases. Thus, pursuant to the rules of IFTA, the auditor presumed the Registrant/Licensee's consumed fuel to be non-tax-paid fuel. Inasmuch as registrant's base of operations is located within Indiana's border with adjoining IRP jurisdictions, numerous jobs included multiple interstate deliveries. The Registrant/Licensee's original reported mileage was apportioned between Indiana and surrounding jurisdictions. Upon requests by auditors for documentation of such apportionment, none were forthcoming, therefore, Registrant/Licensee's records were classified by the auditor as unavailable. Thus, the auditor determined that Registrant/Licensee's records were inadequate for apportionment of mileage between the jurisdictions and assessed 100% of the mileage to Indiana along with the partial allocation to Illinois, Kentucky, Michigan, Ohio, Iowa, Minnesota, Missouri, and Wisconsin as reported by Registrant/Licensee. Registrant/Licensee is protesting these adjustments.

I. IFTA – Record Keeping

DISCUSSION

Registrant/Licensee alleged to have invoices for all fuel purchases, but the Department could not confirm this as Registrant/Licensee failed to provide such documentation to the auditor.

The Indiana Code provides for the joining of Indiana to the IFTA agreement via IC 6-6-4.1-14 and IC 6-8.1-3-14. IC 6-6-4.1-14 states in relevant part:

> The commissioner or, with the commissioner's approval, the reciprocity commission created by IC 9-28-4 may enter into and become a member of the International Fuel Tax Agreement or other reciprocal agreements with the appropriate official or officials from any other state or jurisdiction... An agreement may be made under this subsection only with a state that grants equivalent privileges with respect to motor fuel consumed in the other state or jurisdiction and on which a tax has been paid to this state.

IC 6-8.1.3-14 states in relevant part:

> The department, on behalf of the state, may enter into and become a member of the International Fuel Tax Agreement or other reciprocal agreements providing for the imposition of motor fuel taxes on an apportionment or allocation basis with the proper authority of any state....
>
> The provisions of the IFTA manuals are applicable and IFTA P560.100 states in relevant part:
>
> Retail purchases must be supported by a receipt or invoice, credit card receipt, automated vender generated invoice or transaction listing, or microfilm/microfiche of the receipt invoice. Receipts that have been altered or indicate erasure are not accepted for tax-paid credits unless the licensee can demonstrate the receipt is valid.

IFTA P560.300 state in relevant part:

> An acceptable receipt or invoice must include, but shall not be limited to, the following:
> .005 Date of purchase;
> .010 Seller's name and address;
> .015 Number of gallons or liters purchased;
> .020 Fuel type;
> .025 Price per gallon or liter or total amount of sale;
> .030 Unit numbers; and
> .035 Purchaser's name

IFTA P510.100 states in relevant part:

> The licensee is required to preserve records upon which the quarterly tax return is based for four years from the return due date or filing date, whichever is later, plus any time period included as a result of waivers or jeopardy assessments.

IFTA P530.100 states in relevant part:

Failure to maintain records upon which the licensee's true liability may be determined or to make records available upon proper request may result in an assessment as stated in IFTA Articles of Agreement Section R1200

IFTA R1210.100 states in relevant part:

In the event that any licensee...

.015 fails to maintain records from which the licensee's true liability may be determined, the base jurisdiction shall, on the basis of the best information available to it, determine tax liability of the licensee for each jurisdiction. The base jurisdiction shall, after adding the appropriate penalties and interest, serve the assessment upon the licensee in the same manner as an audit assessment or in accordance with the laws of the base jurisdiction. For purposes of assessment pursuant to.100.010 or.100.015, the base jurisdiction must issue a written request for records giving the licensee thirty (30) days to provide the records or to issue a notice of insufficient records.

IFTA R1210.200 states in relevant part:

The assessment made by a jurisdiction pursuant to this procedure shall be presumed to be correct and, in any case *where the validity of the assessment is questioned, the burden shall be on the licensee to establish a fair preponderance of evidence that the assessment is erroneous or excessive. (emphasis added).*

IFTA Articles of Agreement, Article VIII, R820 states in relevant part:

All motor fuel acquired that is normally subject to consumption tax is taxable unless proof to the contrary is provided by the licensee. The licensee must report all fuel placed in the supply tank of a qualified motor vehicle as taxable on the IFTA tax return. *(emphasis added).*

IFTA A550.200 states in relevant part:

When tax paid fuel documentation is unavailable, all claims for tax paid fuel will be disallowed. (emphasis added).

Registrant/Licensee argues that the Department is in error to presume taxability when original tickets or invoices cannot be produced. This argument is baseless and cannot stand. The plain language of the IFTA agreement itself requires that fuel normally subject to consumption tax be taxed unless proof to the contrary is provided by the licensee. In addition, it is the stated policy of the IFTA Audit Manual to disallow the tax paid fuel credit when tax paid fuel documentation is unavailable. The Registrant/Licensee has failed to provide such proof or documentation, therefore, it was not error for the Department to presume taxability for the fuel consumed by the Registrant/Licensee and deny the tax paid fuel credit.

FINDINGS

Licensee's protest is denied.

II. IRP – Record Keeping

DISCUSSION

The issue is based on IRP 1500,1502, and IRP Audit Procedures Manual 603.

The Indiana Code provides for the joining of Indiana to the IRP agreement via IC 6-6-4.1-14 and IC 6-8.1-3-14. IC 6-6-4.1-14 states in relevant part:

The commissioner or, with the commissioner's approval, the reciprocity commission created by IC 9-28-4 may enter into the International Registration Plan, the International Fuel Tax Agreement, or other reciprocal agreements with the appropriate official or officials of any other state or jurisdiction to exempt commercial motor vehicles licensed in the other state or jurisdiction from any of the requirements that would otherwise be imposed by this chapter...

IC 6-8.1-3-14 states in relevant part:

The department, on behalf of the state, may enter into and become a member of the International Fuel Tax Agreement or other reciprocal agreements providing for the imposition of motor fuel taxes on an apportionment or allocation basis with the proper authority of any state....

The IRP manuals lend guidance in this are and IRP 1500 states:

Any registrant whose application for apportioned registration has been accepted shall preserve the records on which it is based for a period of three years after the close of the registration year. Such records shall be made available to the Commissioner at his request for audit as to accuracy of computation, payments, and assessment for deficiencies or allowances for credits, during the normal business hours of the day.

IRP 1502 states:

If any registrant fails to make records available to the Commissioner upon proper request or if any registrant fails to maintain records from which true liability may be determined, the Commissioner may, thirty days after written demand for an availability of records or notification of insufficient records, impose an assessment of liability based on the Commissioner's estimate of the true liability of such registrant as determined from information furnished by the registrant, information gathered by the Commissioner at his own instance, information available to the Commissioner concerning operations by similar registrants and such other pertinent information as may be available to the Commissioner.

IRP Audit Procedures Manual 603 states in relevant part:

> As part of the initial audit procedures, the auditor requests the records that support apportioned registration application as filed. These records are the same records discussed during the initial contact with the registrant or registrant's agent. *If adequate records are not made available thirty days after notice is given, the registrant may be assessed the potential liability due to all jurisdictions or the registrant may be assessed 100% registration fees for the base jurisdiction.* Penalties may be imposed in addition to the estimated liability amounts in accordance with the laws of the base jurisdiction.... *(emphasis added).*

Registrant/Licensee protests the failure by the Department to issue a credit for IRP fees paid to other states. Registrant/Licensee argues that its Tax Manager was able to locate logs and that the Department would not review them. This argument is insufficient as Registrant/Licensee has not provided the Department with any such logs. It was further urged by the Registrant/Licensee that, due to severe downsizing, it could not sort through the volumes of paper to find the relevant documents. Again, this argument is unacceptable as the auditor has no duty to sift through piles of documents for the Registrant/Licensee. The Department was very flexible as several extensions of time were made in efforts to allow the Registrant/Licensee to locate the necessary documentation.

If the Registrant/Licensee had located the records, the assessment could have been adjusted to include best evidence available. As it now stands no records are available for review, thus it was not error to assess the Registrant/Licensee the full original reported mileage, as provided by the IRP Audit Procedures Manual.

FINDINGS

Registrant's protest is denied.

DEPARTMENT OF STATE REVENUE

0420000327.LOF

LETTER OF FINDINGS NUMBER: 00-0327
Responsible Officer
Sales Tax and Withholding Tax
For Tax Periods: December, 1995-April, 1996

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

ISSUES

1. Sales and Withholding Tax – Responsible Officer Liability

Authority: IC 6-2.5-9-3, IC 6-3-4-8(f), IC 6-8.1-5-1(b), Indiana Department of Revenue v. Safayan 654 N.E. 2nd 270 (Ind.1995), Ball vs. Indiana Department of Revenue, 563 NE2d 522(Ind. 1990)

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

2. Sales and Use Tax – Best Information Available Assessments

Authority: IC 6-8.1-5-4(a), IC 6-8.1-5-4(c), IC 6-8.1-5-1(a), IC 6-2.5-5-8

The taxpayer protests the amount of the sales tax assessment.

3. Tax Administration – Interest and Penalty

The taxpayer protests the imposition of interest and penalty.

STATEMENT OF FACTS

The taxpayer was treasurer and a shareholder of a corporation that did not remit the proper amount of sales and withholding taxes to Indiana. The taxpayer was personally assessed for the taxes, penalties and interest. The taxpayer protested these assessments and a hearing was held. More facts will be provided as necessary.

1. Sales and Withholding Tax-Responsible Officer Liability

DISCUSSION

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

An individual who:

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

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

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

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

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

The issue to be determined in this case is whether or not the taxpayer was a person who was responsible for remitting the corporate trust taxes to the Indiana Department of Revenue.

The seminal case considering the personal liability of officers for corporate withholding and sales taxes is Indiana Department of Revenue v. Safayan 654 N.E. 2nd 270 (Ind.1995). In that case, four investors started a restaurant. One couple, the Safayans, provided most of the capital for the restaurant. The other couple provided the knowledge and experience in the restaurant business. The Safayans delegated the day to day operations of the restaurant to the second couple. After withholding and sales taxes were not properly remitted to the state of Indiana, the Indiana Department of Revenue assessed those taxes, penalty and interest against Mrs. Safayan in her capacity as president of the corporation. The Indiana Supreme Court upheld the assessment.

The taxpayer was the treasurer of the corporation at the time of its incorporation and throughout the life of the corporation. As treasurer, the taxpayer is considered the person with ultimate authority over financial matters unless there is significant evidence to the contrary. The taxpayer testified that he was listed as a signatory on the corporate bank accounts. The taxpayer further testified that he and the other board members delegated the day to day financial duties to the corporate controller. As a member of the board of directors and the treasurer, the taxpayer had the responsibility to oversee that the corporation employees fulfilled the financial responsibilities of a corporation including remitting trust taxes to the Indiana Department of Revenue. Mrs. Safayan also argued that responsibility for day to day financial duties was delegated to another person. The Court specifically found that her delegation of the daily responsibilities did not absolve her of liability. The law does not require, however, that only one person be considered the person with a duty to remit taxes to the state. In the Safayan case, the corporate president was held to be a responsible person even though the day to day operations were specifically delegated to a vice-president in her employment contract as manager. "A party may be liable for trust taxes without having exclusive control over the corporation's funds." Safayan at 274. Another person's possible responsibility for the remittance of taxes does not absolve the taxpayer from responsible officer liability.

Previously the Indiana Department of Revenue personally assessed the corporate trust taxes against the corporation's president. After a hearing, it was determined that the president did not personally owe the taxes. The taxpayer contends that his authority over the financial matters of the corporation was comparable to the responsibility of the corporate president and therefore he had no more personal liability for the taxes than did the president. At the president's hearing, however, the corporate president proved that he had resigned from the presidency of the corporation prior to the tax period for which the trust taxes were not properly remitted to the state. The Letter of Findings did not consider whether or not the president would have been an officer responsible for the remittance of trust taxes if he had been president during the tax period. If he was not an officer or employee during the subject tax period, then he could not be held responsible for those trust taxes. The taxpayer agrees that he was the corporate treasurer throughout the tax period during which the unpaid trust taxes accrued. That substantial difference distinguishes the two cases. The taxpayer can be held personally responsible for the payment of the corporate trust taxes.

The taxpayer also contends that the doctrine of laches bars the Department's ability to assess the taxpayer as a responsible officer in this situation. The Indiana Supreme Court held in Ball vs. Indiana Department of Revenue, 563 NE2d 522(Ind. 1990), at page 522 that laches would apply if the Department acted "in an unusually dilatory manner." Pursuant to IC 6-8.1-5-1(b), The taxpayer carries the burden of proving that the Department is incorrect. Taxpayer presented no evidence that the Department acted in an unusually dilatory manner in this case. Therefore laches does not bar the assessment against Taxpayer.

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

FINDING

The taxpayer's first point of protest is denied.

2. Sales and Use Tax – Best Information Available Assessments

DISCUSSION

The taxpayer also protests the amount of the sales tax personally assessed against him. The Indiana Department of Revenue prepared the assessments based upon the best information available, previous returns filed by the corporation. Taxpayers are required to retain books and records "so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records." IC 6-8.1-5-4(a). Taxpayers also have a duty to present these records to authorized agents of the department in response to reasonable requests. IC 6-8.1-5-4(c). If a taxpayer does not present adequate records for a department auditor to determine the proper tax liability, the department auditor should make a determination of the proper amount of tax liability based upon the best information available. IC 6-8.1-5-1(a).

The taxpayer presented actual sales tax returns that he had prepared based on a recent review of the corporate records. The

corporation was winding down its business during the audit period. The taxpayer presented evidence that the majority of cars sold were exempt from sales tax because they were sold to other dealers who would resell the automobiles. IC 6-2.5-5-8. The returns also include the tax collected on automobiles, parts and other items sold at retail by the corporation. The taxpayer sustained his burden of proving that the tax assessment was incorrect.

