**INDIANA EMERGENCY MEDICAL SERVICES COMMISSION**

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| Title: | **BLS Transport of Patients with ALS Devices** |
| Identification Number: | **EMS-01-2000** |
| Date Originally Adopted: | **April 27, 2000** |
| Dates Revised: | **March 15, 2002** |
| Other Policies Repealed or Amended: | |
| Brief Description of Subject Matter: | **Allows EMTs to transport patients with some advanced life support devices** |
| Citations Affected: | **IC 16-31-3-22, IC 16-18-2-33.5, IC 16-18-2-112, IC 16-18-2-6** |

This non-rule policy statement has been adopted pursuant Indiana Code 4-22-7-7 and does not have the effect of law or represent a formal decision or final action of the Indiana Emergency Medical Services Commission. This nonrule policy statement interprets, supplements, or implements a statute or rule; or specifies a policy that the Indiana Emergency Medical Services Commission relies upon to enforce a statute or rule, conduct an audit or investigation to determine compliance with a statute or rule, or impose a sanction for violation of a statute or rule. This nonrule policy statement shall be used in conjunction with applicable laws. It does not replace laws, and if it conflicts with these laws, the laws shall control. A revision to this nonrule policy statement may be put into effect by the Indiana Emergency Medical Services Commission once the revised nonrule policy statement is made available for public inspection and copying. The Indiana Emergency Medical Services Commission will submit revisions to the Indiana Register for publication.

**I. INTRODUCTION**

The Emergency Medical Services Commission recognizes the increasing numbers of medical-device-dependent patients. EMTs and Advanced EMTs may transport these patients.

Long-term care providers should stop central venous and enteral on-going infusions prior to transport by the EMT or Advanced EMT. EMTs and Advanced EMTs shall not manipulate these devices unless directed to do so by medical control.

**II. POLICY**

EMTs and Advanced EMTs may transport any of the following under control of the provider organization's medical director:

- PCA Pump with any medication or fluid infusing
- Medication infusing via a closed, locked system
- A central catheter that is clamped off
- A patient with a feeding tube that is clamped off
- A patient with a Holter monitor
- A patient with a peripheral IV infusing vitamins
- IV fluids infusing through a peripheral IV via gravity or an infusing system that allows the technician to change the rate of infusion are limited to D5W, Lactated Ringers, Sodium Chloride (0.9% or less), Potassium Chloride (20mEq or less for EMTs, 40mEq or less for Advanced EMTs)

The provider organization' s medical director may approve additional devices at his discretion.

The following are determined by the Emergency Medical Services Commission to require paramedic level transportation:

- Medication infusing through a peripheral or central IV or fluid infusing through a central IV via gravity or an infusing system that allows the operator or assistant to change the rate of infusion
- A patient with a chest tube
- A patient with a continuous feeding tube
- A vent dependent patient

**INDIANA EMERGENCY MEDICAL SERVICES COMMISSION**

| | |
|---|---|
| Title: | **Authority for Advanced EMT Personnel to Perform Finger Sticks** |
| Identification Number: | **EMS-01-2002** |
| Date Originally Adopted: | **March 15, 2002** |
| Dates Revised: | |
| Other Policies Repealed or Amended: | |
| Brief Description of Subject Matter: | **Allows Advanced EMTs to perform finger sticks to measure blood glucose levels** |
| Citations Affected: | **IC 16-31, IC 16-18-2-6, IC 16-18-2-7** |

This non-rule policy statement has been adopted pursuant Indiana Code 4-22-7-7 and does not have the effect of law or represent a formal decision or final action of the Indiana Emergency Medical Services Commission. This nonrule policy statement interprets, supplements, or implements a statute or rule; or specifies a policy that the Indiana Emergency Medical Services Commission relies upon to enforce a statute or rule, conduct an audit or investigation to determine compliance with a statute or rule, or impose a sanction for violation of a statute or rule. This nonrule policy statement shall be used in conjunction with applicable laws. It does not replace laws, and if it conflicts with these laws, the laws shall control. A revision to this nonrule policy statement may be put into effect by the Indiana Emergency Medical Services Commission once the revised nonrule policy statement is made available for public inspection and copying. The Indiana Emergency Medical Services Commission will submit revisions to the Indiana Register for publication.

**I. INTRODUCTION**

The Indiana EMS Commission grants authority for Advanced EMT personnel to perform finger sticks to measure a patient's blood glucose level.

**II. POLICY**

The Indiana Emergency Medical Service Commission authorizes EMS personnel certified at the Advanced EMT level to perform finger sticks for the purpose of drawing blood to measure a patient's blood sugar, as long as the following conditions are met:

1) The provider organization must be certified at the Advanced EMT level.
2) The provider organization must be compliant with Consolidated Laboratory Improvement Act (CLIA) regulations.
3) The provider organization's medical director must issue written approval of the procedure.
4) The provider organization's medical director must issue written protocol for the procedure.
5) The provider organization's medical director must ensure that the EMS personnel are appropriately trained to perform the procedure.
6) The written approval and the protocol must be signed and dated by the provider organization's medical director and be on file with the Indiana EMS Commission.

**INDIANA EMERGENCY MEDICAL SERVICES COMMISSION**

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|---|---|
| Title: | **Authority for EMS Personnel Certified in Advanced Life Support to Function as Tactical Medical Support for Non-EMS Certified Law Enforcement Agencies** |
| Identification Number: | **EMS-02-2002** |
| Date Originally Adopted: | **March 15, 2002** |
| Dates Revised: | |
| Other Policies Repealed or Amended: | |
| Brief Description of Subject Matter: | **Authorizes Advanced Life Support personnel to function as tactical medical support for law enforcement agencies** |
| Citations Affected: | **IC 16-31, IC 16-31-3-1, IC 16-18-2-6, IC 16-18-2-266** |

This non-rule policy statement has been adopted pursuant Indiana Code 4-22-7-7 and does not have the effect of law or represent a formal decision or final action of the Indiana Emergency Medical Services Commission. This nonrule policy statement interprets, supplements, or implements a statute or rule; or specifies a policy that the Indiana Emergency Medical Services Commission relies upon to enforce a statute or rule, conduct an audit or investigation to determine compliance with a statute or rule, or impose a sanction for violation of a statute or rule. This nonrule policy statement shall be used in conjunction with applicable laws. It does not replace laws, and if it conflicts with these laws, the laws shall control. A revision to this nonrule policy statement may be put into effect by the Indiana Emergency Medical Services Commission once the revised nonrule policy statement is made available for public inspection and copying. The Indiana Emergency Medical Services Commission will submit revisions to the Indiana Register for publication.

**I. INTRODUCTION**

The EMS Commission grants authority to Advanced Life Support personnel to function as tactical medical support for law enforcement agencies.

**II. POLICY**

The Indiana Emergency Medical Service Commission authorizes advanced life support personnel to function as tactical medical support for law enforcement agencies as long as all of the following conditions are met:

1) The provider organization must submit an amendment to the existing Application for Advanced Life Support Provider Certification that defines the activities of tactical medical support as a function of the provider organization.

2) The provider organization must submit written documentation authorizing all involved ALS personnel to function in the capacity of tactical medical support personnel within the scope of practice of the provider's and the individual's certification.
3) The provider organization must submit documentation that ensures the continuation, during patient transport, of ALS procedures that are initiated by the tactical medical support personnel transport for all jurisdictions to which the tactical medical support personnel can be reasonably expected to respond.
4) The provider organization's medical director must issue written approval of the tactical medical support activity and approve the individual personnel involved.
5) The provider organization's medical director must issue written authority for any ALS devices and/or medications that are carried by the ALS personnel within the scope of practice of the provider's and the individual's certification.
6) The provider organization's medical director must issue written authority defining when and under what circumstances the ALS personnel may carry the ALS devices and/or medications.
7) The provider organization's medical director must issue written authority defining when and under what circumstances any ALS devices and/or medication may be used.
8) The provider organization's medical director must issue written authority defining how the security of any controlled substances will be ensured.
9) The provider organization's medical director must issue written protocol for EMS procedures performed by the ALS personnel while performing as tactical medical support.
10) The chief officer of the participating law enforcement agency must issue a written acknowledgement that the provider organization's ALS medical personnel are functioning as tactical medical support for the law enforcement agency.
11) All written approvals, authorities, protocols, and acknowledgements must be signed and dated and be on file with the Indiana EMS Commission.
12) EMS personnel that function as tactical medical support personnel are restricted to functioning within the scope of practice of both their provider affiliation and their individual EMS certification.
13) The provider organization must submit a statement agreeing that all medical care rendered by the tactical medical personnel will be documented on the organization's standard patient care record. Further, the organization agrees to submit the requisite patient care data elements to the Indiana EMS Commission in a timely manner.

Law enforcement agencies that chose to provide ALS tactical medical support and have not made arrangements with an Indiana certified ALS provider to provide that ALS tactical medical support must be certified as an Advanced Life Support Non-Transport Provider.

## INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

**Title:** Lead-Based Paint License Transition
**Identification Number:** Air-030-NPD
**Date Originally Presented:** June 5, 2002
**Date Effective:** July 5, 2002
**Dates Revised:**
**Other Policies Repealed or Amended:** None
**Brief Description of Subject Matter:** Describes IDEM's policy regarding House Enrolled Act 1171 statutory changes to lead-based paint licensing expiration dates.
**Citations Affected:** 326 IAC 23-2-5

This nonrule policy document is intended solely as guidance and does not have the effect of law or represent formal Indiana Department of Environmental Management (IDEM) decisions or final actions. This nonrule policy document shall be used in conjunction with applicable laws. It does not replace applicable laws, and if it conflicts with these laws, the laws shall control. This nonrule policy document may be put into effect by IDEM thirty days after presentation to the Air Pollution Control Board and after it is made available to public inspection and comment, pursuant to IC 13-14-1-11.5. 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.

**Purpose**

Indiana's lead-based paint rules went into effect on February 6, 1999. These rules require individuals and contractors who perform certain lead-based paint activities to be licensed by the Indiana Department of Environmental Management (Department). House Enrolled Act 1171 (HEA 1171), signed into law by Governor O'Bannon on March 21, 2002, requires that Indiana's lead-based paint licensing expiration date be extended from the current one year required renewal to a three year renewal. The purpose of this nonrule policy document is to provide a method of transferring current lead-based paint license holders (those individuals or contractors maintaining a current lead-based paint license on July 1, 2002) to an expiration date of June 30, 2004 as prescribed

under HEA 1171. In addition, this nonrule policy document will provide for the issuance of lead-based paint licenses with a three year expiration date for all first time licenses issued on or after July 1, 2002, until the Indiana Air Pollution Control Board adopts amendments to effect these changes as required under HEA 1171. Further this nonrule policy document will allow individuals to obtain lead-based paint refresher training every three years rather than the current annual refresher requirement in 326 IAC 23-2-5, as was the intent of the language in HEA 1171. This non-rule policy is intended to provide a transitional process for individuals and contractors to continue to obtain an Indiana lead-based paint license, while the Department is in the rulemaking process to implement the required statutory requirements of HEA 1171.

**Policy**

Initial licenses and renewals of existing licenses issued prior to July 1, 2002, will be valid for one year, as provided by current law. On July 1, 2002, the Department will automatically reissue those licenses with an extended expiration date of July 30, 2004.

- Individuals who apply for an initial or renewal license after July 1, 2002, will be issued a license valid for three years from the date of issuance.
- Individuals whose current training expires prior to July 1, 2002, must take the appropriate refresher training course in the discipline they are seeking licensure within the time frames established under current law.
- On and after July 1, 2002, individuals must take a refresher training course in the discipline they are seeking licensure within the three year period following their last initial or refresher training course.

This nonrule policy document expires on the effective date of amendments to Indiana's Lead-Based Paint Rules (326 IAC 23) incorporation the statutory requirements as outlined in HEA 1171. After the expiration date, all individuals and contractors shall obtain a license as required and outlined in 326 IAC 23.

If you have any questions regarding this policy or lead-based paint licensing, please contact:

Frank P. Profit (fprofit@idem.state.in.us)
IDEM, Asbestos/Lead Section
100 North Senate Avenue
P.O. Box 6015
Indianapolis, Indiana 46206-6015
1-317-232-8416 or 1-888-574-8150

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**DEPARTMENT OF STATE REVENUE**

Departmental Notice #2

July 1, 2002

Prepayment Of Sales Tax On Gasoline

This document is not a "statement" required to be published in the Indiana Register under IC 4-22-7-7. However, under IC 6-2.5-7-14, the Department is required to publish the prepayment rate in the June and December issues of the Indiana Register. The purpose of this notice is to inform each refiner, terminal operator, and qualified distributor known to the Department to be required to collect prepayments of sales tax on gasoline of the "prepayment rate" effective for the next six-month period. A prepayment rate is calculated twice a year by the Department and is effective for the period January 1 through June 30, or, July 1 through December 31, as appropriate.

The prepayment rate is defined by IC 6-2.5-7-1 as the product of:

1) the statewide average retail price per gallon of gasoline (excluding the Indiana gasoline tax, the federal gasoline tax, and the Indiana gross retail tax); multiplied by

2) the state gross retail tax rate [5%]; multiplied by

3) ninety percent (90%); and then

4) rounded to the nearest one-tenth of one cent ($0.001)

**The prepayment rate of sales tax on gasoline for the six – (6) month period beginning July 1, 2002, is three and two-tenths cents ($.032) per gallon.**

Using the most recent retail price of gasoline available (as required by IC 6-2.5-7-14(b)), the Department has determined the statewide average retail price per gallon of gasoline to be seventy-one cents ($0.71). The most recent retail price of gasoline available was based on data contained in the May 2002 Petroleum Marketing Monthly as published by the Energy Information Agency.

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

| Period | | | Rate Per Gallon |
|---|---|---|---|
| July 1, 1994 | to | December 31, 1994 | 2.9 cents |
| January 1, 1995 | to | June 30, 1995 | 3.7 cents |

| | | | |
|---|---|---|---|
| July 1, 1995 | to | December 31, 1995 | 3.3 cents |
| January 1, 1996 | to | June 30, 1996 | 3.3 cents |
| July 1, 1996 | to | December 31, 1996 | 3.4 cents |
| January 1, 1997 | to | June 30, 1997 | 4.0 cents |
| July 1, 1997 | to | December 31, 1997 | 3.9 cents |
| January 1, 1998 | to | June 30, 1998 | 4.0 cents |
| July 1, 1998 | to | December 31, 1998 | 2.9 cents |
| January 1, 1999 | to | June 30, 1999 | 3.0 cents |
| July 1, 1999 | to | December 31, 1999 | 2.4 cents |
| January 1, 2000 | to | June 30, 2000 | 3.6 cents |
| July 1, 2000 | to | December 31, 2000 | 4.6 cents |
| January 1, 2001 | to | June 30, 2001 | 4.9 cents |
| July 1, 2001 | to | December 31, 2001 | 4.9 cents |
| January 1, 2002 | to | June 30, 2002 | 4.9 cents |
| July 1, 2002 | to | December 31, 2002 | 3.2 cents |

Indiana Department of State Revenue
Kenneth L. Miller
Commissioner

**DEPARTMENT OF STATE REVENUE**
**INFORMATION BULLETIN #2**
**SALES TAX**
**MAY, 2002**

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

**SUBJECT:** Warranties and Maintenance Contracts

**REFERENCE:** IC 6-2.5-2-1, IC 6-2.5-3-2, IC 6-2.5-4-1, 45 IAC 2.2-4-2

**Original Warranties or Dealer Warranties**

Original warranties or dealer warranties warranting the condition of a product and providing that maintenance or replacement parts will be provided for either no charge or a flat charge are subject to sales tax. Original warranties and dealer warranties are not offered as an option when the product is sold and are considered part of the selling price of the product. Any parts transferred to a buyer under the terms of original or dealer warranty are not subject to the sales tax because the parts and or property are considered to have been sold with the product as a part of the retail transaction on which sales tax was collected. Examples:

1. An automobile dealer sells an automobile for $20,000. Included in the selling price is a warranty that will cover any repairs for two years or 20,000 miles. This warranty is an original or dealer warranty. Tax is collected on the full $20,000.

2. Same warranty as in Example 1 above. The automobile needs a new engine after 5,000 miles and six months of driving. The dealer must provide and install the engine under the terms of the warranty. No sales tax is due on the price of the engine since tax was collected on the warranty when the automobile was purchased.

**Optional Extended Warranties and Maintenance Agreements**

Optional extended warranties and maintenance agreements may either be purchased alone, or purchased as an option with the sale of the covered product. Typically, the terms of these agreements provide assurances that any required service and parts will be provided in the event of a break down or malfunction of the covered product. However, some of these agreements also contain provisions for periodic inspection or preventative maintenance activities where tangible personal property will be supplied as a part of the unitary price.

Optional warranties and maintenance agreements that contain the right to have property supplied in the event it is needed are not subject to sales tax. Any parts or tangible personal property supplied pursuant to this type of agreement are subject to use tax. The supplier of the parts or property will be liable for the use tax on the parts or property because the supplier is using the material to fulfill the service called for by the terms of the warranty or maintenance agreement. A merchant that maintains an inventory of

parts for resale and uses some of the parts in fulfilling the terms of the warranty or maintenance agreement should self assess use tax on any parts so used. Example:

3. Same facts as in Examples 1 and 2 above, except that the automobile dealer offers to extend the warranty on the automobile for three additional years or 30,000 additional miles for a price of $1,500. This type of warranty is optional and is in addition to the purchase price. There is no certainty that any parts will be supplied to the buyer under the terms of the warranty, thus sales tax should not be collected on the additional $1,500. The automobile dealer is liable for the use tax on any parts or property subsequently transferred to the buyer under the terms of the warranty or maintenance agreement.

Optional warranties and maintenance agreements that also contain provisions for periodic services where tangible personal property will be supplied as a part of the unitary price fall within the ambit of Rule 45 IAC 2.2-4-2. This Rule, interpreting IC 6-2.5-4-1, states that where**,** in conjunction with rendering services**,** a service provider also transfers tangible personal property for a consideration, this will constitute a retail transaction unless:

1. The service provider is in an occupation that primarily furnishes and sells services, as distinguished from tangible personal property;
2. The tangible personal property is used or consumed as a necessary incident to the service;
3. The price charged for the tangible personal property is inconsequential (not to exceed 10%) compared with the service charge; and
4. The service provider pays gross retail tax or use tax upon the tangible personal property at the time of acquisition.

IC 6-2.5-2-1 imposes the state gross retail tax on retail transactions made in Indiana. If the provisions contained in the warranties or agreements are in complete compliance with all provisions of Rule 45 IAC 2.2-4-2, then the periodic transfer of tangible personal property will not constitute a transaction of a retail merchant constituting selling at retail. If such is the case, the service provider is not obligated to collect sales tax on the unitary price of the warranties or maintenance agreements. However, the service provider of the parts or property will be liable for the use tax on the parts or property because the service provider is using the material to fulfill the service called for by the terms of the warranty or maintenance agreement.

If the provisions contained in the warranties or agreements are not in complete compliance with all provisions of Rule 45 IAC 2.2-4-2, this will constitute a transaction of a retail merchant selling at retail. Thus, the service provider must collect sales tax on the unitary price pursuant to IC 6-2.5-2-1. Any tangible personal property subsequently transferred to the buyer under the terms of the warranty or maintenance agreement is not subject to sales tax.

