DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

Title: IDEM's Confidentiality Policy for its Compliance and Technical Assistance Program
Identification Number: OPPTA - 0001NPD
Date Originally Effective: December 1, 1996
Dates Revised: May 21, 2002
Other Policies Repealed or Amended: none
Brief Description of Subject Matter: Guidance document for implementation of IC 13-28-3-4
Citations Affected: IC 13-28-3-4

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

IDEM's Confidentiality Policy for its Compliance and Technical Assistance Program GUIDANCE DOCUMENT

Background:

The Indiana General Assembly and Governor Evan Bayh established IDEM's Compliance and Technical Assistance Program ("CTAP" or "the program") on January 1, 1995, pursuant to IC 13-28-3. CTAP was created to provide assistance to entities regulated by IDEM. That assistance includes, among other things, environmental compliance assistance, public outreach and training sessions on environmental rules, and technical assistance on pollution control techniques and pollution prevention. CTAP is also authorized to "conduct other activities as required to improve regulatory compliance and to promote cooperation and assistance in meeting environmental requirements." (IC 13-28-3-2) To encourage participation in the program the statute requires that CTAP keep information about the identity of participants in the program confidential from the other IDEM divisions and the public.

Specifically, the confidentiality mandate in IC 13-28-3-4 states that "[i]nquiries made to the program and activities and documents of the program that identify or describe an individual facility or operation are confidential, unless a clear and immediate danger to the public health or environment exists. Information concerning inquiries, activities, and documents of the program that identify or describe an individual facility or operation may not be made available for use by other divisions of the department without the consent of the person who made the inquiry, participated in the activity, or provided the document."

Since its inception on January 1, 1995, CTAP has aggressively fulfilled its responsibilities and developed practices to ensure the confidentiality mandate is met. This nonrule policy was originally adopted in 1996 to clarify ambiguities in the statute and to explain the implementation of the program. This revision of the policy is intended to refine the policy in light of staff's experience with the program over the years and to account for increased participation in the program. Revising the policy also allows IDEM to present the policy to all relevant boards.

Policies and Guidance:

1. Who is in CTAP?

All CTAP staff members are trained on confidentiality procedures and take all necessary steps to safeguard confidential information. CTAP staff share confidential information only with other CTAP staff members. CTAP staff members are predominantly within the Division of Pollution Prevention and Technical Assistance. However, to increase the accessibility of the program to the public, trained CTAP staff are also available in the regional offices, the Office of Agricultural Relations, the Office of Community Relations, the Office of Business and Legislative Relations, and the Office of Planning and Assessment. In addition to their responsibilities to the Compliance and Technical Assistance Program, CTAP staff members also perform a variety of other functions within IDEM that are not related to CTAP. Those functions that are not related to CTAP are not covered by the CTAP confidentiality requirement even if performed by CTAP staff.

For a current list of CTAP staff, please visit the following website: http://www.state.in.us/idem/ctap/staff.html, or request a list of CTAP staff from OPPTA.

1(a) Managing staff movement in and out of CTAP.

All CTAP staff members are trained on CTAP confidentiality procedures before taking part in any CTAP activities and before being given access to confidential CTAP information. Included in the training are the criminal provisions of IC 5-14-3-10 for violations of confidentiality. All CTAP staff will be required to sign an agreement that they will follow the terms of this policy. When staff members leave OPPTA, their supervisor will review the policy with them again, emphasize that they must not disclose confidential information and that they must leave all confidential documents in the CTAP's offices.

2. What information is covered by CTAP confidentiality?

Inquires made to CTAP and activities and documents of CTAP that identify or describe an individual facility or operation are confidential. The only exceptions to this confidentiality mandate are if a clear and immediate danger to the public health or environment exists; or if the person who made the inquiry, or provided the information, consents to the information being revealed.

Because most CTAP staff members have responsibilities in addition to CTAP, not all information in their possession is covered by the CTAP confidentiality requirements. While confidential information will be secured and segregated from non-CTAP information, only information that identifies or describes an individual facility or operation seeking compliance assistance from CTAP will be considered confidential CTAP information. If CTAP staff receive information that is not provided in the context of seeking compliance assistance, it will not be protected by the CTAP confidentiality mandate. For example, information provided by a facility in an application for an award, or in an application for a recognition program, or in an application for a recycling grant, is not provided in the context of seeking compliance assistance and therefore not confidential CTAP information. Similarly, information provided for Toxic Release Inventory quality assurance, or for a supplemental environmental project proposal is not provided in the context of seeking compliance assistance and therefore not CTAP confidential.

Calls directed to CTAP staff will be presumed to be confidential CTAP inquiries until the caller clearly indicates that seeking compliance assistance is not the reason for the call. For example, if an employee of a facility reports environmental violations at the facility to CTAP personnel the call will be presumed to be confidential under CTAP. However, if the employee goes on to unequivocally state that the purpose of their call is to report the violation so IDEM will initiate an enforcement action his employer, it becomes clear that the reason for the call is not to seek compliance assistance. Because the caller clearly indicated that the reason for the call was not to seek compliance assistance the call is not confidential under CTAP. These "whistleblower" calls will be redirected to the IDEM complaint clearinghouse.

2(a) What is clear and immediate danger to the public health or the environment?

As noted above, CTAP information is confidential "unless a clear and immediate danger to the public health or environment exists." The terms in this phrase are not specifically defined by statute**.** Therefore, consistent with IC 1-1-4-1(1), IDEM will endeavor to take these words in their plain, or ordinary and usual sense. Indiana courts have stated that it is axiomatic in Indiana that the plain, ordinary, and usual meaning of non-technical words in a statute is defined by their ordinary and accepted dictionary meaning. Accordingly, the dictionary meaning of clear and immediate danger to the public health and environment is as follows. Danger is the exposure or vulnerability to harm or risk of harm. That danger is clear when it is obvious and easily perceptible. A danger is immediate when it is near to, or related to, the present. The clear and immediate danger is to the public health if public's condition of being sound of body, mind, or spirit is in danger. Similarly, the danger is to the environment if it endangers the complex of physical, chemical and biotic factors (as climate, soil, and living things) that act upon an organism or an ecological community that ultimately determine its form and survival.

The existence of a clear and immediate danger will be determined by IDEM staff using the above definitions as they are detailed in the CTAP Clear and Immediate Danger Worksheet. Determinations of a clear and immediate danger will be independently evaluated and confirmed by increasingly higher levels of IDEM staff in accordance with the CTAP procedures before a final determination is made.

2(b) How can a person consent to waiver of confidentiality?

As also noted above, information from CTAP that identify or describe an individual facility or operation may not be made available for use by other divisions of the department without the consent of the person who made the inquiry, participated in the activity, or provided the document. In essence, this means that the person who provides confidential information to CTAP may consent to make the information available for use by other divisions in IDEM or to the public. Except in extreme circumstances, CTAP staff will require waiver of confidentiality to be in writing before making the information available to the public or to other divisions of IDEM. In extreme circumstances, where prompt action is needed and the means to convey a written waiver are not readily available, IDEM will recognize a verbal waiver of confidentiality if it is clearly communicated to CTAP and verified by a second party at CTAP. Any waiver of confidentiality will also be noted in the compliance and technical assistance database.

2(c) Where is assistance information stored? (Compliance and Technical Assistance Database.)

In order to meet the requirements of IC 13-28-3-3 (Compliance and Technical Assistance Program Annual Report) more efficiently and better direct future agency outreach efforts, the Office of Pollution Prevention and Technical Assistance (OPPTA) has developed a confidential database that contains information related to all compliance and technical assistance efforts. The system will allow OPPTA to track the number and types of inquiries the program received and the services provided by the program and allow us to share information with other areas of IDEM without revealing confidential CTAP information. As an added benefit, CTAP staff will use data entered as a potential resource in answering the wide array of questions asked by our constituents.

The database has been placed on a secured server to ensure that the confidentiality of the information is maintained. Staff from the IDEM Information Technology section with access to information on the secure server will complete CTAP confidentiality training and sign confidentiality agreements. All reports will be developed in a manner that keeps confidentiality intact. Available reports include service type, county based, business type, workshops by type, and mailings by business type.

All CTAP staff enters their assistance efforts into the database. The database includes the incorporation of OPPTA's customer satisfaction survey. The survey, which can be found on OPPTA's website at: http://www.IN.gov/idem/oppta/ survey.html will allow OPPTA to measure CTAP's effectiveness in providing compliance and technical assistance. Survey's submitted via fax or mail will be entered manually, while those submitted via the web will be entered automatically.

INDIANA DEPARTMENT OF INSURANCE

July 1, 2002

Bulletin 111

The Use of Consumer Credit History in Personal Lines Insurance Rates

This Bulletin is directed to all property and casualty insurance companies doing business in the state of Indiana. An insurer that uses, or contracts with a third party vender to use, credit information for rating personal lines insurance policies shall submit under confidentiality protection to the Indiana Department of Insurance ("Department") specific, written criteria on how credit information is utilized in underwriting for rating purposes and tier placement, including (1) the characteristics or factors from a credit report that are used as credit criteria or used in determining a credit score; (2) in the case of credit scoring, the algorithm, computer program, model, or other process that is used in determining a credit score (along with the underlying support, including statistical validation, for the development of the algorithm, computer program, model, or other process that is used in determining a credit score); (3) any underwriting guidelines relating to the use of the credit criteria or credit scores, along with appropriate supporting material for the use of the guidelines; and (4) documentation to demonstrate the correlation between the insurer's use of credit information and the expected loss of risk.

At the request of the Commissioner, an interested party (such as a scoring modeler) shall file or discuss under confidentiality protection with the Department the algorithm, computer program, model, or other process that is used in determining a credit score (along with the underlying support, including statistical validation, for the development of the algorithm, computer program, model, or other process that is used in determining a credit score).

Insurers shall not, after October 1, 2002, use credit information for rating unless the methodology for using such information is filed with the Department.

Premium rates for property and casualty insurance products are regulated under IC 27-1-22. The General Assembly specifically directed that this chapter be "liberally interpreted" to ensure insurance premium rates shall not be "excessive, inadequate or unfairly discriminatory." IC 27-1-22-4 requires every insurer to file with the commissioner, every manual of classifications, rules, and rates, every rating schedule, every rating plan and every modification of any of the foregoing which it proposes to use. Every filing made under this chapter shall be accompanied by the information upon which the filer supports the premium rate filing. In addition, the Commissioner is granted the authority to request any information she deems relevant to the filing. This section should be interpreted broadly to require the filing of any program, formula or other methodology used by an insurer to determine premium rates, including programs that use consumer credit history as a factor in developing premium rates. The Department reserves the right to request any additional information concerning how credit information is used in determining premium rates.

The Department recognizes that many insurers consider their methodologies for using credit information proprietary trade secrets. The Indiana Public Records Act, IC 5-14-3, provides that documents containing trade secrets are not available for public inspection. This Department will treat the methodologies as trade secrets. The information should be clearly labeled "Confidential" and be accompanied by a statement supporting that assertion. The filing should be made independently from any premium rate filing, but with a copy of the cover letter from the most recent rate filing, and accompanied by a separate filing fee. The Department will file the credit information methodologies separately from the documents available for public inspection under IC 27-1-22-4(d).

Insurers currently using credit scoring methodologies that have not been filed with the Department should file them by September 1, 2002. Insurers may continue to use the methodologies unless, after notice and hearing, the Commissioner orders the insurer to cease.

INDIANA DEPARTMENT OF INSURANCE

Sally McCarty, Commissioner

DEPARTMENT OF STATE REVENUE

AUDIT-GRAM NUMBER IR-022

June 12, 2002

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

Business Entity Classification.

Authority: IC 6-3-1-10; IC 6-2.1-1-16(27); IC 6-2.1-1-10; IC 6-2.2-3-25; IRC § 7701; 26 CFR §301.7701; *U.S. v. Kintner* 1954 U.S. App.; Tax Policy Directive # 2, 5/92

IC 6-8.1-4-2. Powers of division of audit.

(a) The division of audit may:

…

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

…

[1980]

IRC 7701. Definitions.

(a) When used in this title …

(1) Person – The term ''person'' shall … mean and include an individual, a trust, estate, partnership, association, company or corporation.

(2) Partnership and partner – The term ''partnership'' includes … joint venture, or other unincorporated organization, through or by means of which any business, … venture is carried on, and which is not … a corporation; and the term ''partner'' includes a member in such a(n) … organization.

(3) Corporation – The term ''corporation'' includes associations …

[1957]

I. GENERAL STATEMENT

Business organizations have a variety of options when deciding the type of entity under which they will interact with customers, taxing authorities, and others. Among those Indiana options are sole proprietorship, partnership, corporation, limited liability company, limited liability partnership, and limited partnership.

Each of these entities have certain characteristics which confirm their validity. These characteristics are defined in the Indiana Code at Title 23, "Business and Other Associations", and are further amplified in State and Federal litigation.

II. ENTITY DETERMINATION – FEDERAL

A. Periods Beginning Prior to January 1, 1997.

Entity classification was defined by Internal Revenue Code (IRC) Section 7701, "Definitions", and former 26 Code of Federal Regulations (CFR) Section 301.7701. The Internal Revenue Service (IRS) under former 26 CFR § 301.7701-2 evaluated an "association" [FN 1] and determined that it acted as a corporation if it possessed at least three of the following four characteristics: [FN 2]

1. Continuity of life.
   (The corporation survives the death of any shareholder)
2. Centralization of management.
   (Corporate shareholders generally do not "manage" the corporation)
3. Corporate debt limited to corporate assets.
   (Corporate shareholders generally are not liable for debts of the corporation)
4. Free transfer of interests.
   (Corporate shareholder may acquire and dispose of shares at will)

B. Periods Beginning on or After January 1, 1997.

Entity classification is defined by IRC § 7701, and amended 26 CFR 301.7701.

Federal "Check-the-Box" Election – Generally an entity that is not a corporation under the laws of any state [FN 3] may elect [FN 4] its entity classification for federal tax purposes under the following conditions:

1. An entity with **two or more members** (If no election, a partnership)
   a. a corporation
   b. a partnership
2. An entity with only **one member** (If no election, a disregarded entity)
   a. a corporation
   b. disregarded entity

A disregarded entity is an entity whose income, expenses, assets, and liabilities are included with those of its owner and reported in single unsegregated amounts on the owner's federal income tax return. The disregarded entity ceases to exist for federal income tax purposes. "*[I]f the entity is disregarded, its activities are treated … as a … branch, or division of the owner.*" [26 CFR § 301.7701-2(a)]

III. ENTITY DETERMINATION – INDIANA

A. Gross Income Tax. (IC 6-2.1)

1. Limited Liability Company [FN 5] (LLC)

a) Single Member Limited Liability Company (SMLLC) – A SMLLC that elects to be, or by default is, treated under 26 CFR § 301.7701-3 as a disregarded entity for federal income tax purposes, is referenced at IC 6-2.1-1-16(27). [FN 6] A SMLLC that is designated as a federal disregarded entity is exempt from the tax. When the receipts of a SMLLC are combined with those of its owner, such receipts are subject to tax. [FN 7]

b) LLC Treated as a Partnership – A LLC that elects to be, or by default is, treated under 26 CFR § 301.7701-3 as a partnership for federal income tax purposes, is referenced at IC 6-2.1-3-25 [FN 8] and its internal reference IC 6-3-1-19 [FN 9]. A LLC that is designated as a federal partnership is exempt from the tax. {FN 10]

2. Other Entities.

a) Publicly Traded Partnership – A partnership that is treated as a corporation for federal income tax purposes under IRC § 7704 [FN 11] is subject to Gross Income Tax. [FN 12]

b) Classification of entities, other than those discussed in this section III.A., are not controlled by their federal income tax treatment.

The Department will however, in the interest of efficient administration, presume that a federal "check-the-box" election accurately reflects the classification that would have resulted from an analysis under Indiana Tax Policy Directive No. 2, issued May 1992, the guidelines of which are discussed in II, A. above. [FN 13] The Department reserves the right to evaluate such entities under former 26 CFR § 301.7701 if a fair representation of a taxpayer's income is in doubt.

B. Adjusted Gross Income Tax (IC 6-3) – Supplemental Adjusted Gross Income Tax (IC 6-3-8) – Financial Institutions Tax (IC 6-5.5).

A federal entity election or default classification is recognized.

C. Sales and Use Tax (IC 6-2.5) – Other Listed Taxes (IC 6-8.1-1-1)

A federal entity election or default classification is not recognized.

[FN 1] "Association". An organization whose objective is to carry on business and to divide the gains therefrom.

[FN 2] C/k/a "The Kintner Regulations" after *United States v. Kintner*, 1954 U.S. App. (216 F.2d 418)

[FN 3] However, the IRS is not bound by the mere formality of state registration.

[FN 4] IRS Form 8832, "Entity Classification Election".

[FN 5] IC 23-18-1-11. "'Limited liability company' or "domestic limited liability company" means … "

[FN 6] IC 6-2.1-1-16. "'Taxpayer' means … (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)".

[FN 7] IC 6-2.1-1-10. "'Receipts' … means the gross income … received by … any limited liability company that is not itself a taxpayer … "

[FN 8] IC 6-2.1-3-25(a). "'[P]artnership' and 'partner' have the same meaning as those terms are defined in IC 6-3-1-19."

[FN 9] IC 6-3-1-19. "'[P]artnership' includes … a limited liability company that is treated as a partnership for federal income tax purposes."

[FN 10] IC 6-2.1-3-25(b). "Gross income received by a partnership is exempt from gross income tax."

[FN 11] IRC 7704(b). "[T]he term 'publicly traded partnership' means … "

[FN 12] IC 6-2.1-3-25(b).

[FN 13] Example: An entity with one or more members that makes a federal election to be taxed as a corporation.

DEPARTMENT OF STATE REVENUE

IN REGARDS TO THE MATTER OF:
S.A.F.E. YOUTH PROGRAM
DOCKET NO. 29-2001-0320

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DEPARTMENTAL ORDER

An administrative hearing was held on Thursday, March 7, 2002 in the office of the Indiana Department of State Revenue, 100 N. Senate Avenue, Room N248, Indianapolis, Indiana 46204 before Bruce R. Kolb, an Administrative Law Judge acting on behalf of and under the authority of the Commissioner of the Indiana Department of State Revenue.

Norman L. Reed of Reed & Smith, 120 E. Market Street, Suite 179, Indianapolis, IN 46204, represented the Petitioner. Attorney Steve Carpenter, appeared on behalf of the Indiana Department of State Revenue.

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

REASON FOR HEARING

On Monday, November 26, 2001 the Indiana Department of Revenue revoked Petitioner's Charity Gaming License. The Department is attempting to suspend Petitioner's right to conduct charity gaming for a period of three (3) years. The Department also wishes to prohibit Petitioner's Vice-President Scott M. Locke, Sr.; Petitioner's President Steven M. Locke, Jr.; and Deborah Kelly from associating with charity gaming for a period of three (3) years each. The Petitioner protested in a timely manner. A hearing was conducted pursuant to IC § 4-32-8-1.

SUMMARY OF FACTS

1) On October 11, 2001, the Indiana Department of Revenue received a request from Petitioner to add additional operators and workers to its annual bingo license.
2) The Department's Criminal Investigation Division attempted to verify the additional information supplied by the Petitioner.
3) Indiana Department of Revenue's Agents from the Criminal Investigation Division (CID) interviewed only one of the individuals listed by the Petitioner as a worker.
4) The Department's investigation allegedly revealed that the Petitioner was attempting to use workers and operators who were not "members" as required by IC 4-32-1-1 *et seq*.
5) On November 26, 2001 the Indiana Department of Revenue revoked Petitioner's charity gaming license and suspended Petitioner's right to conduct charity gaming for a period of three (3) years. The Department also prohibited Petitioner's Vice-President Scott M. Locke, Sr.; Petitioner's President Steven M. Locke, Jr.; and Deborah Kelly from associating with charity gaming for a period of three (3) years each.

FINDINGS OF FACTS

1) On October 11, 2001, the Indiana Department of Revenue received a request from Petitioner to add additional operators and workers to its annual bingo license. (Department's Exhibit A).
2) The list contained seventeen names of individuals who were to be the new workers, one individual who was to be an operator, and one person who was listed as an officer. (Department's Exhibit A).
3) Indiana Department of Revenue's Agents from the Criminal Investigation Division (CID) personally interviewed only two of the proposed workers. (Record at 7-10).
4) The first worker interviewed, Mr. Steven Bowman, made a written statement. (Department's Exhibit B).
5) Petitioner objected to the written statement based upon the grounds that it constituted hearsay. (Record at 10).
6) The second worker interviewed, Ms. Tanesha Morris, was too upset and scared by the Department's investigators to make a written statement. (Record at 28).
7) According to the Department's witness, both individuals stated that they were not members of the Petitioner's organization. (Record at 9 and 10 respectively).
8) Petitioner objected to the statements made by Mr. Bowman and Ms. Morris as hearsay. (Record at 10).
9) The individuals listed in Department's Exhibit A, were not listed on Petitioner's charity gaming application as is required by Indiana law.
10) On November 26, 2001 the Indiana Department of Revenue revoked the Petitioner's charity gaming license.
11) The license revocation was based upon the Department's own investigation.
12) The Petitioner held a meeting in July of 2001. At this meeting it was decided that the organization needed more workers. (Record at 17).
13) Petitioner's witness testified that at the July 2001 meeting she was designated as the person who would actively recruit new members. (Record at 42).
14) Petitioner also stated that she began to recruit new members immediately following the meeting. (Record at 42).
15) When Petitioner's witness was asked how she found new members she stated, "Well, considering I used to work at a bingo hall, so I kind of went in and just found people that I knew who had the experience and that could really help the organization out." (Record at 42).
16) According to Petitioner's staff meeting minutes for August 20, 2001 all seventeen (17) individuals recruited by the Petitioner were voted on and accepted as members. (Petitioner's Exhibit 2).
17) These seventeen (17) new members were the same members included in Department's Exhibit A.
18) Steve Bowman, Jr. and Deborah Kelly were both sent letters dated December 14, 2001 which stated, "Congratulations on your new membership to the S.A.F.E. Youth Program…Your new membership entitles you to a five year agreement, which includes participating in fun (sic) raisers, charitable activities and gaming…" (Petitioner's Exhibit #5).
19) Tanesha Morris was listed on Department's Exhibit A as having been a member for two months.

