INDIANA DEPARTMENT OF INSURANCE
BULLETIN 113
November 4, 2002
PRODUCER DUE DILIGENCE WHEN SELLING GROUP HEALTH PLANS

This Bulletin is directed to all insurance producers licensed in Indiana to sell accident and sickness insurance and to any person who may assist directly or indirectly in the procurement of an insurance product. This Bulletin is intended to replace Bulletin 65, and Bulletin 65 is hereby withdrawn.

As health insurance costs rise, employers and individuals are shopping for more affordable health plans. Producers may be tempted to offer unlicensed plans, “ERISA plans,” or plans that claim to be “reinsurance” or “stop-loss coverage,” and that appear to have significantly lower premiums than plans issued by licensed insurance companies. Often, these plans may claim they are not subject to regulation by the Indiana Department of Insurance (“Department.”)

The Department has shut down some of these plans and, nationwide, consumers and employers have lost millions of dollars to unauthorized and under-funded health insurance plans. Contrary to their claims, most of these plans are subject to state regulation. The plans should be licensed or registered with the Department and monitored for financial solvency. Some employer-sponsored and union plans are exempt from state regulation by the Employee Retirement and Income Security Act of 1974 (29 U.S.C. 1001, *et seq*.). Such plans are formed by employers or unions for their own employees or members and are not sold by insurance producers. A health plan that claims to be exempt from state licensing requirements, but is in fact not exempt, is an unauthorized insurer. Pursuant to Ind. Code § 27-4-5-2(b)(2) if an unauthorized insurer fails to pay any claim or loss within the provisions of its contract, any person who assisted or in any manner aided directly or indirectly in the procurement of the contract is liable to the insured for the full amount of the claim or the loss in the manner provided in the contract.

Any producer approached to sell one of these plans should contact the Enforcement Division at the Department at (317) 233-4243 to learn whether the plan is licensed in Indiana and the existence and/or status of any investigation. A producer should also examine the plan carefully and request financial information, copies of contracts, filings with any state or federal agencies and the plan’s authority to engage in the business of providing health coverage. Producers should pay careful attention to a health plan that:

1. Operates like insurance but claims not to be;
2. Avoids insurance terminology, although it operates like insurance;
3. Refers to reinsurance or stop-loss as the only coverage;
4. Calls itself an “ERISA” or union plan;
5. Calls itself an “employee leasing” arrangement with self-funded coverage;
6. Targets individuals with pre-existing conditions;
7. Advertises unusually low premiums or generous benefits, low or no participation requirements, or little or no underwriting.

Even if a health plan is authorized, producers should be familiar with the plan, including whether it is an employer sponsored plan, a trust or association plan, the name of the policyholder or plan sponsor, the state and federal mandates applicable to the plan, and what protections exist for the consumer in the event of insolvency.[1] The Department receives many complaints from people who believed they bought one kind of plan and then discovered it to be another.

The Department expects producers to exercise due diligence when selling group health plans, and to provide written proof of such due diligence upon request from the Department. In addition to the potential liability outlined above, the failure of a producer to exercise due diligence and to make reasonable inquiries of a health plan may subject the producer to disciplinary action under Ind. Code § 27-8-15.6-12 for incompetence, untrustworthiness, or financial irresponsibility in the conduct of his or her business.

INDIANA DEPARTMENT OF INSURANCE
Sally McCarty, Commissioner

[1] It should be noted that Ind. Code § 27-8-8-18 prohibits the use of the Indiana Life and Health Guaranty Association for marketing purposes.

DEPARTMENT OF STATE REVENUE
COMMISSIONER’S DIRECTIVE # 18
DECEMBER 2002

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

SUBJECT: UTILITY RECEIPTS TAX

INTRODUCTION

The purpose of this Directive is to present an overview of the Utility Receipts Tax which was enacted in 2002. This overview is intended to highlight the major areas of the new law and promote a general understanding of its basic principles.

The Department is required by statute to adopt the initial rules and prescribe the initial forms before December 1, 2002. The statute permits the Department to adopt the initial rules in the same manner that emergency rules are adopted under IC 4-22-2-37.1. The initial rules expire on the earlier of the date that the rule is superseded, amended or repealed by a permanent rule, or July 1, 2004.

AUTHORITY

House Enrolled Act 1001ss (2002) added a new Article to the Indiana Code which enacts a utility receipts tax imposed on the taxable gross receipts of a taxpayer providing the retail sale of utility services. The statute is effective on January 1, 2003.

DEFINITIONS

Gross Receipts. Gross receipts refers to anything of value, including cash or other tangible or intangible property, that a taxpayer receives in consideration for the **retail** sale of utility services for consumption before deducting any costs incurred in providing the utility services.

Receives. Receives as applied to a taxpayer means the actual coming into possession of, or the crediting to the taxpayer of gross receipts; or the payment of a taxpayer's expenses, debts, or other obligations by a third party for the taxpayer's direct benefit.

Taxable Gross Receipts. Taxable gross receipts means the remainder of all gross receipts that are not exempt from tax less all deductions that are allowed under the statute.

Taxable Year. Taxable year means the year that a taxpayer uses for purposes of filing the taxpayer's federal income tax return. If a taxpayer does not file a federal income tax return, then the term means a calendar year.

Taxpayer. Taxpayer includes the following:

1. Assignee;
2. Receiver;
3. Commissioner;
4. Fiduciary;
5. Trustee;
6. Institution;
7. Consignee;
8. Firm;
9. Partnership;
10. Limited liability partnership;
11. Joint venture;
12. Pool;
13. Syndicate;
14. Bureau;
15. Association;
16. Cooperative association;
17. Corporation;
18. Political subdivision or the State of Indiana, to the extent engaged in private or proprietary activities or business;
19. Trust;
20. Limited liability company; or
21. Other group or combination acting as a unit;

regardless of whether the entity is exempt from adjusted gross income tax under IC 6-3 or exempt from federal income tax under the Internal Revenue Code.

Telecommunication Services. Telecommunication services means the transmission of messages or information by using wire, cable, fiber optics, laser, microwave, radio, satellite, or similar facilities.

The term does not include value added services in which computer processing applications are used to act on the form of the information for purposes other than transmission. The term does not include value added services providing text, video graphic or audio program content for a purpose other than transmission.

The term does not include the transmission of video programming or other programming provided by a television broadcast station or a radio station, including cable TV, direct broadcast satellite, or digital television.

Utility Service. Utility service means the furnishing of any of the following:

1. Electrical energy.
2. Natural gas used for heat, light, cooling or power.

3. Water.
4. Steam.
5. Sewage.
6. Telecommunication services.

IMPOSITION

The utility receipts tax is imposed upon the receipt of the entire taxable gross receipts of a taxpayer that is a resident or domiciliary of Indiana, and the taxable gross receipts derived from activities or business or any other sources within Indiana by a taxpayer that is not a resident or domiciliary of Indiana.

The tax is imposed at a rate of one and four-tenths percent (1.4%).

Every "S" Corporation or other entity exempt from federal income taxation under Section 1361 of the Internal Revenue Code, partnership, limited liability company, and limited liability partnership is liable for the utility receipts tax. No utility receipts tax is imposed on a partner's, member's or shareholder's distributive share of the entity's gross income.

TAXABLE RECEIPTS

The following receipts are subject to the utility receipts tax:

1. The retail sale of utility services for consumption.
2. Judgments or settlements as compensation for lost retail sales.
3. Sales to a reseller if the utility is used in hotels, mobile home parks or marinas.
4. Sales of water or gas to another for rebottling.
5. Installation, maintenance, repair, equipment, or leasing services provided to a commercial or domestic consumer that are directly related to the deliver of utility services, and charges for removal of the equipment from such consumer upon termination of service.
6. All other receipts not segregated between retail and non-retail transactions.

NOTE: Generally, retail receipts from all utility services consumed within Indiana are subject to the utility receipts tax regardless of the point of generation or transmission across state lines. Receipts from the provision of mobile telecommunication services are subject to utility receipts tax to the extent that the receipts are sourced to Indiana pursuant to IC 6-8.1-15.

DEDUCTIONS

The following deductions are permitted against the taxable receipts for purposes of the utility receipts tax.

1. Each taxable year a taxpayer is entitled to deduct from the taxpayer's gross receipts an amount equal to $1,000. This amount is prorated if the taxpayer's tax period is less than one year. NOTE: An affiliated group that files a consolidated return is entitled to only one deduction.
2. If a taxpayer reports the taxpayer's gross receipts on an accrual basis, the taxpayer is entitled to deduct bad debts from the taxpayer's gross receipts in the same manner provided in IC 6-2.5-6-9.
3. If, for federal income tax purposes a taxpayer is allowed a depreciation deduction for a particular taxable year with respect to a resource recovery system, and the resource recovery system processes solid waste or hazardous waste, the taxpayer is entitled to a deduction equal to the depreciation deduction for an Indiana resource recovery system that the taxpayer is allowed under Sections 176 and 179 of the Internal Revenue Code.
4. The taxpayer is entitled to deduct from the gross receipts the amount paid by the taxpayer for the return of an empty container of the type customarily returned by the buyer of the contents for reuse as a container if the taxpayer included such deposits in its gross receipts.
5. The taxpayer is entitled to a deduction for gross receipts exempt from taxation under IC 6-8.1-15 and the Mobile Telecommunications Sourcing Act.

NONTAXABLE RECEIPTS

The following receipts are excluded from the computation of the utility receipts tax.

1. Sales to the U.S. Government to the extent prohibited by the U.S. Constitution.
2. Collections by a taxpayer of a tax, fee or surcharge imposed by a state, political subdivision, or the United States if the tax is imposed solely on the sales at retail of utility services, and the taxpayer collects the tax separately as an addition to the price of the utility service sold.
3. Wholesale sales to another generator or reseller of utilities.
4. Holding company receipts from member electric cooperatives.
5. Joint agency receipts from member municipal electric utilities.
6. Refundable deposits paid by a customer to the taxpayer.
7. An occasional sale of utility services by a taxpayer that is not regularly engaged in the trade or business of selling utility services is exempt from the tax.

EXEMPT ENTITIES

Gross receipts received by the following entities are exempt from the utility receipts tax.

1. Conservancy districts established under IC 14-33-20 or IC 13-3-4.
2. Regional water, sewage, or solid waste districts established under IC 13-26 or IC 13-3-2.
3. A nonprofit corporation formed solely for the purpose of supplying water to the public.
4. A county solid waste management district or a joint solid waste management district established under IC 13-21 or IC 13-9.5-2.
5. A nonprofit corporation formed for the purpose of providing a combination of water and sewer and sewage service to the public.
6. A county onsite waste management district established under IC 36-11.

ESTIMATED PAYMENTS AND RETURNS

Every taxpayer whose annual tax liability exceeds one thousand dollars ($1,000) is required to file and pay the utility receipts tax on a quarterly basis. The taxpayer shall pay to the Department twenty-five percent (25%) of the annual estimated tax or the exact amount of utility receipts tax that is due for that quarter.

A taxpayer that uses a taxable year that ends on December 31 shall file the taxpayer's estimated utility receipts tax return and pay the tax due on or before April 20, June 20, September 20, and December 20 of the taxable year. If a taxpayer's taxable year does not end on December 31, the due dates for filing the return and paying the tax are the 20th day of the fourth, sixth, ninth, and twelfth month of the taxpayer's taxable year.

If a taxpayer's estimated quarterly utility receipts tax liability exceeds ten thousand dollars ($10,000), the taxpayer shall pay the estimated utility receipts tax due by electronic funds transfer (EFT) or by delivering in person or by overnight courier a payment by cashier's check, certified check, or money order to the Department. The transfer or payment shall be made on or before the date that the tax is due. If the taxpayer's utility receipts tax payment is made by electronic funds transfer (EFT), the taxpayer is not required to file an estimated utility receipts tax return. To register for electronic funds transfer, form EFT-1 must be completed and remitted to the Department by fax (317-615-2691) or mailed to:

Indiana Department of Revenue
P. O. Box 6077
Indianapolis, IN 46206-6077

Form EFT-1 can be obtained on the Department's web site (www.state.in.us/dor/). Questions concerning the registration process can be directed to 317-615-2695.

ANNUAL RETURNS AND PAYMENTS

Every taxpayer who receives more than one thousand dollars ($1,000) in receipts from the retail sale of utility services is required to file an annual utility receipts tax return, Form URT. Any taxpayer who does not file an annual utility receipts tax return for a taxable year may be required to execute and file with the Department a sworn statement that the taxpayer did not receive more than one thousand dollars ($1,000) of taxable gross receipts during the taxable year.

When the taxpayer files an annual utility receipts tax return, the taxpayer shall pay to the Department the total utility receipts tax liability incurred by the taxpayer for that taxable year, minus the total estimated payments that were made for that taxable year.

A taxpayer who used a taxable year that ends on December 31 shall file the taxpayer's annual return on or before April 15 of the immediately succeeding year. A taxpayer, whose taxable year does not end on December 31, shall file the annual return on or before the fifteenth day of the fourth month after the close of the taxpayer's tax year.

CONSOLIDATED RETURN OF AN AFFILIATED GROUP

Corporations are considered to be affiliated if at least eighty percent (80%) of the voting stock of one corporation is owned by the other corporation. Every corporation affiliated with another corporation is affiliated with every corporation that is affiliated with such other corporation. All corporations so affiliated constitute an affiliated group.

Corporate members of an affiliated group that are incorporated in Indiana or are authorized to do business in Indiana may file a consolidated utility receipts tax return.

An affiliated group must elect at the time the group files its first annual return whether or not the group will file a consolidated utility receipts tax return, or whether each corporate member of the group will file a separate utility receipts tax return. Once an election is made, the group must file the utility receipts tax returns in the same manner as the group's first annual return is filed, unless the Department allows the group to change the manner in which it files its utility receipts tax return.

If a consolidated return is filed, the return can be filed by any member of the group incorporated or authorized to do business in Indiana. The filing member shall remain the filing member on all subsequent consolidated returns filed by the affiliated group, unless the Department allows another member to file the group's consolidated return.

TRANSITIONAL PROCEDURES

There is transitional language in HEA 1001ss that gives direction on how a fiscal year taxpayer will file its initial utility receipts tax return. As stated earlier, the annual return is due on the fifteenth day of the fourth month following the close of the taxpayer's taxable year.

A fiscal year taxpayer for purposes of the utility receipts tax has an initial short tax year that begins on January 1, 2003 and ends on the day preceding the day that the taxpayer's next taxable year under the Internal Revenue Code begins.

If a taxpayer is filing a short year return, the one thousand dollar ($1,000) taxpayer deduction, and the resource recovery system tax deduction will be multiplied by a fraction. The numerator of the fraction is the number of days remaining in the taxpayer's taxable year after December 31, 2002, and the denominator is the total number of days in the taxable year under the Internal Revenue Code for the purposes of federal income taxation.

Kenneth L. Miller
Commissioner

STATE OF INDIANA
DEPARTMENT OF STATE REVENUE

IN REGARDS TO THE MATTER OF:
V.F.W. POST NO. 1421
7712 BLUFFTON ROAD
FORT WAYNE, IN 46809
DOCKET NO. 29-20020316

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DEPARTMENTAL ORDER

An administrative hearing was held on Tuesday, August 20, 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.

Its Quartermaster John Dahman represented the Petitioner. Attorney Steve Carpenter, appeared on behalf of the Indiana Department of State Revenue.

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

REASON FOR HEARING

On June 18, 2002 Petitioner's Indiana Charity Gaming Application was denied. The Petitioner protested in a timely manner. A hearing was conducted pursuant to IC § 4-32-8-1.

SUMMARY OF FACTS

1) Petitioner submitted its Indiana Department of Revenue Annual Bingo License Application CG-2 on April 17, 2002.
2) Based upon a review of Petitioner's application and an investigation by the Indiana Department of Revenue's Criminal Investigation Division the Petitioner's Indiana Charity Gaming Application was denied.

FINDINGS OF FACT

1) Petitioner submitted its Indiana Department of Revenue Annual Bingo License Application on April 17, 2002. (Department's Exhibit A).
2) The Department upon reviewing the application and an investigation by the Indiana Department of Revenue's Criminal Investigation Division determined that Petitioner had violated IC 4-32-9-20; IC 4-32-9-27; and IC 4-32-9-28. (Record at 6).
3) The Department then notified Petitioner by letter dated June 18, 2002, that their Indiana Charity Gaming Application was denied. (Record at 5).
4) The Department opines that the amount paid by Petitioner to rent its facility to conduct charity gaming may exceed the $200 per day statutory limitation provided in IC 4-32-9-20(a). (Record at 8).
5) A review of the individuals listed on Petitioner's CG-2 showed that two individuals on the list were not members of Petitioner's organization, but paid bartenders a violation of IC 4-32-9-27 & 28. (Record at 11).
6) The Petitioner admitted at hearing that the two individuals listed as workers on its Indiana Form CG-2 were paid employees and not members of its organization and as such, should not have been listed as workers on its application. (Record at 26 & 27).
7) The Commander of Petitioner's Post stated in a sworn statement that the checking account listed on its Indiana Charity Gaming Application did not belong to the Post. (Department's Exhibit B).
8) Petitioner also admitted at hearing that they did not know the provisions of IC 4-32-9-17, requiring a separate and segregated charity gaming account, prohibited them from authorizing the opening of a separate individual account held by an individual member. (Record at 32 & 33).
9) Additionally, the Department contends that its denial was based upon the fact that the check that accompanied Petitioner's application was drawn on an account and signed by an individual who was not an officer of the organization.

STATEMENT OF LAW

1) Pursuant to IC 6-8.1-5-1, the Department's findings are prima facie evidence that the Department's claim is valid. The burden of proving that the findings are wrong rests with the person against whom the findings are made. See Portland Summer Festival v. Department of Revenue, 624 N.E.2d 45 (Ind.App. 5 Dist. 1993).
2) The Department's administrative hearings are conducted pursuant to IC § 6-8.1-5-1 et seq. (See, Portland Summer Festival v. Department of Revenue, 624 N.E.2d 45 (Ind.App. 5 Dist. 1993)).
3) Pursuant to 45 IAC 15-5-3(b)(7), "The hearing is not governed by any rules of evidence. The department is expressly excluded from the requirements of the Administrative Adjudication Act.(renamed the Administrative Order and Procedures Act)."
4) Even if the Department were bound by the Administrative Orders and Procedures Act (AOPA), the rules clearly state that hearsay evidence that is properly objected to and does not fall with an exception to the hearsay rule may not form the sole basis of a resulting order. The AOPA does not say that the evidence cannot be heard, presented, or considered.
5) IC 4-32-9-27 states, "An operator or a worker may not directly of indirectly participate, other than in a capacity as operator or worker, in an allowable event…"
6) IC 4-32-9-28 states, "An operator must be a member in good standing of the qualified organization that is conducting an allowable event for at least one (1) year at the time of the allowable event."
7) According to IC 4-32-9-29, "A worker must be a member in good standing of a qualified organization that is conducting an allowable event for at least thirty (30) days at the time of the allowable event."
8) IC 4-32-9-20 states, "Except as provided in subsection (d), if facilities are leased for an allowable event, the rent may not:
(1) be based in whole or in part on the revenue generated from the event; or
(2) exceed two hundred dollars ($200) per day.
(b) A facility may not be rented for more than three (3) days during a calendar week for an allowable event.
(c) If personal property is leased for an allowable event, the rent may not be based in whole or in part on the revenue generated from the event.
(d) If a qualified organization conducts an allowable event in conjunction with or at the same facility where the qualified organization or its affiliate is having a convention or other meeting of its membership, facility rent for the allowable event may exceed two hundred dollars ($200) per day. A qualified organization may conduct only one (1) allowable event under this subsection in a calendar year.
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) The Indiana Department of Revenue Annual Bingo License Application CG-2 states on line 24, "The license fee for an organization's first Annual Bingo License is $25.00 and must be paid with this application. The fee should be paid by a check drawn from **your not-for-profit checking account**. Make your check payable to: Indiana Department of Revenue." (Emphasis added).
11) IC 4-32-9-17 states, "A qualified organization shall maintain accurate records of all financial aspects of an allowable event under this article. A qualified organization shall make accurate reports of all financial aspects of an allowable event to the department within the time established by the department. The department may prescribe forms for this purpose. The department shall, by rule, require a qualified organization to deposit funds received from an **allowable event** in a **separate and segregated account set up for that purpose**. All expenses of the qualified organization with respect to an **allowable event** shall be paid from the separate account." (Emphasis added).
12) IC 4-32-15-4 states, "A payment by a licensed entity to the department may not be in cash. All payments must be in the form of a check, a draft, an electronic funds transfer, or another financial instrument authorized by the commissioner. The department may require licensed entities to establish separate electronic funds transfer accounts for the purpose of making payments to the department."

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) Once again (having ruled on this issue previously) the mere fact that the amount of rent paid by Petitioner ***MAY*** exceed the $200 statutory limitation is ***NOT SUFFICIENT*** to justify a denial of Petitioner's charity gaming application.
3) The Petitioner admitted at hearing that the two individuals listed as workers on its Indiana Form CG-2 were paid employees and not members of its organization and as such, should not have been listed as workers on its application. A violation of IC 4-32-9-27 & 28.
4) Petitioner also admitted at hearing that they did not know the provisions of IC 4-32-9-17, requiring a separate and segregated charity gaming account, prohibited them from authorizing the opening a separate individual account held by an individual member.

5) Pursuant to IC 4-32-9-17, the organization conducting charity gaming must establish a separate and segregated charity gaming account. No other organization or individual may open or operate this account.

6) The provisions of IC 4-32-9-17 only applies to the deposit of funds and payment of expenses related to running allowable events not the submission of application fees.

7) When filing a completed Form CG-2, the appropriate application fee must accompany the application. As long as the fee is in valid United States legal tender, and conforms to the method of payment proscribed in IC 4-32-15-4, the Department must accept it.

8) The Department's CG-2 states, "The fee should be paid by a check drawn from your not-for-profit checking account…" The Department's own form states that the fee ***should*** be paid and does not use the terms **shall** or **must**. Additionally, the form does not state that an officer must sign the check or that it must be from a separate and segregated charity gaming account. The CG-2 merely states that the check should be drawn from "your not-for-profit checking account."

9) The Department's denial of Petitioner's application based upon the fact that the original application fee accompanying the CG-2 was a check drawn from another's account and that it was not signed by one of Petitioner's officers is not valid reason for a denial.

DEPARTMENTAL ORDER

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

Based upon Petitioner's admissions of its violations of IC 4-32-9-17, IC 4-32-9-27 & 28 its appeal 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
SALES TAX DIVISION
INFORMATION BULLETIN #1FB
DECEMBER, 2002
(REPLACES BULLETIN #1FB ISSUED APRIL 8, 2002)

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SUBJECT: COUNTY FOOD AND BEVERAGE TAX

REFERENCE: IC 6-9-12, IC 6-9-20, IC 6-9-21, IC 6-9-23, IC 6-9-24, IC 6-9-25, IC 6-9-26, IC 6-9-27, and IC 6-9-33

This information bulletin is directed to retail merchants responsible for collecting the county food and beverage tax. The purpose of this information bulletin is to assist retail merchants in the proper application of the food and beverage tax. In counties adopting a food and beverage tax the tax equals one percent (1%) of the gross retail income received from food and beverage transactions.

LOCATION OF TRANSACTION

This tax applies only to transactions taking place in counties adopting the tax. A retail merchant that does catering in counties who have not adopted the tax will not collect the tax on transactions in those counties.

MEALS

Sales of meals, including food and beverages, which are sold by a retail merchant for consumption at the merchant's business location or at a location where the merchant provides the meal, are subject to the tax.

All sales of food and beverage as a meal or for immediate consumption made by a retail merchant are subject to the tax. The tax shall apply to all sales of food and beverages which are packaged, prepared, or sold as meals, or in a form which normally may be consumed at or near the premises, whether or not such food and beverages are actually consumed on the premises. This includes street vendor sales, catering sales, and sales by grocery stores.

Food and beverage tax must be collected on any unitary transaction of fifty cents ($0.50) or more. The amount shown on a single check is considered to be a single sale even though food or drink is consumed by more than one person. Payment by one person of items listed on more than one check is also a single sale. Tax is computed on the single sale total.

<u>The Indiana sales tax and county food and beverage tax cannot be included in the selling price.</u> The taxes may be combined after computation as one separately stated tax. The merchant cannot represent that the tax is being absorbed by the merchant.

Food and beverage sold to employees is subject to both the sales tax and the food and beverage tax. If food and beverage is given to an employee; the sales tax, use tax, and food and beverage tax do not apply to the gift.

FOOD AND BEVERAGE SOLD FOR IMMEDIATE CONSUMPTION

Sales of food and beverage which ordinarily are sold for immediate consumption at or near the premises of the seller are taxable even though such food and beverage are sold on a "take-out" or "to go" order and are actually bagged, packaged, or wrapped and taken from the premises of the seller. Where and when the customer actually eats such food is immaterial. Accordingly, sales by restaurants, bars, taverns, cafeterias, lunch counters, grocery stores, drive-ins, roadside ice cream and refreshment stands, fish and chip places, fried chicken places, pizzerias, food and drink concessions, or similar facilities of meals, sandwiches, hamburgers, hot dogs, french fries, fried chicken, fish and chips, pizza, potato salad, cole slaw, salads, popcorn, sundaes, cones and cups of ice cream, milk shakes, soft drinks, and similar ready-to-eat food and beverage items are taxable, regardless whether sold by such establishments for consumption on the premises or on a "take-out" or "to go" basis. Alcoholic beverages sold as part of a meal or by the drink are taxable. Sales of prepared food which requires heating is subject to the food and beverage tax if the merchant provides equipment for heating. For example, sales of individual serving size popcorn or french fries are taxable if the merchant provides a microwave for preparing the food, regardless of whether the customer uses the equipment.

Certain items which are not for immediate consumption, but are subject to sales tax are not subject to the food and beverage tax. For example, soft drinks and alcoholic beverages purchased in packaged form (i.e., 6 packs, bottles, cases) are not subject to the food and beverage tax. Vending machine sales are not subject to food and beverage tax.

Any food and beverage which is prepared to the order of the purchaser or which is cooked and maintained at or near the cooking temperature prior to sale shall be considered to be sold as a meal or for immediate consumption and shall be subject to the food and beverage tax.

COMBINATION BUSINESS

Where a person operates a combination type business at one location such as an eating place combined with a grocery line, or an eating place combined with a donut or pastry shop, sales by such retailer of non-taxable grocery items are non-taxable for purposes of the food and beverage tax when sold for later preparation and consumption by the consumer. The method used in distributing these items, including the kind and size of the order and the container used, will be considered in determining whether the items are sold for immediate consumption. For example, bulk sales of donuts or other assorted pastries, sales of whole pies or cakes, and bulk sales of ice cream are non-taxable as they are not sold for immediate consumption. However, individual orders (i.e., an order of coffee and donuts, a piece of pie and milk, or a cup of ice cream) are taxable regardless whether sold for consumption on the premises or sold on a "take-out" basis for off-premises consumption.

Grocery stores which sell food for immediate consumption (i.e., salad bars, fried chicken, submarine sandwiches, pizza) must collect the food and beverage tax on these sales.

CATERERS

The law provides that the sale of food and beverage shall be taxable whether such food and beverage is served on or off the premises of the retailer. Accordingly, the sale of food or meals by caterers is subject to sales tax.

Tax applies to the entire charges made by caterers for serving meals, food and drink, inclusive of charges for food, the use of dishes, silverware, glasses, chairs, tables, etc., used in connection with serving meals, and for labor of serving meals.

REGISTRATION, SALES AND ACCOUNTING

All retail merchants are required to file an application for a registered retail merchants certificate for each location for the purpose of collecting Indiana sales tax. There is no additional registration requirement for merchants who collect the county food and beverage tax. However, these merchants must contact the Taxpayer Services Division for reporting forms for the county food and beverage tax.

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Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #11
SALES TAX
DECEMBER, 2002
(Replaces Bulletin #11 dated May 1994)

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

SUBJECT: Application of Sales Tax to Restaurant Owners Including Fast Food Operations and Caterers

REFERENCES: IC 6-2.5-5-20, 45 IAC 2.5-5-4, 45 IAC 2.5-5-43, 45 IAC 2.5-5-44, 45 IAC 2.5-5-45

I. General Information

All sales of tangible personal property made by restaurants are subject to the sales tax. The sales tax shall apply to all sales of food and beverages which are packaged, prepared, sold as meals, or in a form which is normally consumed at or near the premises whether or not such food and beverages are actually consumed on the premises.

Sales through a grocery store, salad bar, bakery, or delicatessen and by restaurants, cafeterias, lunch counters, drive-ins, roadside ice cream and refreshment stands, fish and chip places, fried chicken places, pizzerias, food and drink concessions, or similar facilities, of meals, sandwiches, hamburgers, hot dogs, french fries, fried chicken, fish and chips, pizza, potato salad, cole slaw, popcorn, sundaes, cones and cups of ice creams, milk shakes, soft drinks, and similar ready to eat food and beverage items are taxable regardless of whether sold by such establishments for consumption on the premises or on a “take-out” or “to go” basis.

Any food that is cooked to the order of the purchaser, or that is cooked and maintained at or near the cooking temperature prior to sale, or prepared food shall be considered to be sold as a meal or for immediate consumption and shall be subject to the sales tax. In addition the sale of food furnished, prepared, or served for consumption at tables, chairs, or counters, or from trays, glasses, dishes, or other equipment provided by the retail merchant is subject to sales tax.

The sale of food sold through vending machines or by street vendors is also subject to sales tax. The sale of food or meals by caterers is subject to sales tax. The tax does not apply to charges for serving or delivering food or beverages furnished, prepared, or served for consumption at a location or on equipment provided by the retail merchant. However, this exclusion only applies if the charges for serving or delivery are stated separately from the price of the food or beverages when the purchaser pays the charges.

Restaurants and caterers may not accept exemption certificates from any customer or organization in lieu of collecting sales tax except where: (1) the customer or organization purchases food and beverages exclusively for resale; or (2) a not-for-profit organization purchases food and beverage for fund raising.

Sales tax must be collected on any unitary transaction. The amount shown on a single check is considered to be a single sale even though the food or beverage is consumed by more than one person. Payment by one person of items listed on more than one check is also a unitary transaction.

II. Purchases by Restaurants:

A. Exempt Purchases

All purchases by restaurants of tangible personal property to be resold are exempt from sales tax. This exemption shall apply to all types of food, beverages, and other tangible personal property which are to be sold at retail. The purchase of tangible personal property that will act directly on the food during preparation is exempt from sales tax. (For example, a fryer or broiler would be exempt. However, a refrigerator is taxable because it serves merely as an agent in the preservation of food and does not act directly on the food during preparation). Utilities used in the production of food may also be exempt. For more information on this exemption, contact the Indiana Department of Revenue, Compliance Division.

Transactions involving tangible personal property are exempt from sales tax if the property is used, consumed, or removed in the service or consumption of the food, and the property is made unusable for further food service or consumption after the property’s first use for food service or consumption. Items considered exempt include paper napkins, plastic silverware, paper and Styrofoam cups, plates, or bowls. Other items included would be paper place mats, paper tablecloths, and other “to go” containers. Items not exempt from the sale tax would be cloth napkins and tablecloths, reusable plates, glasses, or silverware.

B. Taxable Purchases

The purchase of reusable glasses, cups, plates, cleaning materials, fixtures, cash registers, containers, preparation and serving counters, or any other item which is not directly used in direct production of food or is not purchased for resale is subject to sales tax. All materials that have been purchased exempt from sales tax which are later used for a non-exempt purpose are subject to the use tax.

C. Wrapping Materials:

The purchase of wrapping materials may or may not be subject to tax depending on their use. Wrapping materials and containers used to preserve food are subject to tax because such materials are not to be resold and are not directly used in direct production of food. Other wrapping materials and containers could be exempt if purchased for the reasons described in subpart A. Exempt Purchases.