FINDING

The taxpayer's second point of protest is sustained subject to review.

3. Tax Administration – Interest and Penalty

DISCUSSION

The taxpayer protests the imposition of interest pursuant to IC 6-8.1-10-1. That statute, however, also specifically states that "the department may not waive the interest imposed under this section." Therefore, the interest assessment cannot be waived in this case.

The taxpayer also protests the imposition of penalty. The statutes prescribing the personal liability of officers specifically state that the corporate penalties are passed through to the responsible officers. Therefore the taxpayer owes any penalty properly imposed against the corporation. IC 6-2.5-9-3, IC 6-3-4-8(f).

The Department assessed a twenty percent (20%) penalty on the sales tax assessments and a ten per cent (10%) penalty on the withholding tax assessments.

The twenty per cent (20%) penalty was imposed on the sales tax liabilities pursuant to IC 6-8.1-10-4(b) as follows:

> If the department prepares a person's return under this section, the person is subject to a penalty of twenty per cent (20%) of the unpaid tax.

In this case, the Department prepared the original returns to determine the assessment. To contest the best information available assessments, the taxpayer later prepared and submitted sales tax returns based on the corporation records. Therefore, the twenty per cent (20%) penalty is no longer appropriate.

The ten per cent (10%) penalty on the withholding tax assessment was assessed pursuant to IC 6-8.1-10-2.1(a)(3) that provides for the imposition of a penalty if there is a deficiency due to negligence on the part of the taxpayer.

Indiana Regulation 45 IAC 15-11-2(b) clarifies the standard for the imposition of the negligence penalty as follows:

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

In this case, the corporation had a duty to remit the collected sales and withholding taxes to the state of Indiana. It breached this duty and did not remit the trust taxes. Therefore the corporation negligently did not pay the taxes and the negligence penalty properly applies.

FINDING

The taxpayer's protest is sustained in part and denied in part. The negligence penalty applies to both the sales and withholding taxes.

DEPARTMENT OF STATE REVENUE

0220000389.LOF

LETTER OF FINDINGS NUMBER: 00-0389
Adjusted Gross Income Tax
For Tax Years 1996 through 1998

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

ISSUES

I. Adjusted Gross Income – Throwback Sales

Authority: Wisconsin Department of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214 (1992); IC 6-3-2-2; 45 IAC 3.1-1-64

Taxpayer protests imposition of adjusted gross income tax on out of state throwback sales.

STATEMENT OF FACTS

Taxpayer manufactures mattresses with operations in several states. After an audit for tax years 1996 through 1998, the Department of Revenue ("Department") issued proposed assessments for adjusted gross income tax. Taxpayer protests these assessments. Further facts will be provided as needed.

I. Adjusted Gross Income – Throwback Sales

DISCUSSION

Taxpayer manufactures mattresses and has operations in several states. The Department conducted an audit for the tax years 1996 through 1998. As a result of this audit, the Department issued proposed assessments for adjusted gross income tax. One of the adjustments the Department made was to impose Indiana adjusted gross income tax on throwback sales taxpayer had in Arizona, Kansas and Minnesota. The Department determined that taxpayer had insufficient contacts with these states to be taxable there. Taxpayer protests that it does have sufficient contacts with those states to be taxable and so Indiana may not include income associated with those states in the Indiana adjusted gross income.

The relevant statute is IC 6-3-2-2(n), which states:

For purposes of allocation and apportionment of income under this article, a taxpayer is taxable in another state if:

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

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

Taxpayer has provided documentation establishing non-solicitation business activity in the three states in question for the three audit years. The United States Supreme Court's decision in Wisconsin Department of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214 (1992), provides guidance for this case. In Wrigley, the Court ruled that the Wrigley chewing gum company was subject to taxation in Wisconsin even though the taxable activity was only 0.00007% (several hundred dollars in absolute terms) of Wrigley's total activity in the state. Wrigley, at 235. The Court also explained:

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.

Wrigley, at 232

Also of relevance is the Court's explanation that Wrigley's activities would not be considered in isolation, but rather were taken together to determine whether or not the activities were de minimis. Wrigley, at 235.

Taxpayer did submit documentation establishing non-solicitation contacts with Arizona in 1996 and 1998, Minnesota in 1998, and Kansas in 1997 and 1998. However, even when taken together as provided in Wrigley, those contacts were de minimis. Taxpayer has provided documentation establishing sufficient non-solicitation contacts with Arizona to make taxpayer subject to taxation in that state for the tax year 1997. Taxpayer has provided documentation establishing sufficient non-solicitation contacts with Minnesota to make taxpayer subject to taxation in that state for the tax year1998. Taxpayer has provided documentation establishing sufficient non-solicitation contacts with Kansas to make taxpayer subject to taxation in that state for the tax years 1997 and 1998.

45 IAC 3.1-1-64 states in relevant part:

Taxpayers are not subject to throwback on sales into states in which they are taxable under this regulation *[45 IAC 3.1-1-64]*.

Therefore, taxpayer has satisfied the requirements of IC 6-3-2-2(n) and is not subject to throwback on sales into Arizona for tax year 1997, Kansas for tax years 1997 and 1998, and Minnesota for tax year 1998 as explained in 45 IAC 3.1-1-64. Taxpayer is subject to throwback on sales into Arizona for tax years 1996 and 1998, Kansas for tax year 1996 and Minnesota for tax years 1996 and 1997.

FINDING

Taxpayer's protest is sustained in part and denied in part.

DEPARTMENT OF STATE REVENUE

0220000477.LOF

LETTER OF FINDINGS NUMBER: 00-0477
Corporate Gross Income Tax
For Tax Years 1997 through 1998

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

ISSUE

I. Corporate Gross Income Tax – Services

Authority: 45 IAC 1.1-2-5

Taxpayer protests the auditor's determination that income related to the outsourcing services taxpayer provided in Indiana was subject to tax.

II. Tax Administration – Abatement of Penalty

Authority: IC 6-8.1-10-3

Taxpayer protests imposition of a twenty percent (20%) penalty for taxpayer's failure to file income tax returns.

STATEMENT OF FACTS

Taxpayer is an out-of-state corporation that provides outsourcing services to both industry and government through the management of its clients' information technology systems. Taxpayer provides personnel, and in some instances equipment, necessary to meet its clients' information technology needs. In November of 1996, taxpayer entered into a long-term contract with an insurance management firm (hereinafter, "the Firm") to perform outsourcing services. As the Firm is a multi-national corporation, the contract impacted Firm operations in the United States and Canada. The value of the contract was placed at approximately $250 million.

Upon entering into the contract with the Firm, taxpayer acquired assets located in Indiana. The assets included software license agreements and related hardware. These assets were slated to be relocated to California (the state in which taxpayer is commercially domiciled); however, the software vendor would not allow the software to be relocated to another state. Based upon the foregoing, taxpayer decided to leave the software at the Indiana location. This decision required that office space be rented and support personnel be hired to manage the software. Upon completion of the contract, the Indiana office was closed.

During the years in question, taxpayer did not file any Indiana income tax returns, as taxpayer classified said Indiana office location as "non-revenue recognizing." The Department of Revenue conducted an audit for taxpayer's fiscal years 1997 and 1998, and issued various tax assessments against taxpayer, including a twenty percent (20%) non-filer penalty. Additional facts will be supplied as necessary for discussion.

I. Corporate Gross Income Tax – Services

DISCUSSION

Taxpayer states in its protest letter, dated November 30, 2000, that the only assets that it maintained in Indiana were those assets that were acquired with the contract that taxpayer entered into with the Firm. As such, taxpayer viewed the Indiana office (and the assets contained therein) as a support facility only, and not a revenue generating facility. The payments that the Firm made to taxpayer for the services rendered were lump sum payments; and, all revenue received from the contract was allocated to California, the state in which taxpayer is commercially domiciled.

Taxpayer based its decision to allocate all of the revenue received from the contract to California on a determination by taxpayer that revenue attributable to Indiana (based upon the services provided in Indiana under the terms of the contract) amounted to less than five percent (5%) of the total revenue received under the contract in each of the years in question. The auditor determined that because taxpayer had property (an office) and payroll (employees that operated the office) in Indiana, the income related to the services taxpayer provided in Indiana was subject to tax.

It is well-settled that "[g]ross income derived from the provision of a service of any character within Indiana is subject to the gross income tax." 45 IAC 1.1-2-5(a). However, this regulation goes on to provide that:

> (e) When a contract provides for the provision of services in a state besides Indiana, gross income derived from the provision of services within Indiana will be determined by multiplying the gross income derived from the contract by the ratio of Indiana activities to total activities provided under the contract. The activities used will be only those related to the services performed and reasonably calculated to effectuate an equitable allocation and apportionment of the taxpayer's gross income under the contract. However, if the percentage of Indiana activities to total activities under the contract is less than five percent (5%), then the entire proceeds of the contract, received in that year are exempt from the gross income tax.

Taxpayer argues that because the revenue allocated to Indiana falls below the five percent (5%) floor, the tax assessed against said revenue should be eliminated.

However, the evidence on file establishes that the agreement with the Firm to provide technology outsourcing was made up of numerous outsourcing contracts located all over the United States and Canada. Taxpayer's Indiana income resulted from a contract for the performance of technology outsourcing services within Indiana. To fulfill the contract, perform the services, and maintain the software and assets taxpayer acquired when it entered the contract, taxpayer rented office space and hired personnel.

The purpose of the 5% rule set forth in 45 IAC 1.1-2-5 is to avoid taxing the proceeds of contracts involving minimal activities in Indiana. Although the Indiana revenue from the contract allocated to Indiana was relatively small compared to the total net worth of the taxpayer's business with the Firm, taxpayer's activities within Indiana under the contract were more than minimal or incidental. As such, the auditor did not err in determining that the income from the performance of services within Indiana under the contract were subject to gross income tax.

FINDING

Taxpayer's protest is denied.

II. Tax Administration – Abatement of Penalty

DISCUSSION

Taxpayer protests the imposition of a twenty percent (20%) penalty for failure to file Indiana income tax returns. IC 6-8.1-10-3

states that if an entity fails to file a return, the Department may prepare a return for said entity. If the Department prepares an entity's return under this section, the entity is subject to a penalty of twenty percent (20%) of the unpaid tax.

Taxpayer failed to file Indiana returns as required. The Department assessed a penalty for the failure to file returns. Taxpayer has not shown reasonable cause for its failure to file Indiana returns.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0420010001.LOF

LETTER OF FINDINGS NUMBER: 01-0001
Sales and Use Taxes
Calendar Years 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, and 1999

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

ISSUE(S)

I. Selling at Retail – Best Information Available

Authority: 45 IAC 2.2-6-8; IC 6-8.1-5-1

Taxpayer protests the entire audit.

STATEMENT OF FACTS

The Taxpayer operates a horse farm and has not filed sales and use tax returns. The audit was based upon best information available as allowed under IC 6-8.1-5-1 (a) because the taxpayer did not reply to the auditor's request. *The Almanac of Business & Industrial Financial Ratios* (1994) by Leo Troy was used to determine the total revenue for the taxpayer. No records were made available to the auditor.

Taxpayer submitted a protest that was received by the Indiana Department of Revenue on December 27, 2000 that states that (1) the estimates had no basis in fact, (2) it has supporting documents to indicate it did not sell the number of horses claimed in the estimated (3) it was not licensed to collect sales tax therefore not liable for penalty on something not licensed for; (4) it did not sell horses until 1996, and (5) it was not given an opportunity to participate in the information gathering process.

Based upon the letter of protest, the hearing officer forwarded the file to the auditor for resolution on April 6, 2001. The auditor returned the file to the Legal Division without resolution because the taxpayer failed to respond to telephone calls and a letter scheduling an appointment was returned to the District Office marked "Unclaimed". Auditor left a telephone message for the taxpayer on May 8 that was not returned.

On May 25, 2001 the hearing officer scheduled a meeting for June 13, 2001 which the taxpayer cancelled on June 11, 2001. On that same date, the hearing officer wrote the taxpayer stating various problems encountered with the conversation of that day and also advised that records be made available for the auditor. Taxpayer did not notify the hearing officer of additional records as requested. On August 17, 2001, the hearing officer called the auditor and was advised that the taxpayer had not contacted her. On that date, the hearing officer rescheduled a hearing for September 5, 2001 and on August 30, 2001, the taxpayer cancelled the hearing. The hearing officer wrote a letter on September 4, 2001 after a conversation with the taxpayer and asked the taxpayer to provide additional information that may aid in resolving the protest at the legal level instead of the auditor level. On February 19, 2002 a third and final hearing was scheduled for March 6, 2002. The taxpayer did not call or show for the hearing.

I. Selling at Retail – Best Information Available

DISCUSSION

Taxpayer has not filed Indiana sales and use tax returns for the period January 1990 through December 1999 nor was it registered.

In reviewing the audit report and the file, it is noted that the assessment stems from best information available for both sales and use taxes and the taxpayer had numerous opportunities to provide additional information, either to the auditor or to the hearing officer. Taxpayer provided nothing to aid in the resolution of the audit.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120010002.LOF

LETTER OF FINDINGS NUMBER: 01-0002
Individual Income Tax
Calendar Years 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, and 1999

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

ISSUE(S)

I. Indiana Adjusted Gross Income – Best Information Available

Authority: 45 IAC 6-8.1-5-1(a)

Taxpayer protests the entire audit.

STATEMENT OF FACTS

Taxpayer has not filed individual income tax returns. The audit was based upon best information available as allowed under IC 6-8.1-5-1(a) because the taxpayer did not reply to the auditor's request. *The Almanac of Business & Industrial Financial Ratios* (1994) by Leo Troy was used to determine the total revenue for the taxpayer. No records were made available to the auditor.