20) Ms. Tanesha Morris was sent a letter dated December 12, 2001 stating that her membership dues were delinquent as of November 1, 2001 and her membership was revoked. (Petitioner's Exhibit #5).
21) Petitioner's Exhibit #4 contains fifteen (15) membership certification certificates. Among these certificates are Mr. Bowman's and Deborah Kelly's. These certificates were dated on October 18, 2001.
22) Petitioner's Exhibit #4 does not contain a membership certification certificate for Ms. Tanesha Morris.
23) Department's Exhibit A is a list of individuals Petitioner requested to be added to its list of potential workers and operators for its gaming activities.
24) The Petitioner sent the list of workers and operators to the Department by facsimile transmission on October 11, 2001. (Department's Exhibit A).
25) On this list were the names Steve V. Bowman, Jr. and Tanesha Morris who were purported to have been a members for two (2) months and Deborah Kelly who is listed as a member for two (2) years. (Department's Exhibit A).
26) The meeting minutes contained in Petitioner's Exhibits #1, #2, and #3 were not signed nor dated by any member of Petitioner's organization.
27) Petitioner's Exhibit #1 is the minutes of a meeting allegedly held on July 22, 2001. The minutes state in pertinent part, "lots of work to be done in preparation for opening up a bingo hall. a) must find workers and operators who would join the organization some who may have experience in this type of operation…." Later in the minutes is the statement, "Debra Kelly volunteered to contact and recruit several people to join the organization who have previously volunteered to help with bingo in the past with other organizations…"
28) In July of 2001, Deborah Kelly was recruiting workers and operators for Petitioner's organization, and she was not even a member of the Petitioner's organization according to its own documents submitted at hearing. (See Petitioner's Exhibit #4).

STATEMENT OF LAW

1) Pursuant to IC 6-8.1-5-1, the Department's findings are prima facie evidence that the Department's claim is valid. The burden of proving that the findings are wrong rests with the person against whom the findings are made. See Portland Summer Festival v. Department of Revenue, 624 N.E.2d 45 (Ind.App. 5 Dist. 1993).
2) The Department's administrative hearings are conducted pursuant to IC § 6-8.1-5-1 et seq. (See, Portland Summer Festival v. Department of Revenue, 624 N.E.2d 45 (Ind.App. 5 Dist. 1993)).
3) Pursuant to 45 IAC 15-5-3(b)(7), "The hearing is not governed by any rules of evidence. The department is expressly excluded from the requirements of the Administrative Adjudication Act.(renamed the Administrative Order and Procedures Act)."
4) Even if the Department were bound by the Administrative Orders and Procedures Act (AOPA), the rules clearly state that hearsay evidence that is properly objected to and does not fall with an exception to the hearsay rule may not form the sole basis of a resulting order. The AOPA does not say that the evidence cannot be heard, presented, or considered.
5) IC 4-32-9-4 states, "Each organization applying for a bingo license…must submit to the department a written application…The application must include the following: (7) The name of each proposed operator and sufficient facts relating to the proposed operator to enable the department to determine whether the proposed operator is qualified to serve as an operator. (8) A sworn statement signed by the presiding officer and secretary of the organization attesting to the eligibility of the organization for a license…"
6) IC 4-32-9-26 provides, "An individual may not be an operator for more that one (1) qualified organization during a calendar month…"
7) IC 4-32-9-27 states, "An operator or a worker may not directly of indirectly participate, other than in a capacity as operator or worker, in an allowable event…"
8) IC 4-32-9-28 states, "An operator must be a member in good standing of the qualified organization that is conducting an allowable event for at least one (1) year at the time of the allowable event."
9) According to IC 4-32-9-29, "A worker must be a member in good standing of a qualified organization that is conducting an allowable event for at least thirty (30) days at the time of the allowable event."
10) IC 4-32-12-1(a) (4) provides in pertinent part, "The Department may suspend or revoke the license…of…a qualified organization or an individual …for any of the following: (1) Violation of a provision of this article or of a rule of the department…(4) Commission of fraud, deceit, or misrepresentation."
11) Fraud is defined as the intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Any kind of artifice employed by one person to deceive another. Elements of a cause of action for fraud include a false representation of a present or past fact made by defendant, action in reliance thereupon by plaintiff, and damage resulting to plaintiff from such misrepresentation. Black's Law Dictionary 337 (5th ed. 1983).

12) The elements of actual fraud are (1) a false statement of past or existing material fact (2) made with knowledge it was false or made recklessly without knowledge of its truth or falsity, (3) made for the purpose of inducing the other party to act upon it, (4) and upon which the other party did justifiably rely and act, (5) proximately resulting in injury to the other party. See Epperly v. Johnson, 734 N.E.2d 1066 (Ind. App. 2000).

13) Deceit is defined as a fraudulent and deceptive misrepresentation, artifice, or device used by one or more persons to deceive and trick another, who is ignorant of the true facts, to the prejudice and damage of the party imposed upon. To constitute "deceit", the statement must be untrue, made with knowledge of its falsity or with reckless and conscious ignorance thereof, especially if parties are not on equal terms, made with intent that plaintiff act thereon or in a manner apparently fitted to induce him to act thereon, and plaintiff must act in reliance on the statement in the manner contemplated, or manifestly probable, to his injury. Black's Law Dictionary 211 (5th ed. 1983).

14) Misrepresentation is defined as any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts. An untrue statement of fact. An incorrect or false representation. That which, if accepted, leads the mind to an apprehension of a condition other and different from that which exists. Colloquially it is understood to mean a statement made to deceive or mislead. Black's Law Dictionary 518 (5th ed. 1983).

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

(1) Suspend or revoke the license.

(2) Lengthen a period of suspension of the license.

(3) Prohibit an operator or an individual who has been found to be in violation of this article from associating with charity gaming conducted by a qualified organization.

(4) Impose an additional civil penalty of not more than one hundred dollars ($100) for each day the civil penalty goes unpaid.

CONCLUSIONS OF LAW

1) The Department's findings are prima facie evidence that the Department's claim is valid. The burden of proving that the findings are wrong rests with the person against whom the findings are made.

2) The Petitioner's list of names submitted to the Department for additional operators and workers to be placed on its annual bingo license contained the names of individuals who according to Petitioner's own documentation did not meet the statutory requirements for being a worker or an operator.

3) The list specifically names Deborah Kelly as a proposed operator and a member of Petitioner's organization for two (2) years. The list also contains the names of Steve V. Bowman, Jr. and Tanesha Morris as proposed workers and having been members of Petitioner's organization for a period of two (2) months.

4) These statements along with the testimony of the Petitioner's witnesses all show that the Petitioner was more concerned with obtaining workers for gaming than in expanding their membership.

5) The Petitioner has made incorrect statements to the Department in order to procure a license to conduct charity gaming.

6) The documentation submitted to the Department by the Petitioner in an attempt to convince the Department that Deborah Kelly, Steve V. Bowman, Jr., and Tanesha Morris were legitimate members of its organization for the requisite amount of time constitutes a misrepresentation of the facts.

7) Department's investigation has revealed that the Petitioner was attempting to use workers and operators who were not "members" as required by IC 4-32-1-1 *et seq*.

8) Pursuant to IC 4-32-12-1(a)(4) the Department may suspend or revoke the license of a qualified organization or an individual for any violation of a provision of Article 32 or for the commission of fraud, deceit, or misrepresentation.

DEPARTMENTAL ORDER

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

The Petitioner's protest is denied in part and sustained in part. The Petitioner is hereby prohibited from conducting charity gaming for a period of three (3) years. Scott M. Locke, Sr.; Steven M. Locke, Jr. are prohibited from participating in charity gaming activities in the State of Indiana for a period of one (1) year. Deborah Kelly is prohibited from participating in charity gaming activities in the State of Indiana for a period of two (2) years.

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

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

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

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

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

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

Dated: _____ _____

Bruce R. Kolb / Administrative Law Judge

DEPARTMENT OF STATE REVENUE

IN REGARDS TO THE MATTER OF:
BRENDA L. KING
DOCKET NO. 29-20020197

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DEPARTMENTAL ORDER

An administrative hearing was held on Thursday, May 2, 2002 in the office of the Indiana Department of State Revenue, 100 N. Senate Avenue, Room N248, Indianapolis, Indiana 46204 before Bruce R. Kolb, an Administrative Law Judge acting on behalf of and under the authority of the Commissioner of the Indiana Department of State Revenue.

The Petitioner, Brenda L. King, appeared Pro Se. Attorney Steve Carpenter, appeared on behalf of the Indiana Department of State Revenue.

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

REASON FOR HEARING

On March 27, 2002, the Petitioner was prohibited from associating with charity gaming activities in Indiana for a period of ten (10) years. The Petitioner protested in a timely manner. A hearing was conducted pursuant to IC § 4-32-8-1.

SUMMARY OF FACTS

1) The Indiana Department of Revenue Criminal Investigation Division initiated an investigation of the Boys and Girls Clubs of Indianapolis.

2) The Department's Criminal Investigation Division report regarding the Boys & Girls Clubs of Indianapolis found that the organization had violated the following statutes, IC 4-32-9-15; IC 4-32-9-25; IC 4-32-9-28; IC 4-32-9-29; IC 4-32-12-1; IC 4-32-12-2; 45 IAC 18-6-3.

3) On March 27, 2002, the Department prohibited Petitioner from associating with charity gaming activities in Indiana for a period of ten (10) years.

FINDINGS OF FACTS

1) The Indiana Department of Revenue Criminal Investigation Division initiated an investigation of the Boys & Girls Clubs of Indianapolis. (Department Exhibit A).

2) The Department's Criminal Investigation Division report regarding the Boys & Girls Clubs of Indianapolis found that the organization had violated the following statutes, IC 4-32-9-15; IC 4-32-9-25; IC 4-32-9-28; IC 4-32-9-29; IC 4-32-12-1; IC 4-32-12-2; 45 IAC 18-6-3. (Department Exhibit A).

3) On March 27, 2002, the Department determined that the following sections of the Indiana code were violated: IC 4-32-9-15; IC 4-32-9-25(a); IC 4-32-9-28; IC 4-32-9-29.

4) The Department then notified Petitioner by letter that she was prohibited from associating with charity gaming activities in the State of Indiana for a period of ten (10) years.

5) Petitioner was a member in good standing of the Boys & Girls Clubs of Indianapolis for at least thirty (30) days before she became a worker (Record at 25 and 26).

6) The Petitioner admitted under oath to receiving remuneration for her participation in charity gaming. (Record at 27).

7) Petitioner admitted under oath to receiving tips while participating in charity gaming activities as a worker. (Record at 27).

8) Petitioner admitted under oath that she failed to report income received on her individual income tax returns. (Record at 27).

STATEMENT OF LAW

1) Pursuant to IC 6-8.1-5-1, the Department's findings are prima facie evidence that the Department's claim is valid. The burden of proving that the findings are wrong rests with the person against whom the findings are made. See Portland Summer Festival v. Department of Revenue, 624 N.E.2d 45 (Ind.App. 5 Dist. 1993).

2) The Department's administrative hearings are conducted pursuant to IC § 6-8.1-5-1 et seq. (See, Portland Summer Festival v. Department of Revenue, 624 N.E.2d 45 (Ind.App. 5 Dist. 1993)).
3) Pursuant to 45 IAC 15-5-3(b)(7), "The hearing is not governed by any rules of evidence. The department is expressly excluded from the requirements of the Administrative Adjudication Act.(renamed the Administrative Order and Procedures Act)."
4) Even if the Department were bound by the Administrative Orders and Procedures Act (AOPA), the rules clearly state that hearsay evidence that is properly objected to and does not fall with an exception to the hearsay rule may not form the sole basis of a resulting order. The AOPA does not say that the evidence cannot be heard, presented, or considered.
5) IC 4-32-9-27 states, "An operator or a worker may not directly of indirectly participate, other than in a capacity as operator or worker, in an allowable event…"
6) IC 4-32-9-28 states, "An operator must be a member in good standing of the qualified organization that is conducting an allowable event for at least one (1) year at the time of the allowable event."
7) According to IC 4-32-9-29, "A worker must be a member in good standing of a qualified organization that is conducting an allowable event for at least thirty (30) days at the time of the allowable event."
8) IC 4-32-12-1(a) (4) provides in pertinent part, "The Department may suspend… an individual …for any of the following: (1) Violation of a provision of this article or of a rule of the department…(4) Commission of fraud, deceit, or misrepresentation."
9) IC 4-32-12-3 states, In addition to the penalties described in section 2 of this chapter, the department may do all or any of the following:

(1) Suspend or revoke the license.
(2) Lengthen a period of suspension of the license.
(3) Prohibit an operator or an individual who has been found to be in violation of this article from associating with charity gaming conducted by a qualified organization.
(4) Impose an additional civil penalty of not more than one hundred dollars ($100) for each day the civil penalty goes unpaid.

CONCLUSIONS OF LAW

1) The Department's findings are prima facie evidence that the Department's claim is valid. The burden of proving that the findings are wrong rests with the person against whom the findings are made.
2) Petitioner was a member in good standing of the Boys & Girls Clubs of Indianapolis for at least thirty (30) days before she became a worker.
3) Petitioner admitted under oath to receiving tips while participating in charity gaming activities as a worker.

DEPARTMENTAL ORDER

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

The Petitioner's protest is denied. However, Petitioner's admissions under oath, her remorsefulness, and cooperation during the hearing are all mitigating factors in determining the length of Petitioner's suspension. The Petitioner is hereby prohibited from participating and associating in charity gaming activities in the State of Indiana for a period of five (5) years.
1) Under IC 6-8.1-5-1, the organization may request a rehearing. However, rehearings are granted only under unusual circumstances. Such circumstances are typically the existence of facts not previously known that would have caused a different result if submitted prior to issuance of the Departmental Order.
2) A request for rehearing shall be made within seventy-two (72) hours from the issue date of the Departmental Order and should be sent to the Indiana Department of Revenue, Legal Division, Appeals Protest Review Board, P.O. Box 1104, Indianapolis, Indiana 46206-1104.
3) Upon receipt of the request for rehearing, the Department will review the respective file and the rehearing request to determine if sufficient new information has been presented to warrant a rehearing.
4) The Department will then notify the organization in writing whether or not a rehearing has been granted. In the event a rehearing is granted, the organization will be contacted to set a rehearing date.
5) If the request for rehearing is denied or a request is not made, all administrative remedies will have been exhausted. The organization may then appeal the decision of the Department to the Court of proper jurisdiction.

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

Dated:_____

_____
Bruce R. Kolb / Administrative Law Judge

DEPARTMENT OF STATE REVENUE

IN REGARDS TO THE MATTER OF:
NICOLE L. CALL
DOCKET NO. 29-20020198

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DEPARTMENTAL ORDER

An administrative hearing was held on Thursday, May 2, 2002 in the office of the Indiana Department of State Revenue, 100 N. Senate Avenue, Room N248, Indianapolis, Indiana 46204 before Bruce R. Kolb, Administrative Law Judge, acting on behalf of and under the authority of the Commissioner of the Indiana Department of State Revenue.

The Petitioner, Nicole L. Call, appeared Pro Se. Attorney Steve Carpenter, appeared on behalf of the Indiana Department of State Revenue.

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

REASON FOR HEARING

On March 5, 2002, the Petitioner was prohibited from associating with charity gaming activities in Indiana for a period of three (3) years. The Petitioner protested in a timely manner. A hearing was conducted pursuant to IC § 4-32-8-1.

SUMMARY OF FACTS

1) The Indiana Department of Revenue Criminal Investigation Division initiated an investigation of the Fraternal Order of Eagles Lodge #3164.

2) The Department's Criminal Investigation Division report regarding the Fraternal Order of Eagles Lodge #3164 found that the organization had violated the following statutes, IC 4-32-9-15, IC 4-32-9-25, and 45 IAC 18-3-2.

3) On August 9, 2001, the Department revoked the Eagles charity gaming license.

4) On March 5, 2002, the Department prohibited Petitioner from associating with charity gaming activities in Indiana for a period of three (3) years.

FINDINGS OF FACTS

1) The Indiana Department of Revenue Criminal Investigation Division initiated an investigation of the Fraternal Order of Eagles Lodge #3164 (hereinafter referred to as Eagles). (Department Exhibit A).

2) The Department's investigators spoke with several Trustees of the Eagles who named Jeff Widman as the person who ran their charity event and provided the workers and security. (Department Exhibit B).

3) The Trustees told the Department's investigators that Mr. Widman offered to pay the Eagles five thousand dollars ($5,000) to run their festival and he would then keep the remainder of the profits. (Department Exhibit B).

4) The Trustees provided the Department with a list of the individuals who were to work the festival. (Record at 8).

5) The Petitioner was on a list provided by the Trustees as one of the scheduled workers. (Record at 10).

6) The Department's Criminal Investigation report regarding the Eagles found that they had violated the following statutes, IC 4-32-9-15, IC 4-32-9-25, and 45 IAC 18-3-2. (Department Exhibit B).

7) On March 5, 2002, the Department determined that the following sections of the Indiana code were violated: IC 4-32-9-15, IC 4-32-9-25(a), IC 4-32-9-28, and IC 4-32-9-29. (Department Exhibit B).

8) According to the Department's investigative report, Mr. Widmann delivered and set-up the gaming equipment during the afternoon of August 2, 2001 the day before the festival was to begin. (Department Exhibit B).

9) According to the Eagles' Trustees, the festival was shut down around midnight on August 3, 2001 which was the first day of the festival. (Department Exhibit B).

10) The Department's investigator testified under oath that on August 3, 2001 she interviewed one of the Trustees of the Fraternal Order of Eagles Lodge #3164 and that this individual confirmed that a verbal contract had been entered into between the Eagles Lodge and a Mr. Jeff Widmann. (Record at 6).

11) According to the Trustee, Mr. Widmann would act as the operator, and provide all the workers and security for their event. Mr. Widmann also agreed to set up and tear down the equipment. On the last day of the festival the Eagles would get five thousand dollars ($5,000) and Mr. Widmann would keep the remaining profits. (Record at 6 and 7).

12) The Department's investigation report states that the Petitioner was one of the individuals who was supposed to work the event, and therefore, they recommend Petitioner be suspended from participating in charity gaming activities for one (1) year. (Department Exhibit B).

13) The Department then notified Petitioner by letter that she was prohibited from associating with charity gaming activities in the State of Indiana for a period of three (3) years.

14) Petitioner stated that she was not present at the festival. (Record at 12).

15) The Department's investigator stated under oath that she did not see Petitioner at the event. (Record at 11).
16) Petitioner stated that she was not a member of the Eagles. (Record at 12).
17) At hearing, the Department provided a membership application allegedly showing that the Petitioner applied to join the Eagles. (Department Exhibit A).
18) The application for membership contains no signature.
19) According to the Department's investigator, the Petitioner's name was not on the documents provided to the Department showing her as a potential worker. (Record at 8).
20) Petitioner argues that the membership application provided by the Eagles (Department's Exhibit A) was filled out by someone other than herself, and that the name on the application (Nikki Call) was incorrect and the handwriting was not hers. (Record at 11).
21) Petitioner also contends that the street address on the application is spelled incorrectly as E-B-B-Y. The actual street name is spelled E-B-Y. Petitioner states that she would not spell her own street name wrong. (Record at 11).
22) Departmental records show Petitioner's street name as Eby.
23) Petitioner provided records and letters verifying that she worked all day on August 3, 2001, and that after work she went to the home of an acquaintance for the weekend. (Petitioner Exhibit 1).
24) Petitioner admitted under oath that her name was supplied to organizations that were conducting gaming events, and Petitioner would then participate as a worker at those events if she was a member of that particular organization. (Record at 12).
25) Petitioner stated that she would only work events where she was a member.(Record at 13).

STATEMENT OF LAW

1) Pursuant to IC 6-8.1-5-1, the Department's findings are prima facie evidence that the Department's claim is valid. The burden of proving that the findings are wrong rests with the person against whom the findings are made. See Portland Summer Festival v. Department of Revenue, 624 N.E.2d 45 (Ind.App. 5 Dist. 1993).
2) The Department's administrative hearings are conducted pursuant to IC § 6-8.1-5-1 et seq. (See, Portland Summer Festival v. Department of Revenue, 624 N.E.2d 45 (Ind.App. 5 Dist. 1993)).
3) Pursuant to 45 IAC 15-5-3(b)(7), "The hearing is not governed by any rules of evidence. The department is expressly excluded from the requirements of the Administrative Adjudication Act" (renamed the Administrative Order and Procedures Act).
4) Even if the Department were bound by the Administrative Orders and Procedures Act (AOPA), the rules clearly state that hearsay evidence that is properly objected to and does not fall with an exception to the hearsay rule may not form the sole basis of a resulting order. The AOPA does not say that the evidence cannot be heard, presented, or considered.
5) IC 4-32-9-27 states, "An operator or a worker may not directly or indirectly participate, other than in a capacity as operator or worker, in an allowable event…"
6) IC 4-32-9-28 states, "An operator must be a member in good standing of the qualified organization that is conducting an allowable event for at least one (1) year at the time of the allowable event."
7) According to IC 4-32-9-29, "A worker must be a member in good standing of a qualified organization that is conducting an allowable event for at least thirty (30) days at the time of the allowable event."
8) IC 4-32-12-1(a) (4) provides in pertinent part, "The Department may suspend… an individual …for any of the following: (1) Violation of a provision of this article or of a rule of the department…(4) Commission of fraud, deceit, or misrepresentation."
9) IC 4-32-12-3 states, "In addition to the penalties described in section 2 of this chapter, the department may do all or any of the following:

(1) Suspend or revoke the license.
(2) Lengthen a period of suspension of the license.
(3) Prohibit an operator or an individual who has been found to be in violation of this article from associating with charity gaming conducted by a qualified organization.
(4) Impose an additional civil penalty of not more than one hundred dollars ($100) for each day the civil penalty goes unpaid."