III. Restaurant Records

All restaurant owners and operators must be registered as retail merchants and must maintain accurate records for three (3) years plus the current year in order to report to the Department the correct amount of gross receipts. If any sales are claimed as exempt sales, the records must clearly reflect such, and the owner must be able to substantiate all exempt sales. Refer to IC 6-2.5-6-8 to determine the calculation of very small transactions and the applicability of a sampling method.

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Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #12
SALES TAX
DECEMBER, 2002
(Replaces Information Bulletin #12 dated August 1991)

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SUBJECT: Public Transportation

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

I. Public Transportation Definition

"Public transportation" means the movement, transportation, or carrying of persons and/or property for consideration by a common carrier, contract carrier, household goods carrier, carriers of exempt commodities, and other specialized carriers performing public transportation service for compensation by highway, rail, air, or water, which carriers operate under authority issued by, or are specifically exempt by statute or regulation from economic regulation of, the appropriate federal or state regulatory authority.

Even if a person or company operates under the appropriate authority, they also must transport people or property for consideration. That is to say a public transportation provider must be compensated for transporting people or goods. The goods transported must be goods owned by someone other than the public transportation provider. To qualify for the exemption, a taxpayer must be predominately engaged in public transportation. A taxpayer is predominately engaged in public transportation if greater than 50% of its gross income is derived from transporting people or property for hire.

II. Acquisition of a Public Transportation Provider

Tangible personal property bought by a public transportation provider can be bought exempt from sales or use tax if the property is to be directly used in providing public transportation. Property is directly used in providing public transportation if the property is reasonably necessary to provide public transportation.

Determining whether property is reasonably necessary to provide public transportation can be difficult. The Department has determined that the following list of items are reasonably necessary to provide public transportation. The items listed are not all the items that could be considered reasonably necessary and the purpose of the list is to give some basic examples.

1. Roadway machinery and equipment;
2. Caboose and locomotive supplies such as fuses, lanterns, batteries, and flags;
3. Tariff publications;
4. Vehicles used for public transportation;
5. Communication equipment;
6. Equipment and items purchased to meet federal requirements;
7. All replacement parts, repair parts, and materials consumed by exempt equipment;
8. Tools and equipment used to repair and maintain rolling stock and track;
9. Vehicles used primarily for transportation of track maintenance crews;
10. Items used for repairs and maintenance of such vehicles;
11. Items used for production of financial matters, insurance, schedules, routes, and rates;
12. Items used to provide customer stations, handle baggage, sell tickets;
13. Items used to keep vehicles clean and safe for the passengers;

14. Machine shop and truck tools;
15. Equipment related to the construction and operation of terminals;
16. Directories;
17. Gas storage facilities;
18. Caboose and locomotive compliments such as towels, masking tape, powders, cleaners, ice, water coolers, and bottled water;
19. Cleaning supplies;
20. Employee uniforms; and
21. Garage supplies.

There are certain functional categories of items that are not reasonably necessary to provide public transportation. For example, all items related to the marketing and selling of public transportation are taxable. Telephone utilities used for sales activities, office supplies and furniture for sales personnel, and promotional expenses, such as matches, caps or jackets given away to the public, also would be subject to tax. If a taxpayer predominately engaged in public transportation acquires tangible personal property for predominate use in providing public transportation, it is entitled to the exemption. Thus, a phone used ten percent of the time for sales calls and ninety percent of the time to dispatch vehicles, would meet the predominate use (greater than 50%) test, and the entire purchase price would be exempt.

III. Exemption Certificates

A. Public Transportation

Any person or company predominately engaged in providing public transportation may buy certain items exempt from sales or use tax (see Section II), but to buy exempt, the public transportation provider should register with the Indiana Department of Revenue to obtain a Registered Retail Merchant Certificate, "RRMC". The RRMC will have a number that must be used on all exemption certificates given to vendors by the public transportation provider. Exemption certificates may be used either as a blanket exemption, kept on file by the vendor, or for each individual transaction. A blanket exemption certificate tells the vendor that all purchases made by the public transportation provider are reasonably necessary to providing public transportation. If a public transportation provider uses property purchased with a blanket exemption in a taxable manner, the provider must pay use tax for the purchase. The tax must be remitted on either the provider's sales and use tax return, the annual income tax return or a consumer use tax return, Form ST-115.

B. Individuals

Individuals predominately engaged in public transportation but operating under another person's IN USDOT or IN ID# or similar permit must use a special exemption certificate, Form ST-135, when making an exempt purchase. This special exemption certificate eliminates the need for individuals to register with the Department as retail merchants.

IV. Utilities

Before a person or company predominately engaged in providing public transportation can purchase utilities, natural gas, electricity, local exchange telephone service, intrastate toll message telephone service, steam or water, exempt from tax, an exemption certificate issued by the Department on behalf of the transportation provider, must be on file with the utility. A public transportation provider will only qualify for the special exemption certificate, Form ST-109, after having an ST-200 utility exemption application approved by the Department. The Department will only issue an ST-109 to a utility on behalf of the provider if the utility being bought is used exclusively for an exempt purpose. If the utility is being used less than fifty percent (50%), in providing public transportation, the public transportation provider must pay the tax and file a claim for refund for the exempt percentage.

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #14
SALES TAX
DECEMBER, 2002
(Replaces Bulletin #14 dated October 1982)

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SUBJECT: Taxability of Purchases by Advertising Agencies
REFERENCE: IC 6-2.5-4
Items Used in the Everyday Performance of the Business:

Any purchases of personal property to be used in the everyday performance of the business are taxable to the advertising agency, (e.g., stationery, office supplies, office equipment, furniture, etc.).

Purchases by Advertising Agencies for Their Clients:

If an agency relationship exists between the advertising agent and his client, the principal, the agent may pay the sales tax for the principal when the advertising agency makes purchases of personal property in the client's behalf in the process of performing his services, (e.g., printing plates, photographs, advertising brochures). The agency may then seek reimbursement from the client at the time of billing. Similarly, if the purchase by the advertising agent is for an exempt organization and if the agent is duly authorized by his client to do so, then the agent may execute an exemption certificate using the client's Registered Retail Merchant Certificate Number and signing as agent for the client.

Failure of the agency to pay the sales tax on purchases as outlined above shall not relieve the principal of liability for the tax due.

Retail Sales by Advertising Agencies:

The transfer of tangible personal property for a consideration shall constitute a retail sale by the advertising agency and is subject to Gross Retail Tax unless transferred to the principal for whom the agency purchased the tangible personal property as outlined in the above paragraph.

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #15
SALES TAX
DECEMBER, 2002
(Replaces Bulletin #15 dated November 1987)

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SUBJECT: Application of Indiana Sales Tax to Sales of Gasoline, and Special Fuels Sold Through Stationary Metered Pumps
REFERENCES: IC 6-2.5-7, 45 IAC 2.2-7

I. Gasoline: Calculating the Tax

A. The State Gross Retail (Sales) Tax applies to the total sales price of gasoline sold except for the part which constitutes Indiana Gasoline or Special Fuel tax or Federal Excise Tax. The oil inspection fee cannot be backed out of the price to determine the net price of the fuel. (See Departmental Notice #12 for further information.)

With respect to the sale of gasoline or special fuel from a metered pump, the retail merchant shall collect for each unit sold an amount equal to:

1. The price per unit before the addition of state and federal taxes;
2. Multiplied by the current sales tax rate.

B. Aviation Fuel: The federal tax on aviation fuel is also subtracted from the total sales price before computing Indiana Sales or Use Tax.

C. Each seller is responsible for deducting the correct amount of state and federal excise tax in order to determine the base for computing sales or use tax. (See Departmental Notice #12 for the applicable state and federal excise tax rates.)

D. Price discounts and coupons offered by gasoline retailers will be treated the same as other coupons and discounts offered by other retailers. (See Information Bulletin #58)

EXAMPLE 1: A retailer offers a $.03 per gallon discount if the purchaser has a coupon card issued by the retailer. The gasoline will be sold for $.03 less than the pump price, and the retailer is required to remit the sales tax on the discounted price.

EXAMPLE 2: A manufacturer of a product offers a $1.00 discount for the purchase of gasoline. The manufacturer reimburses the retailer for the $1.00 discount. The retailer is required to remit the tax on the full price of the gasoline.

II. Prepayment of Sales Tax on Gasoline

At the time of purchase or shipment of gasoline from a qualified distributor, a retail merchant shall prepay to the qualified distributor the state gross retail tax. The amount of tax that must be prepaid under this section equals:

1. The prepayment rate per gallon of gasoline; multiplied by
2. The number of invoiced gallons purchased or shipped.

The prepayment rate is the statewide average price per gallon, multiplied by the sales tax rate, multiplied by ninety percent (90%). The prepayment rate shall be determined semiannually, in June and December. The retail merchant must file monthly and remit sales tax which has been collected on the gasoline, less the amount of prepaid tax.

III. Exempt Sales of Gasoline Through a Stationary Metered Pump

A. All persons must pay the full pump price of gasoline sold through a stationary metered pump, whether or not an exemption certificate has been received from the purchaser.

B. If the gasoline is purchased for exempt use, the purchaser may recover sales tax paid by either of the following methods:

1. The purchaser must purchase the official form, STR-100 for gasoline. These receipts can be purchased at the Indiana Department of Revenue at cost. The signed receipts must be attached and filed on a Claim for Refund Form, (GA-110LMP). The request may be on a monthly, quarterly, semiannual, or annual status; or

2. If the purchase of gasoline is made through use of a credit card of a participating credit card company, and a proper exemption certificate has been filed by the cardholder, the company will credit the purchaser's account for the sales tax paid.

IV. Special Fuel: Calculating the Tax

A. Special fuels include those fuels commonly known as diesel fuel, LPG, propane, compressed natural gas, and compressed methane. Fuels which are not gasoline by statute will be considered a special fuel.

B. The Sales Tax is applied to the total sales price of the special fuel sold (except for the part which constitutes Indiana Special Fuel Tax or Federal Excise Tax) unless the retail merchant designates the metered pumps by a sign that reads 'TRUCKS ONLY". To do this, a retail merchant must place at the pump, a sign that states that fuel dispensed from the metered pump may only be placed in the fuel supply tanks of a truck. A sign that reads "TRUCKS ONLY" is sufficient to meet the requirements. If a vehicle not engaged in public transportation uses a "truck only" pump, the sales tax is required to be charged to the purchaser. The sales tax will be the sales tax rate times the raw price of the fuel which excludes state and federal excise taxes.

A retail merchant may not dispense special fuel from a metered pump that is designated for "TRUCKS ONLY" into the supply tank of a vehicle that is not a truck.

A retail merchant is not required to display the total price per unit of the special fuel on a metered pump, if that particular metered pump is designated for "TRUCKS ONLY".

C. Each seller is responsible for deducting the correct amount of state and federal excise tax in order to determine the base for computing sales or use tax.

V. Exempt Sales of Special Fuel Sold Through a Stationary Metered Pump Designated "TRUCKS ONLY"

A. The retail merchant may accept a properly completed exemption certificate from the purchaser of diesel or other special fuel where the sales tax is not required to be included in the pump price. The purchaser must be registered as a retail merchant.

B. Exemption certificate Form ST-105 is normally used to certify exempt use. Exemption certificate Form ST-135 may be used only if the purchaser is engaged in public transportation but is operating under another person's motor carrier permit. Farmers or others hauling their own products are not eligible for exemption. The purchaser must be engaged in providing public transportation of persons or property.

VI. Exempt Sales of Special Fuel Through a Stationary Metered Pump with the Sales Tax Included in the Pump Price

A. All persons must pay the full pump price of special fuel sold through a stationary metered pump which is not designated for "TRUCKS ONLY", unless an exemption certificate has been received from the purchaser.

B. If the special fuel is purchased for exempt use and tax is paid, the purchaser may recover sales tax paid by either of the following methods:

1. The purchaser must purchase the official Form STR-100. These receipts can be purchased at the Indiana Department of Revenue at cost. The signed receipts must be attached and filed on a Claim for Refund Form, (GA-110LMP). The request may be on a monthly, quarterly, semiannual or annual basis; or

2. If the purchase of special fuel is made through use of a credit card of a participating credit card company, the company may credit the purchaser's account for the sales tax paid, if a proper exemption certificate has been filed by the cardholder.

VII. Display of Price on Pump

A. Gasoline. The pump price of all gasoline sold through a stationary metered pump must include the total price per unit, including state sales tax.

B. Special Fuel. Sales tax on the sale of special fuel sold through a stationary metered pump designated for "TRUCKS ONLY" may not be included in the pump price.

Sales tax on the sale of special fuel sold through a stationary metered pump which is not designated for "TRUCKS ONLY" must include the sales tax.

VIII. Advertised or Curb Price of Gasoline and Special Fuel

The retail merchant may not advertise a price which is different than the pump price required to be displayed on the metered pump.

If a retail merchant advertises special fuel at a price that does not include any gross retail taxes that may be due on the sale of the special fuel, the retail merchant must display in easily read lettering, above or below the advertised price, the words "EXEMPT TRUCKS ONLY".

IX. Service Station Nontaxable Transactions

A. Labor charges separately stated on repair orders are not subject to sales tax. (Sales tax must be collected on any parts used unless the purchaser issues an exemption certificate certifying exempt use.)

B. Charges for washes, lubrications, polishing, and waxing are not subject to sales tax. (The service station must pay sales or use tax on the purchase of any supplies consumed.)

X. Purchases by Service Stations

A. Sales or use tax is due on the purchase or use of all supplies, equipment, parts, building repairs, etc., which are not to be resold. Examples of such purchases are:

1. Grease and greasing equipment;
2. Car washing and waxing supplies, materials, and equipment;
3. Soap, towels, brooms, paint, and all other cleaning and maintenance items;
4. All tools, equipment, and utilities used in operating the station;
5. All products taken from stock for personal use by owners or given to employees as part of their compensation; or
6. Those items purchased to be given away as part of a sales promotion such as soft drinks, glassware, candles, etc.

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Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #20
SALES TAX
DECEMBER, 2002
(Replaces Bulletin #20 dated December 1992)

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SUBJECT: Casual Sales: Auctions; Garage Sales; Rummage Sales; and Similar Sales

REFERENCES: IC 6-2.5-4-12, 45 IAC 2.2-4-33, 45 IAC 2.2-4-34, 45 IAC 2.2-4-35

I. General Rule

Indiana Sales Tax is not imposed upon transactions involving casual sales (except for sales of motor vehicles, watercraft or aircraft where sales tax is paid upon titling, registering, or licensing).

A "casual sale" is an isolated or occasional sale of tangible personal property whereby:

1. Such properly was originally acquired by the seller for the seller's own use or consumption; and
2. The seller, in the ordinary course of his or her regularly conducted business, does not acquire such property for the purpose of resale.

II. Auctions

An auction that meets all of the following conditions is a casual sale and is therefore not subject to sales tax:

1. The sale must be on premises owned or provided by the owner of the tangible personal property being sold and not the auctioneer.
2. The tangible personal property must not have been purchased for resale nor consigned by a third party for sale.

In addition, casual sales, which meet the above criteria, are not subject to the use tax and the purchaser is not required to remit use tax.

In the event that certain tangible personal property sold at a particular auction sale meets the foregoing "casual sale conditions", but other property was purchased by the owner for resale or consignment, the sale of the other property is a taxable sale and sales tax must be collected on the property that was purchased for resale or consignment.

If such a taxable sale is conducted by a licensed auctioneer, the auctioneer is a retail merchant with respect to the property being sold and is responsible for the collection of sales tax thereon.

If such a taxable sale is conducted by the owner of the property or a consignee of the property, the owner or the consignee becomes a retail merchant and must collect sales tax on the property being sold.

Before conducting a taxable sale as defined above, a licensed auctioneer; the owner of the property or the consignee must obtain a Registered Retail Merchant Certificate, "RRMC" from the Indiana Department of Revenue.

III. Garage Sales, Rummage Sales or Similar Sales

A garage sale, rummage sale, or similar sale that meets all of the following conditions is a casual sale and therefore is not subject to sales tax:

1. The sale must be at the residence of the owner of the tangible personal property;
2. The sale must be conducted by the owner or the immediate family of the owner of the property being sold;
3. The tangible personal property must not have been acquired by the owner for resale; and
4. All sales or use tax due on the original acquisition of the property must have been paid by the owner.

In the event that certain tangible personal property being sold at a particular sale meets the above conditions but other property fails to meet such conditions, the sales tax must be collected on the sale of all property failing to meet the conditions.

The sale of consigned tangible personal property is a retail sale and the consignee must register as a retail merchant and must collect and remit sales tax.

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Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #24
SALES TAX
DECEMBER, 2002
(Replaces Bulletin #24, dated May 1983)

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SUBJECT: Application of Sales Tax to Merchandise Sold through Television and Radio Stations or Magazines and Newspapers

REFERENCES: IC 6-2.5-4, IC 6-2.5-8-1, 45 IAC 2.2-8

Whenever merchandise is offered for sale by means of customer orders to be placed with or mailed to television stations, radio stations, magazines or newspapers in Indiana, the seller thereof, no matter where located**,** is an Indiana Retail Merchant and must collect and remit Indiana Sales Tax on all merchandise sold through or by means of such orders, together with the sales tax on all other tangible personal property which the seller delivers in Indiana for use or consumption in this state.

Such sellers, prior to offering merchandise for sale by means of customer orders placed with or mailed to such stations or newspapers, must apply for and obtain an Indiana Registered Retail Merchant Certificate.

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Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #25
SALES TAX
DECEMBER, 2002
(Replaces Bulletin #25 dated March 1983)

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SUBJECT: Floriculturists, Horticulturists and Arboriculturists
REFERENCES: IC 6-2.5-4, IC 6-2.5-5-5.1, 45 IAC 2.2-5-13
I. Sales by Such Merchants

All persons engaged in the business of floriculture, horticulture or arboriculture are retail merchants. All persons so engaged must collect Indiana Sales Tax on the sale of all tangible personal property such as shrubs, trees, flowers, etc. If the tangible personal property is sold to the purchaser by such merchants and installed by the seller, the total charge is subject to sales tax unless the selling price of the plants is segregated from the cost of labor and service.

All floriculturists, horticulturists and arboriculturists shall obtain a Registered Retail Merchant's Certificate ("RRMC") from the Indiana Department of Revenue. The sales tax that is collected shall be remitted to the Indiana Department of Revenue on the forms provided by the Department.

II. Sales to Such Merchants

The sale of any tangible personal property as a material which is to be directly used or consumed in direct production by a floriculturist, horticulturist or arboriculturist in the business of producing tangible personal property shall not be subject to the Indiana Gross Retail Tax (i.e., Sales and Use Tax). To purchase such tangible personal property exempt, the floriculturist, horticulturist or arboriculturist must use a General Exemption Certificate, Form ST-105, and submit it to each supplier.

Purchases of tangible personal property by such merchants that are not to be used directly in the direct production of tangible personal property and not for resale shall be subject to the State Gross Retail Tax (i.e., Sales and Use Tax).

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Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #26
SALES TAX
DECEMBER, 2002
(Replaces Bulletin #26, dated April 1983)

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SUBJECT: Dry Cleaning and Laundry Establishments Rental and Nonrental Services
REFERENCES: IC 6-2.5-4, IC 6-2.5-5-8, 45 IAC 2.2-5-15
I. Nonrental Services

The service provided by persons engaged in the operation of laundries or dry cleaning establishments is generally not subject to the Indiana sales tax.

All purchases by laundries and dry cleaning establishments of tangible personal property used in the operation of such businesses are subject to the sales tax, including the purchase of:

1. Detergents;
2. Cleaning fluids;
3. Machinery and equipment;
4. Utilities consumed in the operation of the business, and
5. All wrapping materials, including garment bags and hangers.

The above rules apply uniformly to coin operated dry cleaning, conventional dry cleaning, industrial dry cleaning, and the laundry businesses.

II. Clean Linen, Towel and Uniform Rental Services

This subsection deals with the application of the sales and use tax to the rental of linens, towels, uniforms, and other garments owned by dry cleaners or laundries to their customers.

For the purpose of sales and use tax, total receipts from the rental of clean linens, towels, uniforms and other garments are subject to sales tax, and the operators of such businesses are retail merchants required to collect the tax from their customers. If not so collected, the tax becomes the liability of the lessor as well as customer-lessee. Out-of-state operators furnishing such clean linen, towel, uniform and garment rental service to Indiana customers are engaged in local intrastate business and are required to register as Indiana Retail Merchants and to collect and remit Indiana sales tax.

The subsequent sale of any tangible personal property which has been rented or leased is subject to the sales tax.

Tangible personal property purchased expressly for rental use, such as linens, towels, uniforms and other garments as well as wrapping materials in which such rented property is furnished to customers is exempt from sales and use tax liability on the purchase thereof.

The purchase from Indiana suppliers by operators of such rental service of all materials, supplies, tools and equipment, including soaps, detergents cleaning fluids, deodorants, bleaches, water, electricity, gas washers, dryers, ironers, mangles and all other tangible personal property used in carrying on such rental business, is subject to sales tax. Sellers must collect the tax on such purchases. All such purchases by any laundry, dry cleaner or operators of a rental service on which Indiana sales tax is not paid at the time of purchase, including purchases out-of-state, are subject to payment of use tax by the purchaser.

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #27
SALES TAX
DECEMBER, 2002
(Replaces Information Bulletin #27, dated June 1995)

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SUBJECT: Barbers and Beauticians

REFERENCES: IC 6-2.5-4-1, 45 IAC 2.2-1-1, 45 IAC 2.2-4-2

Services Performed by Barbers and Beauticians

Services performed by barbers and beauticians are not subject to Indiana gross retail tax. Such services include permanents, shaves, and haircuts.

Supplies Used by Barbers and Beauticians

A barber or beautician is liable for Indiana gross retail tax on the purchase of all supplies and equipment used in the course of performing hair services. Such supplies include shampoos, hair rinses, and hair dryers. Indiana sales tax should normally be paid on these items at the time of purchase.

Supplies Purchased for Sale

A barber or beautician who purchases products for the purpose of resale must register with the Department as a retail merchant and collect and remit tax on all product sales. Sales tax is not due on the original purchase of these products if purchased for the purpose of resale.

If a barber or beautician purchases hair products for resale but later uses these products for personal or professional use, the barber or beautician must remit use tax as the consumer of these products. Indiana use tax may be paid and reported on Form ST-103.

Office Equipment

The purchase of furnishings, office equipment, and utilities used by a barber or beautician in the operation of a barber shop or salon is subject to Indiana sales tax.

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #29
SALES TAX
DECEMBER, 2002
(Replaces Information Bulletin #29 dated July 1994)

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

SUBJECT: Sales of Food

REFERENCES: IC 6-2.5-5-20, IC 6-2.5-5-21, IC 6-2.5-5-22

INTRODUCTION:

Generally, the sale of food for human consumption is exempt from Indiana sales tax. The law specifically lists food items which constitute "tax exempt" foods as well as "taxable" foods. Primarily, the exemption is limited to the sale of food items commonly referred to as "grocery" food. The purpose of this bulletin is to assist Indiana retailers in the proper application of this exemption.

A number of items sold by grocery stores, supermarkets, and similar type businesses are classified in this bulletin under the headings "nontaxable grocery food items" and "taxable grocery items". These examples are for illustrative purposes and are not intended to be all-inclusive.

I. Non-taxable Grocery Food Items:

The Indiana sales tax does not apply to the sale of the following food items:

Baby food	Marshmallows
Bakery products	Meat and meat products
Baking soda	Milk and milk products
Bouillon cubes	Mustard
Cereal and cereal products	Natural spring water
Chocolate (for cooking purposes only)	Nuts, including salted, (but not chocolate or candy coated)
Cocoa	Oleomargarine
Coconut	Olive oil
Coffee and coffee substitutes	Peanut butter
Condiments	Pepper
Cookies	Pickles
Crackers	Potato chips
Dehydrated fruits and vegetables	Powdered drink mixes (presweetened or natural)
Deli items, Deli trays, party trays	Relishes
Eggs and egg products	Salad dressings and dressing mixes
Extracts, flavoring as an ingredient of food products	Salt
Fish and fish products	Sauces
Flour	Sherbets
Food coloring	Shortenings
Fruit and fruit products	Soups
Gelatin	Spices
Honey	Sandwich spreads
Ice cream, toppings, and novelties	Sugar, Sugar products, and Sugar substitutes
Jams	Syrups
Jellies	Tea
Kernel popcorn	Vegetables and Vegetable Products (excluding salad bars)
Ketchup	Vegetable oils
Lard	Yeast

Some items in the above categories will be subject to tax if they are sold and prepared for immediate consumption. See Section II E. for further information.

II. Taxable Grocery Items:

The following grocery items are subject to Indiana sales tax:

Alcoholic beverages	Medicines not prescribed
Candy and confectionery	Paper products
Candied apples	Pet food and supplies
Chewing gum	Prepared popcorn

Chocolate covered nuts	Products sold in vending machine - sizes available for immediate consumption
Cocktail mixes (dry or liquid)	Soap and soap products
Dietary supplements (see Household supplies (brooms, mops, etc.)	Soft drinks, sodas, and Tobacco products
Ice	Tonics and vitamins
Liver oils, cod and halibut	Toothpaste
Lozenges	Water, including mineral, distilled, flavored, bottled, carbonated, and soda

A. Confectionery Items:

Preparations of fruits, nuts, or popcorn in combination with chocolate, sugar, honey, candy, or other confectionery are not considered exempt food items. The method used in packaging and distributing these preparations including the kind and size of container used will be considered in determining the primary use for which these preparations are sold. The fact that these items contain ingredients which, if purchased separately, are considered exempt, does not exempt these items

Chocolate commonly used for cooking purposes will be considered exempt food within the meaning of this information bulletin. The method used in packaging and distributing chocolate, including the kind and size of container used, will be considered in determining the primary use for which it is sold.

B. Soft Drinks. Sodas. and Similar Beverages:

Any soft drink which contains carbonated water is subject to tax. Other drinks which may not contain carbonated water, but are normally purchased for consumption out of soft drink bottles or cans will be subject to tax. This would include, for example, chocolate drinks. The term “soft drinks” does not include fruit and vegetable juices. Some beverages contain less than one hundred percent (100%) fruit juice. However, any beverage which contains fruit juice and no carbonated water will be exempt from tax.

C. Dietary Supplements:

Sales of dietary supplements are subject to Indiana sales tax. The term “dietary supplements” includes powdered mixes and meal substitutes specially designed for weight gain, loss, or control, irrespective of the fact that the product may substitute for meals. This includes products such as Figurines, Carnation Diet Drinks, Slimfast, Slender, and Ensure.

Sales of food prescribed as medically necessary by a physician licensed to practice medicine in Indiana are exempt from the sales tax if dispensed by a registered pharmacist or sold by a licensed physician.

D. Water:

All sales of water, except natural spring water, are subject to Indiana sales tax. In determining what constitutes natural spring water, retailers may rely on the labeling of the product as a means of identification. While the Department considers natural spring water to mean all water that comes from a spring and has no artificial or manufactured additives, such a method of identification lends itself to easy application by retailers. Therefore, the label must include the words “natural spring water” in order for the water to be exempt under the natural spring water exemption. It should be noted that the brand name need not contain the words “natural spring water”, it is only necessary that the words or phrase appear somewhere on the label. All water (except natural spring water) including mineral, distilled, bottled, carbonated, soda, and flavored is taxable.

E. Food Sold for Immediate Consumption: Combination Business:

Food sold for immediate consumption at or near the merchant’s premises, or sold through a grocery store salad bar, bakery or delicatessen is subject to sales tax. These sales are taxable even though such food is sold on a “take out” or “to go” basis and is actually taken from the premises of the seller. Where and when the customer actually eats the food is immaterial. If a location combines the sale of grocery items with the sale of food for immediate consumption, sales of the latter are taxable. The sale of food for immediate consumption is taxable even if the merchant does not provide a place to eat the food.

Any food cooked to the order of the purchaser, which is cooked and maintained at or near the cooking temperature prior to sale, or prepared food which is sold by the piece shall be subject to the sales tax. The kind and size of the order and packaging used will be considered in determining whether items are for immediate consumption. For example, individual orders such as a cup of ice cream, the sale of a single pastry, or single servings of pie or cake are taxable regardless of whether they are sold for consumption on the premises or are bagged, wrapped, or packaged on a “take out” basis for off premise consumption.

All food sold through a vending machine or by a street vendor is subject to sales tax regardless of the size of the package or the type of food sold. The fact that the item qualifies as “food for human consumption” if sold by a grocery store does not make the purchase exempt if sold through a vending machine.

III. Coupons, Redemption Certificates, and Bottle Deposits

Coupons or redemption certificates received by the seller as payment or partial payment of merchandise are considered as cash if such coupons are redeemable to the seller and were not extended by the seller.

Example: A cigarette manufacturer issues a coupon for two dollars off on a carton of cigarettes. The tax is applied to the original price and then the discount is given. If the seller reduces the price of cigarettes by two dollars per carton and only rings up the discounted price, then the selling price is subject to tax, and not the original price. The difference is that in the first example the seller will send the coupon to the manufacturer and be reimbursed the two dollars.

Charges for bottle deposits are not subject to sales tax and should be removed from the total on which sales tax is computed. The refund of bottle deposits are not deductible when computing taxable receipts.

IV. Purchases by Retailers

Purchases by the retailer of merchandise for resale and material for non-returnable packaging of merchandise sold is exempt from sales tax.

Gifts and premiums given by a retailer are not purchases for resale and such items are subject to the sales tax when purchased by the retailers. The retailer cannot purchase cash registers, equipment cleaning supplies, cash register tapes, sales tickets and other similar items exempt since the retailer is the final consumer of these items. The retail merchant must pay sales tax on all such items. Sales of merchandise to employees are subject to sales tax on the full final sales price.

V. Registration and Record Keeping Requirements

All grocers and other general merchandise retailers are required to file an application for a registered retail merchant's certificate for each location. Upon application with the Department of Revenue and the payment of a twenty-five dollar ($25.00) fee, a permanent certificate will be issued which must be displayed on the premises at all times.

Indiana retail merchants are required to keep adequate books and records for both taxable and non-taxable sales for a period of three (3) years, plus the current year.

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #32
SALES TAX
DECEMBER, 2002
(Replaces Bulletin #32, dated August 1997)

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

SUBJECT: Public School Corporation Purchases and Sales

REFERENCES: IC 6-2.5-5-22; IC 6-2.5-5-23; IC 6-2.5-5-25; IC 6-2.5-5-26; 45 IAC 2.2- 5-46; 45 IAC 2.2-5-47; 45 IAC 2.2-5-55; 45 IAC 2.2-5-58

INTRODUCTION

This Information Bulletin sets out guidelines and instructions to be followed by public school corporations, (grades one (1) through twelve (12)), and extra curricular account treasurers in determining the applicability of sales tax in acquisitions by the school corporation and the requirements to collect sales tax when selling items.

Registration of Public School Corporations

Indiana public school corporations must register with the Indiana Department of Revenue as not-for-profit organizations. Application for not-for-profit registration must be made on Form NFP20A, **Application to File as a Not-for Profit Organization**, and may be obtained by contacting the Indiana Department of Revenue, Compliance Division. The registration number assigned must be included on Form ST-105, **General Sales Tax Exemption Certificate**, submitted to a vendor to validate an exemption from sales tax collection on qualified purchases by the school corporation. The exemption number can only be used for the purpose of making exempt purchases, and may not be used as authority for making sales and collecting sales tax.

If the school corporation in its ordinary course of business acquires tangible personal property for resale and transfers that property to others for consideration, the school corporation must register as a retail merchant and obtain a Registered Retail Merchant Certificate (RRMC) from the Department.

Sales of School Meals

Sales of school meals are exempt from the sales tax if the seller is a school corporation containing students in any grade one (1) through twelve (12), the purchaser is a student or school employee, and the school furnishes the food on its premises. This exemption also extends to the sale of school meals prepared by a private caterer provided the meals are served on the school's premises, and the caterer is merely acting as an agent for the school.