Taxpayer submitted a protest that was received by the Indiana Department of Revenue on December 27, 2000 that states that (1) the estimates had no basis in fact, (2) it has supporting documents to indicate it did not sell the number of horses claimed in the estimated (3) it was not licensed to collect sales tax therefore not liable for penalty on something not licensed for; (4) it did not sell horses until 1996, and (5) it was not given an opportunity to participate in the information gathering process.

Based upon the letter of protest, the hearing officer forwarded the file to the auditor for resolution on April 6, 2001. The auditor returned the file to the Legal Division without resolution because the taxpayer failed to respond to telephone calls and a letter scheduling an appointment was returned to the District Office marked "Unclaimed". Auditor left a telephone message for the taxpayer on May 8 that was not returned.

On May 25, 2001 the hearing officer scheduled a meeting for June 13, 2001 which the taxpayer cancelled on June 11, 2001. On that same date, the hearing officer wrote the taxpayer stating various problems encountered with the conversation of that day and also advised that records be made available for the auditor. Taxpayer did not notify the hearing officer of additional records as requested. On August 17, 2001, the hearing officer called the auditor and was advised that the taxpayer had not contacted her. On that date, the hearing officer rescheduled a hearing for September 5, 2001 and on August 30, 2001, the taxpayer cancelled the hearing. The hearing officer wrote a letter on September 4, 2001 after a conversation with the taxpayer and asked the taxpayer to provide additional information that may aid in resolving the protest at the legal level instead of the auditor level. On February 19, 2002 a third and final hearing was scheduled for March 6, 2002. The taxpayer did not call or show for the hearing.

I. Indiana Adjusted Gross Income – Best Information Available

DISCUSSION

Taxpayer has not filed individual income tax returns for the period January 1990 through December 1999. Calculations were based upon information from a Sales Use Tax audit that consisted of average total revenue less cost of operations times the consumer price index.

In reviewing the audit report and the file, it is noted that the assessment stems from best information available and the taxpayer had numerous opportunities to provide additional information, either to the auditor or to the hearing officer. Taxpayer provided nothing to aid in the resolution of the audit.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120020092P.LOF

LETTER OF FINDINGS NUMBER: 01-0092P
Individual Income Tax
For the Calendar Year 2000

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

STATEMENT OF FACTS

The taxpayer timely filed his Indiana individual income tax return for the year 2000 with a balance due of $3,950. This represents seventy percent (70%) of the taxpayer's total tax liability for the year. The taxpayer submitted no estimated tax payments for this year and was assessed an underpayment penalty.

DISCUSSION

The taxpayer protests the assessment of the underpayment penalty arguing that the large balance of tax due paid with his return resulted from a significant increase in investment income for the year 2000. The taxpayer further states that it would have been impossible to estimate the amount of investment income due to fluctuations in the stock market. The Department notes that all investors must cope with the uncertainties of the market place in their tax planning.

The statute provides methods by which a taxpayer may avoid the imposition of an underpayment penalty. IC 6-3-4-4.1(c) states in pertinent part:

> …no such declaration (of estimated tax) shall be required if the estimated tax can reasonably be expected to be less than four hundred dollars ($400)…

However, of the taxpayer's $5,631 total tax liability, only $1,681 was satisfied by tax withheld. The amount of estimated tax that should have been reasonably calculated and remitted is well in excess of $400.

IC 6-3-4-4.1(b) references Section 6654 of the Internal Revenue Code and incorporates its relevant portions into the Indiana statute. This section of the federal code at subsection (d) provides that an individual may avoid the underpayment penalty by making estimated payments that equal one hundred percent (100%) of the tax shown on the individual's return for the preceding year. However, as previously stated, the taxpayer made no estimated payments for tax year 2000; hence, the protection afforded by this section of the federal code is not available to the taxpayer.

Furthermore, the taxpayer did make estimated payments for prior years and received an assessment for the underpayment of estimated tax for tax year 1999. Based upon this information, the taxpayer should have been aware of his obligation to remit estimated tax payments to the Department.

The Department finds the penalty to be appropriate.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220010094.LOF

LETTER OF FINDINGS NUMBER: 01-0094
Indiana Corporate Income Tax
For Tax Years 1995 through 1998

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

ISSUE

I. Adjusted Gross Income Tax – Royalty Fee Deduction

Authority: *Moline Properties, Inc. v. Commissioner*, 319 U.S. 436, 63 S.Ct. 1132 (1943); *General Finance Corp. v. Skinner, 426 N.E.2d 77 (Ind. Ct. App. 1981)*; *Park 100 Dev. Co. v. Indiana Dep't of State Revenue*, 429 N.E.2d 220 (Ind. 1981); *Extra Energy Coal Co. v. Diamond Energy & Resources, Inc.*, 467 N.E.2d 439 (Ind. Ct. App. 1984); *Smith v. McCleod Distrib., Inc.*, 744 N.E.2d 459 (Ind. Ct. App. 2000); *Sweetland v. Franchise Tax Board*, 192 Cal. App. 2d 316 (Cal. App. 1st Dist. 1961)
IC 6-3-2-2(m)

Taxpayer protests the Audit Division's determination that taxpayer's deductions for royalty fees should be disallowed.

II. Gross Income Tax – Statute of Limitations

Authority: IC 6-8.1-5-2

Taxpayer protests all of the adjustments made by the auditor for the tax periods ending December 31, 1995 and December 31, 1996 on the grounds that the statute of limitations has expired.

III. Tax Administration – Abatement of Penalty

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

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

STATEMENT OF FACTS

Taxpayer is an Indiana corporation that operates under the umbrella of its parent corporation (hereinafter, "Parent"). Parent, located in Michigan, is a large retailer of building materials, and an operator of door assembly, truss plants, and lumber and building supply distribution centers. Although Parent is located in Michigan, all corporate functions of purchasing, accounting, payroll, trade payables, and property tax payments are performed by a subsidiary corporation headquartered in Ohio (hereinafter, the "Ohio Subsidiary"). The Ohio Subsidiary holds the rights to certain trademarks and corporate logos used by other subsidiaries of Parent. The Ohio Subsidiary charges to its subsidiaries a royalty fee for the use of its trademarks and corporate logos.

Taxpayer, an Indiana corporation and subsidiary of Parent, holds a ninety-nine percent (99%) interest in a partnership formed in 1993 (hereinafter, the "Partnership"). The Partnership was formed between taxpayer and a Kentucky corporation that was also a subsidiary of Parent, for the purpose of holding all of the Indiana assets and the Indiana retail stores. Prior to 1993, taxpayer operated the Indiana retail stores. Taxpayer and the Partnership were found to enjoy a unitary relationship. Taxpayer reports no retail store assets on its balance sheet, and performs no function other than to hold the Partnership investment. Taxpayer reports as its only income the distributive share of the profits and losses of the Partnership.

The Department of Revenue conducted an audit for the tax years in question, and determined, *inter alia*, that taxpayer erred in deducting the royalty fee expenses that it paid to Parent. Additional facts will be provided as necessary.

I. Adjusted Gross Income Tax – Royalty Fee Deduction

DISCUSSION

Pursuant to a royalty agreement (hereinafter, the "Agreement"), taxpayer agreed to pay the Ohio Subsidiary a one percent (1%) royalty fee for the use of various corporate logos. Taxpayer took deductions on its tax returns for the royalty fee expenses. Pursuant to the audit, the auditor disallowed the deduction for royalty expenses. The deduction was disallowed because, according to the auditor, the royalty expenses were charged in a non-uniform manner for the purpose of, *inter alia*, transferring income outside of Indiana. The auditor found that the royalty expenses were charged only to taxpayer, a Kentucky subsidiary, and a Pennsylvania subsidiary, and not to the subsidiaries located in Illinois, Michigan, North Carolina, South Carolina, Virginia, Wisconsin, and Ohio.

Taxpayer argues that whether or not the expenses were charged in a uniform manner to all of the operating subsidiaries is of no significance. According to taxpayer, the deduction is still a valid and appropriate deduction for those divisions that did pay the expenses to the Ohio Subsidiary.

Indiana law gives the Department the authority to apportion or allocate income derived from Indiana sources among commonly owned organizations in order to fairly reflect said Indiana income. Specifically, IC 6-3-2-2(m) states that:

> "[i]n the case of two (2) or more organizations, trades, or businesses owned or controlled directly or indirectly by the same interests the department shall distribute, apportion, or allocate the income derived from sources within the state of Indiana between and among those organizations, trades, or businesses in order to fairly reflect and report the income derived from sources within the state of Indiana by various taxpayers.

The Department determined that the Ohio Subsidiary was the subsidiary designated by Parent to hold all trademarks and corporate logos. The auditor determined that the royalty fees charged for the use of the trademarks and logos were not paid according to each subsidiary's respective usage. Instead, royalty fee amounts were paid to the Ohio Subsidiary by only a small number of subsidiaries. From this information, the auditor determined that individual usage of the trademarks and logos played no part in whether or not the subsidiary was obligated to pay royalty fees Therefore, in an effort to ensure that income generated in Indiana was not distorted and unfairly attributed to another state, the auditor disallowed taxpayer's deduction for royalty fees. It appears that the Audit Division's position is that taxpayer is not operating as a separate and distinct business entity from the Ohio Subsidiary. Instead, taxpayer is a merely an instrumentality of the Ohio Subsidiary.

"[The fiction of a corporate entity] may be disregarded where one corporation is so organized and controlled and its affairs so conducted that it is a mere instrumentality or adjunct of another corporation." *Extra Energy Coal Co. v. Diamond Energy & Resources, Inc.*, 467 N.E.2d 439, 441 (Ind. Ct. App. 1984). "Indiana courts [will] refuse to recognize corporations as separate entities where the facts establish several corporations are acting as the same entity." *General Finance Corp. v. Skinner*, 426 N.E.2d 77, 84 (Ind. Ct. App. 1981). In assessing whether a organization's corporate existence may be ignored, the following factors may be considered: "(1) undercapitalization; (2) absence of corporate records; (3) fraudulent representation by corporation shareholders or directors; (4) use of the corporation to promote fraud, injustice or illegal activities; (5) payment by the corporation of individual obligations; (6) commingling of assets and affairs; (7) failure to observe required corporate formalities; or (8) other shareholder acts or conduct ignoring, controlling, or manipulating the corporate form." *Smith v. McCleod Distrib., Inc.*, 744 N.E.2d 459, 463 (Ind. Ct. App. 2000). That same court noted that "other jurisdictions have disregarded the separateness of affiliated corporations when the corporations are not operated as separate entities but are manipulated or controlled as one enterprise through their

interrelationship to cause illegality, fraud, or injustice or to permit one economic entity to escape liability arising out of an operation conducted by one corporation for the benefit of the whole enterprise." *Id*.

It is well-settled that corporations are free to adopt the corporate form and to engage in activities they deem appropriate. The Supreme Court has stated that the doctrine of corporate entity serves a useful purpose and that "so long as [the] purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity." *Moline Properties, Inc. v. Commissioner*, 319 U.S. 436, 438-439, 63 S.Ct. 1132, 1134 (1943). However, the Court continued, stating that, "in matters relating to the revenue, the corporate form may be disregarded where it is a sham or unreal. In such situations the form is a bald and mischievous fiction." *Id*. at 439. The state courts have been consistent in applying this "business purpose" doctrine, holding that tax avoidance in and of itself is not a valid "business purpose." *See Park 100 Dev. Co. v. Indiana Dep't of State Revenue*, 429 N.E.2d 220 (Ind. 1981); *Sweetland v. Franchise Tax Board*, 192 Cal. App. 2d 316 (Cal. App. 1st Dist. 1961).

Pursuant to the audit, the auditor determined that in 1993 taxpayer and a Kentucky corporation formed a partnership for the purpose of holding all of the Indiana assets and the Indiana retail stores. Taxpayer's contribution to the Partnership consisted of a substantial contribution of Indiana store assets. Prior to 1993, taxpayer operated the Indiana retail stores. Taxpayer and the Partnership were found to enjoy a unitary relationship.

The auditor further determined that in addition to holding the rights to trademarks and corporate logos, the Ohio Subsidiary controls the operations of all of the Indiana retail stores. All corporate functions and day-to-day operations, as well as all asset and inventory purchases, accounting, payroll, invoicing, payables, and property tax payments are performed at the Ohio Subsidiary's headquarters. Neither the Partnership nor taxpayer maintain an office location or management employees separate from the Ohio Subsidiary. The Ohio Subsidiary and taxpayer share corporate officers.

It appears that the Audit Division's position is that taxpayer is not operating as a separate and distinct business entity from the Ohio Subsidiary. Instead, taxpayer is merely an instrumentality of the Ohio Subsidiary. However, the documentation within the file does not support such a finding by audit. Notwithstanding the auditor's finding that the Ohio Subsidiary controls the operations of the Indiana retail stores, the auditor also found that the Ohio Subsidiary charges various fees to the retail stores. For example, the Ohio Subsidiary charges an administrative fee to each store based on sales volume; allocates a charge for rent to each store; charges a service fee for inventory items purchased by the stores from the Ohio Subsidiary; and charges a one percent (1%) royalty fee for use of the trademarks and logos.

Taken in total, the evidence on file supports a determination that taxpayer and the Partnership are operating as a viable entity with economic and business substance that is separate and distinct from that of the Ohio Subsidiary. The auditor found taxpayer's and the Partnership's activities to be a unitary business under established standards. The auditor further found that taxpayer had high rate gross income equal to ninety-nine percent (99%) of the Partnership's taxable income.

FINDING

The taxpayer's protest is sustained.

