DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
COMMISSIONER'S BULLETIN

List of hazardous waste sites scored
using the Indiana Scoring Model (ISM)
Jan-03

http://www.in.gov/idem/land/statecleanup/club.html

	County/City Site Name (Type of Facility) Address	*score based on potential impact* Score Rescore	Score Date Rescore Date	Contaminant Type	Environment Affected	Status
1.	Adams/Berne National Oil Company (Bulk Plant) SR 218 & CR 150W	20.97 -/-	May-92	Fuel	Soil Surface water	Investigation in progress
2.	Delaware/Albany Muncie Race Track (Dump) SR 67 & 700N	27.70 -/-	Feb-91	Metals Solvents PCBs	Soil Groundwater	Waste isolated Landfill capped Ongoing groundwater monitoring
3.	Delaware/Muncie Stout Storage Battery (Industrial) 2505 West 8th	26.22 11.21	Dec-90 May-99	Lead	Soil	Cleanup Complete Delisting evaluation proposed 2003
4.	Elkhart/Elkhart Lusher Avenue (Landfill) CR 18 & 21st Street	31.00 -/-	Feb-91	Solvents	Groundwater	Residential water filters installed
5.	Elkhart/Elkhart Sycamore Street Site (Dry Cleaner) 100 Sycamore	13.13 -/-	May-91	Solvents	Groundwater	Alternate water supplied Delisting evaluation proposed 2003
6.	Elkhart/Middlebury Universal Adhesives/Timminco (Industrial) SR 13 South	25.00 -/-	Dec-90	Solvents	Soil Groundwater	Cleanup completed Delisting evaluation proposed 2003
7.	Fayette/Connersville Connersville Landfill (Landfill) SR 121 & Eastern Avenue	44.60 -/-	Feb-91	Solvents Metals	Soil Surface water Groundwater	Immediate removal action planned
8.	Franklin/Laurel Laurel Dump Site #1 (Dump) Various Sites	20.89 -/-	Mar-92	Solvents Metals	Soil Surface water Groundwater	Surface/subsurface waste removed Pending additional USEPA investigation
9.	Gibson/Princeton Indiana Refining (Industrial) US 41 and 350 S	30.03 -/-	Dec-90	Fuel	Soil	Surface waste removed Delisting evaluation proposed 2003
10.	Grant/Marion Grant County Landfill	15.48	Apr-91	Metals	Soil	Ongoing investigation

	(Landfill) 750 E & SR 18	-/-			Groundwater	
11.	Hancock/Fortville Meridian Road Landfill (Landfill) CR 1000 N and Meridian	40.16 -/-	Dec-90	Solvents Metals	Soil Groundwater	Investigation complete Cleanup in progress
12.	Hendricks/Clayton Clayton Wells (Commercial) Kentucky Street	27.00 -/-	Dec-90	Solvents	Groundwater	Filters supplied Periodic monitoring
13.	Huntington/Huntington Huntington Terminals (Pipeline) Meridian & Erie Stone	28.90 -/-	Dec-90	Fuel	Groundwater	Alternate water supplied
14.	Jackson/Reddington Texas Eastern (Petroleum pipeline) Southwest of Reddington	26.26 -/-	Dec-90	Fuel	Soil Groundwater	Cleanup in progress under Agreed Order
15.	Jackson/Medora United Plastics (Manufacturing) SR235 & 2nd Street	39.00 -/-	Jan-91	Solvents Metals	Soil Groundwater	Waste removal in progress
16.	Kosciusko/Warsaw Warsaw Chemical (Chem-Manufacturing) Argonne & Durban Street	47.45 -/-	Jan-91	Solvents	Soil Groundwater	Cleanup in progress under Agreed Order
17.	Lake/Hammond Calumet Containers (Industrial) 3631 Stateline Road	16.07 -/-	Dec-90	Solvents	Soil	Ongoing removal by USEPA Delisting evaluation proposed 2003
18.	Lake/East Chicago Energy Cooperative Incorporated (Industrial) 3500 Indianapolis Blvd	19.87 -/-	Dec-90	Fuel Lead	Soil Surface water Groundwater	Cleanup in progress under Agreed Order Consent Decree negotiations underway
19.	Lake/Hammond BP (Refinery) Lake Avenue & 129th Street	18.59 -/-	Mar-91	Fuel Acid/bases Lead	Soil Groundwater	Cleanup under RCRA Corrective Action
20.	Lake/Cedar Lake Schreiber Oil Company (Petroleum Storage) 10601 W 133rd Street	13.48 -/-	Dec-90	Fuel	Soil	Surface waste removed
21.	Lake/Hammond William Powers (Dump) 119th & Stateline	18.88 -/-	Mar-91	Cyanide Sulfide	Soil Surface water	Delisting evaluation proposed 2003
22.	Lawrence/Oolitic Oolitic Dump	48.87	Jan-91	Fuel	Soil	Cleanup in progress under Leaking

	(Dump) Hoosier & 4th Street	-/-			Groundwater	Underground Storage Tank Program
23.	Madison/Anderson Prime Battery (Manufacturing) 230 Jackson	29.52 -/-	Dec-91	Lead	Soil Groundwater	USEPA Removal action ongoing Investigation ongoing
24.	Marion/Indianapolis American Lead (Industrial) 2102 Hillside Avenue	21.78 -/-	Jun-99	Lead	Soil	Agreed Order signed Investigation Complete Cleanup proposed
25.	Marion/Indianapolis Avanti Corporation (Industrial) South Harris Street	40.05 23.09	May-93 Oct-98	Lead	Soil Groundwater Surface Water	USEPA removal completed Long-term operation and maintenance ongoing
26	Marion/Indianapolis Marathon Rock Island (Industrial) 500 W 86th Street	15.22 -/-	Jan-91	Gasoline Metals	Soil Surface water Groundwater	Voluntary waste cleanup in progress Ongoing investigation Ongoing negotiations for Agreed Order
27.	Marion/Speedway Marathon Terminal (Industrial) 1304 Olin Avenue	21.04 -/-	Apr-91	Fuel	Soil Surface water Groundwater	Cleanup in progress Multiple recovery wells Soil vapor extraction system in place Ongoing investigation
28.	Marshall/Bourbon Bourbon & Quad Streets Contamination (Commercial) 211 W Center Street	25.86 -/-	May-92	Solvents Fuel	Soil Groundwater	Cleanup in progress under Leaking Underground Storage Tank Program
29.	Montgomery/Crawfordsville Crawfordsville Scrap & Salvage (Dump/Scrap) 419 N Green Street	29.67 -/-	Oct-93	PCBs Lead	Soil Sediments	Entered Voluntary Remediation Program
30.	Montgomery/Crawfordsville P.R. Mallory (Electrical) SR 32 East	22.23 -/-	Sep-91	PCBs	Soil Sediments	Some surface waste removed by USEPA Pending further investigation
31.	Montgomery/Crawfordsville Shelly Ditch (Industrial) 1204 Darlington Avenue	24.04 -/-	Aug-99	PCBs	Soil Sediments	Waste study in progress under Superfund Ongoing removal action USEPA lead
32.	Morgan/Monrovia Davenport Dump (Dump) 6965 Beech Grove Road	28.20 23.20	Dec-90 Jul-00	Solvents	Surface water	USEPA removal action completed Delisting evaluation proposed 2003
33.	Porter/Wheeler Wheeler Landfill (Landfill) SR 130 & Jones Road	31.19 -/-	Jan-92	Solvents Caustics	Groundwater	Long-term monitoring under RCRA Corrective Action

34. Randolph/Union City					
A.O. Smith (Westinghouse)	44.67	Feb-92	PCBs	Soil	Cleanup in progress under Superfund
(Industrial)	-/-			Groundwater	Surface waste removed by USEPA
Frank Miller Road					
35. Randolph/Union City					
Little Mississenewa River	31.37	Jul-99	PCBs	Soil	Cleanup in progress under Superfund
(River)	-/-			Sediments	
Frank Miller Road at					
Little Mississenewa					
36. Randolph/Union City					
UTA	33.70	Sep-99	PCBs	Soil	Cleanup in progress under TSCA
(Industrial)	-/-			Groundwater	
1425 W Oak					
37. St. Joseph/Granger					
Amoco/Granger	54.76	Dec-90	Fuel	Soil	Cleanup in progress
(Industrial)	26.02	Jan-96	Solvents	Groundwater	Agreed Order signed
Adams Road					
38 St. Joseph/South Bend					
Allied Signal Corporation	41.75	May-92	Solvents	Soil	Entered Voluntary Remediation Program
(Industrial)	-/-		Fuel	Groundwater	
717 N Bendix Drive					
39. St. Joseph/South Bend					
ARCO	46.74	Jul-99	Fuel	Soil	Remedial investigation in progress
(Industrial)	-/-			Groundwater	
20630 West Ireland					
40. St. Joseph/South Bend					
Avanti	27.60	Mar-90	Solvents	Soil	Drum removal complete
(Industrial)	28.28	Mar-92		Groundwater	Remedial investigation in progress
765 S Lafayette Road					
41. St. Joseph/South Bend					
Chippewa Avenue Well Field	50.38	Aug-99	Solvents	Groundwater	Remedial investigation in progress
(Industrial)	-/-				Cleanup in progress
600 W Chippewa					
42. St. Joseph/South Bend					
Hollywood Park	12.8	Aug-02	Solvents	Groundwater	Investigation in progress
(Residential)					Ongoing negotiations for Agreed Order
23768 US 20					
43 St. Joseph/South Bend					
Toro-Wheelhorse	29.89	Mar-93	Solvents	Soil	Entered Voluntary Remediation Program
(Industrial)	-/-		Metals	Groundwater	
515 W Ireland Road					
44. Shelby/Shelbyville					
Knauf Fiberglass	43.86	Mar-91	Solvents	Groundwater	Cleanup Complete
(Industrial)	17.85	Mar-94		Surface water	No further action
240 Elizabeth					Delisting proposed 2003
45. Shelby/Shelbyville					
IGC/PSI	19.06	Mar-91	Fuel by-products	Soil	Ongoing investigation
(Industrial)	-/-		Cyanide	Groundwater	
Noble Street					

46. Shelby/Shelbyville					
TRW Incorporated	42.83	Dec-90	Solvents	Soil	Risk assessment in progress
(Industrial)	9.17	Mar-94		Groundwater	Cleanup in progress
630 Noble/513 Hendricks					
47. Spencer/Troy					
Freeman Kline Site/Troy Refinery	31.17	Jun-97	Petroleum	Soil	Immediate removal completed
(Refinery)	-/-			Surface water	Investigation in progress
SR 70 East					
48. Sullivan/Dugger					
Dugger Electric	25.82	Feb-91	Petroleum	Groundwater	Monitoring
(Commercial)	-/-		PCBs		
First and Main Streets					
49. Tippecanoe/Lafayette					
ALCOA	19.44	Dec-90	PCBs	Soil	Ongoing investigation
(Industrial)	-/-			Sediments	
3131 E Main					
50. Tippecanoe/Otterbein					
David John Property	43.8	Aug-01	Solvents	Soil	Ongoing Investigation
(Drum Recycling)				Groundwater	
Vandalia Street					
51. Tippecanoe/Lafayette					
Indiana Gas	44.35	Dec-91	Fuel by-products	Soil	Cleanup complete
(Industrial)	39.65	Jul-99	Cyanide	Groundwater	Long term monitoring
600 N 4th Street					
52. Tippecanoe/Lafayette					
TRW/Ross Gear	58.54	Dec-90	Solvents	Soil	Cleanup complete under Agreed Order
(Industrial)	42.60	Jan-96		Groundwater	
800 Heath Street					
53. Vigo/Terre Haute					
J.I. Case	31.77	Dec-90	Solvents	Groundwater	Agreed Order signed
(Industrial)	-/-				Pilot groundwater cleanup project in place
4901 N 13th Street					
54. Wayne/Richmond					
Dana/Springwood Park	43.17	Jan-91	Solvents	Groundwater	Cleanup in progress under Voluntary
(Industrial)	-/-				Remediation and Solid Waste programs
Williamsburg Pike					
55. Wells/Petroleum	25.26	Feb-92	PCBs	Soil	Pending USEPA Removal Action
Merrill Meyers Property	-/-				
(Farm Equipment)					
SR 1 & CR 900					
56. White/Monon	28.40	Dec-90	Solvents	Soil	Consent Order signed
Monon Well Field	-/-			Groundwater	Wellfield relocated
(Commercial)					Delisting evaluation proposed 2003
Main Street					