Sales of school meals through a vending machine will be granted exemption **only** in the following instances:

(1) The vending machine is located in the school cafeteria or lunch room; and

(2) The food is being sold to students or school employees who are purchasing such food in lieu of purchasing the prepared meals furnished by the school.

All other sales of food through vending machines are subject to sales tax.

Acquisition of Tangible Personal Property

Purchases of tangible personal property are exempt from the sales tax if the property is acquired for incorporation into a school building which is being constructed by a school corporation.

Purchases of tangible personal property are exempt from the sales tax if it is acquired by a school corporation and the property is used to carry on and further the educational purposes of the school corporation. The purchase must be invoiced to and paid for by the school corporation.

School organizations that are under the parental control of the school corporation and whose funds are accounted for through the extra curricular activities account may use the exemption number of the school corporation to make qualified purchases exempt from sales tax. Such purchases may be made **only** where payment is made by an extra curricular activities check, **and** the property purchased is to be used by the organization for purposes other than in connection with social activities.

School organizations may not make purchases exempt from sales tax when such purchases are for the personal ownership or use of individual members of the organization, or if such purchases will be used in connection with social activities of the organization such as parties, dances, picnics, etc., conducted by such organizations.

Registration of Extra Curricular Activities Account as Registered Retail Merchants

Each extra curricular account treasurer must obtain a Registered Retail Merchant Certificate (RRMC) if taxable sales are made by the organization. It is the responsibility of the extra curricular account treasurer to account for the collection of sales tax in connection with all taxable sales of any organization whose funds are accounted for by the particular treasurer.

In order to account for the sales tax, it is necessary for the organization to obtain a registered retail merchant certificate in the name of the extra curricular activities account. Application for an Indiana Registered Retail Merchants Certificate must be made on form BT-1, and accompanied with a remittance of twenty-five dollars ($25.00). This form may be obtained by contacting the Indiana Department of Revenue at www.state.in.us./dor/, Tax Forms Ordering Line at 317-615-2581, Taxpayer Services Division, or any district office of the Department.

Sales Subject to Sales Tax: (Except School Bookstores)

Individual school organizations or functions which conduct selling activities need not collect sales tax if the funds are to be used by the organization in furtherance of the purpose of which it was organized, **and** the organization makes such sales for a period of fewer than thirty (30) days during a calendar year.

This exemption excludes most activities from the responsibility to collect sales tax on the various fund raising and student activities conducted during the school year. It usually eliminates the necessity for collection of sales tax on athletic event concession sales, as long as the concessions are sold directly by the school organization.

Sales of high school yearbooks and annuals are exempt as long as the yearbooks are produced and sold as a student activity or class project, and the commercial publisher’s activities are limited to furnishing necessary artwork, printing, and binding.

Sales of tangible personal property on an ongoing basis **are** subject to collection of sales tax. An example of this would be continued sales of tangible personal property to raise money to buy band uniforms.

Sales by School Bookstores

The sales tax shall not apply to sales by bookstores of tangible personal property intended primarily for the educational purpose of the organization and not used in carrying on a private or proprietary function.

The sales of textbooks and supplies by a parochial, public, or private not-for-profit school is exempt if made to students of the school in grades one through twelve. Such sales are primarily intended to further the educational purposes of the school.

Sales by a bookstore of non-related items such as T-shirts, sweatshirts, hats, memorabilia, class rings, license plates, etc. **are** subject to tax and the bookstore must register as a retail merchant to purchase these items exempt for resale and collect the tax from the ultimate purchaser. Sales to persons that are not students or school personnel are subject to the sales tax.

Purchases by Teachers

Tangible personal property purchased by teachers for use in their classrooms are subject to sales/use tax. This is true even though the teacher may use the funds allotted to teachers to purchase classroom supplies. In order to be exempt from sales tax the purchase must be invoiced directly to the school corporation and paid with a school check.

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Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #33
SALES TAX
DECEMBER, 2002
(Replaces Bulletin #33 dated April 1983)

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SUBJECT: Exemption from the Retail Sales Tax on Unitary Transaction of Eight Cents ($.08) or Less

REFERENCES: IC 6-2.5-2-2; IC 6-2.5-6-8

Effective December 1, 2002, unitary transactions in the amount of one cent ($.01) to eight cents ($.08) are not subject to sales tax.

A "unitary transaction" includes all items of property and/or services, whether or not such services would otherwise be taxable, furnished pursuant to a single order or agreement and for which a total combined charge or selling price is computed for payment.

Items of one cent ($.01) to eight cents ($.08) purchased or paid for at one time are not exempt if the total sale or sales is more than eight cents ($.08).

Registered retail merchants recording and accounting for such sales (i.e., unitary sales of eight cents [$.08] or less) separately may deduct the amount of such sales.

When record keeping and recording procedures are such that it would not be practical or feasible to maintain actual records of unitary transactions of one cent ($.01) to eight cents ($.08) every day in the year, the Department will accept the following procedures as proof of such transactions:

(1) The retail merchant may determine the ratio of one cent ($.01) to eight cent ($.08) sales to total sales during a period of fifteen (15) consecutive days during the first quarter of the merchant's normal and customary sales activity throughout the year.

(2) If a merchant has multiple selling locations or different kinds of selling transactions, the merchant may apply in advance to the Indiana Department of Revenue for permission to use a "representative sampling of locations" at which such checks are to be made. Sufficient information to establish the fact that such locations will be "representative" of all locations will be required.

(3) The merchant using the sampling method must keep an accurate record of the dollar amount of unitary transactions under nine cents ($.09) during this fifteen (15) day period. By dividing this total amount of gross sales at the locations used for the fifteen (15) day period, a percentage can be determined which the merchant may apply against gross sales to establish "sales not subject to the tax". This percentage factor is used throughout the balance of the calendar year in which the sampling is made.

It is important that the percentage factor be calculated from the merchant's actual records. These records must be maintained for three (3) years plus the current year because the merchant will be required to substantiate the percentage factor used upon the request of the Department.

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #36
SALES TAX
DECEMBER 2002
(Replaces Bulletin #36 dated June 1995)

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SUBJECT: Water Conditioning Companies

REFERENCES: IC 6-2.5-4-3; 45 IAC 2.2-4-6; 45 IAC 2.2-4-7

INTRODUCTION

The term "water conditioner" includes all automatic softeners, softener tanks, exchange tanks, purifiers, chlorinators or similar devices, and minerals contained in water conditioning systems which act to condition, purify, soften, or rejuvenate water.

TAXATION OF SALES OF WATER CONDITIONING PRODUCTS

Any water conditioning company or soft water conditioning company which sells, rents, or leases tangible personal property must register with the Indiana Department of Revenue as a retail merchant. Every water conditioning company is required to collect and remit Indiana gross retail tax on the sale of such property.

Sales tax is not due on the sale or rental of water conditioning products if the purchaser qualifies for an exemption. A qualified purchaser must present a valid exemption certificate to the seller at the time of purchase.

TAXATION ON RENTAL OF WATER CONDITIONERS

A company is required to collect sales tax on the rental or leasing of water conditioners. A water conditioner furnished for a monthly or periodic charge, or a water conditioner leased with an option to purchase, is also subject to sales tax on the amount charged. Sales tax is also due on acquiring an option to purchase a water softener as well as on a water softener acquired pursuant to an option to purchase contract.

RELATED MATTERS

Sales tax is due on any materials used to make modifications to accommodate water conditioning equipment (including plumbing) and billed separately from the price of the water softening equipment. If the materials used for installation purposes are not billed as a separate item, the water conditioner company is considered the user of those materials and is therefore liable for use tax.

Example

A company sells and installs a water softener. The cost of the softener is four hundred dollars ($400), and the cost of the installation materials is one hundred dollars ($100). The customer is only billed for the cost of the softener, or four hundred dollars ($400). Therefore, the seller is liable for use tax on the one hundred dollars ($100), cost of the materials.

The purchase of salt and other materials and equipment used to rejuvenate water tanks or water tank minerals is subject to sales tax. Sales tax is also due on all utilities.

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Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #38
INCOME TAX
JANUARY 1, 2003
(Replaces Information Bulletin #38 dated November 2000)

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SUBJECT: RENTER'S DEDUCTION
REFERENCE: IC 6-3-2-6

INTRODUCTION

Indiana residents who rent their dwelling and use it as their principal place of residence are allowed a deduction from adjusted gross income if the dwelling is subject to Indiana property tax. This deduction applies to both rent paid on a single family dwelling and any unit of a multiple family dwelling.

I. LIMITATION OF DEDUCTION:

The renter's deduction is limited to the actual amount of rent paid or two thousand five hundred dollars ($2,500), whichever is less, for tax years beginning after December 31, 2002.

EXAMPLE: Taxpayer A paid rent totaling twelve hundred dollars ($1,200) during the year. Because his total rent was less than the two thousand five hundred dollar ($2,500) limitation, he may deduct twelve hundred dollars ($1,200) on his return.

EXAMPLE: Taxpayer B paid rent totaling three thousand four hundred ($3,400) during the year. Since the total rent exceeded the two thousand five hundred dollar ($2,500) limitation, the taxpayer may deduct two thousand five hundred dollars ($2,500) on the return.

EXAMPLE: If the taxpayer's payment includes items other than rent for the dwelling, the total payment must be segregated and the portion attributed to rent for the dwelling determined. Taxpayer C makes monthly payments of two hundred dollars ($200) for his apartment. His landlord provides the utilities which average twenty-five dollars ($25) per month. Therefore, the taxpayer may only use one hundred seventy-five dollars ($175) of his monthly payment as a basis for deduction. His total deduction on an annual basis would be two thousand one hundred dollars ($2,100).

II. CLAIMING THE DEDUCTION:

This deduction shall be claimed on the Indiana individual income tax return. When claiming the renter's deduction, the taxpayer is required to indicate the landlord(s) to whom the rent was paid and the location(s) of the property.

III. RENT ON MOBILE HOMES:

Rent paid for mobile homes and for land use for mobile homes qualifies for this deduction provided the mobile home is the claimant's principal place of residence. Owners of mobile homes who maintain the mobile home as their dwelling may deduct rent paid for land use.

IV. MEMBERS OF COOPERATIVE HOUSING:

Members of cooperative type housing projects, whereby each member shares in the ownership of the entire property, are not permitted to take the renter's deduction available on the individual income tax return. The purpose of the renter's deduction is to afford to renters, on their individual returns, similar property tax relief as is now enjoyed by property owners in the form of a reduction in property tax liability. Since the payments made by the cooperative member to the cooperative association are based on a cost formula, it is the Department's position that each cooperative member will benefit from property tax relief through a reduction in his/her proportionate share of the cost. Furthermore, payments made by the member to the cooperative association are considered investments and do not constitute rent.

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Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #38
SALES TAX
DECEMBER 2002
(Replaces Bulletin #38, dated July 2, 1984)

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SUBJECT: Application of Sales Tax to Direct Payment Permit Holders

REFERENCE: IC 6-2.5-8-9

Registered retail merchants, wholesalers, and manufacturers may apply for a Direct Payment Permit, which enables them to remit use tax directly to the state rather than paying sales tax to their suppliers.

Direct Payment Permits are issued only when the following conditions are established:

1. The taxpayer normally buys substantial quantities of tangible personal property which may be used for either an exempt or non-exempt purpose.
2. There is no reasonable way that the exempt or non-exempt use can be determined at the time of purchase.
3. Adequate records will be maintained by the taxpayer showing the ultimate use of all tangible personal property purchased and the amount of use tax remitted.

Direct Payment Permits may not be used for the purchase of utilities, motor vehicles required to be licensed for highway use, and aircraft or watercraft required to be registered with this state.

Holders of Direct Payment Permits are required to file a copy of their Direct Payment Permit with their suppliers in lieu of an exemption certificate. A Direct Payment Permit does not expire and is valid until revoked by the Department.

The tax due must be reported as use tax on the sales tax return of the Direct Pay Permit holder.

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Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #39
SALES TAX
DECEMBER 2002
(Replaces Bulletin #39, dated September, 1994)

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SUBJECT: Insurance Companies

REFERENCES: IC 6-2.5-3; IC 6-2.5-4

The purchase of all personal property used or consumed by the insurance company is subject to either sales or use tax. Sales tax should normally be paid to the seller at the time of purchase. However, if the seller is an out-of-state merchant or if sales tax is not paid at the time of purchase, the insurance company is liable for the payment of use tax.

If the insurance company is a registered retail merchant, purchases subject to use tax must be reported on Form ST-103 at the same time any sales tax is reported. If the insurance company is not a registered retail merchant, any use tax due must be listed and remitted to the Indiana Department of Revenue on Form ST-115.

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #41
SALES TAX
DECEMBER, 2002
(Replaces Information Bulletin #41, dated October, 2000)

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SUBJECT: Sales Tax Application to Furnishing of Accommodations

REFERENCES: IC 6-2.5-4-4; 45 IAC 2.2-4-8; 45 IAC 2.2-4-9

INTRODUCTION:

Indiana sales tax applies to the rental of rooms, lodgings, camping space, or other accommodations in Indiana furnished by any person engaged in the business of renting or furnishing such accommodations for periods of less than thirty (30) days. Persons furnishing such accommodations must register as a retail merchant and must collect sales tax from their customers.

I. Definition of Accommodations

"Accommodation" means any space, facility, structure, or combination thereof including booths, display spaces and banquet facilities, together with all associated real or personal property which is intended for occupancy by persons for a period of less than thirty (30) days. The term includes the following:

- Rooms in hotels, motels, lodges, ranches, villas, apartments, houses, bed and breakfast establishments, and vacation homes or resorts.
- Gymnasiums, coliseums, banquet halls, ball rooms, arenas, and other similar accommodations regularly offered for rent.
- Cabins or cottages.
- Tents or trailers (when situated in place).
- Houseboats and other craft with over night facilities.
- Space in camper parks and trailer parks wherein spaces are regularly offered for rent for periods of less than thirty (30) days.
- The renting or furnishing of cubicles or spaces used for adult relaxation, massage, modeling, dancing, or other entertainment to another person.

II. Imposition of Tax

The tax is imposed on the gross receipts received by the retail merchant and include the amount which represents consideration for the rendition of those services which are essential to the furnishing of the accommodation, and those services which are regularly provided in furnishing the room or accommodation. Such amounts are subject to tax even if they are separately itemized on the statement or invoice. This includes telephone access charges. It also includes food or drinks provided by the retail merchant to the customer, if it is included in the room charge. If there is a membership fee charged to the customer, it is included in gross receipts.

III. Exemptions from the Tax

An accommodation that is rented for thirty (30) days or more is not subject to the sales tax. The customer is required to pay the tax for the first thirty (30) days if the customer is billed on less than a monthly basis.

EXAMPLE:

A business rents accommodations for its employees and signs a lease for four months, payable monthly, the first thirty (30) days would not be subject to tax.

Same situation as above; however the business pays the rental on a weekly basis. The business is required to pay sales tax on the first thirty (30) days of rental.

If an entity rents the rooms for employees, the entity is renting the rooms and not the person who stays in the room. The contract would not have to be for a specific room as long as the continuous stay portion of the contract remains in effect.

EXAMPLE:

An innkeeper moves two occupants of rooms rented on an extended stay to make a contiguous area available for a convention that wants all of their rooms together. Moving the people in the extended stay contract does not void the contract.

The tax does not apply to the rental of meeting rooms to charitable or other exempt organizations if the facility is to be used for furtherance of the purpose for which they are granted the exemption.

A person is not a retail merchant if the person is a promoter that rents a booth or display space in a facility that is operated by a political subdivision (including a capital improvement board established under IC 36-10-8 or IC 36-10-9) or the state fair commission. However, this does not exempt the renting of accommodations by a political subdivision or the state fair commission to a promoter or an exhibitor.

NOTE: All exemptions applicable to the sales tax apply to the various innkeepers' taxes.

IV. Subleasing Accommodations

The rental of rooms, lodgings, camping space or other accommodations to a person for periods of less than thirty (30) days for the purpose of subleasing or subletting such accommodations to others, may be done exempt from tax. However, in such situations, the sublessor must register as an Indiana retail merchant and must collect the tax from the person to whom the accommodation is ultimately leased.

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Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #45
SALES TAX
DECEMBER 2002
(Replaces Information Bulletin #45 dated December, 1991)

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

SUBJECT: Vending Machines and Other Food Holding Units

REFERENCE: IC 6-2.5-5-20

I. Vending Machine Sales

A vending machine is a mechanical device that dispenses items for either money or tokens. As a general rule, sales tax must be collected on sales made from a vending machine, including sales of food (fruit, sandwiches, etc.) and beverages.

Because of the nature of vending machine sales, the sales tax due cannot be separately stated on a receipt. A person responsible for collecting sales tax on vending machine sales must post a sign on the vending machine stating that sales tax is included in the price.

If no sign is posted, the Department will assume that the price of the item does not include tax. Thus, the Department will expect the responsible person to remit sales tax on the gross sales from the machine.

If a sign is posted on the machine, the gross receipts subject to tax will be calculated. The gross receipts subject to tax equals the taxable gross receipts from vending machine sales divided by one (1) plus the tax rate.

EXAMPLE:

Vendor A owns and operates fifteen (15) vending machines. Vendor A does not have signs stating that the tax is included in the price of the items on five (5) machines, but does have signs on ten (10) machines. The total taxable sales from each machine is two hundred ($200.00) per month. Because Vendor A does not post signs on five (5) of the machines, the Department will assume that Vendor A collected tax on the total gross receipts of the five (5) machines. For the remaining ten machines, the amount subject to tax is equal to $2,000 divided by one plus the current tax rate. To calculate the tax due, the gross sales subject to tax must be multiplied by the current tax rate.

II. Vending Machine Sales Not Subject to Sales Tax

Sales of tangible personal property for eight cents ($.08) or less are not subject to sales tax. Vending machine sales of items for eight cents ($.08) or less are thus not taxable.

Certain vending machine sales could qualify as exempt sales because of the tax exempt status of the persons or organizations who make the sales. For example, if an elementary school sells food through a vending machine, the food sales could qualify as exempt school meals. There is a specific exemption from sales tax for school meals. Vending machine sales of food by an elementary or secondary school are exempt from sales tax regardless of who makes the sales as long as the sales are only made to students or school employees. (See Sales Tax Information Bulletin #32)

A state operated correctional facility or city/county jail could make exempt sales from a vending machine if the vending machine sales were limited to detainees and employees. The sale by the correctional facility or jail is exempt because selling food or other items to detainees furthers the governmental purpose of the facility or jail. Vending machine sales to employees furthers a governmental purpose because keeping staff on-site contributes to the efficient operation of the facility.

Items sold by the State of Indiana, the federal government or any Indiana political subdivision must be purchased for resale by the exempt entity and the exempt entity must actually sell the item. Vending machine sales from a machine located in a jail or on a federal installation that are made by a person other than the jail or the federal government are taxable.

III. Purchases of Vending Machines

Generally, the purchase of a vending machine is taxable. A vending machine that actually produces a product for resale is not taxable because the vending machine is directly used in manufacturing. A vending machine would also be exempt if purchased by schools to serve school meals, a jail to provide service to detainees or the federal government.

IV. Other Food Holding Units

Sales from any device or equipment other than a vending machine, such as honor boxes, follow the general rules for any sales of property. Tax should be collected on taxable food items, such as candy and confectionery, sold from a cardboard honor box. Tax should also be collected on items, such as fruit and cookies, because it is for immediate consumption.

The method used for determining tax on vending machine sales may also be used to determine the amount subject to tax on sales from honor boxes or similar devices. Honor boxes must have a sign indicating that tax is included to avoid the requirement to remit tax on the gross taxable sales from honor boxes.

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN # 50
SALES TAX
DECEMBER 2002
(Replaces Information Bulletin #50 dated October 1994)

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SUBJECT: SALE OF GOLD, SILVER OR OTHER METAL ALLOYS

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

I. APPLICATION OF SALES TAX

Persons who are occupationally engaged in the selling of gold, silver, or any other metal or alloy such as bullion, bars, ingots, or in any other shape, size, or condition in Indiana are required to register as Indiana retail merchants and collect and remit Indiana sales tax on such transactions.

The sale of gold or silver bullion or any other tangible personal property that is delivered to a point outside Indiana is not subject to Indiana sales tax.

The sale of gold or silver bullion either stored or arranged to be stored in Indiana is subject to Indiana sales tax, regardless of whether the buyer is identified as the owner of the particular gold or silver sold. Further, the sale is subject to tax if the gold or silver sold is stored in Indiana in anticipation of later exchanging or substituting it to discharge an obligation.

II. APPLICATION OF USE TAX

The storage, use or consumption in Indiana of gold, silver, and other alloys and metals purchased in a retail transaction, wherever located, is subject to the use tax.

A credit for sales tax due and paid in another state may be taken for up to the amount of Indiana use tax due.

III. LEGAL TENDER

The use of metal coins (which are legal tender of the United States) given in exchange for goods or in payment of debts is not considered selling at retail, provided the value assigned to such coins in the transaction is not more than the face value of the coin. The sale of coins or currency for more than face value is considered selling at retail and subject to the collection of Indiana sales tax.

IV. POSTAGE STAMPS

The sale by a retail merchant of canceled postage stamps, or the sale, for more than face value, of uncancelled stamps is a retail sale and subject to Indiana sales tax in the same manner as gold, silver, and other alloys and metals.

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #56
SALES TAX
DECEMBER 2002
(Replaces Bulletin #56 dated May 31, 1985)

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SUBJECT: Time Limitation for the Issuance of Assessments

REFERENCE: IC 6-8.1-5-2

IC 6-8.1-5-2 sets forth the time limitation for the issuance of assessments. The Department of Revenue must issue an assessment within three (3) years of the latter of the due date of the return, or, in the case of a return filed for the state gross retail tax, the end of the calendar year which contains the taxable period for which the return is filed.

If a person files a fraudulent, unsigned, or substantially blank return, or does not file a return, there is no time limit within which the department must issue its proposed assessment. If the blank is completed with a zero, and it is determined that substantial use tax liabilities exist, the department will consider the issue of fraud. If fraud appears to exist, the limitation again will not apply.

The three (3) year limitation is inapplicable regarding those individuals found to have the responsibility to remit the sales or use taxes of a corporation or partnership as long as the corporation or partnership receives notice of the assessments within the time limits; additional notice is not required.

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #58
SALES TAX
DECEMBER 2002
(Replaces Bulletin #58 dated October, 1991)

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SUBJECT: Price Discounts

REFERENCES: IC 6-2.5-1-5, IC 6-2.5-2-2, IC 6-2.5-4-1, 45 IAC 2.2-2-1, 45 IAC 2.2-2-3, 45 IAC 2.2-2-4, 45 IAC 2.2-2-5, 45 IAC 2.2-4-1

In any taxable sale of tangible personal property, the amount subject to tax is the amount received by the merchant for the sale of the property. The amount received by the merchant for the sale of any property includes all elements of consideration. Consideration means all items of value such as cash, property or forgiveness of debt.

If time discounts (e.g. 2% discount for payment within ten days) or cash discounts (e.g. discount for cash) are given by a merchant, only the actual amount received by the merchant is subject to the collection of tax. If the consumer is not actually given the discount, then tax must be collected on the full price paid.

Coupons presented to a retail merchant only lower the amount of tax if the merchant is not reimbursed for the coupon. Typically, a manufacturer's coupon entitles a merchant to reimbursement for the face value of the coupon, thus the taxable amount paid for a product purchased with a manufacturer's coupon is the price of the product before applying the coupon.

Coupons for which the merchant is not reimbursed reduce the price subject to tax because by accepting the coupon the merchant has discounted the price of the product.

Example 1: Dishwashing soap is sold for $1.00 per bottle. The customer gives a $.20 manufacturer's coupon to the merchant. The amount subject to sales tax is $1.00 because the merchant receives $.80 from the customer and is reimbursed $.20 from the manufacturer.

Example 2: Cat food is $1.00 for a two pound bag. The merchant gives out coupons that reduces the price of cat food to $.75. The merchant would collect sales tax on $.75 because there is no reimbursement for the $.25 reduction.

Example 3: Dishwashing soap is sold for $1.00 per bottle and the customer presents a $.20 manufacturer's coupon. The merchant advertises that he will double the value of all manufacturer's coupons for the week. The customer pays $.60 for the product. The manufacturer reimburses the merchant $.20 for the coupon. The merchant is not reimbursed for the $.20 for doubling the value of the coupon. The amount subject to sales tax is $.80.

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Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #59
SALES TAX
DECEMBER 2002
(Replaces Bulletin #59 dated October, 1991)

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SUBJECT: Advertising Signs and Billboards

REFERENCES: IC 6-2.5-4-1, IC 6-2.5-4-10

The taxability of billboards and advertising signs for sales tax purposes requires a determination of whether the rental of the advertising space is the rental of tangible personal property or the sale of a service. If the rental of the advertising space is the rental of personal property, then the rental is subject to tax. If the transaction of allowing someone to use a billboard or other advertising space is the sale of a service, then the transaction is not subject to tax.

The key element in determining whether the transaction is a rental or a service is who controls the property. If the person paying for the use of the advertising space controls the space, the transaction is a rental of the space and is taxable. If the person using the property does not control the property then the transaction is a service.

The person paying for the use of the space has control when that person can determine the location of the advertising space or has the right to direct how the advertising space will be used. The person using the space must have exclusive use of the space. Other factors indicating control are whether the customer provides upkeep and maintenance of the space, and whether the customer pays for the posting of the advertising material.

EXAMPLES:

1. A person, who owns a portable advertising sign, lets a customer use the sign for one month for five hundred dollars ($500). The customer's employees move the sign to a location determined by the customer and put a message on the sign also determined by the customer. The transaction between the sign owner and the customer is a rental subject to sales tax.
2. A person owns a billboard next to a major highway. The billboard cannot be moved. A customer pays to display an advertisement for thirty days. The customer chooses the advertisement's content but the sign owner employs the people who

affix the ad to the billboard. The owner also pays for any upkeep and insurance for the billboard and also owns the property on which the billboard is erected. The transaction is a service because the customer does not control the advertising space.

All materials purchased by a person who provides the service of displaying a customer's advertisements are subject to sales and use tax, including any materials incorporated into the advertising structure itself. All materials purchased to be rented or leased to a customer may be purchased exempt from sales or use tax.

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN # 60
SALES TAX
DECEMBER 2002
(Replaces Bulletin #60 dated December, 2001)

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SUBJECT: Construction Contractors

REFERENCES: IC 6-2.5-3-3, IC 6-2.5-4-9, IC 6-2.5-5-3, 45 IAC 2.2-3-7 through 45 IAC 2.2-3-12, 45 IAC 2.2-4-21 through 45 IAC 2.2-4-26

INTRODUCTION

The general rule for the application of sales or use tax is that all sales of tangible personal property are taxable, and all sales of real property are not taxable. This general rule is not changed by the conversion of tangible personal property into realty. Therefore, all construction material purchased by a contractor is taxable either at the time of purchase, or if purchased exempt (or otherwise acquired exempt) upon disposition unless the ultimate recipient could have purchased it exempt.

DEFINITIONS

A. "Construction Contractor" means anyone who is obligated under the terms of a contract to furnish the necessary labor or materials, or both, to convert construction material into realty, including a general or prime contractor, a subcontractor, or a specialty contractor. The term includes a person engaged in the business of: building, cement work, carpentry, plumbing, heating and cooling, electrical work, roofing, wrecking, excavating, plastering, tile work, road construction, landscaping, or installing underground sprinkler systems.

Persons selling and installing personal property such as manufacturing equipment, carpeting, appliances, water softeners, water heaters, garage door openers, telephone or intercom systems under a "lump sum purchase price" are not construction contractors. However, the sales and installation of these properties do result in the conversion of tangible personal property into realty. Therefore, these persons must collect the Indiana sales tax on the purchase price of the personal property and all incidental materials used to install the personal property.

The retail merchant must list separately on its invoices any charges for services not specifically taxable and the purchase price for tangible personal property which is taxable. If the service charges are not separately stated as required, the entire invoice amount will be taxable as a unitary transaction.

B. "Construction materials" means any tangible personal property to be used for incorporation in or improvement of a facility or structure constituting or becoming part of realty. A "facility" means any additions to the land.

C. "Lump sum contract" means a contract to incorporate construction materials into real estate with the charge for labor and materials being quoted as one price. The contractor may subsequently furnish a breakdown of the charges for labor and materials without changing the nature of the lump sum contract. For example, a typical lump sum contract provides that the contractor will build a structure for a total stated price such as $40,000. A lump sum contractor generally must pay sales tax to the vendor who sells the contractor construction materials. If the vendor is located out-of-state and is not required to collect Indiana sales tax or if the person for whom the structure is being built would be exempt from sales tax for the purchase of the construction materials, the lump sum contractor would not pay sales tax. Although the contractor may not pay sales tax when purchasing material from an out-of-state vendor, the contractor would be liable for use tax if the construction materials are stored, used or consumed in Indiana for a nonexempt purpose. Unless otherwise exempt, when a lump sum contractor purchases construction materials free of sales tax, the contractor must pay use tax on those materials when they are incorporated into real property in Indiana. To purchase construction materials exempt from sales tax, a lump sum contractor must be registered as a retail merchant.

D. “Time and materials contract” means a contract to incorporate construction materials into real estate with the charge for the labor and materials being separately stated and the final contract price being dependent on the cost of the materials and the amount of labor it actually takes to complete the contract. Time and materials contractors are considered retail merchants making retail transactions with respect to the sale of construction materials and must register as retail merchants with the Department. Contractors that perform time and material contracts must separately state the charge for any construction materials and must collect Indiana sales tax on the full sales price of the construction material including overhead and profit charges. The construction materials used by a contractor in a time and materials contract should be purchased exempt by the contractor. The sales tax collected by the contractor must be separately stated on the invoice. A time and materials contractor would be entitled to the eighty-three hundredths of one percent (.83%) collection allowance for timely remittances. Exemption certificates and direct pay permits must be retained by time and materials contractors to prove their non-liability for collecting sales tax on a sale of construction materials. If a time and materials contractor purchases construction materials exempt from sales tax and subsequently uses those materials to fulfill a lump sum contract, the contractor would be subject to use tax on those materials.

E. “Improvement to real estate” means that personal property has been incorporated into and becomes a permanent part of the real property. To accomplish this, the personal property generally takes on an immovable character. An immovable fixture is characterized by three elements:

(1) Real or constructive annexation of the article in question to the land.

(2) Adaptation of the personal property as part of the land.

(3) The intention of the party making the annexation to make the personal property a permanent part of the land so that it would pass with the land upon a sale.

Indiana Property Tax regulations concerning commercial property may be consulted as a guideline to determine whether property is real or personal, but it should not be considered determinative.

Tax Consequences

A contractor’s purchase of machinery, tools, equipment and supplies that are not incorporated into the structure being built is subject to sales and/or use tax at the time of purchase. No exemption is available to the contractor because of the exempt status of the customer. Rule 45 IAC 2.2-3-12 [c], which is specifically applicable to contractors under contract for an improvement to real estate with an organization entitled to exemption from sales and use tax, states:

(1) Utilities, machinery, tools, forms, supplies, equipment, and any other items used or consumed by the contractor and which do not become part of the improvement to real estate are not exempt regardless of the exempt status of the person for whom the contract is performed.

Note:

In the construction and repair of public roads, bridges, highways and other public infrastructure for a governmental entity, a contractor may be specifically required to provide certain items of tangible personal property for the safety of the public, for traffic control, or to enable the government to perform its responsibilities. Such items include, but are not limited to, traffic signals; signs; barrels; barricades; temporary pavement markings; materials to construct temporary traffic lanes, roads and bridges; erosion control and drainage materials; aggregates used to set grades; and field offices and communications equipment, provided such offices and equipment are exclusively for government representatives. The purchase, lease or use of such items by a contractor or its subcontractor to comply with the requirements of a government construction contract are not subject to sales or use tax, provided the item is used solely, in connection with the construction and/or repair of public roads, bridges, highways or other public infrastructures that will be paid for by a governmental entity and is not used for any other purpose.