II. Gross Income Tax – Statute of Limitations

DISCUSSION

Taxpayer protests all of the adjustments made by the auditor for the tax periods ending December 31, 1995 and December 31, 1996 on the grounds that the statute of limitations has expired. According to taxpayer's records, the statute of limitations expired on August 30, 2000.

The time limitation on issuance of a proposed assessment is governed by IC 6-8.1-5-2 which provides in pertinent part:

> Except as otherwise provided in this section, the department may not issue a proposed assessment under section 1 of this chapter more than three (3) years after the latest of the date the return is filed, or any of the following:
>
> (1) the due date of the return; or
>
> (2) in the case of a return filed for the state gross retail or use tax... the end of the calendar year which contains the taxable period for which the return is filed.
>
> ...
>
> (e) If a person files a fraudulent, unsigned, or substantially blank return, or if a person does not file a return, there is no time limit within which the department must issue its proposed assessment.

IC 6-8.1-5-2(a), (e).

The evidence of file establishes that on April 14, 2000, taxpayer's Chief Financial Officer executed two Forms AD-10, Agreement to Extension of Time, which stated respectively that any tax due by taxpayer for the tax year 1995 and for the tax year 1996 could be assessed at any time on or before August 30, 2000. However, on July 28, 2000, taxpayer's Chief Financial Officer executed two additional Forms AD-10 extending the time limit of assessment for tax years 1995 and 1996 until October, 15, 2000. Finally, on September 8, 2000, taxpayer's Chief Financial Officer executed one Form AD-10 extending the time limit of assessment for tax year 1996 until January 1, 2001.

The auditor completed her audit on September 9, 2000. The notice for proposed assessments was issued October 18, 2000.

The assessment was for the IT-20 tax return for the period ending December 31, 1998. In fact, the only assessment that the Department issued against taxpayer was for the tax year ending December 31, 1998. No error occurred here.

FINDING

Taxpayer's protest is respectfully denied.

III. Tax Administration – Abatement of Penalty

DISCUSSION

The Audit division determined that a ten percent (10%) negligence penalty should be imposed upon taxpayer. Taxpayer disagrees with the imposition of said penalty.

Under IC 6-8.1-10-2.1(d), the Department is empowered to waive the ten-percent negligence penalty if the taxpayer can establish that its failure to pay the tax deficiency was due to reasonable cause and not due to willful neglect. Under 45 IAC 15-11-2(c), in order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying our failing to carry out a duty giving rise to the penalty imposed. Ignorance of the listed tax laws, rules, and/or regulations is treated as negligence. Factors which may be considered to determine reasonable cause include the nature of the tax involved, judicial precedents set by Indiana courts, judicial precedents established by jurisdictions outside Indiana, published Department instructions, information bulletins, letters of findings, rulings, and letters of advice. 45 IAC 15-11-2(c).

The Audit Division imposed the negligence penalty because taxpayer failed to accurately report its taxable income. Taxpayer points to no precedents, instructions, bulletins, statutes, or regulations which justify its failure to pay the full amount of its state tax. Even assuming that taxpayer's failure to pay the appropriate amount of tax was entirely attributable to an innocent mistake, taxpayer still is unable to establish a "reasonable cause" for that error.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0420010207.LOF

LETTER OF FINDINGS NUMBER: 01-0207
Tax Administration—return of Assessed Tax and Interest
For Tax Years 1993-1999

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.

ISSUE

I. Tax Administration – Return of Assessed Tax and Interest

Authority: IC § 6-2.5-4-1(e); 45 IAC 2.2-1-1(a); IC § 6-8.1-1-1; 45 IAC 15-2-1; IC § 6-8.1-3-1; 45 IAC 15-5-1; IC § 6-8.1-5-1; IC § 6-8.1-10-1

Taxpayer protests that part of the assessed tax that he can now substantiate as non-taxable services.

STATEMENT OF FACTS

Taxpayer sells computer hardware, software, forms, supplies and accessories used by automotive dealerships throughout the Midwest, including Indiana. Taxpayer did not collect and remit gross retail taxes on goods sold in Indiana until the fall of 2000. Taxpayer has conceded that he was required to collect and remit the tax, but protests 60% of the assessment. This percentage figure represents taxpayer's retroactive separation of taxable goods (40% of the assessment) from non-taxable services (60% of the assessment). Further information will be added as necessary.

I. Tax Administration – Return of Assessed Tax and Interest

DISCUSSION

Taxpayer initially protested the entire assessment, but eventually, through discussions and correspondence with the Department, admitted liability and paid the assessment, plus interest. Taxpayer now states he has reconfigured his records to show how goods and services should have been broken down during the tax years at issue. This percentage figure represents taxpayer's retroactive separation of taxable goods (40% of the assessment) from non-taxable services (60% of the assessment).

Pursuant to IC § 6-8.1-3-1(a), the Department "has the primary responsibility for the administration, collection, and enforcement of the listed taxes," including "the state gross retail and use taxes." (IC § 6-8.1-1-1). Under 45 IAC 15-2-1, the Department was established for the purpose of administering, collecting and enforcing all taxes placed under its authority." Pursuant to IC § 6-8.1-5-1(a), the Department "shall make a proposed assessment of the amount of the unpaid tax" when an audit reveals discovers a failure to collect and remit the tax. *See also*, 45 IAC 15-5-1.

Under IC § 6-8.1-5-1(b), the "notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with" taxpayer.

Taxpayer has not met his burden of proof in this matter. Taxpayer has admitted his retail transactions were taxable in Indiana, and that in order to take advantage of the non-taxable nature of services, he would have had to bill customers for parts and service separately. (IC § 6-2.5-4-1[e] and 45 IAC 2.2-1-1[a]. Taxpayer did not do so at the time the taxable transactions occurred. Rather, taxpayer, now that he is aware of his obligations under Indiana tax law, is seeking to have 60% of the assessment returned to him because he can retroactively separate services from goods. Taxpayer cannot use such retroactive devices to ameliorate his tax liability.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420010270P.LOF

LETTER OF FINDINGS NUMBER: 01-0270P
Sales Tax
Calendar Years 1998 and 1999 and Short Year Ending April 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

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 & 1999 and short year ending April 30, 2000.

The taxpayer sells phone cards to retail merchants for resale, and secondly, sells phone cards through vending machines. The taxpayer is an Indiana Sub S company.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer argues the penalty should be waived as the error was the result of improper advice from a third party.

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 ignorant of tax regulations. Ignorance 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

0420010327.LOF

LETTER OF FINDINGS NUMBER: 01-0327 ST
Sales And Use Tax
For Tax Periods: 1998 through 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 specific issues.

ISSUE

Sales and Use Tax – Water Filtration and Distribution Systems

Authority: IC 6-2.5-2-1, IC 6-2.5-4-1, IC 6-2.5-3-2, 45 IAC 2.2-4-2, Sales Tax Information Bulletin #26 April 4, 1983

Taxpayer protests the assessment of tax on its water filtration and distribution systems.

STATEMENT OF FACTS

The taxpayer provides water treatment and dispensing equipment to various retail outlets throughout the midwest. The taxpayer approaches retail establishments such as grocery stores about entering into a contractual agreement to sell purified water through the retail establishments. The taxpayer provides the purification and distribution equipment for use in the retail establishment. The taxpayer retains ownership of the equipment. The retail establishment provides water and sells the purified water to the retail establishment's customers. The retail establishment collects and remits sales tax on the purified water. The taxpayer maintains and services the filtration equipment. After an audit, the Indiana Department of Revenue (department) assessed use tax on the materials used. The taxpayer protested this assessment and a hearing was held. More facts will be provided as necessary.

Sales and Use Tax – Water Filtration and Distribution Systems

DISCUSSION

Retail transactions made in Indiana are subject to sales tax. IC 6-2.5-2-1. A retail transaction is defined generally as the acquiring and subsequent selling of tangible personal property. IC 6-2.5-4-1. Except for certain enumerated services, sales of services are generally not retail transactions and are not subject to sales tax.

Indiana imposes the use tax on "the storage, use or consumption of tangible personal property in Indiana." IC 6-2.5-3-2. Pursuant to this statute, the department assessed use tax on the taxpayer's use of water purification and distribution equipment and attachments.

The taxpayer argued that the process at issue entitled the taxpayer to the manufacuring exemption. However, the facts of this situation indicate that the taxpayer is providing a service on property owned by the retail establishment. The retail outlet purchases the water from the local water supplier. The water is run through the taxpayer's filtration and purification equipment. This equipment acts upon and cleans the water owned by the retail establishment. The retail establishment then sells the purified water for a higher price than the price of the original tap water and collects the sales tax on this sale. In essence the taxpayer cleans water belonging to its customer, the retail outlet.

The taxpayer's situation is analogous to dry cleaners. Dry cleaning establishments clean clothes belonging to their customers. Pursuant to Sales Tax Information Bulletin #26, April 4, 1983 the dry cleaner provides a nontaxable service and must pay sales tax on its purchases of tangible personal property used in the provision of the service.

As the provider of the service of cleaning water belonging to the retail establishments, the taxpayer is liable for the sales tax or the complementary use tax on tangible personal property used in the provision of the service. 45 IAC 2.2-4-2. There is no indication that the taxpayer paid sales tax at the time of the purchase of the tangible personal property that the taxpayer uses to provide the service. Therefore, the taxpayer properly owes use tax.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420010342.LOF

LETTER OF FINDINGS NUMBER: 01-0342
Responsible Officer
Sales Tax and Withholding Tax
For Tax Periods: December, 1995-April, 1996

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

ISSUES

1. Sales and Withholding Tax – Responsible Officer Liability

Authority: IC 6-2.5-9-3, IC 6-3-4-8(f), IC 6-8.1-5-1(b), Indiana Department of Revenue v. Safayan 654 N.E. 2nd 270 (Ind.1995), Ball vs. Indiana Department of Revenue, 563 NE2d 522(Ind. 1990)

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

2. Sales and Use Tax – Best Information Available Assessments

Authority: IC 6-8.1-5-4(a), IC 6-8.1-5-4(c), IC 6-8.1-5-1(a), IC 6-2.5-5-8

The taxpayer protests the amount of the sales tax assessment.

3. Tax Administration – Interest and Penalty

The taxpayer protests the imposition of interest and penalty.

STATEMENT OF FACTS

The taxpayer was secretary and a shareholder of a corporation that did not remit the proper amount of sales and withholding taxes to Indiana. The taxpayer was personally assessed for the taxes, penalties and interest. The taxpayer protested these assessments. Pursuant to the request of the taxpayer, the issue was determined based upon the contents of the file. More facts will be provided as necessary.

1. Sales and Withholding Tax – Responsible Officer Liability

DISCUSSION

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

An individual who:

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

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

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

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

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

The issue to be determined in this case is whether or not the taxpayer was a person who was responsible for remitting the corporate trust taxes to the Indiana Department of Revenue.

The seminal case considering the personal liability of officers for corporate withholding and sales taxes is Indiana Department of Revenue v. Safayan 654 N.E. 2nd 270 (Ind.1995). In that case, four investors started a restaurant. One couple, the Safayans, provided most of the capital for the restaurant. The other couple provided the knowledge and experience in the restaurant business. The Safayans delegated the day to day operations of the restaurant to the second couple. After withholding and sales taxes were not properly remitted to the state of Indiana, the Indiana Department of Revenue assessed those taxes, penalty and interest against Mrs. Safayan in her capacity as president of the corporation. The Indiana Supreme Court upheld the assessment.

The taxpayer was the secretary of the corporation at the time of its incorporation and throughout the life of the corporation. As secretary, the taxpayer is part of the board of directors, which makes the ultimate decisions concerning the operations of the corporation. The taxpayer indicated that he and the other board members delegated the day to day financial duties to the corporate controller. As a member of the board of directors and the secretary, the taxpayer had the responsibility to oversee that the corporation employees fulfilled the financial responsibilities of a corporation including remitting trust taxes to the Indiana Department of Revenue. Mrs. Safayan also argued that responsibility for day to day duties was delegated to another person. The Court specifically found that her delegation of the daily responsibilities did not absolve her of liability. The law does not require, however, that only one person be considered the person with a duty to remit taxes to the state. In the Safayan case, the corporate president was held to be a responsible person even though the day to day operations were specifically delegated to a vice-president in her employment contract as manager. "A party may be liable for trust taxes without having exclusive control over the corporation's funds." Safayan at 274. Another person's possible responsibility for the remittance of taxes does not absolve the taxpayer from responsible officer liability.

Previously the Indiana Department of Revenue personally assessed the corporate trust taxes against the corporation's president. After a hearing, it was determined that the president did not personally owe the taxes because he had resigned from the presidency of the corporation prior to the tax period for which the trust taxes were not properly remitted to the state. The Letter of Findings did not consider whether or not the president would have been an officer responsible for the remittance of trust taxes if he had been president during the tax period. If he was not an officer or employee during the subject tax period, then he could not be held responsible for those trust taxes. The taxpayer agrees that he was an officer throughout the tax period during which the unpaid trust taxes accrued. That substantial difference distinguishes the two cases. The taxpayer can be held personally responsible for the payment of the corporate trust taxes.

The taxpayer also contends that the doctrine of laches bars the Department's ability to assess the taxpayer as a responsible officer in this situation. The Indiana Supreme Court held in Ball vs. Indiana Department of Revenue, 563 NE2d 522(Ind. 1990), at page 522 that laches would apply if the Department acted "in an unusually dilatory manner." Pursuant to IC 6-8.1-5-1(b), The taxpayer carries the burden of proving that the Department is incorrect. The taxpayer presented no evidence that the Department acted in an unusually dilatory manner in this case. Therefore laches does not bar the assessment against Taxpayer.