4 sites were deleted from the Commissioner's Bulletin in 2002

1 site was added to the Commissioner's Bulletin in 2002

DEPARTMENT OF NATURAL RESOURCES
Proposed Conservancy District Nonrule Policy Document
Information Bulletin #36

Subject: Procedural Guidelines for the Interpretations of the Conservancy District Article (IC 14-33). The process outlined here supersedes Information Bulletin #6, Interpretations of Conservancy District Chapter (IC 13-3-3): Contiguous Areas and Annexation (17 IR 1836-1838) and Information Bulletin #12, Procedural Guidelines for the Establishment, Development, and Dissolution of Conservancy Districts (19 IR 2801-2808).

1. History

The development of conservancy districts is an increasingly active option for addressing a variety of land use issues at the local level. Freeholders within contiguous geographic areas may use a conservancy district to achieve a dependable drinking water supply, to provide for sewage collection and treatment, to improve flood control, to reduce soil erosion, or to achieve any of numerous other water-resource community goals, either singly or in combination. IC 14-33-1-1.

The determination whether to approve the establishment of a conservancy district and the primary responsibility for the oversight of an existing conservancy district rest with a circuit court where the district is located. IC 14-33-2-26. Management of the district itself is under the control of a board of directors, selected initially by the county commissioners and subsequently by the freeholders of the district. IC 14-33-5-11.

Important roles are also served by the natural resources commission at six crucial stages in the formation, management, and dissolution of conservancy districts. At two of the stages, hearings for public input are required. At the other four, hearings may be requested. These stages also provide the primary forums for the receipt and evaluation of scientific and technical data upon which the court adjudicates and the board manages. In the receipt and evaluation of technical data, the commission brings together reports and analyses of the department of natural resources, acting primarily through the division of water, and other state and local agencies. Most common among these are the department of environmental management, state department of health, and utility regulatory commission.

In 1996, a comprehensive commission policy was established for procedural functions relating to the formation and development of conservancy districts. [Information Bulletin #12, 19 IR 2801, superseded]. Four developments were identified by the commission in support of the policy:

First, the absence of a policy led to public uncertainty and discomfort, particularly among persons who oppose the formation of a conservancy district or who oppose the development of a project within an existing conservancy district. Concerns had been expressed that the conservancy district process should be re-evaluated to assure all citizens within the boundaries of a proposed or existing district would have meaningful access to the hearing processes.

Second, the complexity of the economic and environmental issues supported the need for a consistent policy. Not the least of these issues were the regulatory functions of the state agencies and their coordination with local governmental entities bearing upon the functions of conservancy districts.

Third, the natural resources commission and the department of natural resources had experienced a statutory evolution regarding hearing processes that had not yet been accommodated for conservancy district hearings. Most noteworthy was the development of the administrative orders and procedures act (IC 4-21.5) and the "sunset review" process for these agencies that resulted in 1990 and 1991 legislation.

The fourth development was the recodification of natural resources laws set forth in P.L. 1-1995. The recodification resolved a statutory ambiguity relative to adding territory to conservancy districts. Compare IC 13-3-3-6(a) as recodified at IC 14-33-4-2(b). In part to address the ambiguity, the commission implemented Information Bulletin #6, published at 17 IR 1836 (April 1, 1994). With the recodification, Information Bulletin #6 was reconsidered and amended.

In response to these developments, Information Bulletin #12 provided guidelines for implementation of conservancy districts processes, where those processes were within the jurisdiction of the natural resources commission. A flexible guidance was designed to help the commission fully and fairly review pertinent issues. Responsibilities were identified and delegated to the commission's division of hearings, and to the department of natural resources, so as to foster better coordination among these and other pertinent agencies.

The primary purposes of Information Bulletin 33 are as follows: (1) refinement of the purposes previously addressed in Information Bulletin #12; (2) integration of the "contiguousness" analysis contained in Information Bulletin #6; (3) clarification of agency treatment of initiatives to add a purpose to an existing district; (4) inclusion of standards for determining whether a district qualifies for the purpose of flood prevention and control; and, (5) consideration of conservancy district elections.

The six crucial stages in which the commission serves are considered separately. These stages are as follows:

(1) consideration of technical issues prior to formation of a district;

(2) development of a district plan;

(3) development of a unit of work;

(4) addition of territory to an existing district;

(5) addition of a purpose to an existing district; and,

(6) dissolution of a district.

2. Consideration of Technical Issues Prior to Formation of a District

A. Petition Referral

As provided in IC 14-33-2-17(b), after a court determines a petition to create a district is in proper form and bears the needed signatures, the petition is referred to the natural resources commission for a technical review. The issues for review are set forth in subsection (c) and include whether:

(1) the proposed district appears to be necessary;

(2) the proposed district holds promise of economic and engineering feasibility;

(3) the proposed district seems to offer benefits in excess of costs and damages (or, for water supply, sewage disposal, or water storage, whether the public health will be served);

(4) the proposed district proposes to cover and serve a proper area; and,

(5) the proposed district could be established in a manner compatible with similar governmental entities.

At least one public hearing is mandatory. An interested person has "the right to be heard. At the request of an interested person, the commission shall hold hearings at the county seat of a county containing land in the proposed district." IC 14-33-2-19(a). Notice of the hearing must be published in a "newspaper of general circulation in each county containing land in the proposed district." IC 14-33-2-19(b). The commission is also required to incorporate technical assistance from any state and local agency that might have jurisdiction over the subject-matter of the proposed district.

The information received at public hearing and from the agencies is incorporated in a factfinding report to the commission from its hearing officer. The factfinding report of the commission on the proposed district is prima facie evidence of the facts in all subsequent proceedings. IC 14-33-2-23. After receipt of the report from the commission, the court sets another hearing at which an opportunity for additional evidence is provided. IC 14-33-2-25.

Of the six stages under consideration, the initial stage has traditionally been the one most likely to evoke controversy. The petitioner is always represented by an attorney. Where there is a formal remonstrance to a proposed district, the remonstrants are likely to have legal representation. Attorneys participating in the process at this stage, most notably those representing remonstrants, have sometimes urged the full application of the administrative orders and procedures act. Key elements of that act are that all testimony must be given under oath, there is an opportunity for the cross-examination of witnesses, and there is a prohibition on substantive ex parte communications between a party and the administrative law judge (or, if applied to conservancy districts, the hearing officer).

The administrative orders and procedures act does not appear to have direct application to the commission's role prior to formation of a district. Most notably, the act applies generally to agency "orders". The commission issues not an order but a factfinding report that the circuit court then utilizes as prima facie evidence. The court itself issues the order whether or not to create a conservancy district and does so only following a judicial hearing held after receipt of the commission's factfinding report. In addition, the application of the relatively formal processes of the administrative orders and procedures act appear unwieldy in relation to the informal public hearings before the commission's hearing officer; often these public hearings are attended by hundreds of participating citizens. Application of the administrative orders and procedures act may have a chilling effect upon public comment and inquiry at this preliminary stage. Finally, before the hearing date the hearing officer typically is only vaguely informed, if informed at all, of the identity of any remonstrants. The concept of party status is not generally well-defined at this stage, casting uncertainty on application of the prohibition against substantive ex parte communications.

On the other hand, fairness requires the full participation by remonstrants and by citizens seeking additional information, as well as by the petitioners, in this stage of the process. The development of a complete factfinding report is also supported by full participation by all citizens, particularly the freeholders to a proposed district. The process should be conducted in a manner which both is and has the appearance of being impartial. To these ends, the following guidelines are established:

(1) Referrals by a court for the technical review anticipated by IC 14-33-2-17(b) are directed to the following address:

Division of Hearings
Natural Resources Commission
Indiana Government Center South
402 West Washington Street, Room W272
Indianapolis, IN 46204-2739

(2) As soon as practicable after the receipt of the referral, the director of the division of hearings appoints a hearing officer. The hearing officer conducts actions appropriate to the preparation and submission to the commission of a recommended factfinding report. Included among these actions are the following:

(A) The hearing officer promptly provides a copy of the referral to the division of water of the department of natural resources, the department of environmental management, the state department of health, the utility regulatory commission, and any other agency determined by the hearing officer to have jurisdiction over the subject-matter of the referral.

Accompanied by the referral is an invitation for comment as well as the address and telephone number of a contact person within the division of water. The address for the contact person is as follows:

Division of Water–Project Development
Department of Natural Resources
Indiana Government Center South
402 West Washington Street, Room W264
Indianapolis, IN 46204-2641

(B) The hearing officer confers with the court or the clerk of the court to determine, if in addition to the petitioners, a remonstrant or other party has entered an appearance as a party to the civil proceeding.

(C) The hearing officer forwards a copy of this nonrule policy document to each of the parties. Also included are the name, address, and telephone number of the contact person within the division of water who will coordinate technical reviews.

(D) If parties other than the petitioners have entered an appearance, the hearing officer promptly sets an informal conference of the parties. An invitation to participate is also made to division of water. During the informal conference, the hearing officer will attempt to develop a consensus for the conduct of the public hearing. If a consensus cannot be developed, the hearing officer determines the conduct of the hearing in accordance with the following principles:

1. A hearing is held in the county seat of a county containing land in the proposed district.
2. The process is conducted in the most informal manner practicable that also supports fairness and meaningful public participation.
3. If issues in dispute are identified during the informal conference which require expert testimony, or for which the hearing officer otherwise determines testimony should be under oath, a second hearing may be conducted. An opportunity for cross-examination shall be provided, the hearing recorded by a court stenographer or reporter approved by the commission, and the trial rules of discovery applied. The hearing officer provides written notice to the parties of any second hearing and also announces the time, date, and location of the second hearing during the initial public hearing. Unless otherwise agreed by the parties, the hearing officer makes every reasonable effort to conduct the second hearing so that a delay is not required in the submission of a recommended factfinding report to the commission.

(E) The hearing officer drafts and tenders to the commission a recommended factfinding report. A copy of the report is forwarded to each party, to the division of water, to any agency that commented upon the proposed conservancy district, and to any other person requesting a copy. The hearing officer encloses with the report a notice of the time, date, and location when the commission is scheduled to act upon the recommended factfinding report.

(F) Following action by the commission, the hearing officer causes a copy of the factfinding report of the commission to be filed with the court and served upon the division of water, the parties, and any other person requesting a copy.