Direct Payment Permits

A contractor holding a direct payment permit may issue it to his suppliers, but when acting as a contractor should remember that he must obtain an exemption certification—not a direct payment permit—from any exempt customer for whom he is making an improvement to real estate as a result of a lump sum contract.

A lump sum contractor does not sell tangible personal property or collect sales tax as a result of the contract and may not accept a direct payment permit. If the organization, for which the contractor is constructing the improvement, is entitled to an exemption, it must give the contractor an exemption certificate (Form ST-105) -- not a direct payment permit—certifying the exemption.

A prime contractor receiving an exemption certificate for a particular job should pass the exemption on to the subcontractor.

Asphalt Manufacturers

The manufacturing exemption will apply to an asphalt plant and paver, including repair parts and fuel for the respective equipment. Asphalt manufacturers/contractors will be granted an exemption for dump trucks used to transport “hot mix asphalt” from their asphalt plant to the job site. No exemption is available to the extent the respective dump trucks are used to haul “raw materials”. Additionally, no exemption for dump trucks is available to contractors who do not produce “hot mix asphalt”. Actual records must be maintained to document the exempt usage, if any. Graders, rollers, distributors, front-end loaders and other construction equipment are not exempt and will be subject to Indiana sales and use tax.

Streets and Sewers

Contractors acquiring material for incorporation as an integral part of a public street or of a public water, sewage or other utility service system are exempt from sales tax on the purchase of the construction material. The public street or public utility service system must be required under an approved subdivision plot and must be accepted by the appropriate Indiana political subdivision to be publicly maintained after its completion.

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Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #61
SALES TAX
DECEMBER 2002
(Replaces Bulletin #61 dated September 12, 1986)

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

SUBJECT: Food Stamps

REFERENCES: IC 6-2.5-5-33

The purchase of food items with food stamps will be exempt from sales tax.

(1) Normally, taxable items will be exempt from sales tax when food stamps are used for the purchase, even if cash is submitted with food stamps, provided the amount of cash does not represent a disproportionate amount of the purchase price.

Example: When $20.00 in food stamps and $2.00 in cash is tendered for the purchase of a group of items that are food stamp eligible, the entire transaction is exempt from tax.

(2) Non-food stamp eligible items (i.e., tobacco products, alcoholic beverages, paper products, etc.) will be unaffected. Applicable sales tax will be collected on all non-food stamp eligible items.

(3) Tax will not be due on the coupon value of any food stamp eligible item paid for with food stamps, or in combination with cash. The full amount of the item would be exempt from tax under (1) above, if purchased without the coupon.

Example: When food stamp eligible items are purchased with $2.00 cash, $20.00 in food stamps and various coupons, the tax will not be due on the coupon value of any food stamp eligible items, resulting in an entire tax exempt transaction.

Stores which accept food stamps are to exempt the entire food stamp purchase including any transaction that provides cash in combination with the food stamps and coupons submitted for food stamp eligible items.

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Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE

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LETTER OF FINDINGS NUMBER: 98-0493 ST
Sales and Use Tax
For Tax Periods: 1994 Through 1996

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

ISSUES

1. Sales and Use Tax- Dust Lights

Authority: IC 6-2.5-3-2 (a), IC 6-8.1-5-1 (b), IC 6-2.5-5-4, 45 IAC 2.2-5-10 (c), *Indiana Department of Revenue v. Cave Stone*, 457 N.E. 2d 520, (Ind. 1983).

The taxpayer protests the assessment of tax on dust lights.

2. Sales and Use Tax-Computer Software

Authority: IC 6-2.5-3-2 (a), Sales Tax Information Bulletin #8, *Lincoln National Life Insurance Company v. Indiana Department of State Revenue,* Ind. Cir. Ct., Noble County Docket No. C-80-635 (October 20, 1981).

The taxpayer protests the assessment of tax on computer software.

3. Sales and Use Tax-Labels and Label Printing Machine

Authority: IC 6-2.5-5-6, IC 6-2.5-5-3, 45 IAC 2.2-5-14 (e).

The taxpayer protests the assessment of tax on labels and the label printing machine.

4. Tax Administration-Negligence Penalty

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

The taxpayer protests the assessment of the negligence penalty.

STATEMENT OF FACTS

The taxpayer is a manufacturer of kitchen and bath cabinets that are sold mostly at wholesale to retailers. After an audit, the Indiana Department of Revenue, hereinafter the "department," assessed additional sales and use tax, interest, and penalty. The taxpayer protested a portion of the assessment and a hearing was held. Further facts will be provided as necessary.

1. Sales and Use Tax-Dust Lights

DISCUSSION

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

IC 6-2.5-5-4 provides an exemption from the use tax for tangible personal property directly used in the direct production of the taxpayer's product. In *Indiana Department of Revenue v. Cave Stone*, 457 N.E. 2d 520, (Ind. 1983) the Indiana Supreme Court found that a piece of equipment qualifies for the manufacturing exemption if it is essential and integral to the production process. 45 IAC 2.2-5-10 (c) further describes manufacturing machinery and tools as exempt if they have an immediate effect on the property in production.

The taxpayer has sanding booths for the individual sanders' use. These booths originally had no attached lighting. After a period of time, the taxpayer decided to attach lights with dust protection to each of the booths. The dust lights were specifically engineered and constructed for this purpose. The lights supplement the general lighting in the room. The department assessed use tax on the dust lights. The taxpayer argued that these lights qualify for the manufacturing exemption.

Because the taxpayer's employees were able to produce the cabinets without the dust lights prior to their installation, the dust lights cannot be essential and integral to the production process as required for the manufacturing exemption. Further the dust lights do not directly impact the production process as required in the regulation. Although the dust lights improved the working situation, they do not qualify for the directly used in direct production exemption from the use tax.

FINDING

The taxpayer's first protest is denied.

2. Sales and Use Tax-Computer Software

DISCUSSION

The department also assessed use tax on the taxpayer's use of a computer software licensing agreement pursuant to IC 6-2.5-3-2 (a). The taxpayer contends that since the computer software licensing agreement was intangible rather than tangible personal property, it was not subject to the use tax. The taxpayer bases this contention on the finding in *Lincoln National Life Insurance Company v. Indiana Department of State Revenue,* Ind. Cir. Ct., Noble County Docket No. C-80-635 (October 20, 1981). In that case, the Noble County Circuit Court held that a computer program software license was intangible, intellectual personal property and not subject to the Indiana sales or use taxes.

The taxpayer's reliance on *Lincoln National* is misplaced. *Lincoln National* is a nonappellate opinion. It was decided in a county circuit court prior to the creation of the Indiana Tax Court. As such, it does not serve as general precedent.

The department's interpretation of the sales and use taxability of canned or pre-written computer programs has been consistently available for taxpayers in Sales Tax Information Bulletin #8 that states as follows:

> Pre-written or canned computer programs are taxable because the intellectual property contained in the canned program is not different than the intellectual property in videotape or a textbook.

As tangible personal property like a textbook, the use of pre-written or canned software is subject to the use tax.

FINDING

The taxpayer's protest is denied.

3. Sales and Use Tax-Labels and Label Printing Machine

DISCUSSION

The taxpayer also protests the assessment of use tax on certain carton labels. Pursuant to IC 6-2.5-5-6, transactions involving tangible personal property are exempt from the use tax if the purchaser acquires it for "incorporation as a material part of other tangible personal property which the purchaser manufactures, assembles, refines, or processes for sale in his business."

This exemption is further explained at 45 IAC 2.2-5-14 (e) as follows:

... incorporated as a material or an integral part into tangible personal property for sale means:

(1) The material must be incorporated into and become a component of the finished product.

(2) The material must constitute a material or integral part of the finished product.

(3) The tangible property must be produced for sale by the purchaser.

The taxpayer attaches the subject adhesive labels to its shipping cartons. These labels identify the size, type, and style of the product. Two of the taxpayer's major customers submitted letters indicating that they require the information provided on the labels. Therefore, the taxpayer argues that the labels meet the statutory and regulatory requirements for exemption.

The cartons to which the taxpayer affixes the labels are cardboard shipping cartons designed to protect the taxpayer's product during shipping. Shipping cartons are not an essential part of the final product. Therefore, the labels that are attached to the shipping cartons do not become part of the finished product and do not qualify for exemption.

The taxpayer also protests the assessment of use tax on the machine used to print the labels. The taxpayer contended that the machine qualified for exemption because it was directly used in the direct production of tangible personal property produced for resale pursuant to IC 6-2.5-5-3. Since the labels are attached to the shipping carton, they are not part of the finished product produced for resale. The label printing machine operates on labels which are not part of the finished product. Therefore, it does not impact the final product and it does not qualify for exemption.

FINDING

The taxpayer's protest to the assessment on the labels and the label printing machine is denied.

4. Tax Administration-Negligence Penalty

DISCUSSION

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

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

The taxpayer failed to follow the law, regulations, and generally available departmental instructions by failing to pay sales or use tax on several varieties of clearly taxable items such as office supplies, first aid supplies, cleaning supplies, and general maintenance supplies. Some of these same items had been assessed in a previous audit. This constitutes negligence. The negligence penalty was properly applied.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04980506.LOF

LETTER OF FINDINGS NUMBER: 98-0506
Sales And Use Tax
For Tax Periods: 1994

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

ISSUE

1. Sales and Use Tax: Unreported Taxable Sales

Authority: IC 6-8.1-5-1 (b).

The taxpayer protests the assessment of sales tax on certain unreported sales.

2. Sales and Use Tax: School Food Service

Authority: IC 6-2.5-2-1 (a), IC 6-2.5-5-20, Sales Tax Information Bulletin #32, August 1997, Hope Lutheran Church v. Chellew, 460 N.E. 2d 1244(Ind. Ct. App.1984), United Artists Theatre Circ., Inc. v. Indiana Department of State Revenue, 459 N.E. 2d 754 (Ind. Ct. App. 1984).

The taxpayer protests the assessment of sales tax on its university food service operations.

3. Sales and Use Tax: Vending Machine Labels

Authority: IC 6-2.5-2-1 (a), IC 6-2.5-5-20, Information Bulletin #45, issued December 1991.

The taxpayer protests the assessment of tax on the gross sales of vending machines.

4. Sales and Use Tax: Consumable Goods

Authority:. IC 6-2.5-2-1 (a), IC 6-2.5-3-2 (a).

The taxpayer protests the assessment of use tax on the use of certain consumable goods.

5. Sales and Use Tax: Capital Purchases

Authority: IC 6-2.5-2-1 (a), IC 6-2.5-3-2 (a).

The taxpayer protests the assessment of use tax on certain capital purchases.

6. Tax Administration: Negligence Penalty

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

The taxpayer protests the imposition of the negligence penalty.

STATEMENT OF FACTS

The taxpayer, a corporation with its commercial domicile in North Carolina, is a food and beverage service company with revenue derived from cafeterias and vending machines in Indiana. After an audit, the Indiana Department of Revenue ("department") assessed the taxpayer additional sales and use tax, interest and penalty. The taxpayer protested the assessment and a hearing was held. More facts will be provided as necessary.

1. Sales and Use Tax: Unreported Taxable Sales

DISCUSSION

All department assessments are presumed to be correct. Taxpayers bear the burden of proving that any assessment is incorrect. IC 6-8.1-5-1 (b).

The department assessed additional tax on sales from various locations that were not reported during some months. The department used close dates taken from the taxpayer's operation reports in calculating the assessments. The taxpayer contends that the close dates used in the audit were inaccurate. The taxpayer submitted computer runs concerning business activity at the protested locations. Each of the computer runs includes a handwritten note that the operations ceased on a certain date. These documents are not persuasive evidence that the operations closed on the handwritten dates. The taxpayer did not sustain its burden of proving that the department used inaccurate close dates for the calculation of sales taxes due.

FINDING

The taxpayer's protest is denied.

2. Sales and Use Tax: School Food Service

DISCUSSION

Indiana imposes a sales tax on the sale of tangible personal property at retail. IC 6-2.5-2-1 (a). Sales tax is specifically imposed on sales of prepared meals in a retailer's establishment. IC 6-2.5-5-20. Meals sold by schools on school premises to university students are exempt from the sales tax. IC 6-2.5-5-22. This statutory exemption is clarified in Sales Tax Information Bulletin #32, August 1997, as being available to an agent who provides food services on behalf of its principal.

The department considered the taxpayer an independent contractor in providing the food service to the universities. Therefore the department assessed additional tax on the taxpayer's university food services. The taxpayer alleged that it was actually the agent of the universities and was entitled to the universities' exemption from sales tax. In Indiana an agency relationship exists when consent to the agency is manifested by the principal, the agent acquiesces to the agency relationship and control is exerted by the principal. Hope Lutheran Church v. Chellew, 460 N.E. 2d 1244(Ind. Ct. App.1984). In this case the taxpayer did not submit any evidence that the universities considered this an agency relationship. In fact, the department cited contracts between the universities and the taxpayer specifically calling the taxpayer an independent contractor. An agency relationship cannot be proved merely by the statements of the agent. United Artists Theatre Circ., Inc. v. Indiana Department of State Revenue, 459 N.E. 2d 754 (Ind. Ct. App. 1984). The taxpayer did submit a previous department decision on a different university food service program. It is not known, however, how that food service operation compared to the taxpayer's food service programs assessed in this audit. The taxpayer did not sustain its burden of proof in establishing that it was in fact operating as an agent rather than an independent contractor.

FINDING

The taxpayer's protest is denied.

3. Sales and Use Tax: Vending Machine Labels

DISCUSSION

Indiana imposes a sales tax on the sale of tangible personal property at retail. IC 6-2.5-2-1 (a). Sales tax is specifically imposed on sales of food through a vending machine. IC 6-2.5-5-20.

Sales taxes must be stated separately from the commodity price.. Consumers pay the sales tax. Vendors collect the tax and remit the tax to the state. IC 6-2.5-2-1 (b). Vending machine sales, however, do not lend themselves to the normal collection practices. Therefore, the department has issued the following directions for the collection and remittance of sales tax from vending machines in Information Bulletin #45, issued December 1991.

> Because of the nature of vending machine sales, the sales tax collected by persons responsible to collect the tax cannot be separately stated on a receipt. A person responsible for collecting sales tax on vending machines sales must post a sign on the vending machine stating that sales tax is included in the price.

> If no sign is posted, the Department will assume that the price of the item does not include tax. Thus, the Department will expect the responsible person to collect and remit sales tax on the gross sales from the machine.

The auditor personally inspected many of the taxpayer's vending machines and did not find the requisite tags on the machines. Therefore the tax was calculated on the gross sales from the vending machines. The taxpayer alleged that all the machines actually had the requisite tags. In support of this argument, the taxpayer submitted samples of tags and letters to the department written by taxpayer's employees in 1986 asserting that the tags had been applied to the taxpayer's vending machines. The letters indicate that there were tags in 1986. The tax period, however, was 1994. Assertions that there were tags in 1986 does not prove that there were tags in 1994. The auditor did not see tags in 1998. The taxpayer did not sustain its burden of proving that there were the requisite tags on the machines during the tax period. Therefore the tax was properly calculated on the gross sales of the vending machines.

FINDING

The taxpayer's protest is denied.

4. Sales and Use Tax: Consumable Goods

DISCUSSION

Indiana imposes a sales tax on the transfer of tangible personal property for consideration in a retail transaction. IC 6-2.5-2-1 (a). Indiana imposes a complementary excise tax, the use tax, on tangible personal property purchased in a retail transaction and used in Indiana. IC 6-2.5-3-2 (a). Proof of payment of the sales tax on a transaction exempts the purchaser from payment of the use tax on the use of the item purchased in the retail transaction.

During the audit, the taxpayer and the department agreed to use a sample method for determination of the amount of use tax due on the consumable goods. Pursuant to this agreement, the department reviewed the taxpayer's available records and gave the taxpayer credit for any sales tax paid during the sample period. The percentage of taxable purchases during the sample period was applied to the total purchases during the entire audit period to determine the proper amount of tax due. This was an appropriate method of computing the taxpayer's use tax liability. The consideration of additional invoices at this time would alter the basis of the original agreement. Therefore, invoices submitted after the hearing will not be used to modify the percentages used in the sample for the determination of use tax properly due to the state.

FINDING

The taxpayer's protest is denied.

5. Sales and Use Tax: Capital Purchases

DISCUSSION

Indiana imposes a sales tax on the transfer of tangible personal property for consideration in a retail transaction. IC 6-2.5-2-1 (a). Indiana imposes a complementary excise tax, the use tax, on tangible personal property purchased in a retail transaction and used in Indiana. IC 6-2.5-3-2 (a). Proof of payment of the sales tax on a transaction exempts the purchaser from payment of the use tax on the use of the item purchased in the retail transaction.

The taxpayer made several capital purchases throughout the audit period. After the close of the audit, the taxpayer submitted evidence that it had paid sales tax on the following capital purchases.

Date	Description	Amount
2/1/94	Conv/door kits (3)	206.42
6/1/94	RMI 213 AW/V	3,315.38
8/1/94	Cash register (3)	525.19
8/1/94	Cash register (3)	525.19

Since the taxpayer showed that it had paid sales tax on these items, the taxpayer does not owe use tax on the use of these items.

FINDING

The taxpayer's protest to the above listed capital purchases is sustained.

6. Tax Administration: Negligence Penalty

DISCUSSION

The taxpayer also protested the imposition of the ten percent negligence penalty pursuant to IC 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2 (b) clarifies the standard for the imposition of the negligence penalty as follows:

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

The taxpayer is a major corporation with an extensive tax and accounting department. Even so, it failed to follow the department's clear directions concerning the remittance of sales taxes on vending machine sales. Further, the taxpayer failed to set in place systems to assure compliance with the sales and use tax law. This failure "to use such reasonable care, caution or diligence as would be expected of an ordinary reasonable taxpayer" was a breach of the taxpayer's duties under the law. This breach of the taxpayer's duties constitutes negligence.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04980507.LOF

LETTER OF FINDINGS NUMBER: 98-0507
Sales And Use Tax
For Tax Periods: 1994-1996

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

1. Sales and Use Tax: Unreported Taxable Sales

Authority: IC 6-8.1-5-1 (b).

The taxpayer protests the assessment of sales tax on certain unreported sales.

2. Sales and Use Tax: School Food Service

Authority: IC 6-2.5-2-1 (a), IC 6-2.5-5-20, Sales Tax Information Bulletin #32, August 1997, Hope Lutheran Church v. Chellew, 460 N.E. 2d 1244(Ind.Ct. App.1984), United Artists Theatre Circ., Inc. v. Indiana Department of State Revenue, 459 N.E. 2d 754 (Ind. Ct. App. 1984).

The taxpayer protests the assessment of sales tax on its university food service operations.

3. Sales and Use Tax: Vending Machine Labels

Authority: IC 6-2.5-2-1 (a), IC 6-2.5-5-20, Information Bulletin #45, issued December 1991.

The taxpayer protests the assessment of tax on the gross sales of vending machines.

4. Sales and Use Tax: Consumable Goods

Authority:. IC 6-2.5-2-1 (a), IC 6-2.5-3-2 (a).

The taxpayer protests the assessment of use tax on the use of certain consumable goods.

5. Sales and Use Tax: Capital Purchases

Authority: IC 6-2.5-2-1 (a), IC 6-2.5-3-2 (a).

The taxpayer protests the assessment of use tax on certain capital purchases.

6. Tax Administration: Negligence Penalty

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

The taxpayer protests the imposition of the negligence penalty.

STATEMENT OF FACTS

The taxpayer, a corporation with its commercial domicile in North Carolina, is a food and beverage service company with revenue derived from cafeterias and vending machines in Indiana. After an audit, the Indiana Department of Revenue ("department") assessed the taxpayer additional sales and use tax, interest and penalty. The taxpayer protested the assessment and a hearing was held. More facts will be provided as necessary.

1. Sales and Use Tax: Unreported Taxable Sales

DISCUSSION

All department assessments are presumed to be correct. Taxpayers bear the burden of proving that any assessment is incorrect. IC 6-8.1-5-1 (b),

The department assessed additional tax on sales from various locations that were not reported during some months. The department used close dates taken from the taxpayer's operation reports in calculating the assessments. The taxpayer contends that the close dates used in the audit were inaccurate. The taxpayer submitted computer runs concerning business activity at the protested locations. Each of the computer runs includes a handwritten note that the operations ceased on a certain date. These documents are not persuasive evidence that the operations closed on the handwritten date. The taxpayer does not sustain its burden of proving that the department used inaccurate close dates for the calculation of sales taxes due.

FINDING

The taxpayer's protest is denied.

2. Sales and Use Tax: School Food Service

DISCUSSION

Indiana imposes a sales tax on the sale of tangible personal property at retail. IC 6-2.5-2-1 (a). Sales tax is specifically imposed on sales of prepared meals in a retailer's establishment. IC 6-2.5-5-20. Meals sold by schools on school premises to university students are exempt from the sales tax. IC 6-2.5-5-22. This statutory exemption is clarified in Sales Tax Information Bulletin #32, August 1997, as being available to an agent who provides food services on behalf of its principal.

The department considered the taxpayer an independent contractor in providing the food service to the universities. Therefore, the department assessed additional tax on the taxpayer's university food services. The taxpayer alleged that it was actually the agent of the universities and was entitled to the universities' exemption from sales tax. In Indiana an agency relationship exists when consent to the agency is manifested by the principal, the agent acquiesces to the agency relationship and control is exerted by the principal. Hope Lutheran Church v. Chellew, 460 N.E. 2d 1244(Ind. Ct. App.1984). In this case the taxpayer did not submit any evidence that the universities considered this an agency relationship. In fact, the department cited contracts between the universities and the taxpayer specifically calling the taxpayer an independent contractor. An agency relationship cannot be proved merely by the statements of the agent. United Artists Theatre Circ., Inc. v. Indiana Department of State Revenue, 459 N.E. 2d 754 (Ind. Ct. App. 1984). The taxpayer did submit a previous department decision on a different university food service program. It is not known, however, how that food service operation compared to the taxpayer's food service programs assessed in this audit. The taxpayer did not sustain its burden of proof in establishing that it was in fact operating as an agent rather than an independent contractor.

FINDING

The taxpayer's protest is denied.

3. Sales and Use Tax: Vending Machine Labels

DISCUSSION

Indiana imposes a sales tax on the sale of tangible personal property at retail. IC 6-2.5-2-1 (a). Sales tax is specifically imposed on sales of food through a vending machine. IC 6-2.5-5-20.

Sales taxes are stated separately from the commodity price. Consumers pay the sales tax. Vendors collect the tax and remit the tax to the state. IC 6-2.5-2-1 (b). Vending machine sales, however, do not lend themselves to the normal collection practices. Therefore, the department has issued the following directions for the collection and remittance of sales tax from vending machines in Information Bulletin #45, issued December 1991.

> Because of the nature of vending machine sales, the sales tax collected by persons responsible to collect the tax cannot be separately stated on a receipt. A person responsible for collecting sales tax on vending machines sales must post a sign on the vending machine stating that sales tax is included in the price.
>
> If no sign is posted, the Department will assume that the price of the item does not include tax. Thus, the Department will expect the responsible person to collect and remit sales tax on the gross sales from the machine.

The auditor personally inspected many of the taxpayer's vending machines and did not find the requisite tags on the machines. Therefore the tax was calculated on the gross sales from the vending machines. The taxpayer alleged that all the machines actually had the requisite tags. In support of this argument, the taxpayer submitted samples of tags and letters to the department written by taxpayer's employees in 1986 asserting that the tags had been applied to the taxpayer's vending machines. The letters indicate that there were tags in 1986. The tax period, however, was 1994-1996. Assertions that there were tags in 1986 does not prove that there were tags in 1994-1996. The auditor did not see tags in 1998. The taxpayer did not sustain its burden of proving that there were the requisite tags on the machines during the tax period. Therefore the tax was properly calculated on the gross sales of the vending machines.

FINDING

The taxpayer's protest is denied.

4. Sales and Use Tax: Consumable Goods

DISCUSSION

Indiana imposes a sales tax on the transfer of tangible personal property for consideration in a retail transaction. IC 6-2.5-2-1 (a). Indiana imposes a complementary excise tax, the use tax, on tangible personal property purchased in a retail transaction and used in Indiana. IC 6-2.5-3-2 (a). Payment of sales tax on a retail transaction exempts the use of the purchased item from the use tax.

During the audit, the taxpayer and the department agreed to use a sample method for determination of the amount of use tax due on the consumable goods. Pursuant to this agreement, the department reviewed the taxpayer's available records and gave the taxpayer credit for any sales tax paid during the sample period. The percentage of taxable purchases during the sample period was applied to the total purchases during the entire audit period to determine the proper amount of tax due. This was an appropriate method of computing the taxpayer's use tax liability. The consideration of additional invoices at this time would alter the basis of the original agreement. Therefore, invoices submitted after the hearing will not be used to modify the percentages used in the sample for the determination of use tax properly due to the state.

FINDING

The taxpayer's protest is denied.

5. Sales and Use Tax: Capital Purchases

DISCUSSION

Indiana imposes a sales tax on the transfer of tangible personal property for consideration in a retail transaction. IC 6-2.5-2-1 (a). Indiana imposes a complementary excise tax, the use tax, on tangible personal property purchased in a retail transaction and used in Indiana. IC 6-2.5-3-2 (a). Proof of payment of the sales tax on a transaction exempts the purchaser from payment of the use tax on the use of the item purchased in the retail transaction.

The taxpayer made several capital purchases throughout the audit period. After the close of the audit, the taxpayer submitted evidence that it had paid sales tax on several of the capital purchases. Since the taxpayer showed that it had paid Indiana sales tax on these items, the taxpayer does not owe use tax on the use of these items.

FINDING

The taxpayer's protest to the capital purchases on which Indiana sales tax was paid is sustained.

6. Tax Administration: Negligence Penalty

DISCUSSION

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

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

The taxpayer is a major corporation with an extensive tax and accounting department. Even so, it failed to follow the department's clear directions concerning the remittance of sales taxes on vending machine sales. Further, the taxpayer failed to set in place systems to assure compliance with the sales and use tax law. This failure "to use such reasonable care, caution or diligence as would be expected of an ordinary reasonable taxpayer" was a breach of the taxpayer's duties under the law. This breach of the taxpayer's duties constitutes negligence.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

03980557.LOF

LETTER OF FINDINGS NUMBER: 98-0557
Withholding Tax
For Tax Periods: 1995 through 1997

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

ISSUE

Gross Income Tax: Withholding on Nonresident Contractor

Authority: IC 6-2.1-2-2, IC 6-2.1-6-1, IC 6-8.1-5-1 (b), 45 IAC 1-1-213, 45 IAC 1-1-214, 45 IAC 1-1-215.

The taxpayer protests the assessment of withholding tax on nonresident contractors.

STATEMENT OF FACTS

The taxpayer is a corporation engaged in the processing of food products that it sells to a major fast food chain. During the tax period, the taxpayer contracted with several nonresident contractors to build a new facility in Indiana. The taxpayer did not withhold gross income tax from the payments to these contractors. The Indiana Department of Revenue, hereinafter referred to as the "department," assessed withholding tax after an audit. The taxpayer protested the assessment and a hearing was held. More facts will be provided as necessary.

Gross Income Tax: Withholding on Nonresident Contractor

DISCUSSION

All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1 (b).

Indiana imposes an income tax, known as the gross income tax, upon the receipt of "the taxable gross income derived from activities or businesses or any other sources within Indiana by a taxpayer who is not a resident or a domiciliary of Indiana." IC 6-2.1-2-2. Except as provided in IC 6-2.1-6-1, each calendar year each individual, firm, organization, or governmental agency of any kind who makes payments to a nonresident contractor for performance of any contract, except contracts of sale, shall withhold from such payments the amount of gross income tax owed upon the receipt of those payments under this article. IC 6-2.1-6-1.

These statutory requirements are further described and clarified at 45 IAC 1-1-213 in effect during the audit period that states as follows:

> Indiana gross income tax is required to be withheld from any and all payments made to a nonresident contractor for performance of any work or services which are taxable to the State of Indiana. The withholding will be made at the higher rate under IC 6-2-1-3(g) on all payments made during the year to a nonresident contractor which exceed the sum of $1,000.00.

The term "nonresident contractor" is defined at 45 IAC 1-1-214, in effect during the tax period as follows:

> A nonresident contractor is any corporation, including partnerships and joint ventures with a corporate partner, either for profit or not-for-profit... which is not qualified with the Indiana Secretary of State to conduct business in the State of Indiana and which performs any work or service of any kind in the State of Indiana.

Pursuant to 45 IAC 1-1-215 in effect during the tax period, work or service performed in Indiana includes "construction contracts of any kind" and "contracts for the furnishing and installation of any tangible personal property."

During the tax period, the taxpayer was a corporation doing business in Indiana. It made payments to out-of-state contractors who were not registered with the Indiana Secretary of State and performed work or service in Indiana by constructing the factory and furnishing and installing the machinery. The law, as clarified in the applicable regulations, required that the taxpayer withhold gross income tax on these payments that it made to the nonresident contractors.

The taxpayer contends that the assessments were for exempt contracts of sale rather than construction contracts or contracts for the furnishing and installation of tangible personal property. In support of its contention, the taxpayer offered legal arguments and definitions of contracts for sale. The taxpayer did not, however, offer any documentary evidence that the transactions in this case were actually contracts of sale rather than the furnishing and installation of tangible personal property. Therefore, the taxpayer did not sustain its burden of proof.

Alternatively, the taxpayer argues that the department should examine the individual contracts to determine the gross income tax rate applicable to that payment. The internal documents submitted by the taxpayer did not, however, provide proof that the transactions were contracts of sale or verifiable breakdowns of the sales of tangible personal property and services. The applicable regulation for out-of-state clearly states that the withholding is to be made at the higher rate for all payments above $1,000.00. The taxpayer did not sustain its burden of proof that it qualified for any of the statutory exceptions. The taxpayer did not withhold in the required manner.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04980558.LOF

LETTER OF FINDINGS NUMBER: 98-0558 ST
Sales and Use Tax
For Tax Periods: 1995 through 1997

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

ISSUE

Sales and Use Tax-Manufacturing Exemption

Authority: IC 6-2.5-3-2 (a), IC 6-2.5-5-3, IC 6-8.1-5-1 (b), 45 IAC 2.2-5-8 (d), *Gross Income Tax Division v. National Bank and Trust Co.*, 79 N.E. 2d 651 (Ind. 1948).

The taxpayer protests the assessment of tax on three items.

STATEMENT OF FACTS

The taxpayer is engaged in the processing of food products that it sells to a major fast food chain. The Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional use tax, interest and penalty after an audit. The taxpayer protested the assessment and a hearing was held. More facts will be provided as necessary.

Sales and Use Tax-Manufacturing Exemption

DISCUSSION

Pursuant to IC 6-2.5-3-2 (a), Indiana imposes an excise tax on tangible personal property stored, used or consumed in Indiana. A number of exemptions are available from use tax. All exemptions must be strictly construed against the party claiming the exemption. *Gross Income Tax Division v. National Bank and Trust Co.,* 79 N.E. 2d 651 (Ind. 1948). IC 6-2.5-5-3 provides for the exemption of "manufacturing machinery, tools and equipment which is to be directly used by the purchaser in the direct production, manufacture, fabrication... of tangible personal property."

All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1 (b).

The taxpayer protests the assessment of tax on a laser printer, a conveyor belt, and the flour corn used during packaging of the product.

The law sets out a two pronged test to determine whether an item qualifies for exemption. First, exempt items must be used during the production process. Secondly, exempt items must direct affect the production of the product.