Finally, the taxpayer alleges that others were actually responsible for the remittance of taxes. The law does not require, however, that only one person be considered the person with a duty to remit taxes to the state. In the Safayan case, the corporate

president was held to be a responsible person even though the day to day operations were specifically delegated to a vice-president in his employment contract as manager. "A party may be liable for trust taxes without having exclusive control over the corporation's funds." Safayan at 274. Another officer's possible responsibility for the remittance of taxes does not absolve the taxpayer from responsible officer liability.

FINDING

The taxpayer's first point of protest is denied.

2. Sales and Use Tax – Best Information Available Assessments

DISCUSSION

The taxpayer also protests the amount of the sales tax personally assessed against him. The Indiana Department of Revenue prepared the assessments based upon the best information available, previous returns filed by the corporation. Taxpayers are required to retain books and records "so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records." IC 6-8.1-5-4 (a). Taxpayers also have a duty to present these records to authorized agents of the department in response to reasonable requests. IC 6-8.1-5-4(c). If a taxpayer does not present adequate records for a department auditor to determine the proper tax liability, the department auditor should make a determination of the proper amount of tax liability based upon the best information available. IC 6-8.1-5-1(a).

The taxpayer presented actual sales tax returns that he had prepared based on a recent review of the corporate records. The corporation was winding down its business during the audit period. The taxpayer presented evidence that the majority of cars sold were exempt from sales tax because they were sold to other dealers who would resell the automobiles. IC 6-2.5-5-8. The returns also include the tax collected on automobiles, parts and other items sold at retail by the corporation. The taxpayer sustained his burden of proving that the tax assessment was incorrect.

FINDING

The taxpayer's second point of protest is sustained subject to review.

3. Tax Administration – Interest and Penalty

DISCUSSION

The taxpayer protests the imposition of interest pursuant to IC 6-8.1-10-1. That statute, however, also specifically states that "the department may not waive the interest imposed under this section." Therefore, the interest assessment cannot be waived in this case.

The taxpayer also protests the imposition of penalty. The statutes prescribing the personal liability of officers specifically state that the corporate penalties are passed through to the responsible officers. Therefore the taxpayer owes any penalty properly imposed against the corporation. IC 6-2.5-9-3, IC 6-3-4-8(f).

The Department assessed a twenty percent (20%) penalty on the sales tax assessments and a ten percent (10%) penalty on the withholding tax assessments.

The twenty percent (20%) penalty was imposed on the sales tax liabilities pursuant to IC 6-8.1-10-4(b) as follows:

> If the department prepares a person's return under this section, the person is subject to a penalty of twenty percent (20%) of the unpaid tax.

In this case, the Department prepared the original returns to determine the assessment. To contest the best information available assessment, the taxpayer belatedly submitted completed returns. Therefore, the twenty percent (20%) penalty is no longer appropriate.

The ten percent (10%) penalty on the withholding tax assessment was assessed pursuant to IC 6-8.1-10-2.1(a)(3) that provides for the imposition of a penalty if there is a deficiency due to negligence on the part of the taxpayer.

Indiana Regulation 45 IAC 15-11-2 (b) clarifies the standard for the imposition of the negligence penalty as follows:

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

In this case, the corporation had a duty to remit the collected sales and withholding taxes to the state of Indiana. It breached this duty and did not remit the trust taxes. Therefore the corporation negligently did not pay the taxes and the negligence penalty properly applies.

FINDING

The taxpayer's protest is sustained in part and denied in part. The negligence penalty applies to both the sales and withholding taxes.

DEPARTMENT OF STATE REVENUE

0420010343.LOF

LETTER OF FINDINGS NUMBER: 01-0343
Responsible Officer
Sales Tax and Withholding Tax
For Tax Periods: December, 1995-April, 1996

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

ISSUES

1. Sales and Withholding Tax – Responsible Officer Liability

Authority: IC 6-2.5-9-3, IC 6-3-4-8(f), IC 6-8.1-5-1(b), Indiana Department of Revenue v. Safayan 654 N.E. 2nd 270 (Ind.1995), Ball vs. Indiana Department of Revenue, 563 NE2d 522(Ind. 1990)

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

2. Sales and Use Tax – Best Information Available Assessments

Authority: IC 6-8.1-5-4(a), IC 6-8.1-5-4(c), IC 6-8.1-5-1(a), IC 6-2.5-5-8

The taxpayer protests the amount of the sales tax assessment.

3. Tax Administration – Interest and Penalty

The taxpayer protests the imposition of interest and penalty.

STATEMENT OF FACTS

The taxpayer was vice president and a shareholder of a corporation that did not remit the proper amount of sales and withholding taxes to Indiana. The taxpayer was personally assessed for the taxes, penalties and interest. The taxpayer protested these assessments. Pursuant to the taxpayer's request, the decision was made based upon the information in the file. More facts will be provided as necessary.

1. Sales and Withholding Tax – Responsible Officer Liability

DISCUSSION

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

An individual who:

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

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

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

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

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

The issue to be determined in this case is whether or not the taxpayer was a person who was responsible for remitting the corporate trust taxes to the Indiana Department of Revenue.

The seminal case considering the personal liability of officers for corporate withholding and sales taxes is Indiana Department of Revenue v. Safayan 654 N.E. 2nd 270 (Ind.1995). In that case, four investors started a restaurant. One couple, the Safayans, provided most of the capital for the restaurant. The other couple provided the knowledge and experience in the restaurant business. The Safayans delegated the day to day operations of the restaurant to the second couple. After withholding and sales taxes were not properly remitted to the state of Indiana, the Indiana Department of Revenue assessed those taxes, penalty and interest against Mrs. Safayan in her capacity as president of the corporation. The Indiana Supreme Court upheld the assessment.

The taxpayer was the vice president of the corporation at the time of its incorporation and throughout the life of the corporation. As vice president, the taxpayer is considered a person with `authority over financial matters unless there is significant evidence to the contrary. The taxpayer stated that he was listed as a signatory on the corporate bank accounts. The taxpayer further testified that he and the other board members delegated the day to day financial duties to the corporate controller. As a member of the board of directors and the vice president, the taxpayer had the responsibility to oversee that the corporation employees fulfilled the financial responsibilities of a corporation including remitting trust taxes to the Indiana Department of Revenue. Mrs. Safayan also argued that responsibility for day to day financial duties was delegated to another person. The Court specifically found that her delegation of the daily responsibilities did not absolve her of liability. The law does not require, however, that only one person be considered the person with a duty to remit taxes to the state. In the Safayan case, the corporate president was held to be a responsible person

even though the day to day operations were specifically delegated to a vice-president in her employment contract as manager. "A party may be liable for trust taxes without having exclusive control over the corporation's funds." Safayan at 274. Another person's possible responsibility for the remittance of taxes does not absolve the taxpayer from responsible officer liability.

Previously the Indiana Department of Revenue personally assessed the corporate trust taxes against the corporation's president. After a hearing, it was determined that the president did not personally owe the taxes because he resigned the presidency of the corporation prior to the tax period for which the trust taxes were not properly remitted to the state. The Letter of Findings did not consider whether or not the president would have been an officer responsible for the remittance of trust taxes if he had been president during the tax period. If he was not an officer or employee during the subject tax period, then he could not be held responsible for those trust taxes. The taxpayer agrees that he was the corporate vice president throughout the tax period during which the unpaid trust taxes accrued. That substantial difference distinguishes the two cases. The taxpayer can be held personally responsible for the payment of the corporate trust taxes.

The taxpayer also contends that the doctrine of laches bars the Department's ability to assess the taxpayer as a responsible officer in this situation. The Indiana Supreme Court held in Ball vs. Indiana Department of Revenue, 563 NE2d 522(Ind. 1990), at page 522 that laches would apply if the Department acted "in an unusually dilatory manner." Pursuant to IC 6-8.1-5-1(b), The taxpayer carries the burden of proving that the Department is incorrect. The taxpayer presented no evidence that the Department acted in an unusually dilatory manner in this case. Therefore laches does not bar the assessment against Taxpayer.

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

FINDING

The taxpayer's first point of protest is denied.

2. Sales and Use Tax – Best Information Available Assessments

DISCUSSION

The taxpayer also protests the amount of the sales tax personally assessed against him. The Indiana Department of Revenue prepared the assessments based upon the best information available, previous returns filed by the corporation. Taxpayers are required to retain books and records "so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records." IC 6-8.1-5-4(a). Taxpayers also have a duty to present these records to authorized agents of the department in response to reasonable requests. IC 6-8.1-5-4(c). If a taxpayer does not present adequate records for a department auditor to determine the proper tax liability, the department auditor should make a determination of the proper amount of tax liability based upon the best information available. IC 6-8.1-5-1(a).

The taxpayer presented actual sales tax returns that he had prepared based on a recent review of the corporate records. The corporation was winding down its business during the audit period. The taxpayer presented evidence that the majority of cars sold were exempt from sales tax because they were sold to other dealers who would resell the automobiles. IC 6-2.5-5-8. The returns also include the tax collected on automobiles, parts and other items sold at retail by the corporation. The taxpayer sustained his burden of proving that the tax assessment was incorrect.

FINDING

The taxpayer's second point of protest is sustained subject to review.

3. Tax Administration – Interest and Penalty

DISCUSSION

The taxpayer protests the imposition of interest pursuant to IC 6-8.1-10-1. That statute, however, also specifically states that "the department may not waive the interest imposed under this section." Therefore, the interest assessment cannot be waived in this case.

The taxpayer also protests the imposition of penalty. The statutes prescribing the personal liability of officers specifically state that the corporate penalties are passed through to the responsible officers. Therefore the taxpayer owes any penalty properly imposed against the corporation. IC 6-2.5-9-3, IC 6-3-4-8(f).

The Department assessed a twenty percent (20%) penalty on the sales tax assessments and a ten percent (10%) penalty on the withholding tax assessments.

The twenty percent (20%) penalty was imposed on the sales tax liabilities pursuant to IC 6-8.1-10-4(b) as follows:

> If the department prepares a person's return under this section, the person is subject to a penalty of twenty percent (20%) of the unpaid tax.

In this case, the Department prepared the original returns to determine the assessment. To contest the best information assessments, the taxpayer later prepared and submitted sales tax returns based on the corporation records. Therefore, the twenty percent (20%) penalty is no longer appropriate.

The ten percent (10%) penalty on the withholding tax assessment was assessed pursuant to IC 6-8.1-10-2.1(a)(3) that provides for the imposition of a penalty if there is a deficiency due to negligence on the part of the taxpayer.

Indiana Regulation 45 IAC 15-11-2(b) clarifies the standard for the imposition of the negligence penalty as follows:

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

In this case, the corporation had a duty to remit the collected sales and withholding taxes to the state of Indiana. It breached this duty and did not remit the trust taxes. Therefore the corporation negligently did not pay the taxes and the negligence penalty properly applies.

FINDING

The taxpayer's protest is sustained in part and denied in part. The negligence penalty applies to both the sales and withholding taxes.

DEPARTMENT OF STATE REVENUE

0320020007.LOF

LETTER OF FINDINGS NUMBER: 02-0007
Withholding Tax
January 2000 through September 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 was assessed late filing penalties for several months in the years 2000 and 2001. In a letter dated December 14, 2001 taxpayer requests the department abate the taxes, penalties and interest. A hearing was scheduled for February 12, 2002. The letter informing the taxpayer of the hearing was returned by the post office and the hearing officer faxed the taxpayer a memo to reschedule. Taxpayer called the hearing officer on February 21, 2002 and asked that a letter of finding be written based upon information already submitted and previously discussed. Taxpayer no longer protests the tax and interest.

Taxpayer states it purchased the company in May 2001 and has been trying to clean up errors. Taxpayer states it paid the taxes, filed all the recaps that had not been filed and is currently assuring payments are timely. June and August were paid late because it was not aware the company was an early filer. Taxpayer further states it was not responsible for the mistakes and requests a penalty waiver.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer failed to timely remit withholding tax for the 2000 year and January through September 2001. Taxpayer purchased the company in May 2001 and has corrected all the prior owner's filing errors. The late filings were primarily from the prior owners.

Taxpayer's failure to remit the tax was not the result of reasonable cause. Taxpayer's new owners are still responsible for the prior owner's omissions.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020015.LOF

LETTER OF FINDINGS NUMBER: 02-0015
Adjusted Gross Income Tax
For Fiscal Years Ended 06-30-94, 06-30-95, 06-30-96, 06-30-97, and 06-30-98

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 and its subsidiaries are a worldwide company focused on communications, semi-conductors, office systems, and advanced electronic systems. The taxpayer was audited by the Internal Revenue Service for FYE 6/30/94, 06/30/95, and 06/30/96. In October 1999, the taxpayer reported in a letter to the department the changes but failed to file amended returns and pay the tax due.

Taxpayer filed a protest dated October 17, 2001.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that the 1994 year relates solely to federal audit changes. Taxpayer states that it reported the changes to the Indiana Department of Revenue timely. Taxpayer further requests abatement for FY 1997 because the amount was small. No protest regarding the penalty was addressed for FY 1996.

Although the taxpayer reported its federal RAR adjustments to the department on October 13, 1999, taxpayer also stated that the tax due was zero. Upon audit, it was determined that the taxpayer did in fact have a Indiana tax liability as a result of the IRS adjustments. For 1997, the taxpayer states the assessment is small and no penalty should apply. However, gross income was understated by $8,891in tax for that year and adjusted gross income increased from $117,761 to $218,965 after reducing the apportionment percentage. The primary reason the assessment was less than $4, 000 was the fact that the taxpayer reported $81,601 in credits instead of the correct $90,716. In addition, taxpayer had other errors.

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

0420020104P.LOF

LETTER OF FINDINGS NUMBER: 02-0104P
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 of shipping containers. At audit, it was determined that the taxpayer failed to self assess and remit use tax for clearly taxable items such as maintenance supplies, janitorial supplies, banners, switches, and other miscellaneous items.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that the tax due represents a modest amount in comparison to the total tax liability and it has always made a concerted effort to be in compliance.