CONCLUSIONS OF LAW

1) The Department's findings are prima facie evidence that the Department's claim is valid. The burden of proving that the findings are wrong rests with the person against whom the findings are made.
2) The Department contends that Petitioner's name was supplied to organizations that were conducting gaming events, and she would then participate as a worker at those events in violation of Indiana charity gaming law.
3) The Department argues that its decision to bar Petitioner from participating in charity gaming for a period of three years is based upon the fact that Petitioner's name appears on a list of proposed workers. These workers were supposed to work at an event sponsored by an organization that Petitioner was not a member of. This alone, according to the Department, is sufficient to show that Petitioner is or had violated Indiana gaming law in the past and that Petitioner is currently part of a scheme to defraud the Department, even though Petitioner never worked the event in question.

4) The Department must establish a factual basis in order to substantiate its decision.
5) The Department presented no evidence at hearing as to which organizations Petitioner belonged to or for how long she had been a member.
6) The Department presented no evidence at hearing as to whether Petitioner participated as a worker at any events.
7) The Department presented no evidence at hearing concerning whether or not Petitioner was a qualified worker.

DEPARTMENTAL ORDER

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

The Petitioner's protest is sustained.

1) Under IC 6-8.1-5-1, the organization may request a rehearing. However, rehearings are granted only under unusual circumstances. Such circumstances are typically the existence of facts not previously known that would have caused a different result if submitted prior to issuance of the Departmental Order.
2) A request for rehearing shall be made within seventy-two (72) hours from the issue date of the Departmental Order and should be sent to the Indiana Department of Revenue, Legal Division, Appeals Protest Review Board, P.O. Box 1104, Indianapolis, Indiana 46206-1104.
3) Upon receipt of the request for rehearing, the Department will review the respective file and the rehearing request to determine if sufficient new information has been presented to warrant a rehearing.
4) The Department will then notify the organization in writing whether or not a rehearing has been granted. In the event a rehearing is granted, the organization will be contacted to set a rehearing date.
5) If the request for rehearing is denied or a request is not made, all administrative remedies will have been exhausted. The organization may then appeal the decision of the Department to the Court of proper jurisdiction.

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

Dated: _____

_____
Bruce R. Kolb / Administrative Law Judge

INDIANA DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #4
Sales Tax
May 2002

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

SUBJECT: Sales to and by Indiana State and Local Governments and the United States Government and its Agencies

REFERENCES: IC 6-2.5-5-16, IC 6-2.5-5-24, IC 6-2.5-7-4, 45 IAC 2.2-5-24, 45 IAC 2.2-5-25, 45 IAC 2.2-5-49

INTRODUCTION.

Generally, purchases by the State of Indiana or any Indiana local government are exempt from sales tax. Sales by State and local agencies are also exempt unless the sale involves a "proprietary" (non-traditional**)** activity.

I. DEFINITIONS.

State Agency - means an authority, board, branch, commission, committee, department, division, or other instrumentality of the executive, legislative, and judicial departments of Indiana State government.

Local Government - refers to any of the following:

A city of any class (IC 36-1-2-3)
Municipal corporation (county, municipality, township, special taxing districts, etc.; IC 36-1-2-10)
Municipality (city or town; IC 36-1-2-11)
Political subdivision (IC 36-1-2-13)
School corporation (IC 36-1-2-17)
Special taxing district (IC 36-1-2-18)
Taxing district (IC 36-1-2-20)
Unit (county, municipality, township; IC 36-1-2-23), or
Any agency of any of the foregoing.

II. PURCHASES BY STATE AND LOCAL GOVERNMENTS.

The State of Indiana and its local governments are not subject to sales or use tax on any purchase to be used primarily to carry out a governmental function. Any purchase used primarily in connection with a proprietary function of the State or a local government would be taxable unless some other specific exemption applies.

Traditional governmental activities, such as police and fire protection, street construction and maintenance, the operation of hospitals, public libraries, cemeteries, and similar activities are considered to be governmental functions.

A purchase is used "primarily" for a governmental function if the purchase is used more than fifty percent (50%) of the time in the performance of that function. To qualify for the exemption, the purchase must be invoiced directly to the State or to the local government making the purchase.

NOTE: If a State or local employee purchases an item, and even if the employee is to be reimbursed by the governmental entity, the purchase is not exempt, and the employee must pay sales tax at the time of purchase.

To purchase property exempt from tax, State and local governments must register with the Department and issue an exemption certificate to the seller. To recover taxes paid on exempt purchases, including the purchase of gasoline or special fuel through a metered pump, the State or local government must file a claim for refund with the Department.

III. SALES BY THE STATE OF INDIANA OR ITS LOCAL GOVERNMENTS.

Sales of tangible personal property to the general public in the ordinary course of operations by the State of Indiana or its local governments are generally subject to sales tax. For example, the sale of key chains or license cases by a license branch is taxable. The State may purchase any property to be resold exempt from tax, but must collect the tax from the purchaser at the point of sale. The following are other examples of proprietary activities which would require the State or local government to collect tax from the purchaser:

(1) Sales of tangible personal property from college book stores, sales and rentals in state parks, food services, concessions, and similar activities;

(2) Rental of tangible personal property to the public;

(3) Sale of by-products of sewage disposal plants; or

(4) Any other activity customarily considered as being competitive with private enterprise.

Some sales may qualify as related to the performance of a governmental function if the sales do not compete with private enterprise. For example, if a city in Indiana were to charge a fee for providing copies of its ordinances, the city would not need to collect tax on the sale of the copies, since providing the copies of its ordinances could be considered a governmental function of the city.

IV. PURCHASES BY THE UNITED STATES GOVERNMENT AND ITS AGENCIES.

The United States Constitution prohibits any State from imposing any tax directly on the U.S. Government or any of its agencies, unless the Congress consents to being taxed. Thus, much Federal purchasing, leasing or renting of tangible personal property, use of utilities, meals consumed in restaurants, or other normally taxable goods or services (including accommodations for less than 30 days), is exempt from Indiana sales and other transaction-based taxes.

However, the fact that the U.S. Government may ultimately reimburse an employee who paid the tax does not exempt such a purchase from tax. For example, if an employee of the Internal Revenue Service pays for lodging cost from his own funds, there should be tax collected at the time of payment. But if the same employee pays for the lodging with a credit card in the name of and billed directly to the Internal Revenue Service, this would be a direct expenditure by the U.S. Government, which would be exempt from the sales tax. A vendor will not be required to collect sales tax on sales made directly to the U.S. Government if the exemption can be verified by documenting the facts and circumstances of the transaction. PLEASE SEE THE ATTACHMENT FOR A DETAILED DESCRIPTION OF FEDERAL ACTIVITY INVOLVING USE OF CREDIT CARDS.

V. SALES BY THE UNITED STATES GOVERNMENT OR ITS AGENCIES.

Under Federal law (4 U.S.C. 107), State and local governments may not levy or collect any type of sales or use tax on transactions in which the U.S. government sells personal property to others. Therefore, Federal agencies are not required to register as retail merchants with the Department, and would not have a Retail Merchants Certificate number or use an Exemption Certificate (Form ST-105).

_____

Kenneth L. Miller
Commissioner

ATTACHMENT

NOTE: The following information is taken from the Federation of Tax Administrators Bulletin B-07/02, dated February 26, 2002. This attachment has been revised and updated for the purposes of Indiana Information Bulletin #4.

. . . . . .

Federation of Tax Administrators, 444 North Capitol St., NW., Washington, D.C. 20001

FEDERAL GOVERNMENT ISSUANCE OF NEW CREDIT CARDS TO EMPLOYEES

SUMMARY

The Federal government has issued new credit cards for its employee purchases. The majority of the new cards are direct-billed to the Federal government and thus represent tax-exempt purchases for State purposes. However, there are both a SmartPay Travel card and a SmartPay Integrated (Combined) Card that are billed to the employee (for later reimbursement). These transactions are taxable in Indiana. The only way to distinguish the direct billed/tax-exempt cards from the employee-billed/taxable cards is to look at the sixth digit of the card. Digits 1, 2, 3 and 4 represent taxable transactions.

Background. Before 1998, the Federal government issued credit cards to employees to purchase various goods and services, including office supplies, fuel, transportation, accommodations, and food. Three primary cards were used: a Visa I.M.P.A.C. card, a Discover card, and an American Express card. (A fleet card named Wright Express was also used.) **NONE OF THESE CARDS IS IN USE ANY LONGER.**

Several Indiana taxes are involved in the use of Federal credit/debit cards, including sales tax and other transaction-based taxes. Generally speaking, Indiana law applies appropriate taxes to purchases made by Federal employees **when the card is billed to the employee.** When a card is billed directly to the Federal government, any tax would be treated as being levied directly on the Federal government and therefore prohibited by the U.S. Constitution.

New Cards. On November 30, 1999, the Federal government began a new credit card program. The Federal General Services Administration (GSA) entered into contracts with a variety of banks. Each Federal agency may choose among these options. The new program has been named GSA Smart Pay. The contracts extend through November 29, 2003, and there are five one-year options to renew.

NOTE: The SmartPay Travel Card can be used by any federal agency. The SmartPay Integrated (combined) card is in use only by the Department of Interior. Generally, purchases using SmartPay Cards are directly billed to the U.S. government and are not taxed. The **exceptions** are:

Federal employee credit card purchases that are billed to the employee and thus may be taxed will:

- Use a SmartPay Travel card which says "For Official Government Travel Only" **and** start with 4486, 4716, or 5568 and have a sixth digit that is either 1, 2, 3, or 4; or
- Use a SmartPay Integrated (Combined) card which says "For Official Government Use Only: **and** has an account number that begins with 5568-16 from the Department of the Interior, **and** the traveler does not carry an I.D. from the Bureau of Reclamation, **and** the purchase is for lodging or food.

All SmartPay cards with other numbers are centrally billed and cannot be taxed.

The General Services Administration maintains a Website for more detailed program information: **http://pub.fss.gsa.gov/services/gsa-smartpay**

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #7
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: Application of Sales Tax to Meals and Banquets

REFERENCES: IC 6-2.5-4-1, IC 6-2.5-5-20(c)(8)

I. General Information

Indiana sales tax generally applies to the selling price of meals, banquets, smorgasbords, and all other food and beverage services and must be collected by the person or organization preparing and/or serving the food to any organization, group, or individual with certain exceptions as provided in "III" below.

Sales tax must be collected whether the individual members are charged separately or the organization pays the entire cost in a single payment, and irrespective of the type of organization. Except as provided in paragraph "III" below, food and beverage services are never considered to be used for the purpose for which an organization might otherwise be granted sales tax exemption.

Gratuities are not taxable when they result from a voluntary, affirmative action on the part of the customer to reward good service. The sales tax does not apply to charges for serving or delivering food or beverages furnished, prepared, or served for

consumption at a location, or on equipment provided by the retail merchant. However, this exclusion only applies if the charges for the serving or delivery are stated separately from the price of the food or beverages when the purchaser pays the charge.

Some counties have adopted a food and beverage tax which applies to the sale of meals and banquets. Caterers who cater in those counties must collect and remit the food and beverage tax on food and beverages sold in the adopting counties. Please call the Revenue Department for a current listing of those counties which have a food and beverage tax.

II. Inclusion of Items Other Than Food Services in a Single Ticket Price

When events are held for which the price of the ticket or admission includes food services as well as entertainment and/or other intangible services, the entire selling price of the ticket is subject to the sales tax unless the price charged for food service is stated separately from the other items.

III. Exemption From Sales Tax

If such meals are prepared and served by a qualified nonprofit organization as a fund raising activity, the proceeds of which are used for the purpose for which such organization is granted exemption from sales tax, and such organization does not conduct selling activities of any nature on more than thirty (30) days in a calendar year, such organization is not required to collect sales tax.

If a qualified nonprofit organization purchases the meals and pays the entire cost in a single payment and the meals are sold by them individually at a higher price as a part of a bona fide fund raising project the proceeds of which are used for the purpose for which such organization is granted exemption from sales tax, such organization is not required to either pay or collect sales tax, if sales are not made on more than thirty (30) days in a year or does not conduct such activities for the sole purpose of raising funds to further the not-for-profit purpose of the organization, the sales tax applies to such food or beverage service.

The furnishing of school meals and meals furnished to college students by a college or university are exempt from sales tax.

More information concerning not-for-profit organizations and the furnishing of school meals can be obtained by contacting the Indiana Department of Revenue, Compliance Division.

IV. Door Prizes and Other Giveaway Merchandise

When such events or tickets include door prizes or other types of giveaway merchandise the organization or group must pay sales tax on the purchase price of such merchandise unless the event and/or organization comes within the exemption provided to not-for-profit organizations. The organization might be required to obtain a door prize or raffle license from the Charity Gaming Section of the Indiana Department of Revenue.

More information concerning prizes and other free merchandise can be obtained by contacting the Indiana Department of Revenue, Compliance Division.

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Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #8
Sales Tax
May 2002

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

SUBJECT: Application of Sales Tax to the Sale, Lease, and Use of Computers and Computer Related Equipment

REFERENCE: IC 6-2.5-4-1

I. Definitions

A. Computer Hardware:

1. The machinery and equipment which constitutes the physical computer assembly, including but not limited to such items as:

- Central Processing Units
- Card or Tape Punchers
- Electronic Message Scramblers
- Data Storage Devices
- Processors
- Output Units
- Flexowriters

- Card Readers
- Paper Tape Input Machines
- Verifiers
- Card Converters
- Sorters
- Collators
- Printers
- Panels
- Terminals
- Modems

2. The internalized instruction code which controls the basic operations (i.e., arithmetic and logic) of the computer causing it to execute instructions contained in system programs, is an integral part of the computer. It is not normally accessible or modifiable by the user. Such Internal code systems are considered part of the hardware.

B. Computer Software:

A software program is one in which instructions and routines (programs) are determined necessary to program the customer's electronic data processing equipment to enable the customer to accomplish specific functions.

The software may be in the form of:

1. System programs (except for the instruction codes which are considered tangible personal property in paragraph 2 above) – programs that control the hardware itself and allow it to compile, assemble, and process application programs.

2. Application programs – programs that are created to perform business functions or control or monitor processes.

3. Pre-written programs (canned) – programs that are either system programs or application programs and are not written specifically for the user.

4. Custom programs – programs created specifically for the user.

C. Terminal or "On Line" Arrangement:

This is descriptive of any arrangement whereby the lessee or purchaser of a terminal unit or units is connected by telephone lines or other methods to a computer system in such a way that the input and output operations of the terminal machines and equipment are under direct control of the computer.

D. Batch Services Arrangement:

An arrangement whereby a consumer of computer services acquires access to a computer system in a manner which is not facilitated by a direct connection. Whatever data the consumer has for input is supplied to the operator of the computer for translation to a form acceptable by the computer. In such an arrangement, access to the computer can only be accomplished by intervention of the operator.

II. Sales and Use Tax application

A. The Sale or Lease of Computer Hardware:

The sale or lease of computer hardware is a retail transaction, and as such is subject to tax based on the total purchase price charged, including but not limited to charges for internalized instruction codes which control the basic computer operations, instructional materials and installation charges.

To the extent that computer hardware will be used directly in direct production, its purchase is exempt from tax. The purchaser must show that the computer has an immediate effect on the article being produced as the result of being an essential and integral part of an integrated production process. With respect to computers, this is known as Computer Assisted Manufacturing (CAM). By contrast, computers used for research and development, known as Computer Assisted Design (CAD) do not qualify for exemption.

B. Transactions Involving Computer Software:

As a general rule, transactions involving computer software are not subject to Indiana Sales or Use Tax provided the software is in the form of a custom program specifically designed for the purchaser.

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

Example One: A software retailer that sells prepackaged programs for use with home television games or other personal computer equipment is considered to be a vendor of tangible personal property and is required to collect sales tax on the sales price of such property.

Example Two: A firm develops and sells pre-written application programs which are available to any of the firm's potential customers. The sale of these programs are subject to tax.

C. Terminal and Batch Service Arrangements:
The sale or lease of computer time through the use of a terminal or as a result of a batch service arrangement is a nontaxable service and is not subject to tax if separately billed or charged. However, any charges for computer machines and equipment (i.e., the terminal) remain subject to tax.
D. Taxable Use of Computer, Machines, Equipment and Applied Programs:
Computer machines, equipment and programs purchased or leased exempt from tax on the basis of a "resale" exemption are subject to use tax if they are put to a taxable use at any time subsequent to the exempt purchase. The subsequent sale of tangible personal property which has been leased or rented is subject to sales or use tax.
E. Lease Subject to Tax as a Unitary Transaction:
A company that leases a computer with exempt software programs and does not segregate in its billing the charge for the software lease makes a transaction which is subject to tax on the entire charge.
F. Sale of Miscellaneous Data:
The sale of statistical reports, graphs, diagrams or any other information produced or complied by a computer and sold or reproduced for sale in substantially the same form as it is so produced is considered to be the sale of tangible personal property unless the information from which such reports was compiled was furnished by the same person to whom the finished report is sold.
The charge for reports compiled by a computer exclusively from data furnished by the same person for whom the data is prepared is considered to be for a service and is not subject to sales or use tax.

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Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #10
Sales Tax Division
June 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: Application of Sales Tax to Not-For-Profit Organizations
REFERENCES: IC 6-2.5-5-25, IC 6-2.5-5-26, 45 IAC 2.2-5-55, 45 IAC 2.2-5-56, 45 IAC 2.2-5-57, 45 IAC 2.2-5-58, 45 IAC 2.2-5-59, 45 IAC 2.2-5-60
Not-for-profit organizations (except governmental entities) are no longer required to obtain retail merchant certificates unless they conduct retail sales on which tax must be collected.
Such organizations must register with the Indiana Department of Revenue and receive a Not-For-Profit Registration Number. The Not-For-Profit Registration Number may be used on sales tax exemption certificates (Form ST-105) when making qualified purchases, unless the organization has been classified as a social organization and issued a number in the 800000 series.
A Not-For-Profit Registration Number in the 800000 series may not be used to make purchases exempt from sales tax.
A not-for-profit organization making taxable sales must register as a retail merchant in addition to registering as a not-for-profit organization (see section II).
I. PURCHASES BY NOT-FOR-PROFIT ORGANIZATIONS
A. Purchases for Own Use.
1. In order to qualify for sales tax exemption on purchases as a not-for-profit organization the following conditions must prevail:
(a) The organization must be named or described in IC 6-2.1-3-19, 6-2.1-3-20, 6-2.1-3-21 or 6-2.1-3-22 or their successors. This includes not-for-profit organizations organized and operated exclusively for one or more of the following purposes.

Charitable	Literary
Civic	Religious
Educational	Scientific
Fraternal	

(b) Also included are the following specifically named not-for-profit organizations.

Business Leagues	Licensed Hospitals
Cemetery Assns.	Monasteries
Churches	Parochial Schools
Convents	Pension Trusts
Labor Unions	Public Schools

(c) The organization is not operated predominantly for social purposes.

(d) In order for a purchase by a not-for-profit organization to qualify for exemption, the article purchased must be used for the same purpose as that for which the organization is being exempted. Purchases for the private benefit of any member of the organization or for any other individual, such as meals or lodgings, are not eligible for exemption. If a member of the organization purchases a meal or lodging, even if the member is to be reimbursed by the organization, the purchase is not exempt, and the member must pay sales tax at the time of purchase. Purchases used for social purposes are never exempt.

(e) The fact that an organization is being exempted by the Federal Government or by the State of Indiana for income tax purposes, does not necessarily mean that purchases made by the not-for-profit organization are exempt.

B. Purchases for Resale.

Tangible personal property purchased for resale by a not-for-profit organization are eligible for sales tax exemption.

C. Purchases by Social Organizations.

Purchases of tangible personal property to be used by organizations organized and operated predominately for social purposes are not exempt. If over fifty percent (50%) of its expenditures are for or related to social activities such as food and beverage services, golf courses, swimming pools, dances, parties, and other similar social activities, the organization will be considered to be predominantly organized and operated for social purposes.

II. SALES BY QUALIFIED NOT-FOR-PROFIT ORGANIZATIONS

A. Sales of tangible personal property by qualified not-for-profit organizations carried on for a total of not more than thirty (30) days in a calendar year and engaged in as a fund raising activity to raise funds to further the qualified not-for-profit purposes of the organization are exempt from sales tax. This provision applies to social organizations as well as other qualified organizations.

B. If an organization conducts selling or fund raising activities during thirty-one (31) or more days in a calendar year (not necessarily consecutive), it is a retail merchant and must collect sales tax on those sales.

However, sales of property that is intended primarily either for the organization's educational, cultural, or religious purposes or for improvement of the work skills or professional qualifications of the organizations members, may be sold exempt throughout the year.

C. All organizations required to collect sales tax must register with the Department of Revenue as retail merchants and obtain a registered retail merchants certificate in addition to registering as a not-for-profit organization.

D. Sales by a qualified organization of periodicals, books, or other property of a kind intended primarily for the educational, cultural, or religious purposes of the organization are exempt from sales tax.

E. Sales by a qualified organization of periodicals, books, or other property to its members of a kind designed and intended to improve the skill or professional qualifications of its members for the purpose of carrying on their business, trade, or profession, are exempt from sales tax.

This bulletin applies only to the status of not-for-profit organizations under the sales tax act. Most not-for-profit organizations are subject to income tax on some of their receipts.

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Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #12-A
Sales Tax
May 2002

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in this bulletin should serve only as a foundation for further investigation and study of the current law and procedures related to its subject matter.