The first issue to be determined is whether or not the protested items are used during or after the production process. 45 IAC 2.2-5-8 (d) defines the production process as follows:

> Pre-production and post-production activities. "Direct use in the production process" begins at the point of the first operation or activity constituting part of the integrated production process and ends at the point that the production has altered the item to its completed form, including packaging if required.

The items are packaged in small groupings within plastic wrap to maintain freshness. The groupings wrapped in plastic are then transported to the boxing area on conveyer belts. The boxes are assembled and moved on a conveyor belt to the packaging area where the product is inserted. The flour corn is a mechanical device that presses the product during placement into the cardboard boxes. The laser printer prints information such as weight, count, supplier, run number, and date directly onto the box.

The customer restaurants require the information printed on the boxes so they know exactly what foodstuffs they are receiving, when and where the foodstuffs were produced, allow discussion of the quality of the product, and to accommodate a recall if necessary. The taxpayer argues that since the restaurants require the labeling, the entire process prior to and including the printing of the information is in the production process. Therefore, according to the taxpayer, the protested items are used in the production process and meet the first prong of the test to qualify for exemption.

The taxpayer's argument is not persuasive. The plastic wrap preserves the freshness of the product. The boxes are merely used for shipping. The information required by the restaurants could be placed on the plastic wrap rather than the boxes. Therefore, the plastic wrap is the last required packaging as contemplated in the regulation. The protested items are used after the completion of the production process and do not meet the first prong of the test for qualification for exemption from the use tax.

Since the protested items do not meet the first prong of the test, it is not necessary to consider the second prong of the test.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

02990152.LOF

LETTER OF FINDINGS NUMBER: 99-0152
Adjusted Gross Income Tax—Business/Non-Business Income
Tax Administration—Penalty
For Tax Years 1995-1997

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

ISSUES

I. Income Tax—Business Versus Nonbusiness Income

Authority: IC § 6-3-1-20; 45 IAC 3.1-1-29; IC § 6-3-1-21; 45 IAC 3.1-1-30; IC § 6-3-2-1(b); 45 IAC 3.1-1-31; IC § 6-8.1-5-1(b); 45 IAC 3.1-1-58; 45 IAC 3.1-1-59; 45 IAC 3.1-1-60; *May Department Stores v Indiana Department of Revenue,* 749 N.E.2d 651 (Ind.Tax, 2001)

Taxpayer protests the auditor's reclassification of certain types of income from non-business to business income.

II. Tax Administration—Penalty

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

Taxpayer protests the imposition of the 10% negligence penalty.

STATEMENT OF FACTS

Taxpayer manufactures medical, electronic, fabric, and industrial products, selling them throughout the world. Taxpayer has a number of subsidiaries, including overseas corporations in countries where taxpayer does business. In Indiana, taxpayer has inventory on consignment to various hospitals, with a single Indiana salesperson holding the remainder of taxpayer's in-state inventory.

The Department audited taxpayer for tax years 1995 through 1997, determining that certain types of income taxpayer had classified as "non-business" should have been classified, for Indiana Adjusted Gross Income Tax purposes, as "business income." Therefore, additional tax was assessed and the 10% negligence penalty was imposed.

Taxpayer timely protested, arguing that the income at issue was "non-business." A hearing was held wherein taxpayer presented some evidence of the non-business nature of the income at issue. The Department requested further information and taxpayer has provided it. Additional facts will be provided as necessary.

I. Income Tax—Business Versus Non-Business Income

DISCUSSION

Taxpayer protests the reclassification of income received from its investment portfolio from non-business to business income. Taxpayer also protests the reclassification of interest received from loans to foreign affiliates, dividends from ownership interests in other affiliates, and a small amount of capital gains, as business income. Taxpayer argues that the income is "non-business" because none of it serves any operational functions within its overall corporate structure. Taxpayer's investment committee, whose purview is separate from the operations arm of the company, decides when and where to invest taxpayer's surplus cash. At the hearing, taxpayer was asked to provide the Department with further information regarding the committee and its decision-making processes. The Department also requested that taxpayer provide documentation and narrative explanations of all contested income reclassifications.

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

IC § 6-3-1-21 defines "nonbusiness income" as "all income other than business income." *See also*, 45 IAC 3.1-1-31. Secondly, IC § 6-3-1-20 defines "business income" as "income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitutes integral parts of the taxpayer's regular trade or business operations." *See also*, 45 IAC 3.1-1-29:

> "Business Income" Defined. "Business Income" is defined in the Act as income from transactions and activity in the regular course of the taxpayer's trade or business, including income from tangible and intangible property if the acquisition, management, or disposition of the property are integral parts of the taxpayer's regular trade or business.
>
> Nonbusiness income means all income other than business income.
>
> The classification of income by the labels occasionally used, such as manufacturing income, compensation for services, sales income, interest, dividends, rents, royalties, gains, operating income, non-operating income, etc., is of no aid in determining whether income is business or nonbusiness income. Income of any type or class and from any source is business income if it arises from transactions and activity occuring in the regular course of a trade or business. Accordingly, the critical element in determining whether income is "business income" or "nonbusiness income" is the identification of the transactions and activity which are the elements of a particular trade or business.

The Indiana Tax Court in *May Department Stores v. Indiana Department of Revenue*, 749 N.E.2d 651 (Ind. Tax 2001), 2001 Ind. Tax Lexis 32, clarified the statutory and regulatory language cited above, and outlined the transactional and functional tests the Department must apply to distinguish business from non-business income.

In *May*, the Indiana Tax Court construed the definitions of "business income" under IC § 6-3-1-20 and IC § 6-3-1-21 (non-business income). As the court noted, the "distinction between business and nonbusiness income is important in calculating a taxpayer's tax liability... whether income is deemed business or nonbusiness income determines whether it is allocated to a specific state or whether it is apportioned between Indiana and other states wherein the taxpayer is conducting its trade or business." *May*, 749 N.E.2d 651 at 656. The court found that "... in passing IND. CODE § 6-3-1-20, the General Assembly provided two tests for defining business income... the 'transactional' and 'functional' tests." Id. at 662. The court goes on to say that IC § 6-3-1-20 "requires that not only the property's disposition but also its acquisition and management must be integral parts of the taxpayer's regular trade or business." Id. at 664.

Under the transactional test, the nature of the particular transaction generating the income is the controlling factor the Department uses to identify business income pursuant to *May*. Three considerations enter into the Department's identification process: the frequency and regularity of similar transactions; the former practices of the business; and taxpayer's subsequent use of the income.

Under the functional test, gain from the disposition of a capital asset is considered business income if the asset disposed of was used by the taxpayer in its regular trade or business operations. According to the court in *May*, the regulation found at 45 IAC 3.1-1-30 requires the Department to consider the following in determining the scope of a taxpayer's trade or business:

1. The nature of taxpayer's trade or business.
2. The substantiality of the income derived from activities and transactions and the percentage of that income which forms taxpayer's total income for a given tax period.

3. The length of time the property producing income was owned by taxpayer.

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

Under the functional test, the Department must focus on the property being disposed of and the relationship between the property at issue and taxpayer's business operations. The question to be asked is whether the property, its use and /or disposition, forms an integral part of taxpayer's business.

The Investment Committee invests surplus funds with a "horizon" of 5-10 years, to maximize returns while managing investment risks. Allocation of assets with the Investment Fund changes as financial conditions warrant; allocation of assets is consistent with the risk and returns parameters outlined by taxpayer. Taxpayer then steps back from the operations of the Committee. The Committee monitors returns achieved by portfolio managers, recommends corrective action if returns do not meet the standards taxpayer has set forth, and makes periodic adjustments. Portfolio managers exercise complete investment discretion within the boundaries described. Investment objectives are intended to provide quantifiable benchmarks against which the progress toward long-term investment goals can be measured.

Given the fact that taxpayer is in the business of manufacturing tangible personal property for sale, income derived from long-term investment strategies is not business income. If taxpayer were to cease its Investment Committee's activities, there would be no effect whatsoever on taxpayer's day-to-day, month-to-month, or year-to-year manufacturing and marketing operations. There would also be no effect on taxpayer inventory or operations in Indiana.

The Committee's view is long-term, with one goal; thus, if investment parameters are met, no changes occur. Taxpayer invests surplus cash this way; taxpayer does not actively oversee or utilize the income to further its manufacturing operations and objectives, i.e., to increase its market share of medical products sold to hospitals and doctors. Therefore, under the transactional test, income from these investments is non-business because the transactions giving rise to the income have nothing to do with manufacturing, or the sale of products in Indiana.

So, too, under the functional test: taxpayer's use and disposition of surplus cash for investment purposes do not serve an integral part of taxpayer's business, manufacturing.

The tests as applied to dividends received from investing in foreign affiliates show that this income is also non-business. Taxpayer lacks any means of controlling operations in the foreign affiliates; they do not rely on taxpayer to conduct operations because they function autonomously and independently of taxpayer's manufacturing goals. The transactions are passive financial investments; if taxpayer withdrew its investment, nothing would happen to taxpayer other than receiving no income from dividends. Nothing would happen to taxpayer's inventory and operations in Indiana.

As applied to the interest on loans to foreign affiliates, the tests demonstrate that interest on the loan to the German subsidiary is business income. The promissory note signed by the parties shows that this is a long-term loan, almost 10 years old, to a subsidiary looking for cash to pursue its own long-term growth strategies. Taxpayer analyzed and entered into the loan transaction back in the early 1990's for tax purposes related to federal and foreign tax rates. 45 IAC 3.1-1-59 states that "interest income is nonbusiness income if the intangible with respect to which the interest was received did not arise out of or was not created in the regular course of the taxpayer's trade or business operations." The original intangible was an accounts receivable owed to the taxpayer by the German subsidiary. Taxpayer converted the accounts receivable into a long-term loan. Thus, the German subsidiary pays interest on the loan, not the accounts receivable.

The Department's research into the issue of transforming an accounts receivable—an intangible arising out of and created "in the regular course of the taxpayer's trade or business operations"—into a loan reveals nothing on point either way, i.e., business or nonbusiness income. The Department therefore upholds the characterization of the interest as business income. Taxpayer has the burden of proof on all issues raised in a protest, and has presented insufficient evidence to show that the interest on the loan to the German subsidiary is not business income.

The analysis concerning the loan to the Italian subsidiary is similar. The promissory note for the loan between taxpayer and the Italian subsidiary indicates that the Italian subsidiary needed an additional influx of cash to relocate its offices; there were difficulties in selling the old offices, and "general business conditions" required taxpayer to give the Italian subsidiary more cash for its operational functions. Therefore, the acquisition, management, and disposition of the loan proceeds were directly for the Italian subsidiary's operational functions. The interest on that loan is therefore business income to the taxpayer.

FINDING

Taxpayer's protest concerning the Audit Division's reclassification of income from certain transactions from non-business to business income is partially sustained and partially denied. Interest gained from taxpayer's investment portfolio and dividends are nonbusiness income. Interest received from the loans to the German and Italian subsidiaries are business income.

II. Tax Administration—Penalty

Taxpayer protests the imposition of the 10% negligence penalty. Taxpayer argues that it had reasonable cause to characterize as non-business the income from the transactions described, *supra.* Taxpayer's characterizations were based solely on taxpayer's interpretation of the relevant statutes and regulations which the Indiana Tax Court has only recently construed.

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

In order for the Department to waive the negligence penalty, taxpayer must prove that its failure to pay the full amount of assessed taxes was due to reasonable cause. Taxpayer may establish reasonable cause by "demonstrat[ing] that it exercised ordinary business care and prudence in carrying or failing to carry out a duty giving rise to the penalty imposed...."

FINDING

Waiver of the penalty is appropriate in this instance. At the time, Taxpayer exercised ordinary and reasonable business care in characterizing the income at issue as non-business rather than business income.

DEPARTMENT OF STATE REVENUE

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LETTER OF FINDINGS NUMBER: 99-0296
Use Tax
For Tax Years 1995 through 1997

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

ISSUES

I. Use Tax—Out of State Sales Tax Collected in Error

Authority: 45 IAC 2.2-3-16; 45 IAC 2.2-3-20; Information Bulletin # 31

Taxpayer protests imposition of Indiana use tax when it was charged Kentucky sales tax in error.

II. Use Tax—Rented Office Space

Authority: 45 IAC 2.2-4-9; 45 IAC 2.2-4-10

Taxpayer protests imposition of use tax on a trailer it rented as temporary office space.

III. Use Tax—Lump Sum Contracts

Authority: 45 IAC 2.2-1-1; 45 2.2-3-8; 45 IAC 2.2-3-9; 45 IAC 2.2-3-12

Taxpayer protests imposition of use tax on materials used in telephone system installation.

STATEMENT OF FACTS

Taxpayer operates several banks in Indiana. The Department conducted an audit for the years in question, and issued several proposed assessments. Taxpayer protests three of the proposed assessments. Further facts will be provided as required.

I. Use Tax—Out of State Sales Tax Collected in Error

DISCUSSION

Taxpayer protests the imposition of Indiana use tax on items for which it was charged Kentucky sales tax. The Department assessed Indiana use tax on these items because they were delivered in Indiana, and Indiana use tax was due but not charged. 45 IAC 2.2-3-20 states:

> All purchases of tangible personal property which are delivered to the purchaser for storage, use, or consumption in the state of Indiana are subject to the use tax. The use tax must be collected by the seller if he is a retail merchant described in Reg. 6-2.5-3-6(b)(010) *[45 IAC 2.2-3-19]* or if he has Departmental permission to collect the tax. If the seller is not required to collect the tax or fails to collect the tax when required to do so, the purchaser must remit the use tax directly to the Indiana Department of Revenue.

Taxpayer purchased tangible personal property from a Kentucky vendor for storage, use or consumption in the state of Indiana. The purchases were subject to Indiana use tax, as explained in 45 IAC 2.2-3-20.

The vendor charged Kentucky sales tax, even though the tangible personal property was delivered to the purchaser for use in Indiana. Taxpayer believes that it is due a credit for sales tax paid to the other state, under 45 IAC 2.2-3-16, which states:

> Liability for Indiana use tax shall be reduced by a credit for the amount of any sale, purchase, or use tax paid to any other state, territory or possession of the United States with respect to the tangible personal property on which Indiana use tax applies.

The Department refers to sales tax Information Bulletin # 31, Section II-B, which explains in relevant part:

> A person is entitled to a credit against the Indiana use tax which is equal to the amount of sales tax, purchase tax, or use tax properly and validly paid to another state, territory, or jurisdiction of the United States for the acquisition of a particular item

of property. No credit will be allowed if the tax was paid in error to another state and was not due that state.

Information Bulletin # 31, dated January 31, 1986, clearly explains that the credit described in 45 IAC 2.2-3-16 is not available when tax is paid to another state in error. Indiana use tax was due on the purchases as described in 45 IAC 2.2-3-20. Taxpayer has not established that Kentucky sales tax was properly due, therefore 45 IAC 2.2-3-16 does not apply in this case.

FINDING

Taxpayer's protest is denied.

II. Use Tax—Rented Office Space

DISCUSSION

Taxpayer protests the imposition of use tax on rented office space. The rental space was a trailer, which was a purpose-built mobile banking facility, used by taxpayer as a temporary branch. The Department assessed use tax on the rental fees paid, on the basis that the office space was in a trailer that was not situated in place. The Department based its decision on 45 IAC 2.2-4-9, which states in part:

For purposes of the state gross retail and use tax, an "accommodation" is any space, facility, structure, or combination thereof including booths, display spaces and banquet facilities, together with all associated personal or real property (including land), which is intended for occupancy by human beings for a period less than thirty (30) days including:

(1) Rooms in hotels, motels, lodges, ranches, villas, apartments or houses.

(2) Gymnasium, coliseums, banquet halls, ballrooms, or arenas, and other similar accommodations reqularly *[sic.]* offered for rent.

(3) Cabins or cottages.

(4) Tents or trailers (when situated in place).

(5) Spaces in camper parks and trailer parks wherein spaces are regularly offered for rent for periods of less than thirty (30) days.

(6) Rooms used for banquets, weddings, meetings, sales displays, conventions or exhibits.

(7) Booths or display spaces in a building, coliseum or hall.

The Department decided that the trailer was not situated in place, since taxpayer was unable to provide documentation establishing that the wheels had been removed and the trailer placed on blocks.

As part of this protest, taxpayer provided a lease describing the trailer as a "Modular Bank Facility". The lease contained a section that described the foundation that would be required for the facility. The lease also explained that the wheels used to move the facility were the property of the lessor and would be removed after delivery.

45 IAC 2.2-4-8(b) provides:

In general, the gross receipts from renting or furnishing accommodations are taxable. An accommodation which is rented for a period of thirty (30) days or more is not subject to the gross retail tax.

Since the facility was situated on a foundation, the facility was situated in place as required by 45 IAC 2.2-4-9(4) to qualify as an accommodation. Since the accommodation was rented for eleven months, 45 IAC 2.2-4-8(b) provides that the facility is not subject to the gross retail tax.

FINDING

Taxpayer's protest is sustained.

III. Use Tax—Lump Sum Contracts

Taxpayer protests the imposition of use tax on the materials used in improvements to realty at one of its branch offices. Taxpayer paid Kentucky sales tax on the materials used in improvements to realty. The Department imposed use tax on the materials portion of the amount charged, but not on the labor amount. For reasons previously discussed, the credit described in 45 IAC 2.2-3-16 does not apply in this instance. In the alternative, taxpayer asserts that the contract called for a lump sum and the materials are therefore not subject to use tax. Taxpayer states that it did not issue exemption certificates to the contractor.

The Department refers to 45 IAC 2.2-3-8, which states:

(a) In general, all sales of tangible personal property are taxable, and all sales of real property are not taxable. The conversion of tangible personal property into realty does not relieve the taxpayer from a liability for any owing and unpaid state gross retail tax or use tax with respect to such tangible personal property.

(b) All construction material purchased by a contractor is taxable either at the time of purchase, or if purchased exempt (or otherwise acquired exempt) upon disposition unless the ultimate recipient could have purchased it exempt (see 6-2.5-5 *[45 IAC 2.2-5]*

The Department also refers to 45 IAC 2.2-1-1(a), which states:

Unitary Transaction. For purposes of the state gross retail tax and use tax, such taxes shall apply and be collected in respect to each retail unitary transaction. A unitary transaction shall include all items of property and/or services for which a total combined charge or selling price is computed for payment irrespective of the fact that services which would not otherwise be taxable are included in the charge or selling price.

Taxpayer refers to 45 IAC 2.2-3-12(e), which states:

A person selling tangible personal property to be used as an improvement to real estate may enter into a completely separate contract to furnish the labor to install or construct such improvement, in which case the sales tax shall be collected and remitted by such seller on the materials sold for this purpose. Such sale of materials must be identifiable as a separate transaction from the contract for labor. The fact that the seller subsequently furnished information regarding the charges for labor and material used under a flat bid quotation shall not be considered to constitute separate transactions for labor and material.

The Department refers to 45 IAC 2.2-3-9(d), which states in relevant part:

Disposition subject to the state gross retail tax. A contractor-retail merchant has the responsibility to collect the state gross retail tax and to remit such tax to the Department of Revenue whenever he disposes of any construction material in the following manner:

(1) Time and material contract. He converts the construction material into realty on land he does not own and states separately the cost for the construction material and the cost for the labor or other charges (only the gross proceeds from the sale of the construction materials are subject to tax)

....

Taxpayer states that the contracts were lump sum contracts, and as such the materials are not subject to use tax. Taxpayer misunderstands the regulations. 45 2.2-3-12(e) does not state that if the sale of materials is not separately stated from the sale of labor then the sale of materials is not taxable. Rather, 45 IAC 2.2-3-12(e) provides that only materials will be taxed as long as materials are a separately identifiable transaction from labor. In either case, materials are taxable. 45 IAC 2.2-3-9(d) provides that a person making a time and material contract for the conversion of materials into realty on land he does not own must collect sales tax.

The Department has reviewed the documentation supplied by taxpayer, and has found that some of the invoices show that the contractor charged sales tax and incorrectly remitted it to Kentucky. The fact that the contractor charged sales tax indicates that he considered the materials to be taxable at the time of taxpayer's purchase. For reasons previously discussed, the sales tax was incorrectly collected and remitted to Kentucky, and Indiana use tax is due. The other invoices showed that materials were used and no sales tax was charged, therefore use tax is due.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

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LETTER OF FINDINGS NUMBER: 00-0445
Indiana Corporate Income Tax
For the Tax Years 1994 through 1998

NOTICE: Under IC 4-22-2-7, 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. Exclusion of Taxpayer's Subsidiary from Taxpayer's Consolidated Adjusted Gross Income Tax Return – Adjusted Gross Income Tax.

Authorities: IC 6-3-2-2(l); IC 6-3-2-2(m); 45 IAC 3.1-1-62; 45 IAC 3.1-1-111.

Taxpayer protests the audit's determination that its out-of-state subsidiary should be excluded from the taxpayer's consolidated adjusted gross income tax return. The exclusion of the subsidiary had the effect of increasing the taxpayer's corporate income tax liabilities. The taxpayer argues that the exclusion of the subsidiary resulted in an unfair and arbitrary division of taxpayer's income derived from Indiana sources.

II. Resource Recovery System Credit – Gross Income Tax.

Authorities: IC 6-2.1-4-3(a); IC 6-2.1-4-3(b); IC 13-11-2-99(a); IC 13-11-2-205(a).

Taxpayer protests the audit's decision to disallow taxpayer's depreciation deduction for its resource recovery system. The taxpayer's argues that the disallowance was erroneous and that it was entitled to the deduction.

STATEMENT OF FACTS

Taxpayer is a major steel manufacturer operating facilities inside and outside the state. The audit determined that the taxpayer was not entitled to include one of its subsidiaries in its consolidated income tax return. The audit also determined that taxpayer was not entitled to a depreciation credit for its resource recovery system. These decisions resulted in Notices of Proposed Assessment for deficiencies in Indiana corporate income tax. The taxpayer protested the audit's decisions, an administrative hearing was held, and this Letter of Findings followed.

DISCUSSION

I. Exclusion of Taxpayer's Subsidiary from Taxpayer's Consolidated Adjusted Gross Income Tax Return.

Taxpayer objects to the exclusion of its out-of-state subsidiary from its consolidated adjusted gross income tax returns. During the tax years at issue, taxpayer engaged in a recapitalization of certain loans entered into by other subsidiaries including a subsidiary operating within Indiana. The recapitalization had the effect of retiring high interest debts and shifting that debt to the out-of-state subsidiary here at issue. The out-of-state subsidiary was able to economically borrow the money necessary to retire the high interest loans because it was in a superior financial position. The out-of-state subsidiary now bears the loan debt – albeit at a lower interest rate – and incurs the expenses concomitant with that loan debt. The audit's decision to exclude the out-of-state subsidiary from the taxpayer's consolidated return, had the effect of precluding taxpayer from taking advantage of the potential tax benefits otherwise attributable to the out-of-state subsidiary.

The audit decided to exclude the out-of-state subsidiary from the taxpayer's adjusted gross income tax returns based upon 45 IAC 3.1-1-111 which states that "The Adjusted Gross Income Tax Act adopts the definition of "affiliated group" contained in Internal Revenue Code section 1504, except that no member of the affiliated group may be included in the Indiana return unless it has adjusted gross income derived from sources within the state...." Therefore, because the audit concluded that the out-of-state subsidiary had no Indiana adjusted gross income, the audit excluded the out-of-state subsidiary.

Taxpayer does not directly challenge the determination that the out-of-state subsidiary did not receive adjusted gross income from sources from within the state. Rather, the taxpayer argues that exclusion of the out-of-state subsidiary results in overstating the income taxpayer – and the consolidated group – received from Indiana sources.

Taxpayer predicates its argument upon the provisions included within IC 6-3-2-2(l) which provides as follows:

> If the allocation and apportionment provisions of this article do not fairly represent the taxpayer's income derived from sources within the state of Indiana, the taxpayer may petition for or the department may require, in respect to all or any part of the taxpayer's business activity, if reasonable;
>
> (1) separate accounting;
>
> (2) the exclusion of any one (1) or more of the factors;
>
> (3) the inclusion of one (1) or more additional factors which will fairly represent the taxpayer's income derived from sources within the state of Indiana; or
>
> (4) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

In addition, taxpayer cites to IC 6-3-2-2(m) which provides:

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

IC 6-3-2-2(l) provides the Department discretionary authority to adjust the allocation and apportionment provisions of the adjusted gross income tax in order to arrive at an equitable and accurate allocation of the taxpayer's Indiana income.

The Department's regulation, 45 IAC 3.1-1-62, provides guidance in applying that discretionary authority. In relevant part, the regulation states that "the Department will depart from use of the standard formula only if the use of such formula works a hardship or injustice upon the taxpayer, results in an arbitrary division of income, or in other respects does not fairly attribute income to this state or other states." However, the regulation also cautions "that these situations will arise only in limited and unusual circumstances (which ordinarily will be unique and nonrecurring) when the standard apportionment provisions produce incongruous results."

Taxpayer argues that before restructuring of its load debt, taxpayer was able to deduct the debt service interest payments from its adjusted gross income because the debt was borne, in part, by taxpayer's in-state subsidiary. The subsequent restructuring did not eliminate the debt but shifted it exclusively to out-of-state subsidiary. However, that restructured debt was intended for the benefit – in part – of in-state subsidiary. The funds made available after the restructuring were used to retire some of in-state subsidiary's debts and fund the continued operation of in-state subsidiary. The funds were used to retire in-state subsidiary's high interest outstanding notes and mortgage bonds which had previously been secured by in-state subsidiary's real property located within Indiana. In addition, the newly available funds were used to retire in-state subsidiary's pollution control bonds issued on behalf of in-state subsidiary. Taxpayer summarizes as follows: "In short, the proceeds from the recapitalization were used to shore up [in-state subsidiary's] balance sheet and capital structure by paying off debt bearing above market interest rates, moving that debt off of [in-state subsidiary's] and onto [out-of-state subsidiary's] books and easing [in-state subsidiary's] burden of managing the debt that remained on its books."

Taxpayer is not entitled to the requested relief because – despite the superficial appeal of taxpayer's argument – the audit's decision to exclude the out-of-state subsidiary from the taxpayer's consolidated return, did not have the effect of artificially distorting the taxpayer's *current* Indiana income. For purposes of determining that Indiana income, the restructuring of the taxpayer's debt load had the effect of totally eliminating the Indiana debt; therefore, the debt – and the associated interest payments – are entirely irrelevant in calculating taxpayer's current Indiana income. Although the taxpayer's debt may be traced to events which were at one time pertinent to taxpayer's Indiana activities, taxpayer's voluntary restructuring rendered the current interest payments, immaterial in "effectuat[ing] and equitable allocation and apportionment of the taxpayer's [current] income." IC 6-3-2-2(l).

FINDING

Taxpayer's protest is respectfully denied.

II. Resource Recovery System Credit.

Taxpayer operates a basic oxygen furnace and continuous caster which it classifies as a "resource recovery system" (RRS). Taxpayer's RRS recycles scrap metals obtained from outside sources, taxpayer's own scrap metals, and various metallic and non-metallic wastes produced during taxpayer's manufacturing process. Taxpayer originally claimed a credit for its RRS against receipts subject to the gross income tax equal to the amount of depreciation taken on its federal returns. The audit disallowed the Indiana depreciation credit stating that the deduction was only available under two conditions. According to audit, those conditions were as follows:

> The "waste" which is to be disposed of in a RRS must have been created by the owner of the RRS and the "waste" which is to be disposed of in a RRS must be worthless at the time of its creation by the owner.

Taxpayer argues that these two additional requirements were "invented" and that the additional requirements were "arbitrary and discriminatory."

Taxpayer claims the credit which is provided for at IC 6-2.1-4-3. The statute states in relevant part as follows:

> If for federal income tax purposes a taxpayer is allowed a depreciation deduction for a particular taxable year with respect to a resource recovery system, and if the resource recovery system processes solid waste or hazardous waste, the taxpayer is entitled to a deduction from his gross income for that same taxable year. IC 6-2.1-4-3(b).

Therefore, in order for taxpayer to claim the credit, the taxpayer must (1) operate a RRS, (2) the taxpayer must have been allowed a federal credit, and (3) the RRS must process "solid waste or hazardous waste."

The statute sets out the criteria as follows; "'Hazardous waste' has the meaning set forth in IC 13-11-2-99(a) and includes a waste determined to be hazardous waste under IC 13-22-2-3(b)." IC 6-2.1-4-3(a).

IC 13-11-2-99(a) states that the term "hazardous waste" means:

> a solid waste or combination of solid wastes that, because of its quantity, concentration, or physical, chemical, or infectious characteristics, may: (1) cause or significantly contribute to an increase in: (A) mortality; (B) serious irreversible illness; or (C) incapacitating reversible illness; or (2) pose a substantial present or potential hazard to (A) human health; or (B) the environment; when improperly treated, stored, transported, disposed of, or otherwise managed.

In addition, the RRS statute establishes the criteria for "solid waste" stating that "'Solid waste' has the meaning prescribed by IC 13-11-2-205(a) but does not include dead animals or any animal solid or semisolid wastes." IC 6-2.1-4-3(a).

IC 13-11-2-205(a) states in part that "'Solid waste', for purposes of IC 13-19, IC 13-21, IC 13-20-22, and environmental management laws... means any garbage, refuse, sludge from a waste treatment plant, sludge from a water supply plant, sludge from an air pollution control facility, or other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, or agricultural operations or from community activities."

Clearly, the Legislature has deemed it appropriate to limit availability of the credit – otherwise available under IC 6-2.1-4-3 – to those RRS which process specifically defined solid or hazardous wastes. Equally clear is that "solid waste or hazardous waste" is defined in such a way as to specifically include certain materials and to exclude certain materials.

IC 13-11-2-99(a) and IC 13-11-2-205(a) support the audit's contention that the depreciation credit is available to those RRS which process materials which are worthless. The statutory authority leads to the conclusion that the Legislature intended to exclude taxpayers from claiming the credit for those RRS which reprocess materials which, by themselves, possess an intrinsic value. However, the statutory authority does not demonstrate that the Legislature intended to exclude taxpayer's from claiming the credit for those RRS merely on the ground that it is processing the valueless waste of third-parties. *See* State of Indiana v. Money, 651 N.E.2d 344 (Ind. Ct. App. 1995).

The taxpayer may not claim the credit for its RRS to the extent that it reprocesses scrap metals obtained from third-parties because these scrap metals possess an intrinsic value. The taxpayer may not claim the credit for its RRS to the extent that it reprocesses scrap metals which are the by-product of the taxpayer's own steel manufacturing activities because those scrap materials also possess an inherent value.

Accordingly, depreciation for the RRS will be eligible as a deduction only to the extent the basic oxygen furnace and continuous caster is used to process the valueless waste of the owner of the RRS or the valueless waste of third-parties. To the extent the RRS is used to process valuable property belonging to the taxpayer or to process valuable property obtained from others, the deduction is not allowed.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0220010141.LOF

LETTER OF FINDINGS NUMBER: 01-0141
Gross Income Tax
For the Years 1996, 1997, and 1998

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

ISSUES

I. Receipts for Graphic Design Work – Gross Income Tax.

Authority: 45 IAC 1-1-15; 45 IAC 1-1-88; 45 IAC 1-1-96; 45 IAC 1-1-121; 45 IAC 1-1-121(c).

Taxpayer maintains that the receipts it derives from its provision of graphic design work are subject to the low rate of gross income tax. In addition, taxpayer argues that the receipts derived from graphic design work provided to out-of-state customers are not subject to the gross income tax.

II. Interest Income as Intercompany Receipts – Gross Income Tax.

Authority: 45 IAC 1-1-8; 45 IAC 1-1-9; 45 IAC 1-1-10; 45 IAC 1-1-17.

Taxpayer argues that its receipt of "intercompany" interest income did not constitute the receipt of taxable "gross income."

