STATE BOARD OF ACCOUNTS

June 30, 2002

Under IC 4-22-7-7, the State Board of Accounts publishes notice of the following publications used to interpret, supplement, or implement agency statutes or rules:

(1) Accounting and Uniform Compliance Guidelines Manual for Cities and Towns.
(2) Accounting and Uniform Compliance Guidelines Manual for City and Town Courts.
(3) Accounting and Uniform Compliance Guidelines Manual for Special Districts.
(4) The Cities and Towns Bulletin and Uniform Compliance Guidelines.
(5) Accounting and Uniform Compliance Guidelines Manual for County Treasurers of Indiana.
(6) Accounting and Uniform Compliance Guidelines Manual for County Auditors of Indiana.
(7) Accounting and Uniform Compliance Guidelines Manual for County Recorders.
(8) Accounting and Uniform Compliance Guidelines Manual for Clerks of the Circuit Courts of Indiana.
(9) The County Bulletin and Uniform Compliance Guidelines.
(10) Accounting and Uniform Compliance Guidelines Manual for Indiana Public School Corporations.
(11) Accounting and Uniform Compliance Guidelines Manual for Extra-Curricular Accounts.
(12) The School Administrator and Uniform Compliance Guidelines.
(13) Accounting and Uniform Compliance Guidelines Manual for Township Trustees.
(14) The Township Trustees' Bulletin and Uniform Compliance Guidelines.
(15) Accounting and Uniform Compliance Guidelines Manual for Libraries.
(16) Accounting and Uniform Compliance Guidelines Manual for County and City Hospitals.
(17) Accounting and Uniform Compliance Guidelines Manual for State Agencies.
(18) Uniform Compliance Guidelines for Examination of Entities Receiving Financial Assistance from Governmental sources.
(19) Guidelines for Audits of County and City Hospitals By Independent Certified Public Accounting Firms.

INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

Title: Guidelines for Submittal and Review of Annual Compliance Certifications under the Federally Enforceable State Operating Permit (FESOP) and Part 70 Permit Programs
Identification Number: AIR 007 NPD
Date Originally Effective: March 6, 1997
Dates Revised: September 6, 2002
Other Policies Repealed or Amended: None
Brief Description of Subject Matter: Guidelines for IDEM and FESOP and Part 70 permittees for the annual compliance certification submittal and review requirements under 326 IAC 2-7-6(5)(C) and 326 IAC 2-8-5(a)(1)(C).
Citations Affected: 326 IAC 2-7-6(5)(C) and 326 IAC 2-8-5(a)(1)(C)

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 (30) days after presentation to the appropriate board and after it is made available for public inspection and comment, pursuant to IC 13-14-1-11.5. If the nonrule policy document is presented to more than one board, it will be effective thirty (30) 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 will begin using this nonrule policy document in reviewing annual compliance certifications submitted in 2003 and thereafter until such time as the nonrule policy document is revised.

General Requirements

1.The Annual Compliance Certification (ACC) must be submitted by the date identified in the permit as follows:
- Part 70 (Title V) sources must submit the ACC to IDEM, U.S. EPA, Region 5, and the local air pollution control agency, where appropriate.
- FESOP sources must submit the ACC to IDEM and the local air pollution control agency, where appropriate.

The submittal dates are April 15 or July 1 and the ACC must be postmarked, have a shipping date on a sender's receipt from a common carrier or be hand delivered as of these dates. Refer to the permit to determine the specific submittal date and addresses.

2.The Annual Compliance Certification must cover the period from January 1 through December 31 of the year being reported, except for the first year of the permit. For the first year of the permit, the certification is to cover the period from the date of permit issuance until December 31 of the year that the permit was issued. The time period the ACC covers should be noted on the certification.

3.The Annual Compliance Certification must include the Part 70 or FESOP certification form signed by a responsible official as defined in 326 IAC 2-7-1(34) for Part 70 sources or authorized individual as defined in 326 IAC 2-1.1-1 for FESOP sources. See pages 11 and 12 for definitions. The certification form that accompanies the ACC submitted to IDEM must contain an original signature and date.

4. The Annual Compliance Certification report is to include the following:
   - The identification of each term or condition of the permit for which compliance must be certified. This includes the permit terms or conditions under sections B, C and the various D sections.
   - The identification of the method(s) or other means used by the owner or operator for determining the compliance status with each term and condition during the certification period.
   - Whether compliance during the period was continuous or intermittent
   - Such other facts as the permitting authority may require to determine the compliance status of the source. This includes:
     — Identification of deviations, including deviations occurring during emergencies.
     — Verification of source summary information in Section A of the permit (optional).

Included with this nonrule policy document is a sample ACC form followed by guidelines for completion. Sources may create their own equivalent form for submittal as long as the required information outlined in this nonrule policy document and in applicable state and federal rules is included.

Permit amendments/modifications

Sources should be sure to use the most recent permit in effect during the reporting period as a starting point. All terms and conditions from permit amendments or modifications issued during the reporting period should be included as part of the annual compliance certification report. The source should also review requirements replaced by amendments or modifications to determine if some requirements that require certification were in effect for a portion of the reporting period. In some cases, this may be addressed by the submission of separate ACCs, although the source should be very clear in identifying the reporting period covered by the separate ACCs. If the only change has been a modification that adds a new Section D, it may be possible to submit a modified ACC that includes a separate certification for the new Section D with a different reporting period for the new requirements.

Permit renewals

Separate ACCs may also be needed to address permit renewals where the new permit is issued at some point during the year. This would be especially true if the permit terms and conditions changed significantly from one permit to the other. Once again, the source has the option of submitting separate ACCs or a modified ACC. As with permit modifications, a modified ACC would be most appropriate where the majority of the permit has remained the same, such as Sections A, B and C remaining the same, but a change or addition has occurred in Section D. In this situation, the source may be able to simply include a separate Section D certification for the changes or additions. Because the new permit will have a different permit number, the source should be sure to include the proper permit numbers and reporting periods in the ACC. In some cases, the source may wish to consult with IDEM about the proper way to address source specific situations.

If a source has to submit separate ACCs or a modified ACC for situations involving permit amendments, modifications or renewals, the source does not have to provide separate responsible official/authorized individual certifications. The ACCs can be included in one submittal with one responsible official/authorized individual certification.

Transfer of ownership and ACCs

In a situation where an owner transfers ownership or sells a source after December 31st, but prior to the ACC submittal deadline, IDEM would expect the seller to complete and submit the ACC prior to the sale. However, if the seller does not submit the ACC, the new owner would need to make the submission. IDEM suggests that the company buying the source make sure that the seller has done so or, at least, make sure the necessary information is available so the buyer can submit the ACC by the ACC submittal deadline.

If a sale takes place after the submittal deadline or later in the year, the new owner will be responsible for submitting the ACC the following year. It is recommended that the new owner makes sure the necessary information is available so that the ACC can be completed after the end of the year

A completed example is attached at the end of the nonrule policy document. The example is included to show how the required information can be provided on the ACC form to satisfy the annual compliance certification requirements. The example does not address situations where a source submits separate or modified ACCs. It is an ACC for a source that has not renewed a permit or had modifications during the reporting period. In completing the example, IDEM has chosen options that it believes appropriate. Others may have a different interpretation and would complete the certification differently. Each permit is different and each certification will be different because of the unique terms and conditions of the various permits.

INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
OFFICE OF AIR QUALITY
COMPLIANCE BRANCH
P.O. Box 6015
Indianapolis, IN 46206-6015

PART 70 / FESOP PERMIT- ANNUAL COMPLIANCE CERTIFICATION

This form should be used to satisfy the annual certification requirements for Part 70 sources under 326 IAC 2-7-6(5) and FESOP sources under 326 IAC 2-8-5(a)(1)(C). Attach a signed certification from the permit to complete the annual compliance certification.

SOURCE INFORMATION					
Source name:					
Source address:					
City:		State:		Zip code:	
Mailing address: (if different)					
City:		State:		Zip code:	
Permit number:					
Contact person:					
Phone number:					
Fax number:					
Reporting period:					

Section A - Information Verification (Optional)
Is the information in Section A correct?
If not, what information has changed:

Attach a signed certification form from the permit to complete this report.

COMPLIANCE CERTIFICATION

The source was in continuous compliance with all of the Section B permit terms and conditions that impose a work practice or emission standard or requires performance testing, monitoring, record keeping or reporting based on the monitoring methods in Section B of the permit:	
The source was in continuous compliance with all of the Section B permit terms and conditions that impose a work practice or emission standard or requires performance testing, monitoring, record keeping or reporting based on the monitoring methods in Section B of the permit, except for the terms and conditions listed below:	

Permit term/condition		**Comp. status** **CC / IC**	**Methods**	**Report date / Comments**
SECTION B - GENERAL CONDITIONS (copy as needed)				

CC = continuous compliance; IC = intermittent compliance

Permit term/condition		Comp. status CC / IC	Methods	Report date / Comments
SECTION C - SOURCE OPERATION CONDITIONS (copy as needed)				

CC = continuous compliance; IC = intermittent compliance

Permit term/condition		Comp. status CC / IC	Methods	Report date / Comments
SECTION D - FACILITY OPERATION CONDITIONS (copy as needed)				

CC = continuous compliance; IC = intermittent compliance

Source information

When completing this section, provide the name, phone number, etc. for the source contact person. This person should be someone that is familiar with the plant and the Part 70 or FESOP permit. This may be an environmental manager or a consultant, but does not have to be the same person signing the certification.

Section A

There are no permit terms or conditions in Section A that require compliance. As part of the compliance certification, IDEM is asking that the source indicate whether or not the information in Section A is accurate. The verification of information is optional and IDEM will not reject an ACC if the information is not supplied. If the information is not accurate and there have been changes that have not been addressed with an administrative amendment or permit modification, IDEM requests that the source identify these changes. It should be noted that the verification does not relieve the source from complying with administrative amendment or permit modification requirements. If the owner or operator has submitted an administrative amendment or minor permit modification, but IDEM has not acted on the application, it is suggested that the date the application was submitted be included.

Examples of information that may have changed include a change in the name of the company, the addition of a new type of insignificant activity (a specifically regulated insignificant activity for Part 70 sources) not previously on-site, or the addition or removal of equipment.

Sections B, C and D

The sample form provides tables that can be used to identify the appropriate terms and conditions in Sections B, C and D. The Part 70 or FESOP permit table of contents can be used as a guide to include the condition number and description into the forms. It is not necessary to include the complete term or condition (see example).

There are some permit terms and conditions in Sections B and C that may be interdependent on terms and conditions in Sections C and D. For instance, a deviation from an emission limit or record keeping requirement in Section D would require that a deviation would also have to identified for permit condition B.8, Compliance with Permit Conditions. If a source would like to make it clear that a deviation is associated with more than one permit term or condition, the associated permit term or condition could be cross referenced in the "Report date / Comments" column, although this is not required.

In order to streamline the certification process for Section B, IDEM will allow a general statement of compliance for this section. At the top of the table for Section B, the source can indicate whether the source was in continuous compliance with all of the terms and conditions for Section B by checking one of the boxes. If the source was in continuous compliance (see discussion of continuous vs. intermittent below) with all of the terms and conditions in Section B with no deviations, check the first line and no additional information is needed. If the source was not in continuous compliance with all of the Section B terms and conditions, then check the second line and identify any deviations in the table. This would include any deviations that result during an emergency. If the deviation or emergency has not been reported during the year in a deviation, emergency occurrence, quarterly or other compliance report, additional information should be attached to describe the deviation, how long the deviation lasted, estimates of excess emissions, whether or not the deviation was corrected, and the actions taken to correct the deviation. If the deviation or emergency was reported previously, all that needs to be included is the date of the report in the "Report date / Comments" column.

A deviation is an exceedance of a permit limitation or a failure to comply with a requirement of the permit, including exceedances during an emergency. Deviations would include not taking a required action, such as the failure to conduct specified compliance monitoring, to take a response step or to maintain proper records, or exceeding a permit limitation for a specified pollutant.

Because not all of the terms and conditions under Section B require compliance, an alternative would be to list out all of the terms and conditions. Then the source could indicate that the conditions that do not impose a work practice or emission standard or require testing, monitoring, record keeping or reporting are not applicable (N/A). Or the source could only list those conditions that impose a work practice or emission standard or require testing, monitoring, record keeping or reporting.

The tables for Sections C and D should be completed by filling in the table with the terms and conditions in these sections of the Part 70 or FESOP permit. Unlike Section B, the source should provide the requested information for each term and condition in Section C and various Section Ds. If a source has multiple Section Ds, the source should include all of the terms and conditions in each Section D in the table. For each of the terms and conditions, the source should provide the information called for in the table. As with Section B, if the source was not in continuous compliance with the listed terms and conditions, then any deviations (including exceedances during an emergency) should be identified in the table. If this information has been submitted to IDEM previously in a Quarterly Deviation and Compliance Monitoring Report, Emergency Occurrence Report or other required report, then the source should provide the date of that report in the column, "Report date / Comments". If the deviation has not been reported previously, additional information should be attached to describe the deviation, how long the deviation lasted, estimates of excess emissions, whether or not the deviation was corrected, and the actions taken to correct the deviation.

There may be some situations where a permit term or condition may not require a specific action (does not impose a work practice or emissions standard) or the action is dependent on something else (actions related to stack testing would only occur or be required if a stack test was actually performed). In these instances, a source may also use the designation of "N/A" for not applicable.

In some cases, a condition in Section D may include several monitoring requirements. In the attached example, condition

D.1.10 and D.1.11 requires daily checks of dry filters or water baffles and a weekly overspray observation and associated record keeping. In this case, the certification lists each of the requirements separately, conditions D.1.10(a) and D.1.10(b) and conditions D.1.11(a) and D.1.11(b). Review the permit terms and conditions carefully to determine if more than one requirement is included under a particular term or condition.

In other cases, some rules allow for several compliance options with a future compliance date and the source may choose the compliance option most appropriate for the source. In these cases, the source should identify the permit term(s) and condition(s) associated with the compliance option the source has chosen and provide the required information. The other permit terms and conditions would not be applicable and "N/A" would be used if these terms and conditions are listed.

In any case, the source should review the permit terms and conditions carefully when completing the annual compliance certification to make sure the certification is accurate and addresses each relevant permit term and condition.

Compliance status (CC/ IC):

The annual compliance certification must indicate whether compliance with the permit terms and conditions was continuous or intermittent. U.S. EPA has not defined what is considered continuous or intermittent compliance, although the issue has been the subject of much debate. If U.S. EPA issues guidance that differs from this nonrule policy document, IDEM will revise this document. In order to assist permit holders with the completion of the required certification, IDEM is providing the following guidance.

Continuous compliance (CC):

In order to certify continuous compliance, a source must have no deviations, irrespective of the monitoring frequency, for the relevant permit term or condition during the reporting period. If a source has identified a deviation during the reporting period, a source cannot certify continuous compliance for the relevant permit term or condition.

Intermittent compliance (IC):

If a deviation has occurred during the reporting period, the source must certify intermittent compliance for the particular permit term or condition. As noted previously, the source must provide information about the deviation, including what the deviation was, how long the deviation lasted, estimates of excess emissions, whether or not the deviation was corrected, and the actions taken to correct the deviation.

— If this information **has been submitted** to IDEM previously in a Quarterly Deviation and Compliance Monitoring Report, Emergency Occurrence Report or other required report, then the source should provide the date of that report in the column, "Report date / Comments".

— If this information **has not been submitted** previously, then the source should attach the information to the certification and the date included in the "Report date / Comments" column would be the date of the certification.

It should be noted that the identification of a deviation does not mean an enforcement action will be initiated. A determination of whether an enforcement action will be initiated can only be made after review and analysis of the data collected from the required monitoring, reports of deviations and any other credible evidence.

Methods:

One of the items that is required as part of an annual compliance certification is the identification of the "methods or means" used to determine the compliance status with each permit term or condition. The following is a list of standard monitoring methods and abbreviations that may be used to complete the annual compliance certification.

Continuous emission monitoring system = CEMS
Continuous opacity monitoring system = COMS
Stack test = ST
Visible emissions = VE
Record keeping = RK
Review of records = RR
Mass balance = MB
Emission factors = EF
Inspections = Insp
Fuel analysis = FA
Work practice = WP
Parametric monitoring = PM
Calculations = Calc
Other = O (specify in the Comments column)

Responsible official/Authorized individual definitions:

Part 70 requirements

"Responsible official" means the following:

(A) For a corporation:

(i) a president;
(ii) a secretary;

(iii) a treasurer;
(iv) a vice president of the corporation in charge of a principal business function;
(v) any other person who performs similar policy or decision making functions for the corporation; or
(vi) a duly authorized representative of any person listed in this clause if the representative is responsible for the overall operation of one (1) or more manufacturing, production, or operating facilities applying for or subject to a Part 70 permit and either:
(AA) the facilities employ more than two hundred fifty (250) persons or have gross annual sales or expenditures exceeding twenty-five million dollars ($25,000,000) (in second quarter 1980 dollars); or
(BB) the delegation of authority to such representative is approved in advance by the commissioner.
(B) For a partnership or sole proprietorship, a general partner or the proprietor, respectively.
(C) For a municipality, state, federal, or other public agency, either a principal executive officer or ranking elected official. As used in this clause, "principal executive officer of a federal agency" includes the chief executive officer having responsibility for the overall operations of a principal geographic unit of the agency, for example, a regional administrator of the U.S. EPA.
(D) For affected sources:
(i) the designated representative for actions, standards, requirements, or prohibitions under Title IV of the CAA or the regulations promulgated thereunder; and
(ii) the designated representative for any other purposes under a Part 70 permit.
A duly authorized representative may be delegated authority to sign a compliance certification, but only if the following occur:

- The representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities and either:
  - the facilities employ more than 250 persons; or
  - have gross annual sales or expenditures exceeding $25,000,000 (in second quarter 1980 dollars)*****; or
  - the delegation is approved in advance by the commissioner.

An example of a responsible official or duly authorized representative would be a plant or site manager that is responsible for the overall operation of a manufacturing plant. Examples of individuals that do not meet the criteria include environmental consultants or environmental managers, human resource directors and safety coordinators that are not responsible for the overall operation of a plant.
***** IDEM can provide a conversion of the dollar figure into current dollars upon request.

<u>FESOP requirements</u>
"Authorized individual" means an individual responsible for the overall operation of one (1) or more manufacturing, production, or operating plants or a duly authorized representative of such person. For any public agency, the term means either a ranking elected official, the chief executive officer, or a designated representative of such person having responsibility for the overall operations of a principal geographic unit of the agency.

The definition of an "authorized individual" is similar to that of a "responsible official", except that the definition of authorized individual is not as narrow. IDEM expects that the authorized individual would have a similar level of control as a responsible official, but the definition could include health and safety managers and others.

INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
OFFICE OF AIR QUALITY
COMPLIANCE BRANCH
P.O. Box 6015
Indianapolis, IN 46206-6015

PART 70 / FESOP PERMIT- ANNUAL COMPLIANCE CERTIFICATION

This form should be used to satisfy the annual certification requirements for Part 70 sources under 326 IAC 2-7-6(5) and FESOP sources under 326 IAC 2-8-5(a)(1)(C). Attach a signed certification from the permit to complete the annual compliance certification.

SOURCE INFORMATION					
Source name:	Blue Ox Woodworks, Inc.				
Source address:	1234 N. Main St.				
City:	Greentown	State:	IN	Zip code:	47345
Mailing address: (if different)					
City:		State:		Zip code:	
Permit number:	T000-0000-0000				
Contact person:	John Smith				
Phone number:	317/989-1234				
Fax number:	317/989-5678				
Reporting period:	1/1/00 to 12/31/00				

Section A - Information Verification (Optional)
Is the information in Section A correct? No
If not, what information has changed: Degreasing operation that does not exceed 145 gallons per 12 months
and not subject to 326 IAC 20-6 has been added. Administrative amendment submitted 3/15/01. Removed paint
booth, PB-1. Administrative amendment submitted 4/10/01.

Attach a signed certification form from the permit to complete this report.