B. 'Contiguousness' of District Boundaries

As part of the factfinding report, the commission is required to determine and communicate to the court whether a proposed district would "cover and serve a proper area." IC 14-33-2-17(c)(5). Also, as provided in IC 14-33-2-22, the factfinding report must include "findings on the territorial limits of the proposed district."

Factors for determining appropriate district boundaries are set forth in IC 14-33-3-1. Among these factors is a requirement that "each part of the district is contiguous to another part." The statutory requirement of contiguousness forms an important element to the geographic requirements of the conservancy district chapter.

If lengthy but narrow boundaries are created to incorporate outlying areas into a district, problems could be posed to adjacent areas, particularly if residents of these areas are not allowed to enter the district. The establishment of a district with exclusive boundaries may hinder attempts by the residents to form a new district. These problems may be acute where a purpose of the district is to provide water supply or sewage disposal.

To establish a consistent and viable framework for determining what is "contiguous" within IC 14-33-3-1, the commission will apply the following:

As used in IC 14-33-3-1, "contiguous" will ordinarily be applied to require that each part of the district adjoin every other part. The requirement is not met where a district boundary is excessively long and narrow. What is excessively long and narrow will be evaluated on an individual basis and will more likely be a major concern for districts that would provide sewage disposal or water supply than for districts which would provide other services. Where the district would provide flood prevention and control, contiguousness will be applied to encourage a coordinated effort within a particular watershed.

An easement or other written license granted by the fee title holder to the district or proposed district may establish contiguousness. Where the district is to provide sewage treatment or water supply, freeholders must typically be provided an opportunity to connect to an adjacent line or to enter the district. As used in this paragraph, an "adjacent line" is one that is either (1) used to carry sewage and located within 300 feet of the freeholder's building; or (2) used to carry water supply and

located on an easement or license that adjoins the freeholder's property. A petitioner must provide the division of water a copy of an easement or other written license that is used to establish contiguousness.

C. Review Standards for Purpose of Flood Prevention and Control

One purpose for which a conservancy district can be established is flood prevention and control. IC 14-33-1-1(a)(1). In order to receive a favorable determination by the commission under IC 14-33-2-17 for the purpose of flood prevention and control, the petitioners must show the district would accomplish at least one of the following functions:

(1) The removal of obstructions and accumulated debris from a waterway channel.

(2) The cleaning or straightening of a channel.

(3) The development of a new and enlarged channel.

(4) The construction or repair of dikes, levees, or other flood protective works.

(5) The construction of waterway bank protection.

(6) The establishment of a floodway.

All works for the purpose of flood prevention and control must be coordinated in design, construction, and operation according to sound and accepted engineering practice so as to effect the best flood control obtainable that complies with IC 14-28-1-29.

3. Development of a District Plan

Following the creation of a conservancy district by the circuit court, the district is required to establish a "district plan." As provided in IC 14-33-6-2, a "district plan consists of an engineering report that sets forth the general, comprehensive plan for the accomplishment of each purpose for which the district was established." The district plan includes physical and technical descriptions, maps, preliminary drawings, cost estimates based upon preliminary engineering surveys and studies, copies of agreements with other governmental entities, and works of improvement.

The board of directors is required to submit a district plan to the commission for its approval within 120 days after the appointment of the board members, unless a time extension is obtained from the commission. IC 14-13-6-3. "The commission may reject a plan or any part of a plan." IC 14-13-6-4(d). "After receiving the approval of the commission, the board shall file the district plan with the court." IC 14-13-6-5(a). Following the filing by the board of directors, the court sets the district plan for a hearing. IC 14-13-6-5(b).

The conservancy district statutory article does not address review of the "approval" process at the state agency level, but administrative reviews are addressed generally in IC 4-21.5 ("administrative orders and procedures act" or "AOPA"). Licenses are governed by AOPA, and included within the definition of "license" is any "approval" required by law. IC 4-21.5-1-8. The term "license" is also defined in the statutory chapter governing the relationship of the natural resources commission and the department of natural resources to include an "approval" that may be issued by the department under Indiana law. IC 14-11-3-1(a).

Significant to the inclusion of "approval" within the definition of license contained in IC 14-11-3-1(a) is that "[n]otwithstanding any other law, the director shall issue all licenses." IC 14-11-3-1(b). A designee may act for the director in license issuance, but the designee must be a "full-time employee of the department" of natural resources. IC 14-11-3-1(c). The commission then acts as the "ultimate authority" for license determinations by the director or his designee. IC 14-10-2-3. "Ultimate authority" is defined in AOPA to mean the entity "in whom the final authority for an agency is vested by law." IC 4-21.5-1-15.

With this background, the following guidelines are established:

(1) The board of directors of a district submits any proposal for or pertaining to a district plan to the department's division of water.

(2) The division of water assists the board in identifying licenses likely to be required to implement the district plan. The division of water also coordinates with the department of environmental management and the state department of health concerning any comments pertaining to the development of a district plan.

(3) The division of water reviews and evaluates comments and alternative proposals to the district plan that may be submitted by other interested persons. The division of water shall consider only technical, engineering, and scientific issues necessary to the development of the district plan. The division may use facilitation or mediation to help resolve any conflict.

(4) The director of the division of water approves or disapproves the district plan. Notice of the agency action and the opportunity to seek administrative review under AOPA is provided to the board of directors and to any other person requesting a copy of the notice. The director of the division of water also acts upon any request to extend the time to file a district plan, and the same notification process applies. The division director shall encourage the board to file completed applications for any necessary license as soon as practicable after approval of a district plan.

(5) The commission's division of hearings conducts any administrative review sought under part (4). The commission is the ultimate authority for the department of natural resources under AOPA. Following the completion of administrative review, the division of hearings notifies the parties of the completion and that review of the commission order is subject to further action by the circuit court pursuant to IC 14-13-6-5(b).

4. Development of a Unit of Work

To implement a district plan, the board of directors of a conservancy district "shall order the preparation of the detailed

construction drawings, specifications, and refined cost estimates.... The implementation may involve all or part of the works of improvement if the part constitutes a unit that:

(1) can be constructed and operated as a feasible unit alone; and

(2) can be operated economically in conjunction with other proposed works set forth in the district plan." IC 14-33-6-8(a). "When the drawings, specifications, and cost estimates have been prepared to the satisfaction of the board [of directors], the board shall by resolution tentatively adopt and submit the drawings, specifications, and cost estimates to the commission for approval." IC 14-33-6-8(b). "Upon the receipt of the written approval," the board provides a "hearing on the drawings, specifications, and cost estimates at which any interested person must be heard." IC 14-33-6-9.

The process of the development of a unit of work is similar to that for the preparation of a district plan. An important distinction is no judicial hearing follows the commission approval. Within the context of the review process, the legislature may have envisioned the hearing by the board, following commission approval of the unit of work, serves as an informational rather than judicial or quasi-judicial process.

With this background, the following guidelines are established:

(1) The board of directors of a district submits to the division of water of the department of natural resources any proposals for or pertaining to a unit work.

(2) The division of water assists the board in identifying licenses likely to be required to implement the district plan. The division of water also coordinates with the department of environmental management and the state department of health concerning any comments pertaining to the development of a unit of work.

(3) The division of water reviews and gives due consideration to comments and alternative proposals to the unit of work which may be submitted by other interested persons. In performing this function, the division is limited to consideration of the design and construction of structures needed to implement the district plan. The division may use facilitation or mediation to help resolve any conflict.

(4) The director of the division of water approves or disapproves the unit of work. Notice of the agency action and the opportunity to seek administrative review pursuant to the administrative orders and procedures act is provided to the board of directors and to any other person requesting a copy of the notice. The director of the division of water also acts upon any request to extend the time by which to file a unit of work, and the same notification process applies. The division director shall encourage the board of a conservancy district to file completed applications for any necessary license as soon as practicable after approval of a unit of work.

(5) The commission's division of hearings conducts any administrative review sought under part (4). The commission is the ultimate authority for the department of natural resources. Following the completion of administrative review under AOPA, the division of hearings notifies the parties of the final agency action by the commission and outlines the process for obtaining judicial review. Also included in the notice is reference to the informal hearing before the board of directors pursuant to IC 14-33-6-9.

5. Addition of Territory to an Existing District

Territory may be added to an existing district according to either of two procedures. These procedures follow distinct paths and are here viewed separately:

A. Additions Initiated with the Circuit Court

Pursuant to IC 14-33-4-2(b)(1), territory may be added according to the same procedure as is provided for the establishment of a district. A petition to add territory under this subdivision will be supported by the following guidance.

After a court determines a petition to add territory to a district is in proper form and bears the needed signatures, the petition is referred to the natural resources commission for a technical review. The issues for review include whether:

1. the proposed addition appears to be necessary;

2. the proposed addition holds promise of economic and engineering feasibility;

3. the proposed addition seems to offer benefits in excess of costs and damages (or, for water supply, sewage disposal, or water storage, whether the public health will be served);

4. the proposed addition proposes to cover and serve a proper area; and,

5. the proposed addition could be implemented in a manner compatible with similar governmental entities, most notably the existing conservancy district.

At least one public hearing is mandatory. The hearing officer will be selected and conduct the hearing essentially as provided to consider the establishment of a new district. An interested person has the right to be heard. The hearing will be held at the county seat of a county containing land in the proposed district. Notice of the hearing will be published in a newspaper of general circulation in each county containing land in the district and the proposed addition. The commission hearing officer will incorporate technical assistance from a state agency having jurisdiction over the subject-matter of the district and the proposed addition.

Where territory is sought to be added to an existing district, the impact upon the district is often inconsequential. An addition may be relatively minor and involve only a small area with little or no measurable affect to the freeholders within the existing district.

The hearing officer will consider and, following the completion of the public hearing or hearings, report to the director of the division of water as to the likely consequence to the district of the proposed addition. The director of the division of water is delegated authority to determine when the proposed addition of territory is de minimis and when its review by the commission is unlikely to be productive. When the division director makes such a determination, the hearing officer's report is forwarded directly to the court as the commission's factfinding report. This report is to be submitted within 30 days of receipt by the division of water of a completed petition to add territory to a district.

B. Additions Initiated with the Board of Directors

As provided in IC 14-33-4-2(b)(2), an addition of territory to an existing district may also be initiated by a board resolution. The resolution follows a petition by the majority of freeholders or the municipality in the area proposed to be added. The resolution and petition are filed with the court, and the court sets the matter for hearing. Notice of the hearing is sent to the natural resources commission and to the freeholders in the district and in the area proposed to be served by the additional territory. The notice to the commission should be forwarded to the division of hearings.

Upon receipt of the notice, the division of hearings will notify the division of water of the department of natural resources and other state agencies which appear to have jurisdiction over the subject of the addition. A conservancy district board wishing to apply IC 14-33-4-2(b)(2) is urged to communicate its wish to the division of hearings as soon as practicable so that expeditious technical discussions may be pursued with the appropriate state agencies. The recommendation is that this communication occur at least 60 days prior to the setting of a hearing under IC 14-33-4-2(d). Adequate review is essential to a favorable comment by the commission to the court. The division director of the division of water is delegated authority by the commission to report favorably, to make recommendations to modify or condition the addition of territory, or to object to the addition of territory. See particularly IC 14-33-4-2(e).