**Examples:**

4. A computer software company sells a taxable software package to a customer. The customer also purchases an optional maintenance agreement from the company. The maintenance agreement entitles the customer to up to twenty hours of programmer help to deal with any problems the customer might have in using the software package. The maintenance agreement also entitles the customer to periodic software updates. The computer software company calculates that the price charged for the software updates is 5% compared with the service charge. The software maintenance agreement is not subject to sales tax.

5. An office supply company sells a photocopy machine to a customer. The customer also purchases an optional maintenance agreement from the company. The maintenance agreement entitles the customer to service and parts at no charge in the event of a breakdown of the photocopying machine. The agreement also provides for quarterly inspections, replacement of the drum after 100,000 copies have been made, and toner to be provided on an as needed basis. The office supply company calculates that the price charged for the above tangible personal property is 35% compared with the service charge. The sale of the maintenance agreement is a transaction of a retail merchant selling at retail and is subject to the collection of sales tax

Kenneth L. Miller
Commissioner

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**DEPARTMENT OF STATE REVENUE**

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**LETTER OF FINDINGS NUMBER: 93-0962**
**Indiana Corporate Income Tax**
**For the 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 concerning a specific issue.

**ISSUES**

**I. Gross Income Tax – Income Derived From Computer Related Service Work**

**Authority:** IC § 6-2.1-1-2(a); IC § 6-2.1-2-2

The taxpayer protests allocation of income attributable to an Indiana based customer.

**II. Adjusted Gross Income Tax – Non-Business Income**

**Authority:** IC § 6-3-1-20; IC § 6-3-1-21; IC § 6-3-2-2(a); IC § 6-8.1-5-1(b); 45 IAC 3.1-1-29; 45 IAC 3.1-1-30; 45 IAC 3.1-1-59(7); 45 IAC 3.1-1-61; May Dept. Stores v. Ind. Dept. of State Revenue, 749 N.E.2d 651 (Ind. Tax Ct. 2001)

The taxpayer protests the imposition of adjusted gross income tax on dividend, interest, sale of stock, patent, rental, and partnership income.

**III. Adjusted Gross Income Tax – Tax Addback**.

**Authority:** IC § 6-3-1-3.5

Taxpayer protests the addback of various state and local taxes.

**IV. Adjusted Gross Income Tax – Foreign Source Dividends**

**Authority:** IC § 6-3-2-12

Taxpayer protests the amount of expenses attributed to foreign dividends.

**V. Tax Administration – Ten Percent Negligence Penalty**

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

The taxpayer protests assessment of the negligence penalty and requests that the Department exercise its discretion to abate the ten percent penalty.

**STATEMENT OF FACTS**

Taxpayer provides its customers information and technology services. Under certain circumstances, taxpayer sells or leases computer equipment in conjunction with the provision of those services. One of the subsidiary corporations conducted business in Indiana. That subsidiary's income was the subject of the audit.

**I. Gross Income Tax – Income Derived from Computer Related Service Work**

**DISCUSSION**

Certain revenues attributed to taxpayer's Indiana subsidiary were not allocated based upon administrative functions performed outside Indiana. Taxpayer claims an adjustment for its general and administration and overhead expenses attributable to its out-of-state locations. IC § 6-2.1-1-2(a) defines "Gross Income" as:

Except as previously provided in this article, "gross income" means *all the gross receipts* a taxpayer receives:

(1) from trades, businesses, or commerce;...

(4) from the performance of contracts; (*Emphasis added*)

None of the exceptions referenced in IC § 6-2.1-1-2 are applicable to the revenues at issue. IC § 6-2.1-2-2 states in relevant part:

(a) An income tax, known as the gross income tax, is imposed upon the receipt of:...

(2) the taxable gross income derived from activities or businesses or any other sources within Indiana by a taxpayer who is not a resident or a domiciliary of Indiana.

The statute's definition and imposition of the Gross Income Tax does not consider overhead and operational expenses of the taxpayer as subject to allocation. The taxpayer's customers are paying for a service, which is performed in Indiana. No part of the service is performed out-of-state. Because the entire service is performed in Indiana, the entire income from the service is taxable.

**FINDING**

The taxpayer's appeal is respectfully denied.

**II. Adjusted Gross Income Tax – Non-Business Income**

The taxpayer protests the classification of interest, sale of stock, patent, and rental income as business income. Taxpayer also protests the classification of partnership income as nonbusiness income. Inasmuch as these five issues all center on the classification of income as either business or nonbusiness, this discussion section will review the relevant statutes and regulations concerning Indiana's classification of income. An analysis specific to each of the five types of income at issue will follow.

Under Indiana law, corporate adjusted gross income derived from sources within Indiana is reported as either business or non-business income. IC § 6-3-2-2(a). Under IC § 6-3-1-20, business income is defined as "income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitutes integral parts of the taxpayer's regular trade or business operations." Non-business income is defined in the negative and "means all income other than business income." IC § 6-3-1-21.

Regulation 45 IAC 3.1-1-29 defines business income as that "income from transactions and activity in the regular course of the taxpayer's trade or business including income from tangible and intangible property if the acquisition, management, or disposition of the property are integral parts of the taxpayer's regular trade or business." That same regulation goes on to state that "[t]he classification of income by the labels occasionally used, such as manufacturing income, compensation for services, sales income, interest, dividends, rents, royalties, gains, operating income, non-operating income, etc., is of no aid in determining whether income is business or nonbusiness income. Income of any type or class and from any source is business income if it arises from transactions and activity occurring in the regular course of a trade or business. Accordingly, the critical element in determining whether income is 'business income' or 'nonbusiness income' is identification of the transactions and activity which are the elements of particular trade or business." Id.

45 IAC 3.1-1-30 interprets trade or business activity as including:

Whether An Activity Is A "Trade or Business". For purposes of determining whether income is derived from an activity which is in the regular course of the taxpayer's trade or business, the expression "trade or business" is not limited to the taxpayer's corporate charter purpose of its principal business activity. A taxpayer may be in more than one trade or business and derive business therefrom depending upon but not limited to some or all of the following:

(1) The nature of the taxpayer's trade or business.

(2) The substantiality of the income derived from activities and transactions and the percentage that income is of the taxpayer's total income for a given tax period.

(3) The frequency, number, or continuity of the activities and transactions involved.

(4) The taxpayer's purpose in acquiring and holding the property producing income.

In determining the nature of income, states have employed one of two tests based upon the previous language. The regulatory phrase, "income from transactions and activity in the regular course of the taxpayer's trade or business..." has led to the formulation of the "transactional test." Id. Under this test, the nature of the particular transaction is critical in determining the nature of the income in question. The second test is the "functional test" and is derived from the language which states that "income from tangible and intangible property [represents business income] if the acquisition, management, or disposition of the property are integral parts of the taxpayer's regular trade or business." Id. In this second test, the particular use or function of the asset -- to which the income at issue is attributable -- within the taxpayer's regular trade or business is used to categorize the income as either business or nonbusiness. *See* May Dept. Stores v. Ind. Dept. of State Revenue, 749 N.E.2d 651, 662-63 (Ind. Tax Ct. 2001).

**Sale of Stock:** Taxpayer received shares of stock for assets transferred as part of the creation of a subsidiary corporation from a division of taxpayer corporation. The former corporate division was operating in Indiana both prior to and after the stock transfer. The formation of the subsidiary was intended to facilitate the sale of this segment of the taxpayer's business. The stock was subsequently sold in various transactions taking place from 1988 through 1990. Under the "functional test," business income includes "income from tangible and intangible property if the acquisition management, or disposition of the property are integral parts of the taxpayer's regular trade or business." The essence of stock sale implicated the sale of taxpayer's subsidiary and income derived is properly classified as "business income."

**Investment Interest:** Taxpayer argues that certain interest income represents nonbusiness income. To that end, taxpayer has presented what is purported to be "representative documentation with respect to that interest income." Taxpayer concludes that – with the exception of 10 percent of the interest income which is admittedly business income – this "representative documentation" is sufficient to support a conclusion that the remaining 90 percent is properly classified as nonbusiness income. Taxpayer errs in its conclusion. At the time of the original audit, taxpayer represented that it employed excess cash derived from government contracts to invest in short and long term investments consisting of preferred stocks, bonds, and long term certificates of deposit. Taxpayer declined the opportunity to provide any details concerning those investments except for two sheets of paper summarizing – within some seven lines of text – the source and disposition of some 20 million dollars in investment income. Taxpayer may not during the administrative appeal stage overcome the presumption of correctness – afforded by virtue of IC § 6-8.1-5-1(b) – attached to the audit's initial assessment by means of self-selected "various representative documentation" which it chose to provide subsequent to the audit. The taxpayer has failed to meet it burden of proof, mandated under IC § 6-8.1-5-1(b), necessary to refute the conclusion that the interest income at issue represents business income.

**Patent Income:** Taxpayer received income attributable to its ownership of a patent. The patent came into taxpayer's possession when it acquired the company that originally owned the patent. Along with the patent itself, taxpayer also acquired a pre-existing licensing agreement which enabled an unrelated entity to exploit the patent. The patented item is an "adapter" fixture, a hardware item – in itself – unrelated to taxpayer's business of providing information and technology services.

45 IAC 3.1-1-61 provides guidance in classifying patent income as either business or nonbusiness income.

Parent and Copyright Royalties. Parent and copyright royalties are nonbusiness income if the patent or copyright with respect to which the royalties were received did not arise out of or was not created in the regular course of the taxpayer's trade or business operations or where the purpose of acquiring and holding the patent or copyright is not related to or incidental to such trade or business operations.

In addition, the regulation provides a two-part example to explain the distinction between business and nonbusiness patent and copyright income.

The taxpayer is engaged in the music publishing business and holds copyrights on numerous songs. The taxpayer acquired the assets of a small publishing company, including music copyrights. Their acquired copyrights are therefore used by the taxpayer in its business. Any royalties received on these copyrights are *business income*.

Same as last example, except that the acquired company also held the patent on a type of phonograph needle. The taxpayer does not manufacture or sell phonographs or phonograph equipment. Any royalties received on the patent would be *nonbusiness income.* 45 IAC 3.1-1-61(2), (3). (*Emphasis added*).

Taxpayer's ownership of the patent was merely the tangential result of the taxpayer's purchase of the acquired company; the

income attributable to the patent was derived as a result of a pre-existing licensing agreement between the acquired company and the third-party licensee; the parented hardware item was only superficially relevant to the taxpayer's service business. The income, derivative of the taxpayer's ownership of the adapter patent, is analogous to the phonograph needle patent income described in the second half of the regulatory example set out in 45 IAC 3.1-1-61(2), (3). Accordingly, the income attributable to the patent was not derived during the "regular course of the taxpayer's trade or business," and the income is properly classified as "nonbusiness income."

**Rental Income**: The auditor found that the rental property was previously used by the taxpayer for business operations. As taxpayer's protest stated, the rental property "is, or has been converted to investment property." IC § 6-3-1-20 states that "business income" includes "income from tangible and intangible property, if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operation." Accordingly, the rental income falls squarely within the definition of "business income" as defined by the "transactional test."

**Partnership Income:** The audit took the position that taxpayer's partnership income should be classified as nonbusiness income because taxpayer owned less than 20 percent of the participating partners. In its protest, taxpayer disagreed arguing that the partnership income should be classified as business income.

Taxpayer entered into joint-enterprise agreements with its partners to perform management and administrative services at two government owned facilities. The contract agreements to perform these services were bid and awarded through the joint efforts of taxpayer together with its partners. The contract agreements related to the provision of services which taxpayer had previously performed for the government on its own behalf. Under the contract agreements, the services were performed, wholly or in large part, by taxpayer's own employees and management staff. According to taxpayer, the primary difference the partnership agreements and agreements under which taxpayer was the sole performer, was that the partnership agreements allowed for the apportionment of the resulting income between the coventurers.

While it is undisputed that the taxpayer owned less than 20 percent of the participating partners, the Department looks to whether the "income [arose] from transactions and activity in the regular course of the taxpayer's trade or business." IC § 6-3-1-20.

Taxpayer is in the business of providing management consulting, education, and research programs related to the strategic use of information resources. In addition, taxpayer is in the business of designing, integrating, and implementing computer resources to manage those information resources. Taxpayer's joint enterprise agreements involved the provision of services similar to the services taxpayer independently provides. The joint enterprise agreements were effectuated largely by taxpayer's own employees and management staff. The joint enterprise agreements with the government were similar to agreements taxpayer previously entered into with the government.

Accordingly, within the limitations of the "transactional test," and within the limitations of the regulatory language in effect at the time the assessment was proposed, the consequent income should be classified as business income. The income derived from taxpayer's joint enterprises was essentially a mirror image of the income taxpayer derived within the normal and regular course of its business. The joint enterprise agreement activities giving rise to the income were similar – if not identical – to the activities taxpayer performed outside the joint enterprise activities.

**FINDING**

The taxpayer's appeal is sustained as to classifying partnership income as business income and classifying patent income as nonbusiness income. Taxpayer's protest is respectfully denied as to reclassifying rental, interest, and sale of stock income. That income will remain classified as business income.

**III. Adjusted Gross Income Tax – Tax Addback**

Taxpayer protests the addback of various state and local taxes under the provisions IC § 6-3-1-3.5(b)(3) which requires the addition to Indiana Adjusted Gross Income of "any deduction or deductions allowed or allowable pursuant to Section 63 of the Internal Revenue Code for taxes based on or measured by income and levied at the state level by any state of the United States."

Taxpayer is correct in its assertion that municipal taxes are not subject to the addback provisions set out in IC § 6-3-1-3.5(b)(3). However, taxpayer errs in its analysis of the Washington Business and Occupation Tax. Taxpayer contends that the Washington Business and Occupation Tax is a gross receipts tax that does not need to be added back. As taxpayer maintains, the Washington Business and Occupation Tax may be labeled a tax "upon gross receipts and not net income." However, the tax is nonetheless *measured* by income. IC § 6-3-1-3.5(b)(3) specifically states that taxes measured by income must be added back for Indiana Adjusted Gross Income Tax purposes. The fact that the Washington Business and Occupation Tax is not labeled as an "income tax" does not alter the fact that the tax is measured by income and must be added back.

**FINDING**

Taxpayer's protest is sustained as to the municipal tax issues and respectfully denied as to the Washington Business and Occupation Tax issue.

**IV. Adjusted Gross Income Tax – Foreign Source Dividends**

In calculating its Indiana tax liabilities, taxpayer, pursuant to IC § 6-3-2-12, deducted foreign source dividend income from its Indiana adjusted gross income. Audit, however, disagreed with taxpayer's calculus. Re-calculation by audit resulted in an increase in taxpayer's Indiana adjusted gross income and tax. Proposed assessments of Indiana adjusted gross income tax followed.

IC § 6-3-2-12(b) states that "A corporation that includes any foreign source dividend in its adjusted gross income for a taxable year is entitled to a deduction from that adjusted gross income. (1) The amount of the deduction equals the product of the amount of the foreign source dividend included in the corporation's adjusted gross income for the taxable year; multiplied by (2) the percentage prescribed in subsection (c), (d), or (e), as the case may be."

The aforementioned subsections (c), (d), and (e) allow corporate taxpayers to receive a one hundred percent (100 %) deduction for foreign source dividends received from corporations in which a taxpayer has an eighty percent (80 %) or larger ownership interest; an eighty-five percent (85 %) deduction for dividends received from corporations in which a taxpayer has a fifty to seventy-nine percent (50 % to 79 %) ownership interest; and a fifty percent (50 %) deduction for dividends received from corporations in which the taxpayer has less than a fifty percent (50 %) ownership interest. IC § 6-3-2-12(c) to (e).

The statutory language is straightforward. IC § 6-3-2-12 authorizes pro rata deductions (based upon the percentage ownership of the payor by the payee) of certain foreign source dividend income.

**FINDING**

Taxpayer's protest is sustained.

**V. Tax Administration – Ten Percent Negligence Penalty**

**DISCUSSION**

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 demonstrated that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed..."

In this instance, the taxpayer has demonstrated the requisite "reasonable cause." The taxpayer has provided to the Department's satisfaction, sufficient justification for its interpretation of the corporate income tax code provisions.

**FINDING**

The taxpayer's protest is sustained.

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**DEPARTMENT OF STATE REVENUE**

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**LETTER(S) OF FINDINGS NUMBER(S): 96-0637, 96-0638, 96-0639, 98-0774,98-0775, 98-0776**
**Withholding Tax**
**Sales Tax**
**For Tax Years 1995 through 1996**

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

**ISSUES**

**I. Withholding Tax – Number of Employees**

**Authority:** IC 6-8.1-5-1; IC 6-8.1-5-4

Taxpayer protests that it did not have the number of employees the Department used to estimate withholding taxes.

**II. Sales Tax – Estimated Sales**

**Authority**: IC 6-2.5-9-3; IC 6-8.1-5-1; IC 6-8.1-5-4; IC 6-8.1-8-1.5

Taxpayer protests that its sales were lower than estimated by the Department.

**STATEMENT OF FACTS**

Taxpayers, a married couple, operated a restaurant from April 1995 through 1996. Taxpayers co-owned the business with a third party until they were awarded total ownership via court proceedings in late April 1995. From 1995 to 1996, the business operated under at least four separate legal arrangements. In as much as taxpayers were in control for this time, the Letter of Findings will treat this as a single entity. The Department issued assessments after determining that taxpayers had underreported the amount of sales and the number of employees. Taxpayers protested the assessments. Further facts will be provided as required.

**I. Withholding Tax – Number of Employees**

Taxpayer protests the withholding tax assessments for the tax years in question. The Department conducted the audit and, due to the lack of available records, determined assessments based on the best information available. IC 6-8.1-5-1(a) states in relevant part:

> If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department.

Taxpayers state that they never had any employees and never paid themselves, therefore they were not required to withhold any tax. The Department determined, after review of the best information available, that taxpayers had employees and estimated the number of employees and the wages that had been paid to them, and then the amount of tax due.

Taxpayers protest that they were the only people who worked in the restaurant. The Department determined that, due to the fact that the restaurant was open for business seventy-nine and a half hours a week and the fact that both taxpayers worked full-time at other jobs for the bulk of the taxable period, it would be impossible for the restaurant to be open without some employees to run it during the hours taxpayers were at work. The Department found other evidence of employees, including regular and irregular payments to individuals, names of "servers" on guest checks, and the posting of a liquor license for someone other than taxpayers.

Taxpayers protest that the Department used the listed operating hours and that these do not accurately reflect the hours the restaurant was actually open. Taxpayers explained that they operated the business in an informal basis and that they would not always adhere to the listed operating hours. IC 6-8.1-5-1(b) provides in relevant part:

> The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.

Taxpayers did not provide records establishing that the Department's estimation was incorrect. IC 6-8.1-5-4(a) states:

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

In conducting its investigation of the taxpayers, the Department found insufficient records to determine the amount of any liability. As previously discussed, the Department based its assessments on the best information available, as provided in IC 6-8.1-5-1(a). Taxpayers failed to provide sufficient records to support their assertions that there were no employees and that the restaurant was not open during the posted hours.

**FINDING**

Taxpayer's protest is denied.