SUBJECT: Public Transportation (School Bus) – Exemption

REFERENCES: IC 6-2.5-5-27, 45 IAC 2.2-5-61, 45 IAC 2.2-5-62, 45 IAC 2.2-5-63

Form ST-135SB is for use by individuals engaged in public transportation under contract or lease with a primary or secondary, public or private school corporation in lieu of the requirement that the individual be registered as a retail merchant. The ST-135SB is a sales and use tax exemption certificate executed by the individual to the seller. The individual utilizes his/her social security number in lieu of a Registered Retail Merchants Certificate Number. The vehicle identification number (VIN) is also required upon the certificate.

If an individual utilizes an oil or petroleum company credit card, the certificate must be submitted directly to the credit card company and not to the station dealer. Additionally, an ST-135SB may not be used on purchases of gasoline from stationary metered-pumps. For such purchases the individual should obtain a receipt book, form STR-100, from the Department of Revenue and have the station attendant complete same at the time of sale. The individual should then forward the completed receipts together with a claim for refund form GA-110LMP and completed ST-135SB to the Department for a sales tax refund. Form STR-100, receipt book, is available at cost.

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Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #13
Sales Tax
June 2002

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SUBJECT: Application of Indiana Retail Sales Tax to Newspaper Publishers

REFERENCES: IC 6-2.5-5-17, 45 IAC 2.2-5-8, 45 IAC 2.2-5-9, 45 IAC 2.2-5-10, 45 IAC 2.2-5-26

I. Newspaper Exemption

Indiana law provides an exemption from the state gross retail tax for transactions involving the sale of newspapers. For purposes of the state gross retail tax, the term "newspapers" shall mean only those publications which are:

1. Commonly understood to be newspapers;
2. Circulated among the general public;
3. Published at stated short intervals;
4. Entered or are qualified to be admitted and entered as second class mail matter at a post office in the county where published.

Publications which are primarily devoted to matters of specialized interest such as business, political, religious, or sporting matters may qualify as newspapers if they also satisfy the aforementioned criteria.

Magazines are not construed to be newspapers. The retail sales of all magazines and periodicals are subject to the sales tax. The sale of magazines by subscription are subject to sales tax without regard to the price of a single copy and sales tax must be collected by the seller from the person who subscribes to the magazine on the full subscription price.

II. Newspaper Insert Exemption

For purposes of the State gross retail tax, the term "newspapers" shall include advertising inserts. Advertising inserts shall mean only those publications which are:

1. Produced for a person by a private printer and delivered to the newspaper publisher, OR
- Produced and printed by a newspaper publisher, OR
- Produced and printed by a person and delivered to the newspaper publisher, AND

2. inserted by the newspaper publisher into the newspapers and distributed along with the newspapers.

Any distribution not meeting the above test does not qualify for the newspaper insert exemption. Examples of items distributed with a newspaper that would not qualify for the newspaper insert exemption; gum, shampoo, detergent samples.

III. Display Space

Sales of classified or display advertising space in a newspaper is not subject to sales tax.

IV. Sales through a Syndicated Column

Sales tax on tangible personal property sold through a syndicated column for which the newspaper acts only as a forwarding agent must be collected by the seller; however, the newspaper is not required to collect the sales tax. If the newspaper acts as an agent for the seller, or if the payment is made directly to the newspaper rather than to the seller, the newspaper must collect and remit sales tax on all such sales of tangible personal property.

V. Manufacturer's Exemption

Indiana law also provides an exemption from the state gross retail tax for transactions involving purchases of machinery, tools, and equipment which are directly used in the direct production of tangible personal property, and for purchases of materials directly consumed or directly incorporated in direct production.

Tangible personal property purchased to be used, consumed, or incorporated directly in the direct production of newspapers is offered exemption on the same basis as is the purchase of tangible personal property used, consumed, or incorporated in any other manufacturing or production.

Production of the newspaper is considered to begin at the point at which news is gathered and ends with the packaging of the newspaper. Cameras, darkrooms or supplies used to take photographs; computers or other equipment used to record stories; equipment used to transmit or receive copy are considered to be used directly in the direct production of the newspapers.

VI. Application for Free Newspapers

The aforementioned information is also applicable to transactions involving free newspapers.

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Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #17
Sales Tax
May 2002

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SUBJECT: Application of Indiana Sales Tax to Cable and Telecommunication Television Companies

REFERENCES: IC 6-2.5-4-6, IC 6-2.5-4-11

For purposes of the Indiana sales tax, companies that provide local or intrastate television service by cable, wire, fiber optics, laser, microwave, radio, satellite, or similar facilities are retail merchants for purposes of the Indiana sales tax.

All cable and telecommunication television companies must register as retail merchants and collect and remit sales tax on charges made for cable and telecommunication television service. Sales tax does not apply to initial installation charges.

Cable and telecommunication television companies must pay sales tax on their purchases of tangible personal property.

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Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #21
Sales Tax
May 2002

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SUBJECT: Lawn Care Applications

REFERENCES: IC 6-2.5-1-1; IC 6-2.5-1-2; IC 6-2.5-2-1; IC 6-2.5-2-2; IC 6-2.5-3-2; IC 6-2.5-4-1; IC 6-2.5-5-8**;** 45 IAC 2.2-4-1

Introduction

The sales tax applies to the total gross income received for each lawn care application.

Sales by a Lawn Care Company

The relationship between a lawn care company and its customer is contractual. The customer agrees to pay a set price and the company agrees to apply the necessary chemicals to a lawn for its proper care and maintenance. The chemical cannot be purchased separately from the company and applied by the customer. A unitary transaction is the purchase of tangible personal property and services under a single agreement for which a total combined charge is calculated. A retail unitary transaction is a unitary transaction that is also a retail transaction. A retail transaction means a transaction that constitutes selling at retail. A lawn care application is a retail transaction because the lawn care company acquires tangible personal property (chemicals) and transfers them to its customers for consideration in the ordinary course of its regularly conducted business.

The sales tax is imposed on the gross retail income received in a retail unitary transaction. The gross retail income received includes the price of the property transferred plus any bona fide charges made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property before its transfer. Because the chemicals are not transferred until they are applied to the lawn, the application charges are included in the company's gross retail income. Therefore, the entire contract price is subject to the Indiana sales tax.

Purchases by a Lawn Care Company

The purchase of chemicals by a lawn care company to be later furnished to a customer for lawn care treatment is a sale for resale and therefore exempt from the Indiana sales tax.

The purchase of tangible personal property other than chemicals for use in the lawn care business, such as chemical applicators, sprayers, and transport vehicles, is subject to the Indiana sales/use taxes.

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Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE

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LETTER OF FINDINGS NUMBER: 96-0635
Corporate Income Tax
For Tax Periods: 1992-1994

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

ISSUE

1. Adjusted Gross Income Tax – Business Income

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

The taxpayer protests the classification of certain income as business income.

2. Adjusted Gross Income Tax – Michigan Single Business Tax Add Back

Authority: IC 6-3-1-3.5(b)(3), First Chicago NBD Corp., f/k/a NBD Bancorp, Inc., et al., v. Dept. of State Revenue, 708 NE2d 631, (Ind. Tax Court, 1999)

The taxpayer protests the add back of the Michigan Single Business Tax.

3. Adjusted Gross Income Tax – Foreign Source Dividend Deduction

Authority: IC 6-3-2-12

The taxpayer protests the calculation of the Foreign Source Dividend Deduction.

STATEMENT OF FACTS

The taxpayer is primarily engaged in developing, manufacturing and marketing consumer, professional, health and other imaging products and services. After an audit, the Indiana Department of Revenue (department) assessed additional corporate income tax. The taxpayer protested the assessment and a hearing was held. Further facts will be provided as necessary.

1. Adjusted Gross Income Tax – Business Income

DISCUSSION

The taxpayer protests the classification of two different sources of income as business income. The first protested source is the 1994 sale of the division that supplied diagnostic products for use in clinical chemistry analysis and immunodiagnostics. The

taxpayer reported this income as non-business income not subject to Indiana adjusted gross income tax. The department reclassified this income as business income. As business income, the department apportioned part of it to Indiana and subjected that portion to adjusted gross income tax.

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 non-business income under the transactional test. These regulations state "... the critical element in determining whether income is 'business income' or 'non-business 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 development, production and sale of imaging products and services. Almost all of the taxpayer's income derived from transactions associated with these activities. The division that the taxpayer sold was accounted for and run as a separate business unit for the ten-year period prior to its sale. The sale of the medical imaging division was an unusual and out of the ordinary transaction for the taxpayer. The sale of this division did not meet the transactional test for classification as business income.

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 taxpayer's situation, the property being disposed of was the medical imaging division. The proceeds from this sale were used to establish a permanent irrevocable trust fund to extinguish long term debt. Because the taxpayer made these provisions to satisfy long term debts, it was able to focus more funds to the development and management of its consumer imaging products and services. The proceeds from the sales allowed the taxpayer to invest more into its primary function and complete the whole of its consumer imaging business. Thus they were necessary and essential for the functioning of the taxpayer's primary business endeavors. This distinguishes the taxpayer's situation from the May case where May sold its business operations pursuant to a court order to reduce its competitive advantage. Since the sale meets the functional test set out in the May case, the department properly classified the sale proceeds as business income subject to the Indiana adjusted gross income tax.

The department also reclassified the taxpayer's income from the sales of certain positions of stock as business income because the positions were held to further the taxpayer's current or future business operations. The sales of these positions of stock do not meet the transactional test because they are an out of the ordinary transaction of the taxpayer. They do not meet the functional test either because they were clearly held for an investment purpose. This is not "necessary or essential" to the taxpayer's regular business of developing, manufacturing and marketing consumer imaging products and services. Therefore the taxpayer properly reported the proceeds from the sale of positions of stock as non-business income not subject to the Indiana adjusted gross income tax.

FINDING

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

2. Adjusted Gross Income Tax – Michigan Single Business Tax Add Back

DISCUSSION

The taxpayer protested the department's adjustment of its adjusted gross income tax by adding back the Michigan single business tax pursuant to IC 6-3-1-3.5(b)(3). The taxpayer contends that the Michigan single business tax is not based on or measured by income and therefore does not need to be added back to the adjusted gross income. The Indiana Tax Court considered the issue of the Michigan single business tax in the case First Chicago NBD Corp., f/k/a NBD Bancorp, Inc., et al., v. Dept. of State Revenue, 708 NE2d 631, (Ind. Tax Court, 1999). In that case, the Tax Court determined that the Michigan single business tax was a value added tax rather than a tax based on or measured by income. Therefore, payments for the Michigan single business tax that were deducted to determine a corporation's federal adjusted gross income do not need to be added back to determine the corporation's taxable Indiana income.

FINDING

The taxpayer's protest is sustained.

3. Adjusted Gross Income Tax – Foreign Source Dividend Deduction

DISCUSSION

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

The taxpayer, in response, directs the department's attention to the language of IC 6-3-2-12(b), which states:

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. 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 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%-79%) percent ownership interest; and a fifty percent (50%) deduction for dividends received from corporations in which a taxpayer has less than a fifty percent (50%) ownership interest. IC 6-3-2-12(c)-(e).

This statutory language is clear. IC 6-3-2-12 authorizes pro rata deductions (based on the percentage ownership of the payor by the payee) of certain foreign source dividend income. In this instance, taxpayer has followed the statutory prescriptions in calculating its foreign source dividend deductions.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

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LETTER(S) OF FINDINGS NUMBER(S): 99-0397, 99-0390, 99-0394, 99-0395, 99-0396, 99-0398, 99-0405
Adjusted Gross Income Tax
For Tax Years 1994 through 1996

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

ISSUES

I. Adjusted Gross Income – Foreign Sales Corporations Dividend Deduction

Authority: IC 6-3-2-12

Taxpayer protests the adjustment of the Foreign Sales Corporations dividend deduction.

II. Adjusted Gross Income – Business/Nonbusiness Income

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

Taxpayer protests the classification of income from the sale of stock in a former subsidiary as business income.

III. Adjusted Gross Income – Business/Nonbusiness Income

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

Taxpayer protests the classification of income from the sale of stock in a former subsidiary as business income.

IV. 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 operates several companies in the automotive supply industry and the energy supply industry. Taxpayer files a combined return with the State of Indiana. As the result of an audit, the Indiana Department of Revenue issued proposed assessments on taxpayer for the tax years in question. Taxpayer protests these assessments. Further facts will be supplied as needed.

I. Adjusted Gross Income – Foreign Sales Corporation Dividend Deduction

DISCUSSION

Taxpayer protests the Department's decision to adjust a deduction taken by taxpayer on dividends from Foreign Sales Corporations (FSC). The instructions on the return explained that the dividend deduction is allowable net of all related expenses and any attributable expenses from Federal Form 1118. The Department adjusted the dividend deduction to reflect that FSC sales commission expenses were a related expense.

Taxpayer refers to IC 6-3-2-12, which states in part:

(a) As used in this section, the term "foreign source dividend" means a dividend from a foreign corporation. The term includes any amount that a taxpayer is required to include in its gross income for a taxable year under Section 951 of the Internal Revenue Code, but the term does not include any amount that is treated as a dividend under Section 78 of the Internal Revenue Code.

(b) 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 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%-79%) ownership interest; and a fifty percent (50%) deduction for dividends received from corporations in which a taxpayer has less than a fifty percent (50%) ownership interest. IC 6-3-2-2 (c)-(e).

This statutory language is cogent and clear. IC 6-3-2-12 authorizes pro rata deductions (based on the percentage ownership of the payor by the payee) of certain foreign source dividend income. In this instance, taxpayer has followed the statutory prescriptions in calculating its foreign source dividend deductions.

FINDING

Taxpayer's protest is sustained.

II. Adjusted Gross Income – Business/Nonbusiness Income

DISCUSSION

Taxpayer protests the Department's classification of income from the sale of stock held in a former subsidiary as business income. Taxpayer claims that the income from the sale of this stock is non-business income since the stock was held for investment purposes only. The Department classified the income as business income since the stock represented taxpayer's holdings in a former subsidiary. The Department considered the sale of stock in the former subsidiary as the continuation of a transaction. Three years passed between the initial sale and the final disposition of the remaining stock.

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.

Taxpayer held less than ten percent (10%) of the subsidiary's stock for approximately three years after the initial spin-off. Taxpayer explains that no centralized management existed and, therefore, no functional integration or economies of scale could or did exist.

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 is not in the business of selling entire subsidiaries, therefore under May the sale of stock 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. The Court held that 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, taxpayer's business is manufacturing automotive parts. Taxpayer's disposal of the former subsidiary's stock was not a part or constituent component necessary or essential to complete the whole of taxpayer's business. Therefore, the income is not business income under the functional test.

Taxpayer has provided sufficient documentation to establish that it did not continue to operate the former subsidiary as part of its regular trade or business. Taxpayer held less than 10% of the stock of the subsidiary. This is an insufficient amount for taxpayer to have exerted control over the former subsidiary. Also, taxpayer held the stock for approximately three years before final disposition. Taxpayer's sale of stock in the former subsidiary does not meet the transactional or functional test as described in May.

FINDING

Taxpayer's protest is sustained.

III. Adjusted Gross Income – Business/Nonbusiness Income

DISCUSSION

Taxpayer protests the Department's classification of income from the sale of stock held in a former subsidiary as business income. Taxpayer claims that the income from the sale of this stock is non-business income since the stock was held for investment purposes only. The Department classified the income as business income since the stock represented taxpayer's holdings in a former subsidiary. 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.

Taxpayer explains that it held less than fourteen and a half percent (14.5%) of one former subsidiary's stock for approximately one year after the spin off. Taxpayer also states that no income, gain or loss was recognized by taxpayer on the initial 85.5% disposition.

The subsidiary was spun off in a tax-free transaction within the meaning of Internal Revenue Code Section 368 (a)(1)(D). The Department viewed the disposition of stock as business income from the continuation of a business transaction. As a condition of making the initial sale of stock a tax-free transaction, taxpayer was subject to an Internal Revenue Service order which had the effect of neutralizing potential control of the second subsidiary by taxpayer.

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 is not in the business of selling entire subsidiaries, therefore under May the sale of stock 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. The Court held that 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, taxpayer's business is manufacturing automotive parts. Taxpayer's disposal of the former subsidiary's stock was not a part or constituent component necessary or essential to complete the whole of taxpayer's business. Therefore, the income is not business income under the functional test.

Taxpayer has provided sufficient documentation to establish that it did not continue to operate the former subsidiary as part of its regular trade or business. Taxpayer held less than 15% of the stock of the subsidiary. Also, taxpayer held the stock for approximately one year before final disposition. Taxpayer's sale of stock in the former subsidiary does not meet the transactional or functional test as described in May.

FINDING

Taxpayer's protest is sustained.

IV. Tax Administration – Negligence Penalty

DISCUSSION

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

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

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

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

04990581.LOF

LETTER OF FINDINGS NUMBER: 99-0581
Gross Retail Tax
For the Tax Years 1996, 1997, and 1998

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

I. Purchases Subject to Use Tax

Authority: IC 6-2.5-5-3; IC 6-2.5-5-3(b); IC 6-8.1-5-1(b); Indiana Dept. of State Revenue v. Cave Stone, 457 N.E.2d 520 (Ind. 1983); General Motors Corp. v. Dept. of State Revenue, 578 N.E.2d 399 (Ind. Tax Ct. 1991); Mumma Bros. Drilling Co. v. Dept. of Revenue, 411 N.E.2d 676 (Ind. Ct. App. 1980); 45 IAC 2.2-3-4; 45 IAC 2.2-4-27(c); 45 IAC 2.2-5-8(h); 45 IAC 2.2-5-8(j)

Taxpayer protests the imposition of use tax against the purchase of certain equipment, supplies, and capital assets.

II. Abatement of the Ten Percent Negligence Penalty

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

Taxpayer requests that the Department abate the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana based manufacturer of aluminum granules. Taxpayer sells the finished granules to aluminum manufacturers. The Department of Revenue (Department) conducted an audit of taxpayer's business records. The audit determined that taxpayer was liable for additional use tax occasioned by the acquisition of tools, equipment, office supplies, computer supplies, shipping equipment, and various other items not directly implicated in the direct production of taxpayer's aluminum granules. In addition, the audit determined that certain items were used in both a taxable and nontaxable manner; accordingly, the audit determined additional tax liability on an apportioned basis.

The taxpayer protested the audit's determinations arguing that the audit's findings were arbitrary, capricious, and were made without an adequate basis in fact or law. In addition, the taxpayer challenged – as fundamentally flawed – the apportionment methods employed during the audit. Taxpayer asserted that the apportionment methods were, in themselves, arbitrary and whimsical.

Taxpayer was provided the opportunity to take part in an administrative hearing during which the taxpayer would be permitted to fully explain the substantive basis for its protest. Taxpayer declined the opportunity to participate in such a hearing. Taxpayer was invited to submit additional information substantiating the basis for its protest. Again, taxpayer declined to provide that information and, instead, relied on the initial assertions as set out in its correspondence and discussions with the Department.

DISCUSSION

I. Purchases Subject to Use Tax

During its review of purchases made during the audit period, the auditor found that taxpayer had not paid sales tax on purchases for which sales tax should have been initially collected. Those purchases thereby became subject to use tax pursuant to 45 IAC 2.2-3-4. That regulation states as follows: "Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase." The audit assessed use tax because the purchased items under consideration were not entitled to one of the sales tax exemptions otherwise available to the taxpayer.

The audit assessed use tax for maintenance tools, equipment, and associated supplies. The assessment was made pursuant to 45 IAC 2.2-5-8(h) which imposes the use tax on equipment which is "predominately used to maintain production equipment...." In addition, the audit assessed use tax on "man-lift" rentals pursuant to 45 IAC 2.2-4-27(c), and on supplies used in the normal repair and maintenance of taxpayer's building under 45 IAC 2.2-5-8(j).

The audit determined that certain of taxpayer's equipment and supplies were used in both a taxable and non-taxable manner. Accordingly, the audit apportioned the use tax liability based upon the manner in which that equipment and those supplies were employed within taxpayer's manufacturing process.

The audit determined that certain supplies and equipment, used in taxpayer's general and administrative operations, were subject to use tax under the provisions of 45 IAC 2.2-5-8(j). The assessed equipment included office and computer equipment used in the taxpayer's administrative operations.

Taxpayer protested the audit's findings arguing that those findings were arbitrary, capricious, and lacked an adequate basis in fact or law. In essence, taxpayer argued that it would not have incurred any of the expenses – for which the auditor assessed use tax – unless those expenses were in some way related to the taxpayer's manufacturing operation. Moreover, the taxpayer argued that the manner in which the audit apportioned the use tax on equipment and supplies which were employed in both a taxable and non-taxable manner, was whimsical and arbitrary.

The Legislature has granted Indiana manufacturers a sales tax exemption for certain purchases. IC 6-2.5-5-3(b) states, "Transactions involving manufacturing machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring the property acquires it for *direct* use in the *direct* production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property." (*Emphasis added*). However, in enacting the stringently worded exemption, the Legislature clearly did not intend to create a global exemption for any and all equipment which a manufacture purchased for use within its manufacturing facility. "Fairly read, the exemption was meant to apply to capital equipment that [meets] the 'double direct' test." Mumma Bros. Drilling Co. v. Dept. of Revenue, 411 N.E.2d 676, 678 (Ind. Ct. App. 1980). The capital equipment "in order to be exempt, (1) must be *directly* used by the purchaser and (2) be used in the *direct* production, manufacture, fabrication, assembly, extraction, mining, processing, refining or finishing of tangible personal property." Indiana Dept. of State Revenue v. Cave Stone, 457 N.E.2d 520, 525 (Ind. 1983). "[t]he test for directness requires the equipment to have an 'immediate link with the product being produced.'" Id. Accordingly, the sales tax exemption is applicable to that equipment which meets the "double direct" test and is "essential and integral" to the manufacture of taxpayer's tangible personal property. General Motors Corp. v. Dept. of State Revenue, 578 N.E.2d 399, 401 (Ind. Tax Ct. 1991).