COMPLIANCE CERTIFICATION

The source was in continuous compliance with all of the permit terms and conditions in Section B that impose a work practice or emission standard or requires performance testing, monitoring, record keeping or reporting based on the monitoring methods in Section B of the permit:	
The source was in continuous compliance with all of the permit terms and conditions in Section B that impose a work practice or emission standard or requires performance testing, monitoring, record keeping or reporting based on the monitoring methods in Section B of the permit, except for the terms and conditions listed below:	X

Permit term/condition		Comp. Status CC / IC	Methods	Report date / Comments
SECTION B - GENERAL CONDITIONS				
B.8	Compliance with Permit Conditions	IC	RK, RR, VE, WP	4/28/00 (B.10), 3/2/00 (B.11), 8/15/00 (D.1.12), 8/17/00 (C.2 and D.2.3), 9/25/00 (C.7), 10/5/00 (C.21), 4/15/01 (D.1.1 and D.1.8)
B.10	Annual Compliance Certification	IC	RR	Submitted 1999 ACC 13 days late, 4/28/00
B.11	Preventative Maintenance Plan	IC	RR	3/2/00, Failed to prepare PMP on time

CC = continuous compliance; IC = intermittent compliance; RK = record keeping; RR = records review

Permit term/condition		Comp. status CC / IC	Methods	Report date / Comments
SECTION C - SOURCE OPERATION CONDITIONS				
C.1	Particulate Matter Emission Limitations For Processes with Process Weight Rates Less Than One Hundred (100) pounds per hour	CC	RK	
C.2	Opacity	IC	VE	8/17/00, Emergency Occurrence Report
C.3	Open Burning	CC	WP	
C.4	Incineration	CC	RK	
C.5	Fugitive Dust Emissions	CC	WP	
C.7	Operation of Equipment	IC	RR	9/25/00
C.8	Stack Height	CC	RK	
C.9	Asbestos Abatement Projects	CC	RK	
C.10	Performance Testing	CC	RK	
C.11	Compliance Requirements	CC	RK	
C.12	Compliance Monitoring	CC	RK	
C.13	Maintenance of Emission Monitoring Equipment	CC	RK	
C.14	Monitoring Methods	CC	PM, RK, VE	
C.15	Pressure Gauge and Other Instrument Specifications	CC	RK	
C.16	Emergency Reduction Plans	CC	RK	
C.17	Risk Management Plan	CC	RK	
C.18	Compliance Monitoring Plan - Failure to Take Response Steps	CC	RK, RR	
C.19	Actions Related to Noncompliance Demonstrated by a Stack Test	CC	RK	
C.20	Emission Statement	CC	RK	
C.21	General Record Keeping Requirements	IC	RK	10/5/00
C.22	General Reporting Requirements	CC	RR	
C.23	Compliance with 40 CFR 82 and 326 IAC 22-1; Stratospheric Ozone Protection	CC	WP	

CC = continuous compliance; IC = intermittent compliance; RK = record keeping; RR = records review; PM = parametric monitoring; VE = visible emissions; WP = work practice

Permit term/condition		Comp. status CC / IC	Methods	Report date / Comments
SECTION D - FACILITY OPERATION CONDITIONS				
D.1.1	Volatile Organic Compounds (VOC)	IC	WP	4/15/01, Deviation report attached
D.1.2	PSD Minor Limit	CC	RK	
D.1.4	Particulate Matter (PM)	CC	RK	
D.1.5	Preventive Maintenance Plan	CC	RK	
D.1.6	Testing Requirements	CC	ST	
D.1.8	VOC Emissions	IC	RK	4/15/01, Deviation report attached
D.1.9	Particulate Matter (PM)	CC	WP	
D.1.10(a)	Monitoring	CC	Insp	
D.1.10(b)	Monitoring	CC	Insp	
D.1.11(a)	Record Keeping Requirements	CC	RK	
D.1.11(b)	Record Keeping Requirements	CC	RK	
D.1.12	Reporting Requirements	IC	RR	8/15/00
D.2.1	Particulate Matter (PM)	CC	RK	
D.2.2	Preventive Maintenance Plan	CC	RK	
D.2.3	Particulate Matter (PM)	IC	RK	8/17/00, Emergency Occurrence Report
D.2.4	Visible Emissions Notations	CC	VE, RK	
D.2.5	Parametric Monitoring	CC	RK	
D.2.6	Broken or Failed Bag Detection	CC	Insp	
D.2.7(a)	Record Keeping Requirements	CC	RK	
D.2.7(b)	Record Keeping Requirements	CC	RK	
D.2.8	Reporting Requirements	CC	RR	

CC = continuous compliance; IC = intermittent compliance; RK = record keeping; RR = records review; VE = visible emissions; Insp = inspection; ST = stack test; WP = work practice

Blue Ox Woodworks, Inc. OP No. T000-0000-00000
Greentown, Indiana
Permit Reviewer: [Reviewer's Name]

INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
OFFICE OF AIR QUALITY
COMPLIANCE DATA SECTION
(and include local agency if applicable)

PART 70 OPERATING PERMIT
QUARTERLY DEVIATION AND COMPLIANCE MONITORING REPORT

Source Name: Blue Ox Woodworks, Inc.
Source Address: 1234 N. Main St., Greentown, IN 47345
Mailing Address: Same
Part 70 Permit No.: T000-0000-0000

Months: September to December Year: 2000

Page 1 of 2

This report is an affirmation that the source has met all the requirements stated in this permit. This report shall be submitted quarterly based on a calendar year. Any deviation from the requirements, the date(s) of each deviation, the probable cause of the deviation, and the response steps taken must be reported. Deviations that are required to be reported by an applicable requirement shall be reported according to the schedule stated in the applicable requirement and do not need to be included in this report. Additional pages may be attached if necessary. If no deviations occurred, please specify in the box marked "No deviations occurred this reporting period".	
□ NO DEVIATIONS OCCURRED THIS REPORTING PERIOD.	
x□ THE FOLLOWING DEVIATIONS OCCURRED THIS REPORTING PERIOD	
Permit Requirement (specify permit condition #) B.8, D.1.1 and D.1.8	
Date of Deviation: 12/2/00 to 12/7/00	**Duration of Deviation:** 5 days
Number of Deviations: 1	
Probable Cause of Deviation: A non-compliant coating was used to paint metal parts because a vendor supplied a non-compliant coating.	
Response Steps Taken: Upon discovery, the company immediately resumed using a compliant coating and the non-compliant coating was returned to the vendor. The company used 100 gallons of non-compliant coating with a VOC content of 4.0 lbs./gal. and an extra 50 pounds of VOC were emitted above allowable VOC emissions.	
Permit Requirement (specify permit condition #)	
Date of Deviation:	**Duration of Deviation:**
Number of Deviations:	
Probable Cause of Deviation:	
Response Steps Taken:	

Blue Ox Woodworks, Inc.
Greentown, Indiana
Permit Reviewer: [Reviewer's Name]

OP No. T000-0000-00000

Permit Requirement (specify permit condition #)	
Date of Deviation:	**Duration of Deviation:**
Number of Deviations:	
Probable Cause of Deviation:	
Response Steps Taken:	

Permit Requirement (specify permit condition #)	
Date of Deviation:	**Duration of Deviation:**
Number of Deviations:	
Probable Cause of Deviation:	
Response Steps Taken:	

Permit Requirement (specify permit condition #)	
Date of Deviation:	**Duration of Deviation:**
Number of Deviations:	
Probable Cause of Deviation:	
Response Steps Taken:	

Form Completed By: Joe Smith
Title/Position: Environmental Manager
Date: 4/15/01
Phone: 317/989-1234

Attach a signed certification to complete this report.

Blue Ox Woodworks, Inc. OP No. T000-0000-00000
Greentown, Indiana
Permit Reviewer: [Reviewer's Name]

INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
OFFICE OF AIR QUALITY

PART 70 OPERATING PERMIT
CERTIFICATION

Source Name: Blue Ox Woodworks, Inc.
Source Address:1234 N. Main St., Greentown, IN 47345
Mailing Address: same
Part 70 Permit No.: T000-0000-0000

This certification shall be included when submitting monitoring, testing reports/results or other documents as required by this permit.

Please check what document is being certified:

x☐ Annual Compliance Certification Letter

☐ Test Result (specify)

x☐ Report (specify) Deviation report

☐ Notification (specify)

☐ Affidavit (specify)

☐ Other (specify)

I certify that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.

Signature:

Printed Name: Sam R. Jones

Title/Position: Vice President

Phone: 317/888-9999

Date: 4/13/01

INDIANA DEPARTMENT OF LABOR

August 9, 2002

The Indiana Department of Labor, Bureau of Safety Education and Training, adopts the Indiana Safety and Health Achievement Recognition Program Guidelines, which may be obtained from the Bureau of Safety Education and Training, Indiana Government Center-South, 402 West Washington Street, Room W195, Indianapolis, Indiana 46204 or by calling (317) 232-2688 or e-mail buset@dol.state.in.us. Additional information may be found at www.buset.info.

DEPARTMENT OF LOCAL GOVERNMENT FINANCE
DLGF Assessment Division Instructional Bulletin 02-01

DATE: July 29, 2002
TO: County Assessors, Township Assessors, and Township Trustee Assessors
FROM: Assessment Division, IN Department of Local Government Finance
SUBJECT: Revisions to 2002 Personal Property Assessments required by HEA 1001(ss)

I. Purpose

The purpose of this bulletin is to assist assessing officials in processing the changes required by HEA 1001(ss) to the March 1, 2002 personal property assessments. HEA 1001(ss) changed the department's personal property rule (50 IAC 4.3) in two areas. First, it restored the thirty-five percent (35%) inventory valuation adjustment. Second, it changed the valuation of construction-in-process and equipment not placed in service from eighty-seven percent (87%) of cost to ten percent (10%) of cost.

II. Emergency Personal Property Rule

HEA 1001(ss) also required the department to issue emergency rules to accomplish these changes. A copy of the emergency rule document #02-229(E) is printed in the September 1, 2002, Indiana Register at 25 IR 4115 for your reference.

III. Procedures to Follow in Changing 2002 Returns

A. **103 Short Form**:

There should be no taxpayers using the "elective" method of reporting inventory or having "equipment not placed in service" filing a short form. Therefore, the township assessor should:

If there is a value shown on line #7 (Adjustments) on Schedule B, make sure the taxpayer has not already claimed a 35% valuation adjustment as has been allowed in prior years. If they have not already claimed the adjustment you should:

1. Deduct 35% of the value on line 8 from line 8 of Schedule B to compute the new inventory value.
2. The new value would then be taken to the front of the return and under **Change By Twnshp. Assessor** the new value would be placed on the Schedule B-Inventory line.
3. Under the **Change By Twnshp. Assessor** re-add the values for Depreciable Assets and Inventory to compute the new Assessed Value.
4. Change the 104 under **Change By Twnshp. Assessor** to agree with the recomputed 103 values.
5. Send the Taxpayer a 113/PP reflecting the recomputed values. It is suggested that you include a notice to the taxpayer with the 113/PP explaining why the changes were made. A suggested "Notice to Taxpayer" is included as Attachment B to this bulletin. This notice is a suggested form and is not mandatory.

B. **103 Long Form**

• ***Depreciable Assets* (Applies to all taxpayers, regardless of whether taxpayers originally filed using the elective inventory valuation method of reporting inventory.)**

1. If the taxpayer shows a value on Schedule A, line 57 in "Equipment not placed in service at cost per Form 106" the cost value should be:
2. Re-computed at 10% instead of the 87% reported on the original return.
3. A new true tax value for Depreciable Assets would then be re-computed by adding or subtracting lines 57 thru 63 to the value computed in the True Tax Value Column D of line 56.
4. If the value has changed, the new re-computed true tax value on line 64 would go to page 1, Form 103 Summary under **Change By Twnshp. Assessor,** Schedule A, Personal Property Other Than Inventory.

Note: You need to pay special attention to any claim made on line 63 (abnormal obsolescence), which should be explained on a Form 106 attached to the return, to be sure the taxpayer has not already taken some kind of adjustment reducing the "Equipment not placed in service" value that was reported on the original return filed. If they have taken an adjustment do not give this depreciable asset adjustment.

• ***Inventory of any taxpayer that originally filed using the "elective inventory election"***

If the taxpayer has:

- Answered **yes** to question 8 b. on the front page of the 103 Long Form
- Shown a value on line 11 of the inventory Schedule B, or
- It is known that the taxpayer is a manufacturer or processor

Then do the following:

1. Add any values the taxpayer shows on lines 1 and 5.
2. Take the total times the 35% valuation adjustment.
3. Deduct this 35% value from the value shown on line 26 of the originally filed return. This would then be the new re-computed inventory value with the best information the Township Assessor has to compute it.
4. The new re-computed true tax value would go to page 1, Form 103 Summary under **Change By Twnshp. Assessor,** Schedule B, Inventory.

5. Under the **Change By Twnshp. Assessor,** re-add the values for Depreciable Assets and Inventory to compute the new Assessed Value.
6. Change the 104 under **Change By Twnshp. Assessor** to agree with the recomputed 103 values.
7. Send the Taxpayer a 113/PP reflecting the recomputed values. It is suggested that you include a notice to the taxpayer with the 113/PP explaining why the changes were made. A suggested "Notice to Taxpayer" is included as Attachment B to this bulletin. This notice is a suggested form and is not mandatory.

Note: Per SECTION 3 (c) of the emergency rule issued by the DLGF (Attachment A to this bulletin), if a taxpayer originally reported using the elective inventory valuation method for Work in Process and Finished Goods inventories and desires to take advantage of the provisions of HEA 1001(ss) relating to the thirty-five percent (35%) valuation adjustment for those inventories, the taxpayer must file an amended return under the provisions of IC 6-1.1-3 and SECTION 2(c) of the emergency rule.

• ***Inventory of any Taxpayer that did not originally file using the "elective inventory election"***

1. Deduct 35% from the amount shown on line 26 of the originally filed return. This would be the re-computed inventory value.
2. The new re-computed true tax value would go to page 1, Form 103 Summary under **Change By Twnshp. Assessor**, Schedule B, Inventory.
3. Under the **Change By Township. Assessor**, re-add the values for Depreciable Assets and Inventory to compute the new Assessed Value.
4. Change the 104 under **Change By Twnshp. Assessor** to agree with the recomputed 103 values.
5. Send the Taxpayer a 113/PP reflecting the recomputed values. It is suggested that you include a notice to the taxpayer with the 113/PP explaining why the changes were made. A suggested "Notice to Taxpayer" is included as Attachment B to this bulletin. This notice is a suggested form and is not mandatory.

Note: If a grain handling facility is filing either a 103 Short or 103 Long Form and is reporting their grain inventory at the farm bulletin price, they should not get the 35% adjustment on that grain inventory. They would however still get a 35% adjustment on any other inventory they have reported.

C. **103-C Form**

There should be no taxpayers using the "elective" method of reporting inventory or having "equipment not placed in service" filing a 103-C form. Therefore, the township assessor should look at the return for each of the taxpayer's locations and, if the taxpayer has inventory, they would do the following for each return.:

1. Deduct 35% of the value on line 15 from line 15 of Schedule B to compute the new inventory value.
2. The new value for each locations depreciable personal property, Schedule A, plus any change in Inventory, Schedule B, to come to a new Total True Tax Value and assessed value @ 100%.
3. These values would have to be corrected on the return by just marking out the taxpayers values and writing in the corrected values, due to there not being a change by township assessor column on the form 103-C. The County Total would also have to be changed.
4. The second page of the Form 104-C, Summary of Assessed Values for all Locations in This County, would have to be corrected to reflect any changes made to individual locations.
5. The front page of the Form 104-C would be changed to reflect the total changes under **Assessed Values By Township Assessor.**
6. Send the Taxpayer a 113/PP reflecting the recomputed values. It is suggested that you include a notice to the taxpayer with the 113/PP explaining why the changes were made. A suggested "Notice to Taxpayer" is included as Attachment B to this bulletin. This notice is a suggested form and is not mandatory.

D. **Form 102**

• **Depreciable Assets**

1. If the taxpayer shows a value on Schedule A, line 55 in "Equipment not placed in service at cost per Form 106" the cost value should be re-computed at 10% instead of the 87% reported on the original return.
2. A new value for Depreciable Assets would then be re-computed by taking the value from line 54, adding the new value on line 55, adding any value shown on line 56, and deducting any value shown on line 59, to come to a re-computed true tax value for line 60.
3. If the value has changed, the new re-computed value for line 60 would go to page 1, Form 102 Summary under **Change By Twnshp. Assessor,** Schedule A, Personal Property Other Than Inventory.
4. Send the Taxpayer a 113/PP reflecting the recomputed values. It is suggested that you include a notice to the taxpayer with the 113/PP explaining why the changes were made. A suggested "Notice to Taxpayer" is included as Attachment B to this bulletin. This notice is a suggested form and is not mandatory.

• Inventory

Many of the prices used on the original Form 102 have changed.

1. Each Form 102 will have to reviewed and be recomputed using those new values.
2. If the taxpayer has reported any values on line 10, 12, and 16 these values would be entitled to a 35% valuation deduction.

3. If a taxpayer reported any exotic animals, they should have been reported at market value so any values reported for these type animals would also be entitled to the 35% valuation adjustment.
4. If any of the values change due to the new prices concerning inventory per Total Poultry from Schedule B-1, or any of the values change on Schedule B due to the new prices, then Lines 17, 48, 49, 50 51, 52, and 53 of Schedule B would have to be changed appropriately.
5. The Total True Tax Value of Inventory on Line 53 would then go to page 1, Form 102 Summary under **Change By Township. Assessor,** Schedule B, Inventory.
6. Send the Taxpayer a 113/PP reflecting the recomputed values. It is suggested that you include a notice to the taxpayer with the 113/PP explaining why the changes were made. A suggested "Notice to Taxpayer" is included as Attachment B to this bulletin. This notice is a suggested form and is not mandatory.

Notice To Taxpayer

To comply with the Emergency Rule enacted by the Department of Local Government Finance as required by House Enrolled Act No. 1001(ss) the Taxing Unit, Township, and County as listed on the enclosed Form 113/PP has recomputed your assessed value for the March 1, 2002 assessment date based on the best information available from your originally filed Business Personal Property tax return.

Please review the Form 113/PP notice to see if you are in agreement with these changes.

The Emergency Rule can be located and reviewed at www.in.gov/dlgf/

These changes should reflect a 35% valuation adjustment to inventory and changing any Equipment Not Placed In Service value from 87% to 10%.

Important:

If you are a **Taxpayer** that reported using the ?elective inventory method? on your original filing, the only values the 35% valuation adjustment were applied to were Raw Materials and Supplies on the enclosed Form 113/PP. If you desire to take advantage of the provisions of HEA 1001(ss) relating to the thirty-five percent (35%) valuation adjustment for Work in Process and Finished Goods inventories you must file an amended return. Special attention should be paid to the emergency rule Section: 50 IAC 4.3-5-6.

NATURAL RESOURCES COMMISSION
Information Bulletin #33
User Fees in Support of Programs of the Department of Natural Resources

During its regular monthly meeting held on March 21, 2002, the Natural Resources Commission adopted the following resolution:

RESOLUTION IN SUPPORT OF EFFORTS
BY THE DEPARTMENT OF NATURAL RESOURCES
REGARDING USER FEES

WHEREAS, the Department of Natural Resources is in great measure founded upon the time-honored principles and ideals of Colonel Richard Lieber as set forth in 1917 in his Conservation of the New Patriotism and in other documents;

WHEREAS, included among these is the philosophy every person must serve as a trustee of the nation for our natural resources;

WHEREAS, in furtherance of this philosophy Colonel Lieber urged, in the development of state parks in Indiana and throughout the nation, that those enjoying our resources should contribute to their protection and maintenance through the payment of reasonable fees such as for admission, parking, and camping;

WHEREAS, fees paid by persons who receive services or enjoy the benefits of natural or cultural resources have come to be commonly known as "user fees";

WHEREAS, excessive dependence on general funding from the Indiana General Assembly can threaten the consistency of services and the integrity of resources, particularly during periods of economic recession;

WHEREAS, the Department of Natural Resources is actively seeking, through increases in user fees, to address challenges to the agency and to its varied responsibilities as trustee for Indiana's natural and cultural resources;

WHEREAS, this effort helps assure those who enjoy the agency's services and impact natural and cultural resources will bear a more equitable share of the associated costs;

WHEREAS, this effort will help protect the consistency of agency services and the integrity of resources both now and in future, particularly during periods of economic recession; and

WHEREAS, this effort is consistent with the time-honored philosophy of Colonel Richard Lieber

BE IT THEREFORE RESOLVED the Natural Resources Commission endorses the current initiatives by the Department of Natural Resources to increase user fees and to reduce dependence both now and in the future upon general funding.

DEPARTMENT OF STATE REVENUE

IN REGARDS TO THE MATTER OF:
LOYAL ORDER OF MOOSE LODGE NO. 1352
DOCKET NO. 29-20010329

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DEPARTMENTAL ORDER

An administrative hearing was held on Tuesday, May 21, 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, Loyal Order of Moose Lodge No.1352, was represented by Steven G. Hedges, Attorney at Law, P.O. Box 185, Mt. Summit, Indiana 47361. Attorney Steve Carpenter, appeared on behalf of the Indiana Department of State Revenue.