**II. Sales Tax – Estimated Sales**

Taxpayers protest the Department's assessment of sales tax on sales at taxpayers' restaurant. The Department conducted an investigation and determined that taxpayers had underreported sales and that additional sales tax was due. Taxpayers protest the assessment on several grounds.

Taxpayers protest that sales were not as high as estimated by the Department. The Department concluded in the course of the investigation that there was insufficient documentation to determine actual sales. IC 6-8.1-5-1(a) states in relevant part:

> If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department.

The Department used the best information available to determine the amount of sales tax due. Taxpayers believe that the Department's estimates of sales are too high. Taxpayers state that they provided records supporting the amount of sales they reported originally and that the Department should rely on those records

The Department examined the available records and determined that they were insufficient to provide an accurate sales record. IC 6-8.1-5-4(a) states:

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

While taxpayers provided register tapes, guest checks and other documents during the audit, the Department determined that these sources were incompletely or incorrectly filled out or rung up. The incomplete nature of the documentation compelled the Department to conclude that additional sales had occurred and that sales tax was therefore due.

Taxpayers protest that they paid back due sales taxes on July 17, 1996, and that they thought the matter was settled then. IC 6-8.1-8-1.5 states:

Whenever a taxpayer makes a partial payment on the taxpayer's tax liability, the department shall apply the partial payment in the following order:

(1) To any penalty owed by the taxpayer.

(2) To any interest owed by the taxpayer.

(3) To the tax liability of the taxpayer.

Taxpayers provided a copy of a credit card receipt establishing a payment to the Department. Taxpayers did not provide documentation establishing what this payment was for. If the payment was for sales tax liabilities, it was applied first to penalties, then interest, then to the liabilities themselves. If there were other liabilities, the payment may have been applied towards those liabilities.

Taxpayers protest that the Department assessed sales on the first four months of 1995, and that they did not gain full ownership of and begin to operate the restaurant until late April 1995. Taxpayers provided documentation supporting this position. The Department refers to IC 6-2.5-9-3, which states in relevant part:

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 (as described in IC 6-2.5-3-2) 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.

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

The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.

The Department issued its proposed assessments for the first four months of 1995 on the basis that taxpayers were members of a partnership retail merchant and had a duty to remit state gross retail taxes, and were therefore personally liable for the payment of those taxes as provided in IC 6-2.5-9-3. The information submitted for this protest does not explain the structure of the partnership and taxpayers' role in the partnership. Taxpayers have not established that they were not members of a partnership retail merchant.

In conclusion, taxpayers failed to keep adequate records as required by IC 6-8.1-5-4(a), and the Department issued proposed assessments using the best information available as provided in IC 6-8.1-5-1(a). The taxpayers have not established that they were not personally liable for payment of the state gross retail taxes, as explained in IC 6-2.5-9-3. Therefore, taxpayers have not met their burden of proving the proposed assessments for the first four months of 1995 wrong, as explained in IC 6-8.1-5-1(b). The payment taxpayers made on July 17, 1996 will be reviewed by the Audit division of the Department to determine the extent of sales tax penalties, interest and liabilities satisfied by the payment.

**FINDING**

Taxpayer's protest is denied.

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**DEPARTMENT OF STATE REVENUE**

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**LETTER OF FINDINGS NUMBER: 98-0592**
**Sales and Use Tax**
**For Tax Periods: 1992-1995**

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

**ISSUES**

**1. Sales and Use Tax – Double Taxation**

**Authority**: IC 6-2.5-3-2(a), IC 6-2.5-3-4(a)(1), IC 6-8.1-5-1(b)

The taxpayer protests the imposition of both sales and use tax on certain items.

**2. Sales and Use Tax – Manufacturing Machinery and Equipment**

**Authority:** IC 6-2.5-5-3, IC 6-2.5-5-4, 45 IAC 2.2-5-10 (c), 45 IAC 2.2-5-10 (h)(2), 45 IAC 2.2-5-7 (h), *Gross Income Tax Division v. National Bank and Trust Co.,* 79 N.E. 2d 651,(Ind. 1948), *Indiana Department of Revenue v. Cave Stone* 457 N.E. 2d 520, (Ind. 1983)

The taxpayer protests the imposition of use tax on various items.

**3. Sales and Use Tax – Vendor Stocking**
**Authority:** IC 6-2.5-5-3
The taxpayer protests the assessment of use tax on items from vendor stocking accounts.
**4. Sales and Use Tax – Equipment to Move Work In Process**
**Authority:** IC 6-2.5-5-3, 45 IAC 2.2-5-8 (f)(3)
The taxpayer protests the imposition of use tax on certain equipment used in transportation.
**5. Sales and Use Tax – Safety Equipment**
**Authority**: IC 6-2.5-5-3, 45 IAC 2.2-5-8 (c)(2)(F)
The taxpayer protests the assessment of use tax on safety equipment.
**6. Sales and Use Tax – Services**
**Authority**: IC 6-2.5-2-1, IC 6-2.5-4-10, IC 26-1-2-301, 45 IAC 2.2-4-2
The taxpayer protests the assessment of use tax on certain services.
**7. Sales and Use Tax – Product Labels**
**Authority**: IC 6-2.5-5-6
The taxpayer protests the assessment of use tax on labels.
**8. Sales and Use Tax – Packaging**
**Authority**: IC 6-2.5-5-3, 45 IAC 2.2-5-16(c)(1)
The taxpayer protests the assessment of use tax on tie-down straps and tie-rods.
**9. Sales and Use Tax – Testing Equipment**
**Authority:** IC 6-2.5-5-3, 45 IAC 2.2-5-10
The taxpayer protests the assessment of use tax on certain testing equipment.
**10. Sales and Use Tax – Capital Purchases**
**Authority:** IC 6-2.5-8-9, IC 6-2.5-5-3, IC 6-2.5-5-30 (1), 45 IAC 2.2-4-22 (e), 45 IAC 2.2-8-17, 45 IAC 2.2-5-8 (j), *Indiana Department of State Revenue v. RCA Corporation,* 310 N.E. 2d 96 (Ind. 1974)
The taxpayer protests the assessment of use tax on capital purchases.

**STATEMENT OF FACTS**

The taxpayer operates a steel manufacturing facility. Products include hot-rolled and cold-rolled sheets, plate products, zinc-coated steels for corrosion protection and tin products used in the food and beverage industry. Customers also include the automotive, appliance, metal building and home construction industries. The Indiana Department of Revenue (Department) performed a sales and use tax audit for the tax period January 1, 1992 through December 31, 1995. During the course of the audit, the Department and the taxpayer agreed to base the audit upon a sampling and projection method. The taxpayer chose the months for the sample. The taxpayer also submitted to the Department an unofficial claim for refund or refund report on the same period. This refund report was integrated into the Department's audit. Subsequent to the issuance of the audit report, the taxpayer filed another claim for refund of taxes paid on items that the taxpayer alleges no tax was due. The refund report listed items that the taxpayer felt had been incorrectly assessed use tax in the sample that the Department used to project the taxpayer's tax liability. The taxpayer protests the audit's failure to give credit for some of the items in the first refund request. A hearing on that protest was held. More information will be provided as necessary.

**1. Sales and Use Tax – Double Taxation**

**DISCUSSION**

Pursuant to IC 6-2.5-3-2(a), Indiana imposes an excise tax on tangible personal property stored, used, or consumed in Indiana. All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1(b).

The taxpayer protests the assessment of use tax on certain items when the taxpayer contends it paid sales tax to the vendor and self-accrued use tax on the same item. Pursuant to IC 6-2.5-3-4(a)(1). Use tax does not apply to the use of property in Indiana if "the property was acquired in a retail transaction in Indiana and the state gross retail tax has been paid on the acquisition of that property." While the taxpayer presented internal documentation indicating that sales tax may have been paid on the subject transactions, it did not sustain its burden of proving that the tax had actually been paid to the retailer.

**FINDING**

The taxpayer's protest is denied.

**2. Sales and Use Tax – Manufacturing Machinery and Equipment**

**DISCUSSION**

A number of exemptions are available from use tax, including those collectively referred to as the manufacturing exemptions. All exemptions must be strictly construed against the party claiming the exemption. *Gross Income Tax Division v. National Bank*

*and Trust Co.,* 79 N.E. 2d 651 (Ind. 1948). IC 6-2.5-5-3 provides for the exemption of "manufacturing machinery, tools and equipment which is to be directly used by the purchaser in the direct production, manufacture, fabrication... of tangible personal property." In *Indiana Department of Revenue v. Cave Stone*, 457 N.E. 2d 520, (Ind. 1983) the Indiana Supreme Court found that a piece of equipment qualifies for the manufacturing exemption if it is essential and integral to the production process. 45 IAC 2.2-5-10 (c) further describes manufacturing machinery and tools as exempt if they have an immediate effect on the property in production. 45 IAC 2.2-5-10 (h)(2) further clarifies the exemption by allowing the exemption of "Replacement parts, used to replace worn, broken, inoperative or missing parts or accessories on exempt machinery and equipment..." IC 6-2.5-5-4 extends the exemption to tools used to build exempt machinery and equipment.

The taxpayer purchased seals and gaskets for work rolls. These rollers actually flatten the heated steel in the production process. The use of these replacement parts in the exempt rollers qualifies them for exemption from the use tax.

The taxpayer purchased a parts-reduction mill. This item was a cover-plate seal for a back-up roll used on the 48" reduction mill. This back-up roll was actually used in the production process and the cover-plate seal was an integral part of that piece of the manufacturing machinery that directly affected the production of the steel. The use of this item qualifies for exemption.

The taxpayer purchased a saw used in a shop that fabricates parts for production machine equipment and also performs normal repair and maintenance functions. The saw qualifies for exemption pursuant to 45 IAC 2.2-5-7 (h) for the percentage of the time it is used to fabricate parts for production machine equipment. The percentage of usage of the saw for routine repair and maintenance functions is subject to the use tax.

The taxpayer purchased parts for the burning equipment. These parts were for burning equipment that was used to cut plate steel into varying dimensions. Since these are integral replacement parts of equipment that actually changed the form of the steel in the manufacturing process, these parts qualify for exemption.

The taxpayer purchased parts for the BOP shop machine. These were replacement parts for equipment that was directly used in the direct production of the steel. Therefore they qualify for exemption.

The taxpayer purchased ball valves. These ball valves were replacement parts for machinery that was directly used in the direct production of the taxpayer's product; therefore they qualify for exemption.

The taxpayer purchased parts that were used in pump stations #1 and #2. These pump stations were used to pump lake water into a common water distribution center. The water from that distribution center was primarily used for cooling in the production process. The specific pump stations in contention here did not pump water from the distribution or storage center through the production process to actually directly impact the production process by cooling the steel in the production process as would be required for exemption. These pumps were secondary to the production process in that they pumped the water to the distribution center from which pumps sent the water to be used as coolant in the production process. The subject pumps pumped the water into the storage and distribution center before the water was actually used in the production process. Therefore the use of these pumps and their replacement parts does not qualify for exemption from the use tax.

The taxpayer's next protest concerns tax assessed on parts which the taxpayer alleges were used in the Turbo House boiler which generates steam for use in the steel-making process. The invoices for these parts were coded to a taxable account for the primary water distribution system. Other invoices in this account were for parts purchased for taxable pump stations. The taxpayer does not provide any documentation to support its assertion that these invoices were for purchases to be used in an exempt boiler. Therefore these parts do not qualify for exemption.

The taxpayer purchased sponge gaskets that were used as integral replacement parts in the exempt 6-stand mill which was used to process tin in the Tin Mill. These gaskets qualify for exemption from the use tax.

The taxpayer also purchased software and parts for computers. Computers and software used to operate machinery that is directly used in direct production qualify for exemption from the use tax. The software was purchased for operation of the computers that controlled and operated the 6-stand mills in the Cold Mill. The parts were for computers that operate a blast furnace, the WDPF system used in production and to repair an operator workstation that was used for development and engineering purposes. Except for the parts for the operator workstation that is used for development and engineering purposes, all the software and parts in this item of protest were used to operate computers that control the production process. Therefore all the parts and software except for the parts for the operator workstation that was used for development and engineering purposes qualify for exemption from the use tax.

The taxpayer withdrew its protests to tax assessed on a computer program purchased on September 30, 1995 for cost center 12220, wc&e 8151 and equipment code lvz01.

The taxpayer claimed refund of tax on certain purchases through the vendor stocking method to replace parts on machinery that was directly used in the direct production process. These items were taken from vendor stocking accounts that the taxpayer coded as taxable. Upon agreement with the taxpayer, the auditor relied on the taxpayer's classification to determine the taxable and exempt vendor stocking accounts. The taxpayer did not present a persuasive reason to ignore its own classification of the vendor stocking accounts.

**FINDING**

The taxpayer's protests are sustained in part and denied in part.

**3. Sales and Use Tax – Vendor Stocking**

**DISCUSSION**

The vendor stocking accounts are for purchases that typically involve lower unit costs than transactions that generate the standard purchase invoice. Vendor stockings are based on predetermined contract prices for a set period for certain goods and services. Invoices are not generated when using the vendor stocking method of purchasing goods or services. Property typically acquired under the vendor stocking method would include nuts, bolts, screws, wiring, labels, cables, hydraulic hoses and others. Some of the uses are taxable and some qualify for exemption as directly used in direct production pursuant to IC 6-2.5-5-3. Examples of the services include delivery and pigeon trapping services. For the projection, the auditor used the taxpayer's own coding system to determine which vendor stocking accounts were taxable and which were exempt. The taxpayer contends that there was miscoding and a significant number that actually qualified for exemption as directly used in direct production were included in the taxable accounts. It was appropriate for the auditor to rely on the taxpayer's records in creating the sample for the audit.

**FINDING**

The taxpayer's protest is denied.

**4. Sales and Use Tax – Equipment to Move Work in Process**

**DISCUSSION**

The taxpayer also purchased items that were used to move product in the production process. The taxpayer contends that these items qualify for exemption as directly used in direct production pursuant to IC 6-2.5-5-3. 45 IAC 2.2-5-8 (f)(3) provides, "transportation equipment used to transport work-in-process or semi-finished materials to or from storage is not subject to tax if the transportation is within the production process."

The specific items in question included parts for a #1 BOP ladle crane, parts for a BOP charge car, grinder drive belts, cables and brake shoes. The grinder driver belts were used in the Roll Shop. The crane was used to move large ladles of molten iron during the casting operation. The charge car was also used to move the product during casting operations. The grinder was used in the refinishing of rolls used in the Hot Rolling Mill. These items qualify for exemption as parts and equipment used to move work in process.

The cable and brake shoes were charged to a shipping account. The taxpayer contends that they were actually used to move work in process. If the cable and brake shoes were actually used to move work in process, the cable and brake shoes would qualify for exemption from the use tax. Taxpayer's protest to the tax assessed against these items is sustained subject to audit verification.

**FINDING**

The taxpayer's protest to the tax assessed on the cable and brake shoes is sustained subject to audit verification. The taxpayer's protests to the other items in this category are sustained.

**5. Sales and Use Tax – Safety Equipment**

**DISCUSSION**

The taxpayer purchased leather leggings, aluminum coats, gas masks and carbon monoxide detectors. There is no indication in the audit that the department assessed tax on taxpayer's use of leather leggings, aluminum coats or gas masks.

The personal carbon monoxide detectors were worn on the belts of production personnel in areas where carbon monoxide tends to accumulate and create an extreme health hazard. The portable instruments that were purchased on February 28, 1995 were also personal carbon monoxide detectors. The taxpayer contends that these items qualify for the directly used in direct production exemption pursuant to IC 6-2.5-5-3. 45 IAC 2.2-5-8 (c)(2)(F) provides an exemption for "safety clothing or equipment which is required to allow a worker to participate in the production process without injury or to prevent contamination of the product during production." Personnel could not work in these areas of the facility without the carbon monoxide detectors. Therefore they qualify for exemption.

The repair parts for the personal carbon monoxide detectors were taken from accounts that the taxpayer and auditor agreed were exempt 85% of the time. It is not appropriate for the taxpayer to pull specific items out of those accounts and consider whether or not they are taxable on an individual basis. The protest to the taxability of these items is denied.

**FINDING**

The taxpayer's protest is sustained in part and denied in part.

**6. Sales and Use Tax – Services**

**DISCUSSION**

Indiana imposes a gross retail tax on the sales of tangible personal property by retail merchants in Indiana. IC 6-2.5-2-1. There is no statutory provision imposing a gross retail tax on services. 45 IAC 2.2-4-2 specifically states that there is no Indiana gross retail tax on services. The taxpayer protested the offset on labor charges for the repair of a mill computer, lease termination charges and separately stated delivery charges. The repair of the mill computer is a service that qualifies for exemption.

The taxpayer contends that the lease termination charges are exempt services. In actuality, the lease termination charges represent payments under a renegotiated lease for the computer. The lease of tangible personal property is a retail transaction subject to the gross retail tax pursuant to IC 6-2.5-4-10.

The taxpayer protests the assessment of tax on separately stated delivery charges for paper products delivered to various areas of the facility. The taxpayer contends that the delivery charges qualify for exemption as a service. Services are, however, subject to sales and use tax when they are performed with respect to tangible personal property being transferred in a retail transaction and the services take place prior to the transfer of the tangible personal property. IC 6-2.5-4-1. In fact, generally sellers in Indiana have an obligation to transfer and deliver goods to the buyer unless other arrangements are explicitly agreed upon. IC 26-1-2-301. In this case there is no indication that the title to the paper products was transferred prior to the delivery of the products to the taxpayer. Therefore, the delivery charges do not qualify as an exempt service. The tax was properly imposed.

**FINDING**

The taxpayer's protest is sustained in part and denied in part.

**7. Sales and Use Tax – Product Labels**

**DISCUSSION**

The taxpayer purchased labels. According to IC 6-2.5-5.6, "... 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,..."

The labels in dispute were charged to the shipping, general or administrative accounts. The picture submitted by the taxpayer shows that the labels are attached to the shipping straps rather than directly to the steel. The labels upon which tax was assessed were actually shipping labels. As such they do not meet the statutory requirements for exemption as property incorporated into the product.

**FINDING**

The taxpayer's protest is denied.

**8. Sales and Use Tax – Packaging**

**DISCUSSION**

The taxpayer also purchased packaging materials. The taxpayer argues that the packaging materials should be granted exemption as directly used in direct production pursuant to IC 6-2.5-5-3. 45 IAC 2.2-5-16 (c)(1) provides that "... nonreturnable containers and wrapping materials including steel strap and shipping pallets to be used by the purchaser as enclosures for selling tangible personal property' qualify for exemption from the gross retail tax." Items included in this protest include various sizes of nonreturnable tie-down straps and tie-rods used to secure steel plate products during shipment by rail to the customer. The taxpayer's product is such that it does not require additional wrapping material for shipping. The items at issue are used to secure the taxpayer's product for shipping rather than as wrapping material. Therefore they do not qualify for exemption from the use tax.

**FINDING**

The taxpayer's protest is denied.

**9. Sales and Use Tax – Testing Equipment**

**DISCUSSION**

The taxpayer also purchased a product temperature tester that the taxpayer contends qualifies for the directly used in direct production exemption pursuant to IC 6-2.5-5-3. The tester is used to test the temperature of coiled steel, the taxpayer's end product. As such, the tester is used after the end of the production process and does not qualify for exemption pursuant to 45 IAC 2.2-5-10(I).