The Indiana courts have attempted to clearly define the boundaries of the manufacturing exemption. Taxpayer is entitled to his view that, in view of the practical realities of its own complex manufacturing process, the test set out IC 6-2.5-5-3 admits of certain vagaries. However, in determining whether taxpayer's own purchases fall within the statute's boundaries – as with all tax exemptions – "[t]he taxpayer claiming [the] exemption has the burden of showing the terms of the exemption statute are met." Id. at 404. (Internal citations omitted). "Exemption statutes are strictly construed because an exemption releases property from the obligation of bearing its fair share of the cost of the government." Id.

Taxpayer admits that it bears the "responsibility of taxes for expenses where such are related to tangential or support systems." However, taxpayer's proposed test, whereby all expenses "associated with the movement, processing, packaging and maintenance of [taxpayer's] product and process equipment...." are entitled to the manufacturing exemption, is itself totally without foundation. Taxpayer has failed to meet its burden of demonstrating that the audit's determinations – distinguishing between equipment and supplies falling inside and outside the exemption's boundaries – were unreasonable or unjustified by either fact or law.

Taxpayer argued that the audit's decisions, concerning the apportionment of use taxes to equipment used for both taxable and non-taxable purposes, were arbitrary and fundamentally flawed. However, taxpayer has utterly failed to provide any substantive evidence refuting the audit's apportionment determinations.

"The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment

is made." IC 6-8.1-5-1(b). The taxpayer has provided the Department nothing which would enable it to provide taxpayer the requested relief.

FINDING

Taxpayer's protest is respectfully denied.

II. Abatement of the Ten Percent Negligence Penalty

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

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

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

Taxpayer argues that it "employs the most diligent controls to assure the proper payment of sales or use tax based upon the based available understanding of IDR rules." In addition, the taxpayer claims that the assessment is "offensive and fundamentally unfair." However, it should be noted that the taxpayer underwent a prior audit during which nearly identical use tax issues were raised. Subsequently, the taxpayer lodged a protest, a hearing was held, and a Letter of Findings was issued. That earlier Letter of Findings clearly and unmistakably delineated the standards applicable to the manufacturing exemption. In addition, that earlier Letter of Findings granted the taxpayer's request to abate the ten percent negligence penalty because "the taxpayer had a bona fide dispute with the Department's interpretation of the tax laws." No such conclusion is possible here.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

04990635.LOF

LETTER OF FINDINGS NUMBER: 99-0635
State Gross Retail Tax
For Tax Years 1992 through 1996

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

ISSUE

Gross Retail Tax – Temporary Storage Exemption: Items Purchased for Use Outside of Indiana

Authority: *Miles, Inc. v. Indiana Dept. of State Revenue*, 659 N.E.2d 1158 (Ind.Tax 1995); IC 6-2.5-2-1; IC 6-2.5-3-1; IC 6-2.5-3-2; IC 6-2.5-3-4; IC 6-2.5-5-1

The taxpayer protests the Department's denial of its claim for refund for Indiana sales tax paid on all miscellaneous supplies temporarily stored in Indiana for subsequent use outside of Indiana.

STATEMENT OF FACTS

Taxpayer operates retail stores specializing in a wide variety of sporting goods. Taxpayer's corporate headquarters is located in Indiana. Taxpayer operates a distribution center located in Indiana (where it stores inventory, fixtures, and supplies for distribution to various stores in and outside of Indiana) and operates retail outlets both in and outside of Indiana. Taxpayer protests the denial of its claim for refund of Indiana sales tax paid to Indiana vendors for items purchased for use outside of Indiana that were temporarily stored in Indiana.

Gross Retail Tax – Temporary Storage Exemption: Items Purchased for Use Outside of Indiana

DISCUSSION

Pursuant to IC 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. Retail transactions involve the transfer of tangible personal property. IC 6-2.5-5-1. A complementary excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. IC 6-2.5-3-2.

The complementary use tax is not imposed on the keeping, retaining, or exercising of any right or power over tangible personal

property, if: (1) the property is delivered into Indiana by or for the purchaser of the property; (2) the property is delivered in Indiana for the sole purpose of being processed, printed, fabricated, or manufactured into, attached to, or incorporated into other tangible personal property; and (3) the property is subsequently transported out of state for use solely outside Indiana. IC 6-2.5-3-2(d).

According to IC 6-2.5-3-4, the storage, use, and consumption of tangible personal property is exempt from use tax if: 1) the property was acquired in a retail transaction in Indiana and the sales tax had been paid; or 2) the property was acquired in a transaction that is exempt from sales tax under any part of IC 6-2.5-5, except IC 6-2.5-5-24(b), and the property is being used, stored, or consumed for the purpose for which it was exempted.

Taxpayer was assessed tax on purchases from Indiana registered vendors which were shipped to the Indiana distribution center (or picked up by the taxpayer and taken to the distribution center) and then later sent to out-of-state locations as store fixtures and supplies. Taxpayer bases its protest on IC 6-2.5-3-2(a) and (d) arguing that its temporary storage of personal property in Indiana did not give rise to a taxable exercise of ownership because taxpayer's personal property was temporarily retained in Indiana for subsequent use outside of Indiana. As a result, taxpayer argues, the items did not meet the definition of taxable storage under IC 6-2.5-3-1 or IC 6-2.5-3-2 but were exempt under the definition of storage as discussed by the Indiana Tax Court in *Miles, Inc. v. Indiana Dept. of State Revenue*, 659 N.E.2d 1158 (Ind. Tax Ct. 1995).

Taxpayer further argues that sales and use taxes are complementary taxes and that the creation of an exception that treats one tax differently from the other brands the complementary notion a nullity. However, sales tax paid to an Indiana registered vendor may only be refunded if the transaction is exempt under any one of the sections of IC 6-2.5. The temporary storage exception found within IC 6-2.5-3-2(d) is specifically and exclusively applicable to "[a]n excise tax, known as the use tax." IC 6-2.5-3-2.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0420000410.LOF

LETTER OF FINDINGS NUMBER: 00-0410
Sales Tax
For Tax Periods: 1997-1998

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.

1. Sales and Use Tax – Public Transportation Exemption

Authority: IC 6-2.5-3-2(a), IC 6-2.5-5-27, IC 6-8.1-5-(b), *Shoup Buses, Inc. v. Indiana Department of Revenue*, 635 N.E.2d 359 (Ind.Tax 1994), *National Serv-All, Inc., and National Serv-All, Inc., d.b.a. Zent's v. Indiana Department of State Revenue, 644 N.E.2d 956* (Ind. Tax 1994), *Continental Grain Company v. Wilber Followell*, 475 NE2d 318 (Ind. App. 1985), *Panhandle Eastern Pipeline Company and Trunkline Gas Company v. Indiana Department of State Revenue*, 74 N.E. 2d, (Ind. Tax 2001).

The taxpayer protests the disallowance of its use of the public transportation exemption.

2. Tax Administration – Penalty

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

The taxpayer protests the imposition of the penalty.

STATEMENT OF FACTS

After an audit for the tax years 1997 and 1998, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional sales tax, interest and penalty. The taxpayer protested the assessment and a hearing was held. More facts will be provided as necessary.

1. Sales and Use Tax – Public Transportation Exemption

DISCUSSION

The taxpayer provides its clients with dumpsters that the clients fill. The taxpayer then transports the dumpsters with contents to landfills for disposal of the contents. The taxpayer charges one fee for this service. Most of the taxpayer's clients are in the construction business. Therefore, the dumpsters are predominately used to store, transport and dispose of construction debris and waste. The department assessed use tax on the tangible personal property that the taxpayer used in providing this service pursuant to IC 6-2.5-3-2(a).

The use of tangible personal property is exempt from the use tax "if the person acquiring the property or service directly uses or consumes it in providing public transportation for persons or property." IC 6-2.5-5-27. The taxpayer contends that the use of the property assessed in the audit qualifies for exemption as directly used in providing public transportation for property.

All departmental 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). Further, exemptions from tax must be strictly construed against taxpayers. *Shoup Buses, Inc. v. Indiana Department of Revenue*, 635 N.E.2d 359 (Ind.Tax Court 1994).

The Indiana Tax Court considered the public transportation exemption in the cases *National Serv-All, Inc., and National Serv-All, Inc., d.b.a. Zent's v. Indiana Department of State Revenue*, 644 N.E.2d 956 (Ind. Tax 1994) and *Panhandle Eastern Pipeline Company and Trunkline Gas Company v. Indiana Department of State Revenue*, 74 N.E. 2d, (Ind. Tax 2001). In the *National Serv-All* case, the petitioner claimed the public transportation exemption from the gross retail and use tax for equipment used in hauling and disposing of household garbage. The court stated that to be involved in public transportation and eligible for the public transportation exemption, a carrier must transport property belonging to others. *Id*. 956. The petitioner in that case did not demonstrate that it was predominately involved in the public transportation of property belonging to others. Therefore, it did not qualify for the public transportation exemption. In the *Panhandle Eastern* case, a gas company qualified for the public transportation exemption because its pipelines were predominately used to transport gas belonging to others.

The taxpayer's use of certain equipment would be exempt if the taxpayer is engaged in public transportation. As the court stated in the *National Serv-All* case, the taxpayer can only be engaged in public transportation and eligible for the public transportation exemption if it is transporting property belonging to others. Therefore, it must be determined whether the construction debris that the taxpayer transported belonged to the construction clients or to the taxpayer.

The taxpayer contends that pursuant to a contract, the construction clients owned the construction debris until it was actually disposed of in the dump. In Indiana, it is settled law that a contract indicates that meeting of the minds of the parties on certain essential elements of an agreement. Whether or not there was a meeting of the minds indicating the intent to enter a contract is a question of fact that is to be determined by the facts and circumstances of the situation. The party claiming that a contract exists has the burden of proving that the contract exists. *Continental Grain Company v. Wilber Followell*, 475 N.E.2d 318 (Ind. App. 1985).

In support of its contention that the parties agreed by contract that the construction contractors owned the construction debris which the taxpayer transported, the taxpayer submitted "Exhibit A," a pink sheet of paper which appears to be the final page of a multi page invoice or other form. This sheet lists six statements each beginning with the phrase "customer agrees..." These statements concern the types of materials to be placed in the bins and disposed of, warrants that the debris is not hazardous waste as defined by state or federal law, responsibility for the construction debris during storage and transportation, responsibility for damage caused by the roll-off containers, payment for services and setting jurisdiction and venue for any legal action. The taxpayer's name, address and telephone number is typed on this form. There is, however, no signature or any other indication that the customers have agreed to these terms. Without any evidence of assent on the part of the client, "Exhibit A" alone is not a contract. Therefore there is no written agreement determining the ownership of the construction debris.

In the *National Serve-All* case, also, there was no written enforceable contract between the homeowners and the garbage disposal company. The Court determined that without a written agreement, the other incidents of ownership of the household garbage would be considered to determine the ownership of the household garbage. *Ibid. 958-959.* The household garbage was of no value to the homeowners after National Serv-All picked it up. Further, after the household garbage was picked up, National Serv-All controlled the household garbage. These incidents of ownership, without a written contract, indicated that National Serv-All owned the garbage after it was picked up and during the transportation to the dump.

The construction clients are like the homeowners without a written contract with National Serve-All in the *National Serve-All* case. The construction debris is of no value or use to the clients after the taxpayer picks it up. The taxpayer controls the construction debris during the process of transporting it to the dump. Absent at least a written contract reserving ownership of the construction debris to the construction clients and/or other indicia indicating the reservation of ownership, the construction debris becomes the property of the taxpayer when the taxpayer picks it up.

Although the taxpayer was given adequate opportunity, the taxpayer never produced additional documentary evidence that the construction clients actually retained ownership during the transportation process. The taxpayer did not sustain its burden of proving that it qualified for the public transportation exemption to the use tax.

FINDING

The taxpayer's protest is denied.

2. Tax Administration – Penalty

DISCUSSION

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

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

The audit assessed use tax on purchases in addition to those under protest. For example, the taxpayer failed to pay retail sales tax or remit use tax on many administrative items used in the office. The taxpayer breached its duty to pay the proper taxes to the state.

FINDING

The taxpayer's final point of protest is denied.

DEPARTMENT OF STATE REVENUE

0420010028.LOF

LETTER OF FINDINGS NUMBER: 01-0028
Indiana Gross Retail and Use Tax
For the Years 1997, 1998, and 1999

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

ISSUES

I. Assessment of Use Tax on Taxpayer's Scrap Bay Crane Trolleys

Authority: IC 6-2.5-3-2(a); IC 6-2.5-5-3(b); 45 IAC 2.2-5-8(c); 45 IAC 2.2-5-8(c)(2); 45 IAC 2.2-5-8(f)(1)

Taxpayer argues that the assessment of use tax on its scrap bay crane trolleys was erroneous. Taxpayer claims that the crane trolleys are used in the direct production of tangible personal property and are entitled to the manufacturing exemption.

II. Assessment of Use Tax on Taxpayer's Air Handling Equipment

Authority: IC 6-2.5-5-3(b); 45 IAC 2.2-5-9(j); Ind. Dept. of State Revenue v. Cave Stone, 457 N.E.2d 520 (Ind. 1983); Dept. of State Revenue v. Kimball Int'l, 520 N.E.2d 454 (Ind. Ct. App. 1988); Ind. Dept. Rev. v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974)

Taxpayer states that its air handlers are used in the direct production of tangible personal property and are, consequently, not subject to use tax.

III. Assessment of Use Tax on Taxpayer's Control Room "Pulpits"

Authority: 45 IAC 2.2-5-8(c); 45 IAC 2.2-5-8(c)(2)

Taxpayer argues that its "pulpits" – enclosed booths housing operator personnel and various computer control devices – are directly used in its steel production process and are exempt from use tax.

IV. Assessment of Use Tax on Taxpayer's Control and Monitoring Equipment

Authority: 45 IAC 2.2-5-8(c); 45 IAC 2.2-5-8(g); 45 IAC 2.2-5-8(j)

Taxpayer states that certain items of control and monitoring equipment – employed to monitor various aspects of its plating and surface treatment operations – are an integral part of its steel production process and are not subject to use tax.

V. Assessment of Use Tax on Taxpayer's Roof Lift Spare Parts

Authority: 45 IAC 2.2-5-8(h)(2)

Taxpayer argues that its roof lift spare parts are equipment intended for eventual use in conjunction with its electric arc furnaces and, because the furnaces are used in the direct production of tangible personal property, the roof lift spare parts are exempt from use tax.

STATEMENT OF FACTS

Taxpayer is a manufacturer specializing in the production of steel and steel products. Taxpayer has multiple divisions with locations throughout the United States including one Indiana location. Taxpayer's Indiana location specializes in the production of hot and cold rolled sheet steel. During the audit, it was determined that certain of the taxpayer's equipment was subject to the use tax. Accordingly, the audit proposed additional use tax assessments, the taxpayer protested those assessments, a hearing was held, and this Letter of Findings followed.

DISCUSSION

I. Assessment of Use Tax on Taxpayer's Scrap Bay Crane Trolleys

Taxpayer owns two scrap bay crane trolleys. The crane trolleys support electromagnetic cranes which are utilized to transfer various metal components into charging buckets. The scrap bay crane trolleys are integral to, and permanently attached to the electromagnetic cranes. The metal components are located within nearby scrap cars each of which contains a different form of scrap. Before the scrap cars are brought to the scrap bay, the contents of the individual scrap cars are pre-weighed for inventory purposes.

The metal components consist of pig iron, bushels, bundles, home scrap, and iron carbide. Non-metallic components consist of lime, charge carbon, and flue dust. Because each of the metal components has specific characteristics, the metal components are

combined according to a pre-determined "recipe" and are measured by weight or by percent volume to achieve that desired "recipe." As examples, the taxpayer provides the crane operator with "recipes" for low residual carbon scrap steel, high residual scrap steel, and low nitrogen scrap steel. Taxpayer's "recipe for low residual carbon scrap steel, required the crane trolley operator to combine specific, measured amounts of bushling, home, bundles, pig iron, blend, lime, and carbon into the charging bucket. The components must be loaded into the charging buckets in a specified order. The loading order is specified in the "recipe" provided to the crane order. For example, the "recipe" for low residual carbon steel specifies that the lime and carbon are – respectively – the seventh and eighth elements introduced into the charging bucket.

The ratio of the various components is determined by their weight. The scale, used to measure the weight of the combined components contained within the charging bucket, is attached to a movable platform upon which the charging bucket rests.

The crane operator determines each metal component's weight by means of a cumulative read-out scale which is visible to the operator. After the crane trolley operator has produced the required mix of metal and non-metallic components, the charging buckets are used to deliver the mix to one of taxpayer's two electric arc furnaces. The electric arc furnaces operate to melt the metal and non-metallic components thereby producing the specified raw steel.

The audit determined that the scrap bay crane trolleys were pre-production equipment and were subject to use tax. Taxpayer argues that the scrap bay crane trolleys are integral to the first step in its production process and, therefore, are exempt from use tax.

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, regardless of the location of that transaction or of the retail merchant making that transaction." IC 6-2.5-3-2(a). However, IC 6-2.5-5-3(b) exempts certain production equipment from the tax "if the person acquiring that property acquires it for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other personal property."

In order to qualify for the manufacturing exemption, taxpayer's equipment must be "directly used in the production process... [having] an immediate effect on the article being produced." 45 IAC 2.2-5-8(c). The equipment has such an "immediate effect" if it is "an essential and integral part of an integrated produces which produces tangible personal property." Id.

The same regulation provides an example that is analogous to the issue raised by taxpayer. 45 IAC 2.2-5-8(c)(2) states that "[t]he following types of equipment constitute essential and integral parts of the integrated production process and are, therefore, exempt.... [a]n automated scale process which measures quantities of raw aluminum for use in the next production step of the casting process in the foundry."

Taxpayer's scrap bay crane trolleys are entitled to the use tax exemption provided under IC 6-2.5-5-3(b) because the cranes operate *within* taxpayer's integrated steel manufacturing process. The scrap bay crane trolleys do not simply provide ancillary transportation services prior to the steel production process. (*See* 45 IAC 2.2-5-8(f)(1)). Instead, the two scrap bay crane trolleys, the electromagnetic cranes, and the platform upon which the charging buckets rest, are constituent, functionally interconnected elements of an integrated process by which the production of taxpayer's finished steel begins.

The scrap bay crane trolleys are employed to combine the constituent materials by means of a precisely predetermined formula. The combining of the constituent materials – by means of the trolleys, electromagnetic cranes, and movable platform – marks the beginning of an ongoing process of transforming those constituent materials into taxpayer's finished steel products. Accordingly, the equipment directly involved in combining the constituent materials qualifies for the use tax manufacturing exemption.

FINDING

Taxpayer's protest is sustained.

II. Assessment of Use Tax on Taxpayer's Air Handling Equipment

The auditor assessed use tax on the air handlers used to control temperatures within taxpayer's cold mill motor control room. The motor control room contains electric drive motors which directly operate the reversing mill and temper mill. Also in the motor control room are computers which control the electric drive motors.

The audit determined that the air handlers were devices employed for general temperature control and, under 45 IAC 2.2-5-9(j), were subject to the use tax.

Taxpayer argues that the air handlers are essential and integral to its integrated steel production process. According to the taxpayer, the electric drive motors produce extremely high heat which would cause the computers to fail if the air handlers did not function to dissipate the heat. Taxpayer has provided specific information relating to the function of the air handlers. According to taxpayer's electrical maintenance supervisor, the cold mill motor control room contains temperature sensors which set off an alarm if the temperature within the room reaches 80 degrees Fahrenheit. If the temperature within the motor control room continues to rise, the same sensors will automatically shut down the steel production process when the temperature reaches 90 degrees Fahrenheit.

In a factually analogous case, the court of appeals, in Ind. Dept. Rev. v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974), found that the manufacturer's air handling equipment was not entitled to the exemption because the equipment did not have a direct effect on the manufacturer's products. Id. at 100. Although the equipment was an "integral and essential" part of the manufacturing process, the equipment did not have the requisite "direct" effect on the manufacturer's products. Id. at 98, 100. However in a later attempt to synthesize the cases interpreting the manufacturing exemption, the supreme court in Ind. Dept. of State Revenue v. Cave

Stone, 457 N.E.2d 520 (Ind. 1983), held that, in order to fulfill the "directly used in the direct production" requirement, the equipment must have an "immediate link with the product being produced." Id at 525. The court found the RCA holding consistent with its own analysis because the RCA manufacturer – even without its air handling equipment – could continue to manufacturer its own product, albeit less economically. Id. at 526.

Taxpayer has met its burden of demonstrating that the air handling equipment is entitled to the use tax exemption provided under IC 6-2.5-5-3(b). Taxpayer has demonstrated that the air handling equipment is used within the direct production of taxpayer's steel products, is an integral part of that production, and is not simply the "general temperature control" equipment described in 45 IAC 2.2-5-9(j). Unlike the RCA manufacturer, the taxpayer's own air handling equipment is not simply employed to enhance and make more economical the taxpayer's productivity. Rather the taxpayer's air handling equipment is essential to the continuation of the taxpayer's integrated manufacturing process and has the requisite "immediate link" with the taxpayer's steel production. Cave Stone at 525. *See also* Dept. of State Revenue v. Kimball Int'l, 520 N.E.2d 454 (Ind. Ct. App. 1988). Taxpayer has demonstrated this integral relationship between the air handlers and its steel production by virtue of the fact that the entire system is designed to automatically cease production – upon reaching a predetermined cutoff temperature – thereby circumventing even the possibility of a more disruptive computer failure.

FINDING

Taxpayer's protest is sustained.

III. Assessment of Use Tax on Taxpayer's Control Room "Pulpits"

The audit determined that taxpayer's "pulpits" were subject to use tax. These "pulpits" are small, protected rooms located in proximity to the taxpayer's steel furnaces. The pulpits contain computer controls, house furnace operator personnel, and are supplied with cooled air. Taxpayer argues that the pulpits are necessary to protect the computer equipment and operator personnel from the heat and sparks given off by the steel furnaces.