III. Out-of-State Subsidiaries' Indiana Destination Sales – Gross Income Tax.

Authority: IC 6-2.1-1-2(a); IC 6-2.1-2-2; IC 6-2.1-2-2(a)(2); Bethlehem Steel v. Dept. of State Revenue, 597 N.E.2d 1327 (Ind. Tax Ct. 1992); Indiana- Kentucky Elec. Corp. v. Indiana Dept. of State Revenue, 598 N.E.2d 647 (Ind. Tax Ct. 1992); 45 IAC 1-1-120.

Taxpayer asserts that its out-of-state subsidiaries do not have an Indiana situs and that income derived by those subsidiaries – from sales made to Indiana customers – is not subject to the gross income tax. Even if the subsidiaries did have an Indiana business situs, the activities giving rise to that situs did not give rise to Indiana gross income tax liability.

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 should exercise its discretion to abate the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer operates as a holding company in the business of producing plastic packaging products. Taxpayer has various in-state and out-of-state subsidiaries. Taxpayer's corporate headquarters and commercial domicile is in Indiana. The audit examined taxpayer's business records, its federal tax returns, and its state tax returns. As a result of that audit, a number of additional assessments were proposed. The taxpayer disagreed with certain of those assessments and submitted a protest to the Department of Revenue (Department). An administrative hearing was held, and this Letter of Findings resulted.

DISCUSSION

I. Receipts for Graphic Design Work – Gross Income Tax.

One of taxpayer's Indiana subsidiaries (Hereinafter, "taxpayer") produces customized plastic products. Taxpayer operates an arts and graphic automation department. This graphics department creates the proofs and color separations needed to produce printing plates. The printing plates are then used to print the customer's individual design work on the particular products the customer has ordered from taxpayer. The taxpayer's graphics department does not actually create the customer's design work but simply adapts the customer's pre-existing art work to conform to the surface of the intended product. For example, the department will use a computer program to adjust the customer's logo to fit on the curved surface of a plastic cup.

The audit concluded that, pursuant to 45 IAC 1-1-96, the money that taxpayer received for the performance of these design services was subject to gross income tax at the high rate.

Taxpayer disagrees arguing that, under 45 IAC 1-1-88, the provision of the design services was integral to the sale of the finished product (i.e. customer's plastic cups) and was subject to gross income tax at the low rate. According to taxpayer, the sale of the final product – including the cost of the printing plates – was a "retail sale" and the entire transaction was subject to tax at the low rate.

45 IAC 1-1-96, states as follows:

> Gross receipts from services means receipts derived from activities performed in the process of completing a service agreement or contract, and includes all amounts charged for labor and expenses forming an integral and/or required part of its completion. Gross income from services of any character is taxable at the higher rate. Such income includes, but is not limited to commissions, fees, receipts from service contracts or income from similar sources.

However, 45 IAC 1-1-88 establishes that certain service charges are included as part of the consideration received for "Selling at Retail" and are taxable at the lower rate. The regulation states in part:

> Gross income derived from the transfer of ownership of tangible personal property by a retail merchant through selling at retail

is taxable at the lower rate. *Any receipts from services performed in connection with the sale at retail prior to the delivery of the property is also taxable at the lower rate...* (*Emphasis added*).

In order for the income to be taxed at the lower rate, the "income shall include all amounts representing bona fide charges added to or included in the consideration for a transaction. Such charges include charges for preparation, fabrication, alteration, modification, finishing, completion, delivery or other services performed by the retail merchant." Id. "These charges are to be stated separately or otherwise clearly determinable by the retail merchant's records and performed before the delivery of the property to the purchaser." Id.

In taxpayer's case, it was its practice to offset the income received from graphic services against related expenses in its account labeled "Bill to Customer."

The Department's regulations distinguish between services provided to the customer before delivery of the goods and services provided after the goods are delivered. The regulation specifies that income for services provided *after* delivery of the goods is to be taxed at the high rate. However, the regulation also provides that income derived from services provided *before* delivery is to be taxed at the low rate. Specifically, 45 IAC 1-1-15 states, in relevant part, as follows: "[W]hen the sales price of goods includes charges for services rendered before delivery, i.e., charges for preparation, fabrication, alteration, modification, finishing, completion, delivery charges, etc., such charges are considered a part of the sales price and are taxed at the same rate as the sale itself."

Taxpayer's customers contracted with taxpayer for the production of a customized plastic product. As part of those agreements, taxpayer's graphics department prepares the design work and printing plates necessary to imprint the customer's design on the finished goods. That design work is performed prior to the delivery of the completed goods. The service charges are "clearly determinable by the merchant's records." 45 IAC 1-1-88.

Accordingly, as set forth in 45 IAC 1-1-15 and 45 IAC 1-1-88, the income received from preparing the customer's design work and the printing plates is taxable at the low rate. The issue, initially raised by taxpayer, of whether the provision of the services, is somehow "integral" to the production of the plastic products, is irrelevant because the provision of the services is conceptually severable from the provision of the plastic products. Clearly, some of taxpayer's customers will arrange to pay for the full range of taxpayer's graphics services, while other customers will purchase only a limited range of those services. It is entirely possible that certain customers, in contracting to buy plastic products, will purchase none of the taxpayer's graphics services. In order to sustain taxpayer's basic argument, it is sufficient to find that the services – to whatever extent required – were "rendered before delivery" (45 IAC 1-1-15) and that cost of the services was related to, but separately determinable from, the charges for the plastic products themselves. *See* 45 IAC 1-1-88.

Taxpayer sets out a secondary argument related to the provision of the design services arguing that those services provided to out-of-state customers are not subject to the state's gross income tax. Taxpayer's argument is without foundation. 45 IAC 1-1-121 clearly provides that "Gross income derived from the performance of a contract or service within Indiana is subject to gross income tax." The regulation specifically addresses those instances when the Indiana taxpayer provides the service for an out-of-state customer stating that "[t]he performance of a service with or without the incidental furnishing of tangible personal property on goods belonging to others is taxable if it takes place in Indiana, regardless of whether the property is moved in interstate commerce before or after performance of the service." 45 IAC 1-1-121(c). Since the provision of taxpayer's services occurs entirely within the state, the income derived from the provision of those services is subject to the states gross income tax even if services are provided to out-of-state customers.

FINDING

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

II. Interest Income as Intercompany Receipts – Gross Income Tax.

Taxpayer borrowed money from an outside lender. When it came time to pay the money back, it charged a portion of the accrued interest due to certain of its subsidiaries. The subsidiaries then paid the interest back to the taxpayer. As a hypothetical example, taxpayer owed the outside lender $100 in interest and apportioned that $100 to three of its subsidiaries. Subsidiary one would be apportioned $25, subsidiary two $25, and subsidiary three $50. The three subsidiaries then individually paid their apportioned share of the interest back to taxpayer.

The audit determined that the interest payments taxpayer received from its subsidiaries represented gross income and assessed additional tax accordingly. The interest payments could not be eliminated as inter-company receipts since the affiliated members did not qualify to file a consolidated return.

The taxpayer has protested the assessment of this gross income tax because, according to taxpayer, its receipt of the interest did not represent "gross income." Taxpayer maintains that the interest allocation was made merely for accounting purposes and that the allocation and subsequent repayment was without economic substance. There was no debt instrument evidencing an actual obligation between the taxpayer and its subsidiaries. Rather the allocation of the interest to the subsidiaries was made to better account for the operating income and expenses of the different entities. Therefore, the inter-company interest charges were not subject to gross income tax because the charges did not constitute actual payments made to the taxpayer.

For purposes of the state's gross income tax scheme, 45 IAC 1-1-8 defines "receipts" as follows:

"Receipts" is used synonymously with the Act *[IC 6-2.1]* and means the entire or total amount of "gross income" or "gross receipts" derived from all sources, and which are actually or constructively received by the taxpayer, credited to him, or paid to his creditors by another person. The term "receipts" is not limited to cash or checks received by or credited to a taxpayer, but also includes notes or other property of any kind, or the value received in the form of services, or receipts in any form received by or credited to him in lieu of cash.

The accompanying regulation encompasses those situations in which the taxpayer does not come into actual physical possession of gross income. 45 IAC 1-1-9 states, in relevant part that "[i]t is not necessary for gross income to actually come into a taxpayer's possession to be his gross income. Whenever gross income is 'received' in any manner other than by actual possession, gross income is considered to be 'constructively received.'" The companion regulation defines "constructive receipts" stating that "'Constructive receipts' are those items of gross income which are not actually received by the taxpayer but which are credited to him, available for his withdrawal, paid to another for his benefit, or represent income to which he is entitled." 45 IAC 1-1-10.

Under 45 IAC 1-1-17 – which defines gross income as "all income actually or constructively received" – the interest payments taxpayer received from its subsidiaries constituted "gross income." Even if the taxpayer regarded the interest allocation and subsequent repayment of that interest as a nonsubstantive apportionment of the entities' relative financial liabilities, nonetheless, the interest payments constituted the constructive receipt of the value represented by the subsidiaries' interest payments. The interest payments were "credited to him" and "represent[ed] income to which he [was] entitled." 45 IAC 1-1-10.

FINDING

Taxpayer's protest is respectfully denied.

III. Out-of-State Subsidiaries' Indiana Destinations Sales – Gross Income Tax.

Taxpayer owns a number of out-of-state subsidiaries. The out-of-state subsidiaries made sales to Indiana customers. The audit, on the ground that the out-of-state subsidiaries "channeled" their sales through taxpayer's Indiana office, determined that the transactions were Indiana destination sales for gross income tax purposes and assessed additional taxes accordingly.

Under the provisions of IC 6-2.1-2-2, the state's gross income tax is imposed on the receipt of "the taxable gross income derived from activities or businesses or any other sources within Indiana by a taxpayer who is not a resident or a domiciliary of Indiana." IC 6-2.1-2-2(a)(2).

However, taxpayer indirectly cites to 45 IAC 1-1-120 for support of the proposition that the Indiana sales were not subject to gross income tax. The regulation states as follows:

As a general rule, income derived from sales made by nonresident sellers to Indiana buyers is not subject to gross income tax unless the seller was engaged in business activity within the state and such activity was connected with or facilitated the sales. Local activity sufficient to subject the seller to taxation may result from his maintenance of a fixed business location in Indiana, or may result from the nature and extent of his business activities in the State.

Taxpayer argues that these receipts are not subject to the state's gross income tax because the out-of-state subsidiaries do not have sufficient contacts with the state. The Indiana Tax Court has set forth a three-part test to determine whether a non-resident taxpayer has sufficient contacts with Indiana to warrant imposition of the state's gross income tax. The taxability of the non-resident taxpayer is dependent on determining whether (1) the taxpayer's receipts constitute "gross income," (2) whether the "gross income" is derived from sources within Indiana," and (3) whether the "gross income" derived from those sources within Indiana is "taxable gross income." Bethlehem Steel v. Dept. of State Revenue, 597 N.E.2d 1327, 1330 (Ind. Tax Ct. 1992), *aff'd* 639 N.E.2d 264 (Ind. 1994); *See also* Indiana- Kentucky Elec. Corp. v. Indiana Dept. of State Revenue, 598 N.E.2d 647, 661 (Ind. Tax Ct. 1992).

The preliminary question is easily answered. Taxpayer's out-of-state subsidiaries entered into agreements to sell goods to Indiana customers. It is not disputed that the consideration received for the shipment of the goods into Indiana constituted "gross income" for purposes of the state's gross income tax scheme. IC 6-2.1-1-2(a) clearly provides that "[e]xcept as expressly provided in this article, 'gross income' means all the gross receipts a taxpayer receives... from the performance of contracts." Therefore, under IC 6-2.1-1-2(a), and in the absence of any exemption to the contrary, the payments received by the out-of-state subsidiaries constituted "gross income" for purposes of determining the applicability of the state's gross income tax.

It is the second provision of the Bethlehem Steel test which is central to taxpayer's protest. In order for the Department to establish that the subsidiaries' income – received for the completion of Indiana destination sales – is subject to the state's gross income tax, the Department must establish that the taxpayer's income is derived from a source within Indiana. Specifically, "[i]f the activities giving rise to the income sought to be taxed do not occur within Indiana, then the tax may not be levied – not because to do so is forbidden by the United States Constitution (although it may well be) – but rather because under those facts the levy is forbidden by the statute." Bethlehem Steel, 597 N.E.2d at 1330. 45 IAC 1-1-120 clearly provides that sales into Indiana by non-resident taxpayers is not subject to the gross income tax "unless the seller was engaged in business activity within the State [i.e., tax situs]." The court in Indiana-Kentucky explained stating that "the regulations teach that a nonresident is subject to taxation if the 'source' of the gross income is an Indiana *tax situs*, i.e., an Indiana *business situs* at which business activities are performed that are connected with or facilitate the transaction... giving rise to the gross income." Indiana-Kentucky, 598 N.E.2d at 662 (*Emphasis added*).

According to taxpayer, the facts support the proposition that its out-of-state subsidiaries have not established an Indiana tax situs. Taxpayer maintains that, the subsidiaries do not have physical locations or assets with the state; the subsidiaries do not perform direct services in Indiana; the subsidiaries do not distribute goods within the state with their own vehicles; the subsidiaries do not accept or approve contracts within the state; visits by the subsidiaries' employees to taxpayer's Indiana headquarters are de minimis; the subsidiaries do not have a commercial domicile in the state; the subsidiaries' activities are managed and directed from their respective out-of-state headquarters. In addition, taxpayer states that each of the out-of-state locations also has its own customer service representative who may be called upon to accept orders, service accounts, and answer customer questions.

The audit cited to specific instances in which the out-of-state subsidiaries had contact with the state. The general headquarters for both taxpayer and its subsidiaries is in Indiana. Most of the managerial decisions, affecting the out-of-state subsidiaries, are made in Indiana. Additional centralized Indiana activities, affecting the out-of-state subsidiaries, include: management training, research and development, payables, purchasing, payroll, software system development, and credit checks. According to the audit report, all customer orders are received at taxpayer's Indiana location by means of an 800 telephone number. All the customer orders are approved at the Indiana location. All customer complaints are handled at the Indiana location. All applications for credit are approved at the Indiana location. All requests for customer service are handled at the Indiana location.

It is apparent that the subsidiaries "[were] engaged in business activity within the state and such activity was connected with or facilitated the sales." 45 IAC 1-1-120. Not only do the out-of-state subsidiaries have substantial operational contacts with the state, it is evident that sales made by the out-of-state subsidiaries are completed within Indiana. The order for each sale is received in the state, the customer's credit is checked in this state, and the order is approved at taxpayer's Indiana location.

Therefore, given that the income at issue is derived from business activities conducted within the state, under IC 6-2.1-2-2(a)(2), the income from those business activities is subject to the state's gross income tax.

FINDING

Taxpayer's protest is respectfully denied.

IV. Abatement of the Ten Percent Negligence Penalty.

The taxpayer argues that the ten percent negligence penalty, associated with the imposition of the additional tax assessment, should be abated. According to taxpayer, it made every effort to comply with the state's tax laws. Given the amount of taxpayer's total sales, any error attributable to a misclassification of that income was relatively minor. Further, the gross income tax laws are subject to varying interpretations and applications.

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 has presented evidence sufficient to establish to establish that its failure to pay the deficiency was due to reasonable cause and not due to willful neglect.

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

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LETTER OF FINDINGS NUMBER: 01-0171; 01-0172
Indiana Corporate Income Tax
For the Tax Years 1996, 1997, and 1998

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

ISSUES

I. Taxpayer's Out-of-State Sales Subsidiaries – Adjusted Gross Income Tax.

Authority: IC 6-3-2-2(l); IC 6-3-2-2(m); Allied-Signal Inc. v. Director, Div. of Taxation, 504 U.S. 768 (1992); F.W. Woolworth

v. Taxation and Revenue Dep't. of New Mexico, 458 U.S. 354 (1982); ASARCO, Inc. v. Idaho State Tax Comm'n., 458 U.S. 307 (1982); Exxon Corp. v. Dep't. of Revenue of Wisconsin, 447 U.S. 207 (1982); Mobil Oil Corp. v. Commissioner of Taxes of Vermont, 445 U.S. 425 (1980).

Taxpayer takes issue with the audit's decision to include certain of taxpayer's subsidiaries within its Indiana consolidated income tax returns. The taxpayer had originally included within those returns only the subsidiaries which were incorporated within Indiana.

II. Georgia Throw-Back Sales.

Authority: 15 U.S.C.S. § 381; IC 6-3-2-2; IC 6-3-2-2(e); IC 6-3-2-2(n); IC 6-3-2-2(n)(1); Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co., 112 S.Ct. 2447 (1992); Indiana Dept. of State Revenue v. Continental Steel Corp., 399 N.E.2d 754 (Ind. Ct. App. 1980); 45 IAC 3.1-1-53(5); 45 IAC 3.1-1-64; Ga. Code Ann. § 48-7-21(a).

Taxpayer maintains that the audit should not have "thrown-back" to Indiana the proceeds of sales made to Georgia customers. According to taxpayer, the sales should not have been thrown-back because it is subject to income tax within Georgia by virtue of its ownership of a land trust in that state.

III. Taxpayer's Delaware Trademark Holding Company.

Authority: IC 6-2.1-2-2; IC 6-3-1-1 et seq.; IC 6-3-2-2(a); Indiana Dept. of State Revenue v. Bethlehem Steel Corp., 639 N.E.2d 264 (Ind. 1994); 45 IAC 1-1-51; 45 IAC 3.1-1-55. Taxpayer argues that its Delaware trademark holding company was not subject to Indiana's corporate income tax scheme because the company did not have a "business situs" within the state.

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 asks that the Department exercise its discretion to abate the ten-percent negligence penalty.

STATEMENT OF FACTS

The taxpayer is a retail merchant which manufactures the products it sells. The products consists of remanufactured components. The majority of these products are remanufactured from salvaged parts. With the exception of certain specialty items, all of taxpayer's products are manufactured in Indiana.

Taxpayer has various wholly-owned subsidiaries operating both within the state and at out-of-state locations. One of the subsidiaries provides transportation for in-process and finished products between taxpayer's manufacturing facilities and its distribution facilities. Other subsidiaries operate exclusively as distribution warehouses for the parent company.

An audit was conducted of taxpayer's business activities during the years 1996, 1997, and 1998. The audit made certain adjustments including adjustments which resulted in additional corporate income tax liabilities for all three years. The taxpayer disagreed with the adjustments and submitted a protest. An administrative hearing was conducted, and this Letter of Findings followed.

DISCUSSION

I. Taxpayer's Out-of-State Sales Subsidiaries – Adjusted Gross Income Tax.

The audit determined that certain of taxpayer's out-of-state subsidiaries had a "unitary business" relationship with taxpayer. As a result, the audit found that taxpayer – having elected to make a consolidated filing for its adjusted gross income tax – was required to include all qualified affiliated members in taxpayer's consolidated filing. Taxpayer maintains that the income of the out-of-state subsidiaries, not incorporated within Indiana, should not have been considered when calculating taxpayer's adjusted gross income tax.

Both taxpayer and the audit approach the issue as to whether or not the subsidiaries had "nexus" with the state of Indiana. The issue is more properly addressed as whether the taxpayer and its subsidiaries should have been treated as a single taxpayer (unitary treatment) and, thereafter, required to file a combined return in order to more fairly reflect the taxpayer's Indiana income during the years at issue.

Some of taxpayer's subsidiaries operate as out-of-state distribution warehouses for delivery of taxpayer's products to local customers. Some of these subsidiaries operate out of one location. Two of these subsidiaries operate additional branch distribution centers. Each out-of-state location has a general manager responsible for that location's activities. Taxpayer's customers place orders at taxpayer's Indiana location. Once received, the order is processed, the customer's credit checked, and the order is given final approval at the Indiana location. After taxpayer's inventory has been checked, the order is electronically transferred to the local subsidiary from where delivery is arranged.

Yet another subsidiary operates to transport in-process goods and finished goods between taxpayer's manufacturing facilities. This transportation subsidiary also transports finished goods from the taxpayer's Indiana location to the various out-of-state distribution subsidiaries.

According to the audit, all orders flow through taxpayer's centralized order processing department at taxpayer's central Indiana location. Most of taxpayer's customers make payment to the central Indiana location. If a local subsidiary does receive a customer payment, that payment is transferred to taxpayer's local Indiana bank account.

According to the audit, the subsidiaries have their corporate headquarters in Indiana; each subsidiary has the same Indiana corporate officers; management and administrative decisions are made at the Indiana location; the subsidiaries' boards of directors meet at the Indiana location; and the subsidiaries' corporate records and tax returns are prepared and maintained at the Indiana location. In addition, the subsidiaries' accounting, purchasing, manufacturing, advertising, inventory management, data processing, and accounts receivable are all controlled and managed by taxpayer at its Indiana location.

Taxpayer maintains that the subsidiaries exercise a degree of individual autonomy. All of the subsidiaries' employees work at or out of the local out-of-state location. Certain records – including bills of lading, invoices, cash accounting, return credit memos, inventory records, maintenance records – are maintained at the local subsidiary. In addition, the manager of each local subsidiary has the authority to reject an order otherwise approved at the Indiana location. Daily operational decision-making power is vested with the manager of the local subsidiary.

IC 6-3-2-2(m) provides as follows:

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

In addition, IC 6-3-2-2(l) vests both taxpayers and the Department with authority to allocate and apportion a taxpayer's income within and among the members of a unitary group of related entities.

> If the allocation and apportionment provisions of this article do not fairly represent the taxpayer's income derived from sources within the state of Indiana, the taxpayer may petition for or the department may require, in respect to all or any part of the taxpayer's business activity, if reasonable;
>
> (1) separate accounting;
>
> (2) the exclusion of any one (1) or more of the factors;
>
> (3) the inclusion of one (1) or more additional factors which will fairly represent the taxpayer's income derived from sources within the state of Indiana; or
>
> (4) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

It is apparent from the language contained with IC 6-3-2-2(l) that the standard apportionment filing method is the preferred method of representing a taxpayer's income derived from Indiana sources. The alternate methods of allocation and apportionment – including the combined reporting method – are only employed when the standard apportionment formula does not fairly reflect the taxpayer's Indiana income.

The first issue is whether the audit was correct in determining that taxpayer and its various subsidiaries warranted treatment as a unitary group. If, after determining that a unitary relationship exists, the second issue is whether requiring taxpayer to file a combined return is necessary to fairly reflect the taxpayer's and its subsidiaries' Indiana income.

For purposes of resolving the unitary group issue, the Supreme Court has developed a three-part test to determine whether a unitary relationship exists between different entities. The test consists of the following factors; common ownership, common management, and common use or operation. <u>Allied-Signal Inc. v. Director, Div. of Taxation</u>, 504 U.S. 768 (1992); <u>F.W. Woolworth v. Taxation and Revenue Dep't. of New Mexico</u>, 458 U.S. 354 (1982); <u>ASARCO, Inc. v. Idaho State Tax Comm'n.</u>, 458 U.S. 307 (1982); <u>Exxon Corp. v. Dep't. of Revenue of Wisconsin</u>, 447 U.S. 207 (1982); <u>Mobil Oil Corp. v. Commissioner of Taxes of Vermont</u>, 445 U.S. 425 (1980).

Because each of the subsidiaries is wholly owned by the Indiana parent company, the first factor in the three-part test – "common ownership" – is readily met.

Although taxpayer has demonstrated that the individual subsidiaries exercise a degree of managerial autonomy, the available information indicates that the individual subsidiaries and taxpayer parent company are largely governed under a common management scheme. The information indicates that the subsidiaries on-site management personnel are authorized to make decisions relating to immediate, day-to-day issues. However, the information also indicates the authority for the over-all governance of the individual subsidiaries remains largely reserved to the taxpayer parent company. A fair consideration of the relevant information weighs in favor of finding that the second factor in the three-part test – "common management" – is also met.

The third test is that of common operation or use. Evidence of common operation exists where certain functions are performed for the group by the parent. In taxpayer's case, the information indicates that all customer orders are received and processed by the Indiana parent. Although each subsidiary maintains a local checking account, most of the subsidiaries' purchases were made through the parent's central account with costing to the individual subsidiary. Corporate records and tax returns for each of the subsidiaries are prepared and maintained at the Indiana parent's location. With one exception, the subsidiaries have all designated the Indiana parent as their corporate headquarters. The subsidiaries are managed by the identical corporate officers and those corporate officers are located at the Indiana parent. Management and decisions are made at the Indiana parent's location.

Taxpayer, along with the individual subsidiaries, function jointly to construct and deliver rebuilt components to taxpayer's customers. There is little to indicate that the subsidiaries perform – or are capable of performing – independent, self-contained services for a particular sub-set of local customers. There is no indication that the transportation subsidiary offers independent transportation services. There is no indication that the distribution subsidiaries offer independent warehousing or distribution services. Rather, the evidence weighs substantially in favor of a determination that the subsidiaries are integrated components of a "common operation." Based upon this information, the audit did not err when it concluded that the subsidiaries and the parent shared a common use or operation.

Based on their common ownership, common management, and common use or operation, the Department finds that the taxpayer and its subsidiaries exhibit a unitary relationship.

The final issue is whether, under IC 6-3-2-2(l), requiring the taxpayer and its subsidiaries to file a combined return is necessary to "fairly represent" the taxpayer's Indiana income. From the information contained within the file, it appears that the Indiana parent and its subsidiaries were so functionally integrated, that the filing of a combined return was necessary in order to avoid distorting and instead fairly portray the taxpayer's Indiana source income.

Accordingly – for purposes of calculating taxpayer's Indiana adjusted gross income under IC 6-3-2-2(l), (m) – the audit was justified in its determination that the taxpayer and its subsidiaries should be treated as a unitary group and required to file a combined return in order to fairly reflect taxpayer's Indiana income.

FINDING

Taxpayer's protest is respectfully denied.

II. Georgia Throw-Back Sales.

Taxpayer argues that the audit erred when it "threw back" Georgia sales to Indiana. Taxpayer maintains that the throw-back was inappropriate because the taxpayer was subject to income taxes in Georgia.

The audit determined that, for purposes of calculating taxpayer's Indiana tax liability, sales made to Georgia should be allocated back to Indiana because the sales were made within a state where the taxpayer was not subject to a state income tax. The audit was apparently basing its decision on 45 IAC 3.1-1-53(5) which states that "[i]f the taxpayer is not taxable in the state of the purchaser, the sale is attributed to [Indiana] if the property is shipped from an office, store, warehouse, factory, or other place of storage in this state." Such sales are designated as "throw-back" sales. Id.

The basic rule is found at IC 6-3-2-2. IC 6-3-2-2(e) provides that "[s]ales of tangible personal property are in this state if... (2) the property is shipped from an office, a store, a warehouse, a factory, or other place of storage in this state and... (B) the taxpayer is not taxable in the state of the purchaser." IC 6-3-2-2(n) provides that "[f]or purposes of allocation and apportionment of income... a taxpayer is taxable in another state if: (1) in that state the taxpayer is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business or a corporate stock tax; or (2) that state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not." Therefore, in order to properly allocate income to a foreign state, taxpayer must show that one of the taxes listed in IC 6-3-2-2(n)(1) has been levied against him or that the state has the jurisdiction to impose a net income tax regardless of "whether, in fact, the state does or does not." Id.

According to taxpayer, the throw-back of the Georgia sales was improper because, "The auditor ignored the fact that the parent company is subject to income taxes in Georgia due to its ownership in a land trust in Georgia."

Georgia imposes a net income tax on corporations. Specifically, Ga. Code Ann. § 48-7-21(a) provides as follows: "Every domestic corporation and every foreign corporation shall pay annually an income tax equivalent to 6 percent of its Georgia taxable net income. Georgia taxable net income of a corporation shall be the corporation's taxable income from property owned or from business done in this state."

Assuming for the moment that taxpayer's ownership of a land trust brings it within the purview of Georgia's corporate income tax scheme, it does so apparently to the extent that income from the land trust is subject to Georgia's income tax. However, the unresolved issue is whether taxpayer's income – derived from sales within Georgia – is subject to that state's net income tax by virtue of the taxpayer's activities having established a Georgia nexus.

15 U.S.C.S. § 381 (Public Law 86-272) controls those occasions in which a state may properly impose a tax on the net income, derived from sources within that state, by foreign (out-of-state) taxpayers. 15 U.S.C.S. § 381 sets a minimum standard for the imposition of a state income tax based on the solicitation of interstate sales. <u>Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co.</u>, 112 S.Ct. 2447, 2453 (1992). 15 U.S.C.S. § 381 prohibits a state (Georgia) from imposing its net income tax on the foreign (Indiana) taxpayer if the foreign taxpayer's only business activity within that state is the solicitation of sales. Georgia may not impose its net income tax on income derived from an out-of-state entity's business activities unless those business activities exceed the mere solicitation of sales. 15 U.S.C.S. § 381(a), (c). Conversely, the effect of Indiana's throw-back rule is to revert sales receipts back to the state, from where the goods were shipped, in those situations where 15 U.S.C.S. § 381 deprives the purchaser's own state of the authority to impose a net income tax. 45 IAC 3.1-1-64. In effect, 15 U.S.C.S. § 381 allows Indiana to tax out-of-state business activities, without violating the Commerce Clause and without the possibility of subjecting taxpayer to double taxation, because Indiana's right to tax those out-of-state activities is derivative of the foreign state's own, taxing authority. In every transaction, at least one state has the power to tax income derived from the sale of tangible personal property; if the state wherein the sale occurred is forbidden to do so by 15 U.S.C.S. § 381, then the income is "thrown-back" to the originating state.

Accordingly, the resolution of taxpayer's protest does not depend on whether taxpayer pays Georgia net income on income attributable to ownership of the Georgia land trust, but whether "taxpayer's business activities are sufficient to give the state jurisdiction to impose a net income tax under the Constitution and statutes of the United States." 45 IAC 3.1-1-64.

Based upon the information supplied by taxpayer, the issue cannot be resolved in taxpayer's favor. There is insufficient evidence to indicate that taxpayer's Georgia activities exceeded the "mere solicitation" standard set out in 15 U.S.C.S. § 381 as defined by Indiana Dept. of State Revenue v. Continental Steel Corp., 399 N.E.2d 754 (Ind. Ct. App. 1980).

FINDING

Taxpayer's protest is respectfully denied.

III. Taxpayer's Delaware Trademark Holding Company.

The audit concluded that the Delaware subsidiary's income producing activities occurred within Indiana subjecting the subsidiary's income to the state's taxing authority.

Taxpayer parent company (hereinafter "taxpayer") argues that its Delaware subsidiary (hereinafter "holding company") does not have a "business situs" within Indiana and the state was without authority to tax its 1996, 1997, and 1998 income. In support of that argument, taxpayer maintains that the holding company's assets and operations are directed and managed in the State of Delaware and that the holding company's business and tax situs are in Delaware.

The holding company was incorporated in the state of Delaware. Taxpayer entered into a "Trademarks Assignment Agreement" whereby taxpayer transferred ownership of certain intellectual property to the holding company. In exchange, the holding company issued taxpayer 1,000 shares of stock. As a result, taxpayer became the holding company's sole shareholder. By the terms of their agreement, taxpayer agreed to pay 6 percent of its annual wholesale sales as compensation for the uninterrupted privilege of using the intellectual property in conjunction with the on-going manufacture of taxpayer's products. The available information indicates that the holding company subsequently transferred substantial amounts of that income back to taxpayer.

Taxpayer maintains that its holding company is a valid entity, established for the valid business purpose of "protect[ing] valuable intellectual property rights." According to taxpayer, the holding company has no business activities within Indiana and that all of the holding company's business activities occur in Delaware. To that end, taxpayer points out that the holding company performs certain activities entirely within Delaware; the holding has a Delaware bank account, the stockholder and directors' meetings are held in Delaware, the holding company's minute books are located in Delaware, the officers perform their duties in Delaware, and the holding company's income is distributed by means of a Delaware bank account. Further, taxpayer argues that the formation of the holding company was based upon "genuine business purposes" including the protection of the intellectual property "in the event of some catastrophic lawsuit." In addition, taxpayer theorizes that the "existence of a separate trademark protection company... allows for the future additional licensing of the marks."