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

REASON FOR HEARING

On December 13, 2001, the Petitioner was assessed civil penalties in the amount of thirteen thousand five hundred dollars ($13,500) as a result of violations of IC 4-32 et seq. discovered during a Departmental investigation. 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 Loyal Order of Moose Lodge No. 1352.
2) The Department's Criminal Investigation Division report regarding the Loyal Order of Moose Lodge No. 1352 determined that the Petitioner conducted the sale of punchboards, pulltabs, and tipboards without a license from December 1, 1997 to November 30, 2000 in violation of IC 4-32-9-2.
3) Petitioner allegedly failed to keep accurate records in violation of IC 4-32-9-17.
4) On December 13, 2001, the Department assessed Petitioner civil penalties in the amount of thirteen thousand five hundred dollars ($13,500).
5) At hearing, the Petitioner stipulated to the fact that they did conduct gaming without a license.
6) The Petitioner argues that a member of its organization that allegedly embezzled money, and did not procure an annual gaming license ran their gaming.
7) Petitioner contends that the failure to obtain a license is not the organization's fault, but that of the former member.
8) As a result of the organization being deceived by one of its members, the Petitioner argues that it should be allowed to file its past gaming applications retroactively, and pay a one dollar ($1.00) civil penalty for each year's violation, thus eliminating all but three dollars ($3.00) of the civil penalties imposed by the Department and also any related tax implications.
9) Petitioner also argues that it should only be required to pay a $1.00 fine for its failure to keep accurate records.

FINDINGS OF FACTS

1) The Indiana Department of Revenue Criminal Investigation Division initiated an investigation of the Loyal Order of Moose Lodge No. 1352. (Record at 10).
2) On April 12, 2001, the Department's investigator met with Barb Polson the Petitioner's administrative assistant and Jim Hudson Petitioner's Government Relations Chairman. (Record at 11).
3) Ms. Polson and Mr. Hudson acknowledged that the Petitioner sold punchboards, pulltabs, and tipboards without a license for a period of three years. (Record at 11).
4) Ms. Polson and Mr. Hudson also told the Department that no records had been kept of the organization's proceeds from the illegal gambling. (Record at 12).
5) The Department's letter dated December 13, 2001 regarding the Loyal Order of Moose Lodge No. 1352 found that the organization had violated the following statutes, IC 4-32-9-2 and IC 4-32-9-17.
6) On December 13, 2001, the Department assessed Petitioner civil penalties in the amount of thirteen thousand five hundred dollars ($13,500).
7) The Petitioner's Attorney stipulated that they did operate charity gaming for a period of three (3) years without a charity game license. (Record at 9).
8) Petitioner alleged that Mr. Hummer, a former administrator of its organization, is responsible for the failure to obtain a gaming license from the Department. (Record at 24).
9) Petitioner contends that Mr. Hummer also embezzled all gaming monies. (Record at 24).
10) Petitioner's witness also stated, "I kind of blame the officers for part of this because they didn't check to make sure they (the organization's bills) had been paid." (Record at 25).

11) Petitioner did not contact any law enforcement agency regarding the allegedly stolen money. Petitioner's witness stated when asked about whether they reported the money missing, "We were told that we should just report it to Moose International, and they'd take it to their bonding company." (Record at 29).

12) Petitioner's counsel stated that Petitioner's insurance carrier paid them approximately eleven thousand dollars ($11,000) as a result of a bond to cover Mr. Hummer's actions. (Record at. 17).

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 4-32-9-2 states, "Except as provided in section 3 of this chapter, a qualified organization must obtain a license from the department to conduct an allowable event."

6) IC 4-32-9-17 states, "A qualified organization shall maintain accurate records of all financial aspects of an allowable event under this article…"

7) IC 4-32-8-1 states, "IC 6-8.1 applies to the Department's decision making process under this article."

8) IC 6-8.1-2-1 provides, "The department of state revenue is established as an agency of the state of Indiana for the purpose of administering, collecting, and enforcing the taxes placed under its authority."

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 sold pulltabs, tipboards and punchboards from December 1, 1997 to May of 2000 without a charity game license in violation of IC 4-32-9-2.

3) Petitioner did not keep any records of its gaming activities in violation of IC 4-32-9-17.

4) Based upon Indiana law governing the administrative hearing process, the Commissioner or his designee cannot act as a court of equity to overturn a statutorily imposed civil fine based upon a stipulated violation of Indiana law and the totality of the circumstances involved.

DEPARTMENTAL ORDER

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

The Petitioner's protest is denied.

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

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

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

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

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

THIS 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:
DIANNE FLORY
DOCKET NO. 29-20020149

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DEPARTMENTAL ORDER

An administrative hearing was held on Tuesday, June 4, 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, Dianne Flory, 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 A).
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 A).
4) The Trustees provided the Department with a list of the individuals who were to work the festival. (Record at 6).
5) The Petitioner was on a list provided by the Trustees as one of the scheduled workers. (Record at 6).
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 A).
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 A).
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 A).
9) According to the Eagles' Trustees, the festival was shut down around midnight on August 3, 2001 which was the first day of the three day festival. (Department Exhibit A).
10) The Trustees of the Fraternal Order of Eagles Lodge #3164 confirmed that a verbal contract had been entered into between the Eagles Lodge and a Mr. Jeff Widmann. (Department Exhibit A).
11) According to the Trustees, 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. (Department Exhibit A).
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 A).
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 a member of the Eagles during the Department's investigation. However, she had been a member on and off with her father in the past.
15) Petitioner is employed by the Department of Veterans Affairs in Fort Wayne, Indiana. (Petitioner Exhibit 1).

16) Petitioner argues that she was not at the event in question, and that she was working on August 3rd, the first day of the festival, from 3:30pm to 1:00am the next morning. (Petitioner Exhibit 1).
17) Petitioner's work schedule shows that she had August 4 and 5 off which were the remaining two days of the festival.(Petitioner Exhibit 1).
18) Petitioner stated under oath that she did not even know about the event. (Record at 8).
19) Petitioner contends that, "…a list was provided with anyone who had the skill to deal, and we were to be contacted if we were interested, and we were to agree or disagree to participate." (Record at 8).
20) Petitioner admitted under oath that her name was supplied to organizations that were conducting gaming events. (Record at 10).
21) Petitioner when asked about the list of potential workers names being circulated responded, "Yes. Little Vegas has a – to my knowledge –legit organization in Fort Wayne. And during the holiday seasons, primarily, he will employ people to deal blackjacks for organizations such as St. Joe Press Center, things of that nature. And we have options to do that if we choose." (Record at 10).
22) Petitioner also stated under oath, "…he pays us ten dollars an hour; we get about thirty dollars a night."(Record at 10).
23) When Petitioner was asked how often she deals blackjack she responded, "Twice last year." The Department then asked, "Do you remember at what occasions?" and Petitioner stated, "I believe at Al Gratz' Body Shop would have been—it's a Christmas event…And I don't know the second. I don't recall." (Record at 12).
24) Petitioner also stated under oath, "I don't believe I have been involved in a scheme of any sort in quite some time. Possibly decades." (Record at 19).
25) Neither St. Joe Press Center nor Al Gratz' Body Shop were ever registered to conduct charity gaming. These two organizations are not even registered non-profit entities.

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 4-32-9-25 provides in pertinent part, "…an operator or a worker may not receive remuneration…"
9) 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."
10) 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:

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

CONCLUSIONS OF LAW

1) 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's name was supplied to organizations that were conducting legal and illegal gaming events, and she would then participate as a worker at those events in violation of Indiana charity gaming law.

DEPARTMENTAL ORDER

Following due consideration of the entire record, the Administrative Law Judge orders the following:
The Petitioner's protest is denied.

1) Under IC 6-8.1-5-1, the organization may request a rehearing. However, rehearings are granted only under unusual circumstances. Such circumstances are typically the existence of facts not previously known that would have caused a different result if submitted prior to issuance of the Departmental Order.
2) 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

02980221.LOF

LETTER OF FINDINGS NUMBER: 98-0221
Indiana Corporation Income Tax
For Years 1989 to 1994

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

ISSUES

I. Property Tax Addback to Determine Taxpayer's Adjusted Gross Income: Property Taxes Paid by Taxpayer Lessor

Authority: IC 6-3-1-3.5(b); Cooper Industries, Inc. v. Indiana Dept. of State Revenue, 673 N.E.2d 1209 (Ind. Tax Ct. 1996); 45 IAC 3.1-1-8; 45 IAC 3.1-1-8(3)(b); I.R.C. § 63; I.R.C. § 164

The taxpayer has protested the auditor's determination that property taxes, levied by local taxing jurisdictions on the taxpayer's leased property and paid by the taxpayer as lessor, should be added back in the calculation of the taxpayer's Indiana adjusted gross income tax.

II. Calculation of Property Tax Addback: Inclusion of Lessee Rendered Taxes

Authority: 45 IAC 3.1-1-8(3)(b); I.R.C. § 61; I.R.C. § 63; I.R.C. § 164

Taxpayer has protested the auditor's determination that property taxes, the responsibility for which had been assumed by the lessee, should be included within the property tax addback calculation used to determine taxpayer's Indiana adjusted gross income tax.

III. Gross Income Tax Reporting: Taxpayer's Indiana Nexus

Authority: Indiana Dept. of Revenue v. Bethlehem Steel, 639 N.E.2d 264 (Ind. 1994); 45 IAC 1-1-49; 45 IAC 1-1-51

The taxpayer has protested the auditor's determination that receipts derived from the lease of certain equipment located within Indiana should be included as a part of the taxpayer's gross income. In support of that proposition, taxpayer maintains that it has neither a "business situs" or a "commercial domicile" within the state.

IV. Gross Income Assessed at High Rate: Sales of Previously Leased Equipment

Authority: IC 6-2.1-2-3; IC 6-2.1-2-4; IC 6-2.1-2-4(1); IC 6-2.1-2-4(4); IC 6-8.1-5-1(b)

The taxpayer has protested the auditor's determination that receipts from sales of certain equipment, previously leased by the taxpayer, should be taxed at the higher rate. Taxpayer argues that the sales of previously leased equipment are a regular part of the taxpayer's business, occurring in the regular course of the taxpayer's business, and should be taxed at the lower rate.

STATEMENT OF FACTS

Taxpayer is an out-of-state entity in the business of leasing aircraft and certain types of other commercial equipment. Taxpayer has no representatives within the state. Taxpayer maintains no physical location within Indiana but has conducted its leasing activities within the state.

DISCUSSION

I. Property Tax Addback to Determine Taxpayer's Adjusted Gross Income: Property Taxes Paid by Taxpayer Lessor

For some of the taxpayer's leased equipment, the taxpayer – as lessor – bills and collects property taxes from the individual lessees. According to taxpayer, this is a common practice within the leasing industry. Because the property tax payments and the reimbursements received from the lessees "net" to zero, the taxpayer argues that the property tax reimbursements should not be added back in determining its taxable adjusted gross income.

IC 6-3-1-3.5(b) provides the starting point for determining taxpayer's taxable income stating that the term "adjusted gross income" shall mean, "In the case of corporations the same as 'taxable income' (as defined in Section 63 of the Internal Revenue Code...." The Department's Administrative Rules restates the basic principle at 45 IAC 3.1-1-8 stating that "'Adjusted Gross Income' with respect to corporate taxpayers is 'taxable income' as defined in Internal Revenue Code – section 63...." In Cooper Industries, Inc. v. Indiana Dept. of State Revenue, 673 N.E.2d 1209 (Ind. Tax Ct. 1996), the court held that the code provision was "plain and unambiguous." Id. at 1213. "Indiana adjusted gross income begins with federal taxable income as defined by I.R.C. § 63, not as reported by the taxpayer." Id.

In calculating the taxpayer's adjusted gross income, Indiana begins with the federal definition as found in I.R.C. § 63. However, in calculating federal adjusted gross income, I.R.C § 164, allows for a deduction of property taxes stating that "[e]xcept as otherwise provided in this section, the following taxes shall be allowed as a deduction for the taxable year within which paid or accured: (1) State and local, and foreign real property taxes. (2) State and local personal property taxes."

After determining the taxpayer's federal adjusted gross income, Indiana's own regulations provide for particular adjustments to that amount, one of which is relevant here. 45 IAC 3.1-1-8(3)(b) provides for the addback of "[p]roperty taxes levied by a political subdivision of any state...." The effect of the regulatory provision is to subject property taxes, even if otherwise not subject to the federal adjusted gross income tax, to the state's own adjusted gross income tax scheme.

Taxpayer's receipt of payments from its lessees – designated and segregated as property tax reimbursements – falls within the IC 6-3-1-3.5(b) definition of "Adjusted gross income." Taxpayer is entitled to the federal property tax deduction and, subsequently, Indiana is both entitled and authorized to add that same deduction back for purposes of calculating taxpayer's Indiana adjusted gross income tax.

FINDING

Taxpayer's protest is respectfully denied.

II. Property Tax Addback to Determine Taxpayer's Adjusted Gross Income: Property Taxes Paid by Lessee on Behalf of Taxpayer Lessor

The terms of the lease agreements between certain of the lessees and the taxpayer require that the individual lessees assume responsibility for paying property taxes levied against the leased equipment. In those instances, the lessees and the taxpayer have agreed that the individual lessees will be solely responsible for paying any applicable property taxes. The audit included these property tax payments in calculating the property tax addback. Taxpayer now argues that these amounts should not be included in the addback.

As set out in Section I, Indiana is entitled to add back property taxes for the purpose of determining the taxpayer's adjusted gross income tax. Taxpayer argues that, by shifting the responsibility for property taxes levied against the leased property to the various lessees, taxpayer is entitled to avoid liability for paying Indiana income taxes on those amounts.

Taxpayer is entitled to structure its lease agreements in any manner which it deems appropriate. Taxpayer is entitled to require the lessees to assume the immediate responsibility for property taxes levied against the leased property. Indeed, taxpayer is entitled to require the lessees to direct the lease payments in any manner it chooses and to designate those payments in any manner it chooses. However, the property taxes are levied against the taxpayer's own property, are simply one portion of the "cost" that the lessees assume when entering into the agreements, and are ultimately the taxpayer's own responsibility.

Taxpayer has provided nothing upon which to refute the presumption that the property tax payments, made on behalf of taxpayer by the various lessees, are not part of the taxpayer's gross income, as defined under I.R.C. § 61. That section states that taxpayer's gross income means "all income from whatever source derived, including (but not limited to).... [g]ross income derived from business." In determining its adjusted gross income under I.R.C. § 63, taxpayer is plainly entitled to deduct those property tax payments under I.R.C. § 164. Just as plainly, Indiana is entitled to require taxpayer to add back those amounts as required under 45 IAC 3.1-1-8(3)(b).

FINDING

Taxpayer's protest is respectfully denied.

III. Gross Income Tax Reporting: Taxpayer's Indiana Nexus

Taxpayer argues that it is not subject to the state's gross income tax based upon the two tests provided within 45 IAC 1-1-51. Taxpayer maintains that, pursuant to 45 IAC 1-1-51, it has neither a "business situs" or a "commercial domicile" within the state. However, the two tests cited by taxpayer are prerequisites necessary for determining the taxability of income derived from intangibles. As stated within the regulation, "The term 'intangible' or 'intangible property,'... means and includes notes, stocks in either foreign or domestic corporations, bonds, debentures, certificates of deposit, accounts receivable, brokerage and trading accounts, bills of sale, conditional sales contracts, chattel mortgages, 'trading stamps,' final judgments, leases, royalties, certificates of sale, choses in action and any and all other evidences of similar rights capable of being transferred, acquired or sold."

Equally unavailing is taxpayer's citation to Indiana Dept. of Revenue v. Bethlehem Steel, 639 N.E.2d 264 (Ind. 1994) as authority for the proposition that income – derived from taxpayer's leasing activities – falls outside the state's taxing jurisdiction. The issue before the court in Bethlehem Steel was whether appellee taxpayer's income, derived from the sale of certain tax benefits, was subject to Indiana's gross income tax. Id. at 265. Although the dispositive issue was whether appellee taxpayer had acquired the requisite business situs or commercial domicile within the state, that question only became dispositive because appellee taxpayer obtained income from the sale of intangibles as defined under 45 IAC 1-1-51.

Because taxpayer is in the business of leasing aircraft and other types of commercial equipment, it is more pertinent to cite to 45 IAC 1-1-49 which states in relevant part, "For purposes of these regulations [45 IAC 1-1], a taxpayer may establish a "business situs" in ways including, but not limited to, the following... (6) Ownership, leasing, rental or other operation of income-producing property (real or personal)...."

Taxpayer's attenuated argument notwithstanding, taxpayer entered into agreements with various Indiana entities for the lease of various mobile and non-mobile equipment. Having done so, taxpayer falls squarely under the provisions of 45 IAC 1-1-49.

FINDING

Taxpayer's protest is denied.

IV. Gross Income Assessed at High Rate: Sales of Previously Leased Equipment

Taxpayer argues that the proceeds received from the sales of previously leased equipment should not be subject to the gross income tax at the high rate.

IC 6-2.1-2-3 sets out two different rates under the state's gross income tax scheme. The statute specifies as follows:

(a) The receipt of gross income from transactions described in section 4 of this chapter is subject to a tax rate of three-tenths of one percent (0.3%).

(b) The receipt of gross income from transactions described in section 5 of this chapter is subject to a tax rate of one and two-tenths percent (1.2%).

Therefore, having determined that the income taxpayer received from conducting leasing activities within the state is subject to its gross income tax, the issue becomes whether income received from selling the previously leased equipment is subject to the low or high rate.

In order for the income to be taxed at the low rate, taxpayer's sales income must come within one of the categories set out in IC 6-2.1-2-4. The statute specifies as follows:

The receipt of gross income from the following is subject to the rate of tax prescribed in section 3(a) of this chapter:

(1) wholesale sales;

(2) display advertising, including outdoor painted and poster display advertising and radio and television media advertising, but not including any sale or rental of tangible property or any personal professional service rendered in connection with such advertising;

(3) the business of dry cleaning and laundering, excluding the operation of coin operated laundry and dry cleaning equipment;

(4) selling at retail;

(5) the business of softening and conditioning water, including the exchange of water softening and conditioning tanks in the ordinary course of business, but not including the preparation of customer's plumbing and other work incident to furnishing such tanks in the first instance;

(6) the renting or furnishing for periods of less than thirty (30) days any rooms, lodgings, or any other accommodations, including booths, display spaces, and banquet facilities that are located in a place where rooms, lodgings, or any other accommodations are regularly furnished for a consideration; and

(7) the business of commercial printing that results in printed materials, excluding the business of photocopying.

Taxpayer has provided no suggestion as to which of the particularized seven IC 6-2.1-2-4 categories the sales income should fall. The only rational categories are found at IC 6-2.1-2-4(1), "wholesale sales," and IC 6-2.1-2-4(4), "selling at retail." However, taxpayer has provided no basis to establish that the money received from the sale of previously leased equipment was derived from either "wholesale sales" or "selling at retail."

Left with no basis upon which to discern the basis for taxpayer's argument, that argument fails. 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 the person against whom the proposed assessment is made."

Absent any indication that the income derived from the sale of previously leased equipment is not subject to the high rate set out in IC 6-2.1-2-5, taxpayer's invitation to reclassify that income must be declined.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

04990035.LOF

LETTER OF FINDINGS NUMBER: 99-0035
Sales and Use Tax
For Tax Periods: 1995-1997

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

ISSUES

Sales and Use Tax – Retail Sales of Cars

Authority: IC 6-2.5-2-1, IC 6-8.1-5-1, 45 IAC 2.2-3-5

The taxpayer protests the assessment of tax on certain retail sales of cars.

STATEMENT OF FACTS

The taxpayer is a used car dealer. In 1998, the Indiana Department of Revenue, hereinafter referred to as the department, performed an audit on the taxpayer. The audit resulted in an assessment of additional sales and use taxes. The taxpayer protested the assessment and requested a hearing. The taxpayer did not appear for the hearing, so the Letter of Findings is based upon the information in the file. Further facts will be provided as follows.

Sales and Use Tax – Retail Sales of Cars

Pursuant to IC 6-2.5-2-1, Indiana imposes a sales tax "on retail transactions made in Indiana." The purchaser pays the tax at the time of purchase to the retail merchant who collects the tax as agent for the state and remits the tax to the state. 45 IAC 2.2-3-5 clarifies the procedure for professional car dealers to collect and remit the sales tax. The dealers collect the sales tax at the time of sale and provide the purchaser with a completed form showing the tax was paid. The purchaser then uses this form at the Indiana Bureau of Motor Vehicles License Branch, hereinafter referred to as the bureau, to title the car and purchase license plates. The dealer remits the sales tax to the state.