Taxpayer has provided photographs documenting the manner in which the pulpits are employed in its steel production process. From the photographs, it appears that the pulpits are located approximately 30 feet from taxpayer's steel furnaces. In one of the photographs, sparks given off by one of the furnaces land immediately in front of the pulpit. In another photograph, a worker standing outside the pulpit is wearing substantial protective clothing. Taxpayer states that the steel furnaces produce temperatures of 2,900 degrees Fahrenheit.

Enclosed within the pulpits is the computer equipment used to control the furnace operation. However, the computer equipment does not autonomously control the furnace operation; the computer equipment requires the active participation of the human operator. For example, at a certain stage in the furnace operation, the operator touches an icon on the computer screen to open or close the furnace roof. At another stage, the operator touches another icon to cause the electric power to begin charging the contents of the furnace or to cease charging the contents. At yet another stage, the operator touches a computer icon to "tap" the furnace and discharge the furnace contents into a ladle.

Setting aside the issue of whether taxpayer's pulpits protect the enclosed computer equipment or whether that same equipment is itself involved in taxpayer's steel production, the pulpits are entitled to the use tax exemption as specified in 45 IAC 2.2-5-8(c)(2). The regulation states that "[t]he following types of equipment constitute essential and integral parts of the integrated production process and are, therefore, exempt... [s]afety 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."

The pulpits are entitled to the use tax exemption set out in 45 IAC 2.2-5-8(c). Based upon taxpayer's description, it is apparent that the pulpits are necessary to permit otherwise unprotected personnel to operate the steel furnaces. Clearly, the pulpits are not provided for the comfort or convenience of taxpayer's operating personnel but are equipment essential in permitting the workers to participate in taxpayer's steel production process.

FINDING

Taxpayer's protest is sustained.

IV. Assessment of Use Tax on Taxpayer's Control and Monitoring Equipment

The audit determined that certain items of control and monitoring equipment were subject to use tax. Those items included: (1) flight recorders; (2) thermal scanners; (3) FCE atmosphere monitors; and (4) hot mill PDA system. The audit found that the equipment did not have "an immediate effect upon the article being produced...." 45 IAC 2.2-5-8(g). Instead, the equipment was part of taxpayer's "non-operational activities" and was subject to use tax under the provisions of 45 IAC 2.2-5-8(j).

The taxpayer argues that the equipment monitors its production process providing data to the mill operators which, in turn, allows the operators to interact with the production machinery and equipment. Accordingly, taxpayer asserts that the equipment is entitled to the exemption afforded under 45 IAC 2.2-5-8(c).

Taxpayer's thermal scanners are used to monitor the temperature of slab steel during the production process. If the temperature of the steel slab falls below 1,975 degrees Fahrenheit, the thermal scanner detects the temperature change and the amount of water being sprayed on the slab steel is reduced. Reducing the amount of water allows the temperature of the steel to remain at the specified level. Taxpayer has provided evidence demonstrating that maintaining the specified temperature is critical to producing

steel of the desired quality. Accordingly, because of the immediate, functional interrelationship between the thermal scanners, the water sprayers, and the production of the slab steel, the thermal scanners are entitled to the use tax exemption. Under 45 IAC 2.2-5-8(c), the thermal scanners have an "immediate effect on the article being produced" and are an "essential and integral part of [taxpayer's] integrated process."

The remaining three categories of equipment – the flight recorders, FCE atmosphere monitors, and hot mill PDA system – are not entitled to the use tax exemption because they are not integrally related to the taxpayer's steel production process. For example, the audit found that the flight recorder "measures and monitors the performance of the mill... [and] communicates this information to [the] level 3-administration and business system." Taxpayer maintains that these three categories of equipment are essential to producing quality steel. Undoubtedly, the three categories of equipment play an important part in the production of taxpayer's steel. However, as noted in 45 IAC 2.2-5-8(g), "The fact that particular property may be considered essential to the conduct of the business of manufacturing because its use is required... by practical necessity does not itself mean that the property 'has an immediate effect upon the article being produced.'"

FINDING

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

V. Assessment of Use Tax on Taxpayer's Roof Lift Spare Parts

Use tax was assessed against one of the taxpayer's invoices for "roof lift spare parts." Taxpayer argues that the roof lift is used within the steel production process and therefore, under 45 IAC 2.2-5-8(h)(2), the roof lift spare parts qualify for the use tax exemption. 45 IAC 2.2-5-8(h)(2) reads as follows:

Replacement parts, used to replace worn, broken, inoperative, or missing parts or accessories on exempt machinery and equipment, are exempt from tax.

The "roof" referred to by taxpayer, is the lid of one of taxpayer's electric arc furnaces. From the photograph provided by the taxpayer, the roof appears to be approximately 25 feet in diameter. The lift is physically attached to the roof and used to elevate the roof, rotate the roof away from the furnace, and allow the scrap bucket to empty its contents into the furnace. Taxpayer has a roof lift for each of its two electric arc furnaces.

The roof lift is integral to the electric arc furnaces. The electric arc furnaces are clearly central to the taxpayer's steel production process. Accordingly, the roof lift spare parts are entitled to the use tax exemption provided under 45 IAC 2.2-5-8(h)(2).

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

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LETTERS OF FINDINGS NUMBERS: 01-0056 (1990-1999); 01-0058 (1990-1999); 01-0059 (1990-1999); 01-0060 (1997-1998); 01-0061 (1997-1999)
Gross Retail and Use Tax – Public Transportation Exemption
Tax Administration – Statute of Limitations
Tax Administration – Method of Calculation
Tax Administration – Penalty

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

ISSUES

I. Gross Retail and Use Tax – Public Transportation Exemption

Authority: IC § 6-2.5-5-27; 45 IAC 2.2-5-61; IC § 6-8.1-5-1(b); 45 IAC 2.2-5-62

Taxpayer protests proposed assessments of the state's gross retail and use taxes, arguing that his companies fall under the public transportation exemption.

II. Tax Administration – Statute of Limitations

Authority: IC § 6-3-4-1; 45 IAC 15-5-7; IC § 6-3-4-3; IC § 6-8.1-5-2

Taxpayer protests the Audit Division's assessment of 10 years of tax liability.

III. Tax Administration – Method of Calculation

Authority: IC § 6-8.1-5-4

Taxpayer protests the Audit Division's method of calculating taxes owed where no records were available.

IV. Tax Administration – Penalty

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

Taxpayer protests the 10% negligence assessment.

STATEMENT OF FACTS

Taxpayer, through a single Indiana-domiciled, Illinois-organized corporation, owns 5 different companies that, in one form or another, provide a variety of services to carriers engaged in the interstate transportation of goods and property. The companies are domiciled in Indiana, but organized under the laws of Illinois. Taxpayer's companies clean and occasionally sell repair parts to these customers; some of these carriers transport hazardous material requiring special cleaning before hauling their next load of goods and/or property. Taxpayer, believing that his companies were exempt from Indiana's gross retail and use taxes because they were engaged in public transportation, never filed any Indiana tax returns. Additional facts will be supplied as necessary.

I. Gross Retail and Use Tax – Public Transportation Exemption

DISCUSSION

Taxpayer protests proposed assessments of the state's gross retail and use taxes, arguing that his companies fall under the public transportation exemption. Under IC § 6-8.1-5-1(b), a "notice of proposed assessment is *prima facie* evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." The public transportation exemption from gross retail and use taxes, IC § 6-2.5-5-27, provides that transactions "involving tangible personal property and services are exempt from the state gross retail tax, if the person acquiring the property or service directly uses or consumes it in providing public transportation for persons or property."

Taxpayer's companies clean trucks, tankers, and railcars that provide public transportation for property; the trucks, tankers, and railcars are covered by the exemption; taxpayer is not. *See also*, 45 IAC 2.2-5-61 and 45 IAC 2.2-5-62. "In order to qualify for exemption, the tangible personal property must be reasonably necessary to the rendering of public transportation. The tangible personal property must be indispensable and essential in **directly** transporting persons or property." 45 IAC 2.2-5-61(c). **(emphasis added)** When taxpayer's customers purchase goods and/or services from one of taxpayer's companies, the exemption applies because the customers are in the business of transporting persons and/or property. When taxpayer purchases goods and/services in order to clean customer trucks, tankers, and railcars, the exemption does not apply because taxpayer provides a service. Taxpayer argues that his services to his customers are "reasonably necessary, "indispensable and essential in directly transporting persons and/or property." Taxpayer also argues that if he did not perform these services, carriers would be unusable for public transportation and the flow of interstate commerce would be impeded.

45 IAC 2.2-5-61(b) defines public transportation as meaning and including the following:

> movement, transportation, or carrying of persons and/or property for consideration, by a common carrier, contract carrier, household goods carrier, carriers of exempt commodities and other specialized carriers performing public transportation service for compensation by highway, rail, air, or water, which carriers operate under authority issued by, or are specifically exempt by statute or regulation from economic regulation of, the public service commission of Indiana, the Interstate Commerce Commission, the aeronautics commission of Indiana, the U.S. Civil Aeronautics Board, the U.S. Department of Transportation, or the Federal Maritime Commissioner; however, the facts that a company possess a permit or authority issued by the P.S.C.I., I.C.C., etc., does not of itself mean that such a company is engaged in public transportation unless it is in fact engaged in the transportation of persons or property for consideration as defined above.

Taxpayer's business activities fail to fall under the definitions in 45 IAC 2.2-5-62. This regulation exempts from the state gross retail and use taxes "the sale, storage, or use of tangible personal property which is directly consumed in the rendering of public transportation of persons or property. Subsection (c) limits the exemption to "tangible personal property directly consumed in rendering public transportation." Subsection (d) provides that in order to qualify for the exemption, "the consumption of tangible personal property must be reasonably necessary to the rendering of public transportation." These subsections apply to taxpayer's customers, not taxpayer's companies.

Taxpayer's companies do not engage in any of the above-defined activities. Taxpayer argues that the services he provides, and the tangible personal property used in providing those services, are "indispensable and essential in directly transporting persons or property" because in a majority of cases, the carriers must be thoroughly cleaned and occasionally repaired before the customer can use the vehicle again. Taxpayer supplies as additional support for his various arguments that he has a regulatory number assigned to him by the Federal Department of Transportation. However, under 45 IAC 2.2-5-61(b), this fact is not dispositive of taxpayer's tax liability under Indiana law.

Taxpayer's arguments, while interesting, do not meet the regulatory language cited *supra*. Taxpayer's companies do not transport either persons or property. His customers do. While the services taxpayer provides are important, they are not indispensable. The Department must reject taxpayer's invitation to extend the coverage of the public transportation exemption provided by statute and regulation to his business enterprises.

FINDING

Taxpayer's protest concerning proposed assessments of the state's gross retail and use taxes, based on his theory that his companies are entitled to the public transportation exemption, is denied.

II. Tax Administration – Statute of Limitations

DISCUSSION

Taxpayer protests the Audit's Department's assessment of 10 years of tax liability.

The Department has the authority under 45 IAC 15-5-7 to "look back" more than three years for assessing tax liability under certain circumstances. Subsection (f) provides "[t]hat the running of the statute of limitations for purposes of assessing unpaid taxes will not start if the taxpayer fails to file a return which is required by any listed tax provision. Also, a substantially blank, unsigned or fraudulent return will not start the running of the statute of limitations." Taxpayer has stated that he has had operating losses for the past 6 years and that it is not fair to pick up tax liabilities so far in the past.

The Department considered taxpayer to be a "non-filer" at the time of the audit. Taxpayer has alleged he has filed Indiana income tax returns for 1996 and 1997, filed in 2000 and 2001 respectively. Indiana Code section 6-8.1-5-2 provides for a three-year statute of limitations from the latest filing date of a return, from the due date of a return, or from the end of the calendar year that contains the taxable period for which the return is filed. However, without documentary proof, i.e., copies of the income tax returns, the Department has no recourse but to pursue its statutory obligations. The profitability of a specific business—or lack thereof—is not determinative of a taxpayer's statutory duty to file Indiana tax returns**.** While the taxes at issue in this protest concern unpaid sales and use taxes, the authority behind the income tax filing requirements is crucial because the IT 20 form contains a section where taxpayers are required to self-assess use tax. Taxpayer was therefore on notice that he was required to assess use tax, and remit it to the Department, regardless of the profitability of his companies. See discussion under Method of Calculation, *infra.* Taxpayer has known since the department's June 2001 Opinion Letter that documentary proof would be required in order to successfully protest the Department's assessment of 10 years of tax liability for unpaid taxes.

FINDING

Taxpayer's protest concerning the Department's assessment of 10 years of tax liability is denied.

III. Tax Administration – Method of Calculation

Taxpayer protests the Audit Division's methodology in calculating tax liability for years where records were not available.

DISCUSSION

The methodology the Audit department used to calculate use tax liability was based on years for which records were available. Audit arrived at a separate total for each year having records, averaged that total, and used that figure for each of the tax years where records were not available. Where records were available, the actual amounts were properly assessed for those tax years. Taxpayer's major argument against this methodology appears to be that each company, for the first few years, was just getting started, and had start-up costs. That is, the companies were not profitable during the years where no records were available. Audit looks at records of actual purchases and subsequent usages of tangible personal property. If the records are not available pursuant to IC § 6-8.1-5-4, then Audit must use whatever records are available to arrive at a figure for tax years where a taxpayer has not kept the proper records. It is the taxpayer's duty to keep records of its business transactions. ("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." IC § 6-8.1-5-4(a). Profitability—or lack thereof—neither excuses taxpayer's neglect nor relieves him of the statutory duty to collect and remit gross retail and use taxes.

FINDING

Taxpayer's protest concerning Audit's methodology in calculating taxes for tax years where records had not been kept is denied.

IV. Tax Administration – Penalty

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

DISCUSSION

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

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

Taxpayer has failed to set forth a basis whereby the Department could conclude taxpayer exercised the degree of care statutorily imposed upon an ordinarily reasonable taxpayer. Although some of the questions raised by taxpayer involve technical issues of interpretation and applicability, given the totality of the circumstances, waiver of the penalty is inappropriate in this instance.

FINDING

Taxpayer's protest concerning the assessment of the 10% negligence penalty is denied.

DEPARTMENT OF STATE REVENUE

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LETTER OF FINDINGS NUMBER: 01-0276
Indiana Use Tax
For the Tax Years 1998, 1999, and 2000

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

ISSUES

I. Assessment of Use Tax on Bid Documents Acquired on Behalf of Taxpayer's Customers

Authority: 45 IAC 2.2-4-2

Taxpayer protests the imposition of use tax against its purchases of bid documents which are acquired on behalf of the tax-exempt customers of its architectural services.

II. Abatement of the Ten Percent Negligence Penalty

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

Alternatively, taxpayer has requested that the Department exercise its discretion to abate the ten percent negligence penalty on the ground that its failure to self-assess use tax was an honest mistake and that the acquisition and transfer of the documents on behalf of its clients did not result in a profit to the taxpayer.

STATEMENT OF FACTS

Taxpayer is an architectural firm conducting the majority of its business – approximately 75% – on behalf of various tax-exempt organizations such as schools. After taxpayer has completed the design and specification work for one of its customers, taxpayer works with the customer and the associated contractors to assure that the construction project is successfully completed. As part of that post-design process, taxpayer arranges with a printing company to prepare "bid documents" for the project. The "bid documents" consist of blueprints and project specifications. Typically, the printing company will prepare approximately 60 sets of these bid documents. The bid documents are then made available to companies which intend to place a bid on the construction project. These bidding companies leave a deposit with taxpayer to assure the return of the documents. After the contract has been awarded to the successful bidder, the successful bidder is entitled to make use of the blueprints and project specifications which have been returned by the unsuccessful bidders.

The printing company bills taxpayer for the bid documents. Taxpayer pays the printing company directly and then turns to the customer for reimbursement of that amount. Taxpayer does not mark up the cost of the bid documents. If taxpayer pays the printing company $1,000 for a particular project's bid documents, taxpayer seeks $1,000 reimbursement from the customer. According to taxpayer, this procedure is followed in order to assure that the printing company is promptly paid for the bid documents.

The audit determined that the taxpayer should have paid Indiana sales or use tax on the bid documents. Taxpayer protested that determination, an administrative hearing was held, and this Letter of Findings follows.

DISCUSSION

I. Assessment of Use Tax on Bid Documents Acquired on Behalf of Taxpayer's Customers

The preparation and provision of the bid documents is a necessary incident to the architectural services taxpayer provides for its customers. Under 45 IAC 2.2-4-2, taxpayer does not collect sales tax for the cost of the services it provides to its customers. However, that regulation also requires that taxpayer pay the gross retail (use) tax on the cost of the bid documents which are acquired for, and transferred on behalf of, the ultimate customer. In part, the regulation states as follows:

> Where, in conjunction with rendering professional services, personal services, or other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail unless:
>
> (1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property;
>
> (2) The tangible personal property purchased is used or consumed as a necessary incident to the service;

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

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

Taxpayer erroneously assumed that its customers' tax-exempt status carried over to the transactions between itself and the printing company. Taxpayer assumed it was exempt from paying sales tax or self-assessing use tax on the cost of acquiring the bid documents from the printing company. Nonetheless, liability for the gross retail tax accrued as a result of the transaction between taxpayer and the printing company. Taxpayer's customers stood outside that transaction rendering the customers' own tax-exempt status entirely irrelevant. Therefore, in the transactions between taxpayer and the printing company, either the printing company should have collected sales tax or the taxpayer should have self-assessed use tax. In the absence of any indication that the printing company collected the sales tax, taxpayer remains entirely liable for self-assessing the use tax.

Since the audit, taxpayer has adjusted the business arrangements between itself, its customers, and the printing company such that taxpayer presumably avoids accruing further use tax liability. With that in mind, taxpayer requests that that the Department abate the existing use tax liability – together with the accumulated interest charges – on equitable grounds. Taxpayer asserts that it never profited on the amount of reimbursement it received from its customers. According to taxpayer, it reasonably believed that it was entitled to assert its customers' tax-exempt status for the transactions it entered into with the printing company. Taxpayer further asserts that, subsequent to the audit, it has made a reasonable and good faith effort to arrange its business practices to wholly comply with the "technicalities" of the state's gross retail tax.

However well intentioned taxpayer's efforts – either before or after the audit – may have been, the Department is completely without authority to make an "equitable" adjustment of taxpayer's use tax assessment. There is nothing within the Indiana statutes or the Department's regulations which provides the Department authority to make an adjustment of a properly levied tax assessment or the interest which has accrued against that assessment. It would be both presumptuous and extra-legal for the Department to grant taxpayer's request.

FINDING

Taxpayer's protest is respectfully denied.

II. Abatement of the Ten Percent Negligence Penalty

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

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

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

Taxpayer's assertion that it was previously unaware of its responsibility to pay sales tax or to self-assess use tax upon acquisition of the bid documents, does not justify abatement of the ten percent negligence penalty. As plainly set out in 45 IAC 15-11-2(b), "Ignorance of the listed tax laws, rules and/or regulations is treated as negligence."

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

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LETTER OF FINDINGS NUMBER: 01-0297; 01-0298
Gross Retail Tax
For the Tax Years 1999 and 2000

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

ISSUES

I. Applicability of the State's Gross Retail (Sales) Tax to the Sale of Taxpayer's Coupon Books

Authority: IC 6-2.5-2-1; IC 6-2.5-4-1; IC 6-2.5-4-1(b): IC 6-2.5-4-13; IC 6-2.5-5 et seq.; Maurer v. Indiana Dept. of State Revenue, 607 N.E.2d 985 (Ind. Tax Ct. 1993); Monarch Beverage Co. v. Ind. Dept. of State Revenue, 589 N.E.2d 1209 (Ind. Tax. Ct. 1992); 45 IAC 2.2-2-2

Taxpayer argues that sales of its promotional coupon books are not subject to the state's gross retail tax.

II. Imposition of Use Tax on Taxpayer's Free Coupon Books

Authority: IC 6-2.5-3-1(a); IC 6-2.5-3-2(a); 45 IAC 2.2-3-1; 45 IAC 2.2-3-4

Taxpayer argues that the purchase price of its free coupon books is not subject to the state's use tax.

III. Prospective Treatment of Taxpayer's Cumulative Gross Retail Tax Liability

Authority: IC 6-8.1-3-3; IC 6-8.1-3-3(b); City Securities Corp. v. Dept. of State Revenue, 704 N.E.2d 1122 (Ind. Tax Ct. 1998); West Publishing Co. v. Indiana Dept. of Revenue, 524 N.E.2d 1329 (Ind. Tax Ct. 1988); 45 IAC 15-3-2(d)(1), (e); 45 IAC 15-3-2(d)(3); 45 IAC 15-3-2(e)

If the Department determines that sales of its coupon books is subject to the gross retail tax and that it should have self-assessed use tax on the price it paid for the free coupon books, taxpayer maintains that it is entitled to prospective treatment of those determinations.

STATEMENT OF FACTS

Taxpayers are two distinct corporate entities one of which is a "spin-off" of the other. The two entities were separately assessed additional sales and use tax. The two entities chose to file a joint-protest, and – for the sake of simplicity and clarity – are addressed simply as "taxpayer" within this Letter of Findings.

Coupon Books Offered For Sale: Taxpayer prints and sells books which consist entirely of promotional coupons. Taxpayer sells some of the books directly to consumers and sells some books for resale. The ultimate purchaser then uses the promotional coupons – during the term in which the coupons remain valid – to obtain merchandise at a reduced price.

Taxpayer arranges with various merchants obtaining permission to include the merchants' coupons in the coupon book. The merchants do not pay taxpayer to have their coupons included in the book. Taxpayer does not pay the merchants to secure permission to include the merchants' coupons. Rather, taxpayer obtains permission to include the merchants' coupons in the book, the merchants supply taxpayer with appropriate commercial artwork, the merchants specify the content and terms of each coupon, and taxpayer prints and binds the accumulated coupons. The "face" value of the various coupons substantially exceeds in value the amount the consumer paid to purchase the book.