6. Addition of a Purpose to an Existing District

A purpose may be added to an existing district in either of two ways. The same procedure may be used as is provided for the establishment of a district. IC 14-33-1-4(1). If this subdivision is applied, reference should be made to the process for the addition of territory pursuant to part 5A of this nonrule policy document.

In the alternative, IC 14-33-1-4(2) provides that the conservancy district board may add a purpose based upon a petition signed by at least 10% of the freeholders of the district. If the resolution is passed, the resolution and petition are filed with the county court and the court sets the matter for hearing. The court forwards to the commission the notice of hearing along with a copy of the resolution "at least 30 days before the date of hearing." IC 14-33-1-5.

Upon receipt of the notice, the division of hearings will notify the department's division of water and other state agencies that appear to have jurisdiction over the subject of the addition. A conservancy district board wishing to apply IC 14-33-1-4(2) is urged to communicate its wish to the division of hearings as soon as practicable so that expeditious technical discussions may be pursued with the appropriate state agencies. The recommendation is this communication occur at least 60 days before setting a hearing under IC 14-33-1-5(b). Adequate review is essential to a favorable comment by the commission to the court. The division director of the division of water is delegated authority by the commission to report favorably, to make recommendations to modify or condition the addition of territory, or to object to the addition of territory. See particularly IC 14-33-1-5(e).

7. Dissolution of a District

A conservancy district may be dissolved either because the district is "no longer of benefit" (IC 14-33-15) or because "construction of works of improvement has not begun within six (6) years after the district plan." (IC 14-33-16). Where works of improvement are not begun, there is no statutory participation by the natural resources commission; no procedural issue is presented. A district dissolved due to loss of benefit applies "the same procedure used to establish a district. The petition must set forth the change of circumstances that causes the district to lose the district's benefit." IC 14-13-15-1.

Because the process is essentially the same for the dissolution as for the establishment of a conservancy district, the same analysis applies to the development of an appropriate process. With this background, the following guidelines are established:

(1) Referrals by a court for the technical review anticipated by IC 14-33-15-1 are directed to the division of hearings.

(2) As soon as practicable after the receipt of the referral, the director of the division of hearings appoints a hearing officer. The hearing officer conducts actions appropriate to the preparation and submission to the commission of a recommended factfinding report. Included among these actions are the following:

(A) The hearing officer promptly provides a copy of the referral to the division of water of the department of natural resources, the department of environmental management, the state department of health, the utility regulatory commission, and any other agency determined by the hearing officer to have jurisdiction over the subject-matter of the referral. Accompanied by the referral is an invitation for comment as well as the address and telephone number of a contact person within the division of water.

(B) The hearing officer confers with the court or the clerk of the court to determine, if in addition to the petitioners, a remonstrant or other party has entered an appearance as a party to the civil proceeding.

(C) The hearing officer forwards a copy of this nonrule policy document to each of the parties. Also included are the name, address, and telephone number of the contact person within the division of water.

(D) If parties other than the petitioners have entered an appearance, the hearing officer promptly sets an informal conference of the parties. An invitation to participate is also made to division of water.

During the informal conference, the hearing officer will attempt to develop a consensus for the conduct of the public hearing. If a consensus cannot be developed, the hearing officer determines the conduct of the hearing in accordance with the following principles:

(1) A hearing is held the county seat of a county containing land in the district.

(2) The process is conducted in the most informal manner practicable which also support fairness and meaningful public participation.

(3) If issues in dispute are identified requiring expert testimony, or for which the hearing officer otherwise determines testimony should be under oath, a second hearing may be conducted. An opportunity for cross-examination shall be provided, the hearing recorded by a court stenographer or reporter approved by the commission, and the trial rules of discovery applied. The hearing officer announces the time, date, and location of the second hearing during the initial public hearing. Unless otherwise agreed by the parties, the hearing officer makes every reasonable effort to conduct the second hearing so that a delay is not required in the submission of a recommended factfinding report to the commission.

(4) The hearing officer determines whether either of the following matters are in issue: (a) whether the board has failed, within two years of establishment of the conservancy district, to produce satisfactory evidence of progress in the preparation of the district plan; or, (b) whether federal or state money, or both, contemplated in the petition for the establishment of the district, appears to be unavailable. See IC 14-33-15-2.

(E) The hearing officer drafts and tenders to the commission a recommended factfinding report. A copy of the report is forwarded to each party, to the division of water, to any agency that commented upon the conservancy district, and to any other person requesting a copy. The hearing officer encloses with the report a notice of the time, date, and location when the commission is scheduled to act upon the recommended factfinding report.

(F) Following action by the commission, the hearing officer causes a copy of the factfinding report of the commission to be served upon the division of water, the parties, and any other person requesting a copy.

8. Election of Board of Directors and Notice to Commission

Neither the natural resources commission nor the department of natural resources have jurisdiction over board elections. The board of commissioners of the county appoints the board of directors for the new district within twenty (20) days after a court order establishing a district. IC 14-33-5-1. A person adversely affected by an action committed or omitted by the board may petition the court having jurisdiction over the district to enjoin or mandate the board. IC. 14-33-5-24.

The board chair is required by IC 14-33-5-17 to promptly notify the commission when board members are elected or appointed. The department's division of water maintains a database of conservancy districts and board members. By this Information Bulletin, the commission identifies the following address for the notice required by IC 14-33-5-17:

Division of Water–Project Development
Department of Natural Resources
Indiana Government Center South
402 West Washington Street, Room W264
Indianapolis, IN 46204-2641

Service at this address will also help assure the division of water's database is current. For more information see http://www.IN.gov/dnr/water/pdf/con_dist_dir_2001.pdf.

9. Application and Modification

This information bulletin is intended to be liberally construed in order to support efficient administration by the natural resources commission, acting in cooperation with other agencies, of its conservancy district responsibilities. Modifications to the document may be needed based upon experience or legislative changes. Suggestions for modification of the document are welcomed from the public and should be forwarded to the division of hearings at the address set forth previously. Send any suggestions to the address for the division of hearings shown above or by email to slucas@dnr.state.in.us.

NATURAL RESOURCES COMMISSION
DIVISION OF HEARINGS
Information Bulletin #1(First Amendment)

SUBJECT: Establishment of Division of Hearings; Indexing of Final Adjudicative Agency Decisions; Transcript Fees. To be noted, the information outlined here supersedes Information Bulletin #1, Establishment of Division of Hearings, Indexing of Final Adjudicative Agency Decisions, Transcript Fees (13 IR 1938).

ESTABLISHMENT OF THE DIVISION OF HEARINGS

The Department of Natural Resources is among those state agencies that are governed by IC 4-21.5 (sometimes called the "administrative orders and procedures act" or the "administrative adjudication act") and IC 4-22 (rule adoption). The Indiana general assembly has provided that effective July 1, 1990, all hearings required by IC 4-21.5 and IC 4-22 for the Department will be conducted on behalf of the Natural Resources Commission. See IC 14-10-2-3 and IC 14-34-2-2.

To assist in the separation of the hearings functions from other legal functions of the Department of Natural Resources, the Natural Resources Commission has, by resolution, established under IC 14-10-2-2 a "division of hearings." The Commission approved the resolution on January 25, 1990. As required by statute, the resolution was considered and approved by the Governor on April 27, 1990 and became effective July 1, 1990.

The resolution provides in part: "The division of hearings is established, under the natural resources commission, to be coordinated by the chief administrative law judge: (1) to conduct hearings and proceedings relative to the administrative adjudication act, the rule adoption act, the conservancy district act, and as otherwise specified by the commission; and (2) to provide assistance to the commission and the other boards of the department in seeking to conform with the legal requirements for the conduct of their meetings."

The current offices of the Division of Hearings are located at Indiana Government Center South, 402 West Washington Street, Room W272, Indianapolis, Indiana. The telephone number is (317) 232-4699.

INDEXING OF FINAL ADJUDICATIVE AGENCY DECISIONS

The administrative adjudication act provides in IC 4-21.5-3-32 that an agency shall index and make available all written final orders for public inspection and copying. In addition to providing better communications to the regulated public, this provision acknowledges that an agency may utilize an indexed order as precedent. The sanction applicable to an agency that does not index its orders is that the agency generally may not use nonindexed orders as precedent.

The Division of Hearings maintains a database on the Internet, called "CADDNAR." Accessible through CADDNAR are decisions rendered by the Commission following the completion of a contested proceeding. Included are those following hearing or summary judgment (or involuntary dismissal, where a noteworthy point of law is considered). In addition, upon the request of the parties, settlement agreements are included which have notable precedential value. CADDNAR includes all such decisions since 1978, when the agency began regularly assigning adjudicatory cases to Administrative Law Judges. An attempt is made to track the history of individual decisions taken on judicial review to a circuit or superior court or on appeal. CADDNAR is a searchable database available on-line at the Natural Resources Commission Homepage at http://www.ai.org/cgi-bin/nrc/decision_list.pl.

During its meeting of November 22, 1988, the Natural Resources Commission, by resolution, adopted CADDNAR as the agency index under IC 4-21.5-3-32 for final orders of the Department of Natural Resources. The Commission also specified that material included in CADDNAR may be used as precedent for actions controlled by the administrative adjudication act.

Use of CADDNAR was first acknowledged by the Indiana Court of Appeals in Peabody Coal v. Indiana DNR, (1994 Ind. App.), 692 N.E.2d 925. Subsequent reported decisions have also acknowledged CADDNAR.

TRANSCRIPT FEES

Under the administrative adjudication act, the party that initiates judicial review of a final agency order is generally responsible for the costs of transcript preparation. As provided in IC 4-21.5-5-13(d), the agency "shall charge" the person seeking judicial review "with the reasonable cost of preparing any necessary copies and transcripts for transmittal to the court." The statutory subsection also clarifies that preparation costs include more than copying expenses.

The Natural Resources Commission has adopted 312 IAC 3 to assist in its implementation of the administrative adjudication act. 312 IAC 3-1-14 governs court reporters and transcripts. Subsection (c) provides, in part, that the "party who requests a transcript… shall pay the cost of the transcript: (1) as billed by the court reporting service; or (2) if the transcript is prepared by an employee of the commission, as determined from time to time by the commission on a per page basis after consideration of all expenses incurred in the preparation of the transcript."

The Natural Resources Commission at its March 24, 1998, meeting has determined the per page basis for a transcript prepared by an employee of the commission according to the 1988 resolution. "The Natural Resources Commission resets the fee for transcript preparation at $3.80 per page."

NATURAL RESOURCES COMMISSION

Information Bulletin #16 (First Amendment)

Civil Penalty Schedule for Violations of Oil and Gas Production Laws

1. INTRODUCTION

The department of natural resources (the "DNR") is the state agency responsible for the regulation of oil and gas exploration, development, and site reclamation. The statutory authority is set forth at IC 14-37, with rules to help administer the authority codified

at 312 IAC 16). One element of enforcement to help assure compliance with these laws is the authority to assess civil penalties through the DNR's division of oil and gas.

The Natural Resources Commission caused the original civil penalty schedule to be published in the Indiana Register as Information Bulletin #16 on September 1, 1997. The First Amendment to Information Bulletin #16 is made effective January 1, 2003.

2. PURPOSE

The purpose of this nonrule policy document is to present a process for the assessment of civil penalties which is consistent and equitable. This penalty policy is designed to deter owners or operators from violating the law. The civil penalties are structured to provide incentives to take precautions against falling into noncompliance before it occurs. One exception is for significant violations, including but not limited to intentional waste fluid dumping or exceeding maximum allowable injection pressure which has the potential for damaging an Underground Source of Drinking Water (USDW). For these and similar significant violations, the division may assess a maximum penalty of up to ten thousand dollars ($10,000) per day for every day that the violation exists (IC 14-37-13-3).