**FINDING**

The taxpayer's protest is denied.

**10. Sales and Use Tax – Capital Purchases**

**DISCUSSION**

The audit assessed tax on materials used in several improvements to the taxpayer's realty or capital purchases. The taxpayer contends that these transactions qualify for exemption from tax pursuant to the following provisions of 45 IAC 2.2-4-22(e):

> Disposition subject to the use tax. With respect to construction materials contractor acquired tax-free, the contractor is liable for the use tax and must remit such tax (measured on the purchase price) to the Department of Revenue when he disposes of such property in the following manner:
>
> ...
>
> (3) Lump sum contract. He converts the construction material into realty on land he does not own pursuant to a contract that includes all elements of cost in the total contract price.
>
> A disposition under C. will be exempt from the use tax if the contractor received a valid exemption certificate from the ultimate purchases (purchaser) or recipient of the construction material (as converted), provided such person could have initially purchased such property exempt from the state gross retail tax.

In each of the capital purchases the contractor purchased the materials tax-free and the contractor did not receive a valid exemption certificate from the taxpayer. The taxpayer argues that pursuant to the cited Regulations, the contractors are the parties responsible for the payment of use tax on the construction material used in each of the improvements to realty. Following this argument, the Indiana Department of Revenue must collect the unpaid taxes from the contractors rather than the taxpayer.

Evidence indicates, however, that the taxpayer provided the contractors with its direct pay permit. Pursuant to IC 6-2.5-8-9, a business entity may apply for and receive a direct pay permit from the Indiana Department of Revenue. The issuance of a direct pay permit indicates that the purchaser will directly remit to the Indiana Department of Revenue any sales or use tax that is due on that particular transaction. The application of direct pay permits to the taxpayer's situation with contractors is clarified at 45 IAC 2.2-8-17 as follows:

> (a) The contractor who has applied for and received permission to pay on a direct payment permit basis may issue direct payment permits to his suppliers, but when acting as a contractor should remember that he must obtain an exemption certificate-not a direct payment permit-from any exempt customer for whom he is making an improvement to real estate as a result of a flat bid or lump sum contract.
>
> ...
>
> (b) A flat bid contractor, on the other hand, does not sell tangible personal property or collect sales tax as a result of his contract, and the receipt of a direct payment permit is of no value to him. If the organization, for which the contractor is constructing the improvement, is entitled to exemption, they must give the contractor an exemption certificate (ST-105) certifying that fact. A direct payment permit from the organization would not certify that the organization was entitled to exemption-only that they would pay tax for which they were liable.

The taxpayer's specifications for bids indicated that sales and use tax should not be included in the lump sum bid price prepared by contractors. The taxpayer gave contractors direct payment permits that included the language as follows:

> Direct payment permits may be issued to contractors on lump sum contracts for the improvement of realty if the contractor supplies a breakdown of the costs of the materials. If no breakdown of the cost of the materials is available, the contractor will be liable for tax on the materials.

The instructions on the face of the direct pay permits indicate that they may be given to contractors if the costs of the materials are stated separately as they were in the instances assessed under the audit. It would be reasonable for the contractors in such circumstances to accept the direct pay permits and think that the taxpayer would pay the required taxes. It is disingenuous at this point for the taxpayer to rely on the distribution of direct pay permits rather than exemption certificates to deny liability for the payment of the sales and use taxes on the materials used in the improvements to the taxpayer's realty. Therefore, the taxpayer is liable for the taxes on the materials in any capital improvement not used in an exempt manner.

The taxpayer protests the assessments of use tax on materials used in several lump sum contracts for which the taxpayer does not allege any other exempt use. These protests include UGA1-0283-84" Finishing Mill Improvements; UGA1-0318-North Sheet Mill Building Extension for Pro-Tec; UGA1-0331-Rehabilitate No. 8 Blast Furnace; UGA1-0336-Replace Turbo Blower Boiler House Roof; UGA1-0344-No. 1 Caster Operating Trailer Complex; UGA1-0358-No. 4 Blast Furnace Hoist House HVAC System Upgrades; UGA1-0366-Tar Loading Facility; UGA1-0367 Wheelchair Lift; UGA1-0400-Steelworker'' Memorial; UGA1-0445-No. 8 Blast Furnace Repairs-Iron Producing Division; UGA1-0488, Housing for No. 8 Blast Furnace Emergency Repairs; UGA1-0381-No.2 Q-BOP SIP Emission Control System; and UGA1-0493-Research Equipment-Metallurgical Lab Improvements. The taxpayer is liable for the use tax on the materials used in each of these improvements to the taxpayer's realty.

The taxpayer also protests the assessment of use tax on materials that the taxpayer contends were used in projects qualifying for the directly used in direct production exemption pursuant to IC 6-2.5-5-3.

The first of these protests was for tax assessed on improvements to the 84" pickle line. These improvements included a welder pulpit, a camera and a knife removal device. The welder pulpit is the building around the controls for the pickle line. This building is for the convenience of the employee and is not an essential and integral part of the production process. Therefore it does not qualify for exemption. The line operator uses the camera to observe distant portions of the pickle line. This camera is for the operator's convenience and does not qualify for the exemption. The knife removal device is attached to the pickle line equipment. It is swung into position whenever a pickle line knife must be replaced. It does not have an immediate effect on the material being produced and is too far removed from the actual production process to qualify for exemption.

The next protest is for tax assessed on materials used in a project to control zebra mussels in a service water system. This system, as discussed earlier in this Letter of Findings, pumped water from Lake Michigan to a holding tank. Water was then pumped from the holding tank to the cooling system. These materials were used at the point the water was pumped out of Lake Michigan, before the beginning of the production process. Therefore the taxpayer is liable for use tax on these materials.

The taxpayer also protests the assessment of use tax on materials used in constructing concrete walls used in construction of cement walls and an extension of the casthouse in a project to improve the dry slag pits. These pits store a by-product of the production process. This storage takes place after the end of the production process. These items do not qualify for exemption as directly used in direct production.

The next protest concerns the assessment of use tax on improvements to the motor room cooling system for the 84" hot strip mill. These improvements were to cool the electrical equipment that powers the mill machinery. The taxpayer contends that since a cool environment is necessary, these items have an immediate link with production and qualify for the exemption. The Department assessed tax pursuant to 45 IAC 2.2-5-8(j). That regulation specifically states that cooling equipment is subject to use tax. *Indiana Department of State Revenue v. RCA Corporation,* 310 N.E. 2d 96 (Ind. 1974) deals with this issue. In that case, RCA argued that the air conditioning system was exempt because it was directly used in the direct production of the television tubes. The cooling system in this case is analogous to the cooling system that the Court determined was taxable in the RCA case. While both systems are needed for production, the Court clearly stated that that was not the test to determine if the system was qualified for exemption. To qualify for exemption, the air cooling system must directly affect the production of the tangible personal property. In this case, the air cooling system directly affects the air rather than the production process. That is too far removed from the production of steel to qualify for the directly used in direct production exemption. Therefore, the taxpayer's protest to this assessment is denied.

The next protest concerns the assessment of use tax on the material in a fire protection system for the 84" hot strip mill. Under this appropriation, a water/foam deluge system was installed on the seven finishing mills, vertical scale breaker, six roughing mills and motor room wall. The tax treatment of the fire prevention system is similar to the tax treatment of the cooling system. It does not directly impact the production of the product. The taxpayer is liable for use tax on the fire prevention system pursuant to 45 IAC 2.2-5-8 (j).

The taxpayer's final protest based on the directly used in direct production exemption is to use tax assessed on materials used in the Q-BOP Mixer Area improvements. These improvements include video cameras, a new pulpit and lighting. The video cameras are used to allow the operator to observe the production process. This use is for the operator's convenience and does not qualify for exemption. The new pulpit is the building around the operating controls. The building does not directly affect the production of steel. Therefore, the taxpayer is liable use tax on the pulpit. The lighting is for the general lighting of the room. It also does not directly affect the production process. Therefore, the taxpayer's protest to the use tax assessed on the lighting materials is denied. The taxpayer also contends that there were double invoices on rail stops and vendor materials in this order. The use of any item can only be taxed once. This protest is sustained subject to audit verification.

The next general area of the taxpayer's protest includes improvements that the taxpayer argues are exempt because they were used for environmental purposes. The contested contracts include UGA1-0262-Gary Works Sewer Remediation Consent Decree, UGA1-0305-Door and Jamb Cleaners, UGA1-0425-Install Above Ground Spent Acid Tank for the Metallurgical Lab, UGA1-0447-Gary Works Green Lights Program, and UGA1-0443-Tank Truck Secondary Spill Containment.

IC 6-2.5-5-30(1) provides an exemption for items used as follows:

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

The taxpayer protests the assessment of use tax on items coded in category UGA1-0262. The taxpayer claims that these items were used in accordance with the Gary Sewer Works Consent Decree of 1988 between the taxpayer and the Environmental Protection Agency. The Consent Decree, however, requires that the taxpayer provide various Management Plans that would identify and develop implementation schedules for construction projects to implement further compliance associated with the Consent Decree. These items would actually qualify for exemption if they were used in construction to correct the problems addressed in the Consent Decree. There is, however, no evidence in the file that the items were actually used in construction associated with the Consent Decree. The protest is sustained pursuant to the taxpayer providing documentation that the claimed purchases are part of the plans for compliance submitted to the EPA.

The taxpayer did not produce adequate documentation to sustain its burden of proving that they Door and Jamb Cleaners and Tank Truck Secondary Spill Containment contracts were actually entered into and the purchases made to comply with environmental standards. The use of tangible personal property for the completion of these contracts is subject to the use tax.

The taxpayer installed an Above Ground Spent Acid Tank for the Metallurgical Lab. This tank was installed to comply with environmental quality regulations. As such, it qualifies for exemption from the use tax.

The taxpayer also protests the assessment of use tax on items used in the Gary Works Green Lights Program. The primary purpose of the program was to install energy efficient lighting as opposed to compliance with statutes, regulations or standards. The documentation in the file indicates that this was a voluntary program. The taxpayer could terminate the agreement without notice of penalties. This protest is denied.

The taxpayer also protests the assessment of use tax on materials used in a project to renovate the highline structure. The highline is an elevated steel structure that is utilized to deliver metallurgical coke to the blast furnaces via stockhouse material bins. The structure supports three parallel railroad tracks on the topside and furnace material bins on the underside. The materials used in this project on which tax was assessed included doors and sheeting. The taxpayer contends that these items qualify for exemption because they were used to rebuild equipment that transports work in process.

45 IAC 2.2-5-8(f)(3) provides that, "transportation equipment used to transport work-in-process or semi-finished materials to or from storage is not subject to tax if the transportation is within the production process." The only part of the structure that is actually used to transport product is the railroad line section of the highline structure. The stockhouse material bins store product. Since there is no exemption for storage facilities, any materials used in renovating these bins would be subject to use tax. The doors and sheeting would not be materials used in rebuilding the railroad lines, but rather be used in the storage portion of the structure. Therefore they do not qualify for exemption.

The taxpayer also protests the assessment of use tax on materials used in constructing Section C items. These are capitalized assets that were under $25,000.00 in cost. The auditor used the standard industry percentages for labor and materials in determining the tax due on these items. This is appropriate. The taxpayer's protest to this item is denied.

**FINDING**

The taxpayer's protests are sustained in part, sustained subject to audit verification in part and denied in part.

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**DEPARTMENT OF STATE REVENUE**

04980603.LOF

**LETTER OF FINDINGS NUMBER: 98-0603**
**Retail Sales Tax**
**For the Tax Periods: 1996, 1997**

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

**ISSUE**

**I. Retail Sales Tax – Responsible Officer Liability**

**Authority**: IC 6-2.5-2-1, IC 6-2.5-2-2, IC 6-2.5-9-3, IC 6-8.1-5-1, *Indiana Department of Revenue v. Safayan*, 654 N.E.2d 270, 273 (Ind. 1995)

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

**STATEMENT OF FACTS**

Taxpayer was assessed for retail sales taxes as a responsible officer. Taxpayer was listed as the Secretary and Treasurer of the corporation on the Business Tax Application (Form BT-1). The Business Tax Application was completed by Taxpayer and was signed by Taxpayer as Secretary and Treasurer. Several retail sales tax returns also bear Taxpayer's signature signed as Treasurer. More facts will be provided as necessary.

**I. Retail Sales Tax – Responsible Officer**

**DISCUSSION**

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

An individual who:

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

(2) has a duty to remit state gross retail or use taxes to the department; holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

Pursuant to *Indiana Department of Revenue v. Safayan*, 654 N.E.2d 270, 273 (Ind. 1995): " The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that they are paid". In *Safayan*, the court also stated, "where the individual was a high ranking officer, we presume that he or she had sufficient control over the company's finances to give rise to a duty to remit the trust taxes." *Id.* "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid". IC 6-8.1-5-1(b).

Here, Taxpayer stated that he only acted only as a part time consultant with the company. However, Taxpayer is listed on the BT-1 under the title of Secretary and Treasurer. Additionally, Taxpayer signed several Indiana Sales Tax Returns as Treasurer.

From the cited facts, the Department finds Taxpayer failed to show that he lacked sufficient authority or requisite control to give rise to a duty to remit trust taxes collected on behalf of the state.

**FINDING**

The Taxpayer's protest is denied.

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**DEPARTMENT OF STATE REVENUE**

02980757.LOF

**LETTER OF FINDINGS NUMBER: 98-0757**
**Adjusted Gross Income Tax**
**For Tax Years 1995 through 1997**

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

**ISSUES**

**I. Adjusted Gross Income Tax – Business Income**

**Authority:** The May Department Store Company v. Indiana Department of State Revenue, 749 N.E.2d 651 (Ind. Tax 2001); IC 6-3-1-20; IC 6-3-1-21; 45 IAC 3.1-1-29; 45 IAC 3.1-1-30; 45 IAC 3.1-1-58

Taxpayer protests the classification of income as business-related.

**II. Adjusted Gross Income Tax – Capital Loss**

**Authority:** IC 6-3-4-14; IC 6-3-2-2

Taxpayer protests the denial of a capital loss carryback.

**III. Tax Administration – Negligence Penalty**

**Authority:** 45 IAC 15-11-2

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

**STATEMENT OF FACTS**

Taxpayer manufactures major appliances, with operations nationwide. As the result of an audit, the Department of Revenue ("Department") issued proposed assessments for adjusted gross income tax. Taxpayer protests two issues, as well as the ten percent (10%) negligence penalty. Further facts will be provided as necessary.

**I. Adjusted Gross Income Tax – Business Income**

**DISCUSSION**

Taxpayer protests the classification of income from the sale of stock in another company as business income. Taxpayer explains that its relationship with the other company, a licensee of taxpayer, was not unitary. There was no common management, functional integration, or economies of scale between taxpayer and the licensee. The Department assessed the income as business income on the grounds that either the underlying property generated business income in the ordinary course of business, or the proceeds served an operation function in the ordinary course of business. The Department referred to 45 IAC 3.1-1-58, which states:

> Capital Gains and Losses. Capital gains and losses from the sale of real property formerly used to produce nonbusiness income are allocated to the state where the property is located. Capital gains and losses from the sale of nonbusiness tangible personal property are allocated to Indiana if the property had a situs in the state when sold, or if the taxpayer's commercial domicile is in Indiana and it is not taxable in the state where the property had a situs. Capital gains and losses from sales of nonbusiness intangible property are allocated to Indiana if the taxpayer's commercial domicile is in this state.

Taxpayer claims that the income from the sale of this stock is non-business income since the stock was held for investment purposes only. Business income is defined by IC 6-3-1-20, which states:

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

IC 6-3-1-21 states:

> The term "nonbusiness income" means all income other than business income.

The Department found that the company whose stock taxpayer disposed of generated royalty income for taxpayer and that royalty income is properly classified as business income. The Department considered the sale of stock in a company with whom taxpayer had a licensing agreement that generated business income to be in the regular course of taxpayer's business.

In The May Department Store Company v. Indiana Department of State Revenue, 749 N.E.2d 651 (Ind. Tax 2001), the Indiana Tax Court determined that IC 6-3-1-20 provides for both a transactional test and a functional test in determining whether income is business or non-business in nature. Id. at 662-3.

The court looks to 45 IAC 3.1-1-29 and 30 for guidance in determining whether income is business or nonbusiness income under the transactional test. These regulations state, "… the critical element in determining whether income is 'business income' or 'nonbusiness income' is the identification of the transactions and activity which are the elements of a particular trade or business." Id. at 664. 45 IAC 3.1-1-30 lists several factors in making this determination. These include the nature of the taxpayer's trade or business; substantiality of the income derived from activities and relationship of income derived from activities to overall activities; frequency, number or continuity of the activities and transactions; length of time income producing property was owned; and

taxpayer's purpose in acquiring and holding the property producing income. In May, the Court found that the transactional test was not met when a retailer sold a retailing division to a competitor because the taxpayer was not in the business of selling entire divisions. Id. at 664.

In the instant case, taxpayer sold the stock in a licensee to a competitor in the industry. Taxpayer's business is manufacturing appliances, the income derived from the sale of stock is not substantial compared to taxpayer's overall activities, and the transaction was a one-time sale. Also, the percentage of stock held was insufficient to allow taxpayer to exert control over the licensee indicating an investment purpose in acquiring and holding the property producing income. When all of these factors are considered, the transactional test as described in May is not met.

The functional test focuses on the property being disposed of by the taxpayer. Id. at 664. Specifically the functional test requires examining the relationship of the property at issue with the business operations of the taxpayer. Id. at 664. In order to satisfy the functional test the property generating income must have been acquired, managed and disposed of by the taxpayer in a process integral to taxpayer's regular trade or business operations. Id. at 664. The Court in May defined "integral" as part or constituent component necessary or essential to complete the whole. Id. at 664-5. The Court held that the May's sale of one of its retailing division was not "necessary or essential" to May's regular trade or business because the sale was executed pursuant to a court order that benefited a competitor and not May. In essence, the Court determined that because May was forced to sell the division in order to reduce its competitive advantage, the sale could not be integral to May's business operations. Therefore, the proceeds from the sale were not business income under the functional test.

In the instant case, the Department noted the fact that taxpayer received business income from the stock of the licensee. The Indiana Tax Court explained in May:

> More importantly, this process (i.e., acquisition, management and disposition) must be *integral* to the taxpayer's regular trade or business operations. It is not enough that the property was used to generate business income for the taxpayer prior to its disposition. The disposition too must be an integral part of the taxpayer's regular trade or business operations.
>
> Id. at 664.

The term "integral" is defined as, "The term in ordinary usage means part or constituent component necessary or essential to complete the whole." Black's Law Dictionary 809 (6th ed. 1991). The documentation does not establish that the sale itself was a part or constituent component necessary or essential to complete the whole of taxpayer's regular trade or business operations. In this case, while owning stock in a licensee may have been advantageous to taxpayer, the owning and selling of the stock was not a necessary or essential component of taxpayer's business of manufacturing appliances.