The taxpayer sells the promotional books by various means. Taxpayer operates a telemarketing service; taxpayer operates kiosks in shopping malls; taxpayer has a limited number of over-the-counter sales at their main office. In addition to the direct sales, taxpayer sells the coupon books to various businesses for their own use as promotional items, incentives, and gifts. Taxpayer sells some of the coupon books to not-for-profit organizations at a discounted price. The not-for-profit organizations then sell the coupon books at their face value and retain the profit for their own purposes.

The audit determined that taxpayer's direct sales of the coupon books were transfers of tangible personal property subject to the gross retail tax. Accordingly, the audit determined that taxpayer was liable for unpaid *sales* tax.

Free Coupon Books: In addition, taxpayer – under its separate operating identity – prints and distributes free coupon books entirely distinct from the books previously described. These particular coupon books were not sold but were mailed free of charge to potential customers. Taxpayer solicited various merchants to purchase pages in the books. The merchants purchased pages in order to offer discount coupons to the ultimate recipients of the free coupon books. After taxpayer sold all the pages in its free coupon book, it arranged for the printing of the book. During the time period considered by the audit, taxpayer arranged with an out-of-state printer for the production of the free coupon books. After the out-of-state printer completed production of the free coupon books, the books were delivered to an out-of-state mailing service. The mailing service then addressed and mailed the books to targeted geographical areas within Indiana. The taxpayer did not pay sales tax on the printed material and did not self-assess Indiana use tax on the free coupon books. The audit determined that taxpayer should have self-assessed use tax on the price taxpayer paid for the free coupon books consumed within the state.

The taxpayer protested both the sales and use tax determinations, an administrative hearing was held, and this Letter of Findings follows.

DISCUSSION

I. Applicability of the State's Gross Retail (Sales) Tax to the Sale of Taxpayer's Coupon Books

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

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

IC 6-2.5-4-1 defines "retail merchants" responsible for collecting sales tax. The statute defines a "retail merchant" as follows:

(a) A person is a retail merchant making a retail transaction when he engages in selling at retail.

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

(1) acquires tangible personal property for the purpose of resale; and

(2) transfers that property to another for consideration.

It is not disputed that taxpayer arranges for the preparation, printing, and assembly of the coupon books. It is not disputed that taxpayer enters into transactions for the sale of the coupon books. However, taxpayer contends that the coupon books do not represent "tangible personal property." According to taxpayer, the coupon books represent an intangible right to acquire property and services from the participating merchants.

To that end, taxpayer argues that the coupon books are analogous to raffle tickets which the Indiana Tax Court, in Maurer v. Indiana Dept. of State Revenue, 607 N.E.2d 985 (Ind. Tax Ct. 1993), found were not subject to the state's gross retail tax. The court held that, "Raffle tickets are evidence of a right to claim a prize if a contingency occurs; they are not tangible personal property." Id. at 989.

However, taxpayer is not selling the coupon book purchasers an undifferentiated random opportunity to win merchandise. Rather, the coupon books themselves possess an inherent, assured value to the individual purchasers. For example, the purchaser acquires one of taxpayer's booklets that contains a discount restaurant coupon. The coupon allows the purchaser to obtain a meal, normally costing ten dollars, for six dollars. There is no contingency in operation to determine whether or not the coupon does or does not have value because, when the consumer purchased the coupon book, he purchased a sure and certain 40 percent – albeit discounted – share of the restaurant's ten-dollar meal. When the restaurateur charges the consumer for the ten-dollar meal, the restaurateur collects six dollars together with sales tax on that six dollars. Under taxpayer's proposed scenario, the consumer obtains 40 percent of the meal tax-free.

Alternatively, taxpayer argues that the purchase of coupon booklets is similar to the purchase of a gift certificate. When a retail gift certificate is purchased, no sales tax is assessed because the merchant receives no profit and no "retail transaction" occurs at the time the consumer acquires the gift certificate. Rather, the imposition of the tax is deferred until the time that the gift certificate is redeemed in exchange for tangible personal property because that is the point where the "retail transaction" occurs and that is the point where the merchant receives profit attributable to that transaction. However, unlike a gift certificate, no sales tax is ever imposed upon the value represented by the individual coupons. Unlike a gift certificate, there is no retail transaction subject to sales tax when the customer redeems the coupon. The customer merely receives the right to purchase an item at a discount. Sales tax is only charged on the reduced value of the item purchased.

"The essence of a sale is the transfer of title to property for consideration." Maurer 607 N.E.2d at 989. *See also* Monarch Beverage Co. v. Ind. Dept. of State Revenue, 589 N.E.2d 1209, 1213 (Ind. Tax. Ct. 1992). Plainly, taxpayer is a "retail merchant" entering into retail transactions – upon which taxpayer receives a profit – for the transfer of tangible personal property possessing an inherent and assured value. Absent any indication that the sale of the coupon books falls into any one of the exemptions under IC 6-2.5-5 et seq., sales of the coupons books are subject to the state's gross retail tax.

FINDING

Taxpayer's protest is respectfully denied.

II. Imposition of Use Tax on Taxpayer's Free Coupon Books

Taxpayer argues that the audit erred in assessing use tax on the purchase price it paid for the free coupon books consumed within Indiana.

IC 6-2.5-3-2(a) imposes "[a]n excise tax, known as the use tax... on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." *See also* 45 IAC 2.2-3-4. IC 6-2.5-3-1(a) in turn defines "use" as the "exercise of any right or power of ownership over tangible personal property." *See also* 45 IAC 2.2-3-1.

Taxpayer's acquisition of the free coupon books falls within the purview of the state's use tax scheme. Taxpayer acquired the coupon books as tangible personal property from the out-of-state printer by means of a retail transaction. Taxpayer exercised its ownership over the free coupon books on two occasions; when taxpayer directed the out-of-state printer to deliver the books to the out-of-state mailing service and when it instructed the out-of-state mailing service to then deliver the books to the ultimate Indiana recipients. The free coupon books were used or consumed within the state because the books were directed at, shipped to, and received by targeted Indiana recipients.

Accordingly, the purchase price of the free coupon books delivered to Indiana recipients was properly subject to imposition of the use tax under IC 6-2.5-3-2. That the tangible personal property at issue was prepared and shipped by out-of-state vendors is an irrelevancy under the IC 6-2.5-3-2(a).

FINDING

Taxpayer's protest is respectfully denied.

III. Prospective Treatment of Taxpayer's Cumulative Gross Retail Tax Liability

Alternative to its primary arguments, taxpayer argues that it is entitled to prospective treatment of the Department's determination that sales of the coupon books were subject to the gross retail tax and the determination that taxpayer's consumption

of the free coupon books was subject to the use tax. Taxpayer bases its argument on a letter received from the Department indicating that the sales of the coupon books were not subject to sales tax. The letter dated March 19, 1987, reads in part as follows:

> In response to your question regarding the taxability of coupon book sales, the Department finds that the coupon books are not subject to the Indiana Gross Retail sales Tax. However, when individual coupons from the coupon books are redeemed for the purchase of tangible personal property, sales tax would be collected on the transaction.

Taxpayer maintains that it operated its business in good faith and in reliance upon the correspondence received from the Department.

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

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

However, in West Publishing Co. v. Indiana Dept. of Revenue, 524 N.E.2d 1329 (Ind. Tax Ct. 1988), the tax court held that respondent Department was not estopped from assessing state income taxes based upon a letter respondent Department had previously issued to petitioner taxpayer. Id. at 1334. The West letter was prepared by respondent Department after petitioner taxpayer had replied to respondent Department's request for a detailed description of petitioner taxpayer's business activities in Indiana. Id. at 1331. Petitioner taxpayer argued that the letter, written by one of respondent Department's tax examiners, stated that petitioner taxpayer bore no state income tax liability because respondent taxpayer's activities within the state were limited to the solicitation of sales. Id. at 1333. The tax court disagreed with petitioner taxpayer's contention finding that the "letter does not purport to state that [petitioner taxpayer] bore no tax liability." Id. Instead, the tax court found that "[i]t is true that the letter *could* be read as a statement that [petitioner taxpayer] was not liable, but the mere *possibility* that the Department made such a representation is not, in this court's view, sufficient to create estoppel." Id. (*Emphasis added*).

The West letter directed to petitioner taxpayer read as follows:

> This letter is in acknowledgement of your reply to my correspondence of March 28, 1979. The information which you have submitted has proved to be a sufficient answer to the question raised in my previous correspondence. I would like to thank you for your cooperation in this matter. Id.

The tax court held that petitioner taxpayer was precluded from asserting the estoppel argument, based upon the representations contained within the ambiguous letter, because – inter alia – there was no evidence that petitioner had changed its position in reliance upon those representations. Id. at 1334.

A particular Indiana taxpayer is entitled to place its reliance upon a Department ruling "based on a particular situation which may affect the tax liability of the taxpayer...." 45 IAC 15-3-2(d)(3). The Department will issue advisory letters to individual taxpayers, some of which will be binding upon the Department and some of which will not bind the Department. 45 IAC 15-3-2(e). When an individual taxpayer directs a written inquiry to the Department, describing in full the factual circumstances surrounding a particular transaction and seeking advice as to the tax consequences of that particular transaction, then "[a]ll such rulings issued will be binding provided that all of the facts described in obtaining the ruling are true and accurate. Any misstatement of material fact or information will void the ruling." Id.

Taxpayer's March 19, 1987, Department letter is not analogous to the enigmatic West letter petitioner taxpayer had received from the Department and more closely resembles a written ruling described in 45 IAC 15-3-2(e). Unlike petitioner taxpayer's letter in West, taxpayer's 1987 letter clearly indicated that the Department had considered the nature and object of the tax. Unlike petitioner taxpayer's letter in West, taxpayer's 1987 letter, specifically indicated that taxpayer was *not* subject to the tax. Unlike petitioner taxpayer's letter in West, taxpayer's letter indicated that taxpayer directed a particularized question to the Department seeking advice concerning the taxability of a specific transaction – taxpayer's sales of its coupon books.

Based upon the information now available, the Department concludes that taxpayer's 1987 letter was the result of a specific inquiry, in which taxpayer sought advice as to the tax consequences of a particular transaction. 45 IAC 15-3-2(e). Therefore, taxpayer's March 19, 1987 letter has all the indicia of a written ruling as described in 45 IAC 15-3-2(d)(1), (e), upon which taxpayer was similarly entitled to place its reliance. Because there is no indication that the circumstances surrounding nature or sale of taxpayer's coupon books have changed since 1987, that the facts taxpayer presented to the Department were inaccurate, or that taxpayer in any way misstated the material facts surrounding the coupon book sales, taxpayer could reasonably have expected that the 1987 letter would bind the Department until the Department made a specific determination to the contrary. *See* Id.

Accordingly, for purposes of the assessment of the gross retail tax on the *sales* of its coupon books, taxpayer is in the same

position as petitioner taxpayer in City Securities and is entitled to prospective treatment of the determination that sales of the coupon books are subject to the state's gross retail tax. The Department, in language subject to no ambiguity, gave notice to the taxpayer that its coupon books sales fell outside the purview of the tax. There is no evidence that, prior to the audit here at issue, taxpayer was given any notice of a change in the Department's position. There is no evidence that the taxpayer operated in other than good faith in continuing to rely on the Department's position as set out in the 1987 letter. There is no indication that factual setting surrounding the sale of the coupon books has in any way altered during the intervening years.

Therefore – based upon the Department's long acquiescence to the conclusions set out in the 1987 letter and the taxpayer's continued reliance on that same letter – for purposes of the gross retail tax assessment made against the *sales* of its coupon books, taxpayer is entitled to the same treatment afforded petitioner taxpayer in City Securities when the court stated that, "beginning with the first full tax year after the issuance of this opinion, [taxpayer] is considered to have notice of the Department change in policy." City Securities 704 N.E.2d at 1129. In taxpayer's own particular circumstances, taxpayer is considered to have received "notice" of the Department's "change in policy" during June of 2001 – the point at which the original audit report was completed.

However, taxpayer is not entitled to similar prospective treatment on the *use* tax assessment made against the consumption of the free coupon books within the state. The 1987 Department letter is straightforward; "In response to your question regarding the taxability of coupon book *sales*, the Department finds that the coupon books are not subject to the Indiana Gross Retail *Sales* tax." (*Emphasis added*). Although the taxpayer may have had a good faith belief that the determination contained within the 1987 letter could be applied to resolve use tax issues, it was plainly not entitled to do so. The facts surrounding the preparation and ultimate sales of its coupon books were distinct from the circumstances surrounding the acquisition of the free coupon books intended for consumption within the state. For purposes of determining its *use* tax liability, the 1987 letter was not a written ruling upon which the taxpayer was entitled to place its reliance or a written ruling which in any way bound the Department. *See* 45 IAC 15-3-2(e). Accordingly, taxpayer was not entitled to conclude that it could acquire coupon books destined for free distribution (consumption) within the state without self-assessing use tax.

FINDING

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

DEPARTMENT OF STATE REVENUE

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LETTER OF FINDINGS NUMBER: 02-0076P
Sales Tax
For October 1998

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

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

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

I. Tax Administration – Penalty

DISCUSSION

Taxpayer was assessed a ten percent (10%) penalty because it paid its tax after the due date.

Taxpayer states it took over a bad situation, cleaned it up, and has cooperated with the state of Indiana in all subsequent requests. Taxpayer has also complied fully in the past three years.

Taxpayer has not provided reasonable cause to allow a waiver of the penalty assessed. Payment was made late.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020094.LOF

LETTER OF FINDINGS NUMBER: 02-0094
Gross, Adjusted Gross and
Supplemental Net Income Tax
For the Years 1996 through 1999

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

ISSUES

I. Income Tax – Unrelated Business Income Tax

Authority: IC § 6-8.1-3-1(a); IC § 6-8.1-1-1; IC § 6-8.1-5-1(a); IC § 6-8.1-5-1(b); 45 IAC 15-2-1; 45 IAC 15-5-1

Taxpayer protests the Department's assessment of Gross, Adjusted gross, and Supplemental Net Income Tax.

II. Tax Administration – Penalty

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

STATEMENT OF FACTS

Taxpayer was incorporated as a not-for-profit entity on January 19, 1962. Taxpayer received a Federal determination letter from the IRS granting it tax exempt status on September 29, 1969 and again on January 17, 2002. The taxpayer never received tax exempt status from the Department. The taxpayer was created to own real property because the parent organization by-laws do not allow it to own real property. The Department conducted an audit investigation and discovered that the taxpayer held title to the property used by the parent organization, operated the bar with alcohol and food sales, conducted pulltab and punchboard games, and maintained slot machines for use by the parent organization members and their guests. The slot machines viewed by the Department's auditor were cherry masters that dispense five dollar ($5) winning tickets and the video poker machines pay ten dollars ($10) for every 200 points. According to the Department's auditor, the bartender pays the winning tickets. The auditor also stated in his report that the taxpayer is not tracking slot machine income and in two instances the bartenders pay has come out of the bingo account.

I. Income Tax – Unrelated Business Income Tax

DISCUSSION

Taxpayer, a not-for-profit corporation, received its Federal tax exemption in 1969. However, the taxpayer did not apply for State tax exemption. The taxpayer is also not a qualified organization for charity gaming purposes. Therefore, the income generated from selling pulltabs and punchboards is subject to gross income tax at the high rate. The Department calculated the gross receipts from these games and subtracted the manufacturer's listed pay outs to determine the gross income subject to taxation. The illegal revenue from slot machines was also taxed at the high rate. The taxpayer's income from gaming activities for the years 1996 and 1997 was subjected to gross income tax. For the years 1998 and 1999, the taxpayer's income is subject to adjusted gross income tax. The audit allowed a deduction for the expense of pulltab and tipboard games as determined by the invoices provided by the taxpayer. Other expenses allowed as deductions have been taken from the parent organization federal form 990EZ. The taxpayer and the parent organization filed a 990EZ and combined their records in order to complete the returns. The Department informed the taxpayer that the entities are two separate organizations and they must file separate returns. The taxpayer was also subjected to supplemental net income tax.

Pursuant to IC § 6-8.1-3-1(a), the Department "has the primary responsibility for the administration, collection, and enforcement of the listed taxes," including "the state gross retail and use taxes." (IC § 6-8.1-1-1). Under 45 IAC 15-2-1, the Department was established for the purpose of administering, collecting and enforcing all taxes placed under its authority." Pursuant to IC § 6-8.1-5-1(a), the Department "shall make a proposed assessment of the amount of the unpaid tax" when an audit reveals discovers a failure to collect and remit the tax. *See also*, 45 IAC 15-5-1. Under IC § 6-8.1-5-1(b), the "notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with" taxpayer.

The taxpayer has not met his burden of proof in this matter. Taxpayer did not receive tax exempt status from the Department as a not-for-profit; therefore, taxpayer is taxable as a regular corporation.

FINDING

Taxpayer's protest is denied.

II. Tax Administration – Penalty

DISCUSSION

The taxpayer protests the imposition of the ten percent (10%) negligence penalty. Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. IC 6-8.1-10. The Indiana Administrative Code at 45 IAC 15-11-2 provides in pertinent part:

(b) "Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would

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

(c) The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 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. Factors which may be considered in determining reasonable cause include, but are not limited to:

(1) the nature of the tax involved;

(2) judicial precedents set by Indiana courts;

(3) judicial precedents established in jurisdictions outside Indiana;

(4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;

(5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case. In this instance taxpayer was negligent in its failure to apply for State tax exempt status and its use of illegal gambling machines and the failure to pay taxes on the receipt of the illegal income is sufficient grounds upon which to impose the negligence penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020131P.LOF

LETTER OF FINDINGS NUMBER: 02-0131P
Income Tax
Calendar Years 1997, 1998, and 1999

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

ISSUE

I. Tax Administration – Penalty

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

The taxpayer protests the negligence penalty.

STATEMENT OF FACTS

The negligence penalty was assessed on an income tax assessment that resulted from a Department audit conducted for the calendar years 1997, 1998, & 1999.

The taxpayer is an international freight forwarder which arranges the movement of goods from one location to another. The office in Indianapolis employs five people who arrange to expedite shipments. The company has offices in Indiana and 28 other states. The taxpayer also has offices internationally in Canada, Argentina, and El Salvador.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer argues the negligence penalty should be waived as the error was the result of an unintentional computer math error.

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

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

FINDING

The taxpayer's penalty protest is denied.

DEPARTMENT OF STATE REVENUE

0320020135P.LOF
0320020136P.LOF

LETTER OF FINDINGS NUMBER: 02-0135P and 02-0136P
Withholding and Sales Taxes
Month Ending 08/31/01

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer was assessed a late payment penalty (ST-103 and WH-1) for the month of August 2001. In a letter dated January 21, 2002, taxpayer requests a waiver due to the events that occurred September 11, 2001. Taxpayer states that regular operations in its office were disrupted in many ways and once it realized that taxes were not remitted, payment was made immediately on October 9, 2001.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer failed to timely remit its withholding and sales tax for the month of August 2001. Taxpayer further states that operations were disrupted due to the events that occurred on September 11, 2001.

Taxpayer's failure to remit the tax timely was not the result of reasonable cause. Taxpayer has offered no explanation for the late payment other than to say that "[r]egular operations at our office were disrupted in many ways, as was more to rule than the exception in many businesses." While the statement may indeed be true, the substantial majority of business taxpayers submitted their payments in a timely manner. Taxpayer has failed to substantiate a reason for a waiver of the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020138P.LOF

LETTER OF FINDINGS NUMBER: 02-0138P
Use Tax
For the Period August 1, 1998 through May 31, 2001

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

II. Tax Administration – Interest

Authority: IC 6-8.1-10.1

Taxpayer protests the interest assessed.

STATEMENT OF FACTS

Taxpayer was converted to an insurance company that dealt solely with the federal government in 1998. Purchases of equipment and supplies at that time were thought to be nontaxable based upon the exemption for purchases made for the federal government. Subsequent to that erroneous decision, taxpayer states it recalculated its liability and registered with the Indiana Department of Revenue to self assess the tax and remit it voluntarily. Taxpayer requests abatement of the penalty based upon coming forward and correcting its error.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it misinterpreted the state regulations but feels that by coming forward and correcting its error, the penalty and interest should be abated.

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

Taxpayer failed to file sales tax returns for the period August 1998 through May 31, 2001 timely and has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

II. Tax Administration – Interest

DISCUSSION

Taxpayer protests the interest assessed, however, the Department has no authority to waive interest.

FINDING

Taxpayer's protest is denied.

CONCLUSION

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

DEPARTMENT OF STATE REVENUE

0220020145P.LOF

LETTER OF FINDINGS NUMBER: 02-0145P
Adjusted Gross Income Tax
For the Year Ended December 31, 2000

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

II. Tax Administration – Interest

Authority: IC 6-8.1-10.1

Taxpayer protests the interest assessed.

STATEMENT OF FACTS

Taxpayer filed its return late and was assessed a penalty. Taxpayer's tax liability was $13,880.00 that it remitted after the due date. Taxpayer filed an extension; however, an extension to file is not an extension for payment.

Taxpayer's representative filed a penalty protest dated February 22, 2002 indicating it paid all Indiana tax timely, on a consolidated basis, for the year 2000. Taxpayer's representative states that prior to tax year 2000, all income derived from Indiana sources was included in another wholly owned subsidiary of the taxpayer. As a result of its mid-year restructuring, the exact income was not determined until early 2001.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it paid no estimated taxes for the entity at issues. Taxpayer states that within the consolidated group, however, Indiana taxes were overpaid at the time of the original due date of the returns.

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

Taxpayer did not attempt to remit tax timely for the corporation at issue. The overpayment of a related corporation cannot be carried over to the taxpayer at issue. Taxpayer failed to remit its tax timely and has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

II. Tax Administration – Interest

DISCUSSION

Taxpayer protests the interest assessed.

The Department has no authority to waive interest.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020146P.LOF

LETTER OF FINDINGS NUMBER: 02-0146P
Sales Tax
For August and September 2001

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer paid its August and September 2001 sales tax late and was assessed a late payment penalty.

Taxpayer's representative, in a letter dated February 18, 2002 requests that the department waive the late payment penalty due to an oversight which was not intentional. Taxpayer began business in July and other forms were due at months' end instead of the 20th. Although that date is on the form, taxpayer requests waiver of the penalty.