The auditor compared the taxpayer's and bureau's records. The records did not always agree. In several instances, the bureau's records indicated that the taxpayer sold cars at retail and collected the tax when the taxpayer's records did not indicate the sales or collection of tax. The department assessed additional sales tax based upon the sales recorded by the bureau but not by the taxpayer.

The taxpayer protested the assessment of sales tax on three cars that it claims it did not sell to the people or at the time stated in the audit. The taxpayer also protested the assessment of sales tax on several transactions that allegedly were handled by another car dealer who used the taxpayer's name, number and paperwork.

IC 6-8.1-5-1 (a) provides for the assessment of additional sales and use taxes as follows:

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

In this case, the taxpayer's records were such that the department determined it was necessary to verify sales with the bureau. The bureau's records indicated that the taxpayer had collected sales tax on several sales of automobiles that were not listed in the taxpayer's records. The bureau's records provided the best information available to the auditor as to the actual amount of sales tax collected by the taxpayer and due to the state. It was appropriate for the department to use these records in the audit process and to prepare the audit assessment. A notice of proposed assessment based upon the audit report was sent to the taxpayer.

IC 6-8.1-5-1 (b) provides as follows:

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

The taxpayer did not appear at the hearing or present additional documentation to demonstrate that the proposed assessment was incorrect. Therefore the taxpayer did not meet its burden of proof.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

02990136.LOF

LETTER OF FINDINGS NUMBER: 99-0136
Adjusted Gross Income Tax
For Tax Years 1995 through 1996

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

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

ISSUE

I. Adjusted Gross Income Tax – Partnership Income

Authority: Allied-Signal, Inc., as Successor-in-Interest to the Bendix Corporation v. Director, Division of Taxation, 504 U.S. 768(U.S. 1992); 45 IAC 3.1-1-153; 45 IAC 15-3-2

Taxpayer protests the Department's classification of partnership income as non-unitary.

STATEMENT OF FACTS

Taxpayer is a 49.0% general partner in a partnership. Taxpayer has no other activities, employees or property other than its interest in the partnership. There is no activity between taxpayer and the partnership. Taxpayer receives its share of the partnership earnings only. In Indiana, the partnership contracts with a phone carrier and an office building that offers shared services. The partnership will then install and operate the phone system in that building. Further facts will be provided as necessary.

I. Adjusted Gross Income Tax – Partnership Income

DISCUSSION

Taxpayer protests the Department's modification of taxpayer's returns for the tax years in question. The Department determined that taxpayer was a non-unitary partner in a partnership, and eliminated apportionment factors and Indiana adjusted gross income and Indiana modifications were backed out as total non-business income and added back as Indiana non-business, non-unitary income. The Indiana modification represents Indiana's pro rata share of the add back of state income taxes plus real and property taxes. Taxpayer's share of the add back items was determined by taking its 49% multiplied against the total partnership add back items, after which the Indiana apportionment was applied arriving at the amount to be added back to the non-unitary income.

Taxpayer disagrees with the adjustment and states that the Department erred in its application of the relevant regulation. Taxpayer believes that 45 IAC 3.1-1-153(b) should have been applied and that the Department applied 45 IAC 3.1-1-153(c). These subsections of 45 IAC 3.1-1-153 provide:

(b) If the corporate partner's activities and the partnership's activities constitute a unitary business under established standards, disregarding ownership requirements, the business income of the unitary business attributable to Indiana shall be determined by a three (3) factor formula consisting of property, payroll, and sales of the corporate partner and its share of the partnership's factors for any partnership year ending within or with the corporate partner's income year, with the following modifications:

(1) The value of the property which is rented or leased by the corporate partner to the partnership or vice versa shall, with respect to the corporate partner, be excluded from the property factor of the partnership or eliminated to the extent of the corporate partner's interest in the partnership, whichever the case may be, in order to avoid duplication.

(2) Intercompany sales between the corporate partner and the partnership shall be eliminated from the corporate partner's sales factor as follows:

(A) Sales by the corporate partner to the partnership to the extent of the corporate partner's interest in the partnership.

(B) Sales by the partnership to the corporate partner not to exceed the corporate partner's interest in all partnership sales.

(c) If the corporate partner's activities and the partnership's activities do not constitute a unitary business under established standards, disregarding ownership requirements, the corporate partner's share of the partnership income attributable to Indiana shall be determined as follows:

(1) If the partnership derives business income from sources within and without Indiana, the business income derived from sources within Indiana shall be determined by a three (3) factor formula consisting of property, payroll, and sales of the partnership.

(2) If the partnership derives business income from sources entirely within Indiana, or entirely without Indiana, such income shall not be subject to formula apportionment.

The decision of which of the two subsections to use rests on whether or not the partnership's activities constitute a unitary business under established standards. Taxpayer states that it is not aware of any Indiana case law that deals with unitary business standards when one company acts purely as a holding company for another. The United States Supreme Court explained the standard as, "In the course of our decision in *Container Corp.*, we reaffirmed that the constitutional test focuses on functional integration, centralization of management, and economies of scale." Allied-Signal, Inc., as Successor-in-Interest to the Bendix Corporation v. Director, Division of Taxation, 504 U.S. 768, 783 (U.S. 1992)

Therefore, whether to use 45 IAC 3.1-1-153(b) or (c) depends on whether taxpayer and the company in whom it held stock had functional integration, centralization of management, and economies of scale, as provided in Allied-Signal. Taxpayer has not provided documentation establishing that there was functional integration, centralization of management, or economies of scale between it and its subsidiary.

Taxpayer referred to three Letters of Findings previously issued by the Department for other taxpayers in other tax years. Taxpayer alleges that these LOFs are directly on point with its situation. The Department refers to 45 IAC 15-3-2(d)(3), which states in relevant part:

In respect to rulings issued by the department, based on a particular fact situation which may affect the tax liability of the taxpayer, only the taxpayer to whom the ruling was issued may rely on it.

...

Letters of findings that are issued by the department, as a result of protested assessments, are to be considered rulings of the department as applied to the particular facts protested.

Therefore, as explained by 45 IAC 15-3-2(d)(3), only taxpayers to whom Letters of Findings are issued may rely on them. None of the LOFs referred to by taxpayer were issued to taxpayer, so taxpayer may not rely on them. Additionally, taxpayer has not established that its situation is similar to those situations described in the three LOFs.

In conclusion, taxpayer has not established that it maintained a unitary relationship with its subsidiary via functional integration, centralization of management or economies of scale, as described in Allied-Signal. Therefore, it is appropriate to use 45 IAC 3.1-1-153(c) to determine taxpayer's income attributable to Indiana. The Letters of Findings referred to provide no support for taxpayer.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420000175.LOF

LETTER OF FINDINGS NUMBER: 00-0175
Sales Tax
Calendar Years 1995, 1996, 1997, 1998, Partial Year 8/30/99

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

ISSUE(S)

I. Selling at Retail – Sales Tax Not Remitted

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

Taxpayer protests duplication of audit assessment.

STATEMENT OF FACTS

The Taxpayer operated a business and made retail transactions without obtaining a registered retail merchant's certificate. The taxpayer registered the business during the audit investigation. The taxpayer also collected Indiana Sales Tax and did not remit these taxes to the Department. The audit was based upon information; i.e., net receipts from 1120S returns and from daily sales sheets provided by the Power of Attorney.

I. Selling at Retail – Sales Tax Not remitted

DISCUSSION

In reviewing the audit report and the file, it is noted that the assessment stems from information obtained from taxpayer's own records. The taxpayer filed sales tax returns after the audit was completed which cannot be relied upon.

Taxpayer's only argument is that the same tax was charged to another location. The Department has determined that the referenced taxpayer's location is correct based upon information contained in the audit. Adjustments will be made to the related file.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0320000176.LOF

LETTER OF FINDINGS NUMBER: 00-0176
Withholding Tax
Calendar Year 1995

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

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

ISSUE(S)

I. Withholding Tax – Liability of Employer

Authority: IC 6-3-4-13; 45 IAC 3.1-1-109

Taxpayer protests the tax assessed.

STATEMENT OF FACTS

Taxpayer was audited for calendar year 1995 and found to have failed to report and remit withholding tax withheld from employees. Auditor's review of W-2's and WH-3 revealed that the taxpayer failed to remit tax. Although taxpayer withheld tax from its employees, the taxpayer filed "zero" returns for several months.

The investigation adjusted withholding tax for amounts withheld and not remitted the department.

ISSUE

I. Withholding Tax – Liability of Employer

DISCUSSION

Taxpayer failed to remit withheld state and county income taxes for a partial year in 1995 and has not provided reasons or arguments.

The audit report stands as written as no information was made available to rebut the assessment.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420000184.LOF

LETTER OF FINDINGS NUMBER: 00-0184
Use Tax
For Tax Years 1997 through 1998

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

ISSUES

I. Use Tax – Rental and Purchase of Tangible Personal Property

Authority: IC 6-8.1-5-1; 45 IAC 2.2-3-4; 45 IAC 2.2-4-27

Taxpayer protests imposition of sales and use tax on the rental and purchase of tangible personal property.

STATEMENT OF FACTS

Taxpayer manufactures parts for industrial use. As the result of a sales tax audit, the Indiana Department of Revenue ("Department") issued proposed assessments on certain purchases and rentals for 1997 and 1998. Taxpayer protests some of the assessments. Further facts will be provided as required.

I. Use Tax – Rental and Purchase of Tangible Personal Property

DISCUSSION

Taxpayer protests the imposition of Use Tax on various items it purchased or rented during the audit period. With regard to the rented items, the Department referred to 45 IAC 2.2-4-27(c), which states:

> In general, the gross receipts from renting or leasing tangible personal property are subject to tax. The rental or leasing of tangible personal property constitutes a retail transaction, and every lessor is a retail merchant with respect t such transactions. The lessor must collect and remit the gross retail tax or use tax on the amount of actual receipts as agent for the state of Indiana. The tax is borne by the lessee, except when the lessee is otherwise exempt from taxation.

For the purchased items, the Department refers to 45 IAC 2.2-3-4, which states:

> 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.

Taxpayer offers several arguments to explain why it believes that some items should not be subject to use tax. Taxpayer asserts that several items are used in the production process, several items are safety equipment, and that several items are purchased for resale and are therefore not subject to tax.

Taxpayer has provided no documentation to support its position. The Department refers to IC 6-8.1-5-1(b), which states in relevant part:

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

At hearing, taxpayer was informed that documentation was necessary to rebut the presumption that the Department's assessment based on a comprehensive audit of taxpayer's entire process is correct. Taxpayer did send in some photographs of items in its plant, without explanatory materials. These photographs do not speak for themselves and are insufficient to support taxpayer's position. Therefore, taxpayer has not met the burden imposed by IC 6-8.1-5-1(b).

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

1020000192.LOF

LETTER OF FINDINGS NUMBER: 00-0192 FBT
Food and Beverage Tax
For the Tax Period: 1996, 1997, and 1998

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

ISSUES

I. Food and Beverage Tax – Imposition

Authority: IC 6-9-12-1; IC 6-2.5-2-1; IC 6-2.5-4-1; IC 6-2.5-3-2

Taxpayer protests the assessment of food and beverage tax.

STATEMENT OF FACTS

Taxpayer opened several restaurants in Central Indiana. Taxpayer failed to remit food and beverage taxes. Taxpayer filed food and beverage tax returns but failed to remit payment. Audit assessed additional tax based upon information provided.

I. Food and Beverage Tax – Imposition

DISCUSSION

The city-county council of a county that contains a consolidated city may adopt an ordinance to impose an excise tax, known as the county food and beverage tax, on any transaction in which food or beverage is furnished, prepared, or served as provided by IC 6-9-12-3 and IC 6-9-12-2. The same exemptions that are allowed to retail merchants under IC 6-2.5 are allowed for taxpayers that are subject to Indiana's county food and beverage tax. IC 6-9-12-4. The food and beverage tax "applies to any transaction in which food or beverage is furnished, prepared, or served." IC 6-9-12-3.

"The notice of proposed assessment is *prima facie evidence* that the department's claim for unpaid tax is valid, and 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 (emphasis added). Taxpayer has not submitted any evidence or documentation to rebut the validity of the food and beverage tax imposed on transactions in which it furnished, prepared, or served foods and beverages. Therefore, the Department finds that the assessment of food and beverage tax is valid.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220000418.LOF

LETTER OF FINDINGS NUMBER: 00-0418
Gross Income Tax
For the Tax Years 1995, 1996, and 1997

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

ISSUES

I. Gross Income Tax – Taxpayer Railroad Company Acting in an Agency Capacity – Inclusion of Receipts for the Maintenance of Joint/Shared Facilities

Authority: IC 6-2.1-2-2(a)(1); IC 6-2.1-2-2(a)(2); Policy Management Systems Corp. v. Indiana Department of State Revenue, 720

N.E.2d 20 (Ind. Tax Ct. 1999); Universal Group Limited v. Indiana Department of State Revenue, 642 N.E.2d 553 (Ind. Tax Ct. 1994); 45 IAC 1.1-1-2; 45 IAC 1.1-1-2(b)(1); 45 IAC 1.1-1-2(b)(2); 45 IAC 1.1-6-10

Taxpayer argues that the money it received for the maintenance of certain joint/shared facilities was not subject to the gross income tax because taxpayer was acting in an agency capacity at the time it received the money.

II. Gross Income Tax – Taxpayer Railroad Company Acting in an Agency Capacity – Inclusion of Receipts for the Repair of Foreign Railcars

Authority: 45 IAC 1.1-1-2(b)(1); 45 IAC 1.1-1-2(b)(2); 45 IAC 1.1-6-10

Taxpayer argues that the money it received for the repair of railroad cars belonging to other railroads was not subject to the gross income tax because taxpayer was acting in an agency capacity at the time it received the money.

III. Commerce Clause – Receipts Subject to the State's Gross Income Tax

Authority: U.S. Const. art. I, § 8, cl. 3; IC 6-2.1-3-3; IC 6-8.1-5-1(b)

Taxpayer argues that the money it received from the maintenance of joint/shared facilities and the money it received from the repair of foreign railroad cars was not subject to the state's gross income tax by virtue of the protections afforded under the Commerce Clause.

IV. 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 maintains that the Department is obligated to abate the ten percent negligence penalty imposed at the time of the original audit.

STATEMENT OF FACTS

Taxpayer operates a railroad business along its approximately 200 miles of mainline tracks located in Illinois and Indiana. Taxpayer entered into and maintains long-standing agreements with four other railroads governing the maintenance of "joint/shared facilities." These "joint/shared facilities" are specific points along taxpayer's system where the tracks of the four other railroads cross taxpayer's own tracks. By the terms of the various agreements, taxpayer became obligated to maintain these facilities but was entitled to be reimbursed, on a pro-rata basis, for the costs incurred in performing that maintenance work. In addition, taxpayer was reimbursed for the costs of repairing "foreign" railroad cars – rolling stock belonging to numerous other railroad companies – which were received by taxpayer for transport within taxpayer's own system. Taxpayer further argues that the money received from the maintenance of the joint/shared facilities and the money it received for the repair of foreign cars was not subject to the gross income tax because the money was received as a result of conducting business in interstate commerce.

The audit found that income received from the maintenance of the joint/shared facilities along with the income received from the maintenance of foreign railroad cars, was subject to the state's gross income tax. Taxpayer disagreed arguing that it received this income while acting in an agency capacity. An administrative hearing was held to discuss taxpayer's protest, and this Letter of Findings follows.

DISCUSSION

I. Gross Income Tax – Taxpayer Railroad Company Acting in an Agency Capacity – Inclusion of Receipts for the Maintenance of Joint/Shared Facilities

Taxpayer entered into agreements with certain other railroads governing the establishment and maintenance of joint/shared facilities located at specific points along taxpayer's track system. These joint/shared facilities permit the tracks of another railroad to cross over the taxpayer's own tracks. Taxpayer receives a pro-rata reimbursement of those costs incurred in the maintenance of the joint/shared facilities and argues that the reimbursement is not subject to the state's gross income tax scheme. To bolster its agency argument, taxpayer cites to particular provisions of the governing agreements with the four other railroads. Those provisions require taxpayer to undertake the repairs necessary to maintain the joint/shared facilities in proper working order. In addition, the agreements govern the apportionment of any damages attributable to the actions of taxpayer's employees, incurred while its employees are performing the maintenance activities or injuries incurred as a result of having performed the maintenance activities.

Indiana imposes a gross income tax upon the entire gross receipts of a taxpayer who is a resident or domiciliary of Indiana. IC 6-2.1-2-2(a)(1). For the taxpayer who is not a resident or domiciliary of Indiana – such as taxpayer railroad company – the tax is imposed on the gross receipts which are derived from business activities conducted within the state. IC 6-2.1-2-2(a)(2). However 45 IAC 1.1-6-10 exempts that portion of the taxpayer's income which the taxpayer receives when acting in an agency capacity. 45 IAC 1.1-1-2 defines an "agent" as follows:

(a) "Agent" means a person or entity authorized by another to transact business on its behalf.

(b) A taxpayer will qualify as an agent if it meets both of the following requirements:

(1) The taxpayer must be under the control of another. An agency relationship is not established unless the taxpayer is under the control of another in transacting business on its behalf. The relationship must be intended by both parties and may be established by contract or implied from the conduct of the parties. The representation of one (1) party that it is the agent of another party without the manifestation of consent and control by the alleged principal is insufficient to establish an agency relationship.

(2) The taxpayer must not have any right, title, or interest in the money or property received from the transaction. The income must pass through actually or substantively, to the principal or a third party, with the taxpayer being merely a conduit through which the funds pass between a third party and the principal.

The Indiana Tax Court in Policy Management Systems Corp. v. Indiana Department of State Revenue, 720 N.E.2d 20 (Ind. Tax Ct. 1999) and Universal Group Limited v. Indiana Department of State Revenue, 642 N.E.2d 553 (Ind. Tax Ct. 1994) reviewed the relationship between imposition of the state's gross income tax and agency principles, echoed the standards set out in 45 IAC 1.1-1-2 and 45 IAC 1.1-6-10, and held that an agency relationship required consent by the principal, acceptance and authority by the agent, and control of the agent by the principal.

Taxpayer misapprehends the elements necessary to establish an agent/principal relationship. Critical to the nature of such a relationship is the presence of a "principal" on whose behalf the putative agent – in this case taxpayer – is acting. In order for the agent to avoid the consequences of the gross income tax, the agent must have no control or authority over the receipts at issue because the receipts simply pass unimpeded through to the principal. Any apparent control which the agent exercises over the receipts is transitory and illusory because, at all times, the agent is simply acting on behalf of the principal. The agent eludes imposition of the gross income tax because the receipts never belong to the agent. *See* IAC 1.1-1-2(b)(2).

In taxpayer's own particular circumstances, there is no "principal" on whose behalf the taxpayer is receiving money obtained for making repairs and maintaining the joint/shared facilities. The fact that the taxpayer has – by virtue of the agreements entered into with the other railroads – surrendered a degree of its autonomy to conduct repair and maintenance activities in any manner it chooses, is alone insufficient to establish an agent/principal relationship. The fact that the manner in which taxpayer conducts its repair activities is subject to the dictates of federal regulators, is also insufficient to establish that taxpayer was acting as an agent in making repairs of the joint/shared facilities. The assertion that taxpayer receives no profit from the maintenance of the joint/shared facilities is entirely irrelevant. 45 IAC 1.1-1-2(b)(2) requires that, in order for the taxpayer to qualify as an agent, the receipts "must pass through actually or substantively, to the principal or a third party, with the taxpayer being merely a conduit through which the funds pass between a third party and the principal."

Essentially, taxpayer entered into agreements whereby it agreed to obligate itself to conduct specified repair and maintenance activities but to receive a partial reimbursement for the costs incurred in conducting those activities. Accordingly, taxpayer falls squarely within the admonition contained within 45 IAC 1.1-6-10 which states that the "reimbursement of a taxpayer's own expenses are *never* excluded from gross income." (*Emphasis added*).

FINDING

Taxpayer's protest is respectfully denied.

II. Gross Income Tax – Taxpayer Railroad Company Acting in an Agency Capacity – Inclusion of Receipts for the Repair of Foreign Railcars

Taxpayer transports railroad cars belonging to numerous other railroad companies along its approximately 200 miles of mainline track. Before these "foreign" railroad cars can be transported along taxpayer's system, they are inspected by taxpayer to make certain that the railroad cars meet federally mandated safety standards. If taxpayer determines that repairs must be made before the foreign railroad car can be transported within taxpayer's system, one of two things will occur: (1) If the repair is minor, taxpayer will perform the repair and bill the foreign railroad for the cost of the repair; (2) If the foreign railroad car requires more extensive repairs, the foreign railroad has the option of retrieving the car and performing the repair itself, or the foreign railroad will permit taxpayer to perform the repair work. In either case, taxpayer receives a reimbursement for the cost of performing the maintenance work on the foreign railroad car. It is these receipts which are the subject of the taxpayer's protest because – according to taxpayer – the receipts were received while taxpayer was functioning in an agency capacity.