Therefore, under both the transactional and functional tests provided in May, sale of the stock in the licensee was non-business income. Under 45 IAC 3.1-1-58, capital gains and losses from sales of nonbusiness intangible property are allocated to Indiana if the taxpayer's commercial domicile is in this state. Taxpayer's commercial domicile is not in this state, therefore the capital gains from the sale of nonbusiness intangible property is not allocated to Indiana.

**FINDING**

Taxpayer's protest is sustained.

**II. Adjusted Gross Income Tax – Capital Loss**

**DISCUSSION**

Taxpayer protests the denial of credit for a capital loss in 1994, which taxpayer wanted to carry back to 1991 and 1993. The Department denied the carry back on the basis that the loss was the result of taxpayer selling assets of one subsidiary and stock of another, neither of which was listed on taxpayer's Indiana consolidated return. The Department referred to IC 6-3-4-14(b), which states:

> For the purposes of this section the term "affiliated group" shall mean an "affiliated group" as defined in Section 1504 of the Internal Revenue Code with the exception that the affiliated group shall not include any corporation which does not have adjusted gross income derived from sources within the state of Indiana.

Taxpayer refers to IC 6-5.5-1-2 to support its position that capital losses may be carried back. IC 6-5.5-1-2 applies to financial institutions, while taxpayer is not a financial institution. The statute applicable to taxpayer is IC 6-3-2-2(i), which states:

(1) Capital gains and losses from sales of real property located in this state are allocable to this state.

(2) Capital gains and losses from sales of tangible personal property are allocable to Indiana if:

> (i) the property had a situs in the state at the time of the sale; or
>
> (ii) the taxpayer's commercial domicile is in this state and the taxpayer is not taxable in the state in which the property had a situs.

(3) Capital gains and losses from sales of intangible personal property are allocable to this state if the taxpayer's commercial domicile is in this state.

At hearing, taxpayer explained that the Department erred in determining which subsidiary's assets were sold and which subsidiary's stock was sold. In either case, the stock is intangible personal property and is allocated to Indiana if the taxpayer's commercial domicile is in this state, as provided in 45 IAC 3.1-1-58. Taxpayer's commercial domicile is not in Indiana, therefore

the capital loss is not allocated to Indiana. The assets are tangible personal property. However, the assets did not have a situs in Indiana, therefore the capital loss is not allocated to Indiana.

In conclusion, the subsidiaries were not included on the consolidated return. As is consistent with the finding in Issue I, the taxpayer's commercial domicile was not in Indiana. The tangible personal property had no Indiana situs. As provided in IC 6-3-2-2(i), under these circumstances the capital loss is not allocable to Indiana.

**FINDING**

Taxpayer's protest is denied.

**III. Tax Administration – Negligence Penalty**

**DISCUSSION**

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

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

Taxpayer has not demonstrated that it exercised ordinary business care and prudence in carrying out its duty to pay income tax. Therefore, taxpayer has not affirmatively established reasonable cause, and the negligence penalty shall not be waived.

**FINDING**

Taxpayer's protest is denied.

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**DEPARTMENT OF STATE REVENUE**

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**LETTER OF FINDINGS NUMBER: 98-0759**
**Corporate Income Tax**
**For Tax Period: 1995**

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

**ISSUES**

**1. Gross Income Tax – Sale of Intangibles**

**Authority:** IC 6-2.1-1-2, 45 IAC 1.1-6-2, 45 IAC 1.1-3-3(c)(7), IC 6-2.1-2(a)(2), Bethlehem Steel Corporation v. Indiana Department of State Revenue, 597 N.E.2d 1334 (Ind. 1994)

The taxpayer protests the imposition of gross income tax on the sale of intangibles.

**2. Adjusted Gross Income Tax – Business Income**

**Authority:** IC 6-3-1-20, 45 IAC 3.1-1-29,30, May Department Store Company v. Indiana Department of State Revenue, 749 N.E.2d 651 (Ind. Tax 2001)

The taxpayer protests the classification of receipts from the sale of a division as business income.

**STATEMENT OF FACTS**

The taxpayer is an Ohio corporation whose principal business activity is the producing and wholesaling of shoes and the retailing of apparel, shoes and eyewear. The taxpayer sold its retail apparel and eyewear through its own stores in Indiana and other states. The shoes were sold through its own stores and through stores belonging to other business entities in Indiana and other states. In 1995, the taxpayer sold its shoe division to a Missouri corporation and its retail apparel division to a Connecticut corporation.

The Indiana Department of Revenue (department) audited the taxpayer for the years 1988 through 1996. The taxpayer protested two adjustments. A hearing was held on the protest. More facts will be provided as necessary.

**1. Gross Income Tax – Sale of Intangibles**

**DISCUSSION**

The taxpayer's first protest concerns the imposition of gross income tax on the 1995 gross receipts from the sale of certain intangibles. The audit assessed gross income tax on the gross receipts from goodwill and tradename of the Indiana retail apparel stores that were allocated to Indiana. The taxpayer and the department agree that the taxpayer received gross income from the sale of intangibles. The issue to be determined is whether or not these receipts are subject to the Indiana gross income tax.

"Gross Income" is defined at IC 6-2.1-1-2(a)(3) as including the receipts from sales of intangibles. Indiana imposes gross

income tax on a nonresident taxpayer's receipt of taxable gross income that is derived from activities, business or any other sources within Indiana. IC 6-2.1-2-2(a)(2).

The department stated its longstanding position in the January 1, 1999 Indiana Gross Income Tax Regulations at 45 IAC 1.1-6-2:

(b) Except as provided in subsection (c), receipts derived from an intangible are included in gross income.

(c) Receipts derived from an intangible are not included in gross income under the following situations:

(1) The intangible forms an integral part of:

(A) a trade or business situated and regularly carried on at a business situs outside Indiana; or

(B) activities incident to such trade or business.

(2) The intangible does not form an integral part of a trade or business situated and regularly carried on at a business situs in Indiana, and the taxpayer's commercial domicile is located outside Indiana.

(3) The receipts from the intangible are otherwise excluded from gross income under IC 6-2.1-1-2 or 45 IAC 1.1-3-3 (c)(7).

(d) In determining whether an intangible forms an integral part of a trade or business or activities incident thereto under subsection (c), it is the connection of the intangible itself to such trade or business or activities incident thereto that is the controlling factor. The physical location of the evidence of the intangible (share of stock, bond, etc.) is not a controlling factor. Also, any activities related to the sale of an intangible occur after the fact and are never determinative.

These receipts are subject to the Indiana gross income tax if they are from an activity, business or source within Indiana. The issue to be determined is whether these receipts are derived from an activity, business or source within Indiana and thus subject to the Indiana gross income tax.

The taxpayer cites Bethlehem Steel Corporation v. Indiana Department of State Revenue, 597 N.E.2d 1334 (Ind. 1994) in support of its contention that receipts from the sale of the Indiana stores' goodwill and tradename is not subject to the Indiana gross income tax. In that case, the United States Congress had legislated certain investment credits to encourage businesses to invest in new machinery and hopefully alleviate a recession. Since Bethlehem did not owe federal income tax during those years, it took advantage of a provision allowing it to enter into a sale-leaseback agreement with another company by which it essentially sold the tax credits to the out-of-state company. In that case, the Court found that Bethlehem did not owe income tax on the receipts from the sale of the tax credits.

The taxpayer's situation is distinguishable from the Bethlehem case. It dealt with congressionally created tax credits which did not significantly add to the value of the machinery. Congress artificially created the intangible that only tangentially related to the machinery. The tax credits did not have the integral relationship to the taxpayer's business found necessary to subject receipts from intangibles to the Indiana gross income tax required at 45 IAC 1.1-6-2 (c)(2). Further, the sale was negotiated and transacted contemporaneously with the origination of the tax credits that were sold. The machinery was purchased to provide the tax credits which Bethlehem could sell to the out-of-state concern.

In the taxpayer's situation, the Indiana stores' tradename and goodwill were an integral part of the taxpayer's Indiana retail locations. Shoppers came to the stores because of the continuing good will engendered by the employees, physical plants and inventory at the local stores. The trade name and goodwill were totally wrapped up in and a part of the Indiana retail establishments. These intangibles significantly added to the value of the stores long before the sale was considered and effectuated by the employees at the Ohio corporate offices. Therefore, the activities relating to the sale are not determinative in this situation pursuant to 45 IAC 1.1-6-2 (d). The department correctly imposed gross income tax on the receipts from the taxpayer's sale of the trademark and goodwill derived from its Indiana retail locations pursuant to IC 6-21-2-2(a)(2).

**FINDING**

The taxpayer's protest is denied.

**2. Adjusted Gross Income Tax – Business Income**

The department classified the receipts from the sale of the taxpayer's shoe division as business income. Pursuant to this classification, the receipts were apportioned and included in the Indiana sales factor. The taxpayer contends that the receipts should have been classified as derived from non-business income and not included in the taxpayer's Indiana income.

In The May Department Store Company v. Indiana Department of State Revenue, 749 N.E.2d 651 (Ind. Tax 2001), the Indiana Tax Court determined that IC 6-3-1-20 provides for both a transactional test and a functional test in determining whether income is business or non-business in nature. Id. at 662-3.

The court looked to 45 IAC 3.1-1-29 and 30 for guidance in determining whether income is business or nonbusiness income under the transactional test. These regulations state "... the critical element in determining whether income is 'business income' or 'nonbusiness income' is the identification of the transactions and activity which are the elements of a particular trade or business." Id. at 664. 45 IAC 3.1-1-30 lists several factors in making this determination. These include the nature of the taxpayer's trade or business; substantiality of the income derived from activities and relationship of income derived from activities to overall activities; frequency, number or continuity of the activities and transactions; length of time income producing property was owned; and taxpayer's purpose in acquiring and holding the property producing income. In May, the Court found that the transactional test was

not met when a retailer sold a retailing division to a competitor because the taxpayer was not in the business of selling entire divisions. Id. at 664.

The nature of this taxpayer's business included the manufacture of shoes and the sale of shoes, apparel and eyeglasses. Almost all of the taxpayer's income derived from transactions associated with these activities. The taxpayer had owned the shoe production and sale businesses for a significant period of time. The sale of the shoe division was an unusual transaction for the taxpayer since it was not in the business of selling entire divisions. The sale of this division does not meet the transactional test.

The functional test focuses on the property being disposed of by the taxpayer. Id. at 664. Specifically the functional test requires examining the relationship of the property at issue with the business operations of the taxpayer. Id. at 664. In order to satisfy the functional test the property generating income must have been acquired, managed and disposed of by the taxpayer in a process integral to taxpayer's regular trade or business operations. Id. at 664. The Court in May defined "integral" as part or constituent component necessary or essential to complete the whole. Id. at 664-5. Therefore, the proceeds from the sale were not business income under the functional test.

In the taxpayer's situation, a foreign eye care business purchased the taxpayer to acquire the eyeglasses and eye care division. The purchasing corporation disposed of the shoe division so it could further its regular business operations in the area of eye care. Therefore, the sale of the shoe division was necessary to complete the purchaser's regular trade of providing eye care and eyeglasses. The proceeds of this sale constituted business income under the functional test.

**FINDING**

The taxpayer's protest is denied.

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**DEPARTMENT OF STATE REVENUE**

02990105.LOF

**LETTER OF FINDINGS NUMBER: 99-0105**
**Income Tax**
**For Tax Periods: 1995-1996**

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

**ISSUE**

**Gross Income Tax – Resource Recovery System**

**Authority:** IND. CONST. art. 14, § 2; IC §§ 6-1.1-2-1, 6-1.1-12-28.5, 6-2.1-4-3 (1988 and 1993); *Wheeling Steel Corp. v. Fox,* 298 U.S. 193, 56 S.Ct. 773, 80 L.Ed. 1143 (1936); *Indiana Dep't of State Revenue v. Bethlehem Steel Corp.,* 639 N.E.2d 264 (Ind. 1994); *Miami Coal Co. v. Fox,* 203 Ind. 99, 176 N.E. 11 (1931); *Harbor Belt. R. Co. v. Public Serv. Comm'n,* 147 Ind. App. 652, 263 N.E.2d 292 (1970)

The taxpayer protests the Indiana Department of Revenue's disallowance of its resource recovery system deduction.

**STATEMENT OF FACTS**

The taxpayer is a Delaware corporation with its commercial domicile and a manufacturing facility in another State. The taxpayer manufactures high quality carbon steel coils. In the first stage of the production process, the taxpayer produces molten iron by combining iron ore, coke and limestone and heating these raw materials in a blast furnace. The taxpayer then combines the molten iron with scrap steel and other ingredients in a Basic Oxygen Furnace (BOF) to produce molten steel. The resulting molten steel is then transported to a continuous caster, where it is formed into slabs as it passes through a series of mold segments and cools. The taxpayer then uses a series of rolling mills to reduce the slab thickness, smooth the surface of the steel, and turn the slab into a salable coil. Other rolling and finishing mills are utilized to finish the coil to customer specifications. As part of the manufacturing process, the taxpayer generates scrap when it trims steel from the edges of the slabs and coils. The taxpayer also generates scrap steel when it produces a coil that does not meet customer specifications due to either non-conforming metallurgical qualities or surface quality. If the flawed coil cannot be sold in the secondary steel market, the taxpayer uses it in the manufacturing process. These scrapped coils are consumed as raw materials at the BOF. In addition, the taxpayer purchases scrap for use as a raw material at the BOF. The taxpayer claimed a depreciation deduction for its facility as a resource recovery system (RRS) against its federal adjusted gross income tax liability. It also took a resource recovery deduction from its gross income for Indiana gross income tax purposes. The Indiana Department of Revenue (department) disallowed this deduction in an audit. The taxpayer protested the disallowance and a hearing was held. Further facts will be provided as necessary.

**Gross Income Tax – Resource Recovery System**

**DISCUSSION**

The taxpayer took a RRS deduction for the manufacturing facility pursuant to IC 6-2.1-4-3(b) as follows:

If for federal income tax purposes a taxpayer is allowed a depreciation deduction for a particular taxable year with respect to

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

The department denied the RRS deduction because the taxpayer took it for the out-of-state RRS facility. The taxpayer argued that IC § 6-2.1-4-3 does not state that the RRS deduction is restricted to Indiana property. It also submits that the legislature's use of detailed language in other income tax statutes (i.e., IC §§ 6-2.1-3-32 and 6-3-2-2.6) indicates that the General Assembly knows how to restrict an exemption or deduction when it so chooses.

The department finds that the RRS deduction of IC § 6-2.1-4-3 is available only for an RRS located within Indiana for four reasons. First, the rules of statutory construction, simple logic and the state constitution all require it. The legislative history of this deduction clearly shows that the legislature always addressed the RRS deductions of IC §§ 6-1.1-12-28.5 and 6-2.1-4-3 in the same session law. Statutes passed simultaneously at the same session of the legislature and relating to the same subject matter are to be construed *in pari materia,* i.e. in harmony with each other. *E.g., Lutz v. Arnold*, 208 Ind. 480, 500, 193 N.E. 840, 848 (1935). IC § 6-1.1-12-28.5 governs the RRS deduction from the property tax. As such, it has to be interpreted *in pari materia* with IC § 6-1.1-2-1, which identifies the property subject to that tax. *See Ralston v. State,* 218 Ind. 591, 595, 34 N.E.2d 930, 932 (1941) (requiring different parts of the property tax code relating to tax sales to be read together). However, since IC § 6-2.1-4-3 must be construed *in pari materia* with IC § 6-1.1-12-28.5, and IC § 6-1.1-12-28.5 must be construed *in pari materia* with IC § 6-1.1-2-1, it follows that IC § 6-2.1-4-3 must be construed *in pari materia* with IC § 6-1.1-2-1. This last statute states that "[e]xcept as otherwise provided by law, all tangible property *which is within the jurisdiction of this state* on the assessment date of a year is subject to assessment and taxation for that year." *Id* (emphasis added). The department interprets "jurisdiction" as used in IC § 6-1.1-2-1 consistent with IND. CONST. art. 14, § 2, which states that "[t]he State of Indiana shall possess *jurisdiction* and sovereignty *co-extensive with the boundaries declared in the preceding section*[.]" *Id* (emphases added. The department does not interpret the word "jurisdiction" as used in IC § 6-1.1-2-1 as meaning, as the taxpayer's argument implies, that Indiana can exercise "long-arm" jurisdiction over the out-of-state RRS. *See* Ind. Trial Rule 4.4(A) (describing acts of, among others, non-residents serving as a basis for jurisdiction). In other words, IC § 6-2.1-4-3, read in the context of the constitutional provision and the other statutes cited in this paragraph, requires the RRS of a gross income taxpayer taking the RRS deduction to be physically located within the legal geographic boundaries of Indiana. "A statute is *prima facie* operative only as to persons or things within the territorial jurisdiction of the lawmaking power which enacted it." *Harbor Belt. R. Co. v. Public Serv. Comm'n,* 147 Ind. App. 652, 662, 263 N.E.2d 292, 298 (1970).

Second, restricting the deduction to gross income taxpayers who have an RRS physically located in the state is consistent with the "business situs" holdings of the *Miami Coal* and *Bethlehem Steel* opinions. In *Miami Coal* the court stated that "[t]he legal proposition that personal property may obtain an actual situs different from the domicile of its owner and designated by the words 'business situs,' has long been recognized in Indiana." 203 Ind. at 107, 176 N.E. at 14. The court elaborated later in the opinion as to tangible personal property as follows:

The rule of law that tangible personal property may acquire for itself a fixed situs in a state other than that of the domicile of its owner is an absolute rule. Tangible personal property which has acquired such a situs is immune from taxation, when considered as a form of riches upon which to base a tax in personam upon its owner. And such a tax, if so fixed upon its owner in a jurisdiction different from that of the fixed situs of the property, violates the Fourteenth Amendment to the federal Constitution. *Delaware, etc. R. Co. v. Pennsylvania* (1905), 198 U.S. 341, 25 S. Ct. 669, 49 L. Ed. 1077.

203 Ind. at 112, 176 N.E. at 16. *See also Wheeling Steel*, 298 U.S. at 209, 56 S.Ct. at 776 (stating that "it is impossible for one state to reach out and tax property in another without violating the Constitution.") (internal quotation marks omitted). The Indiana Supreme Court extended the "business situs" doctrine to gross income taxation in *Bethlehem Steel II. See* 639 N.E.2d at 269-72, and cases there discussed.

When the legislature enacted the RRS property and gross income tax deductions in 1979, it presumably was aware of the Indiana Supreme Court's 1931 opinion in *Miami Coal* and the United States Supreme Court's 1936 opinion in *Wheeling Steel*. *See Stith Petroleum Co. v. Department of Audit and Control*, 211 Ind. 400, 405, 5 N.E.2d 517, 519 (1937) (stating that "the Legislature is presumed to have had before it and to have had in mind the history and decisions of the courts upon [the] subject [of the act in question]"). The 1979 session of the General Assembly did not include any language in IC § 6-1.1-12-28.5, or for that matter in any other property tax statute of which the department is aware, that limited or overruled the "business situs" holding of *Miami Coal*. It therefore follows that the 1979 legislature intended that holding to apply under the RRS property tax deduction, and under IC § 6-2.1-4-3 as well, since the two statutes must be construed *in pari materia*. If there was ever any doubt that the "business situs" holding of *Miami Coal* applies under the gross income tax, the Indiana Tax and Supreme Courts removed it in their later *Bethlehem Steel* opinions. Due process and the "business situs" rule preclude Indiana from taxing gross income from a source consisting of tangible personal property having a fixed out-of-state business situs. *Wheeling Steel*, 298 U.S. at 209, 56 S.Ct. at 776; *Miami Coal*, 203 Ind. at 112, 176 N.E. at 16. If that is the case, it logically follows that Indiana also cannot grant a deduction from income it is

not entitled to tax in the first place. Due process and the "business situs" rule therefore act to restrict the gross income tax deduction of IC § 6-2.1-4-3 only to gross income taxpayers that own a RRS having a "business situs" within this state.