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 twenty-two percent (22%) of its 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

0420020111P.LOF

LETTER OF FINDINGS NUMBER: 02-0111P
Sales and Use Tax
Calendar Years 1995, 1996, 1997, and Partial Year Ended 8/30/98

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 is headquartered out of state and has several business locations in Indiana. The taxpayer provides intrastate and interstate telecommunications services. At audit, it was determined that the taxpayer deducted the collection allowance from the sales tax collected and remitted the balance to the Department. 45 IAC 2.2-6-16 does not allows public utilities the collection allowance. Taxpayer made several other errors in its sales tax reporting. Taxpayer failed to keep accurate records of its purchases and the payment of use tax, therefore a projection was utilized. The audit also included a claim for refund that the audit allowed in part. 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 the deficiency was due to reasonable cause.

Taxpayer further states that (1) it consistently filed its Indiana sales and use tax returns on time, (2) this is the first sales and use tax assessment issued against it so there is no history of prior deficiencies, and (3) the amount of the tax assessment is small relative to the amount of tax paid to Indiana.

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 approximately thirty percent (30%) of its taxable sales for the audit period. The amount of use tax not remitted was minimal because the department included a claim for refund in the audit for items the taxpayer erroneously remitted use tax upon. 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

0420020112P.LOF

LETTER OF FINDINGS NUMBER: 02-0112P
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 produces and markets systems for the conversion and storage of electrical power, including industrial batteries and electronics. Taxpayer is organized into four operating divisions and has one business location in Indiana. Taxpayer failed to remit use tax on approximately forty-two percent (42%) of its taxable purchases during the audit period. A January 12, 1999 audit of taxpayer contained the same issues.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that the purchases subject to use tax represent.008% of the cost of sales which is a small percentage representing a minor oversight. Taxpayer further states it had made progress in identifying and remitting use tax and will continue to make changes to improve its procedures to avoid this oversight from occurring in the future.

Taxpayer had a prior audit that assessed tax for similar items. Taxpayer failed to self assess and remit use tax on more than forty percent of its 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

0220020127P.LOF

LETTER OF FINDINGS NUMBER: 02-0127P
Gross and Adjusted Gross Income Tax
Fiscal Year Ended 03/31/98

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 protested liability 98-0066576 that was issued on August 1, 2001 and generated due to filing the return late. Taxpayer states that it was audited and the assessment was reduced, therefore no penalty should be assessed.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed on its late filed fiscal year 1998 tax return because an audit reduced the assessment. Taxpayer filed its 1998 return late which was due on July 15, 1998. The payment date was December 15 1998, which is clearly late. An audit was conducted later that reduced the assessment.

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 approximately thirty-five percent (35%) of its tax for fiscal year 1998, timely. A subsequent audit reduced the assessment; however, the reduction does not affect the filing of the tax return.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0320020130P.LOF

LETTER OF FINDINGS NUMBER: 02-0130P
Withholding Tax
February, March, June, September, November 1998, February, March, May, June, July, August, September, October, November, December 1999, January, February, May, June, July, August, October 2000

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

II. Tax Administration – Interest

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

Taxpayer protests the interest assessed.

STATEMENT OF FACTS

Taxpayer was assessed late filing penalties. In a telephone conference hearing on March 7, 2002, taxpayer requests the department waive the penalties and interest assessed against it and references a letter addressed to the department dated February 11, 2002.

Taxpayer states its delinquent payment of withholding taxes arose from a bookkeeper that did not fulfill the responsibilities of her job. Not until February 15, 2001 was the taxpayer aware that the WH-1 returns had not been filed and tax had not been paid. Upon discovery, they immediately took steps to determine which periods needed returns and payments. Taxpayer states that the IDR provided the necessary information and forms for the taxpayer to file as required and the filings and payments were mailed July 2, 2001. The first penalty notices were not received until October and continued to arrive through December and represent an additional delay of three to five months.

Taxpayer further states it sent abatement request letters as notices arrived that were dated October 17, October 22, November 2, and December 11, 2001. A letter dated January 16, 2002 denied the abatement of penalties.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer states that it filed the missing returns immediately upon its knowledge that they were not remitted. Taxpayer further states it has cleared up the problem. Taxpayer states that it was unaware that the returns were not filed by its bookkeeper.

Taxpayer's failure to remit the tax was not the result of reasonable cause. Taxpayer should have been aware of the actions of its employee and should have verified the books yearly.

FINDING

Taxpayer's protest is denied.

II. Tax Administration – Interest

DISCUSSION

Taxpayer requests that the department waive the interest assessed because the Department delayed in sending balance due notices after the taxpayer filed returns.

The Indiana statute does not allow a waiver of interest and the taxpayer had use of Department tax monies.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

15990119.SLOF

SUPPLEMENTAL LETTER OF FINDINGS NUMBER: 99-0119
International Fuel Tax Agreement (IFTA)
For the Tax Periods 1995, 1996, and 1997

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

ISSUES

I. Applicability of IFTA Regulations to Taxpayer's Single-Axle Trucks

Authority: IC 6-8.1-3-14; Indiana Dep't of Natural Resources v. United Minerals, 686 N.E.2d 851 (Ind. Ct. App. 1997); IFTA Articles of Agreement R245

Taxpayer argues that the Department incorrectly concluded that its fleet of "single-axle" trucks came within the purview of the International Fuel Tax Association (IFTA) regulations.

II. Sufficiency of Documentation Upon Which Taxpayer Was Assessed Additional Fuel Tax Liability

Authority: IC 6-6-4.1-9; IC 6-8.1-5-4(a); IFTA Audit Manual A550.100

Taxpayer argues that the audit's determination of additional fuel tax liability was based upon insufficient and inadequate documentation. Accordingly, based upon information which the taxpayer is now able to provide, taxpayer is entitled to a supplemental audit which will, presumably, decrease its tax liability.

III. Abatement of the Ten percent Negligence Penalty

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

Taxpayer requests that that Department exercise its discretion to abate the ten percent negligence penalty assessed against the taxpayer following the audit of taxpayer's existing records.

STATEMENT OF FACTS

Taxpayer operates a small fleet of trucks both within the state and within neighboring states. The Department conducted an audit of the taxpayer's records for the years at issue. The audit determined that the taxpayer did not maintain documentation sufficient to arrive at a conclusive determination of the taxpayer's fuel tax liability. In the absence of that documentation, the audit based its determination of the additional fuel tax liability upon the "best information available." That information included: fuel and mileage records available for three of the four quarterly 1997 periods; records available from taxpayer's fuel supplier; a summary estimate prepared by taxpayer's representative; and information available on taxpayer's International Registration Plan (IRP) records.

Based upon that available information, the audit determined that taxpayer was liable for additional fuel tax. Taxpayer protested that determination, an administrative hearing was held, and this Supplemental Letter of Finding resulted.

Because taxpayer's initial protest was based upon various assertions – including references to the federal Paperwork Reduction Act – the precise scope of taxpayer's protest was discussed and defined during the administrative hearing. It was agreed that taxpayer's protest was predicated upon the issues as summarized within this Supplemental Letter of Findings. That determination was confirmed with taxpayer's representative both during the hearing and in a written letter subsequent to the hearing.

At the time of the initial protest, taxpayer challenged the basis for the additional IRP assessment determined at the time of the audit encompassing the 1995 through 1997 tax periods. Though not specifically addressed during the hearing process, presumably the protest issues raised by taxpayer apply with equal force to that IRP assessment. The determinations contained within this Supplemental Letter of Findings are concomitant to the audit's IRP assessment.

I. Applicability of IFTA Regulations to Taxpayer's Single-Axle Trucks

According to taxpayer, its vehicles do not come within the purview of the IFTA regulations and that, consequently, it was not required to maintain the records requested during the audit. Taxpayer's argues that it operates a fleet of "single-axle" vehicles weighing more than 26,000 pounds. Taxpayer asserts that the term "axle" is commonly understood within the transportation industry as a powered axle – that is an axle which is attached to the vehicle's engine by means of a transmission. Therefore, IFTA's references to vehicles having two or three axles are references irrelevant to taxpayer's own fleet of "single-axle" vehicles.

IFTA is an agreement between various United States jurisdictions and Canada allowing for the equitable apportionment of previously collected motor fuel taxes. The agreement's goal is to simplify the tax, licensing, and reporting requirements of interstate motor carriers such as taxpayer. The agreement itself is not a statute but was implemented in Indiana pursuant to the authority granted under IC 6-8.1-3-14.

Accordingly, the authoritative regulation relevant to taxpayer's assertion is found at IFTA Articles of Agreement R245. The regulation states as follows:

Qualified Motor Vehicle means a motor vehicle used, designed, or maintained for transportation of persons or property and:

.100 Having two axles and a gross vehicle weight or registered gross vehicle weight exceeding 26,000 pounds or 11,797 kilograms; or

.200 Having three or more axles regardless of weight; or

.300 Is used in combination, when the weight of such combination exceeds 26,000 pounds or 11,797 kilograms gross vehicle or registered gross vehicle weight. Qualified Motor Vehicle does not include recreational vehicles.

As listed above, the language contained within IFTA Articles of Agreement R245 was adopted in 1992 and, as written, was in effect during the tax years here at issue.

Taxpayer's argument, that the term "axle" as used within IFTA Articles of Agreement R245, refers only to "powered" axles, is without substance. There is absolutely nothing within the Articles of Agreement, explanations, footnotes, manuals, or exemptions which so constrains definition of the term. Taxpayer argues for a specialized and limited definition of the term "axle" which is unwarranted because "[w]ords in an administrative regulation are to be given their plain and ordinary meaning." Indiana Dep't of Natural Resources v. United Minerals, 686 N.E.2d 851, 854 (Ind. Ct. App. 1997). Although it may be fair to argue that regulatory language is often obscured by convoluted and overly technical language, taxpayer has presented nothing of substance which authoritatively refutes the plain and ordinary definition of "axle" as "[a] supporting shaft or member upon which a wheel or a set of wheels revolves." American Heritage Dictionary of the English Language 93 (4th ed. 2000); *See also* Webster's II New Riverside University Dictionary 143 (1988). Taxpayer's vehicles, having two axles and weighing more that 26,000 pounds, fall squarely and explicitly within the purview of IFTA Articles of Agreement R245.

FINDING

Taxpayer's protest is respectfully denied.

II. Sufficiency of Documentation Upon Which Taxpayer Was Assessed Additional Fuel Tax Liability

Taxpayer argues that the audit relied on incomplete records upon which to determine the taxpayer's additional fuel tax liabilities. Taxpayer maintains that the audit discounted or ignored the available records because those records were not presented in a format amenable or convenient to the audit.

During the audit, the taxpayer was unable to produce complete fuel and mileage records for certain of the periods under review. Taxpayer was unable to produce authoritative records for the years 1995, 1996, and for the first quarter of 1997. Taxpayer was able to provide records for the second, third, and fourth quarters of 1997. As an alternative, the audit relied upon a single-page summary prepared and provided by the taxpayer. On that summary, taxpayer provided information concerning the amount of fuel purchased, total miles, miles driven within each jurisdiction, the estimated cost of the fuel, and an estimated fuel consumption rate of five miles-per-gallon. The audit also relied upon corresponding IRP records, records available from taxpayer's fuel supplier, and taxpayer's trip sheets.

The audit accepted certain of the taxpayer's estimates and modified others. For example, the audit accepted the mileage records for the second, third, and fourth quarters of 1997. However, the audit declined to utilize the five mile-per-gallon estimate provided by the taxpayer representative and chose to use a four mile-per-gallon figure as mandated under IC 6-6-4.1-9 and permitted under IFTA Audit Manual A550.100. Despite the absence of the corresponding trip sheets, the audit accepted the reported total mile figures as reported. The audit accepted and utilized the taxpayer's fuel price estimate in arriving at its conclusions. Similarly, the audit accepted and utilized the taxpayer's estimates in arriving at the jurisdictional miles and in arriving at the jurisdictional fuel consumption.

Taxpayer argues that the audit capriciously rejected the available records because those records were not in a format amenable to the Department. To the contrary, there is every indication that the audit relied upon the accuracy and completeness of both the taxpayer's contemporaneous and reconstructed records in an entirely reasonable attempt to reconstruct the otherwise missing fuel and mileage records. There is no indication that the audit rejected out-of-hand any of the information provided by the taxpayer.

Taxpayer challenges the four mile-per-gallon fuel consumption rate employed by the audit. Taxpayer argues that it can now provide records demonstrating that its vehicles currently obtain significantly better fuel economy and the current figures should be used to arrive at a projection of fuel consumption – for the tax years at issue – more favorable to the taxpayer. Taxpayer's request must be respectfully rejected. The four mile-per-gallon figure comports equably with the taxpayer's own estimate of five miles-per-gallon originally prepared by taxpayer's own representative and submitted at the time of the audit. The audit's use of the four mile-per-gallon rates is explicitly allowed under IC 6-6-4.1-9 which states that "[i]f there are no records showing the number of miles actually operated per gallon of motor fuel and if section 11(c) of this chapter is inapplicable, it is presumed for purposes of this chapter that one (1) gallon of motor fuel is consumed for every (4) miles traveled." Any reexamination of the taxpayer's available records would, by sheer necessity, necessitate various projections, estimates, and extrapolations to arrive at a re-construction of taxpayer's fuel tax liability. Such a reexamination would result in a determination either more or less favorable to the taxpayer. However, given the entirely common sense manner in which the original audit was conducted, the paucity of contemporaneous substantive records, and the likelihood that a reexamination of those records would little alter the original audit's conclusions, taxpayer's invitation to conduct a supplemental audit must be declined.

Taxpayer complains strenuously of the Department's "screw-ups," "books cooking," and reliance upon "fuzzy numbers."