Taxpayer has little or no discretion in deciding what repairs are needed or in determining the amount for which it will be reimbursed. The repair work is mandated by the Federal Railroad Administration (FRA). That same agency conducts inspections to assure that necessary repair work is actually performed. The prices that taxpayer can charge for the repair work are established by the Association of American Railroads (AAR), a trade association of United States Railroads to which taxpayer is a subscribing associate member.

Therefore, if a foreign railroad company introduces a railroad car for transport along taxpayer's system and that particular foreign railroad car has a faulty air hose, the FRA will mandate that the air hose be repaired. Since it is a minor repair, taxpayer will automatically undertake the repair. Taxpayer will then bill the foreign railroad by means of a protocol established by the AAR. If the AAR stipulates that repair of an air hose is to be reimbursed at a rate of $100, taxpayer will bill the foreign railroad $100. If the repair of the particular air hose actually costs $50, taxpayer is nonetheless entitled to bill the foreign railroad $100. If the repair of the particular air hose costs taxpayer $150, taxpayer is nonetheless required to bill the foreign railroad $100. It is this absence of control which is central to taxpayer's argument that it operates as an agent when it receives the repair reimbursements.

Taxpayer is correct in its assertion that the absence of control is *one* prerequisite to establishing an agency/principal relationship. "The taxpayer must be under the control of another." 45 IAC 1.1-1-2(b)(1). However, taxpayer's argument does not withstand close scrutiny because there is no principal on whose behalf taxpayer receives the reimbursements for the repair of the foreign railroad cars. The foreign railroad is not the principal. The FRA is not the principal. The AAR is not the principal. None of these parties ever receive the reimbursement for the repair of the foreign railroad cars. The taxpayer itself is merely being reimbursed – with or without a profit – for expenses it incurred in undertaking the repairs. Again, 45 IAC 1.1-6-10 specifically mandates that "reimbursement of a taxpayer's own expenses are never excluded from gross income." Absent any evidence that the reimbursement costs "pass through actually or substantively, to the principal or a third party, with the taxpayer being merely a conduct through which the funds pass between a third party and the principal," taxpayer's argument clearly fails. 45 IAC 1.1-1-2(b)(2).

FINDING

Taxpayer's protest is respectfully denied.

III. Commerce Clause – Receipts Subject to the State's Gross Income Tax

Taxpayer sets out a secondary argument based upon the requirements contained within the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, giving Congress the exclusive power to regulate commerce conducted between the states. Taxpayer argues that receipts from the repair and maintenance of joint/shared facilities and receipts derived from the repair of foreign railroad cars are shielded by the Commerce Clause from imposition of the state's gross income tax.

IC 6-2.1-3-3 codifies the constitutional prohibition placed upon the individual states by the Commerce Clause. Specifically, IC 6-2.1-3-3 provides that "Gross income derived from business conducted in commerce between the state of Indiana and either another state or a foreign country is exempt from gross income tax to the extent the state of Indiana is prohibited from taxing that gross income by the United States Constitution."

Taxpayer's argument is apparently based on the presumption that certain of taxpayer's business activities are conducted within interstate commerce. However, taxpayer fails to explain how the payments it receives from undertaking repair work on facilities and rolling stock located within the state, are themselves derived from interstate commerce. Taxpayer offers no explanation as to how these particularized in-state activities can possibly be entitled to the constitutional protection afforded under U.S. Const. art. I, § 8, cl. 3 or IC 6-2.1-3-3.

Taxpayer's ill-defined argument does not meet the standard imposed under IC 6-8.1-5-1(b) which states that "[t]he notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of providing that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

FINDING

Taxpayer's protest is respectfully denied.

IV. Abatement of the Ten Percent Negligence Penalty

Taxpayer maintains that it is entitled to abatement of the ten percent penalty imposed under IC 6-8.1-10-2.

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. 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 made a good faith, conscientious attempt to comply with the state's tax laws and that it was entitled to assume the stance it took based upon past Departmental rulings on the issue of agency. To that end, taxpayer cites to a 1991 Letter of Findings addressing its previous protest of the nearly identical gross income tax issues. In that Letter of Findings, the Department determined that taxpayer was acting in an agency capacity "as to receipts derived from the operation of joint facilities, shared facilities, and safety repairs."

However, taxpayer fails to note that the identical issue was addressed in a 1992 Letter of Findings in which the Department found that receipts derived from the maintenance of its joint/shared facilities and the repair of foreign railroad cars "[were] not received in an agency capacity, but [that] the taxpayer has right, title and interest in the funds received."

Taxpayer fails to note that the identical issues were addressed in a 1998 Letter of Findings in which the Department found that the money it received for the maintenance of its joint/shared facilities were "taxpayer's receipts. The taxpayer is not merely passing the receipts along, as a conduit, to another person or entity."

Taxpayer fails to note that the identical issues were addressed in a 1998 Supplemental Letter of Findings in which the Department found that the "receipts at issue were receipts, for services rendered [and that] in the instant situation there is no conduit merely the performance of services."

Finally, taxpayer fails to take note of the fact that it petitioned the Indiana Tax Court in 1998 for it to address certain tax issues between itself and the Department. However, in its petition to the court, "concerning the gross income tax as applied to certain agency receipts" it specifically conceded the issue and did not raise it on appeal.

Accordingly, by raising the identical agency argument against the determinations contained within an audit conducted in 2000 after having conceded that issue two years earlier, taxpayer has demonstrated that it failed to "use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." 45 IAC 15-11-2(b).

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0220010093.LOF

LETTER OF FINDINGS NUMBER: 01-0093
Gross Income Tax
For the 1998 Tax Year

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

ISSUES

I. Gross Income Tax – Construction Management Company Acting in an Agency Capacity

Authority: IC 6-2.1-2-2(a)(1); IC 6-2.1-2-2(a)(2); Western Adjustment and Inspection Co. v. Gross Income Tax Division, 142 N.E.2d 630 (Ind. 1957); Policy Management Systems Corp. v Indiana Department of State Revenue, 720 N.E.2d 20 (Ind. Tax Ct. 1999); Monarch Steel Co. v. State Bd. Of Tax Comm'r, 699 N.E.2d 809 (Ind. Tax Ct. 1998); Trinity Episcopal Church v. State Bd. Of Tax Comm'r, 694 N.E.2d 816 (Ind. Tax. Ct. 1998); Universal Group Limited v. Indiana Department of State Revenue, 642 N.E.2d 553 (Ind. Tax Ct. 1994); 45 IAC 1-1-54; 45 IAC 1-1-54(1); 45 IAC 1-1-54(2); 45 IAC 1-1-100; 45 IAC 1-1-105

Taxpayer argues that because it was acting merely in an agency capacity when it accepted from the owner of a construction project payments due subcontractors, it should not be liable for gross tax income tax on those payments. Taxpayer maintains that the existence of an agency relationship between itself and the building owner can be established by the law and the facts.

II. Apportionment of Taxpayer's Income Between Labor and Materials

Authority: IC 6-8.1-5-1(a); IC 6-8.1-5-1(b); 45 IAC 1-1-100

In the event the Department determines that there was no agency relationship between taxpayer and the building owner, taxpayer argues that, for the construction project here at issue, the audit incorrectly apportioned the amount of income between money received for material and money received for labor.

STATEMENT OF FACTS

Taxpayer is an out-of-state domiciliary engaged in the construction management business. Taxpayer oversees the construction of large commercial and industrial buildings. Taxpayer contracts with a building owner on either a lump sum or cost plus fee basis for the construction of the building. The construction project here at issue was based on a cost plus fee arrangement. In a cost plus fee arrangement, the taxpayer is compensated at actual cost for all materials, equipment, rentals, and subcontracts. In addition, the taxpayer is reimbursed for the hourly salary of the taxpayer's own employees together with a multiplier. The taxpayer is reimbursed for the salary of administrative personnel together with both a multiplier and a flat fee. The salary, overhead multipliers, and flat fee are set forth in the taxpayer's contract with the building owner. The taxpayer then enters into contracts with the individual subcontractors working at the particular building project. The contracts between taxpayer and the subcontractors are lump sum contracts. Taxpayer oversees the subcontractor bidding process, construction procedures, billing, administration, scheduling, inspection, and coordination of the entire building project. Taxpayer's own on-site employees include scheduling managers, construction managers, superintendents, and engineers. During the audit period, the taxpayer supervised two construction projects in Indiana.

For one of the Indiana construction projects, taxpayer failed to report either labor or material receipts for gross income tax purposes. Taxpayer maintained that the gross income received for that particular construction project was derived from the receipts taxpayer received in an agency capacity. According to taxpayer, it acted merely as a "pass-through" agent between the individual subcontractors and the building owner.

The audit determined that there was no agency relationship between the individual subcontractors and the building owner. Accordingly, the audit determined that the money taxpayer received from the building owner was subject to gross income tax.

DISCUSSION

I. Gross Income Tax – Construction Management Company Acting in an Agency Capacity

Indiana imposes a gross income tax upon the entire gross receipts of a taxpayer who is a resident or domiciliary of Indiana. IC 6-2.1-2-2(a)(1). For the taxpayer who is not a resident or domiciliary of Indiana, the tax is imposed on the gross receipts which are derived from business activities conducted within the state. IC 6-2.1-2-2(a)(2). It is undisputed that taxpayer is not a resident or domiciliary of Indiana but that it received gross receipts from construction activities conducted within the state. However, 45 IAC 1-1-54 exempts that portion of a taxpayer's income which the taxpayer receives while acting in an agency capacity. That regulation states:

Taxpayers are not subject to gross income tax on income they receive in an agency capacity. However, before a taxpayer may deduct such income in computing his taxable gross receipts, he must meet two (2) requirements:

(1) The taxpayer must be a true agent. Agency is a relationship which results from the manifestation of consent by one person to another authorizing the other to act on his behalf and subject to his complete control, and consent by the other to so act. Agency may be established by oral or written contract, or may be implied from the conduct of the parties. However, the representation of one party that he is an agent of another without a manifestation of consent by the alleged principal is insufficient to establish an agency. Both parties must intend to act in such a relationship.

Characteristic of agency is the principal's right to complete and continuous control over the acts of the agent throughout the entire performance of the contract. This right to control cannot be limited to the accomplishment of a desired result. In addition, the principal must be liable for the authorized acts of the agent.

(2) The agent must have no right, title, or interest in the money or property received or transferred as an agent. In other words, the income received for work done or services performed on behalf of a principal must pass intact to the principal or a third party; the agent is merely a conduit though which the funds pass. A contractual relationship whereby one person incurs expense under an agreement to be reimbursed by another is not an agency relationship unless the other elements of agency exist, particularly the element of control discussed above. Where tangible personal property is purchased by an agent for a principal, title need not vest immediately in the principal in order for the agent's reimbursement to be deductible if there is an agreement between the parties authorizing one to purchase on behalf of other. However, income derived from sales by the principal and subsequent resale by the agent to customer is subject to gross income tax.

In summary, when applying the above facts to a taxpayer, the critical factor is that of control. Notwithstanding the fact that the taxpayer acting for another has no right, title or interest in the money or property received, he is not entitled to deduct such income from his gross receipts unless he was acting as a true agent subject at all times to the control of his principal.

The Indiana Tax Court in Policy Management Systems Corp. v Indiana Department of State Revenue, 720 N.E.2d 20 (Ind. Tax Ct. 1999) and Universal Group Limited v. Indiana Department of State Revenue, 642 N.E.2d 553 (Ind. Tax Ct. 1994) reviewed the relationship between the imposition of the state's gross income tax and agency principles, echoed the regulatory standards set out in 45 IAC 1-1-54, and found that an agency relationship required consent by the principal, acceptance and authority by the agent, and control of the agent by the principal.

The taxpayer has the burden of establishing that the reimbursements received from the building owner were not subject to the state's gross income tax. *See* Western Adjustment and Inspection Co. v. Gross Income Tax Division, 142 N.E.2d 630, 635 (Ind. 1957). When discussing tax exemptions, such as 45 IAC 1.1-6-10, the courts have held that the exemptions are strictly construed against the taxpayer and in favor of taxation. Monarch Steel Co. v. State Bd. Of Tax Comm'r, 699 N.E.2d 809, 811 (Ind. Tax Ct. 1998). Trinity Episcopal Church v. State Bd. Of Tax Comm'r, 694 N.E.2d 816, 818 (Ind. Tax. Ct. 1998).

Taxpayer argues that it was the building owner's agent and that money it received from the building owner was merely "passed through" to the individual subcontractors. To that end, taxpayer maintains that it has presented sufficient evidence demonstrating that the taxpayer and the building owner both intended and established an agency relationship. An agreement between taxpayer and the building owner, dated April 2, 1998, specifically identified – for sales tax indemnification purposes – the taxpayer as agent for the principal. A letter directed to the Department by the building owner and dated July 10, 2000, indicates that the building owner intended to enter into an agency relationship with the taxpayer. The agreements between the taxpayer and the various subcontractors, reference the building owner as the proprietor of the Indiana construction project.

In addition to this documentary evidence, the taxpayer argues that the parties' conduct evinces an agency relationship between taxpayer and the building owner. When making the final selection of a subcontractor, the taxpayer would forward to the building owner a list of the qualified subcontractors together with a recommendation as to which of the qualified subcontractors should be chosen. The building owner was entitled to accept or reject the taxpayer's recommendation. In addition, the building owner issued separate purchase orders for the payment of taxpayer's management services and for the payment of subcontractors.

Further, taxpayer argues that the method by which the various subcontractors received monthly payments further evidences the existence of an agency relationship. Under the subcontractor agreements, the subcontractor was required to make a monthly payment request to the taxpayer. The subcontractor's monthly request delineated the materials and labor expended by the subcontractor. After the taxpayer approved the payment request, a payment request was submitted to the building owner. The building owner paid taxpayer the amount requested, taxpayer received and deposited the amount into its own unsegregated bank account, and taxpayer – in turn – paid the individual subcontractor after the subcontractor demonstrated that there were no liens on the property and that the materials expended had been paid for. The individual subcontractor agreements stipulated that taxpayer was to pay each subcontractor within five days after receiving payment from the building owner. In addition, the subcontractor agreements conditioned the subcontractor's payment upon taxpayer's own receipt of the money from the building owner.

There is no record of the original agreement, governing the $24,000,000 Indiana building project at issue, between the taxpayer and the building owner. The taxpayer and building owner apparently agreed that taxpayer would be compensated by reference to the terms of a previous construction project agreement. According to taxpayer, no record of that predecessor agreement is available.

In order to find that the taxpayer was acting as an agent for the building owner, the taxpayer must establish that it was authorized to bind the building owner as the principal. 45 IAC 1-1-54(1). The various agreements between the taxpayer and the subcontractors do not demonstrate such authority. To the contrary, the subcontracts are binding agreements between the subcontractor and the taxpayer. As the agreement itself states, "The Trade Contractor [subcontractor] agrees to be bound to and assume toward the Construction Manager [taxpayer] all of the obligations and responsibilities that the Construction Manager... assumes toward the Owner." The agreements bind the subcontractor to perform construction work to the satisfaction of the taxpayer. The subcontractor is required to adhere to a work schedule established by taxpayer. The subcontractor is liable to the taxpayer for any liquidated damages which the taxpayer incurs by reason of any failure on the part of the subcontractor. The subcontractor is precluded from performing any extra work unless approved in writing by the taxpayer. The subcontractor agrees to any changes in the scope of the construction project as dictated by the taxpayer. If the subcontractor finds itself unable to perform the required work, the taxpayer is "at liberty to terminate the employment of the Trade Contractor." In essence, the subcontracts are agreements exclusively between the individual subcontractors and the taxpayer with the taxpayer retaining total authority over the subcontractor. As the agreement specifically states, "the Construction Manager [taxpayer] reserves the right to terminate this Agreement for its convenience upon written notice to the Trade Contractor." In return for the obligations assumed by the subcontractor, the taxpayer specifically agrees "to pay the Trade Contractor for the satisfactory performance of his work the total sum of: [contract price]." Although, the subcontractor agreements make reference to the building owner, there is no indication whatsoever that taxpayer was binding the building owner to any portion of the agreement between the taxpayer and the subcontractors.

That taxpayer conditioned the subcontractors' monthly payments upon receipt of the building owner's payment is, standing alone, an irrelevancy. The agreements between taxpayer and the subcontractors contained numerous conditions precedent each of which needed to be fulfilled before the subcontractor received payment.

Taxpayer entered into agreements with its subcontractors whereby both parties bound themselves to the terms of those agreements. The subcontractors agreed to perform construction work at the direction of and to the satisfaction of the taxpayer. Taxpayer agreed to pay – subject to certain conditions precedent – the subcontractors for that construction work. The building owner was a third-party bystander to those agreements. Absent any indication that the taxpayer was entitled to bind the building owner to the agreements' terms, under 45 IAC 1-1-54(1) the taxpayer's argument, that it was acting as an agent of the building owner, must fail.

By the terms of the agreements between taxpayer and the subcontractors, taxpayer took upon itself the obligation to pay the subcontractors. The terms of the agreement between taxpayer and the building owner – the exact nature of which remains undetermined – apparently obligated the building owner to pay the taxpayer the costs incurred in making payment to the subcontractors. Lacking any other reasonable means of describing that arrangement, such a payment appears to be in the nature of a reimbursement. As specifically set out in 45 IAC 1-1-54(2), "A contractual relationship whereby one person incurs expense under an agreement to be reimbursed by another is not an agency relationship unless the other elements of agency exist...."

Taxpayer produced documentary evidence, originating with the building owner, which unmistakably indicates that the parties *intended* to enter into an agency relationship. However well intentioned the parties may have been, the documentary evidence is insufficient to establish the existence of an agency relationship in the face of the parties' actual conduct. Rather, the parties' conduct demonstrates that the building owner engaged taxpayer for the purpose of exploiting the taxpayer's ability and experience in expediting the completion of a major building project. In turn, taxpayer hired the subcontractors necessary to complete the project. In turn, the building owner repaid the taxpayer for the obligations which the taxpayer assumed toward the subcontractors. The documentary evidence of the parties' intentions aside, such an arrangement does not evidence an agency relationship.

Taxpayer argues that the payments received from the building owner were merely passed through to the individual subcontractors by the taxpayer acting in its agency capacity. However, the circumstances surrounding the payment transfers demonstrated that taxpayer exercised independent authority and control over the funds. Taxpayer deposited the amounts it received from the building owner into its own unsegregated general bank account. These amounts, received for the purpose of reimbursing the individual subcontractors, were intermingled with taxpayer's own funds. Those same amounts earned interest to the taxpayer's benefit during the brief time the funds remained deposited in the taxpayer's bank account. In addition, the taxpayer was entitled to indefinitely delay the subcontractor's final payment until the taxpayer had secured a general release from the subcontractor. Although the subcontractor agreements stated that the subcontractors would receive payment within five days after taxpayer received payment from the building owner, clearly taxpayer was entitled to treat the money as its own during that five days or during the indeterminate time in which the subcontractor was unable to produce a general release. As 45 IAC 1-1-54(2) states, in order to qualify as an agent, "[t]he agent must have *no right, title or interest in the money or property received* or transferred as an agent. In other words, the income received for work done or services performed on behalf of a principal must pass intact to the principal or a third party; the agent is merely a conduit through which the funds pass." (*Emphasis added*).

Finally, whatever agency arguments the taxpayer may set forth, regardless of the parties' intent, and regardless of the precise circumstances surrounding the transactions here at issue, taxpayer's argument is precluded by the plain language of 45 IAC 1-1-105. The regulation states that "[c]ontractors are taxed at the applicable rate upon the entire amount derived from the performance of their contracts *without deduction for amounts paid to sub-contractors, costs of labor, costs of material or any other costs or expenses.*" (*Emphasis added*). Although taxpayer labels itself as a "construction management company," taxpayer nonetheless falls with the regulatory definition of "contractor." As set out in 45 IAC 1-1-100, "The term 'contractor' means any taxpayer obligated under the terms of a contract, except a contract of sale, to furnish the necessary required labor, material and other elements of cost for the performance of construction, erection, installation or any other service work for another person regardless of the form of the contract or whether it is performed on a lump-sum, cost-plus-a-fixed-fee, percentage-of-cost, or any other basis or whether such taxpayer the general, prime, or subcontractor."