3. PENALTY DETERMINATION

The civil penalty policy described in this nonrule policy document is intended to account for various factors in the assessment of an appropriate civil penalty for noncompliance with the statutes or rules. The director of the DNR's division of oil and gas shall determine the base civil penalty to be assessed by considering the following criteria:

A. *History of Violations*: The division director shall consider the operator's history of previous violations during the preceding twelve months. Each violation shall be counted without regard to whether it led to a civil penalty assessment.

B. *Seriousness:* The division director shall consider the seriousness of a violation, including any actual or potential damage to the environment or hazard to the health and safety of the public;

C. *Negligence*: The division director shall consider the degree of fault in the occurrence of, or failure to correct, a violation.

4. PENALTY MATRIX

Based on these criteria for a penalty determination, the matrix shall be used by the division to assess base civil penalties. The matrix was designed to remove excessive subjectivity from the penalty assessment phase. The matrix contains the following information:

A. *Violation Type*: Includes an alphabetical list of all (coded) violations observed by the division of oil and gas.

B. *Division Response*: This category includes the information on the initial action to be taken by the individual who noted the noncompliance, through the final action by the division for referral to the attorney general's office.

C. *Base Penalty Amount*: Includes the amount of the penalty to be assessed based upon the number of occurrences and the type of violation.

In the case of continuing violations, the DNR has the authority to immediately assess a penalty, regardless of the noncompliance. In these cases, the penalty can be calculated based on the number of days the violation or noncompliance occurred. The base civil penalty derived from the penalty matrix could then be multiplied by the number of days of violation. A copy of the penalty matrix is attached to, and made a part of, this policy.

Where warranted by the facts of a particular case, the division may omit the penalty stage and escalate directly to permit revocation. Examples include when an owner or operator is bankrupt, deceased, or is not serviceable. The penalty phase may also be bypassed where an operator has three or more outstanding violations and has not contacted the division or made any attempt to correct the noncompliances.

The following factors may be considered in mitigating the penalty, once a violation has been abated:

A. Actions after the violation.

B. Ability to pay.

C. Cost to DNR of the enforcement action.

D. Economic benefit.

E. Other unique factors found appropriate by the division.

These factors are discussion in more detail:

1. Actions after the violation

Good faith can be manifested by the violator promptly reporting, and correcting, its noncompliance. Assuming such self-reporting is not required by law, this behavior can result in mitigation of the penalty. Prompt correction of environmental problems also can constitute good faith. Lack of good faith, on the other hand, can result in the denial of penalty mitigation. Subject to this guidance, the division director may make adjustments up or down, on a case by case basis. The following percentage reductions of the base civil penalty will be considered for operators demonstrating good faith efforts in achieving compliance:

- If the violation is abated immediately or within 25% of the time set for abatement, including extensions of time for abatement, a reduction of 90% of the base penalty will be considered.
- If the violation is abated within 26% to 50% of the time set for abatement, a reduction of 80% of the base penalty will be considered.
- If the violation is abated within 51% to 75% of the time set for abatement, a reduction of 50% of the base penalty will be considered.

- If the violation is abated within 76% to 100% of the time set for abatement, a reduction of 25% of the base penalty will be considered.
- If a violation was self-reported or if an error was made in specific reporting requirements, the director may reduce the penalty by up to 90%.

2. Ability to pay

The burden to demonstrate inability to pay rests on the respondent, as it does with any mitigating circumstances. Thus, a respondent's inability to pay usually will be considered at the settlement stage, and then only if the issue is raised by the respondent. If the respondent fails to provide sufficient information, such as state and federal income tax returns for at least three years, the division will disregard this factor in adjusting the penalty.

When it is determined that a violator cannot afford the penalty prescribed by this policy, or the payment of all or a portion of the penalty will preclude the violator from achieving compliance or from carrying out remedial measures which DNR believes to be more important than the deterrence effect of the penalty, the following options may be considered:

- a delayed payment schedule. Such a schedule may even be contingent upon an increase in sales or some other indicator of improved business.
- an installment payment plan with interest.
- straight penalty reductions as a last recourse.

The amount of any downward adjustment of the penalty is dependent on the individual financial facts of the case.

3. Cost to DNR of Enforcement Action

Pursuant to IC 14-37-13-7, if an order is issued under this article (or as a result of any administrative proceeding under this article), the court or the division director may assess against any party to the proceeding the costs and expenses, including attorney's fees, reasonably incurred by that person with respect to the proceeding, including any judicial review of a final agency action. The division director shall determine the amount of these costs and expenses.

4. Economic Benefit

An economic benefit component should be considered when a violation results in significant economic benefit to the violator. Whenever possible, the economic benefit of noncompliance must be examined; however, for many regulatory requirements, the economic benefit of noncompliance will be difficult to quantify. Enforcement personnel should consider the following types of economic benefit from noncompliance in determining the economic benefit component:

- Benefit from delayed costs
- Benefit from avoided costs
- Other benefits (e.g., profits for period of startup prior to obtaining a permit)

5. Other unique factors

This policy allows an adjustment for unanticipated factors which may arise on a case by case basis. Enforcement personnel have the discretion to make adjustments to the civil penalty for such reasons.

Possible circumstances that may necessitate a downward adjustment in the base civil penalty include:

- It is highly unlikely that the DNR will be able to recover the full civil penalty in litigation
- Defects in evidence, loss of witness, revision of rules, or other complication
- Factors which may make negotiation desirable or reasonable.

5. MINIMUM PENALTY

The minimum penalty, regardless of calculations, will not be less than fifty dollars ($50).

6. WAIVER OF CIVIL PENALTIES

The division director upon his own initiative or upon written request, may waive the civil penalty in whole or in part if he or she determines that the penalty would be demonstrably unjust. The basis for every waiver shall be fully explained and documented in the records of the case.

7. ADMINISTRATIVE REVIEW OF CIVIL PENALTY ASSESSMENT

The owner or operator assessed a civil penalty may contest the proposed penalty by requesting administrative review within thirty days of receipt of the Notice of Penalty Assessment. A petition for review in writing must be sent which states facts demonstrating that:

A. The petitioner is a person to whom the order is specifically directed;

B. The petitioner is aggrieved or adversely affected by the order; or

C. The petitioner is entitled to review under any law.

The request for administrative review shall be delivered to:

Natural Resources Commission
Division of Hearings
Indiana Government Center South
402 W. Washington St., Room W272
Indianapolis, IN 46204

Typically, the first stage of a proceeding after filing a request for administrative review is to set the proceeding for a prehearing conference. If the respondent believes that it is not liable or that the circumstances of its case justify mitigation of the proposed penalty, these issues can be discussed before or during the prehearing conference. In many cases, the fact of a violation will be less of an issue than the amount of the penalty assessed. The burden always is on the violator to justify any mitigation of the assessed penalty.

8. FINAL ASSESSMENT AND PAYMENT

If an operator fails to request a hearing as provided in IC 4-21.5-3-7, the proposed assessment becomes a final order of the director; the penalty assessed becomes immediately due and payable upon expiration of the time allowed to request a hearing. The division director retains the discretion, however, to enter into a settlement agreement with an operator which fails to request review of a civil penalty.

Penalty Matrix
Division of Oil and Gas
Division Response

						Number of Occurrences (Previous Year)		
Violation	1st Action	2nd Action	3rd Action	4th Action	5th Action	Occurrences 1-3	Occurrences 4-6	Occurrences >6
ANN1	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General		$2,000	$4,000	$8,000
AWF1	NOV w/ Penalty	Sec. 8 Complaint	Attorney General			1/3 Assess. Amt	2/3 Assess. Amt	Assess. Amt.
BC1	WONC	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General	$500	$1,000	$2,000
DP1*	NOV w/ Penalty	Sec. 8 Complaint	Attorney General			$500	$1,000	$2,500
DP1**	NOV w/ Penalty	Sec. 8 Complaint	Attorney General			$250	$500	$1,000
DP1***	NOV w/ Penalty	Sec. 8 Complaint	Attorney General			$500	$1,000	$2,500
FH1	WONC	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General	$50	$100	$200
FH2	WONC	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General	100	$200	$400
FH3	WONC	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General	$50	$100	$200
FH4	WONC	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General	$50	$100	$200
FH5	WONC	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General	$50	$100	$200
FH6	WONC	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General	$50	$100	$200
FH7	WONC	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General	$50	$100	$200
FH8	WONC	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General	$50	$100	$200
FRL1	WONC	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General	$50	$100	$200
IC1	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General		$250	$500	$1,000
IC2	NOV w/ Penalty	Penalty	Sec. 8 Complaint	Attorney General		$250	$500	$1,000
IC3	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General		$250	$500	$1,000
IC4	NOV w/ Penalty	Penalty	Sec. 8 Complaint	Attorney General		$250	$500	$1,000
ID1	WONC	Penalty	Sec. 8 Complaint	Attorney General		$50	$100	$200
IP1	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General		$1,000	$2,000	$4,000
IP2	NOV w/ Penalty	Penalty	Sec. 8 Complaint	Attorney General		$1,000	$2,000	$4,000
IP3	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General		$1,000	$2,000	$4,000
IP4	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General		$1,000	$2,000	$4,000
IP5	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General		$1,000	$2,000	$4,000
MIF1	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General		$2,500	$5,000	$10,000
MIF2	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General		$2,500	$5,000	$10,000
MIT1	NOV w/ Penalty	Sec. 8 Complaint	Attorney General			$2,500	$5,000	$10,000
OPM1	WONC	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General	$50	$100	$200
PP1	WONC	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General	$100	$200	$400
QMR1	WONC	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General	$50	$100	$200
RP1	WONC	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General	$100	$200	$400
SPC1	NOV w/ Penalty	Sec. 8 Complaint	Attorney General			$2,500	$5,000	$10,000
SPR1	WONC	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General	$100	$200	$500
SR1	WONC	NOV w/o Penalty	Penalty	Sec.8 Complaint	Attorney General	$100	$200	$400
TB1	WONC	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General	$100	$200	$400
UNI1	NOV W/Penalty	Sec. 8 Complaint	Attorney General			$2,500	$5,000	$10,000
UNI2	NOV W/Penalty	Sec. 8 Complaint	Attorney General			$2,500	$5,000	$10,000
UNI2(SR)	NOV W/Penalty	Sec. 8 Complaint	Attorney General			$100	$250	$500
UNI3	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General		$2,500	$5,000	$10,000
UNI4	NOV w/ Penalty	Sec.8 Complaint	Attorney General			$2,500	$5,000	$10,000
WFD1	WONC	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General	$1,000	$2,000	$4,000
WFD2	WONC	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General	$2,000	$4,000	$8,000
WFD3	NOV w/ Penalty	Sec. 8 Complaint	Attorney General			$2,500	$5,000	$10,000
WFD4	WONC	NOV w/o Penalty				$1,000	$2,000	$4,000
WFD5	WONC	NOV w/o Penalty				$1,000	$2,000	$4,000
WFD6	WONC	NOV w/o Penalty				$1,000	$2,000	$4,000
WIP1	NOV w/ Penalty	Sec. 8 Complaint	Attorney General			$1,000	$2,000	$4,000
WNP1	WONC	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General	$250	$500	$1,000
WNP2	WONC	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General	$250	$500	$1,000
WNP3	WONC	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General	$250	$500	$1,000