However, the solution to these various difficulties may be found with taxpayer's own diligence in maintaining and preserving accurate and complete records that can be made available during any subsequent audit. As set forth in IC 6-8.1-5-4(a):

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

FINDING

Taxpayer's protest is respectfully denied.

III. Abatement of the Ten percent Negligence Penalty

The taxpayer protests the Department's imposition of the ten percent penalty assessment. IC 6-8.1-10-2.1 requires that a ten percent penalty be imposed if the tax deficiency results from the taxpayer's negligence. Department regulation 45 IAC 15-11-2 provides guidance in determining if the taxpayer was negligent.

Departmental regulation 45 IAC 15-11-2(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." Id.

IC 6-8.1-10-2.1(d) allows the Department to waive the penalty upon a showing that the failure to pay the deficiency was based on "reasonable cause and not due to willful neglect." Departmental regulation 45 IAC 15-11-2(c) requires that in order to establish "reasonable cause," the taxpayer must demonstrate that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed...."

Taxpayer argues that it demonstrated reasonable care by directing various inquiries to the Department in order to determine whether its vehicles fell within the purview of IFTA. According to taxpayer, the Department failed to either respond to the taxpayer's requests for information or to supply a definitive answer. However, copies of taxpayer's correspondence with the Department refutes the implication that the Department entirely failed to respond to taxpayer's request for information because the correspondence itself acknowledges prior receipt of information from the Department. There is nothing in the information supplied by taxpayer indicating that the Department misled or misinformed taxpayer or that taxpayer – to its detriment – relied upon the Department in concluding that it did not come within the record keeping provisions of IFTA.

Taxpayer's argument, that it exercised reasonable care in concluding that it was not subject to the IFTA record keeping requirement, does not withstand close scrutiny. Taxpayer's own records indicates that sometime during 1997, it realized the necessity of keeping complete IFTA records. Similarly, taxpayer's assertion that it was previously unaware of those record keeping requirements, does not justify abatement of the ten percent negligence penalty. As plainly set out in 45 IAC 15-11-2(b), "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

0220000408; 0220000409.SLOF

SUPPLEMENTAL LETTER OF FINDINGS NUMBER: 00-0408; 00-0409
Indiana Gross Income Tax
For the Tax Years 1995, 1996, and 1997

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

ISSUE

I. Imposition of Gross Income Tax on Revenues Derived from Taxpayer's Procurement and Transfer of Steel Products – Prospective Treatment

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

Taxpayers argues that they are entitled to prospective treatment of the Department's determination that income, derived from the procurement of steel on behalf of third-party customers, was subject to the state's gross income tax.

STATEMENT OF FACTS

Taxpayers are sister corporations involved in the purchase and sale of various commodities. The audit determined that income received by the taxpayers from certain transactions involving the procurement of steel and steel related products was subject to the state's gross income tax scheme. The taxpayers initially argued that they were merely service providers and, because they never took

title or possession of the steel commodities, the income was not subject to gross income tax. The original Letter of Findings disagreed with the taxpayers' contention and determined that the transactions were indistinguishable from the straightforward purchase and sale of steel commodities.

The taxpayers submitted a request for rehearing in which the taxpayers maintained that they could present new evidence demonstrating that they were entitled to prospective treatment of the determination arrived at within the original Letter of Findings. The request for rehearing was granted, and this Supplemental Letter of Findings addresses the prospective treatment issue.

DISCUSSION

I. Imposition of Gross Income Tax on Revenues Derived from Taxpayer's Procurement and Transfer of Steel Products – Prospective Treatment

Taxpayers predicate their argument for prospective treatment on the ground that a previous audit, conducted for the years 1988 through 1990, found that income from similar steel procurement transactions was not subject to gross income tax. According to the taxpayer, "it would be unconscionable to now tax us going back almost 10 years when we clearly relied on the findings of the Indiana Department of Revenue and continued to perform our business and prepare our records in the same manner."

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

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

Taxpayers believe that they are in the same situation as plaintiff taxpayer in City Securities and, as a consequence, are entitled to the same prospective treatment on their own tax liability. Specifically, taxpayers cite to a prior audit conducted for the period March 1988 through March 1990 and completed approximately ten years ago.

In response to questions submitted to the taxpayers during the prior audit, taxpayers stated that it was in the business of buying steel from Indiana steel producers and that "[t]he steel is sold to branches of [Taxpayer One]. [Taxpayer Two] does not carry inventory." Taxpayer One's branches were located outside Indiana. Based on the taxpayers' own reply, the prior audit would have reasonably concluded that all of the sales went to out-of-state locations. Since taxpayers had no inventory within the state, the prior audit would have concluded that there were no taxable sales within Indiana.

Unlike the prior audit, the current audit concluded that taxpayers maintained an inventory of steel within the state. In addition, the current audit concluded that the taxpayers were engaged in "back to back" transactions occurring entirely within the state. The steel originated at an Indiana steel plant and came to rest with an Indiana customer. Even though taxpayers were out-of-state entities, the steel transactions occurred exclusively within the state and the proceeds of those transactions were properly subject to Indiana's gross income tax.

Absent any indication that the prior audit considered transactions functionally identical to those transactions considered within the current audit, that the explanations taxpayers provided during the two audits were identical, or that the taxpayers' specifically relied upon an adjustment made and explained within the prior audit report, taxpayers' request for prospective treatment must be denied.

For the three tax periods here at issue, the original Letter of Findings determined that taxpayers' "business is indistinguishable from the straightforward purchase and sale of steel commodities," and that the revenue attributable to those transactions is subject to the state's gross income tax. Because there is no indication that the Department is "reinterpreting" taxpayers' tax liability, the Department has no basis upon which to grant taxpayers' request for prospective treatment of that liability.

FINDING

Taxpayers' protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0420020049P.SLF

SUPPLEMENTAL LETTER OF FINDINGS NUMBER: 02-0049P SLOF
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, at hearing states that there is a discrepancy regarding the seventy-seven percent underpayment in sales tax because it paid tax on purchases that were credited in the audit report.

The taxpayer states that it did not fail to remit sales tax on seventy-seven percent (77%) of its taxable sales but accrued and paid use tax; therefore the statement is misleading. The hearing officer reassigned the over accrued use tax to the sales tax column to reduce the percentage. The result was that the sales were still underpaid by $10,009 or fifty-one percent (51%) in 1998 and $7,704 or seventy-three percent (73%) in 2000. The movement of the overpaid accounts from purchases to sales increased the purchases from ($19,292) to $1,823 in 1998, from ($14,212) to $20,151 in 1999, and from $17,217 to $25,587 in 2000 thereby also increasing the percentage where tax was not paid upon taxable purchases. Overall the taxpayer failed to remit 10.5% in 1998 and 22% in 2000. A prior audit waived the penalty because the taxpayer paid more than 99% of the tax due which is not true for the current audit. As stated in the first Letter of Findings, the department gave 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.

INDIANA DEPARTMENT OF STATE REVENUE

Revenue Ruling #2002-01 ST

January 23, 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 information about the Department's official position concerning a specific issue.

ISSUE

State Retail Sales/Use Tax - Application of State Retail Sales/Use Tax on Service Contracts

Authority: IC 6-2.5-4-1, 45 IAC 2.2-4-2, Sales Tax Information Bulletin #2

The taxpayer requests the Department to rule whether or not the taxpayer can collect retail sales tax on the sale of maintenance agreements for office equipment.

STATEMENT OF FACTS

The taxpayer is engaged in the retail sale of copiers, copier equipment and supplies throughout Indiana and the Midwest. The taxpayer also sells maintenance and supply contracts to customers who have leased or purchased copiers. The taxpayer offers three types of maintenance contracts – "Standard," "Full Service" and "Comprehensive." "Standard" maintenance agreements include all labor and repair parts, excluding the copier drum/photoconductor. The "Full Service" agreement includes labor, repair parts and the copier drum/photoconductor. The "Comprehensive" maintenance agreement includes all labor, all repair parts (including the drum/photoconductor), and supplies. All maintenance agreements include provisions for periodic inspection and interim maintenance activities where tangible personal property may be supplied to the customer.

The taxpayer was audited by the Indiana Department of Revenue in 1995 and was advised that for years after 1994, the taxpayer should self-assess use tax on all parts and supplies removed from its inventory for the purpose of fulfilling its obligations under its "Comprehensive" maintenance agreements. As a result of this, the taxpayer has paid use tax on all parts and supplies provided to customers under all maintenance contracts since 1995. No sales tax is collected on any of the maintenance agreements at the current time.

The taxpayer states that there is a virtual certainty that parts and supplies will be provided to all "Standard," "Full Service" and "Comprehensive" maintenance agreement customers on a periodic basis. During the ten-month period ending October 30, 2001, maintenance agreement revenues and the cost of parts and supplies sold to customers were as follows:

All maintenance agreement revenue	2,490,359
Cost of parts provided pursuant to maintenance agreements	696,417
Cost of supplies provided pursuant to maintenance agreements	729,239
Percentage of parts and supplies to revenue	57.25%

DISCUSSION

IC 6-2.5-4-1(a) provides that "a person is a retail merchant making a retail transaction when he engages in selling at retail." Section 1(a) 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." Based upon that statute, the taxpayer is not a "retail merchant making a retail transaction" when selling service contracts for office equipment.

45 IAC 2.2-4-2 states that services are not subject to gross retail tax. The second part of that regulation (see paragraph below) does not apply to the "Standard" or "Full Service" contracts because we do not necessarily have a transfer of personal property. Thus, it is necessary to apply the Sales Tax Information Bulletin #2, which provides detailed guidelines on the applicability of sales/use tax to warranties and maintenance contracts. That Bulletin provides that "[o]ptional warranties and maintenance agreements that only contain the intangible right to have property supplied and there is no certainty that property will be supplied are not subject to sales tax. Any parts or tangible personal property supplied pursuant to this type of agreement are subject to use tax." Because there is no certainty that property will be supplied in either the "Standard" or the "Full Service" maintenance contract agreements, the parts used in conjunction with such remain subject to use tax.

However, this is not the case with the "Comprehensive" maintenance contract where all labor, repair parts, and supplies are included. Because a transfer of personal property is assured under the "Comprehensive" maintenance agreement, it is necessary to apply the remaining sections of 45 IAC 2.2-4-2. 45 IAC 2.2-4-2(a) provides that when there is a transfer of "tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail unless:

(1) the serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property

(2) the tangible personal property purchased is used or consumed as a necessary incident to the service

(3) the price charged for tangible personal property is inconsequential (not to exceed 10%) compared with the service charge; and

(4) the serviceman pays gross retail tax or use tax upon the tangible personal property at the time of acquisition."

The taxpayer does not satisfy the third exception where the cost of supplies (only available in the "Comprehensive" agreement) provided to the customer exceeds the 10% limitation. Because the taxpayer does not meet the four exceptions, the taxpayer may collect retail sales tax on the "Comprehensive" agreement only.

RULING

The Department rules that the sale of the "Comprehensive" contracts are subject to state retail sales tax while the taxpayer needs to continue to assess use tax on tangible personal property used to satisfy the "Standard" and "Full Service" maintenance agreements.

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.

INDIANA DEPARTMENT OF STATE REVENUE
Revenue Ruling #2002-02 IT
April 10, 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.

ISSUES

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

Authority: IC 6-2.1-3-25, Rule 45 IAC 1.1-1-3, Rule 45 IAC 1.1-2-13, IC 6-2.1-1-16, Tax Policy Directive #2, IC 6-3-1-3.5, IC 6-2.5-2-1, IC 6-2.5-3-2, IC 6-2.5-4-1, IC 6-3-4-8

The taxpayer requests the Department to rule on various issues pertaining to two proposed business restructurings. The specific issues will be listed and addressed in the "Discussion and Rulings" portion of this ruling.

STATEMENT OF THE FACTS

Taxpayer is incorporated and commercially domiciled in the State of Ohio. Taxpayer engages in the business of constructing single-family homes with its affiliates in several states, including Indiana. In Indiana, Taxpayer has resident employees, sales offices, and real and tangible personal property (hereinafter "Indiana assets"). Indiana employees perform activities related to home sales, construction management, land acquisition, zoning approvals, and other related activities. Under the proposed restructuring, the Indiana employees may or may not be transferred to another legal entity. Taxpayer hires subcontractors for the purpose of constructing the homes. Personnel located in the Ohio corporate headquarters are responsible for home design, marketing initiatives, and corporate management activities. In addition, corporate headquarters manages national relationships with various national vendors such as lumber and appliance suppliers. Supplies purchased under the national accounts are used to construct Indiana homes. Taxpayer currently files a separate Indiana corporate income tax return.

To minimize business risk and protect shareholder value, Taxpayer is proposing to restructure the manner in which it conducts business activities in the State of Indiana. A primary reason underlying the proposed restructuring is to minimize legal risks related to the Indiana home building operations. This is accomplished by transferring the Indiana operations (assets as well as employees) into a fully operational limited partnership. Through separating the Indiana operations into a separate legal entity, with separate legal owners, Taxpayer will minimize its legal exposure related to liabilities arising from the Indiana operations. In addition, Taxpayer can more accurately measure financial results related to the Indiana operations because these operations are conducted within a separate legal entity. Taxpayer will benefit from minimizing its legal risks, and its shareholders will benefit from more accurate financial information regarding the Indiana operations. Finally, the Indiana operations will be organized for the purpose of making a profit from building residential homes in Indiana, which provides the proposed restructuring with additional business purpose.