FINDING

Taxpayer's protest is respectfully denied.

II. Apportionment of Taxpayer's Income Between Labor and Materials

During the audit, the portion of the contract revenue attributable to the construction project at issue was apportioned between revenue received for labor and revenue received for materials. That apportionment was based upon the available records submitted by the subcontractors for the two Indiana construction projects. The audit determined that 72 percent of the taxpayer's income was attributable to labor and 28 percent was attributable to materials. At the time of the audit, both the auditor and the taxpayer agreed that this apportionment was based upon the best information available and accurately reflected the taxpayer's operating results.

In the absence of primary information authoritatively differentiating between the revenue received for labor from the revenue received for materials, IC 6-8.1-5-1(a) requires that the audit arrive at a tax assessment based on the "best information available." The law states that, "If the department reasonably believes that a person has not reported the proper amount of tax due, the department *shall* make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department." (*Emphasis added*).

Taxpayer now argues that the audit's determination incorrectly apportioned labor and materials for the single construction project here at issue. Taxpayer maintains that it can produce information establishing that – for the construction project here at issue – the correct apportionment should be 29 percent for labor and 71 percent for materials. The significance of the distinction is found at 45 IAC 1-1-100 which states that, "Under a cost-plus contract, the actual material cost will be taxed at the lower rate, and labor, overhead and fixed fee will be taxed at the higher rate." Adoption of the taxpayer's apportionment scheme would decrease taxpayer's gross income tax liability.

The audit's determination of taxpayer's liabilities arrives with a presumption of correctness. IC 6-8.1-5-1(b) states that "[t]he 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." Taxpayer's assertion concerning the proper apportionment between and labor and materials revenue is based on its interpretation of the "best information available." Taxpayer does not – nor is it entitled to do so – maintain that its apportionment is based on a definitive analysis of the actual revenues derived from the project under examination. Essentially, taxpayer argues that its analysis is more favorable on its own behalf and should be accepted by the Department in lieu of the audit's determination. The argument fails because taxpayer does not meet its burden of overcoming the presumption of correctness, under IC 6-8.1-5-1(b), accorded the audit's original determination.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0120010294.LOF

LETTER OF FINDINGS NUMBER: 01-0294 AGI
Adjusted Gross Income Tax
For Tax Periods: 2000

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

ISSUES

1. Adjusted Gross Income Tax – Claim of Right Doctrine

Authority: 26 USCA 1341

The taxpayer protests the denial of a credit claimed based upon the Claim of Right Doctrine.

2. Adjusted Gross Income Tax – Doctrine of Equitable Recoupment
Authority: 26 USCA 1341, IC 6-8.1-9-1, U.S. v. Dalm, 110 S.Ct. 1361 (1990), Indiana Department of Revenue v. Smith, 473 N.E.2d 611 (Ind. 1985)

The taxpayer requests a refund of taxes paid pursuant to the Doctrine of Equitable Recoupment.

STATEMENT OF FACTS

The taxpayers are a married couple filing a joint Indiana Adjusted Gross Income Tax Return. The husband sold a business in October of 1996. A portion of the sales price was paid at closing with the remaining purchase price paid in annual installments on the first and second anniversaries of the closing. As a part of the agreement, the taxpayer agreed to indemnify the buyer for all claims made against the buyer for which notice was given to the taxpayer prior to the sixth anniversary of the closing date. Such indemnifications were to be an adjustment of the original sales price.

In 2000, the buyer exercised its right of indemnification in regards to a lawsuit filed against the buyer by a former customer of the business. The taxpayer's share of the settlement and corresponding legal fees amounted to $239,591. This adjustment of the original sales price caused the taxpayer to recompute the tax previously paid to the Indiana Department of Revenue (hereinafter referred to as the "department"). The taxpayers asked for a recovery of the tax previously paid under the claim of right doctrine on line 11 of schedule 2 of their 2000 IT-40. Although the $10,410 represents a recovery of taxes paid based upon the taxpayers' best estimate of the taxable gain generated from the installment sale, the taxpayer concluded that the "Indiana Credits" schedule appeared to provide the best solution as to how to present this recovery. The department disallowed this credit and sent the taxpayers a "Notice on Intent to Offset." The taxpayers protested the disallowance of the credit and a hearing was held.

1. Adjusted Gross Income Tax – Claim of Right Doctrine

DISCUSSION

The so-called "Claim of Right Doctrine" is really not a doctrine at all. It is a procedure created by statutory law, 26 USCA 1341, for the computation of tax where the taxpayer restores a substantial amount of income previously reported under a claim of right. If the taxpayer meets the criteria set out in this federal statute, then the taxpayer may be entitled to a deduction or a credit in a later year because it is established that the taxpayer did not have an unrestricted right to the income. This statute applies to the federal return but not the state return because Indiana has not adopted Section 1341 of the Internal Revenue Code. Also, Indiana has not enacted its own statute pertaining to the claim of right situation. Therefore, the taxpayer cannot recover his alleged overpayment of the Indiana adjusted gross income tax through the claim of right doctrine.

FINDING

The taxpayer's protest is denied.

2. Adjusted Gross Income Tax – Doctrine of Equitable Recoupment

DISCUSSION

Federal courts have created, and Indiana courts have recognized, the "Doctrine of Equitable Recoupment." Because this doctrine is judicially and not statutorily created, it is governed by case law. Under this doctrine, the bar of the statute of limitations may be avoided by a taxpayer or the department in certain limited circumstances. The doctrine prevents inconsistent tax treatment of a single transaction or event with regard to a single taxpayer or different taxpayers with a significant identity of interest. It arises where the claim of one party, whether for unpaid taxes or for a refund, is open, while the related and conflicting claim of the other party is barred by the statute of limitations. Thus, for a taxpayer, the doctrine of equitable recoupment permits a time-barred refund claim to reduce a related liability that has been timely asserted by the department.

An essential element of the doctrine of equitable recoupment is that a single transaction or event be subject to two taxes on inconsistent legal theories. It is based on the concept that a transaction that is the subject of judicial attention should be examined in all its aspects, and any judgement that is rendered must do justice in view of the one transaction as a whole. As the United States Supreme Court stated in U.S. v. Dalm, 110 S.Ct. 1361 (1990), at page 1368: "... a party litigating a tax claim in a timely proceeding may, in that proceeding, seek recoupment of a related, and inconsistent, but now time-barred tax claim relating to the same transaction." The Court went on to hold that the doctrine of equitable recoupment cannot be the sole basis for jurisdiction of a refund suit and stated at page 1369:

> Our conclusion is reinforced by the fact that congress has legislated a set of exceptions to the limitations period prescribed by Sections 7422 and 65112(a). In 1938, Congress adopted what are known as the mitigation provisions, now codified at Section 1311-1314. These statutes, in specified circumstances, permit a taxpayer who has been required to pay inconsistent taxes to seek a refund of a tax the recovery of which is otherwise bared by Section 7422(a) and 6511(a). It is undisputed that Dalm's action does not come within these provisions; were we to allow her to maintain a suit for refund on the basis of equitable recoupment, we would be doing little more than overriding Congress' judgment as to when equity requires that there be an exception to the limitations bar.

Although the Court did not mention Section 1341 of the Internal Revenue Code, Computation of Tax Where Taxpayer Restores Substantial Amount Held Under Claim of Right, it would have the same effect where the taxpayer is outside the statute of limitations for amending the reporting year.

The doctrine of equitable recoupment was specifically recognized by the Indiana Supreme Court decision in Indiana Department of Revenue v. Smith, 473 N.E.2d 611 (Ind. 1985). In this case, real estate held by spouses as tenants by the entireties and then transferred by them to their children subject to joint and successive life estates in the spouses was correctly subject to inheritance tax at the time of death of the last spouse. However, at the death of the first spouse, one-half of the real estate was incorrectly taxed in the first spouse's estate. A claim for refund of the erroneously paid inheritance tax was never filed. Instead, the second spouse's estate attempted to include only one-half of the real estate as being taxable due to the reporting error in the first estate. The department petitioned the court for inclusion of the full value of the real estate as required by statute. The Supreme Court held that the department was correct but that under the doctrine of equitable recoupment, the estate was entitled to a credit for the taxes erroneously paid in the first estate.

Although the doctrine of equitable recoupment was developed by the courts, it may be applied under the appropriate circumstances in an administrative proceeding. Therefore, if the Department finds that recoupment would be allowed as a defense against a tax assessment in a case in which a court would have uncontested jurisdiction to adjudicate one of the taxes in question, then the department could allow the application of the doctrine without first requiring that suit be filed.

For taxpayers, the doctrine of equitable recoupment applies only to the following set of circumstances:

(1) The department has a claim for unpaid taxes which is open.

(2) The taxpayer has a refund claim which is barred by the statute of limitations.

(3) The claim for unpaid taxes and the refund claim are based on a single transaction or event that has been subjected to two taxes on inconsistent legal theories.

(4) Only a single taxpayer, or different taxpayers with a significant identity of interest, is involved.

The taxpayer's situation would have to satisfy all four of the above criteria or the doctrine of equitable recoupment would not apply. In this case, the taxpayer's situation meets three of the requirements. The department has an open claim for unpaid taxes. The taxpayer has a refund claim that is barred by the statute of limitations. Only one taxpayer is involved. There are not, however, two inconsistent legal theories for the imposition of taxes. The taxpayer reported an amount of income and the department claimed the appropriate amount of taxes on the reported income. The taxpayer did not report the amended amount of income during the statutorily prescribed period. Therefore, the taxpayer's claim is barred by the statute of limitations.

As pointed out by the United States Supreme Court in Dalm, supra, the doctrine cannot be applied to simply allow a refund claim that is otherwise barred by the statute of limitations, no matter how meritorious the claim may be. The remedy for a straight refund claim is controlled by IC 6-8.1-9-1.

FINDING

The taxpayer's claim for refund pursuant to the Doctrine of Equitable Recoupment is denied.

DEPARTMENT OF STATE REVENUE

1520020037.LOF

LETTER OF FINDINGS NUMBER: 02-0037
Motor Carrier Fuel Tax
For the Tax Periods of 1998 through 2000

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

ISSUES

I. Motor Carrier Fuel Tax – Sufficiency of documentation

Authority: IC 6-6-4.1-4, IC 6-6-4.1-4.5, IC 6-6-4.1-2, IC 6-6-4.1-9

The Taxpayer protests the motor carrier fuel tax assessment resulting from Taxpayer's lack of fuel tax documentation.

II. Penalty – Imposition

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

The Taxpayer protests the assessment of a ten percent (10%) penalty.

FACTS

Taxpayer sells and installs fences and was assessed Motor Carrier Fuel Tax on Taxpayer's vehicles during an audit. More facts provided as necessary.

DISCUSSION

Pursuant to IC 6-6-4.1-4:

(a) A tax is imposed on the consumption of motor fuel by a carrier in its operations on highways in Indiana. The rate of this tax is the same rate per gallon as the rate per gallon at which special fuel is taxed under IC 6-6-2.5. The tax shall be paid quarterly by the carrier to the department on or before the last day of the month immediately following the quarter.

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

(c) The amount of tax that a carrier shall pay for a particular quarter under this section equals the product of the tax rate in effect for that quarter, multiplied by the amount of motor fuel consumed by the carrier in its operation on highways in Indiana and upon which the carrier has not paid tax imposed under IC 6-6-1.1.

....

Additionally, a surcharge tax is imposed on the consumption of motor fuel by a carrier in its operations on highways in Indiana at a rate of $0.11 per gallon. IC 6-6-4.1-4.5.

The tax applies to, among others, trucks having a gross weight of greater than twenty six thousand pounds or vehicles used in combination if the gross weight is greater than twenty six thousand pounds are subject to the tax. IC 6-6-4.1-2

Taxpayer maintains various vehicles, some which are subject to tax only when a trailer is attached. During the audit, the auditor used four miles per gallon for fuel consumption after it was determined insufficient documentation existed to show otherwise.

Taxpayer notes that the auditor's figures are inflated because only certain vehicles were subject to tax when a trailer was attached and the figures do not accurately reflect what Taxpayer actually owes. Taxpayer does not dispute that they lacked sufficient documentation for the periods in question.

IC 6-6-4.1-9 states:

If there are no records showing the number of miles actually operated per gallon of motor fuel and if section 11(c) of this chapter is inapplicable, it is presumed for purposes of this chapter that one (1) gallon of motor fuel is consumed for every four (4) miles traveled.

Consequently, Taxpayer's protest is respectfully denied.

FINDING

The Taxpayer’s protest is respectfully denied.

II. Penalty – Imposition

DISCUSSION

Taxpayer protests the ten percent negligence penalty. The Department may impose a ten percent (10%) negligence penalty on the amount of deficiency as determined by the Department. IC 6-8.1-10-2.1. Also, 45 IAC 15-11-2 states in 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 gibing 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 causes is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer argues that while the fuel tax records may have been insufficient for the periods in question, vast improvements have been made. While it is clear from the documentation supplied by Taxpayer at the hearing that there have been improvements since the audit, it remains that during the periods covered by the audit, there was inattention on the part of the Taxpayer with regards to maintaining their records. Thus, Taxpayer’s protest is respectfully denied.

FINDING

The Taxpayer’s protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0220010062.LOF

LETTER OF FINDINGS NUMBER: 02-0062
Corporate Income Tax
For the Fiscal Years Ending May 31, 1996, 1997, 1998, and 1999

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

ISSUES

I. Gross Income Tax – Classification of Contractor's Receipts as Taxable at the Lower Rate or Higher Rate of Tax

Authority: 45 IAC 1.1-2-12(c)

The taxpayer protests the auditor's reclassification of a portion of its receipts from the lower to the higher rate of tax.

II. 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 contractor that builds above-the-ground tanks and storage facilities for petroleum refiners. A departmental audit resulted in an assessment of additional gross income tax. The taxpayer protested this assessment and the imposition of penalty in letters dated January 29, 2001 and April 18, 2002, respectively.

I. Gross Income Tax – Classification of Contractor's Receipts as Taxable at the Lower Rate or Higher Rate of Tax

The auditor reclassified a portion of the taxpayer's gross receipts from the lower rate to the higher rate of taxation. The taxpayer protested stating that the auditor treated all of its contracts as time and material contracts. The taxpayer asserted that not all of its contracts were of this type. Following review and discussion, the auditor and the taxpayer resolved this matter. The auditor has completed a supplemental audit to modify this adjustment. In a letter dated April 18, 2002, the taxpayer withdrew its protest of this issue based on the proposed supplemental audit adjustments.

FINDING

The taxpayer has withdrawn its protest of this issue.

II. Tax Administration – Penalty

For gross income tax purposes, the taxpayer originally reported income from the performance of contracts as follows: 33 percent was reported as subject to the higher rate of tax, and 67 percent was reported as subject to the lower rate. The audit properly reclassified a portion of these receipts from the lower 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.

In a letter dated June 4, 2002, the taxpayer argued that in 2001 it hired an outside consulting firm to serve as its internal tax department. According to the taxpayer, this action has greatly improved its compliance with the tax laws of Indiana and other states. While the hiring of the consulting firm may be commendable, it does not excuse the fact that the taxpayer's record keeping practices during the audit period were inadequate.

Improved compliance efforts made subsequent to the completion of an audit do not excuse a taxpayer's negligence during the audit period.

A second argument put forth by the taxpayer asserts that nearly a year passed between the filing of its protest and the point at which the auditor returned to review the taxpayer's additional information. The taxpayer further points out that interest charges have continued to accrue on the supplemental assessment. The taxpayer believes that as it was not responsible for this delay the penalty should be waived to balance the increased interest charges.

While the department strives to process all taxpayer protests in a prompt manner, it is not required by statute or regulation to do so within a specific period of time. Furthermore, the taxpayer had the option of paying the original assessment in full in order to stop the accrual of interest. Following the resolution of the audit issues, the taxpayer could have filed a claim for refund if appropriate. Neither argument set forth by the taxpayer establishes that its failure to timely pay the full of 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

0420020071.LOF

LETTER OF FINDINGS NUMBER: 02-0071
Responsible Officer
Sales Tax
For Tax Periods: 1995-1997

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

ISSUE

Sales Tax – Responsible Officer Liability
Authority: IC 6-2.5-9-3; IC 6-2.5-2-1

The taxpayer protests the assessment of responsible officer liability for unpaid use taxes.

STATEMENT OF FACTS

The taxpayer was an officer of three related corporations that were audited by the Indiana Department of Revenue, hereinafter referred to as the "department." The sales and use tax audit resulted in an additional use tax liability. This liability was personally assessed against the taxpayer. After the taxpayer protested the personal assessment, a hearing was held. More facts will be provided as necessary.

Sales Tax – Responsible Officer Liability

DISCUSSION

Retail merchants collect sales taxes as agents for the state pursuant to IC 6-2.5-2-1. If a corporate retail merchant has collected sales taxes and failed to remit them to the state, the corporate officers can be held personally responsible for the payment of the collected trust taxes pursuant to IC 6-2.5-9-3. The department assessed the corporations' audit liabilities personally against the taxpayer.

The audits indicate that each of the corporations properly remitted all sales taxes due to the state. The additional liabilities resulted from the corporations' failure to self assess and remit use taxes on tangible personal property used and consumed in the business. Use taxes are not trust taxes that can be personally assessed against corporate officers.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0120020114.LOF

LETTER OF FINDINGS NUMBER: 02-0114 AGI
Adjusted Gross Income Tax
For Tax Periods: 2000

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

ISSUES

Adjusted Gross Income Tax – Imposition
Authority: IC 6-3-2-1(a), IC 6-3-1-12, IC 6-8.1-5-1(b), *State Election Board v. Evan Bayh*, 521 N.E.2d 1212, (Ind. 1988)

Taxpayer protests the imposition of the adjusted gross income tax.

STATEMENT OF FACTS

The taxpayer worked and lived in Florida during the tax year 2000. The Indiana Department of Revenue, hereinafter referred to as the "department," assessed Indiana adjusted gross income tax for that year. The taxpayer protested the assessment and a hearing was held. Further facts will be provided as necessary.

Adjusted Gross Income Tax – Imposition

DISCUSSION

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

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

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

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

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

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

Domicile in Indiana is defined as "the place where a person has his true, fixed, permanent home and principal establishment, and to which place he has, whenever he is absent, the intention of returning." *State Election Board* at page 1317. Once established, a person's domicile is presumed to continue until the person's actions provide adequate evidence that along with moving to another jurisdiction, the person intends to establish a domicile in the new residence. Whether or not the person has successfully established a new domicile is a question of fact to be determined by the trier of fact. *Id.* at page 1317. Some of the facts considered were that Mr. Bayh paid in-state tuition at Indiana University, out -of -state tuition at the University of Virginia law school and voted in the elections in Vigo County, Indiana. He also registered for the draft from Indiana. The Supreme Court considered these acts adequate evidence to prove that Mr. Bayh intended to return to Indiana and retained his Indiana domicile even though he had lived outside the state for several years.

The taxpayer agrees that he was domiciled in Indiana prior to his move to Florida. The taxpayer began his Florida job and moved to Florida in August, 1999. Throughout 2000, the taxpayer maintained his parent's Indiana address as his principal address. He also used the Indiana address on his Indiana adjusted gross income tax, federal adjusted gross income tax and Florida intangibles tax returns. The W-2 Wage and Tax Statements issued by the taxpayer's employer indicate the taxpayer's Indiana address. Three months after his move to Florida, the taxpayer renewed his Indiana driver's license in November, 1999. He did not obtain a Florida driver's license until September 8, 2001. The taxpayer did not own an automobile, so he was not required to register a vehicle in either state. The taxpayer did not register to vote in either state until his September 8, 2001 registration in the state of Florida. Since the taxpayer owned no real estate, he did not pay any real estate taxes or file a homestead exemption in either state. The taxpayer's parents submitted an affidavit indicating that the taxpayer did not live in Indiana during 2000, the taxpayer did not own property in Indiana during 2000, and that they considered the taxpayer a resident of Florida rather than Indiana during 2000.

During the year 2000, the totality of the taxpayer's actions and failures to act do not clearly evidence that taxpayer intended to change his domicile to Florida.

The taxpayer did not meet his burden of proving that he changed his domicile from Indiana to Florida prior to the tax year 2000.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020123.LOF

LETTER OF FINDINGS NUMBER: 02-0123
State Gross Retail Tax
For the 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.

ISSUE

I. Gross Retail Tax – Taxpayer's Architectural Renderings

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

Taxpayer argues that agreements to provide architectural renderings to its clients are transactions involving the provision of professional services. Therefore, the transactions are not subject to the state's gross retail (sales) tax.