The intellectual property consists largely of four trademarks which taxpayer developed over the course of its Indiana business activities. The four trademarks are used to distinguish taxpayer's products from products produced by its competitors. The four trademarks consist of words displayed in stylized print accompanied by cartoon-like depictions. At the time the trademarks were transferred to the holding company, the taxpayer had placed a value of on the trademarks based upon the income-producing capabilities of those assets.

The essence of taxpayer's argument is that all business activities associated with intellectual property occur in Delaware, and that the Delaware holding company does not have an Indiana business situs.

A. Adjusted Gross Income Tax.

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

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

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

As taxpayer so vigorously maintains, the holding company's commercial domicile is found in Delaware. The corporate activities associated with the maintenance and governance of the Delaware holding company's business affairs – corporate meetings, record keeping, local financial decisions – occur largely within that state. However, it is equally apparent that the holding company's intellectual property has acquired a "business situs" within Indiana. The Delaware holding company has licensed taxpayer to employ the intellectual property within Indiana in conjunction with taxpayer's Indiana manufacturing activities. The substantial value attached to the intellectual property exists solely in the ability to "place" that intellectual property within this state and to derive the economic benefits attributable entirely to the intellectual property's Indiana business situs. The "intellectual property" could accurately and fully be reproduced on a single sheet of typing paper. That this "intellectual property" somehow has an economic vitality severable from taxpayer's Indiana manufacturing activities – and attributable exclusively to the holding company's physical Delaware location – is an entirely illusory assertion. It would be a meaningless and unprofitable exercise in formalistic property rights for the holding company to abrogate its licensing agreement with taxpayer and husband the intellectual property entirely within Delaware. In addition, given the close relationship between taxpayer and the holding company, it would appear unlikely that the holding company would enter into a parallel relationship with one of taxpayer's competitors by which the competitor would become entitled to make use of the trademarks associated with the taxpayer's own products.

As the regulation states, "'business situs' is the place at which [the] intangible personal property is employed as capital...." 45 IAC 3.1-1-55. The place at which the "value attaches to the [intellectual] property is within the state of Indiana. Id.

The income attributable to the intellectual property falls within the purview of the state's adjusted gross income tax scheme because the value of that property derives entirely from the ability to assign the intellectual property to taxpayer and to reap the benefits derived from exploiting the intellectual property through activities occurring entirely within this state.

Therefore, because the intangible personal property has acquired an Indiana business situs, and – as set out in part I of this Letter of Findings - inclusion of the Delaware holding company within the combined return is necessary to fairly represent the unitary group's Indiana adjusted gross income.

B. Gross Income Tax.

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

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

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

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

It is apparent that the income derived from the Delaware holding company's licensing of the intellectual property, is income derived from a "business situs" within Indiana and is properly subject to the state's gross income tax scheme. The intellectual property is exclusively licensed to the Indiana taxpayer. The intellectual property is "localized" within Indiana in the sense that the Indiana taxpayer employs the property to enhance the value of its goods manufactured within this state. The Delaware holding company would derive no income from the intellectual property except for the fact that the intellectual property was licensed for use within Indiana and then actually used within Indiana in conjunction with the manufacturing activities themselves occurring within the state. The holding company's income is based entirely on a fixed percentage of taxpayer's wholesale sales; in turn, those wholesale sales are derived from taxpayer's Indiana manufacturing activities.

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

FINDING

Taxpayer's protest is respectfully denied.

IV. Abatement of the Ten-Percent Negligence Penalty.

Taxpayer protests the assessment of the ten-percent negligence penalty on the amount of tax deficiency determined at the time of the original audit.

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 has presented evidence sufficient to establish to establish that its failure to pay the deficiency was due to reasonable cause and not due to willful neglect.

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0420010215.LOF

LETTER OF FINDINGS NUMBER: 01-0215
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

1. Sales and Use Tax: Delivery Charges

Authority: IC 6-2.5-2-1, IC 6-2.5-4-1(b), IC 6-2.5-4-1(e)(2), IC 26-1-2-401(2), IC 26-1-2-308, IC 26-1-2-401, 45 IAC 2.2-4-3(a), Indiana Department of Revenue v. Martin Marietta Corporation, 398 N.E.2d 1309 (Ind. App. 1979).

The taxpayer protests the imposition of tax on freight charges.

2. Sales and Use Tax: Miscellaneous Receipts

Authority: IC 6-2.5-2-2, IC 6-8.1-5-1 (b).

The taxpayer protests the imposition of tax on miscellaneous receipts.

STATEMENT OF FACTS

The taxpayer operates an office forms and supplies business. After an audit, the Indiana Department of Revenue, hereinafter referred to as the "department", assessed additional sales tax. The taxpayer protested the assessment and a hearing was held. Further facts will be provided as necessary.

1. Sales and Use Tax: Delivery charges.

DISCUSSION

The taxpayer sells office forms and items that are embossed with the customer's name to businesses in Kentucky, Indiana, and Florida. All inventories are ordered from printers or other suppliers who drop ship the items to the customers. Shipment is handled by UPS, RPS or occasionally truck. The supplier bills the taxpayer for the item and freight (often shipping and handling or other added charges) and no sales tax. The taxpayer then bills his customer for the item, mark up, freight and sales tax on the cost of the item plus mark up. The department assessed sales tax on the freight charges and the taxpayer protested this assessment.

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

There are two prerequisites for separately stated delivery charges to be subject to sales tax. The Regulations state these prerequisites as "[s]eparately stated delivery charges are considered part of selling at retail and subject to sales and use tax if the delivery is made by or on behalf of the seller of property not owned by the buyer." 45 IAC 2.2-4-3(a).

The application of sales tax to these delivery charges then depends upon when title to the goods transferred to the buyer. The Indiana law concerning the passing of title of goods to the buyer states that, "Unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods... " IC 26-1-2-401(2). The taxpayer contends that it has completed his performance with regard to the sales of business forms when the printing companies load the shipments onto the common carrier and delivery to the buyer takes place at the printing factory prior to shipment and any delivery services or freight charges after that point would not be subject to the sales tax.

In support of its contention that the delivery charges are non-taxable services, the taxpayer cites Indiana Department of Revenue v. Martin Marietta Corporation, 398 N.E.2d 1309 (Ind. App. 1979). In that case the corporation excavated, processed and sold sand, gravel and other aggregate materials. Usually the product was shipped to buyers by common carrier. Customers were billed by a single invoice listing the price of the goods and delivery charges separately. The corporation did not collect and remit sales tax on the cost of the delivery by common carrier. The court, finding that the freight charges were not subject to sales tax, stated on page 1313 in pertinent part as follows:

> Although the transactions here involved were made pursuant to oral agreements, with no discussion of "delivery" or "passage of title", the relevant Commercial Code provisions imply a "shipping contract" which provides that delivery occurs when the goods are placed on the carrier, IC 26-1-2-308, and that title to the goods passes to the buyer at the time of delivery, IC 26-1-2-401. Thus, we agree that the freight charges were incurred after delivery and in respect to property owned by the buyer.

The taxpayer submitted invoices from the factories to the taxpayer indicating that the purchases were F.O.B. the loading dock of the factory. These invoices indicate that the property was transferred to the taxpayer at this time. The taxpayer was then responsible for the delivery to the final purchasers at their locations. Title to the business forms did not transfer to the taxpayer's customers until the property was actually delivered to them at their location. This is, therefore, different than the Martin Marietta case where title to the tangible personal property had been transferred to the customer prior to the delivery services.

In this case the delivery charges were for services performed prior to the transfer of title to the customer. Therefore these charges are properly subject to the sales tax.

FINDING

The taxpayer's protest is denied.

2. Sales and Use Tax: Miscellaneous Receipts

DISCUSSION

The audit also assessed sales tax on the "miscellaneous receipts" in the cash accounts pursuant to IC 6-2.5-2-2 that states in pertinent part that the sales tax is "measured by the gross retail income." The taxpayer contended that these sums represented tax refunds and monies from loans that the owner loaned to the taxpayer business.

All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1 (b). In support of its contention that the miscellaneous receipts were exempt from the sales tax, the taxpayer submitted a register report with distribution detail. This report indicated that the funds were used to pay petty cash type expenses such as postage, parking and office expenses. In this case the taxpayer did not provide any documentation that the cash receipts were actually non-taxable loans from the owner to the taxpayer business. The distribution records do not verify the source of the funds in the account that was called "miscellaneous receipts." The taxpayer did not sustain its burden of proving that the receipts in this account were not subject to the sales tax.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420010238.LOF

LETTER OF FINDINGS NUMBER: 01-0238
Gross Retail Tax—Tangible Personal Property
Tax Administration—Penalty
For Tax Years 1999-2000

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

ISSUES

I. Gross Retail Tax—Tangible Personal Property

Authority: IC § 6-2.5-2-1; 45 IAC 2.2-3-8; IC § 6-2.5-4-9; 45 IAC 2.2-4-21; IC § 6-2.5-5-16; 45 IAC 2.2-5-3; IC § 6-8.1-5-1(b); 45 IAC 2.2-5-4; 45 IAC 2.2-5-24; 45 IAC 2.2-5-25

Taxpayer protests the assessment of Indiana's gross retail tax on sales of residential and industrial irrigation systems.

II. Tax Administration—Penalty

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

Taxpayer protests the assessment of the 10% penalty.

STATEMENT OF FACTS

Taxpayer sells, installs, and services irrigation systems throughout the west central area of Indiana. The Audit Division assessed the state's gross retail tax on the untaxed selling price of the irrigation equipment and parts. The Audit also assessed the 10% negligence penalty. Taxpayer protested, arguing that the irrigation systems are more properly classified as nontaxable real property rather than as taxable tangible personal property, and, that in some cases, tax had already been paid on the components.

I. Gross Retail Tax—Tangible Personal Property

DISCUSSION

Taxpayer protests the Audit Division's assessment of Indiana's gross retail tax on sales of residential and industrial irrigation systems. Taxpayer argues that Indiana's exemption statutes and regulations are outdated and make absurd distinctions between real and tangible personal property. Taxpayer argues that the equipment and parts he sells are more properly classified as real property, not tangible personal property, and therefore the retail transactions are not subject to Indiana's gross retail tax. At the hearing, taxpayer appeared to drop this argument in favor of providing copies of documents to show that invoices taxed as lump sum invoices had actually charged, collected, and remitted tax on parts sold during installation. Taxpayer has provided those documents as requested.

Under IC § 6-8.1-5-1(b), a "notice of proposed assessment is *prima facie* evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." IC § 6-2.5-2-1 imposes the "excise tax, known as the state gross retail tax... on retail transactions made in Indiana." Taxpayer is not arguing that the transactions are not retail transactions. Taxpayer is arguing that the items he sells are real property, not tangible personal property, and are therefore not subject to Indiana's gross retail tax.

45 IAC 2.2-3-8 provides as follows:

(a) In general, all sales of tangible personal property are taxable, and all sales of real property are not taxable. The conversion of tangible personal property into realty does not relieve the taxpayer from a liability for any owing and unpaid state gross retail tax or use tax with respect to such tangible personal property.

(b) All construction material purchased by a contractor is taxable either at the time of purchase, or if purchased exempt (or otherwise acquired exempt) upon disposition unless the ultimate recipient could have purchased it exempt.

Taxpayer argues that the equipment and parts he sells for installation and servicing of irrigation systems are more properly classified as real property and not tangible personal property. Taxpayer analogizes irrigation systems to above and in ground pools (real property) and fences (real property), and states that it is illogical to consider these items real property while irrigation systems, less easily removed than above-ground pools and fences, are classified as tangible personal property under Indiana's tax statutes and regulations. *See*, 45 IAC 2.2-4-21.

Taxpayer's argument is without merit. As 45 IAC 2.2-3-8 states, "all sales of tangible personal property are taxable." The only difference lies in who pays the tax, taxpayer upon purchase of materials from a supplier, or his customers upon purchase of an irrigation system and installation from taxpayer.

The Audit Division's assessment is correct except for the transaction for which taxpayer has provided a valid exemption certificate for a sale to an Indiana instrumentality. *See*, 45 IAC 2.2-5-24 and 45 IAC 2.2-5-25; *see also* IC § 6-2.5-4-9 and IC § 6-2.5-5-16. In addition, those invoices previously taxed as lump sum invoices have shown that the state's gross retail tax was collected and remitted on the materials sold as part of an installation project. To the extent that taxpayer has shown the gross retail tax was collected and remitted, that part of the assessment is reversed.

FINDING

Taxpayer's protests regarding the assessment of the state's gross retail tax on tangible personal property, e.g., parts and equipment used to install and service irrigation systems, is sustained to the extent the documentation shows the state's gross retail tax was collected and remitted.

II. Tax Administration—Penalty

DISCUSSION

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

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

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

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

FINDING

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

DEPARTMENT OF STATE REVENUE

0420010261.LOF

LETTER OF FINDINGS NUMBER: 01-0261
State Gross Retail Tax
For Years 1998 AND 1999

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

ISSUES

I. State Gross Retail Tax —Adequate Documentation

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

Taxpayer protests the proposed assessments of Indiana's State Gross Retail tax.

STATEMENT OF FACTS

Taxpayer is an Indiana merchant selling carpeting and flooring, including installation. Taxpayer sells to the general public and businesses with billings as time and material invoicing. Taxpayer had maintained insufficient documentation to establish amounts subject to gross retail tax, thus as part of the audit the auditor and taxpayer's representative signed two projections (Form AD-10A), one to calculate an unreported cash difference for 1998 due to missing records for the months of January 1998 through December 1998 and one to calculate the percentage of reported taxable sales to reported cash for 1998 and 1999. Taxpayer's new representative-engaged by taxpayer after the audit at issue- protested the assessment that was based on these amounts, arguing that the audit misinterpreted taxpayer's accounting system.

I. State Gross Retail Tax —Adequate Documentation

DISCUSSION

At the hearing, taxpayer's representative stated that the audit misinterpreted the taxpayer's accounting system. The representative did not address the absence of records to support taxpayer's claim of error in the audit determinations, nor did the representative address the projection agreements that this assessment was based on.

This issue revolves around the burden of proof in an audit situation, which IC § 6-8.1-5-4 defines as:

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

Taxpayer does not cite any statute, regulation, or case law for the proposition that the auditor was required to accept taxpayer's assertions as to the nature of the transactions without any supporting documentation and contrary to two signed projections between the Department and taxpayer for the period in question. Pursuant to the above statute and the requirements of IC § 6-8.1-5-1 and 45 IAC 15-5-4, taxpayer has failed to establish a basis for reversal of this assessment.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220010275.LOF

LETTER OF FINDINGS NUMBER: 01-0275
Gross Income Tax
For Calendar Year 1997

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

ISSUE(S)

I. 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 April 15, 1998. Taxpayer filed its return late on October 15, 1998 with payment of approximately forty-seven percent (47%) of its tax liability. The Department issued its late payment assessment on July 30, 2001.

Taxpayer filed a tax and penalty protest letter dated September 27, 2001 that states that it would provide a written brief and supplemental documentation supporting the protest. On July 2, 2002 taxpayer submitted its written brief to protest the penalty only.

Taxpayer states that it executed the sale of one of its divisions in December 1997 and the full ramifications of the sale such as the amount of realized gain and the forgiveness of debt were not realized until the filing of the tax return, at which time the remaining amount of tax due was paid in full. Taxpayer states it relied upon the advice of its accountant and the amount of tax due when it filed for an extension was based on the advice it was given. Taxpayer prepared the Indiana return and submitted payment of the tax. A federal extension was filed on March 16, 1998.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer's representative, at hearing, states that prior to 1997 the taxpayer was not required to file estimated taxes, was near bankruptcy, and due to financial problems decided to sell one of its divisions. In December 1997 it entered into a preliminary agreement to sell the company which was not completed until December 31, 1997. The ramifications of the sale were not realized until the filing of the tax return. Taxpayer requests the penalty be waived and states that it complied with the Indiana State Revenue requirements, relied upon the advice of its accountant, and the amount of tax due when it filed for an extension was based upon the advice it was given.

Taxpayer did not make full payment by the original due date of the return. More than forty-seven percent (47%) of the tax due was paid after the due date of the return. An extension to file is not an extension for payment.

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

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020186.LOF

LETTER OF FINDINGS NUMBER: 02-0186
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. Consumer Use Tax - Documentation

Authority: 45 IAC 2.2-4-2

Taxpayer protests purchases that had tax assessed.

STATEMENT OF FACTS

Taxpayer was audited for calendar years 1998, 1999, and 2000. Upon audit it was discovered that the taxpayer failed to retain a majority of its purchase records. The invoices that were provided the auditor had no sales tax charged. After repeated requests to provide invoices, the auditor utilized the purchase amounts reported on Schedule C of the 1120 form for each year.

At hearing, the taxpayer requested additional time to provide copies of invoices. Thereafter, several telephone conversations ensued indicating the taxpayer had not been able to provide additional information other than an invoice indicating a reduction in tax in the amount of $191.60 for 1999. The last telephone conversation was on September 6, 2002 when the taxpayer indicated that one of her suppliers had not supplied her with the promised information. The hearing officer called the supplier on September 10, 2002 and was informed that UNBS was not registered with the State of Indiana to collect sales tax.

I. Consumer Use Tax - Documentation

DISCUSSION

Taxpayer protests the proposed assessments of consumer Use Tax arguing that she may have available for inspection, documents supporting her contention that sales tax was paid upon purchases made. Because of taxpayer's inability to timely provide proper documents to the auditor, a hearing was held. At the hearing, taxpayer stated that records would be made available within a short period of time. Said records were not provided, other than one invoice indicating tax paid in the amount of $191.60 in 1999. That invoice, however, shows delivery to the taxpayer's home and is apparently for furnishings.

Taxpayer, on September 6, 2002 called the hearing officer and advised her that one of her suppliers would not verify whether tax was paid unless she had more detailed information regarding her purchases. On September 10, 2002, the hearing officer found that the retailer was not registered with the Indiana Department of Revenue.

The Department cannot allow a tax credit for 1999 in the amount of $191.60 because the furnishings were delivered to the taxpayer's home. In addition, no fixed assets are shown on taxpayer's Schedule C. Taxpayer has not provided proof to allow a reduction in tax.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020243.LOF

LETTER OF FINDINGS NUMBER: 02-0243
Use Tax
For 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 is a motel located in Indiana. The audit focused on capital asset purchases and start-up costs for the new motel. The motel has an outdoor pool and offers a complimentary continental breakfast to guests. An Indiana contractor who was working under a lump-sum contract built the motel.

Taxpayer did not register with the Indiana Department of Revenue as a retail merchant until 1998. In May 1997 it qualified to do business in Indiana as a foreign corporation incorporated in Kentucky in October 1996. Taxpayer had no use tax accrual system in place. Taxpayer requests abatement of the penalty because it attempted to recover taxes paid to the State of Kentucky in error. The statute, however, has elapsed and additional penalties would allegedly create additional undue burden upon them.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it has attempted to recover taxes paid to the State of Kentucky in error, the statute has elapsed and additional penalties would created additional undue burden upon the company.

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

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

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020256P.LOF

LETTER OF FINDINGS NUMBER: 02-0256P
Sales Tax
For June 1999 through March 2002

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer was assessed late payment penalties for several sales tax returns that were not timely filed nor paid. Taxpayer states that during transition in 1999, the new person responsible overlooked the filing of the sales tax returns. Taxpayer began to receive tax notices on non-payment of Indiana Sales Tax. These notices contained estimated tax liabilities that were paid. In March 2002, the taxpayer hired a local CPA to bring the sales tax to a current status.

Taxpayer, in a letter dated May 9, 2002 requests that the department waive the non-filing and late payment penalties because it has filed the returns.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer was assessed a penalty because it failed to remit its tax and tax returns by the due date for several months between 1999 and 2002. In a letter dated May 21, 2002, the taxpayer was advised that several liabilities were in the warrant stages and could no longer be protested. Only four of the liabilities were at the protest stage. Taxpayer was also advised to pay the outstanding liabilities or to send a protest letter regarding the four liabilities. No response was forthcoming. In a letter dated July 10, 2002 taxpayer was again advised to pay the outstanding liabilities or to send a protest letter within ten days. No response was forthcoming.

Taxpayer merely states that an employee overlooked the filing of sales tax returns.

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

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

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0320020332P.LOF

LETTER OF FINDINGS NUMBER: 02-0332P
Withholding Tax
Calendar Year Ended 12-31-99

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

During a sales tax audit it was determined that the parent company located in Indiana failed to withhold and remit tax on its out-of-state shareholders as required under 45 IAC 3.1-1-109.

Taxpayer protests the penalty assessed and states that it made every effort to comply with the withholding requirements and due to first year filing issues, some shareholders had nothing withheld on the belief that such shareholders would file Indiana returns. Taxpayer requests a penalty waiver based upon the fact that 1999 was its first year.

ISSUE

I. Tax Administration – Penalty

Taxpayer protests the imposition of penalty.

DISCUSSION

Taxpayer states it has made every attempt at compliance with the laws and regulations of Indiana and every effort was made to file and pay taxes on a timely basis. Further, taxpayer states it correctly identified and withheld tax on all of its nonresident shareholders for the years 2000 and 2001.

Taxpayer did not comply with the regulations, did not correct the 1999 year, nor did it provide reasonable cause to allow the Department to waive the penalties assessed.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020333P.LOF

LETTER OF FINDINGS NUMBER: 02-0333P
Adjusted Gross Income Tax
For Calendar Year Ended 12/31/2000

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer filed its return late and was assessed a penalty. Taxpayer's tax liability was $176,514.76, $71,404.65 of which came from a prior year overpayment. Taxpayer remitted the balance of $105,110.00 after the due date of the return. An extension to file is not an extension for payment and the taxpayer was assessed a late payment penalty.

Taxpayer filed a penalty protest in a letter dated June 27, 2002.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it timely filed its request for an extension of time. Taxpayer states that due to extenuating circumstances, the estimated tax that was calculated for 2000 at the time of the extension request was insufficient to satisfy the liability and the balance of the tax due was paid by the extended due date of the return. Taxpayer states there were two factors that impacted the underestimation of tax due at the time of the extension. The first factor related to bonus payments that were not paid by March 15, 2001 and therefore, not deductible until tax year 2001. The second factor is that the activity changed significantly during 2000 whereby the Indiana apportionment increased from 37% to 81.9%.

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

Taxpayer failed to remit more than fifty percent (50%) of its tax by the due date of the return, did not remit one hundred percent (100%) of the prior year's tax by the due date, nor has provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0320020351P.LOF

LETTER OF FINDINGS NUMBER: 02-0351P
Withholding Tax
For the Period July 2000 through November 2000

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer was assessed penalty for failing to file and remit its withholding tax by the due date.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer failed to file and remit its withholding tax for several months.

Taxpayer states that the circumstances that forced it to be late with payments were related to the Secretary of State's office processing its application as a foreign corporation. It filed the necessary forms on August 21, 2000. A certificate of good standing from the State of Minnesota was dated July 19, 2000. The state rejected the application on August 28, 2000 because another company in Indiana was identically named. To correct the problem, the taxpayer wrote the word "fictitious" behind its name on the application. Several weeks passed and the taxpayer was rejected again saying it needed a board resolution authorizing the use of the fictitious name. A board resolution was submitted dated November 13, 2000. Taxpayer states it was again rejected on December 4, 2000 because its certificate of good standing from the State of Minnesota had expired. The processing time of its application was beyond its control. Taxpayer further states that it could have met the withholding report deadlines if it had been issued a temporary number.

Taxpayer failed to remit its tax timely and has not provided reasonable cause for its failure. Withholding Tax is a trust tax that could have been remitted and held in escrow.

The Department finds the penalty appropriate.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020352P.LOF

LETTER OF FINDINGS NUMBER: 02-0352P
Gross Income Tax
Calendar Year 1997

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

ISSUE(S)

I. 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, an out of state corporation, has an Indiana location and is a wholly owned subsidiary of Company A. Taxpayer filed form IT-20SC for 1997 in error, and, as a result of the incorrect return being filed, the Indiana Department of Revenue refunded all "Estimated Payments" made by the taxpayer.

Taxpayer filed a penalty protest letter dated March 15, 2002.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that prior to September 28, 2001, it was a wholly owned subsidiary of Company A and their auditors prepared all tax returns. For 1997, Company A's auditors prepared the return using the incorrect form IT-20SC rather than the IT-20. The return was forwarded to Company A's headquarters where it was signed and mailed. Taxpayers relied on their paid preparer to properly prepare the appropriate tax return.

During 2001 when a sales tax audit was initiated, the issue with the 1997 income tax return was discovered. At the same time Company A was in negotiations with the management of the taxpayer to sell the company to its management. During the negotiations, Company A indicated it would take responsibility for resolving the 1997 tax issue since it was during its tenure as owner and the mistake was made by its tax preparer. During the signing of the purchase agreement, Company A refused to include the 1997 taxes in the liabilities it retained. Taxpayer states that the new management has cooperated fully with the Indiana auditors in resolving this issue and requests a penalty waiver.

Taxpayer correctly prepared its 1998 and 1999 returns. The taxpayer erroneously prepared form IT-20SC for 1997 that was corrected during audit. The new managing company believes it should not be penalized when it was the responsibility of the old company to correctly prepare the returns. A company has the responsibility to assure that tax returns are properly filed, whether under new or old management.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020386P.LOF

LETTER OF FINDINGS NUMBER: 02-0386P
Gross and Adjusted Gross Income Tax
For Calendar Year Ended December 31, 2000

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer protests the proposed penalty assessment for the late payment of its income tax. The due date of the return was April 15, 2001. Taxpayer filed its return late on October 12, 2001 with payment of thirty-two percent (32%) of its tax liability. The Department issued its late payment assessment on March 26, 2002.

Taxpayer filed a penalty protest letter dated April 26, 2002 and states that it did not have the infrastructure in place to handle all the matters that a new company has to contend with. Taxpayer was formed in July of 1999. Taxpayer prepared the Indiana return for calendar year 2000 and submitted the balance of tax due in the amount of $32,827 on October 12, 2001. The Department has no returns on file prior to calendar year 2000.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it did not become apparent that significant tax liabilities would be due for Indiana until it filed its return.

Taxpayer did not make payment by the original due date of the return as required under IC 6-8.1-10-2.1 (a)(2). The penalty is ten percent (10%) of the amount of the tax not paid, if the person fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment.

Taxpayer made payment after the due date of the return and has not provided reasonable cause to allow the Department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020401P.LOF

LETTER OF FINDINGS NUMBER: 02-0401P
Corporate Income Tax
For the Calendar Years 1997, 1998, 1999, 2000

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

ISSUE

I. Tax Administration – Penalty

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

The taxpayer protests the penalty assessed.

STATEMENT OF FACTS

The taxpayer is a not-for-profit organization formed to sponsor several soccer teams for high school students and young adults. A departmental audit resulted in the assessment of additional gross income tax on proceeds from gaming activities. The taxpayer filed a letter of protest for each audited year requesting that the penalty be waived. The taxpayer asserts that the understatement of gaming income on its tax returns was not intentional. All gaming activities were conducted by volunteers.

DISCUSSION

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

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

The unintentional omission of income from income tax returns falls within the definition of "negligence." The intentional omission of income might have resulted in the imposition of the penalty for fraud.[1] Further, the assertion that the gaming activities were conducted by volunteers is irrelevant. The Department's position on the matter of volunteers as opposed to compensated employees is set forth in its Charity Gaming Information publication: "An operator or a worker may not receive any compensation for conducting or assisting with any allowable (charity gaming) event."[2]

A taxpayer's total income is to be reported on its tax returns. 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.

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[1] The statutory imposition of the penalty for fraud may be found at IC 6-8.1-10-4.
[2] Charity Gaming Information, Publication 2, Revised June 1996, page 28.

DEPARTMENT OF STATE REVENUE

0220020410P.LOF

LETTER OF FINDINGS NUMBER: 02-0410P
Adjusted Gross and Supplemental Net Income Tax
For Fiscal Years Ended 07/29/00 and 07/28/2001

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer was assessed a penalty for the underpayment of quarterly estimated income taxes for the period ending July 28, 2001 and a penalty for failing to report and pay gross income tax for the years 2000 and 2001. Taxpayer failed to report sales shipped from within Indiana at the high rate of gross income, although it had property and inventories in the State of Indiana. Taxpayer paid tax on its adjusted gross income.

Taxpayer filed a penalty protest letter dated August 1, 2002.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalties assessed and requests a penalty waiver. No reasons were given in the letter. In a telephone conversation on September 17, 2002, taxpayer simply stated that he was unaware of Schedule A, and the income was already included in Adjusted Gross Income.

Taxpayer failed to report gross income subject to tax in Indiana and has not provided reasonable cause for its failure to do so. The failure to report gross income resulted in the taxpayer's failure to pay fourteen percent (14%) and thirty-six percent (36%) of its tax for fiscal years 2000 and 2002 respectively.

Taxpayer failed to pay one hundred percent of the prior years tax in estimated payments for fiscal year 2001 that resulted in an underpayment penalty.

Taxpayer has not provided reasonable cause to allow penalty waivers.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020412P.LOF

LETTER OF FINDINGS NUMBER: 02-0412P
Adjusted Gross Income Tax
For Short Year 01/01/99 to 07/16/99

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

ISSUE(S)

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer protests the proposed penalty assessment for the late payment of its income tax. The due date of the return was November 16, 1999. Taxpayer had an extension to file until October 15, 2000 and submitted payment of approximately thirty percent (30%) of its tax liability. The Department issued its late payment assessment on June 25, 2002.

Taxpayer filed a penalty protest letter dated August 7, 2002.

Taxpayer states that it was formerly named Company A. The name change occurred on July 16, 1999 when Company A was sold. As a result of the sale, two short period returns were filed for tax year 1999. Immediately prior to its sale, Company A recognized unexpected and significant income as a result of a gain related to restructuring activity. Company A's estimated payments were not substantial enough to meet the Indiana income tax liability created by this additional income. During the period of the sale, the owner was in the process of restructuring its operations, which required extensive review of accounting systems, establishing procedures to close the financial reports or the sold corporations and transitioning personnel to new roles within the accounting and tax department. These factors contributed to reduced continuity within the accounting and tax departments as responsibilities were transferred among new and different people. As a result of the restructuring, Company A's tax personnel were not able to estimate the gain, and the resulting increased Indiana income tax liability, in time to pay additional estimated tax to cover the additional income.

These factors contributed to the underpayment of estimated tax for this period. These factors also resulted in the underpayment of estimated tax for the period from July 17, 1999 to December 31, 1999. Taxpayer states that it has an excellent history of filing all tax returns on a timely basis.

Taxpayer believes that its underpayment of tax was due to reasonable cause and not willful neglect and has paid the interest.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states.

The issue is not the underpayment of tax but the late payment thereof. Taxpayer did not make full payment by the original due date of the return. More than thirty percent of the tax due was paid after the due date of the return. An extension to file is not an extension for payment.

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

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020414P.LOF

LETTER OF FINDINGS NUMBER: 02-0414P
Gross Income Tax
For Fiscal Year 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 late on January 15, 2002 with payment of one hundred percent (100%) of its tax liability. The Department issued its late payment assessment on May 15, 2002.

Taxpayer filed penalty protest letters dated May 25, 2002 and August 20, 2002. Taxpayer requests penalty abatement because it was taxpayer's initial return and the filing requirements were not known as of July 15, 2001. The corporation was qualified to do business in Indiana on February 28, 2001. Taxpayer prepared the Indiana return and submitted one hundred of the tax due on January 15, 2002.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it was not aware of the filing requirements until after the due date. In addition, the return was the initial return filed. It was not apparent that significant tax liabilities would be due for Indiana until it filed its return.