**FINDING**

The taxpayer's protest is denied.

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**DEPARTMENT OF STATE REVENUE**

02990549P.LOF

**LETTER OF FINDINGS NUMBER: 99-0549P**
**Income Tax**
**Fiscal Year Ending March 31, 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. Tax Administration – Penalty**

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

The taxpayer protests the negligence penalty.

**STATEMENT OF FACTS**

The negligence penalty was assessed on an income tax billing which resulted from a late payment for the fiscal year ending March 31, 1998.

The taxpayer is a company with a commercial domicile that is located out-of-state.

**I. Tax Administration – Penalty**

**DISCUSSION**

The taxpayer argues the negligence penalty should be waived as the amount of estimated tax payments for the current year approximated the tax liability for the prior year.

The Department points out the penalty is the result of a late payment and not the result of estimated tax payments. IC 6-8.1-6-1(a) states that 90% of the tax due is to be paid by the due date of the return. The estimated tax payments approximated 15% of the tax liability. The due date of the return was July 15, 1999. The final payment of $8,808, which approximates 85% of the liability, was not received until September 21, 1999, a date after the due date. As such, the taxpayer did not remit 90% of the tax liability by the due date of July 15, 1999, and therefore is subject to penalty and interest.

**FINDING**

The taxpayer's penalty protest is denied.

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**DEPARTMENT OF STATE REVENUE**

0420000029.LOF

**LETTER OF FINDINGS NUMBER: 00-0029 ST**
**Sales and Use Tax**
**For Tax Periods: 1995 through 1997**

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

**ISSUES**

**1. Sales and Use Tax – Consumed in Production Exemption**

**Authority**: IC6-2.5-3-2. IC 6-2.5-5-5.1(b), 45 IAC 2.2-5-12

The taxpayer protests the imposition of use tax on liquid nitrogen.

**2. Tax Administration – Penalty**

**Authority:** IC 6-8.1-10-2(a)

The taxpayer protests the imposition of the penalty.

**STATEMENT OF FACTS**

The taxpayer is in the business of manufacturing sulfuric acid. The petroleum refining process generates a waste known as spent sulfuric acid. The taxpayer purchases this spent sulfuric acid to use as a raw material in its manufacturing process. Throughout the production process, the liquid nitrogen is used to stabilize the gasses emitted from the spent sulfuric acid by creating an inert or non-combustible atmosphere within the closed-vent system. It also prevents the formation of gasses containing volatile organic compounds by exerting pressure on the elements of the manufacturing process.

The taxpayer claimed a refund of taxes paid on the liquid nitrogen in 1995. The Indiana Department of Revenue (department) audited the taxpayer for the years 1995-1997 and assessed additional tax. The taxpayer protested the taxes assessed on the liquid nitrogen and the denial of the claim for refund. A hearing was held. Further facts will be provided as necessary.

**1. Sales and Use Tax – Consumed in Production Exemption**

**DISCUSSION**

Indiana imposes a use tax "on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction..." IC 6-2.5-3-2. The taxpayer contends that its use of liquid nitrogen qualifies for exemption pursuant to the provisions of IC 6-2.5-5-5.1(b) as follows:

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

The liquid nitrogen is tangible personal property that is used in the production of the taxpayer's product, sulfuric acid. The issue to be determined is whether or not the liquid nitrogen is actually consumed in the process of manufacturing of sulfuric acid.

The term "consumed" is defined for the purposes of this exemption at 45 IAC 2.2-5-12 as "the dissipation or expenditure by combustion, use, or application." The taxpayer produced evidence that the liquid nitrogen is dissipated during the production process. It does not become part of the sulfuric acid and it is not present at the end of the sulfuric acid production process. Since the liquid nitrogen is consumed in the production process, it qualifies for exemption from the use tax.

**FINDING**

The taxpayer's protest is sustained.

**2. Tax Administration – Penalty**

Taxpayer also protests the imposition of the negligence penalty pursuant to IC 6-8.1-10-2 (a).

If a person fails to... pay the full amount of tax shown on his return on or before the due date for the return or payment, incurs, upon examination by the department, a deficiency which is due to negligence,... the person is subject to a penalty.

The department had previously audited the taxpayer. Even so, the taxpayer did not pay sales tax or self assess use tax on such previously identified taxable items as kitchen sink parts, shipping supplies, janitorial supplies, and asphalt patching material.

This breach of the taxpayer's duty to pay the proper amount of tax constitutes negligence.

**FINDING**

Taxpayer's protest to the assessment of the negligence penalty is denied.

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**DEPARTMENT OF STATE REVENUE**

0220010092.LOF

**LETTER OF FINDINGS NUMBER: 01-0092**
**Corporate Income Tax**
**For Tax Periods: Fiscal Year Ending March 31, 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**

**1. Gross Income Tax – Special Corporation Eligibility**

**Authority**: IC 6-2.1-3-24.5 9(a), IC 6-2.1-3-24.5 9(b), 26 USCA 1361(b), 26 USCA 1504(a)

The taxpayer protests the denial of its special corporation eligibility.

**STATEMENT OF FACTS**

The taxpayer is in the business of selling auto paint and supplies to auto dealers and body shops. The taxpayer had warehouses in Indianapolis and Evansville. In an audit, the Indiana Department of Revenue (department) denied the corporation its special corporation eligibility and assessed gross income tax, interest and penalties on the income from sales from the Indiana warehouses

to Indiana businesses. The taxpayer protested the assessment. Since the taxpayer did not appear for the hearing, the determination is based upon a review of the documentation in the file. Further facts will be provided as necessary.

**1. Gross Income Tax – Special Corporation Eligibility**

**DISCUSSION**

An Indiana corporation that qualifies as a special corporation for federal purposes also qualifies as a special corporation in Indiana. IC 6-2.1-3-24.5 9(a). Any Indiana corporation qualified to file as a special corporation is exempt from the Indiana gross income tax. IC 6-2.1-3-24.5 9(b).

Prior to January 1, 1997, 26 USCA 1361(b) stated that a corporation did not qualify for special corporation status if it was a member of an affiliated group as determined under 26 USCA 1504. The taxpayer's federal return indicated that the taxpayer corporation made loans to a subsidiary. The taxpayer corporation was part of an affiliated group for the first twenty eight days of the fiscal year ending March 31, 1997. Pursuant to 26 USCA 1504(a), a corporation's ownership of at least eighty per cent (80%) of the value and the voting power of another corporation's stock constituted affiliation unless the subsidiary had no gross income. Since the corporate taxpayer was part of an affiliated group during 1996, the taxpayer corporation did not qualify as a special corporation and did not qualify for the special corporation exemption from gross income tax. Therefore, the department properly assessed gross income tax, interest and penalty against the taxpayer.

**FINDING**

The taxpayer's protest is denied.

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**DEPARTMENT OF STATE REVENUE**

0220010129.LOF

**LETTER OF FINDINGS NUMBER: 01-0129**
**Adjusted Gross Income Tax – Payroll Factor**
**For Tax Years 1997 through 1999**

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

**ISSUES**

**I. Adjusted Gross Income Tax – Payroll Factor**

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

Taxpayer protests the auditor's determination that the wages earned by employees of two of taxpayer's subsidiary corporations and paid by taxpayer should be deducted from taxpayer's payroll factor denominator.

**II. Tax Administration – Abatement of Penalty**

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

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

**STATEMENT OF FACTS**

Taxpayer is an operator of full service restaurants in Indiana and surrounding states. The company also sells frozen food items to grocery stores and institutional customers. In April of 1997, taxpayer transferred many of its Ohio restaurants to a separate corporation (hereinafter, the "Ohio Subsidiary"). In October of 1997, taxpayer transferred a number of its Michigan restaurants to a different separate corporation (hereinafter, the "Michigan Subsidiary"). Taxpayer controls both the Ohio and the Michigan Subsidiaries.

Taxpayer's corporate staff prepares payroll and withholding tax returns for taxpayer and the two subsidiaries. Pursuant to a management agreement, the subsidiaries pay a five percent (5%) management fee to taxpayer for performing the services on their behalf. In addition thereto, the subsidiaries reimburse taxpayer for the costs taxpayer incurs in providing payroll compensation.

In fiscal years ending April 1998 and April 1999, taxpayer included in the denominator of its payroll factor, for adjusted gross income tax purposes, the total amount of compensation that it paid on behalf of the employees employed by the restaurants that were held by the Ohio and Michigan Subsidiaries. Pursuant to the audit performed for the years in question, the auditor determined that the payroll compensation paid on behalf of the employees of the Ohio and Michigan Subsidiaries should not be included in the denominator of taxpayer's payroll factor because taxpayer was reimbursed for the costs associated with providing the payroll compensation. Taxpayer protests the auditor's determination.

**I. Adjusted Gross Income Tax – Payroll Factor**

**DISCUSSION**

In determining its Indiana income, taxpayer included in the payroll factor for the apportionment of taxpayer's Indiana income subject to the adjusted gross income tax the payroll compensation paid by taxpayer to the employees of the Ohio and Michigan

Subsidiaries. Pursuant to a management agreement, and in exchange for the payroll services provided by taxpayer, the subsidiaries reimbursed taxpayer for its costs (in addition to paying to taxpayer a five percent (5%) management fee). The auditor disallowed the inclusion of the payroll compensation paid on behalf of the employees of the Ohio and Michigan subsidiaries because taxpayer was reimbursed for those payroll expenses.

The payroll factor for apportionment of Indiana income is found at IC 6-3-2-2(d), which states in pertinent part:

> The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the taxable year by the taxpayer for compensation, and the denominator of which is the total compensation paid everywhere during the taxable year. However, with respect to a foreign corporation, the denominator does not include compensation paid in a place that is outside the United States.

IC 6-3-2-2(d). This statute is clarified in 45 IAC 3.1-1-47 as follows:

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

45 IAC 3.1-1-47.

The auditor's documentation reveals that on taxpayer's fiscal year 1999 pro forma Form 1120 federal tax return, taxpayer separated the management fee into two components, an income component and an expense component. Taxpayer listed in the column entitled "Other Income" an offsetting account entitled "Intercompany Employee Leasing". Taxpayer also included on the tax return as a payroll expense the amounts it paid in payroll compensation on behalf of the subsidiaries. The management agreements between taxpayer and the subsidiaries stated, *inter alia*, that the management fee owed by the subsidiaries for the payroll services shall equal 105% of the actual expenses incurred or accrued by taxpayer. From this information, the auditor determined that taxpayer was recouping directly the costs associated with the payroll compensation it provided for the subsidiaries. Consequently, because taxpayer received "reimbursements" from the subsidiaries that offset its payroll expenses on behalf of the subsidiaries, taxpayer, in actuality, did not incur as much payroll expense as taxpayer originally reported on its tax returns.

Taxpayer argues that although its payroll expenses and the management fee received therefor were separated into two components and listed on two separate lines of its pro forma tax return, it is only receiving from the subsidiaries one management fee. And, according to taxpayer, the entire amount that taxpayer expended on behalf of the subsidiaries in the form of payroll compensation should be included in the payroll factor as a legitimate payroll expense. However, taxpayer's argument does not negate the auditor's findings that the management fee received by taxpayer is in part a reimbursement of payroll expenses that reduces taxpayer's overall expense calculation.

Based upon the evidence before us, we find that the auditor did not err in determining that because taxpayer received a reimbursement, the payroll expenses attributable to the employees of the restaurants of the Ohio and Michigan Subsidiaries should be removed from the denominator of taxpayer's payroll factor.

**FINDING**

Taxpayer's protest is denied.

**II. Tax Administration – Abatement of Penalty**

**DISCUSSION**

Taxpayer protests the imposition of a ten percent (10%) negligence penalty. Taxpayer argues that it had reasonable cause for its failure to pay the appropriate amount of tax due because said underpayment of tax was based solely upon taxpayer's interpretation of relevant statutes and regulations. The Audit Division determined that a penalty should be assessed because taxpayer is a large corporation that has been audited by the Department several times, and in the instant case taxpayer was negligent in its Indiana income tax responsibilities.

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

In order to waive the negligence penalty, taxpayer must prove that its failure to pay the full amount of tax due was due to reasonable cause. 45 IAC 15-11-2. 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...." 45 IAC 15-11-2(c). In determining whether reasonable cause existed, the Department may consider the nature of the tax involved, previous judicial precedents, previous department instructions, and previous audits. *Id*.

Taxpayer has failed to set forth a basis for establishing that it exercised the degree of care statutorily imposed upon an ordinarily reasonable taxpayer. Given the totality of the circumstances, waiver of the penalty is inappropriate in this instance.

**FINDING**

Taxpayer's protest is denied.

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**DEPARTMENT OF STATE REVENUE**

0220010230.LOF

**LETTER OF FINDINGS NUMBER: 01-0230**
**Indiana Corporate Income Tax**
**For Tax Years 1995-1998**

**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); *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); IC 6-3-2-2(m)

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

**II. 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); 45 IAC 3.1-1-153(b), (c)

Taxpayer protests the Audit Division's determination that taxpayer and its partnership do not enjoy a unitary relationship.

**III. 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.

**IV. 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 a Kentucky 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 and truss plants, as well as 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, "Ohio Subsidiary"). The Ohio Subsidiary holds the rights to certain trademarks and corporate logos used by other subsidiaries of Parent. The Ohio Subsidiary charges the other subsidiaries with, *inter alia*, a royalty fee for the use of its trademarks and corporate logos.

Taxpayer, a Kentucky corporation and subsidiary of Parent, operates the retail stores located in Kentucky. In 1993, a partnership was formed between taxpayer and an Indiana corporation that was a subsidiary of Parent, for the purpose of holding all of the Indiana assets and retail stores (hereinafter, "Partnership"). Taxpayer holds a one percent (1%) interest in the Partnership. Each year, Taxpayer reports a partnership distributive share in addition to the proceeds from the retail operations of the Kentucky stores.

The Department of Revenue conducted an audit for the tax years in question, and determined that taxpayer erred in deducting the royalty fee expenses that it paid to Parent for the use of trademarks and corporate logos. The Department further determined that whereas the Indiana corporation and the Partnership enjoyed a unitary relationship, taxpayer and the Partnership *did not* enjoy a unitary relationship. As such, the Department classified taxpayer's and the Partnership's distributive share of Indiana income as non-business income. Additional facts will be provided as necessary.

**I. Adjusted Gross Income Tax – Royalty Fee Deduction**

**DISCUSSION**

Pursuant to a royalty agreement (hereinafter, "Agreement"), taxpayer agreed to pay the Ohio Subsidiary a one percent (1%) royalty fee for the use of various trademarks and 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, an Indiana 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]." *Taxpayer's Protest Letter* dated January 17, 2001, pg. 1.

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 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 or 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).

The evidence on file reveals that the Ohio Subsidiary is a separate viable entity with economic and business substance. 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. Although the Ohio Subsidiary and taxpayer share corporate officers, taxpayer is a separate Kentucky corporation that holds a one percent (1%) interest in the Partnership in addition to operating the retail stores located in Kentucky.

The Ohio Subsidiary charged a one percent (1%) royalty fee to taxpayer for its use of the trademarks and logos. Taxpayer paid the royalty fee and deducted the fee from its gross income as a business expense. Based on the available evidence, both the Ohio Subsidiary and taxpayer are viable, separate business entities.

**FINDING**

Taxpayer's protest is sustained.

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

**DISCUSSION**

Taxpayer next argues that the Audit Division erred in finding that taxpayer did not enjoy a unitary relationship with the Partnership. Audit determined that taxpayer's corporate activities and the Partnership's activities did not constitute a unitary business under established standards because taxpayer merely held a one percent (1%) investment interest in the Partnership and performed no administrative or management functions for the Partnership.

45 IAC 3.1-1-153 specifically addresses the manner in which to treat a corporate partner with respect to partnership income. This regulation is also determinative of how to determine whether or not a unitary relationship exists. 45 IAC 3.1-1-153(b) reads in part that if a

> "corporate partner's activities and the partnership's activities constitute a unitary business under established standards, disregarding ownership requirements, the business income of the unitary business attributable to Indiana shall be determined by a three (3) factor formula consisting of property, payroll, and sales of the corporate partner and its share of the partnership's factors..."

(Alternatively, 45 IAC 3.1-1-153(c) sets forth the means by which one attributes partnership income in those situations where the corporate partner's activities and the partnership's activities *do not* demonstrate a unitary business relationship.) This section further

indicates that to establish the existence of a unitary operation, the taxpayer must demonstrate that the relationship between the taxpayer itself and the partnership meet the established characteristics of a unitary relationship.

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). To establish a unitary relationship, taxpayer must demonstrate at the very least that taxpayer has operational control of the partnership or that management of the partnership is centralized with management of the corporation. Specifically, the information in taxpayer's file shows that during the audit period, taxpayer held a one percent (1%) interest in the Partnership, having contributed ten thousand dollars ($10,000) at the formation of the Partnership. Given taxpayer's status as a minor partner in the Partnership, taxpayer would have to have been given an unusual amount of control from the general partner (i.e., the corporation which held a ninety-nine percent (99%) interest in the Partnership). No such unusual amount of control was given to taxpayer by the general partner. As taxpayer has failed to meet the first prong of the three-part test, taxpayer has failed to establish that it enjoys a unitary relationship with the Partnership.

**FINDING**

Taxpayer's protest is denied.

**III. Gross Income Tax – Statute of Limitations**

**DISCUSSION**

Taxpayer protests 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 on 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. 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 the audit on September 9, 2000. The notice for proposed assessments was issued October 18, 2000. The only assessment was for the IT-20 tax return for the period ending December 31, 1998. In as much as the only assessment that the Department issued against taxpayer was for the tax year ending December 31, 1998, no error occurred and the statute of limitations protest is rendered moot.

**FINDING**

As it has been determined that the Audit Division made no adjustments to taxpayer's tax accounts and proposed no assessments against taxpayer for the tax periods ending December 31, 1995, December 31, 1996, or December 31, 1997, rendering this issue moot.

**IV. 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 out or 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.

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**DEPARTMENT OF STATE REVENUE**

0120010266.LOF

**LETTER OF FINDINGS NUMBER: 01-0266**
**Individual State Income Tax**
**For the Tax Years 1997, 1998, and 1999**

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

**ISSUE**

**I. Imposition of Individual State Income Tax Based Upon Best Information Available**

**Authority**: IC 6-3-1-1 et seq.; IC 6-3-1-9; IC 6-3-1-12; IC 6-8.1-5-1(a); IC 6-8.1-5-1(b)

Taxpayer protested the imposition of individual income taxes based upon the best information available at the time of the audit.