STATEMENT OF FACTS

Taxpayer is in the business of providing architectural renderings. Architectural renderings are elaborate drawings of buildings typically commissioned by architects, construction companies, or building owners. Taxpayer uses either a set of blueprints or photographs as the basis for the rendering. Occasionally, taxpayer will make an on-site visit to the source building. The rendering may be prepared using pencil, pen and ink, watercolors, or combinations of those media.

During an examination of taxpayer's financial records, the audit found that taxpayer was selling these architectural renderings to Indiana customers without charging sales tax. The audit determined that the provision of the architectural renderings constituted a "unitary transaction" and that the taxpayer should have been collecting sales tax on each transaction. Accordingly, the audit assessed taxpayer for the uncollected sales tax.

The taxpayer protested the audit's determination and assessment, an administrative hearing was held, and this Letter of Findings follows.

DISCUSSION

I. Gross Retail Tax – Taxpayer's Architectural Renderings

The audit found that taxpayer's provision of architectural renderings was a "unitary transaction" under 45 IAC 2.2-4-1. The regulation states as follow:

> (a) Where ownership of tangible personal property is transferred for a consideration, it will be considered a transaction of a retail merchant constituting selling at retail unless the seller is not acting as a "retail merchant."
>
> (b) All elements of consideration are included in gross retail income subject to tax. Elements of consideration include, but are not limited to:
>
> (1) The price arrived at between purchaser and seller.
>
> (2) Any additional bona fide charges added to or included in such price for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other services performed in respect to or labor charges for work done with respect to such property prior to transfer.
>
> (3) No deduction from gross receipts is permitted for services performed or work done on behalf of the seller prior to the transfer of such property at retail.

The regulation derives from IC 6-2.5-1-1 which states that a "'unitary transaction' includes all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated." A "retail unitary transaction" occurs when a retail merchant purchases tangible personal property in his ordinary course of business and then sells that property along with services as a unitary transaction. IC 6-2.5-1-2.

Taxpayer disagrees with the audit's analysis arguing that taxpayer is not a "retail merchant" but is a service provider under 45 IAC 2.2-4-2 and is therefore entitled to the exemption provided under that regulation. 45 IAC 2.2-4-2, allowing a sales tax exemption for service providers, states in part as follows:

> (a) Professional services, personal services, and services in respect to property not owned by the person rendering such services, are not "transactions of a retail merchant constituting selling at retail", and are not subject to gross retail tax. Where, in conjunction with rendering professional services, personal services, or other services, the serviceman also transfer tangible personal property for a consideration, this will constitute a transaction of a retail merchant selling at retail unless:
>
> (1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property;
>
> (2) The tangible personal property purchased is used or consumed as a necessary incident to the service;
>
> (3) The price charged for tangible personal property is inconsequential (not to exceed 10%) compared with the service charge; and
>
> (4) The serviceman pays gross retail tax or use tax upon the tangible personal property at the time of acquisition.

In order to qualify for the sales tax exemption as a service provider, the taxpayer must meet each of the four individual requirements established within 45 IAC 2.2-4-2.

Taxpayer is in the business of providing professional services as distinguished from tangible personal property. What taxpayer's clients purchase is taxpayer's ability to apply pencil, pen, ink, and water colors to cardboard or canvas in such a way as to create a stylized, attractive, and hyper-realistic rendition of the client's building. If the client wanted to acquire a literal, graphical representation of its building, there would be no need to purchase taxpayer's services. Instead the client could rely on the original blueprints or photographs without having to purchase taxpayer's services.

In one sense, the client never actually acquires absolute "ownership" of the architectural rendering because, in all cases, taxpayer retains reproduction rights to the original rendering. If the client wishes to duplicate the architectural rendering in a brochure or advertisement, the client must separately bargain and pay for the right to do so. If the client wishes to obtain a duplicate copy of the original rendering, it must – by the terms of the parties' original agreement – obtain that second copy from taxpayer. However, it should be noted that, in transactions involving the provision of additional copies from the original architectural rendering, the taxpayer should be collecting sales tax. In furnishing those additional copies, the taxpayer is not longer functioning as a service provider but is acting as a "retail merchant" transferring tangible personal property in the form of a unitary transaction.

Because taxpayer is essentially in the business of providing a service to its clients, it meets the first requirement set out in 45 IAC 2.2-4-2(a)(1).

The various supplies purchased by taxpayer – cardboard, canvas, ink, paint, pens – are necessarily consumed in the production of the architectural renderings. The supplies cannot be retrieved, recycled, or reused in the production of a different architectural rendering. Therefore, the taxpayer meets the second requirement set out in 45 IAC 2.2-4-2(a)(2).

The taxpayer's 48 representative invoices presented at the time of the hearing indicate that taxpayer charges approximately $100 to $3,500 for each original architectural rendering. The price varies based upon the size of the rendering, the media employed, and the complexity of the rendering. Taxpayer estimates that the value of the tangible personal property consumed in the production of the rendering is approximately four to five percent of the actual charge for the rendering. Common sense would indicate that the cost of pen, ink, water colors, and cardboard represents a very small portion of the ultimate total cost of a rendering costing upwards of $3,500. Therefore, the taxpayer meets the third requirement set out in 45 IAC 2.2-4-2(a)(3).

When taxpayer originally purchased the items of tangible personal property used to produce the architectural renderings, it paid sales tax on those purchases. This fact is attested to in the original audit report. Therefore, taxpayer meets the fourth requirement set out in 45 IAC 2.2-4-2(a)(4).

Taxpayer is primarily in the business of furnishing a service, consumes the acquired tangible personal property in providing the service, the value of the tangible personal property is less than ten-percent of the cost of the service, and pays sales tax at the time it acquires the tangible personal property. Therefore, because taxpayer is not acting as a "retail merchant," it falls outside the authority of 45 IAC 2.2-4-1 and taxpayer is entitled to claim the sales tax exemption provided under 45 IAC 2.2-4-2.

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0420020140.LOF

LETTER OF FINDINGS NUMBER: 02-0140
Responsible Officer
Sales Tax and Withholding Tax
For Tax Period 1996

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

ISSUE

Sales and Withholding Tax – Responsible Officer Liability

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

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

STATEMENT OF FACTS

The taxpayer was an officer of a corporation that did not remit the proper amount of sales and withholding taxes to Indiana for the tax period 1996. After the taxpayer was personally assessed for the taxes, penalties and interest, he timely filed a protest. Pursuant to the request of the taxpayer, the issue was determined based upon the contents of the file. More facts will be provided as necessary.

Sales and Withholding Tax – Responsible Officer Liability

DISCUSSION

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

An individual who:

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

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

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

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

Indiana Department of Revenue assessments are prima facie evidence that the tax assessment is correct. The taxpayer bears the burden of proving that the assessment is incorrect. IC 6-8.1-5-1 (b).

The statutes set out two tests that must be met for an individual to be personally responsible for corporate taxes. The first test requires that the taxpayer be an employee or officer of the corporation. In this case, the taxpayer was the vice president of operations. As an officer, the taxpayer meets the first requirement of the test.

The issue to be determined in this case is whether or not the taxpayer had the duty to remit the trust taxes to the state.

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

Pursuant to Safayan at page 273: "The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that they are paid. The factors considered to determine whether a person has such authority are the following:

1. The person's position within the power structure of the Corporation;
2. The authority of the officer as established by the Articles of Incorporation, By-laws or employment contract; and
3. Whether the person actually exercised control over the finances of the business including control of the bank account, signing checks and tax returns or determining when and in what order to pay creditors."

As vice president of operations, the taxpayer was responsible for the plant activities and supervision of personnel involved in the manufacture of the corporation's product. He was not involved in the financial matters of the corporation. Although he did have check signing authority, he only signed checks on the rare occasion that neither the president or chief financial officer were available and they had specifically authorized the taxpayer to sign the check. He did not sign tax returns or other financial forms. He had no contact with the taxing authorities. He was not involved in the collection of or withholding of taxes. The taxpayer first learned of the corporation's tax difficulties in approximately October, 1996, when a new accountant was hired. She told the taxpayer that the corporation had not been paying taxes. The taxpayer then approached the president and chief financial officer who acknowledged the tax problem. By then the corporation was financially unable to resolve the tax problem. Shortly thereafter, in late 1996, the corporation filed bankruptcy.

In this case, the taxpayer's position within the power structure of the corporation did not primarily concern financial matters. The taxpayer's actual day to day job duties did not concern control of corporate finances. It appears that the taxpayer did not have control of the bank accounts or determining when and in what order to pay creditors. The taxpayer did not meet the criteria set out in the Safayan case to be an officer with the duty to collect and remit withholding and sales taxes to the state.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0220010167.LOF

LETTER OF FINDINGS NUMBER: 02-0167
Corporate Income Tax
For the Fiscal Years Ending June 30, 1996, 1997, 1998

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.

ISSUES

I. Adjusted Gross Income Tax – Expenses Related to Foreign Source Dividends

Authority: 45 IAC 3.1-1-8

The taxpayer protests the auditor's calculation of expenses applied against foreign source dividends.

II. 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 manufactures and sells electronic medical monitoring equipment and disposable medical supplies. The taxpayer also generates revenues from the performance of services on maintenance contracts and other service work on equipment it has sold. The department audited the taxpayer; the audit resulted in an assessment of additional gross income tax, supplemental net income tax (SNIT), and penalty.

In a letter dated November 14, 2000, the taxpayer conceded its liability for the additional gross income tax. However, the taxpayer protested the adjustment to adjusted gross income tax (resulting in the assessment of additional SNIT) and the imposition of penalty.

I. Adjusted Gross Income Tax – Expenses Related to Foreign Source Dividends

The taxpayer protested the auditor's calculation of expenses applied against foreign source dividends. Following review and discussion, the auditor and the taxpayer resolved this matter. The auditor has completed a supplemental audit to reverse this adjustment in the taxpayer's favor. In a letter dated March 27, 2002, the taxpayer withdrew its protest of this issue based on the proposed supplemental audit adjustments.

FINDING

The taxpayer has withdrawn its protest of this issue.

II. Tax Administration – Penalty

For gross income tax purposes, the taxpayer originally reported income from the performance of services 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.

In a letter dated May 6, 2002, the taxpayer argued that "… there was no intentional disregard of the law in this matter." The taxpayer is advised that the penalty being imposed is not for intentional disregard of the law (fraud) but for negligence. The taxpayer has demonstrated ignorance of the Indiana gross income tax law. The taxpayer should have known that income derived from providing services is taxable at the higher rate of tax. 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

0120020211P.LOF

LETTER OF FINDINGS NUMBER: 02-0211P
Individual Income Tax
Calendar Year 1999

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer, in a letter dated April 8, 2002, requested an abatement of the late payment penalty.

Taxpayer filed its return late with a tax balance due of $7,469 (or more than eighteen percent of the tax due) and remitted the tax plus interest with the return. Taxpayer requests a waiver of the penalty because the taxpayer had timely filed an extension. The taxpayer, however, remitted only $2,454 with the extension request which was not enough to avoid a penalty.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer merely states that it had an extension on file.

Taxpayer remitted eighty-two percent (82%) of its tax by the due date of the return. An extension to file at a later date is not an extension to make a late payment.

The Department finds the penalty appropriate.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020244P.LOF

LETTER OF FINDINGS NUMBER: 02-0244P
Adjusted Gross 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 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 failed to timely file its Indiana income tax return for the tax year ending December 31, 1999. The department issued a penalty billing.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer's letter states that the company did not make money, did not owe income tax, and is now out of business.

Based upon the above information, taxpayer requests that the penalty be waived.

Taxpayer failed to timely file its IT20-S return for calendar year 1999.

IC 6-8.1-10-2.1(g) states:

A person who fails to file a return for a listed tax that shows no tax liability for a taxable year, other than an information return (as defined in section 6 of this chapter), on or before the due date of the return shall pay a penalty of ten dollars ($10) for each day that the return is past due, up to a maximum of two hundred fifty dollars ($250).

Taxpayer failed to file its return timely. The department finds that a penalty is proper.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

4520020245.LOF

LETTER OF FINDINGS NUMBER: 02-0245
Gaming Card Excise 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. Gaming Card Excise Tax – Qualified and Nonqualified

Authority: IC 4-32-15-1 through IC 4-32-15-6; 45 IAC 18-4-2; 45 IAC 18-5-2; Muncie Novelty v. Department of State Revenue, 20 N.E.2d 779; (Ind. Tax 1999)

Taxpayer protests the imposition of GCE tax.

II. Tax Administration – Penalty

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

Taxpayer protests the imposition of a penalty.

STATEMENT OF FACTS

The Taxpayer states it accepted and paid the correct tax for qualified organizations at 10% and non-qualified organizations at 5% of its sales. The taxpayer was audited as a licensed distributor of charity gaming devices such as pull-tabs, tip boards, punchboards, and bingo cards and supplies. Upon audit it was discovered that the taxpayer failed to maintain invoices consecutively and the customer's name and address were not included on all invoices. Numerous invoices were found in each of the audited years that stated "cash" in the name section with no further information about the customers. These invoices did not contain the taxpayer's name or distributor license number or, obviously, the customer's license number. The invoices contained a description of the item being purchased and the quantity of cases but did not include serial numbers of the purchases. A record of the serial numbers of the merchandise being sold was kept in the sales journals. Excise tax was charged to the customers on the invoices that included the customer's name with the exception of the bingo card sales, which were not subject to the tax. Sales tax was calculated on the invoices that were "cash sales". The sales tax was remitted on these sales. In most cases, the sales tax was not collected from the customers but was paid by the taxpayer.

Most of the taxpayer's invoices listed the name of the qualified non-for-profit organization to which the sales were made. The gaming card excise tax was listed as a separate line item on these invoices and was collected from the customers at the rate of ten percent (10%) of the retail price. In each year of the audit period, the taxpayer made numerous cash sales. The taxpayer did not collect the gaming card excise tax or sales tax on these cash sales in most cases. The forms ST-103 sales tax returns were filed monthly and the appropriate amount of sales tax was remitted on the total retail price of the cash sales. Thus, the taxpayer paid the sales tax rather than collect it from the customers. The taxpayer was aware that at least a portion of the sales to cash-paying customers was made to representatives of qualified organizations but, for whatever reason, these customers wished to remain anonymous. The taxpayer was unable to identify the cash sales that were made to representatives of qualified organizations or non-qualified organizations. It is assumed that these sales were made to qualified organizations and the cash sales are subject to the gaming card excise tax. The cash sales were reduced by the sales of bingo cards. The gaming card excise tax was calculated on net sales with credit being given for the sales tax paid in error by the taxpayer.

I. Charity Gaming Excise Tax – Qualified and Nonqualified

DISCUSSION

Taxpayer was found not to be in compliance with the tax laws of this state and was assessed tax accordingly.

Indiana Codes state that licensed entities such as the taxpayer are liable for payment of the tax at the time it "transports pull tabs, punch boards, or tip boards to qualified organizations in Indiana for resale by those qualified organizations." Also the code requires the company to maintain satisfactory records that include the following:

1) The date of sale
2) The customer name and business
3) A full description of the item sold, including the serial number of the products sold
4) The quantity and sales price of each item
5) The manufacturer's or distributor's license number; [and]
6) The gaming card excise tax due on the sale

The Indiana Tax Court affirmed in *Muncie Novelty v. Department of State Revenue, 720 N.E.2d 779 (*Ind. Tax 1999) that the Indiana Department of Revenue was correct in finding the taxpayer liable for the Charity Gaming Excise Tax for sales to all unidentified customers. Likewise, the Taxpayer at issue falls into the court's ruling that it is subject to the Gaming Excise Tax because it failed to comply with record keeping.

FINDING

Taxpayer's protest is denied.

II. Tax Administration – Penalty

DISCUSSION

Taxpayer merely states it was not aware of the penalty law.

Taxpayer was assessed a penalty because he was in violation of the Indiana Tax Code and regulations and has not shown reasonable cause.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0320020253P.LOF

LETTER OF FINDINGS NUMBER: 02-0253P
Withholding Tax
Calendar Years 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 foreign subchapter S corporation doing business in Indiana with nonresident shareholders. Taxpayer protests the penalty assessed on a late filed return.

Taxpayer failed to timely remit withholding taxes.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer requests the department waive its late penalty because it felt that by withholding at the corporate level it would be beneficial for the shareholders and the State of Indiana. By the time it realized that this would be beneficial for both, the due date had already passed for making a timely deposit. Taxpayer further states that it chose to go ahead and make the election and deposit even though the due date had passed and feels it acted in good faith by making the deposit and did not intentionally make the election and deposit late.

Taxpayer failed to remit tax timely as required by statue and has not provided reasonable cause for failing to do so.

Taxpayer should be aware of its tax liabilities when doing business in this state.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020255P.LOF

LETTER OF FINDINGS NUMBER: 02-0255P
Adjusted Gross 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 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 failed to timely file its Indiana income tax return for the tax year ending December 31, 1999. The department issued a penalty billing.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer's letter states that the company did not make money, did not owe income tax, and is now out of business.

Based upon the above information, taxpayer requests that the penalty be waived.

Taxpayer failed to timely file its IT20-S return for calendar year 1999.

IC 6-8.1-10-2.1(g) states:

A person who fails to file a return for a listed tax that shows no tax liability for a taxable year, other than an information return (as defined in section 6 of this chapter), on or before the due date of the return shall pay a penalty of ten dollars ($10) for each day that the return is past due, up to a maximum of two hundred fifty dollars ($250).

Taxpayer failed to file its return timely. The department finds that a penalty is proper.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020268P.LOF

LETTER OF FINDINGS NUMBER: 02-0268P
Adjusted Gross Income Tax
For Fiscal Ended June 30, 2000

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer protests the proposed assessment for penalty for the late payment of its income tax. The due date of the return was October 15, 2000. Taxpayer filed its return late on April 16, 2001 with payment of one hundred percent of its tax liability plus interest. The Department issued its late payment assessment on August 6, 2001.

Taxpayer filed a penalty protest letter dated August 16, 2001 and states that its entire taxable income was generated by a major divestiture that actually occurred on June 30, 2000. All other activities during the year ending June 30, 2000 totaled a loss of $6,641,994.00. Taxpayer states that it identified payroll and property in the state of Indiana when it compiled its apportionment data. Research then disclosed that Indiana considered its divestiture as "business income" and thus it had an Indiana tax liability of $66,179. Taxpayer prepared the Indiana return and submitted payment of the tax and interest covering the period from the original due date (10/15/00) to its actual payment date (04/11/01) and submitted a federal extension on September 15, 2001.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it complied with the Indiana State Revenue requirements as soon as the facts became available.

Taxpayer did not make payment by the original due date of the return nor attempted to make a partial payment when it had property and payroll in the state of Indiana.

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

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020269P.LOF

LETTER OF FINDINGS NUMBER: 02-0269P

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 operates a generation and transmission cooperative providing wholesale electric power to member distribution cooperatives. Taxpayer was previously audited for the tax years 1992 through 1994.

Upon audit it was found that the taxpayer failed to self assess use tax on clearly taxable items such as subscriptions, software, office supplies, construction materials, and other miscellaneous items.

In a letter dated May 13, 2002, taxpayer protests the penalty assessed.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that due to extraordinary circumstances surrounding this time period, its staff had to continue with its regular accounting duties as well as design and implement a new system. The staff unintentionally failed to accrue use tax on some transactions.

The audit indicates that the taxpayer failed to self assess use tax on 30.4% and 6% of its taxable purchases for calendar years 1999 and 2000 respectively for items that were assessed in a previous audit. The percentage of error also increased from the prior audit. Taxpayer has not provided reasonable cause to allow a penalty waiver.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020270P.LOF

LETTER OF FINDINGS NUMBER: 02-0270P
Sales and Use Tax
Calendar Years 1997, 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 provides a wide array of digital wireless communications services throughout the United States and has a sales office in Indiana where they have property, employees, and inventory. At audit, it was determined that the taxpayer failed to charge sales tax to several customers for whom no exemption certificates could be obtained. Taxpayer purchased fixed assets for use in Indiana. Upon the auditor's review of the taxpayer's fixed assets listings and the supporting invoices and other relevant documents, it was determined that no sales tax was billed or paid at point of purchase and no use tax was self assessed nor paid.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that the bulk of the assessment resulted from exemptions that were improperly granted to its customers and it has corrected these errors and taken steps to ensure that they will not recur in the future. In addition, taxpayer states that it is implementing an automated use tax accrual system that will improve its compliance with respect to use tax accruals on fixed assets and expense purchases.

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

The taxpayer failed to remit use tax (primarily fixed assets) on 27.25%, 70.71%, and 40.30% of use tax due for calendar years 1998, 1999, and 2000 respectively. Taxpayer also failed to collect and remit sales tax on some of its taxable sales and did not assure that its clients had tax exemption certificates. Taxpayer has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020281P.LOF

LETTER OF FINDINGS NUMBER: 02-0281P
Use Tax
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.