I. Tax Administration – Penalty

DISCUSSION

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

Taxpayer, in a letter dated February 18, 2002 protested penalties assessed and states it did not make the late payments intentionally but was due to an oversight.

Taxpayer has not provided reasonable cause to allow a waiver of the penalty assessed. Taxpayer should have made itself aware of tax deadlines.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020148P.LOF

LETTER OF FINDINGS NUMBER: 02-0148P
Corporate Income Tax
For the Fiscal Years Ending July 31, 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 the date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Tax Administration – Penalty

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

The taxpayer protests the penalty assessed.

STATEMENT OF FACTS

The taxpayer is a wholly owned subsidiary of a company that produces aerial work platforms and material handling equipment. The taxpayer provides after-sales service and support including sales of replacement parts, equipment leases, training, and used equipment sales and reconditioning. The taxpayer was audited by the department; the audit resulted in an assessment of additional gross income tax and penalty.

In a letter dated November 14, 2001, the taxpayer conceded its liability for the additional tax but protested the imposition of penalty. The taxpayer asserted that at the time of filing its income tax returns, it was not aware of the relevant provisions of the Indiana tax law.

DISCUSSION

For gross income tax purposes, the taxpayer originally reported income from leased property and commissions at the lower rate of tax. The audit properly reclassified these sources of income to the higher rate of tax. This reclassification constitutes the bulk of the audit assessment.

Administrative Rule 45 IAC 15-11-2 (b) states the following:

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

Clearly, the taxpayer's assertion that, "The company (taxpayer) inadvertently classified the income at the lower rate of tax, not being aware of the provision of the tax code at the time of filing," indicates ignorance of the listed tax laws. The taxpayer has not established that its failure to timely pay the full amount of tax due was due to reasonable cause and not due to negligence.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020167P.LOF

LETTER OF FINDINGS NUMBER: 02-0167P
Sales and Use Taxes
For Calendar Years 1998, 1999, and 2000

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

II. Tax Administration – Interest

Authority: IC 6-8.1-10.1

Taxpayer protests the interest assessed.

STATEMENT OF FACTS

Taxpayer is a contractor of tile flooring, installs carpets, and makes retail sales. Audit determined that the taxpayer had no use tax accrual system in place and failed to pay tax on clearly taxable items such as gas for forklifts, janitorial supplies, office supplies, rental of floor machine, tools, and other miscellaneous items.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it misinterpreted the state regulations, which was unintentional.

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

Taxpayer failed to self-assess use tax on clearly taxable items and had no use tax accrual system in place. Taxpayer has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

II. Tax Administration – Interest

DISCUSSION

Taxpayer protests the interest assessed, however, the Department has no authority to waive interest.

FINDING

Taxpayer's protest is denied.

CONCLUSION

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

DEPARTMENT OF STATE REVENUE

0220020171P.LOF

LETTER OF FINDINGS NUMBER: 02-0171P
Corporate Income Tax
For Calendar Year 1999

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

ISSUE

I. Tax Administration – Penalty

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

The taxpayer protests the penalty assessed.

STATEMENT OF FACTS

The taxpayer filed its Indiana income tax return with remittance after the due date and was assessed a late payment penalty. During the tax year, the taxpayer only paid 11% of its total tax liability through estimated payments.

The taxpayer filed a letter of protest and a letter of supplemental information requesting that the penalty be waived. The taxpayer stated that during 1999 it underwent a significant reorganization involving several acquisitions and mergers. Additionally, during the reorganization the sole person responsible for tax reporting terminated employment with the taxpayer.

According to the taxpayer, upon realizing that its Indiana income tax return was due, it promptly completed the return and paid the tax due. The taxpayer states that there was no willful noncompliance with the laws of Indiana.

DISCUSSION

Administrative Rule 45 IAC 15-11-2 (b) states the following:

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

The taxpayer is advised that the penalty being imposed is not for willful noncompliance with the law (fraud) but for negligence.[1] The Department acknowledges the confusion created by corporate reorganization and the loss of vital personnel. However, the possibility of such events should have been anticipated by the taxpayer; procedures should have been in place to assure that tax obligations were timely paid. The taxpayer has not established that its failure to timely pay the full amount of tax due was due to reasonable cause and not due to negligence.

FINDING

The taxpayer's protest is denied.

[1] The statutory imposition of the penalty for fraud may be found at IC 6-8.1-10-4.

DEPARTMENT OF STATE REVENUE

0420020191P.LOF

LETTER OF FINDINGS NUMBER: 02-0191P
Sales Tax
Calendar Years 1998, 1999, & 2000

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

ISSUE

I. Tax Administration – Penalty

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

The taxpayer protests the negligence penalty.

STATEMENT OF FACTS

The negligence penalty was assessed on a sales tax assessment resulting from a Department audit conducted for the calendar years 1998, 1999, & 2000.

The taxpayer manufactures, packages and sells a wide range of pet animal foods and supplies. The taxpayer has several manufacturing and warehouse facilities with some of them being located within Indiana. The taxpayer's commercial domicile is out-of-state.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer argues the penalty should be waived as the error was the result of an oversight in the self assessment of use tax.

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

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

FINDINGS

The taxpayer's penalty protest is denied.

DEPARTMENT OF STATE REVENUE

0220020192P.LOF

LETTER OF FINDINGS NUMBER: 02-0192P
Income Tax
Calendar Year 1997, and Partial Years Ending June 5, 1998, July 31, 1998, and December 16, 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 assessment that resulted from a Department audit conducted for the calendar year 1997, and partial years ending June 5, 1998, July 31, 1998, and December 16, 1998.

The taxpayer owns real estate and is the contractual entity of rights of way, easements, real property leases, and hardware and software purchases. The taxpayer was merged into its parent on December 16, 1998. The parent is a telecom company which provides local, interstate, and international voice and data communication services to business and residential customers. The taxpayer has a sales office in Indianapolis, Indiana.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer argues the negligence penalty should be waived as the error was the result of an unintentional error. The error occurred when the tax duties were neglected as a result of the tax duties being transferred from one corporate entity to another corporate entity.

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

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

FINDING

The taxpayer's penalty protest is denied.

DEPARTMENT OF STATE REVENUE

0220020196P.LOF

LETTER OF FINDINGS NUMBER: 02-0196P
Gross Income Tax
For the Year Ended September 30, 1999

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

II. Tax Administration – Interest

Authority: IC 6-8.1-10.1

Taxpayer protests the interest assessed.

STATEMENT OF FACTS

Taxpayer filed its return late and was assessed a penalty. Taxpayer's tax liability was $6,346.00 that it remitted after the due date. An extension to file is not an extension for payment and the taxpayer was assessed a late payment penalty.

Taxpayer's representative filed a penalty protest letter dated August 22, 2001 indicating it was not aware that it owed tax prior to receiving an invoice in August 2001 and it paid the amount due. On March 20, 2002, taxpayer's representative provided additional arguments and states that it was in the midst of moving its corporate offices and many of the individuals responsible for the accounting functions had to be replaced. At the same time, the taxpayer's corporate structure was being re-evaluated and subsequent mergers and acquisitions took place that affected the timely filing of the various state tax returns. Taxpayer states it voluntarily prepared and filed its Indiana tax return and paid the corresponding balance of tax due and there was no willful neglect in the filing of its return.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it voluntarily prepared and filed its Indiana tax return and paid the balance of tax due. Taxpayer requests a penalty waiver because it was in the process of moving its offices from one state to another.

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

Taxpayer failed to remit its tax timely and has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

II. Tax Administration – Interest

DISCUSSION

Taxpayer protests the interest, as the first notice of assessed penalties was not issued until more than a year later on August 1, 2001.

Taxpayer had use of the money until date of payment. Payment is first applied to penalties, interest, and then tax. Interest continues to accrue until payment in full has been received. Taxpayer had use of the tax monies after the due date.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020200P.LOF

LETTER OF FINDINGS NUMBER: 02-0200P
Gross and Adjusted Gross Income Tax
For the Year Ended December 31, 2000

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

II. Tax Administration – Interest

Authority: IC 6-8.1-10.1

Taxpayer protests the interest assessed.

STATEMENT OF FACTS

Taxpayer filed its return late and was assessed a penalty. Taxpayer's tax liability was $5,331 that it remitted after the due date along with $187 in interest. An extension to file is not an extension for payment and the taxpayer was assessed a late payment penalty.

Taxpayer filed a penalty and interest protest dated February 8, 2002 stating that it made a payment of penalties and interest for 1999 and submitted its 2000 return with $187 interest as well. Taxpayer states it made these payments in order to bring its account up to date, unaware of additional amounts being assessed. It has put in place the proper measures to avoid the event from happening again and requests a waiver of penalties and interest assessed.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it paid penalties and interest for 1999 and submitted its 2000 return with $187 interest to bring its account up to date.

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

Taxpayer failed to remit its tax timely and has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

II. Tax Administration – Interest

DISCUSSION

Taxpayer protests the additional interest assessed.

Payment is first applied to penalties, interest, and then tax. Interest continues to accrue until payment in full has been received. The Department has no statutory authority to waive interest.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020206P.LOF

LETTER OF FINDINGS NUMBER: 02-0206P
Adjusted Gross Income Tax Penalty
Calendar Year 2000

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer protests the penalty assessed.

I. Tax Administration – Penalty

DISCUSSION

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

Taxpayer and its representative have sent several protest letters to the department. In a letter dated August 29, 2000, the taxpayer's CPA states that the penalty was incorrectly charged as IC 6-8.1-10-2.1 allows waiver if at least 25% of the final income tax liability for the previous tax year was remitted quarterly. On April 2, 2002 and April 23, 2002 the taxpayer requested a penalty waiver because it was a good corporate citizen and it has made good faith efforts to estimate its tax liability. Taxpayer states its estimated tax payments were $140,000 higher than in the previous year, and in the year 2000, it overpaid its estimated taxes in excess of $350,000. Taxpayer requests the penalty be considered for abatement.

Taxpayer was several months late in paying all of its tax liability. Approximately twenty two percent (21.5%) of the tax due was not paid until after the original due date of the tax return. An extension to file is not an extension for payment and taxpayer has not provided reasonable cause to allow a waiver of the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020207P.LOF

LETTER OF FINDINGS NUMBER: 02-0207P
Sales Tax
For December 2001 and January 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 the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer paid its December 2001 and January 2002 sales tax late and was assessed a late payment penalty.

Taxpayer paid its December tax on January 23, 2002 and its January 2002 tax on February 21, 2002.

Taxpayer, in a letter dated April 23, 2002 requests that the department waive the late payment penalties because it believed the tax to be due on the 22nd of each month based upon a quarterly voucher that shows a due date of April 22, 2002.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer was assessed a ten percent (10%) penalty because it paid its tax after the due date of the return for December 2001 and January 2002.

Taxpayer, in a letter dated April 23, 2002 protested penalties assessed and states it was unaware that payment was due on the 20th of each month.

Taxpayer has the due dates clearly printed on its vouchers and has not provided reasonable cause to allow a waiver of the penalty assessed.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020208P.LOF

LETTER OF FINDINGS NUMBER: 02-0208P
Sales Tax
For July, August, and September 2001

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer paid its July, August, and September 2001 sales tax late and was assessed a late payment penalty.

Taxpayer's representative, in a letter dated December 20, 2001 requests that the department waive the late payment penalty due to an oversight which was not intentional. Taxpayer's representative states that she started with the Tax Service in June 2001 and was not aware that the taxpayer was an early filer.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer was assessed a ten percent (10%) penalty because it paid its tax after the due date of the return for July, August, and September 2001.

Taxpayer's representative, in a letter dated December 20, 2001, protests the penalties assessed and states it did not make the late payments intentionally and should have been notified by the taxpayer of the due date.

Taxpayer's representative has not provided reasonable cause to allow a waiver of the penalty assessed. The representative should have made itself aware of tax deadlines that are clearly shown on the ST-103.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120020209P.LOF

LETTER OF FINDINGS NUMBER: 02-0209P
Individual Income Tax
Calendar Year 2000

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalties assessed.

STATEMENT OF FACTS

Taxpayer, in a letter dated January 16, 2002 requests an abatement of the penalty. Taxpayer was assessed a late filing penalty and a penalty for the underpayment of estimated taxes.

Taxpayer filed its return with a tax balance due of $1,460.13 or one hundred percent (100%) of the total tax and failed to remit payment. Taxpayer also failed to pay estimated income taxes and was assessed a penalty. Taxpayer requests the department abate the penalty because he would be paying the penalty twice.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer states that it does not agree with the assessment for three reasons. He has already paid a ten-percent penalty in December 2001; he was not employed in the State of Indiana; and instructions (both in the IT-40 booklet, and the Indiana Code) state you "should pay estimated tax" and not "shall".

Taxpayer remitted $1,523.27 postmarked November 23, 2001 that carries a late payment penalty. In addition, taxpayer failed to make estimated tax payments when the amount is in excess of $400 a year.

IC 6-8.1-10-2.1 states that a person is subject to a penalty if he "fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment.

IC 6-3-4-4.1(c) states that "In the case of an underpayment of the estimated tax as provided in Section 6654 of the Internal Revenue Code, there shall be added to the tax a penalty in an amount prescribed by IC 6-8.1-10-2.10(b)".

Taxpayer has not proved reasonable cause; therefore, the Department finds the penalties appropriate.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020210P.LOF

LETTER OF FINDINGS NUMBER: 02-0210P
Use Tax
Calendar Years 1998, 1999, and 2000

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer is the operating company for two hotels in Indiana and has interest in hotels located out of state.

At audit, it was determined that the taxpayer failed to self assess and remit use tax for clearly taxable items such as office supplies, billboards, carpets, publications, consumable supplies, and other miscellaneous items.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that the underpayment was minor as to the amount of use tax paid. However, taxpayer failed to self assess use tax on more than ninety percent (90%) of its purchases subject to use tax in all years of the audit.

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

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

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020212P.LOF

LETTER OF FINDINGS NUMBER: 02-0212P
Sales and Use Taxes
Calendar Years 1998, 1999, and 2000

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer sells petroleum equipment to construction contractors, retail petroleum industries, transportation companies, and to other retailers and service providers. Taxpayer also provides repair services to gas stations on petroleum equipment.

At audit, it was determined that the taxpayer failed to charge tax on all of its cash sales. Cash sales were examined for the months of March and April 2000. Taxable sales on which no sales tax was charged was used for projecting additional cash taxable sales to the remainder of 2000, 1998, and 1999. In addition, sales tax registers were reviewed for each month of the audit period. Major discrepancies were noted. Tax collected was underreported for January through April 1999 and tax collected was over reported for May through December 1999. Tax collected was underreported for April and August 2000 and over reported for January through March, June, July, and September through December 2000. In addition, taxpayer had unsupported exempt sales. Exempt sales were examined for the months of March and April of 2000 for which no exemption certificates were on file. Taxpayer also made purchases of office supplies, shipping supplies, space rental, subscriptions, furniture, computer equipment, and other miscellaneous items.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that audits in previous years have resulted in very little additional tax being due. Taxpayer further states that the additional tax resulted from its previous controller who was lax in enforcing the systems that have been in place for several years.

Taxpayer remitted less than seventy percent (70%) of its use tax due in all years at audit. Although the percentage of sales tax not remitted amounted to less than three percent (3%) of its total, taxpayer should have had controls in place to assure that sales tax was collected and remitted on all taxable sales. More than fourteen thousand dollars ($14,000) in sales tax was not collected nor remitted. No penalty was assessed for the use tax in the year 2000 because the taxpayer received a refund for sales tax.

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

Taxpayer failed to self assess and remit use tax on more than thirty percent (30%) of its untaxed purchases and failed to have procedures in place to assure that sales tax was collected and remitted on its taxable sales. Taxpayer has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0320020214P.LOF

LETTER OF FINDINGS NUMBER: 02-0214P
Withholding and Sales Taxes
Month Ending 12/31/01

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

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer was assessed a late payment penalty for the month of December 2001. In a letter dated March 12, 2002, taxpayer requests a waiver because all of the information necessary to complete the W-2's was not available until almost the end of January 2002. Its plan was to get everything balanced before making the deposit. These facts coupled with the illness of the accounting person who handles the deposits, at the time the deposit was due, contributed to the late payment of the tax. Taxpayer states that it immediately remitted the tax upon discovery of the oversight.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer failed to timely remit its withholding tax for the month of December 2001. Taxpayer states that all of the information necessary to complete the W-2's was not available until almost the end of January and the person responsible for making the deposits was ill.

Taxpayer's failure to remit the tax timely was not the result of reasonable cause. Taxpayer should have had procedures in place to assure that taxes are timely paid when an employee is ill. Taxpayer has failed to substantiate a reason for a waiver of the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020230P.LOF

LETTER OF FINDINGS NUMBER: 02-0230P
Use Tax
Calendar Years 1999 and 2000

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer is a partnership that owns a hotel in Indiana.

At audit, it was determined that the taxpayer failed to self assess and remit use tax for clearly taxable items such as shrubbery, fireplace screens, towel holders, shower seats, telephone system materials, pool chemicals, televisions, and other miscellaneous items. The auditor allowed a tax credit for items for which the taxpayer erroneously paid sales tax.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that over the nine months of construction, hundreds of invoices were paid and the sales tax was properly included and, as noted by the audit results, very few invoices are included that failed to properly pay sales tax. Taxpayer states it was not negligent, and to the contrary took reasonable means to properly pay and remit sales tax.

Taxpayer remitted no use tax for 1999 and approximately five percent (5%) in the year 2000. One of the partners is a CPA actively involved with the company who should have been aware of the State's Use Tax laws.

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

Taxpayer failed to self assess and remit use tax on more than ninety five percent (95%) of its untaxed purchases and has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0320020231P.LOF

LETTER OF FINDINGS NUMBER: 02-0231P
Withholding Tax
January 2001 through March 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 the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

II. Tax Administration – Interest

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

Taxpayer protests the interest assessed.

STATEMENT OF FACTS

Taxpayer was assessed late filing penalties. In a letter dated April 22, 2002, taxpayer requests the department waive the penalties and interest assessed against it.

Taxpayer states its delinquent payment of withholding taxes arose from a previous Senior Controller's failure to inform the payroll department of the change in payment status. The company's payroll coordinator received a new coupon book for 2001 stating that the company should file quarterly instead of monthly like it had done in the past. Taxes were remitted quarterly as stated on the coupon.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer states that it filed the returns quarterly as shown on Form WH-1 timely. Taxpayer states that it was unaware that the returns were not filed properly.

On July 31, 2000, a letter advised the taxpayer that payments are still due each month and the due date stays the same. However, monthly returns need not be filed. Instead, a quarterly recap form must be filed. The EFT authorization further states that any monthly coupons should be discarded and the taxpayer must not file monthly returns after beginning to remit by EFT. In addition, the payment booklet clearly states that payments must be made monthly.

Taxpayer mailed checks quarterly instead of utilizing the ACH Debit method as required. Taxpayer received notice from the Department explaining the method of payment.

Taxpayer's failure to remit the tax was not the result of reasonable cause. Taxpayer should have been aware of its filing status.

FINDING

Taxpayer's protest is denied.

II. Tax Administration – Interest

DISCUSSION

Taxpayer requests that the department waive the interest assessed.

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

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020232P.LOF

LETTER OF FINDINGS NUMBER: 02-0232P
Use Tax
Calendar Years 1998, 1999, and 2000

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of

publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

At audit, it was determined that the taxpayer failed to self assess and remit use tax for clearly taxable items. In 1998 it self-assessed and remitted eighty-five percent (85%), in 1999 seventy-one percent (71%), and in 2000 eighty-seven percent (87%) of use tax due.

Taxpayer failed to self assess use tax for clearly taxable items such as capital assets, repair parts for equipment, office supplies, uniforms, signs, and other miscellaneous items.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that its vendors are required to charge tax or its branches are required to self–assess use tax. However, this is a manual procedure and a continuous process of training its accounts payable employees. Through the volume of detail, errors occur. Taxpayer further states that one of its branches significantly overpaid the use tax. Taxpayer totally disagrees with the penalty assessment as it makes every attempt to process taxes in an accurate and timely manner and no other state has ever assessed it a penalty.

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

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

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020254P.LOF

LETTER OF FINDINGS NUMBER: 02-0254P
Gross Income Tax
For the Fiscal Year Ended February 28, 2001

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer filed its return late and was assessed a penalty. Taxpayer's tax balance due was $280,392.84 that it remitted after the due date. Payment was made on November 15, 2001. An extension to file is not an extension for payment and the taxpayer was assessed a late payment penalty.

Taxpayer filed a penalty protest letter dated April 18, 2002 stating it filed the Indiana Income Tax return timely with the automatic federal extension until November 15, 2001. Taxpayer states it paid the estimated taxes in full and in a timely manner.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it timely filed and paid one hundred percent of the prior year's tax liability in a timely manner.

IC 6-8.1-6-1 (a) states that "if a person responsible for filing a tax return is unable to file the return by the appropriate due date, he may petition the department, before that due date, for a filing extension. The person must include with the petition a payment of at least ninety percent (90%) of the tax that is reasonably expected to be due on the due date. When the department receives the petition and the payment, the department shall grant the person a sixty (60-day) extension.

IC 6-8.1-6-1 (c) states that "the person must pay at least ninety percent (90%) of the Indiana income tax that is reasonably expected to be due on the original due date by that due date, or he may be subject to the penalties imposed for failure to pay the tax."

IC 6-8.1-10-2.1 (a) provides for a penalty if a person "fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment"

Taxpayer paid $280,392.84 after the due date. Taxpayer states that it paid one hundred percent of the prior year's tax liability in a timely manner. This is true under IC 6-3-3-3.1 (e) and the Department did not assess a penalty for the underpayment of estimated taxes. The Department assessed a late payment of taxes.

Taxpayer failed to remit ninety percent of its tax due by the original due date of the return, i.e. June 15, 2002 and has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.