WNP4	WONC	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General	$250	$500	$1,000
WNP5	WONC	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General	$250	$500	$1,000
WNP6	WONC	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General	$250	$500	$1,000
WOP1	WONC	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General	$500	$1,000	$2,000
WR1	WONC	NOV w/o Penalty	Penalty	Sec. 8 Complaint	Attorney General	$50	$100	$200

Legend:

ANN	Improper Annulus
AWF	Annual Well Fee
BC	Bond Cancellation
DP	Drilling Permit
FH	Fire Hazards
FRL	File Review Letter
IC	Improper Casing
ID	Lease and Well Identification
IP	Improper Pit
MIF	Mechanical Integrity Failure
MIT	Mechanical Integrity Test
OPM	Operation and Maintenance
PP	Pit Permit (Authorization)
QMR	Quarterly Monitoring Report
RP	Rotary Pit
SPC	Spill Containment/ Cleanup
SPR	Spill Reporting
SR	Site Restoration
TB	Transfer and Bond
UNI	Unauthorized Injection
WFD	Waste Fluid Disposal
WIP	Well Improperly Plugged
WOP	Well Operation
WNP	Well Not Plugged
WONC	Warning of Non-Compliance
WR	Well Record
NOV	Notice of Violation
NOV W/O	Notice of Violation (Without Penalty)

Number of Occurrences means the number during the previous 12-month period except for AWF.
Number of Occurrences for AWF means the number for the operator.
DP1* Response for drilling without a permit.
DP1** Response for changing status of well without permit; Class II to oil well.
DP1*** Response for changing status of well without permit; oil well to Class II.

NATURAL RESOURCES COMMISSION

Information Bulletin #35

January 1, 2003

Type I and Type II Marine Sanitation Devices on Navigable Waters of Indiana

This information bulletin identifies Indiana rivers, streams, and lakes where a person can lawfully operate a Type I Marine Sanitation Device ("Type I MSD") or a Type II Marine Sanitation Device ("Type II MSD") on a motorboat. The bulletin was prepared by the Department of Natural Resources, Division of Law Enforcement, in consultation with the U. S. Coast Guard.

The use of marine sanitation devices is governed by federal statutes and regulations—particularly those promulgated by the U.S. Coast Guard and the U.S. Environmental Protection Agency. A "marine sanitation device" refers to any equipment for installation on board a boat that is designed to receive, retain, treat, or discharge sewage, and any process to treat such sewage. A Type I MSD means one that, under federal testing, produces an effluent having a fecal coliform bacteria count not greater than 1,000 per 100 milliliters and no visible floating solids. A Type II MSD means one that, under the federal testing, produces an effluent having a fecal coliform bacteria count not greater than 200 per 100 milliliters and suspended solids not greater than 150 milligrams per liter.

A "Type III marine sanitation device" ("Type III MSD") means one that is designed to prevent the overboard discharge of treated or untreated sewage or any waste derived from sewage. A Type III MSD is sometimes referred to as a holding tank and does not provide for the treatment of sewage. Waste from a Type III MSD must be disposed through a licensed pumpout facility. This information bulletin is not primarily directed to the use of Type III MSDs.

Both a device and a waterway must qualify if sewage is to be lawfully discharged through a Type I MSD or a Type II MSD. For the device to qualify, it must be approved by the U.S. Coast Guard and must be properly maintained and operated. For a waterway to qualify, it must be (1) legally navigable; and, (2) suitable, in fact, for direct interstate boating transportation. A Type

I MSD or Type II MSD cannot be used upstream from where a natural or man-made obstruction in the waterway reasonably prevents a boat from advancing. The waterways in Indiana where a Type I MSD or a Type II MSD may lawfully be used are those that can, in fact, be traveled by a boat large enough to be equipped with a Marine Sanitation Device. Use of a Type I MSD or Type II MSD on waters other than those listed in this information bulletin is unlawful.

Improper use of a Type I MSD or a Type II MSD is a violation of federal law, enforced primarily through the U.S. Coast Guard. In addition, the Natural Resources Commission has incorporated this portion of the regulations into state rules, so improper use of a Type I MSD or a Type II MSD is also a violation of state law, enforced primarily through the Division of Law Enforcement. See particularly 312 IAC 5-5-2(c): "A person who maintains or operates a watercraft, upon Lake Michigan or another waterway described in 40 CFR 140.3, that is equipped with a Type I marine sanitation device or a Type II marine sanitation device, must comply with 33 CFR 159 and 40 CFR 140."

The Natural Resources Commission previously identified its "Roster of Indiana Waters Declared Navigable or Nonnavigable" in Information Bulletin #3 (First Revision) published at 20 Indiana Register 2920-2939 (July 1, 1997) with a listing by county also available at http://www.in.gov/nrc/policy/IV.html. The waterways where a Type I MSD or a Type II MSD may be lawfully used in Indiana are as follows:

Clark County

(1) Fourteen Mile Creek: *0.6 river miles upstream from its junction with the Ohio River*

(2) Ohio River

(3) Silver Creek: *0.78 river miles from its junction with the Ohio River (S.R. 62 Bridge)*

Crawford County

Big Blue River: *3.0 river miles upstream from its junction with the Ohio River*

(2) Little Blue River: *3.6 river miles upstream from its junction with the Ohio River*

Ohio River

Dearborn County

Great Miami River: *Throughout the county*

Hogan Creek (including North Fork and South Fork): *Hogan Creek (Main Stem) from its junction with the Ohio River for the entire length (0.4 river miles); North Fork of Hogan Creek from its junction with Hogan Creek for 4.9 river miles; and, South Fork of Hogan Creek from its junction with Hogan Creek for 5.0 river miles*

Laughery Creek: *6.0 river miles upstream from its junction with the Ohio River*

(4) Ohio River

(5) Tanners Creek: *10.6 river miles upstream from its junction with the Ohio River*

(6) Whitewater River: *Throughout the county*

(7) Wilson Creek: *1.9 river miles upstream from its junction with the Ohio River*

Harrison County

(1) Big Blue River: *3.0 river miles upstream from its junction with the Ohio River.*

(2) Buck Creek: *0.3 river miles upstream from its junction with the Ohio River*

(3) Indian Creek: *0.9 river miles upstream from its junction with the Ohio River.*

(4) Mosquito Creek: *0.25 river miles upstream from its junction with the Ohio River*

(5) Ohio River

Floyd County

(1) Ohio River

(2) Silver Creek: *0.78 river miles from its junction with the Ohio River (S.R. 62 Bridge)*

Jefferson County

Indian-Kentuck Creek: *2.2 river miles upstream from its junction with the Ohio River*

(2) Ohio River

Lake County

(1) Indiana Harbor and Ship Canal: *from the entrance on Lake Michigan to the Outer Harbor Basin. On the Outer Harbor Basin, for 1.4 river miles to the Turning Basin at the Forks of the Calumet River Branch and Lake George Branch. On the Calumet River Branch southward for 0.4 river miles (Columbus Drive Street Bridge). On the Lake George Branch for 0.6 river miles to where it dead-ends.*

(2) Lake Michigan

LaPorte County

(1) Lake Michigan

(2) Trail Creek: *upstream for 1.0 river miles from its junction with Lake Michigan*

Ohio County

Arnold Creek: *0.25 river miles upstream from its junction with the Ohio River*
Laughery Creek: *6.0 river miles upstream from its junction with the Ohio River.*
Ohio River

Perry County

Anderson River: *0.11 river miles upstream from its junction with the Ohio River*
Big Oil Creek: *0.05 river miles from its junction with the Ohio River (S.R. 66 Bridge)*
Deer Creek: *0.03 river miles from its junction with the Ohio River (S.R. 66 Bridge)*
(4) Ohio River

Porter County

(1) Burns Ditch: *See* **Portage Burns Waterway**
(2) Portage Burns Waterway: *For its entirety*
(1.3 river miles) as a connection between the Little Calumet River and Lake Michigan
(3) Lake Michigan
(4) Little Calumet River: *On the West Fork of the Little Calumet River for 1.5 river miles (South Shore Marina). On the East Fork of the Little Calumet River for 1.5 river miles (where it forms a "Y")*

Posey County

Big Creek: *5.4 river miles upstream from its junction with the Ohio River*
McFadden Creek: *0.3 river miles upstream from its junction with the Ohio River*
New Harmony Cut-Off: *0.72 river miles upstream from its downstream junction with the Wabash River*
(4) Ohio River
(5) Wabash River: *42.5 river miles upstream from its junction with the Ohio River*

Spencer County

(1) Anderson River: *0.11 river miles upstream from its junction with the Ohio River*
(2) Ohio River
(3) Sandy Creek: *2.6 river miles upstream from its junction with the Ohio River*

Switzerland County

(1) Bryant Creek: *2.6 river miles upstream from its junction with the Ohio River*
(2) Goose Creek: *0.5 river miles upstream from its junction with the Ohio River*
(3) Grants Creek: *2.5 river miles upstream from its junction with the Ohio River*
(4) Indian Creek: *4.1 river miles upstream from its junction with the Ohio River*
(5) Ohio River
(6) Plum Creek: *1.25 river miles upstream from its junction with the Ohio River for 2.9 river miles*
(7) Turtle Creek: *1.3 river miles from its junction with the Ohio River*

Vanderburgh County

Bayou Creek: 0.06 river miles upstream from its junction with the Ohio River
(2) Ohio River
(3) Pigeon Creek: *0.03 river miles upstream from its junction with the Ohio River (the 1891 Ohio Street Bridge)*

Warrick County

Little Pigeon Creek: *1.5 river miles upstream from its junction with the Ohio River (Yankeetown Bridge on C.R. 250W)*
(2) Ohio River

DEPARTMENT OF STATE REVENUE

02960198.LOF

LETTER OF FINDINGS NUMBER: 96-0198
Income Tax
For Tax Periods 1990-1993

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. Income Tax – Long Term Contract Adjustment

Authority: Allied-Signal, Inc. v. Director, Division of Taxation, 504 U.S. 768 (1992); IC 6-3-2-2; 45 IAC 3.1-1-23; 45 IAC 3.1-1-29; 45 IAC 3.1-1-51; 45 IAC 3.1-1-52

Taxpayer protests the disallowance of adjustments to long-term contracts.

STATEMENT OF FACTS

Taxpayer manufactures industrial and aerospace products. Taxpayer absorbed a formerly wholly owned subsidiary in 1988. The subsidiary had long-term contracts and used the completed contract method of accounting to report income for Federal and state income tax purposes. As the result of an audit, the Indiana Department of State Revenue ("Department") disallowed taxpayer's deferred income adjustments for 1990, 1991 and 1992. Taxpayer protests the disallowance. Further facts will be provided as necessary.

I. Income Tax – Long Term Contract Adjustment

DISCUSSION

Taxpayer claimed deferred income adjustments for three of five years of the audit period based on earned income (loss) from previous years. The Department disallowed the deductions for 1990 and 1992, and the increase to income for 1991. The Department based its decision on two regulations, 45 IAC 3.1-1-23(1) and 45 IAC 3.1-1-29. 45 IAC 3.1-1-23(1) states:

> When a taxpayer moves to Indiana and becomes a resident and/or domiciliary of Indiana during the taxable year, Indiana will not tax income from sources outside Indiana which the taxpayer received prior to becoming an Indiana domiciliary. Indiana will, however, assess adjusted gross income tax on all taxable income after the taxpayer becomes an Indiana resident.