Taxpayer did not make payment by the original due date of the return as required under IC 6-8.1-10-2.1 (a)(2). The penalty is ten percent (10%) of the amount of the tax not paid, if the person fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment.

Taxpayer made payment after the due date of the return and has not provided reasonable cause to allow the Department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0320020415P.LOF

LETTER OF FINDINGS NUMBER: 02-0415P
Withholding Tax
Calendar Year 2001

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer filed its WH-3 late and was assessed ten dollars ($10) for each late filed W-2.

Taxpayer protests the penalty assessed and states that its return was due on January 30, 2002, and the return and payment were submitted on January 12, 2002.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer requests the department waive the penalty for its failure to file information returns timely.

The Annual Withholding Tax Reconciliation Return shows that thirteen (13) W-2 forms were submitted to the Department on March 5, 2002 which was clearly late. The taxpayer erred in its assumption that the penalty is due to late payment of tax. Penalty applies to the late filing of an information return, as the taxpayer has not provided reasonable cause for its failure to file.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0320020416P.LOF

LETTER OF FINDINGS NUMBER: 02-0416P
Withholding Tax
For December 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 filed its WH-1 and payment late and was assessed a late payment penalty. In a letter dated August 13, 2002, taxpayer protests the penalty assessed because it has filed returns for thirteen (13) years without incident. Taxpayer states that its accountants had to revise some of the preliminary information it supplied and the accountants needed additional time to revise the depreciation schedules. Unfortunately, their accountants sent the completed partnership return and withholding tax return to the wrong address. Taxpayer states that it had moved to a new location. When it realized that it had not received a return, the taxpayer contacted its accountant. As soon as the taxpayer received the newly generated returns, they were forwarded to the Department. Taxpayer requests a penalty waiver because it was not careless in its duty to file and remit tax to the state.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer was assessed a ten percent (10%) penalty because it paid its tax after the due date of the return for December 31, 2001.

Taxpayer, in a letter dated August 13, 2002 protested the penalty assessed and stated that it hires professionals to assist in its duty to file and remit tax, therefore, it used ordinary business care and prudence to meet its tax obligation to the state. The late filing was primarily due to an accident of using an incorrect address and not through gross neglect.

Actions of the taxpayer's representative are also the actions of the taxpayer. Taxpayer apparently did not inform its representative that it had a change of address causing the return to be filed late. Taxpayer has not provided reasonable cause to allow a waiver of the penalty assessed.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020418P.LOF

LETTER OF FINDINGS NUMBER: 02-0418P
Adjusted Gross Income Tax
For Fiscal Years Ended September 30, 1995 and September 30, 1996

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

ISSUE(S)

I. 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 failing to report Federal RAR adjustments. Taxpayer was audited for Fiscal Years 1998 through Calendar Year 2000. During the audit it was determined that final resolution with the Internal Revenue Service was on March 26, 2001 but the taxpayer failed to report the RAR adjustments to the Indiana Department of Revenue.

Taxpayer filed a penalty protest letter dated August 8, 2002 that merely requests a penalty waiver.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer merely requests a penalty waiver and provided no reasons.

Taxpayer did not notify the Department as required under 45 IAC 3.1-1-94 and IC 6-3-4-6 which state that the taxpayer file a notice, on a form prescribed by the department, within one hundred twenty (120) days after the modification is made.

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

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

9920020419P.LOF

LETTER OF FINDINGS NUMBER: 02-0419P
Motor Vehicle Rental Excise Tax
May 2000 through April 2002

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

II. Tax Administration – Interest

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

Taxpayer protests the interest assessed.

STATEMENT OF FACTS

Taxpayer was assessed late filing penalties. In a letter dated August 22, 2002, taxpayer states that it was its office manager's job to make all tax payments. Deposits were done through an electronic fund transfer and the taxpayer believed its books and financial statements were accurate. Taxpayer requests the department waive the penalties and interest assessed against it.

Taxpayer states its delinquent payment of motor vehicle rental excise taxes arose from an office manager that did not fulfill the responsibilities of her job. Not until recently was the taxpayer aware that the MVR tax returns had not been filed and tax had not been paid. Upon discovery, taxpayer immediately took steps to report and pay the tax due.

I. Tax Administration – Penalty

DISCUSSION

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

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

FINDING

Taxpayer's protest is denied.

II. Tax Administration – Interest

DISCUSSION

Taxpayer requests that the department waive the interest.

The Indiana statute does not allow a waiver of interest.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020420P.LOF

LETTER OF FINDINGS NUMBER: 02-0420P
Sales Tax
May 2000 through April 2002

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

II. Tax Administration – Interest

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

Taxpayer protests the interest assessed.

STATEMENT OF FACTS

Taxpayer was assessed late filing penalties. In a letter dated August 22, 2002, taxpayer states that it was its office manager's job to make all tax payments. Deposits were done through an electronic fund transfer and the taxpayer believed its books and financial statements were accurate. Taxpayer requests the department waive the penalties and interest assessed against it.

Taxpayer states its delinquent payment of sales taxes arose from an office manager that did not fulfill the responsibilities of her job. Not until recently was the taxpayer aware that the sales tax returns had not been filed and tax had not been paid. Upon discovery, taxpayer immediately took steps to report and pay the tax due.

I. Tax Administration – Penalty

DISCUSSION

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

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

FINDING

Taxpayer's protest is denied.

II. Tax Administration – Interest

DISCUSSION

Taxpayer requests that the department waive the interest.

The Indiana statute does not allow a waiver of interest.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020424P.LOF

LETTER OF FINDINGS NUMBER: 02-0424P
Sales and 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 sales tax on a portion of its sales and had no evidence of exemption. In addition, taxpayer failed to self-assess use tax on a majority of its non-taxed taxable purchases.

Taxpayer requests abatement of the penalty due to human error.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it consistently files its sales tax returns in Indiana on time and has been prudent in determining the proper amount of sales tax liability. Taxpayer states that the error was not due to misrepresentation or intentional disregard of Indiana sales tax rules but the result of pure clerical oversight.

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 was previously audited and failed to remit use tax due on clearly taxable items. Taxpayer remitted less than two percent (2%) in 1998, no percent in 1999, and approximately six percent (6%) in 2000 of the use tax due, and has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020425P.LOF

LETTER OF FINDINGS NUMBER: 02-0425P
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 seventy percent (70%) of its non-taxed taxable purchases.

Taxpayer requests abatement of the penalty due to human error.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it manually reviews invoices for use tax liability. In conjunction with the conversion of its Accounts Payable systems to new software this year, Taxpayer is looking at automating this process so that all invoices that do not have sales tax on the invoice will automatically be selected for payment of use tax.

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

Taxpayer was previously audited and failed to remit use tax due on clearly taxable items, primarily fixed assets, and has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420000427.LOF

LETTER OF FINDINGS NUMBER: 00-0427
For The Period: 1997 & 1998

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

ISSUES

I. Sales/Use Tax: Model/Display Manufactured Homes

Authority: IC 6-2.5-3-1; IC 6-2.5-3-2; IC 6-2.5-3-4; 45 IAC 2.2-3-15; 45 IAC 2.2-5-8(j); Monarch Beverage v. Indiana Dept. of State Revenue, 589 N.E.2d 1209 (Ind.Tax 1992).

The taxpayer protests the assessment of tax on manufactured homes for model/display.

STATEMENT OF FACTS

Taxpayer is a producer of manufactured homes. The taxpayer has display homes at its manufacturing plant that it uses as models for prospective buyers. The taxpayer sells its manufactured homes through independent builders, dealerships, and planned home communities.

I. Sales/Use Tax: Model/Display Manufactured Homes

DISCUSSION

The taxpayer argues that its display homes are treated as inventory, and that the homes are used to "acquaint [customers] with the features of a [the taxpayer's manufactured home] and display various options that are available."

The taxpayer summarizes its position as follows:

> [The] units are inventory held for resale. The units could be moved off of their existing platform with minimal effort and could be transferred to a prospective customer's building site within days. Accordingly, we feel these units are inventory for resale and should be exempt from sales and use tax until the final sale occurs.

The taxpayer, shortly before the hearing date, faxed to the Department documents that it says shows that the display homes were eventually sold. In a cover sheet to the fax, the taxpayer stated:

> Here are the four houses invoices that were on display in 1997 and 1998. We have sold all four models and have collected the sales tax for each.

Additionally, the taxpayer stated that there was no true foundation, the models could be bought and shipped within a two-week time frame if a buyer so desired.

The Indiana Code 6-2.5-3-1 defines "use" as:

> (a) "Use' means the exercise of any right or power of ownership over tangible personal property.

And in pertinent part in IC 6-2.5-3-2:

> (a) An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

And finally the use tax exemption, IC 6-2.5-3-4:

> (a) The storage, use, and consumption of tangible personal property in Indiana is exempt from the use tax if:
>
> > (1) the property was acquired in a retail transaction in Indiana and the state gross retail tax has been paid on the acquisition of that property; or
> >
> > (2) the property was acquired in a transaction that is wholly or partially exempt from the state gross retail tax under any part of IC 6-2.5-5, except IC 6-2.5-5-24(b), and the property is being used, stored, or consumed for the purpose for which it was exempted.
>
> (b) If a person issues a state gross retail or use tax exemption certificate for the acquisition of tangible personal property and subsequently uses, stores, or consumes that property for a nonexempt purpose, then the person shall pay the use tax.

The questions before the Department can be stated as, "Were the homes converted from inventory by the taxpayer's use of them as display models and thus subjecting the taxpayer to the "use tax" statute?" And, "Does the assessment of use tax on display homes (eventually) sold constitute double-taxation?"

The auditor contends that the taxpayer made nonexempt use of the display homes. The auditor relies on 45 IAC 2.2-3-15 and 45 IAC 2.2-5-8(j). The former regulation states that "If any person who issues an exemption certificate … thereafter makes any use of the tangible personal property" that is "not permitted by the exemption, such use, consumption, or storage shall become subject to the use tax. …" The latter regulation, 45 IAC 2.2-5-8(j), says the following:

> Managerial, sales, and other non-operational activities. Machinery, tools, and equipment used in managerial sales, research, and development, or other non-operational activities, are not directly used in manufacturing and, therefore, are subject to tax. This category includes, but is not limited to, tangible personal property used in any of the following activities: management and administration; *selling and marketing; exhibition of manufactured or processed products;* …. (Emphasis added)

The display homes were for exhibition (tours for prospective buyers), which is set out in 45 IAC 2.2-5-8(j) (*See* the italicized portions above) as taxable. The fact that the taxpayer had utilities hooked up, carpeted and furnished the homes, further shows that the taxpayer made use of the homes in a selling, marketing, and exhibition mode.

Regarding the double-taxation issue, the auditor noted at the time of the audit:

> [An independent] dealer purchased and occupies one of the show models for uses as a sales office. The taxpayer did not provide evidence of ever selling one of these display homes except for the model sold to the dealer.

The taxpayer provided, prior to the hearing, documentation that purports to show that the homes were in fact sold. The taxpayer argues that it cannot be charged use tax on display homes that were sold. The touchstone case in Indiana on double-taxation is Monarch Beverage v. Indiana Dept. of State Revenue, 589 N.E.2d 1209 (Ind.Tax 1992). The court in that case stated "sales or use tax can be collected more than once on the same item if the item is subject of more than one nonexempt transaction." Id. at 1214.

In the present case the *taxpayer* is being assessed use tax on the materials used in manufacturing the display homes—thus the *taxpayer itself* owes the use tax. With regard to the sales of the display homes the taxpayer is acting as an *agent* for the state (that is, the taxpayer is not the one who owes the tax, its *customers* do. The taxpayer is simply collecting and remitting the tax, as required, for the State of Indiana). The use tax and sales tax are for two separate and distinct transactions—one the use of the display homes for exhibition tours, the other the eventual sale of the homes.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

02970521.SLOF

SUPPLEMENTAL LETTER OF FINDINGS: 97-0521 SLOF
Indiana Adjusted Gross Income Tax
For the Years 1993, 1994, and 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

I. Reallocation of Taxpayer's Sales to Indiana – Throw-Back Sales.

Authority: 15 U.S.C.S. § 381; IC 6-3-2-2(e); IC 6-3-2-2(n); IC 6-3-2-2(n)(1); IC 6-3-2-2(n)(2); Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co., 112 S.Ct. 2447 (1992). Indiana Dept. of State Revenue v. Continental Steel Corp., 399 N.E.2d 754 (Ind. Ct. App. 1980); 45 IAC 3.1-1-53(5); 45 IAC 3.1-1-64.

Taxpayer argues that income it received from selling its products within other states should not be thrown back to Indiana because taxpayer's out-of-state activities were sufficient to establish nexus with those foreign states.

STATEMENT OF FACTS

Taxpayer is in the business of producing custom-designed plastic products. Most of its business is generated by the design, manufacture, and sale of custom designed packing and shipping trays which taxpayer refers to as "Transport Packaging Systems." Taxpayer's customers include television picture tube manufacturers and automobile component manufacturers. Taxpayer ships products from its plants in Indiana to other states.

Taxpayer original protest was addressed within a Letter of Findings (LOF) which concluded that "taxpayer's protest is sustained subject to the findings of a supplemental audit" because the LOF determined that the taxpayer had presented evidence of an "ongoing, complex, collaborative" endeavor between itself and its out-of-state customers.

That supplemental audit was conducted and concluded that the "taxpayer did not produce evidence to establish that the activities of the taxpayer created nexus in each state during the audit period." Therefore, the supplemental audit "[was] unable to make supplemental audit adjustments to the billing."

The taxpayer requested and was granted an opportunity for a rehearing. That rehearing was held, and this Supplemental Letter of Findings followed.

DISCUSSION

I. Reallocation of Taxpayer's Sales to Indiana – Throw-Back Sales.

Taxpayer protested the imposition of the Indiana adjusted gross income tax on sales income received from certain out-of-state customers. The original audit had determined that, for purposes of determining the taxpayer's adjusted gross income, sales to out-of-state customers should be allocated back to Indiana because the sales were made to customers located within states in which the taxpayer was not subject to an income tax. Under 45 IAC 3.1-1-53(5) "[I]f the taxpayer is not taxable in the state of the purchaser, the sale is attributed to [Indiana] if the property is shipped from an office, store, warehouse, factory, or other place of storage in this state." Such sales are designated as "throw-back" sales. Id.

Taxpayer does business in 39 states outside of Indiana. With the exception of Idaho and Alaska, taxpayer argues that it is entitled to a blanket exemption from the application of Indiana's throw-back rule because of the intensive, ongoing, and complex relationship it develops with the out-of-state customers when it designs, manufacturers, and sells its Transport Packaging Systems.

Taxpayer believes it is entitled to this blanket exemption under the terms of IC 6-3-2-2 and Public Law 86-272. IC 6-3-2-2(e) provides that "[s]ales of tangible personal property are in this state if... (2) the property is shipped from an office, a store, a warehouse, a factory, or other place of storage in this state and... (B) the taxpayer is not taxable in the state of the purchaser." IC 6-3-2-2(n) provides that "[f]or purposes of allocation and apportionment of income... a taxpayer is taxable in another state if: (1) in that state the taxpayer is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business or a corporate stock tax; or (2) that state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not." Therefore, in order to properly allocate income to a foreign state, taxpayer must show that one of the taxes listed in IC 6-3-2-2(n)(1) has been levied against him or that the state has the jurisdiction to impose a net income tax regardless of whether the state actually does so.

15 U.S.C.S. § 381 (Public Law 86-272) controls the circumstances under which a state may impose a tax on the income – derived from sources within that state – by an out-of-state taxpayer. 15 U.S.C.S. § 381 establishes the minimum standard for the imposition of a state income tax based on the solicitation of interstate sales. Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co., 112 S.Ct. 2447, 2453 (1992). 15 U.S.C.S. § 381 prohibits a state from imposing a net income tax on a foreign taxpayer if the foreign taxpayer's only business activity within that state is the solicitation of sales. A state may not impose an income tax on income derived from business activities within the taxing state unless those business activities exceed the mere solicitation of sales. 15 U.S.C.S. § 381(a), (c). Conversely, the effect of the throw-back rule is to revert sales receipts back to the state from where the goods were originally shipped in those situations where 15 U.S.C.S. § 381 deprives the purchaser's home state of the power to impose a net income tax. 45 IAC 3.1-1-64.

Taxpayer has presented information detailing its representatives' activities in various states. In addition, taxpayer has provided affidavits from certain of its employees describing the number and nature of the contacts between taxpayer and its out-of-state customers. Taxpayer maintains that – because of the extensive contacts it develops with its customers – it is not primarily in the business of selling tangible personal property; it is in the business of providing a service to its customers.

Even accepting taxpayer's basic contention – that it works closely with its out-of-state customers to custom design Transport Packaging Systems – the income here at issue was derived from the sale of taxpayer's unique packaging materials. Taxpayer is not entitled to the blanket exemption from Indiana's throw-back rule because its representatives' activities – even considering that close collaboration with the out-of-state customers – are simply "generally accepted or customary acts in the industry which lead to the placing or orders." Indiana Dept. of State Revenue v. Continental Steel Corp., 399 N.E.2d 754, 759 (Ind. Ct. App. 1980). Taxpayer's representatives clearly provide assistance to past purchaser's of its products; nonetheless, that assistance is provided with the principal aim of obtaining future orders from those same customers.

The statute precludes Indiana from employing the throw-back rule on a taxpayer's out-of-state income when the foreign state "has jurisdiction to subject the taxpayer to a net income regardless of whether, in fact, the state does or does not." IC 6-3-2-2(n)(2). Although not *determinative*, taxpayer's failure to demonstrate that it is already paying a foreign state's income tax on the subject income is clearly *probative* in determining whether Indiana may properly impose its own tax on that income.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

04970583; 04980355.SLOF

SUPPLEMENTAL LETTER OF FINDINGS: 97-0583 SLOF; 98-0355 SLOF
Indiana Sales and Use Tax
For the Tax Periods 1991 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 the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Processing Exemption – Sales/Use Tax.

Authority: IC 6-2.5-2-1; IC 6-2.5-3-2; IC 6-2.5-5-1 et seq.; IC 6-2.5-5-3(b); Indianapolis Fruit Co. v. Department of State Revenue, 691 N.E.2d 1379 (Ind. Tax Ct. 1998); 45 IAC 2.2-5-10(d).

Taxpayer maintains that particular items of in-store equipment – deli prep counter, salad bar prep table, deli slicer, balloon wrap system, cardboard baler – qualify for the processing exemption.

II. Work-in-Process – Handling and Storage Equipment – Sales/Use Tax.

Authority: IC 6-2.5-5-3; Indianapolis Fruit Co. v. Department of State Revenue, 691 N.E.2d 1379, 1385 (Ind. Tax Ct. 1998); General Motors Corp. v. Indiana Dept. of State Revenue, 578 N.E.2d 399 (Ind. Tax Ct. 1991); 45 IAC 2.2-5-8; 45 IAC 2.2-5-8(e)(1); 45 IAC 2.2-5-8(f)(3); 45 IAC 2.2-5-8(f)(4).

Taxpayer argues that material handling equipment employed at its specialty foods division is used to transport work-in-process within the division. As such, the division's material handling equipment is not subject to sales or use tax. In addition, taxpayer asserts that certain items of its in-store equipment – deli cases, salad bars, self-serve bakery cases, floral cases, and lobster tanks – are used to store "work-in-process" and are similarly entitled to the exemption.

III. Refrigeration Equipment – Sales/Use Tax.

Authority: 45 IAC 2.2-5-10; 45 IAC 2.2-5-10(k).

Taxpayer argues that it is entitled to an additional 17 percent credit for certain refrigeration equipment because that refrigeration equipment is associated with its processing and manufacturing activities. In addition, taxpayer argues that it is entitled to a credit for tax previously paid on Freon-recovery equipment.

IV. Labels and Packaging Materials – Sales/Use Tax.

Authority: 45 IAC 2.2-5-15; 45 IAC 2.2-5-16.

Taxpayer maintains that labels used in its pharmacy department and labels used during its in-store manufacturing activities are not subject to sales or use tax.

V. 1991 Refund Claims – Sales/Use Tax.

Authority: IC 6-8.1-9-1.

Taxpayer argues that it is entitled to request additional credits/refunds for taxes incorrectly paid during 1991.

STATEMENT OF FACTS

Taxpayer is a major grocery store chain with, at the time of the audits, over 1,100 retail outlets. In addition, taxpayer operates 25 manufacturing and food processing facilities.

Over the course of two audits, taxpayer's records for 1991 through 1996 were examined. Three of taxpayer's retail store divisions, two dairies, one bakery, one distribution center, and one specialty foods division fell within the purview of the two audits.

The review of taxpayer's transactions resulted in proposed additional assessments of Indiana sales and use tax. Taxpayer protested those additional assessments, an administrative hearing was held, and a Letter of Findings was prepared and published. However, the original Letter of Findings did not address all of the "refund items" which the taxpayer had originally brought to the Department's attention. Accordingly, the Department determined that taxpayer was entitled to a rehearing. However, in the letter granting taxpayer's request for a rehearing, "the scope of the rehearing [was] limited to a review of those issues – included within the original protest – which were not addressed within the original Letter of Findings." In granting the rehearing, the Department gave no indication that the conclusions contained within the original Letter of Findings were erroneous or that those conclusions would be revisited.

DISCUSSION

I. Processing Exemption – Sales/Use Tax.

Indiana imposes a sales tax on retail transactions. IC 6-2.5-2-1. The state also imposes a complementary use tax on tangible personal property that is stored, used, or consumed within the state. IC 6-2.5-3-2. For both of these taxes, certain exemptions are available. IC 6-2.5-5-1 et seq. Taxpayer invokes the equipment exemption found at IC 6-2.5-5-3(b), which reads as follows:

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

Taxpayer maintains that its master scales are entitled to this exemption because the "master scales are used to weigh and label work in process items prior to being placed in the items final package."

As pointed out within the original Letter of Findings, "Without production there can be no exemption." Indianapolis Fruit Co. v. Department of State Revenue, 691 N.E.2d 1379, 1385 (Ind. Tax Ct. 1998). The original Letter of Findings came to the conclusion that taxpayer "performs a modicum of processing activities within its in-store bakery and meat departments. Conversely, work performed within taxpayer's cheese, deli, and produce departments cannot be characterized as the processing of tangible personal property." The original Letter of Findings concluded that the activities within the cheese, deli, floral, and produce departments represented the performance of services ancillary to taxpayer's retail sale of groceries. This Supplemental Letter of Findings finds no reason to challenge that original conclusion.

Accordingly, to the extent that taxpayer's master scales and parts are employed *within* the production process occurring in its in-store bakery and meat departments, the master scales and parts are entitled to exempt treatment.

Taxpayer argues that its deli prep counter, salad bar prep table, deli slicer, balloon wrap system, and cardboard bailer are entitled to the exemption because these items of equipment are found within its integrated production process. In support of that assertion, taxpayer cites to 45 IAC 2.2-5-10(d), which reads, in relevant part, as follows: "'Direct Use' begins at the point of the first operation or activity constituting part of the integrated production process and ends at the point that the processing or refining has altered the item to its completed form, including packaging, if required."

Taxpayer errs in its conclusions concerning the deli prep counter, salad bar prep table, and deli slicer. As noted within the original Letter of Findings, no "production" of tangible personal property occurs within the taxpayer's cheese, deli, and produce departments.

Taxpayer describes its balloon wrap system as follows: "The system combines various materials such as balloons, toys and ribbons and produces gift items sold in the stores." Taxpayer is not entitled to an exemption for the balloon wrap system because there is no indication that the device is in any way involved in the "production" of tangible personal property. Based upon taxpayer's description, the use of the device more closely resembles the services provided within taxpayer's cheese, deli, and produce departments.

Taxpayer maintains that its cardboard bailer is entitled to the exemption. The bailer is used to process empty cardboard boxes into baled and tied units, which are then sold to a recycle processor. Taxpayer is entitled to claim the exemption for its cardboard bailer because, under at IC 6-2.5-5-3(b), the device is directly used in the "processing" of "tangible personal property" which is sold in a subsequent retail transaction. The device acts directly upon an unmarketable raw material – empty cardboard boxes – transforming that waste material into a form which then can be sold to its recycle processor.

FINDING

As to taxpayer's master scales, the associated master scale parts, and the cardboard bailer, taxpayer's protest is sustained. The remainder of taxpayer's protest is respectfully denied.

II. Work-in-Process – Handling and Storage Equipment – Sales/Use Tax.

Taxpayer operates a specialty foods division. This division produces various deli salads and food dips in bulk. Taxpayer maintains that the material handling equipment used to transport work in process within the plant and between the plant and the individual retail stores is entitled to the exemption afforded under 45 IAC 2.2-5-8. The regulation, in relevant part, states that "Transportation equipment used to transport work-in-process or semi-finished materials to or from storage is not subject to tax if the transportation is within the production process." IAC 2.2-5-8(f)(3) *See also* IC 6-2.5-5-3.

Taxpayer believes that its status is similar to that of the automobile manufacturer in General Motors Corp. v. Indiana Dept. of State Revenue, 578 N.E.2d 399 (Ind. Tax Ct. 1991) *aff'd* 599 N.E.2d 588 (Ind. 1992). In General Motors, the automobile manufacturer shipped component automobile parts to its plants and – as taxpayer here has done – claimed an exemption for the purchase of items employed in the interdivisional transfer of those components parts. The court held that the automobile manufacturer's packing materials were part of the integral process whereby the manufacturer produced its finished product. Therefore, the automobile manufacturer's packing materials were exempt under IC 6-2.5-5-3. The court reached that decision after finding the automobile manufacturer's widely separated production facilities formed a cohesive, singular production unit in which the claimant's "manufacture of finished marketable automobiles [was] accomplished by one continuous integrated production process within which the transport of parts from component plants to assembly plants [was] an essential and integral part." General Motors, 578 N.E.2d at 404.

Taxpayer has failed to establish that the equipment, for which taxpayer now seeks the exemption, is used to transport partially processed salads and food dips within the confines of its specialty foods division. One could postulate a scenario in which an item of equipment is used to move partially manufactured food dip from one location within the specialty foods division to another. However, such is not the case here. There is nothing to indicate that the equipment is used "*within* the production process." 45 IAC 2.2-5-8(f)(3) (*Emphasis added*).

Additionally, taxpayer maintains that – similar to the automobile manufacturer in General Motors – it is entitled to an exemption for the equipment used to transport food products between the specialty foods division and its individual retail outlets. However, the automobile manufacturer was entitled to the exemption because its equipment was used to move partially automobile parts *within* a continuous, integrated production process even though that production process took place at a series of geographically distinct locations. Unlike the automobile manufacturer, it is apparent that the taxpayer's processing of its salads and food dips is complete once those products leave the specialty food division. There is nothing to indicate that the salads and food dips undergo further processing or production once they leave the specialty food division's doorway. As stipulated within the regulation itself, "Transportation equipment used to transport work-in process, semi-finished, or finished goods between plants is taxable, if the plants are not part of the same integrated production process." 45 IAC 2.2-5-8(f)(4)

Taxpayer maintains that its deli cases, salad bars, self-serve bakery cases, floral cases, and lobster tanks are entitled to the temporary store exemption set out in 45 IAC 2.2-5-8(e)(1). The regulation states that "[t]angible personal property used in or for the purpose of storing work-in-process or semi-finished goods is not subject to tax if the work-in-process or semi-finished goods are ultimately completely produced for resale and in fact resold."

The deli cases, salad bars, and floral cases do not qualify for the exemption because there is nothing to indicate that manufacturing or processing occurs within the respective departments wherein this equipment is located. As previously stated, in the absence of a finding that the taxpayer is producing or processing tangible personal property, there can be no "work-in-progress" and the related equipment will not qualify for the exemption. Indianapolis Fruit, 691 N.E.2d 1384.

Even though it has been determined that a "modicum" of manufacturing activities take place within taxpayer's in-store bakery and meat departments, the lobster tank and the self-serve bakery cases do not qualify for exempt status because these items stand outside whatever processing or production activities occur within the two departments. Rather than temporarily holding "work-in-process or semi-finished goods," these items are used to display products for which production and processing has been completed and which are ready to be selected by the ultimate consumer.

FINDING

Taxpayer's protest is respectfully denied.

III. Refrigeration Equipment – Sales/Use Tax.

The audit found that 12 percent of taxpayer's refrigeration equipment was used to store work-in-process. Accordingly the 12 percent of the refrigeration equipment – used in taxpayer's meat, seafood, bakery, and commissary departments – was classified as "exempt" pursuant to 45 IAC 2.2-5-10.

Taxpayer requests a further exemption on the ground that an additional 17 percent of its refrigeration equipment is used to store work-in-process. According to taxpayer, 17 percent of its refrigeration equipment is attributable to its deli, cheese, produce, and floral departments.

Taxpayer is not entitled to the additional exemption because, as previously stated, there is no processing or refining within those four departments. As noted in 45 IAC 2.2-5-10(k), "A processed or refined end product... must be substantially different from the component parts." There is no indication that the products produced within taxpayer's deli, cheese, produce, or floral departments are "substantially different from the component parts."

In addition, taxpayer requests an exemption for Freon recovery equipment installed within its in-store refrigeration equipment. Taxpayer believes that this equipment is entitled to the exemption because it is associated with its in-store "manufacturing" activities. Consistent with the conclusions of the audit and the original Letter of Findings, taxpayer's Freon recovery equipment is exempt to the extent that the equipment is specifically associated with taxpayer's in-store meat, seafood, bakery, and commissary departments.

FINDING

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

IV. Labels and Packaging Materials – Sales/Use Tax.

Taxpayer argues that certain of its packaging labels are entitled to exempt status under 45 IAC 2.2-5-15 and 45 IAC 2.2-5-16. Taxpayer has provided nothing to indicate that the issue was not fully addressed within the original Letter of Findings or that the conclusions contained within that document were in any way erroneous.

FINDING

To the extent that taxpayer's protest is at variance with the original Letter of Findings, taxpayer's protest is respectfully denied.

V. 1991 Refund Claims – Sales/Use Tax.

Taxpayer argues that it was entitled to a further re-examination of its 1991 records to determine whether it overpaid taxes. The audit disagreed, because "the normal statute of limitations had expired on [tax year] 1991." Consistent with that conclusion, the audit determined that "no additional credit items discovered by the taxpayer for 1991 will be considered during this investigation, and if the review of the facts indicate additional use tax was due in excess of the amounts timely claimed, no additional assessment can be made for this year."

The time limitation for filing a refund claim is found at IC 6-8.1-9-1, which states in relevant part:

> If a person has paid more tax than the person determines is legally due for a particular taxable period, the person may file a claim for a refund with the department. Except as provided in subsections (f) and (g), in order to obtain the refund, the person must file the claim with the department within three (3) years after the date of the following:
>
> (1) The due date of the return.
>
> (2) The date of the payment.

It is not disputed that taxpayer's original 1991 refund claim was timely submitted. However, by the time that the audit began examining that claim, the time for making additional 1991 refund claims – or for the Department to make additional assessments – had expired. During the audit examination, certain of taxpayer's refund claims were offset and certain claims were denied. Thereafter, in August of 2000, taxpayer submitted *additional* credit items for the audit's consideration because taxpayer viewed the initial offsets and denied claims as if they were audit payments which triggered anew the running of IC 6-8.1-9-1.

Taxpayer maintains that it is not seeking an additional refund but "believes these additional items should be considered in computing net offsets to amounts claimed." Taxpayer makes a distinction without a difference. Taxpayer filed its secondary claims in August of 2000 well beyond the time limitation contained with IC 6-8.1-9-1. The initial consideration of taxpayer's 1991 refund claim did not toll the running of the three-year limitations period specified under IC 6-8.1-9-1. Plainly stated, taxpayer is seeking a refund of overpaid 1991 taxes long after the allowable period for doing so had expired. This it may not do because, as correctly pointed out to the taxpayer, "there is no provision for legally extending this time limit."

FINDING

Taxpayer's protest is respectfully denied.