STATEMENT OF FACTS

Taxpayer was audited for calendar years 1998, 1999, and 2000. Upon audit it was discovered that the taxpayer failed to remit use tax on approximately ninety-eight percent (98%) of its non-taxed taxable purchases.

Taxpayer requests abatement of the penalty due to mistakes or misunderstandings on its part.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it misinterpreted the state regulations, paid Ohio tax in many cases, and had a misunderstanding concerning tax exempt versus non-exempt purchases.

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 use tax due on clearly taxable items and has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0320020285.LOF

LETTER OF FINDINGS NUMBER: 02-0285
Withholding Tax – Responsible Officer
July 31, 1995, August 31, 1995, and September 30, 1995

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

ISSUE(S)

I. Tax Administration – Responsible Officer

Authority: IC 6-8.1-10-9(c)

Taxpayer protests the withholding tax assessment.

STATEMENT OF FACTS

Taxpayer failed to file and pay withholding taxes for the months of July, August, and September 1995 and has not filed those returns nor paid the money to date even though the hearing officer had written letters regarding the issue on several occasions.

I. Tax Administration – Responsible Officer

DISCUSSION

At issue is whether the taxpayer owes the third quarter withholding taxes for the year 1995.

Taxpayer has not filed nor paid its third quarter withholding tax return to date. The department issued best information billings for each month in the third quarter because neither return nor payment was received. The taxpayer has not provided arguments regarding the missing months after the second quarter was adjusted for the payment received. No payment was received for the third quarter. Taxpayer had numerous opportunities to provide detail or information to allow the department to adjust or negate the assessment. Taxpayer failed to show for several scheduled hearings.

FINDING

Taxpayers protest is denied.

DEPARTMENT OF STATE REVENUE

0220020297P.LOF

LETTER OF FINDINGS NUMBER: 02-0297P
Gross Income Tax
For Fiscal Ended March 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.

STATEMENT OF FACTS

Taxpayer protests the proposed penalty assessment for the late payment of its income tax. The due date of the return was July 15, 2001. Taxpayer filed its return on January 14, 2002 with payment of one hundred percent of its tax liability plus interest. The Department issued its late payment assessment on April 8, 2002.

Taxpayer faxed a penalty protest on June 7, 2002 and states that the tax reporting function was unaware of gross receipts activity in Indiana and upon finding that it did have activity in Indiana, it submitted the return and tax and in good faith, interest. Taxpayer prepared the Indiana return and submitted payment of the tax and interest covering the period from the original due date (07/15/01) to its actual payment date (01/14/02). A federal extension to file was submitted.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it complied with the Indiana State Revenue requirements as soon as the facts became available.

Taxpayer did not make payment by the original due date of the return nor attempt to make a partial payment when it had income from the state of Indiana.

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

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120020315P.LOF

LETTER OF FINDINGS NUMBER: 02-0315P
Individual Income Tax
Calendar Year 2000

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer, in a letter dated March 8, 2002, requests an abatement of the penalty.

Taxpayer filed its return late with a tax balance due of $4,669 or twenty-nine percent (29%) and remitted the tax, the underpayment of estimated tax penalty, and interest with the return. Taxpayer requests a penalty waiver because the taxpayer had timely filed an extension. The taxpayer enclosed a copy of the federal extension.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer states that it had an extension on file and requests the penalty be waived.

Taxpayer remitted seventy-one percent (71%) of its tax by the due date of the return. An extension to file at a later date is not an extension to make a late payment.

The Department finds the penalty appropriate.

FINDING

Taxpayer's protest is denied.

INDIANA DEPARTMENT OF STATE REVENUE
Revenue Ruling #2002-01TPT
July 23, 2002

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

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

ISSUES

Tobacco Products Tax – Imposition and Credits

Authority: IC 6-7-2-7, IC 6-7-2-2, IC 6-7-2-14

The taxpayer requests the Department to rule whether or not:

1. Under the taxpayer's Proposed Change, the taxpayer is liable for the tobacco products tax when replacement product is received by its Sales Reps; and
2. Under the taxpayer's Proposed Change, the taxpayer is entitled to receive credits for the taxes paid on products returned by its Sales Reps.

STATEMENT OF FACTS

The taxpayer is engaged in the promotion and sale of smokeless tobacco products in the State of Indiana and elsewhere throughout the United States. The taxpayer holds a valid Other Tobacco Products Certificate of Registration. Most of the taxpayer's customers are licensed wholesale distributors who resell the products to retailers and remit the tax on tobacco products.

Current Returned Goods Procedures

The taxpayer employs sales representatives ("Sales Reps"), who act as representatives for the taxpayer. These Sales Reps, furnished with company cars and a supply of stock ("car stock"), provide a service on behalf of its distributors by traveling to retail customers to sample and otherwise promote the sale of the taxpayer's tobacco products and to regularly replace outdated or damaged products ("returned products") with car stock. Returned products are accumulated by Sales Reps and periodically exchanged for an equivalent amount of fresh products ("replacement products") through certain of the taxpayer's wholesale distributor customers ("Central Service Jobbers" or "CSJs"). CSJs ship returned products back to the manufacturer's facility where the manufacturer accepts such products on behalf of the taxpayer and issues affidavits of their return to the CSJ and the taxpayer. The taxpayer then issues a refund or credit to the CSJ for the original purchase price of the tobacco products. Currently, CSJs pay the tobacco tax on replacement products and obtain a credit for tax paid on returned products. The taxpayer pays the tobacco tax on the initial issuance of car stock at the time it is first received by Sales Reps.

Proposed Changes to Returned Goods Procedures

The taxpayer is considering changing the manner in which it processes replacement and returned products (the "Proposed Change"). Sales Reps will continue to replace outdated or damaged products with their available car stock. Under the Proposed Change, however, Sales Reps (not CSJs) will ship returned products directly to the manufacturer. The manufacturer will accept such products on behalf of the taxpayer and issue affidavits of their return solely to the taxpayer. Furthermore, under the Proposed Change, Sales Reps will order replacement product (in order to replenish their car stock) directly from the taxpayer rather than through a CSJ. The taxpayer will accordingly ship replacement products directly to the Sales Rep.

The taxpayer will ship car stock to locations where the taxpayer rents warehouse space for Sales Rep pickup. These locations for the most part coincide with our distributors' locations.

Under the Proposed Change, the taxpayer will separately account for each transaction (i.e., the sale of replacement product and the credit sale of returned product) on its books and records. Although a Sales Rep exchanges tobacco products on a can-for-can basis, a Sales Rep's order of replacement stock will generally not equal the number of cans returned at any one point in time. This difference, which is due primarily to timing, may result in a net lax liability or credit in any particular tax reporting period. For example, a Sales Rep may order two cases of replacement product on December 31st but not ship two cases of returned products back to the manufacturer until the following month when he accumulates a substantial quantity of products to return. Consequently, should these be the only transactions that occur within these respective monthly tax reporting periods, a tax would be due in December and an equal amount of tax would be credited or refunded in January.

Under the Proposed Change, CSJs will no longer be paying tax on replacement products ordered by a Sales Rep or filing for tax credits on products returned by a Sales Rep since the new process will not involve the CSJ.

DISCUSSION – ISSUE #1

Whether or not under the taxpayer's Proposed Change, the taxpayer is liable for the tobacco products tax when replacement product is received by its Reps?

IC 6-7-2-7 states:

A tax is imposed on the distribution of tobacco products in Indiana at the rate of eighteen percent (18%) of the wholesale price of the tobacco products. The distributor of the tobacco products is liable for the tax. The tax is imposed at the time the distributor:

1. brings or causes tobacco products to be brought into Indiana for distribution;
2. Manufactures tobacco products in Indiana for distribution; or
3. Transports tobacco products to retail dealers in Indiana for resale by those retail dealers.

IC 6-7-2-2 provides that a "Distributor" includes a person who manufactures, sells, barters, exchanges, or distributes tobacco products in Indiana to retail dealers for the purpose of resale.

In the instant case then, when a Sales Rep receives replacement products for the purpose of exchanging such product for returned products in Indiana, the taxpayer, as the distributor of such tobacco products, would be subject to tobacco products tax at that time.

RULING – ISSUE #1

The Department rules that the taxpayer will be subject to tobacco products tax when a Sales Rep receives replacement product for the purpose of exchanging such product for returned products in Indiana.

DISCUSSION – ISSUE #2

Whether or not under the taxpayer's Proposed Change, the taxpayer is entitled to receive credits for the taxes paid on products returned by its Sales Reps?

IC 6-7-2-14 states:

The department shall credit or refund to a distributor the tax paid under this chapter on tobacco products that are:

1. shipped outside Indiana;
2. returned to the manufacturer; or
3. destroyed by the distributor in the presence of an employee or agent of the department.

Here, the taxpayer is a statutory distributor of tobacco products and its Sales Reps will return outdated and damaged tobacco products to the manufacturer, therefore, the taxpayer falls within the ambit of IC 6-7-2-14 and is entitled to a credit or refund for damaged and outdated tax-paid product received from retailers and returned to the manufacturer.

RULING – ISSUE #2

The Department rules that the taxpayer is entitled to a credit or refund for damaged and outdated tax-paid product received from retailers and returned to the manufacturer.

CAVEAT

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

INDIANA DEPARTMENT OF STATE REVENUE
Revenue Ruling #2002-09ST
June 13, 2002

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

ISSUES

Sales/Use Tax and Gross Income Tax – Restructuring

Authority: IC 6-2.5-5-3, IC 6-2.5-5-4, IC 6-2.5-5-5.1, IC 6-2.5-5-30, IC 6-2.5-5-6, Mid-America Energy Resources, Inc. v. Indiana Department of State Revenue, Indianapolis Fruit Co. v. Department of State Revenue, Rule 45 IAC 2.2.5-10, IC 6-2.5-4-2, IC 6-2.1-2-3, IC 6-2.1-2-4, IC 6-2.1-2-1, Rule 45 IAC 1.1-1-23, IC 6-2.1-5-5, IC 6-2.1-4-6, Internal Revenue Code Section 1504

The taxpayer requests the Department to rule, if the taxpayer restructures to form A Co as described herein, whether or not:

1. The taxpayer will continue to be entitled to the sales and use tax industrial exemptions found in IC 6-2.5-5-3, IC 6-2.5-5-4, IC 6-2.5-5-5.1 and IC 6-2.5-5-30, also including, without limitation the exemption provided by IC 6-2.5-5-6 for the raw materials the taxpayer purchases to make orthopedic implants;
2. A Co will be treated as an industrial processor for sales and use tax purposes and will be entitled to the industrial exemptions found in IC 6-2.5-5-3, IC 6-2.5-5-4, IC 6-2.5-5-5.1, IC 6-2.5-5-30 and IC 6-2.5-5-6;
3. A Co will be treated as an industrial processor for Indiana gross income tax purposes and its receipts will be subject to such tax at the low rate; and
4. A Co will qualify for inclusion in a consolidated gross income tax return with the taxpayer, and the taxpayer and A Co will be entitled to deduct or eliminate intercompany transactions between each other and with other members of the taxpayer's affiliated group by the filing of a consolidated return.

STATEMENT OF FACTS

The taxpayer is headquartered in Indiana and is incorporated under the laws of Delaware. The taxpayer is authorized to do business in Indiana and is a wholly-owned subsidiary of a holding company.

The taxpayer has manufacturing facilities at various locations in the United States and overseas, including Indiana. The Indiana plant manufactures certain orthopedic reconstructive implants. The orthopedic reconstructive implants are manufactured through a continuous series of production operations, which the company calls "production cells." All production cells for the implants are controlled by federal Food and Drug Administration ("FDA") regulations and industry standards on the manufacture and production of implantable orthopedic devices.

Currently, the taxpayer purchases large quantities of raw metals, such as stainless steel, titanium, chrome, etc., which are then melted, cut and formed into the basic shape of the implant. Throughout this part of the production process, a finer cut and more detailed shape is achieved. Following the cutting and shaping of an implant, the implant is run through polishing belts and wheels to remove excess metal particles and produce a smooth, polished metal surface.

The implants are then etched with an identification number. This production cell is mandated by United States FDA regulations and foreign government agencies to provide traceability on an implant.

Thereafter, the implant is immersed in a solution to remove foreign materials. This passivation process is intended to improve the corrosion resistance of the implants and remove objectionable surface contaminants such as microscopic bioburden and bacteria.

The implant is then rinsed and dried, and inspected, packaged, shrink-wrapped and sent out for further sterilization before being shipped to customers in the United States and abroad.

For various business reasons, the taxpayer intends to form a company ("A Co") and contribute to A Co its Indiana manufacturing facility. A Co will be a Delaware corporation, qualified to do business in Indiana. The taxpayer will own 75% of the voting stock of A Co. A separate wholly-owned (100%) subsidiary of the taxpayer ("B Co") (a foreign corporation) will hold the remaining 25% of A Co's voting stock.

The taxpayer will then contract with A Co to perform those implant production cells which consist of melting, shaping, forming and polishing of the implant. The taxpayer will continue to purchase all raw materials incorporated into the orthopedic implant. The raw materials will be directly delivered from the suppliers to a warehouse located in the Indiana plant owned by A Co. The taxpayer will retain title to the raw materials and work-in-process as they are processed by A Co.

After A Co has completed its processing, the partially completed implants will be transferred to the taxpayer which will perform the etching and chemical passivation through to final packaging, as described above. The taxpayer will lease from A Co the space and equipment at the Indiana plant necessary to perform its portion of the manufacturing process.

DISCUSSION

Issue 1– Whether or not the taxpayer, after the corporate restructuring, will be engaged in manufacturing and production and will entitled to the industrial exemptions under IC 6-2.5-5-3, IC 6-2.5-5-4, IC 6-2.5-5-5.1, IC 6-2.5-5-30 and IC 6-2.5-5-6.

Currently, the taxpayer qualifies for all of the industrial exemptions. After the restructuring described above, the taxpayer will continue to qualify for the industrial exemptions because the taxpayer remains engaged in production and manufacturing of tangible personal property, even though it has contracted with A Co to perform part of the implant manufacturing process.

The activities that the taxpayer will continue to perform after the restructuring constitute manufacturing and qualify the taxpayer for the industrial exemptions. The etching, chemical passivation, inspecting, packaging and shrink-wrapping of the orthopedic implant are all steps that are needed – indeed, are legally required – to produce a marketable implant. As the Tax Court has recognized, "production is 'broadly defined' and focuses on the creation of a marketable good." *Mid-America Energy Resources, Inc. v. Indiana Dep't of State Revenue,* 681 N.E.2d 259, 262 (Ind. Tax Ct. 1997) where the court found that the chemical treatment and chilling of water constituted production; *see also Indianapolis Fruit Co. v. Department of State Revenue*, 691 N.E.2d 1329 (Ind. Tax Ct. 1998), where the chemical treatment of bananas was found to constitute production.

The implant preparation activities which the taxpayer will continue to perform after the restructuring are required to produce a marketable implant and clearly result in important changes in the partially finished implants that are transferred to the taxpayer from A Co, i.e. resistance to corrosion, traceability and sterility.

In short, after the restructuring, the taxpayer will be entitled to an exemption from sales and use tax for its raw material purchases, its machinery and equipment purchases and its purchases of other tangible personal property under IC 6-2.5-5-3; IC 6-2.5-5-4; IC 6-2.5-5-5.1; IC 6-2.5-5-6 and IC 6-2.5-5-30 because it will continue to be engaged in production and manufacturing.

Issue 2 – Whether or not A Co is engaged in industrial processing for Indiana sales and use tax purposes and may claim the industrial sales and use tax exemptions.

The industrial exemptions extend to industrial processors. 45 IAC 2.2-5-10. An industrial processor is a person who acquires tangible personal property owned by another person, provides industrial processing or servicing and transfers the property back to the owner to be sold by that owner in the same form or as a part of other tangible personal property produced by that owner in his business of manufacturing. IC 6-2.5-4-2(c); 45 IAC 2.2-5-10(a)(1)-(3).

In this case, A Co will qualify as an industrial processor because A Co acquires raw materials owned by the taxpayer, provides industrial processing (melting, forming and shaping) and transfers the work in process back to the taxpayer to be further manufactured by the taxpayer into a finished orthopedic implant, which is then sold. As an industrial processor, A Co will be entitled to the sales and use tax exemptions provided by IC 6-2.5-5-3; -4; -5.1; -6 and –30.

Issue 3 – Whether or not A Co's gross receipts are subject to the low rate (0.3%).

IC 6-2.1-2-3 provides that gross income from transactions listed in IC 6-2.1-2-4 are subject to a tax rate of 0.3% (the "low rate"). Among the transactions listed in IC 6-2.1-2-4 that are subject to the low rate are wholesale sales. Wholesale sales include, *inter alia,* receipts from industrial processing or servicing if the property is owned and produced for sale by the business for whom the servicing or processing is performed. IC 6-2.1-2-1(c)(1)(D); 45 IAC 1.1-1-23(b).

In this case, A Co by contract will function as an industrial processor for the implants owned by the taxpayer. The implants are owned and produced for sale by the taxpayer. In short, any gross receipts generated by A Co are receipts from industrial processing, are wholesale sales, and are subject to the low rate of gross income tax.

Issue 4 – Whether or not the taxpayer and A Co qualify to file a consolidated gross income tax return and may deduct or eliminate from that return gross receipts from intercompany transactions among members of the affiliated group.

IC 6-2.1-5-5(b) provides that corporate members of an affiliated group that are incorporated or authorized to do business in the state may file a consolidated gross income tax return. IC 6-2.1-4-6 provides that an affiliated group of corporations filing a consolidated gross income tax return is entitled to a deduction from the gross income reported on the consolidated return in the amount of gross income received from transactions between members of the group that are incorporated in or authorized to do business in Indiana. IC 6-2.1-5-5(a) provides that corporations are "affiliated" if at least 80% of the voting stock of one corporation is owned by the other corporation.

In this case, both the taxpayer and A Co will be authorized to do business in Indiana. The taxpayer will directly hold 75% of the voting stock of A Co. The remaining 25% of A Co's voting stock will be held by B Co, a wholly-owned (100%) subsidiary of the taxpayer. For gross income tax purposes, through direct and indirect ownership, the taxpayer holds 100% of the voting power of A Co and the taxpayer and A Co should be permitted to file a consolidated gross income tax return.

This conclusion is supported by how the 80% stock ownership test is calculated to determine affiliation for federal income tax purposes. The 80% stock ownership test is met in a chain of corporations if the common parent corporation holds at least 80% of the stock of at least one includible corporation in that chain and at least 80% of the stock of the other includible corporations in the chain is held directly by one or more of the other includible corporations in the chain. See IRC Section 1504(a).

As explained, the taxpayer and A Co will not be affiliated for federal income tax purposes because B Co, a foreign corporation, is not an includible corporation for federal income tax purposes. However, but for B Co's status as a foreign corporation, the 80% stock ownership test would otherwise be met for federal purposes and the taxpayer and A Co could file a consolidated federal return.

By contrast, the Indiana gross income tax law provides that a foreign corporation, such as B Co, is includible in a consolidated return if it is qualified to do business in Indiana. In this case, B Co will be qualified to do business in Indiana. Therefore, B Co is includible in the taxpayer's consolidated gross tax return and the 80% voting stock test of IC 6-2.1-5-5(a) is satisfied not only with respect to B Co but also with respect to A Co. As a result, the taxpayer, B Co and A Co may file a consolidated gross income tax return and may deduct the gross income received from transactions between them as members of the consolidated group.

RULINGS

The Department rules that:

Issue 1 – The taxpayer will be engaged in manufacturing and production and will continue to be entitled to the sales and use tax industrial exemptions pursuant to IC 6-2.5-5-3, IC 6-2.5-5-4, IC 6-2.5-5-5.1 and IC 6-2.5-5-30, including without limitation, IC 6-2.5-5-6 for the raw materials the taxpayer purchases to make orthopedic implants;

Issue 2 – A Co will be treated as an industrial processor for sales and use tax purposes and will be entitled to the industrial exemptions provided by IC 6-2.5-5-3, IC 6-2.5-5-4, IC 6-2.5-5-5.1, IC 6-2.5-5-30 and IC 6-2.5-5-6;

Issue 3 – A Co will be treated as an industrial processor for Indiana gross income tax purposes and its receipts will be subject to such tax at the low rate; and

Issue 4 – A Co will qualify for inclusion in a consolidated gross income tax return with the taxpayer and the taxpayer and A Co will be able to deduct or eliminate intercompany transactions between each other and with other members of the affiliated group by the filing of such a consolidated return.

CAVEAT

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