45 IAC 3.1-1-29 states:

> "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 occurring in the regular course of a trade or business. Accordingly, the critical element in determining whether income is "business income" or "non-business income" is the identification of transactions and activity which are the elements of a particular trade or business.

The adjustments taken by taxpayer represent income or loss earned, but unreported for tax purposes, by a subsidiary prior to December 31, 1988. At that time the subsidiary and taxpayer merged. The subsidiary had no nexus with Indiana prior to its merger with taxpayer, however taxpayer (and its former subsidiary as a result of merger) had nexus with Indiana during the audit period. Taxpayer reported income on its 1990 and 1992 returns and a loss in 1991 using the completed contract method of accounting.

Taxpayer refers to Allied-Signal, Inc. v. Director, Division of Taxation, 504 U.S. 768, 778 (1992), which states in part:

> Although our modern due process jurisprudence rejects a rigid, formalistic definition of minimum connection, we have not abandoned the requirement that, in the case of a tax on an activity, there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax, see Quill Corp. v. North Dakota, ante, at 306-308.

Taxpayer manufactured parts outside of Indiana and shipped them to its buyer outside of Indiana. Taxpayer protests that there is no connection between Indiana and the activity being taxed, and therefore the activity may not be taxed.

The Department refers to IC 6-3-2-2(b), which states in relevant part:

> Except as provided in subsection (*l*), if business income of a corporation or a nonresident person is derived from sources within the state of Indiana and from sources without the state of Indiana, then the business income derived from sources within this state shall be determined by multiplying the business income derived from sources both within and without the state of Indiana by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three (3).

45 IAC 3.1-1-51 states in relevant part:

> The denominator of the sales factor includes all gross receipts from the taxpayer's sales, except as noted in Regulation 6-3-2-2(1)(010) *[45 IAC 3.1-1-62]*.

45 IAC 3.1-1-52 states in relevant part:

> The numerator of the sales factor generally includes gross receipts from sales attributable to this state, and includes all interest income, service charges, carrying charges, or time-price differential charges incidental to such sales regardless of where the accounting records are maintained or the location of the contract or other evidence of indebtedness

Therefore, IC 6-3-2-2(b) provides that Indiana will only tax income attributable to Indiana, via the standard apportionment formula. Indiana related income is listed in the numerator of the sales factor, while all income is listed in the denominator of the sales factor.

Taxpayer is correct in its assertion that Allied-Signal prohibits Indiana from taxing income earned from activities conducted wholly outside its borders. Standard apportionment procedures, as described in IC 6-3-2-2(b), provide that Indiana will not tax income earned from activities conducted wholly outside its borders. Taxpayer's adjustments distorted the standard apportionment formula, and the Department properly disallowed the adjustments.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

02990248.LOF

LETTER OF FINDINGS NUMBER: 99-0248
GROSS INCOME TAX
FOR TAX PERIODS: 1995-March, 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. Gross Income Tax: Gross Receipts

Authority: IC 6-2.1-2-2, IC 6-2.1-4-2, 45 IAC 45-1-1-17, Indiana Department of State Revenue v. Northern Indiana Steel Supply Company, 388 N.E. 2nd 596 (Ind. App.) 1979

The taxpayer protests the assessment of gross income tax on income constructively received.

2. Tax Administration: Penalty

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

The taxpayer protests the imposition of the ten percent (10%) negligence penalty.

STATEMENT OF FACTS

The taxpayer owned and operated an Indiana television station. After a routine audit, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional income tax. The taxpayer protested the assessment and a hearing was held on the taxpayer's alleged constructive receipt of income.

1. Gross Income Tax: Gross Receipts

DISCUSSION

The taxpayer owned and operated an Indiana television station. When the taxpayer agreed to sell an advertisement or commercial, it sent an invoice to the advertising agency involved. That invoice showed the gross cost of the advertisement, the advertising agency commission of fifteen per cent (15%) and the net billing for the commercial. The advertising agent paid the taxpayer by check. The advertisers pay the advertising agency's percentage of the bill directly to the advertising agency. The taxpayer never received a check or other monetary compensation for the advertising agency commission. Due to its accrual accounting method, the taxpayer recorded the total price of the advertisement in its books, with separate entries for the advertising agency commission and the actual cost for the airing of the commercial. The taxpayer reported the entire amount of the income as income on its federal income tax return and deducted the amount of the commissions under "other income." The department imposed gross income tax on the advertising agency commissions. The taxpayer protested this assessment.

IC 6-2.1-2-2 imposes a gross income tax on the gross income or gross receipts of taxpayers domiciled in Indiana. The term "gross receipts" is clarified in the applicable 1988 Regulations at 45 IAC 1-1-17 as follows:

Gross Income Defined. "Gross income" and "gross receipts" mean the entire amount of gross income received by a taxpayer. This includes all income actually or constructively received, i.e., monies credited to the taxpayer by his creditors, or paid to his creditors on his behalf by a third party.

Amounts received or credited include not only cash and checks but notes or other property of any value or kind, services of any value or kind and receipts in any form received by or credited to the taxpayer in lieu of cash.

The taxpayer is required to report his entire gross income in order to determine its taxability. From this amount he may take deductions as allowed under the Act.

The taxpayer contends that it never actually or constructively received the money or any other services, receipts in kind or any other type of credit for the advertising agency's fifteen per cent (15%) of the total billing. Therefore, the advertising agency fee did not qualify as gross receipts subject to gross income tax.

In accordance with its accrual accounting method, the taxpayer actually recorded the total amount as a receipt. Clearly, this income was credited to the taxpayer and the taxpayer received the benefits of income in its books and balance sheets. The taxpayer

also held both the advertiser and the agency jointly and severally liable for any outstanding bill. The taxpayer's statement that it would forbear from attempting to collect the commission does not negate the fact that based upon the invoice, it has the right to collect the commission.

The taxpayer cites the case Indiana Department of State Revenue v. Northern Indiana Steel Supply Company, 388 N.E. 2nd 596 (Ind. App.) 1979 in support of its contention that the contested receipts did not constitute income subject to the gross income tax. In the case, the Northern Indiana Steel Supply Company sold two cranes, magnets, and a mobile office with furniture to another company. The cranes and magnets were subject to liabilities. The negotiated purchase price was $405,319.80. The purchaser satisfied the total purchase price by assuming the liabilities in the amount of $383,163.50 and paid the seller cash in the amount of $22,156.30. The Indiana Department of Revenue attempted to assess gross income tax on the value of the assumption of the liabilities. In holding that only the cash received was subject to the gross income tax, the Court stated at page 599 as follows:

> The taxing statute empowers the Department to tax payment of a taxpayer's debts by a third party *for his direct benefit*. In this case, the purchaser paid the liens for its own direct benefit. The fact that Northern was thereupon freed as surety on the obligations constituted at most an incidental or indirect benefit under the taxing statute.

This case is distinguishable from the taxpayer's situation. The taxpayer receives a direct benefit in that the booking of the commission income directly increases the income and value of the corporation.

The advertising agency fees recorded in the taxpayer's books were constructively received gross income since a third party satisfied the taxpayer's obligation to the advertising agency. As such, the recorded amounts were gross income as contemplated by the law and regulation. The law provided for certain deductions from gross income for tax purposes such as a deduction for bad debts pursuant to IC 6-2.1-4-2. However, the law provides no deduction for commissions.

The department properly imposed gross income tax on the commissions.

FINDING

The taxpayer's protest is denied.

2. Tax Administration: Penalty

DISCUSSION

The taxpayer also protests 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 disregarded its clear obligation to report its total receipts for the gross income tax. This constituted negligence.

FINDING

The taxpayer's protest to the imposition of the penalty is denied.

DEPARTMENT OF STATE REVENUE

01990538.LOF

LETTER OF FINDINGS NUMBER: 99-0538
Individual Income Tax
Calendar Years 1996 and 1997

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

ISSUE(S)

I. Individual Income – Best Information Available

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

Taxpayer protests the tax.

STATEMENT OF FACTS

The Taxpayer operates a tavern and is a sole proprietor. At audit and after numerous requests, taxpayer failed to provide documentation. Auditor attributed the sales based on cost of goods sold. The profit from the business was carried to the individual returns. Taxpayer had no source documents or cash register tapes for the business.

Taxpayer submitted a protest that was received by the Indiana Department of Revenue on October 8, 1999 that requested a hearing. In addition to the numerous requests made by the auditor, the hearing officer returned the file to the auditor because the

taxpayer's representative stated that he had additional information. The file was returned without resolution because no records were made available. The taxpayer or his representative never adhered to numerous requests and three scheduling hearings. In a letter dated July 29 2002, the hearing officer scheduled a final hearing for September 3, 2002. No one appeared.

I. Individual Income – Best Information Available

DISCUSSION

Taxpayer's representative simply maintains that the assessment is too high and has provided no documentation to rebut the assessment.

In reviewing the audit report and the file, it is noted that the assessments, to which the taxpayer disagrees, stem from taxpayer's failure to retain cash register receipts and books from its business. The income was carried forward to the Individual Income Tax Return

IC 6-8.1-5-4 (a) states:

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

Taxpayer provided nothing to aid in the resolution of the audit.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04990539.LOF

LETTER OF FINDINGS NUMBER: 99-0539
Sales Tax
Calendar Years 1996, 1997, and 1998

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

ISSUE(S)

I. Selling at Retail – Best Information Available

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

Taxpayer protests the tax.

STATEMENT OF FACTS

The Taxpayer operates a tavern and is a sole proprietor. At audit and after numerous requests, taxpayer failed to provide documentation. Auditor attributed the sales based on cost of goods sold. Originally a multiplier of 4 was used in this type of business, but the taxpayer's oral testimony and price list was adequately persuasive to the auditor to reduce the multiplier to 3. Taxpayer had no source documents or cash register tapes.

Taxpayer submitted a protest that was received by the Indiana Department of Revenue on October 8, 1999 that requested a hearing. In addition to the numerous requests made by the auditor, the hearing officer returned the file to the auditor because the taxpayer's representative stated that he had additional information. The file was returned without resolution because no records were made available. The taxpayer or his representative never adhered to numerous requests and three scheduling hearings. In a letter dated July 29 2002, the hearing officer scheduled a final hearing for September 3, 2002. No one appeared.

I. Selling at Retail – Best Information Available

DISCUSSION

Taxpayer's representative simply maintains that the assessment is too high and has provided no documentation to rebut the assessment.

In reviewing the audit report and the file, it is noted that the assessments, to which the taxpayer disagrees, stem from taxpayer's failure to retain cash register receipts and books.

IC 6-8.1-5-4 (a) states:

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

Taxpayer provided nothing to aid in the resolution of the audit.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04990578.LOF

LETTER OF FINDINGS NUMBER: 99-0578
Sales and Use Taxes
Calendar Years 1996, 1997, and 1998

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

ISSUE(S)

I. Selling at Retail – Best Information Available

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

Taxpayer protests the tax on sales to landfills.

II. Use Tax – Mulch spreader and trailer

Authority: 45 IAC 2.2-4-26

Taxpayer protests the use tax on two mulch spreaders and trailers.