**STATEMENT OF FACTS**

Taxpayer did not file individual income tax returns for three successive years. The investigating auditor requested that taxpayer submit completed returns for those years. Taxpayer declined the opportunity to do so and referred the auditor to his accounting firm. Two successive appointments with the accounting firm were unprofitable because the taxpayer was unable or unwilling to supply his own accounting firm with the necessary financial records. Accordingly, five months after making the initial request to the taxpayer, the audit calculated taxpayer's income based upon the best information available.

Taxpayer was sent notices of "Proposed Assessment" and responded by submitting a protest letter. An administrative hearing was held to permit the taxpayer to explain the rationale underlying his protest. During that hearing, taxpayer indicated that it would be possible to provide financial records that would substantiate the basis for the protest. Taxpayer requested and was permitted one month in which to submit the records. Taxpayer failed to do at the end of one month and requested an additional two weeks in which to submit the missing records. Taxpayer again failed to submit records necessary to refute the assumptions underlying the notices of "Proposed Assessment." Taxpayer did not explain the failure to present the financial records or to request an additional extension of time. Accordingly, this Letter of Findings was prepared based upon the taxpayer's initial protest letter and the information contained within the audit report.

**DISCUSSION**

**I. Imposition of Individual State Income Tax Based Upon Best Information Available**

Taxpayer has protested proposed individual income tax assessments for the tax periods ending in 1997, 1998, and 1999. In the absence of taxpayer's own financial records for those years, the audit arrived at an assessment of taxpayer's income taxes based upon information contained within the taxpayer's 1996 return.

Taxpayer's densely written protest letter contained a laundry list of arguments and demands. Included within those arguments were assertions that taxpayer was not required to file an income tax return, that the Department had failed to meet its burden of proof, that the taxpayer's protest must be heard in a "de jure county or state Court, at law," and that if the Department failed to respond to taxpayer's numerous demands within 10 days, the doctrine of "estoppel by acquiescence" would preclude the Department from pursuing collection of the unpaid state income taxes.

Taxpayer's protest letter imposed upon the Department certain demands related to the Privacy Act, Freedom of Information Act, and taxpayer's rights as set out in the Internal Revenue Code. Taxpayer failed to explain how these federal statutes related to his protest concerning the imposition of Indiana individual income tax. In addition to these and numerous other demands, taxpayer required access to Department officials' social security numbers. Again taxpayer failed to explain how this information was in any way relevant to his protest.

Taxpayer's protest letter is essentially a boilerplate mishmash of irrelevant court cases and references to unrelated federal statutes. Taxpayer has failed to elaborate on or substantiate the basis for his protest and the Department will not expend its time or resources in addressing each and every one of taxpayer's misbegotten arguments.

Given that taxpayer is a "natural person" (IC 6-3-1-9), was a resident of Indiana for the years 1997, 1998, 1999 (IC 6-3-1-12), and presumptively received taxable income, the statutes imposing the state's individual adjusted gross income tax (IC 6-3-1-1 et seq.) apply with equal force to the taxpayer along with his fellow Indiana residents.

Taxpayer's failure to file tax returns for the years 1997, 1998, and 1999 or to provide the relevant financial information does not relieve him of his shared responsibility to pay Indiana state income taxes. IC 6-8.1-5-1(a) provides the Department with the following authority:

> If the department reasonably believes that a person has not reported the proper amount of tax due, the department *shall* make a proposed assessment of the amount of the unpaid tax on the basis of the *best information available* to the department. The amount of the assessment is considered a payment not made by the due date and is subject to IC 6-8.1-10 concerning the imposition of penalties and interest. (*Emphasis added*).

After the Department determined that taxpayer had paid no income taxes for the three years at issue, the Department was entitled to rationally conclude that taxpayer "had not reported the proper amount of tax due." When taxpayer ignored the Department's repeated efforts to obtain more precise information upon which to calculate an alternative assessment, the Department was justified in arriving at a determination of taxpayer's liabilities based upon "the best information available." Taxpayer has provided nothing of substance to overcome the presumption of correctness – afforded by virtue of IC 6-8.1-5-1(b) – attached to the Department's initial assessment.

**FINDING**

Taxpayer's protest is denied.

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**DEPARTMENT OF STATE REVENUE**

4320010325.LOF

**LETTER OF FINDINGS NUMBER: 01-0325**
**Underground Storage Tank Fee**
**For the Tax Periods: 1995, 1996**

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

**ISSUE**

**I. Underground Storage Tank Fees – Imposition**

**Authority:** IC § 6-8.1-1-1, IC § 6-8.1-1-6, IC § 13-23-12-1

Taxpayer protests the assessment of the underground storage tank owner registration fee.

**II. Underground Storage Tank Fees – Penalty**

**Authority**: IC § 13-23-14-3, IC § 13-22-12-7, IC § 6-8.1-10-2.1

Taxpayer protests the assessment of penalties.

**STATEMENT OF FACTS**

Taxpayer was assessed underground storage tank fees and penalties for the periods of 1988 through 2001. Taxpayer inherited the property where the tanks were located after his father passed away on October 26, 1996. The tanks were removed as of September 5, 2000. More facts will be provided as necessary.

**I. Underground Storage Tank Fees – Imposition**

**DISCUSSION**

The underground storage tank fee is administered by the Indiana Department of Revenue per IC § 6-8.1-1-6 which states in relevant part: "The provisions of this article apply for the purposes of imposing, collecting, and administering the listed taxes." The fee is based on IC §13-23-12-1 and constitutes a listed tax by inclusion in the definition of "Listed taxes" at IC § 6-8.1-1-1.

IC 13-23-12-1 states:

(a) Each year the owner of an underground storage tank that has not been closed before July 1 of any year under:
  (1) rules adopted under IC 13-23-1-2; or
  (2) a requirement imposed by the commissioner before the adoption of rules under IC 13-23-1-2;
shall pay to the department of state revenue an annual registration fee.

(b) The annual registration fee required by this section is as follows:
  (1) Ninety dollars ($90) for each underground petroleum storage tank.
  (2) Two hundred forty-five dollars ($245) for each underground storage tank containing regulated substances other than petroleum.

(c) If an underground storage tank consists of a combination of tanks, a separate fee shall be paid for each tank.

Taxpayer states that he did not own the property where the tanks were situated until August 1997 and has provided the deed to demonstrate this fact. Taxpayer inherited the property. Consequently, Taxpayer is not liable for fees prior to his ownership of the property.

**FINDING**

The Taxpayer's protest is sustained in part and denied in part. Taxpayer is not liable to any fees due prior to August 1997. However, Taxpayer is liable for fees subsequent to the aforementioned date to their removal on September 5, 2000.

**II. Underground Storage Tank Fees – Penalty**

Taxpayer protests the penalties included in the assessments. The notices sent by the Department (Form UST-1) to Taxpayer, listed two separate penalties titled "Late" which was ten (10%) of each annual amount assessed and an "Environmental" penalty of six thousand dollars ($6,000) for each assessment.

With regards to the penalties labeled "Environmental", Taxpayer contends that he is not subject to a civil penalty because he was not the owner of the property when the violation first occurred. Pursuant to IC 13-23-14-3:

(a) Except as provided in subsection (b), a person who violates:

(1) a requirement or standard set forth in this article; or

(2) a rule adopted under IC 13-23-1-2 other than a violation described in section 2 of this chapter;

is subject to a civil penalty of not more than ten thousand dollars ($100,000) per underground storage tank for each day of violation.

(b) A person is not subject to the civil penalty described in subsection (a) if:

(1) the violation arose from an underground storage tank that is on a brownfield;

(2) *the person was not the owner or operator of the underground storage tank when the violation first occurred; (emphasis added*)

(3) the person does not dispense a regulated substance into or from the underground tank:

(A) for any purpose other than temporary or permanent closure; or

(B) in violation of any federal, state, or local regulations; and

(4) the underground storage tank is brought into compliance with this article not later than one (1) year after the person acquired ownership of the property.

While Taxpayer is correct that a person not an owner when the violation first occurred is not subject to a civil penalty, it seems more likely that the penalty in question was added for nonpayment of fees. Taxpayer owned three tanks. IC 13-22-12-7 states:

Penalties for nonpayment of fees

(a) An owner of an underground storage tank who:

(1) is required to pay the fee under section 1 of this chapter; and

(2) fails to pay the fee when due as established under section 2 of this chapter;

shall be assessed a penalty of not more than two thousand dollars ($2,000) per underground storage tank for each year that passes after the fee becomes due and before the fee is paid.

…

(d) The penalty set forth in this section is in addition to the penalties that may be imposed under the following:

(1) IC 13-23-14-2

(2) IC 13-23-14-3

(3) IC 13-23-14-4

(4) IC 13-30-4

(5) IC 13-30-5

(6) IC 13-30-6

(7) IC 13-30-8

Taxpayer argues that if the "Environmental Penalty" is a penalty for the non-payment of fees, it is inappropriate to disguise the true nature of the penalty by labeling "Environmental" and leading one to conclude it is a civil penalty.

Additionally, a ten percent (10%) "Late penalty" is included in the assessments. A ten percent (10%) penalty may be imposed if a person fails to pay or file a timely return of a listed tax. IC 6-8.1-10-2.1. Pursuant to IC 13-22-12-7(d), the assessment of penalties for nonpayment of underground storage tank fees is inconsistent with the Department's assessment in this area. Consequently, Taxpayer's protest is denied as to the penalty for the non-payment of fees. However, Taxpayer's protest of the ten percent (10%) late fee is sustained.

**FINDING**

Taxpayer's protest is sustained in part and denied in part. Taxpayer's protest of the ten percent (10%) late fee is sustained. However, Taxpayer's protest is denied as to the penalty for the non-payment of fees.

**DEPARTMENT OF STATE REVENUE**

0120020070.LOF

**LETTER OF FINDINGS NUMBER: 02-0070**
**Indiana Individual Income Tax**
**For the Tax Year 2000**

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

## ISSUES

### I. Imposition of the State's Individual Income Tax By Reference to Taxpayer's Federal Adjusted Gross Income

**Authority**: Ind. Const. art. IV, § 1; IC 6-3-1-3.5; Cooper Industries, Inc. v. Indiana Dept. of State Revenue, 673 N.E.2d 1209 (Ind. Tax Ct. 1996); Bissell Carpet Sweeper Co. v. Shane Co., 143 N.E.2d 415 (Ind. 1957); IAC 3.1-1-1

Taxpayer argues that the state may not impose its own adjusted gross income tax by reference to the taxpayer's federal adjusted gross income.

### II. Definition of "Taxpayer" for the Purpose of Assessing the State's Individual Income Tax

**Authority**: Ind. Const. art. X, § 8; IC 6-2.1-1-16; IC 6-2.1-2-2; IC 6-3-1-1 et seq.; IC 6-3-1-9; IC 6-3-1-12

Taxpayer maintains that, for purposes of assessing the state's individual adjusted gross income tax, he is not a statutorily defined "taxpayer" subject to imposition of the tax.

### III. Definition of "Income" as Applied to Individual Indiana Residents for the Purpose of Imposing the State's Individual Income Tax

**Authority**: Ind. Const. art. X, § 8; IC 6-3-1-3.5 et seq.; New York v. Graves, 300 U.S. 308 (1937); Merchant's Loan & Trust Co. v. Smietanka, 255 U.S. 509 (1921); Doyle v. Mitchell, 247 U.S. 179 (1918); United States v. Connor, 898 F2d 942 (3rd Cir. 1990); Wilcox v. Commissioner of Internal Revenue, 848 F2d 1007 (9th Cir. 1988); Coleman v. Commissioner of Internal Revenue, 791 F2d 68 (7th Cir. 1986); United States v. Koliboski, 732 F2d 1328 (7th Cir. 1984); United States v. Ballard, 535 F.2d 400 (8th Cir. 1976); United States v. Romero, 640 F2d 1014 (9th Cir. 1981); Snyder v. Indiana Dept. of State Revenue, 723 N.E.2d 487 (Ind. Tax Ct. 2000); Thomas v. Indiana Dept. of State Revenue, 675 N.E.2d 362 (Ind. Tax. Ct. 1997); Richey v. Indiana Dept. of State Revenue, 634 N.E.2d 1375 (Ind. Tax Ct. 1994)

Taxpayer argues that, even by reference to the federal Internal Revenue Code, he did not receive "income" for purposes of assessing the state's individual income tax. According to taxpayer, only corporate entities are subject to that tax.

## STATEMENT OF FACTS

Taxpayer filed an individual income tax return for the year ending December 31, 2000. On that return, taxpayer reported federal adjusted gross income of "0." Taxpayer subsequently received a "Notice of Proposed Assessment" indicating that taxpayer owed taxes, penalty, and interest. Taxpayer replied stating that the proposed assessment was erroneous and that because the taxpayer reported no federal adjusted gross income, he had no liability for Indiana adjusted gross income tax. Accordingly, the taxpayer demanded that the amount of taxes previously withheld from the taxpayer in the amount of $3,300 be returned immediately. The Department declined taxpayer's invitation to refund the withheld amount, an administrative hearing was held to determine the basis for taxpayer's protest, and this Letter of Findings followed.

## DISCUSSION

### I. Imposition of the State's Individual Income Tax By Reference to Taxpayer's Federal Adjusted Gross Income

After taxpayer reported "0" adjusted gross income on his federal return, the taxpayer reported "0" adjusted gross income on his state return. According to taxpayer, he was compelled to do so based upon the explicit instructions included on the Indiana return. Ancillary to that proposition, is taxpayer's argument that Indiana may not statutorily incorporate by internal reference the federal definition of "adjusted gross income."

It is undisputed that the Indiana tax return for the tax year 2000 employs federal adjusted gross income as the starting point for determining the taxpayer's state individual income tax liability. Line one of the IT-40 form requires the taxpayer to "Enter your federal adjusted gross income from your federal return (see page 9)."

IC 6-3-1-3.5 states as follows: "When used in IC 6-3, the term 'adjusted gross income' shall mean the following: (a) In the case of all individuals 'adjusted gross income' (as defined in Section 62 of the Internal Revenue Code)...." Thereafter, the statute proceeds to delineate specific addbacks and deductions, peculiar to Indiana, which modify the federal adjusted gross income amount. The Department's regulation concisely restates the same formulary principal. 45 IAC 3.1-1-1 defines individual adjusted gross income as follows:

Adjusted Gross Income for Individuals Defined. For individuals, "Adjusted Gross Income" is "Adjusted Gross Income as defined in Internal Revenue Code § 62 modified as follows:

(1) Begin with gross income as defined in section 61 of the Internal Revenue Code.

(2) Subtract any deductions allowed by section 62 of the Internal Revenue Code.

(3) Make all modifications required by IC 6-3-1-3.5(a).

Both the statute, IC 6-3-1-3.5, and the accompanying regulation, 45 IAC 3.1-1-1, require that an Indiana taxpayer employ the federal adjusted gross income calculation, as determined under I.R.C. § 62, as the starting point for determining the taxpayer's Indiana adjusted gross income.

Taxpayer's contention – that he was compelled by force of law to declare "0" as Indiana adjusted gross income because he declared "0" on his federal return – is patently without merit. The statute is plain and unambiguous. Indiana adjusted gross income begins with federal taxable income as defined by I.R.C. § 62, not as reported by the taxpayer. *See* Cooper Industries, Inc. v. Indiana Dept. of State Revenue, 673 N.E.2d 1209, 1213 (Ind. Tax Ct. 1996). The directions contained within the Indiana income tax form provide the individual taxpayer with abbreviated directions for completing the form and not the means for determining the taxpayer's adjusted gross income. The Indiana tax form instructs the taxpayer to put what number in what box. Those directions notwithstanding, taxpayer is nonetheless required to actually perform the calculations necessary to determine his liability for Indiana adjusted gross income tax.

In addition, taxpayer argues that the Indiana Constitution does not permit references to another taxing jurisdiction's own laws and when faced with such an improper reference – such as that found within IC 6-3-1-3.5 – the taxpayer's compliance is not required.

The Indiana Constitution specifically and exclusively vests legislative authority in the Indiana General Assembly. "The Legislative authority of the State shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives. The style of every law shall be: 'Be it enacted by the General Assembly of the State of Indiana': and no law shall be enacted, except by bill." Ind. Const. art. IV, § 1. Taxpayer is correct in his assertion that that Indiana General Assembly may not delegate either its authority or its responsibility for performing its exclusively legislative functions. "The power to legislate or to exercise a legislative function cannot be delegated to a non-governmental agency or person. Nor can the Legislature delegate its law-making power to a governmental officer, board, bureau or commission." Bissell Carpet Sweeper Co. v. Shane Co., 143 N.E.2d 415, 419 (Ind. 1957) (Internal citations omitted).

On its face, taxpayer's contention appears to have merit. The Indiana General Assembly may not delegate its responsibility for defining the state's adjusted gross income tax scheme to the federal government. However, the cross-reference to I.R.C. § 62 contained within IC 6-3-1-3.5 does not delegate any such authority. The Indiana Code provision reflects merely the legislature's considered and independent decision to use the federal calculation as the starting point for determining Indiana's adjusted gross income tax. "It is well settled that a legislative body may enact a law, the operation of which depends upon the existence of a stipulated condition." Campbell v. Heiss, 53 N.E.2d 634, 636 (Ind. 1944). That the Indiana General Assembly has assiduously retained authority to stake out the parameters of the state's adjusted gross income tax scheme is evidenced by the Assembly's decisions to periodically reenact IC 6-3-1-3.5 the latest of which occurred in 2001. Whether the General Assembly should have avoided a reference to I.R.C. § 62 by independently drafting original statutory provisions mirroring the Internal Revenue Code and then require every Indiana taxpayer to recalculate his taxable income, is an issue beyond the scope of this Letter of Findings and irrelevant to determining taxpayer's tax liability. Suffice it to say that the General Assembly acted entirely within its authority in employing the federal adjusted gross income as the jumping off point for calculating the individual taxpayer's Indiana adjusted gross income.

**FINDING**

Taxpayer's protest is denied.

**II. Definition of "Taxpayer" for the Purpose of Assessing the State's Individual Income Tax**

Taxpayer argues that he is not a statutorily defined "taxpayer" required to pay Indiana adjusted gross income tax. In support of his assertion, taxpayer cites to IC 6-2.1-1-16 stating that he does not fall within one of the enumerated categories defining "taxpayer." IC 6-2.1-1-16 states in its entirety:

> "Taxpayer" means any: (1) assignee; (2) receiver; (3) commissioner; (4) fiduciary; (5) trustee; (6) institution; (7) national bank; (8) bank; (9) consignee; (10) firm; (11) partnership; (12) joint venture; (13) pool; (14) syndicate; (15) bureau; (16) association; (17) cooperative association; (18) society; (19) club; (20) fraternity; (21) sorority; (22) lodge; (23) corporation; (24) municipal corporation; (25) political subdivision of the state of Indiana or the state of Indiana, to the extent engaged in private or proprietary activities or business; (26) trust; (27) limited liability company (other than a limited liability company that has a single member and is disregarded as an entity for federal income tax purposes); or (28) other group or combination acting as a unit.

Taxpayer is correct in his basic assertion that he does not fall within one of the enumerated categories of "taxpayer" as set out in IC 6-2.1-1-16. Taxpayer is also correct in claiming that he is in not subject to the state's gross income tax scheme. However, that determination is ultimately pointless because no individual is *ever* subject to gross income tax. The state's gross income tax is imposed exclusively on corporate business entities which are either residents or domiciliarys of Indiana or on non-resident business entities which nonetheless derive income from doing business within the state. IC 6-2.1-2-2.