Under the proposed restructuring, Taxpayer would contribute a ninety-nine percent (99%) undivided interest in its Indiana assets and related liabilities to a newly created single member limited liability company (SMLLC #1) in exchange for a one hundred percent (100%) membership interest in SMLLC #1. Taxpayer would also contribute the remaining one percent (1%) interest in its Indiana assets and related liabilities to another newly created single member limited liability company (SMLLC #2) in exchange for a one hundred percent (100%) member ship interest in SMLLC #2. Pursuant to the Internal Revenue Code (IRC) under Treasury Regulation Section 301.7701-3(b)(ii), SMLLC #1 and SMLLC #2 will be disregarded as an entity separate from their owner, Taxpayer. For federal income tax purposes, the transactions are non-taxable as transfers from one division to another, and no gain or loss is recognized and the assets will have a carryover basis.

A newly created limited partnership (LP) will also be created under Indiana partnership statutes. SMLLC #1 and SMLLC #2 will contribute their undivided interests in the Indiana assets and related liabilities to LP. In return for the contribution, SMLLC #1 will receive a ninety-nine percent (99%) general or limited partnership interest and SMLLC #2 will receive a one percent (1%) general or limited partnership interest in LP.

For federal income tax purposes any income or loss earned by LP will be treated as if Taxpayer received it because both SMLLC#1 and SMLLC #2 are disregard from their owner for federal income tax purposes and treated as branches of Taxpayer. For federal income tax purposes, the LP would be treated as if it were solely owned by Taxpayer, and also disregarded as an entity separate from its owner pursuant to Treas. Reg. Section 301.7701-3(b)(ii). Accordingly, for federal income tax purposes the income or loss of LP would be included as part of Taxpayer's federal taxable income.

DISCUSSION & RULINGS

ISSUE #1:

Whether the Department will recognize LP as a partnership for gross income tax purposes.

RULING #1

The Department recognizes the existence of the LP for gross income tax purposes to the extent the partnership is created pursuant to all applicable Indiana statutes.

ISSUE #2:

Whether the Department will impose gross income tax on LP.

RULING #2

The Department rules that the LP will not be subject to gross income tax to the extent the LP is not a publicly traded partnership that is treated as a corporation for federal income tax purposes under Section 7704 of the Internal Revenue Code as provided by IC 6-2.1-3-25.

ISSUE #3:

Whether the Department will treat SMLLC #1 and SMLLC #2 as disregarded entities or pass through entities not subject to gross income tax.

RULING #3

Pursuant to IC 6-2.1-1-16, limited liability companies that have a single member and are disregarded as entities for federal income tax law purposes are not defined as gross income tax "taxpayers". Further, Departmental Tax Policy Directive #2 provides that for Indiana income tax purposes LLCs are treated the same as they are for federal tax purposes. Therefore, the Department rules that the SMLLCs are both, not defined as gross income taxpayers and are disregarded entities for gross income tax, hence are not subject to gross income tax.

ISSUE #4:

If the Department respects LP as a partnership for gross income tax, will the net income earned by the LP be treated as a partnership distribution from the limited and general partners to Taxpayer under the gross income tax

RULING #4

The Department rules that, pursuant to Rule 45 IAC 1.1-1-3, distributions from the limited partner are taxed 100% to the Taxpayer at the rate of 1.2%. Pursuant to Rule 45 IAC 1.1-2-13, distributions from the general partner are apportioned, if applicable, and taxed at the rate of 1.2% at the taxpayer's level.

ISSUE #5:

Whether the Department will follow federal income tax treatment and disregard the SMLLCs and the LP from their owner, Taxpayer. If so, for adjusted gross income tax and supplemental net income tax will Taxpayer's taxable income include all the income or loss, subject to apportionment, of all the entities described in this proposed restructuring, i.e., the group of entities will be treated as a single entity?

RULING #5

Pursuant to IC 6-3-1-3.5, the departure point for calculation of the Indiana adjusted gross income tax and the supplemental net income tax for corporations is IRC Section 63 "taxable income". This being the case, the Department rules, to the extent the SMLLCs and the LP are treated as disregarded entities for federal income tax purposes, the Taxpayer's adjusted gross income tax and supplemental net income tax "taxable income" will include all income or loss, subject to apportionment, of all the entities described in the proposal set forth in the statement of facts, e.g., the two SMLLCs and the LP will be treated as a single entity.

ISSUE #6

Whether any sales or use taxes will be due on the transfer of vehicles and other assets from Taxpayer to the SMLLCs or the LP.

RULING #6

IC 6-2.5-2-1 and IC 6-2.5-3-2 impose sales/use tax on retail transactions made in Indiana and on tangible personal property stored, used or consumed in Indiana that was acquired in a retail transaction. IC 6-2.5-4-1 provides that a "retail transaction" is defined as the transfer of tangible personal property for consideration. The Department rules, to the extent that the LP is not a taxable event for federal income tax purposes, there is no consideration involved in the transfer. Therefore, no retail transaction is executed and no sales/use tax is due on the transfer of vehicles and other assets in proposed restructuring.

ISSUE #7

If the Indiana employees are transferred to a new legal entity, which entity will be treated as the employer following the restructuring?

RULING #7

IC 6-3-4-8 states that every employer making payments of wages subject to tax under IC 6-3 who is required under the provisions of the Internal Revenue Code to withhold, collect and pay over income tax on wages paid by such employer to such employee, shall, at the time of payment of such wages, deduct and retain therefrom the amount prescribed in the withholding instructions issued by the Department. It is clear then, every employer who is required under the provisions of the Internal Revenue Code to withhold, collect and pay over federal income tax on wages paid by the employer is required, also, to withhold Indiana state and county tax (if applicable) on these wages. Therefore, the Department rules, to the extent the Taxpayer and/or the LP are required to withhold federal income tax on wages paid, the Taxpayer and/or the LP are required to, also withhold Indiana state and county tax (if applicable) on these wages.

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.

DEPARTMENT OF STATE REVENUE INDIANA
Revenue Ruling #2002-05 ST
March 14, 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 information about the Department's official position concerning a specific issue.

ISSUES

Sales/Use Tax – Consequences of Proposed Transaction Concerning an Aircraft

Authority: IC 6-2.5-5-8, IC 6-2.5-8-8, IC 6-2.5-3-2, IC 6-2.5-3-4, IC 6-2.5-2-1, IC 6-2.5-4-10

The taxpayer requests the Department to rule, should the taxpayer decide to execute the proposed transaction as described herein, whether or not:

1. The taxpayer will be allowed to acquire the aircraft exempt from sales and use tax because it is acquiring the aircraft for resale;
2. The taxpayer will be required to collect and remit sales and use tax on each rental payment as collected. The rental of the aircraft through the agent, along with separately stated charges by the agent for services, will not relieve the taxpayer of a duty to collect tax on each rental payment; and
3. To the extent sales are contracted through the agent's business, also a retail merchant, the agent may commingle sales of the taxpayer with its own sales and report and remit to the Department under the agent's retail merchant number. To the extent the taxes are paid by the agent the taxpayer will be relieved of the duty to collect and remit taxes on those sales.

STATEMENT OF FACTS

The taxpayer, a Limited Liability Company, proposes to acquire a single engine piston aircraft for rental to students and licensed pilots training and operating out of Indiana airports. The taxpayer proposes to acquire customers through the use of a marketing agreement in which it engages local fixed base operators and flight school operators to serve as agents in obtaining and scheduling customers for the use of its aircraft. The taxpayer will be responsible for licensing, maintenance, storage and insurance of the aircraft. The taxpayer will not have operational control of the aircraft when rented to a customer. The taxpayer will not use the aircraft for its own use, but rather, it will be exclusively held and operated for the rental to others. The taxpayer will obtain a Retail Merchant's Certificate and remit sales tax on each use of the aircraft.

DISCUSSION

The taxpayer submitted a copy of the marketing agreement referenced in the "Statement of Facts" section of this ruling for Departmental review. The marketing agreement reveals that the relationship between the taxpayer and the local fixed based operators and flight school operators, hereinafter "agents", will be one of lessor and lessee. The following sales/use tax consequences result:

1. IC 6-2.5-5-8 provides that tangible personal property can be purchased exempt from sales/use tax when acquired for lease/rental purposes. The taxpayer, therefore, may purchase the aircraft exempt from sales/use tax upon issuing a proper Indiana sales/use tax exemption certificate to the seller (IC 6-2.5-8-8);
2. The agents will be leasing/renting the aircraft from the taxpayer for leasing/renting purposes. The agents may issue a proper Indiana sales/use tax exemption certificate to the taxpayer (IC 6-2.5-8-8) and not be required to pay sales/use tax to the taxpayer on the lease/rental payments as a result of the above mentioned lease/rental exemption statute IC 6-2.5-5-8. Should the agents, however, use the aircraft for non-lease/rental purposes the agents must pay use tax (IC 6-2.5-3-2) to the Department as provided by IC 6-2.5-3-4; and
3. Pursuant to IC 6-2.5-2-1 and IC 6-2.5-4-10, the agents will be required to collect sales/use tax from their lease/rental customers.

RULING

The Department rules that the taxpayer's proposed transaction concerning an aircraft will result in the following sales/use tax consequences:

1. The taxpayer may purchase the aircraft exempt from sales/use tax;
2. The taxpayer will not be required to collect sales/use tax from the agents on the lease/rental payments made by the agents to the taxpayer. The agents, however, will be required to pay use tax to the Department for all non-lease/rental use of the aircraft; and
3. The agents will be required to collect and remit sales/use tax to the Department on the lease/rental of the aircraft to their customers.

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 taxpayer any protection. It should be noted that subsequent to the publication of this ruling, a change in statute, regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection.

INDIANA DEPARTMENT OF STATE REVENUE
Revenue Ruling #2002-07 ST
April 11, 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 – Product sold and stored in Indiana and later shipped to another state

Authority: IC 6-2.5-2-1; IC 6-2.5-4-1; 45 IAC 2.2-5-53; 45 IAC 2.2-5-54

The taxpayer requests the Department to rule whether:

1. Collection of sales tax should occur on behalf of foreign states or Indiana for products that are stored in Taxpayer's Indiana warehouse prior to shipment to buyers in foreign states.

STATEMENT OF THE FACTS

Taxpayer produces graphics products for customers located in various states. These are primarily large-scale decals that are affixed to large trucks. The product is manufactured in Indiana and is either shipped via third party common carrier to the customer, shipped via third party common carrier to the customer and installed by outside contractors hired by Taxpayer, or transferred to Taxpayer's warehouse in Indiana to await future shipping (called "paid stock"). In each case the customer pays for the product and it is said to no longer belong to the Taxpayer. Taxpayer charges customers 10% "paid stock" fee for storage in its warehouse. Further, taxpayer charges customers a "shipping and handling" fee on all shipments. All shipping is arranged by the Taxpayer and, if requested, will ship by a specific carrier. In addition, if the product is damaged in Taxpayer's warehouse, then the Taxpayer's insurance carrier covers the loss. If the product is damaged in transit, the common carrier is responsible for the loss.

It has been the Taxpayer's position that if the product is transferred to the Taxpayer's warehouse and title passes at that point to the customer, the sale has taken place in Indiana and sales tax is due to Indiana. The state in which the product will ultimately be used is not determinate at this point, since the customers have locations all over the country.

Recently, other states have begun to challenge this treatment using hindsight and claim that Taxpayer should have charged their state's sales tax if the product ultimately ended up in their state. (Based on varying rules of nexus, Taxpayer has filing responsibilities in several states and does charge those states' sales taxes where the product is shipped directly into that state after production.)

DISCUSSION

Whether collection of sales tax should occur on behalf of foreign states or Indiana for products that are stored in Taxpayer's Indiana warehouse prior to shipment to buyers in foreign states.

IC 6-2.5-2-1 provides in relevant part:

(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.

(b) 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 agent for the state.

IC 6-2.5-4-1 defines a retail transaction as:

(c) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:...

(2) transfers that property to another person for consideration.

45 IAC 2.2-5-53 provides in relevant part:

(a) The state gross retail tax shall not apply to such part of the gross income from transactions constituting selling at retail as is exempt from the gross income tax under the provisions of IC 6-2.1-3-3.

(b) Gross receipts derived from transactions which constitute "retail transactions" which the state of Indiana is prohibited from taxing by the Constitution of the United States of America are exempt from gross retail tax. Under this regulation [45 IAC 2.2], this exemption is limited to gross receipts from transactions conducted in commerce between Indiana and other states of the United States, or between Indiana and foreign countries. Such sales commonly are referred to as "sales in interstate commerce" and Indiana is prohibited from taxing such sales by the United States Constitution.

45 IAC 2.2-5-54 provides in relevant part:

b) Delivery to purchaser in a state other than Indiana. Sales of tangible personal property which are delivered to the purchaser in a state other than Indiana for use in a state other than Indiana are not subject to gross retail tax or use tax, provide the property is not intended to be subsequently used in Indiana.

c) Delivery by common carriers. (1) Delivery to common carriers in Indiana for shipment to another state by common carrier shall be deemed delivery to a purchaser in a state other than Indiana for purposes of applying the gross retail tax or use tax.

In the instant case, the fact that legal title to the product may pass from the Taxpayer to its customer when the product is transferred to the Taxpayer's warehouse for shipment at a later date is not determinative. A transfer of taxable personal property necessary to execute a retail transaction, as provided by IC 6-2.5-4-1, does not, in all instances, require an initial transfer of legal title, but it does require, at the minimum, a "deemed" possession of tangible personal property by the purchaser. Therefore, when the Taxpayer warehouses the "paid stock" and subsequently ships the products by a third party common carrier to purchasers outside of Indiana, the transaction is not an Indiana retail transaction. The customer does not take possession of the product until the product is shipped out of state by the third party common carrier. According to the Indiana Administrative Code, specifically 45 IAC 2.2-5-54(c)(1), this is a transaction that is not subject to the Indiana sales tax.

RULING

The Department rules that the transactions described by the Taxpayer are not retail transactions for purposes of the Indiana sales tax.

CAVEAT

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