Taxpayer's concern is – or should be – with the provisions of the individual adjusted gross income tax provisions as set out in IC 6-3-1-1 et seq. In establishing the adjusted gross income tax, the Indiana General Assembly exercised its prerogative, under

Ind. Const. art. X, § 8, to impose the tax on both individuals and corporations. In doing so it defined an individual, subject to the adjusted gross income tax as, "a natural born person, whether married or unmarried, adult or minor." IC 6-3-1-9.

Given that taxpayer is a "natural born person," was a resident of Indiana for the year 2000 (IC 6-3-1-12), and presumptively received taxable income, the statutes imposing the state's individual adjusted gross income tax apply with full force to the taxpayer.

**FINDING**

Taxpayer's protest is denied.

**III. Definition of "Income" as Applied to Individual Indiana Residents for the Purpose of Imposing the State's Individual Income Tax**

Taxpayer argues that he did not receive "income" during the year 2000. Liberally construed, taxpayer's argument is that – for purposes of determining income tax liability – "income" can only be derivative of corporate activity. Therefore, as an individual Indiana resident who by definition did not receive "corporate" income, taxpayer is not subject to the adjusted gross income tax.

In support of that proposition, taxpayer cites to a number of Supreme Court cases including Doyle v. Mitchell, 247 U.S. 179 (1918); Merchant's Loan & Trust Co. v. Smietanka, 255 U.S. 509 (1921); and a federal circuit court case, United States v. Ballard, 535 F.2d 400 (8th Cir. 1976).

In Doyle, the Court stated that "Whatever difficulty there may be about a precise and scientific definition of 'income' it imports... the idea of gain or increase arising from corporate activities." Doyle at 185. In Smietanka, the Court stated that, "There can be no doubt that the word [income] must be given the same meaning and content in the Income Tax Acts of 1916 and 1917 that it had in the Act of 1913." Smietanka at 519. Similarly, the same Court stated, "there would seem to be no room to doubt that the word must be given the same meaning in all of the Income Tax Acts of Congress that was given to it in the Corporation Excise Tax Act and that what that meaning is has now become definitely settled by decisions of this court." Id. Taxpayer reads these and the cited companion cases as supporting the proposition that the federal income tax – and by extension Indiana's adjusted gross income tax – can only be levied against corporate gain. According to taxpayer, the cases inevitably lead to the conclusion that "income" – as referred to within both the federal and companion state statutes – is exclusively limited to that definition as established under the Civil War Income Tax Act of 1867; the Corporation Excise Tax Act of 1909; and the Income Tax Acts of 1913, 1916, and 1917.

However, the cited cases do not permit such a conclusion. In the cases cited by taxpayer, the Court was asked to determine the definition of corporate income. In Doyle, the Supreme Court was asked to resolve the issue of whether the increase in value of the corporate taxpayer's standing timber constituted "income." In determining that the increase in value did not constitute corporate "income," the Court stated that the definition of corporate income had remained unchanged during the intervening recodifications of the federal corporate income tax and the ratification of the Sixteenth Amendment to the United States Constitution. In Smietanka – resolving the issue of whether a provision in a will, stipulating that accretions in the value of testamentary property should be considered additions to principal and not income – the court similarly noted that the definition of "income" had remained unchanged. The Court went on to state that. "In general, income is the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets...." Smietanka at 519.

The cited cases support the proposition that corporate gain is subject to the existing federal corporate income tax scheme. The cited cases do nothing to support the assertion that *only* corporate gain is subject to the tax. Simply stated, if the courts are asked to define "corporate income," the courts will arrive at a conclusion which defines "corporate income."

In United States v. Ballard, 535 F.2d 400 (8th Cir. 1976), the court stated, in determining appellant taxpayer's individual income tax liability, that, "The general term "income" is not defined in the Internal Revenue Code." Id. at 404. Rather, the court noted that the Internal Revenue Code operates under and employs the term "gross income." Id. However, nothing in Ballard can be read to support the proposition that the federal adjusted gross income tax is only applicable to corporate gain or that individual taxpayers' wages are not subject to imposition of the federal adjusted gross income tax. To the contrary, the court found that appellant taxpayer was liable for additional income taxes on wages received from his business. Id. at 405.

The question of what constitutes individual taxable "income" has been answered by the courts. Although not binding upon Indiana's decision to tax the wages of its own citizens, the United States Supreme Court has definitively ruled on the question of whether a citizen's individual income may be subjected to an adjusted gross income tax. In New York v. Graves, 300 U.S. 308, 312-13 (1937), Justice Stone stated as follows:

> That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized. Domicil itself affords a basis for such taxation. Enjoyment of the privileges of residence in the state and the attendant right to invoke the protect of its laws are inseparable from the responsibility for sharing the costs of government.... A tax measured by the net income of residents is an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits. The tax, which is apportioned to the ability of the taxpayer to pay it, is founded upon the protection afforded by the state to the recipient of the income in his person, in his right to receive the income and in his enjoyment of it when received. These are rights and privileges which attach to domicil within the state. To them and to the equitable distribution of the tax burden, the economic advantage realized by the receipt of income and represented by the power to control it, bears a direct relationship. Neither the privilege nor the burden is affected by the character of the source from which the income is derived.

Since that 1937 decision, the federal courts have consistently, repeatedly, and without exception determined that individual wages – no matter in what form the taxpayers have attempted to characterize, define, or label those wages – are income subject to taxation. United States v. Connor, 898 F2d 942. 943 (3rd Cir. 1990) ("Every court which has ever considered the issue has unequivocally rejected the argument that wages are not income"); Wilcox v. Commissioner of Internal Revenue, 848 F2d 1007, 1008 (9th Cir. 1988) ("First, wages are income."); Coleman v. Commissioner of Internal Revenue, 791 F2d 68, 70 (7th Cir. 1986) ("Wages are income, and the tax on wages is constitutional."); United States v. Koliboski, 732 F2d 1328, 1329 n. 1 (7th Cir. 1984) ("Let us now put [the question] to rest: WAGES ARE INCOME. Any reading of tax cases by would-be tax protesters now should preclude a claim of good-faith belief that wages – or salaries – are not taxable.") (Emphasis in original); United States v. Romero, 640 F2d 1014, 1016 (9th Cir. 1981) ("Compensation for labor or services, paid in the form of wages or salary, has been universally held by the courts of this republic to be income, subject to the income tax laws currently applicable.... [Taxpayers] seems to have been inspired by various tax protesting groups across the land who postulate weird and illogical theories of tax avoidance all to the detriment of the common weal [sic] and of themselves.").

In addressing the identical question, the Indiana Tax Court has held that, "Common definition, an overwhelming body of case law by the United Sates Supreme Court and federal circuit courts, and this Court's opinion... all support the conclusion that wages are income for purposes of Indiana's adjusted gross income tax." Snyder v. Indiana Dept. of State Revenue, 723 N.E.2d 487, 491 (Ind. Tax Ct. 2000). *See also* Thomas v. Indiana Dept. of State Revenue, 675 N.E.2d 362 (Ind. Tax Ct. 1997); Richey v. Indiana Dept. of State Revenue, 634 N.E.2d 1375 (Ind. Tax Ct. 1994).

Taxpayers' distinctions aside, taxpayer's income – by whatever linguistic device the taxpayer may wish to characterize that income – is subject to Indiana's adjusted gross income tax as defined by the General Assembly under IC 6-3-1-3.5 et seq. and as authorized by the Indiana Constitution. Ind. Const. art X, § 8.

**FINDING**

Taxpayer's protest is denied.

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**DEPARTMENT OF STATE REVENUE**

0220020170P.LOF

**LETTER OF FINDINGS NUMBER: 02-0170P**
**Income Tax**
**Calendar Years 1999**

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

**ISSUE(S)**

**I. Tax Administration – Late File Penalty**

**Authority:** IC 6-8.1-10-2.1(g)

Taxpayer protests the assessment of penalty.

**STATEMENT OF FACTS**

The taxpayer is an accounting service provider. The taxpayer was assessed a late file penalty in the amount of two hundred fifty dollars ($250.00) on the late filing of their 1999 IT-20S calendar year end return. In the letter of protest, the taxpayer states that the 1999 tax year return was under an automatic six-month extension. The taxpayer further states that the Federal 1120S Return was filed on or about September 17, 2001. It is assumed by the Department that the taxpayer had intended to write September 17, 2000 (not 2001). Finally the taxpayer states that the Indiana State IT-20S return is always filed by depositing the return in the United States Mail at the same time as the federal return.

**I. Tax Administration – Late File Penalty**

**DISCUSSION**

In review of the taxpayer's 1999 IT-20S return with an attached copy of the Federal 1120S return, the Department does not find a copy of the automatic extension of time as referenced in the taxpayer's letter. This however is moot. Even with an automatic extension of time, the due date for the Indiana form IT-20S would had been 30-days beyond the Federal extended due date.

If there was in fact a six-month Federal extension for the 1999 calendar year end return, the due date for the Indiana return would had been Monday, October 16, 2000. This date would be six-months plus 30-days past the original return due date of March 15, 2000.

The Indiana return was signed by the taxpayer and dated November 21, 2000. The postmark for the return was also November 21, 2000. If there was in fact an extension, the return was still filed thirty-six days past the extended due date.

The Department finds that the taxpayer filed their 1999 form IT-20 late by at least thirty-six days. The Indiana Code provides for a penalty of ten dollars ($10.00) for each day that the return is past due, up to a maximum of two hundred fifty dollars ($250.00). As the taxpayer was more than twenty-five days late, the maximum penalty amount of two hundred fifty dollars ($250.00) was imposed. The taxpayer has failed to demonstrate reasonable cause for the failure to timely file the return, and therefore, the Department finds the assessment of the penalty is proper.

**FINDING**

The taxpayer's protest is denied.

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**DEPARTMENT OF STATE REVENUE**
**Revenue Ruling #2002-03IT**
May 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 the information about the Department's official position concerning a specific issue.

ISSUE

**Gross Income Tax – Applicability of Gross Income Tax to Taxpayer**

**Authority:** Rule 45 IAC 1.1-3-3, Rule 45 IAC 1.1-1-3

The taxpayer requests the Department to rule whether or not the presence of a piece of the taxpayer's equipment that is used at a third party's location in Indiana subjects the taxpayer's Indiana gross income to Indiana gross income tax.

**STATEMENT OF FACTS**

The taxpayer is a corporation with its headquarters in California. The taxpayer is in the business of selling electronic organizers. The vast majority of its sales are to retailers and distributors to whom the taxpayer solicits sales at their corporate headquarters. Sales to end users, which account for less than 10% of the taxpayer's sales, are made via the taxpayer's web site. The servers for the web site are not located in Indiana.

Additional facts are as follows:

- The taxpayer's presence in the State of Indiana is limited to a piece of equipment that is at a third party location. The equipment is a tooling mold used to manufacture parts for the taxpayer's product.
- There is no sales solicitation, invoicing, advertising or customer support done in Indiana. All orders and approvals are processed at the taxpayer's headquarters in California.
- The majority of the taxpayer's customers are major electronic retailers. The taxpayer solicits sales from its customers at the customer's corporate headquarters, none of which are in Indiana. From the customer's headquarters, they direct the taxpayer on the quantity and destination of product to be shipped.
- All sales to the taxpayer's end users are placed through its web site.
- All shipments into Indiana are from other states and are made via common carrier.
- There is no inventory of goods kept in Indiana.
- The taxpayer currently has no employees in Indiana. In the last calendar year, two employees lived in Indiana and worked in a taxpayer engineering facility in a neighboring state. In addition, one employee worked out of this home in the taxpayer's software marketing department. His activity did not solicit or generate any income in Indiana.

**DISCUSSION**

Pursuant to Rule 45 IAC 1.1-3-3, gross income derived from the sale of tangible personal property in Indiana by a nonresident is not subject to gross income tax unless the sale is significantly associated with an Indiana business situs established by the nonresident. Rule 45 IAC 1.1-1-3 provides that a "business situs" arises where possession and control of a property right has been localized in some business or investment activity away from the owner's domicile. A taxpayer may establish a business situs by ownership of income-producing property (real or personal) in Indiana. Here, the taxpayer's tooling mold used in Indiana by an Indiana manufacturer to manufacture parts for the taxpayer's product is not directly producing Indiana gross income, therefore, does not establish an Indiana business situs for the taxpayer.

Even it this were not the case, the above referenced Rule 45 IAC 1.1-3-3, states that a sale of tangible personal property to an Indiana buyer by a nonresident with an in-state business situs or activities but the situs or activities are not significantly associated with the sale because it was initiated, negotiated and serviced by out-of-state personnel, and the goods are shipped from out-of-state is a sale not completed in Indiana prior to or after shipment in interstate commerce, hence, is not subject to gross income tax.

It is clear then, the presence of the taxpayer's tooling mold in Indiana does not subject the taxpayer's Indiana sales to gross income tax.

**RULING**

The Department rules that the presence of a piece of the taxpayer's equipment (tooling mold) used at a third party's location in Indiana does not subject the taxpayer's Indiana gross income from Indiana sales to Indiana gross income tax.

**CAVEAT**

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

**DEPARTMENT OF STATE REVENUE**
**REVENUE RULING #2002-08ST**
May 8, 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**

**Sales/Use Tax – Merchant Power Plant and Wholesale Sales of Electricity**

**Authority:** IC 6-2.5-5-10, IC 6-2.5-4-5, Rule 45 IAC 2.2-4-11

The taxpayer requests the Department to rule on the application of sales/use tax to a merchant power plant and to the wholesale sales of electricity. The taxpayer specifically requests the following issues be addressed:

1. Whether or not the taxpayer's purchase, storage, use or consumption of all items that would be treated as production plant or power production expenses should be exempted from the Indiana gross retail tax, including without limitation:
   (a) all power generation equipment, such as turbines and generators; and
   (b) consumables, such as natural gas and fuel oil, including such items purchased from an affiliate;
2. Whether or not the wholesale sales of electricity to public utilities or affiliated companies should be subject to Indiana gross retail tax; and
3. Whether or not the resale of electricity by any affiliates of the taxpayer into the wholesale market should be subject to Indiana gross retail tax.

**STATEMENT OF FACTS**

The taxpayer, a limited liability company authorized to do business in Indiana, is currently acting in its capacity as construction agent in the development of an electricity generating facility (the "Project") in Indiana. The Project will be a merchant power plant dedicated to the generation of electricity and subsequent sale of such electricity at wholesale. The taxpayer will submit an application to the Federal Energy Regulatory Commission ("FERC") for a determination that it will be an Exempt Wholesale Generator ("EWG"). As an EWG, electricity from the Project will be only sold at wholesale. Additionally, the IURC determined that the taxpayer is a public utility under Indiana law and declined to exercise its jurisdiction over the taxpayer provided that certain ongoing requirements are met.

The Project consists of two phases. The first phase is the construction of 542 MN combined-cycle generating facility. The second phase is the construction of two 44 MW simple-cycle combustion turbines. All of the electricity produced from this facility will be sold either to other public utilities in the wholesale market, or to an affiliate of the taxpayer for resale into the wholesale market. The affiliate of the taxpayer will not make sales of electricity at retail.

**ISSUE #1 – DISCUSSION**

1. Whether or not the taxpayer's purchase, storage, use or consumption of all items that would be treated as production plant or power production expenses should be exempted from the Indiana gross retail tax, including without limitation:
   a. all power generation equipment, such as turbines and generators; and
   b. consumables, such as natural gas and fuel oil, including such items purchased from an affiliate.

IC 6-2.5-5-10 states:

Transactions involving tangible personal property are exempt from the state gross retail tax, if:

(1) the property is classified as production plant or power production expenses, according to the uniform system of accounts which was adopted and prescribed for the utility by the Indiana utility regulatory commission; and

(2) the person acquiring the property is:

(A) a public utility that furnishes or sells electric energy, steam, or steam heat in a retail transaction described in IC 6-2.5-4-5...

IC 6-2.5-4-5 states:

(b) A... person engaged as a public utility is a retail merchant making a retail transaction when the... person furnishes or sells electrical energy, natural or artificial gas, water, steam, or steam heating service to a person for commercial or domestic consumption.

Regulation 45 IAC 2.2-4-11 defines a public utility for sales tax purposes as follows:

(c) the term "public utilities" as used in this regulation [45 IAC 2.2] means any organization which is engaged in the furnishing or selling of electricity... and having the right of eminent domain or subject to government regulation in connection with the furnishing of public utility services...

The taxpayer has obtained an order from the IURC declaring it a public utility for Indiana regulatory purposes. Additionally, the taxpayer will file with, and expects to obtain an Order from, the FERC indicating that the taxpayer qualifies as an EWG. The taxpayer, therefore, is a "public utility" for purposes of both IC 6-2.5-4-5 and IC 6-2.5-5-10, and within the meaning of 45 IAC 2.2-4-11. As a "public utility" all of taxpayer's machinery, equipment and other tangible personal property that is treated as production plant or power production expenses according tot he Uniform System of Accounts for electric utilities is exempt from Indiana sales/use tax.

**ISSUE #1 – RULING**

1. The taxpayer's purchase, storage, use or consumption of items that are treated as production plant or power production expenses according to the Uniform System of Accounts for electric utilities will be exempt from Indiana sales/use tax, including without limitation:

a. all power generation equipment, such as turbines and generators; and

b. consumables, such as natural gas and fuel oil, including such items purchased from an affiliate.

**ISSUE #2 – DISCUSSION**

2. Whether or not the wholesale sales of electricity to public utilities or affiliated companies should be subject to Indiana gross retail tax.

IC 6-2.5-4-5(b) provides that sales of electrical energy by a public utility constitute retail transactions subject to sales tax; however, IC 6-2.5-4-5(c)(2) exempts sales to "another public utility".

(c) Notwithstanding subsection (b), a... person engaged as a public utility is not a retail merchant making a retail transaction when:

...

(2) The... person sells the services or commodities listed in subsection (b) to another public utility or power subsidiary...;

For the purpose of imposition of sales/use tax under IC 6-2.5-4-5(c) the Department has determined that "a person engaged as public utility" includes anyone selling utility services. The "sales for resale" (wholesale sales) by the taxpayer, therefore, are exempt from Indiana sales/use tax as the purchasers of electricity, also, meet the definition of "public utility".

**ISSUE #2 – RULING**

The taxpayer's wholesale sales of electricity will not be subject to Indiana sales/use tax.

**ISSUE #3 – DISCUSSION**

3. Whether or not the resale of electricity by any affiliates of the taxpayer into the wholesale market should be subject to Indiana gross retail tax.

As discussed in above "Issue #2", the Department has determined that for the purpose of the imposition of sales/use tax under IC 6-2.5-4-5(c) "a person engaged as a public utility" includes anyone selling utility services. Here the taxpayer's affiliate and the purchasers of the electricity sold by the taxpayer's affiliate are "public utilities", hence, the sales of electricity by the taxpayer's affiliate will not be subject to Indiana sales/use tax.

**ISSUE #3 - RULING**

The wholesale sales of electricity by the taxpayer's affiliate will not be subject to Indiana sales/use 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.