STATEMENT OF FACTS

The Taxpayer is a landscape contractor providing lawn seeding and trees. Its primary customers include privately owned landfills and major department stores. No tax was paid on materials sold through lump sum improvements to realty. The taxpayer did not obtain valid exemption certificates from its customers and the customers that responded to the AD-70 "Special Sales/Use Tax Exemption" certificate claimed no exemption.

A projection of materials used on landfill and department store jobs was calculated for 1996 and 1997 because the taxpayer had no sales records available for those years. The total 1998 errors were divided by the total sales for 1998 to develop a percentage of error. This percentage was multiplied by the total 1996 and 1997 sales to arrive at the material portion subject to use tax.

Taxpayer submitted a protest that was received by the Indiana Department of Revenue on November 5, 1999 that states that its sales fall under the environmental control exemption and that it assists landfills in their compliance with these regulations by incorporating grass and other vegetation into the soil along with fertilizer and straw in order to provide the mandate control of surface water runoff from the facility. Taxpayer's customers however failed to submit exemption certificates, and the ones that did respond, stated they were not exempt.

On July 9, 2002 the hearing officer scheduled a meeting for July 24, 2002 to which the taxpayer responded in a telephone call on July 23, 2002. Taxpayer stated that he would send exemption certificates. The three forwarded Exemption Certificates however are invalid because they covered periods other than those of the audit. Taxpayer was informed that the letter of Findings would be written based upon the information he submitted via FAX and the information contained in the audit file unless he preferred a hearing.

I. Selling at Retail – Best Information Available

DISCUSSION

Taxpayer simply protests tax on sales that he claims fall under the environmental exemption.

In reviewing the audit report and the file, it is noted that the assessments, to which the taxpayer disagrees, stem from lump sum contracts to several organizations, some of which have refused to sign the Special Exemption certificates. One specifically states it is not exempt.

Taxpayer, in billing the lump sum contracts, did not pay tax on the material upon purchase nor did it charge sales tax on the material portion when completing these contracts of seeding and mulching.

Taxpayer provided nothing to aid in the resolution of the audit.

FINDING

Taxpayer's protest is denied.

II. Use Tax – Mulch spreader and trailer

DISCUSSION

Taxpayer states that the mulch spreader and trailers are actually straw blowers that are built onto their own self-contained trailers and are only suitable for extremely large projects such as landfills. Taxpayer further states that both of these items are used "predominantly for the prevention, control, reduction, or elimination of water pollution which are required to cover the bare soil after the seed and fertilizer is incorporated into the surface and are exempt. Taxpayer cites case in *Indiana Department of Environmental Management v. Amax, Inc.*, 529 N.E.2d 1209 (Ind. App. 1 Dist. 1988).

The case referenced by the taxpayer refers to water runoff from mined lands that carry pollutants and other minerals to the streams and waters of the State.

There is no indication whatsoever, that these are mined lands. The taxpayer is not in the business of mining. To the contrary,

the exemptions the taxpayer tries to claim are for contracts for large department stores and other customers that refuse to state that they are exempt from state taxation.

The taxpayer uses the mulch spreaders and trailers in its landscaping business and has not provided proof that they are used in an exempt manner.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120000044. LOF

LETTER OF FINDINGS NUMBER: 00-0044
Individual Income Tax
Calendar Years 1996 and 1997

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

ISSUE(S)

I. Indiana Adjusted Gross Income – Best Information Available

Authority: 45 IAC 6-8.1-5-1 (a); 45 IAC 3.1-1-66; 45 IAC 3.1-1-5; IC 6-3.5-1.1-16

Taxpayer protests the entire audit.

STATEMENT OF FACTS

Taxpayer is a shareholder in an S Corporation that was audited. Because the S Corporation had additional income assessed through a "Best Information Available" audit, those adjustments flowed through to the shareholders as required by 45 IAC 3.1-1-66. The audit assessed state and county income taxes on the estimated distribution of income pursuant to 45 IAC 3.1-1-5 and IC 6-3.5-1.1-16. The taxpayer, an Indiana full-year resident for the years at audit, filed IT-40 returns.

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

Taxpayer submitted a protest that was received by the Indiana Department of Revenue on January 18, 2000 that states that (1) he was never contacted by an auditor; (2) the corporation never operated or offered flight instruction or banner towing services; (3) the corporation was formed with the intent to purchase one single engine aircraft and to lease said aircraft; and (4) the "fleet" to which the auditor refers to was owned and operated by another company and not the corporation. Taxpayer further states that these incorrect assumptions of the company's services and asset load directly affect the auditor's equations and figures. In addition, none of the officers or shareholders in the company received any income from the business venture because the company operated at a loss.

Based upon the letter of protest, the hearing officer forwarded the file to the auditor for resolution. On May 9, 2001 the auditor asked the taxpayer to supply information that would allow a negation or reduction in the audit assessment. The auditor returned the file to the Legal Division on July 3, 2001 without resolution because the taxpayer failed to respond. On July 6, 2001, the hearing officer asked the taxpayer to provide records. Taxpayer states the auditor never contacted him. On July 8, 2002, the hearing officer sent an E-mail to the taxpayer to see where in the protest process we were. No further information has been provided.

On October 7, 2002 a hearing was scheduled for Thursday, October 24, 2002. No one called or appeared for the hearing.

I. Indiana Adjusted Gross Income – Best Information Available

DISCUSSION

Taxpayer is a shareholder in an S Corporation that was audited. Additional income determined in an investigation for the corporation flowed through to the shareholders as required by 45 IAC 3.1-1-66.

In numerous attempts, the Department's auditor and legal representative have asked the taxpayer for information to allow a reduction in the assessment. No detail has been provided. Taxpayer was scheduled for a hearing on October 24, 2002 to which he also did not reply.

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

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

1820000253.LOF

LETTER OF FINDINGS NUMBER: 00-0253
Financial Institutions Tax
For the Tax Years 1993 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. Applicability of the Financial Institutions Tax

Authority: IC 6-5.5 et seq.; IC 6-8.1-5-1(b); 45 IAC 17-2-1(a); 45 IAC 17-2-3; 45 IAC 17-3-5; 45 IAC 17-3-5(a); 45 IAC 17-3-5(c); 45 IAC 17-3-5(d)

Taxpayer argues that the audit erred in determining that taxpayer was subject to the state's Financial Institutions Tax (FIT). Taxpayer maintains that its only business contact with the state was through the leasing of business equipment.

II. Statute of Limitations – Financial Institutions Tax

Authority: IC 6-5.5-6-1; IC 6-8.1-1-1; IC 6-8.1-5-2(a); IC 6-8.1-5-2(e); 45 IAC 15-5-7(f); 45 IAC 17-3-5(a); Germantown Trust Co. v. Commissioner of Internal Revenue, 309 U.S. 304 (1940)

Taxpayer argues that the FIT assessment, for the tax years 1993 through 1995, is untimely. According to taxpayer, its otherwise timely filing of the Indiana Corporation Income Tax Return (IT-20), started the three-year limitations period during which the state was obligated to propose any additional taxes.

III. 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 assessment of the ten percent negligence penalty was unwarranted because, at all relevant times, taxpayer exercised good business judgment in determining its Indiana tax liability.

STATEMENT OF FACTS

Taxpayer is an out-of-state institution which, as stated by taxpayer, "was engaged in the business of a bank holding company... subject to regulation by the Federal Reserve Board." During the years at issue, taxpayer owned two out-of-state banking corporations along with an out-of-state subsidiary engaged in the activity of leasing business equipment. For the years at issue, the subsidiary leasing company filed Indiana Corporate Income Tax Returns (IT-20) on a "separate company basis."

The Department of Revenue conducted an audit of taxpayer's records and determined that taxpayer, together with its related business entities, was liable under the state's Financial Institutions Tax scheme because taxpayer's various subsidiaries conducted the business of a financial institution within the state. The audit determined taxpayer's FIT liability on the ground that taxpayer, along with its affiliates, should originally have filed a combined FIT return. Taxpayer disagreed with the audit's conclusions, submitted a protest, and an administrative hearing was conducted. This Letter of Findings follows as a result of the protest and subsequent hearing.

DISCUSSION

I. Applicability of the Financial Institutions Tax

Taxpayer maintains that the audit erred when it concluded that it should have been reporting its income on a combined FIT return. The fact that taxpayer is conducting business within the state is uncontested. Taxpayer does challenge the audit's conclusion that it should have been submitting a "combined return" for its "unitary group."

Indiana imposes a franchise tax, known as the Financial Institution Tax (FIT), on corporations transacting the business of a financial institution inside the state. IC 6-5.5 et seq. The tax is imposed on resident financial institutions, nonresident financial institutions, and on non-bank entities that transact the business of a financial institution. 45 IAC 17-2-1(a). The term "Financial Institution" is defined at 45 IAC 17-2-3 which states as follows:

> The "business of a financial institution" means the activities of a holding company, a regulated financial corporation, or a subsidiary of either that each is authorized to perform under federal or state law, including the activities authorized by regulation or order of the Federal Reserve Board for such a subsidiary under Section (4)(C)(8) of the Bank Holding Act of 1956 (12 U.S.C. 1843(C)(8)).

One of taxpayer's own subsidiary's leased tangible personal property – apparently the office equipment referred to in its protest – to customers within the state. Another one of taxpayer's own subsidiaries had business within the state during 1996; that business consisted of processing unsecured consumer loans. Taxpayer, itself, is a bank holding company as defined under the Bank Holding Company Act of 1956, 12 U.S.C.S. § 1843(c)(8). The audit concluded that taxpayer "[had] no types of corporations exempt from the financial institutions tax...."

45 IAC 17-3-5 requires that members of a "Unitary Group" file a single, combined return for the purposes of determining the group's FIT liability. That regulation states, in relevant part, as follows:

A "unitary business" means business activities or operations that are of mutual benefit, dependent upon, or contributory to one another, individually, or as a group, in transacting the business of a financial institution. Unity of ownership exists when a corporation is a member of a group of two (2) or more entities and more than fifty percent (50%) of the voting stock of each member of the group is directly or indirectly owned by: (1) a common owner or common owners, either corporate or noncorporate.... 45 IAC 17-3-5(c).

The regulation further requires that "A unitary group for purposes of the FIT is composed of those taxpayer members that are engaged in a unitary business transacted wholly or partially within Indiana." Id. Once it has been determined that a unitary group is conducting the business of a financial institution, "A designated taxpayer who is a member of a unitary group shall file a combined return covering all the operations of the unitary business and including all taxpayer members of the unitary group." 45 IAC 17-3-5(a). "Therefore, if one (1) one member of a unitary group is conducting the business of a financial institution in Indiana, then all members of the unitary group engaged in a unitary business must file a combined return, even if some of the members are not transacting business in Indiana." 45 IAC 17-3-5(d).

Taxpayer has failed to provide information sufficient to overcome the presumption of correctness afforded the audit's conclusions under IC 6-8.1-5-1(b). Taxpayer falls within the definition of a "bank holding group." Together with its various subsidiaries, taxpayer constitutes a "unitary group," is conducting the "business of a financial institution," and is conducting that business "wholly or partially within Indiana." Accordingly, the audit did not err in concluding that taxpayer came within the purview of the state's Financial Institutions Tax.

FINDING

Taxpayer's protest is respectfully denied.

II. Statute of Limitations – Financial Institutions Tax

Taxpayer argues that the assessment of taxes for the years 1993 through 1995 was untimely because the statute of limitations period had expired. The audit disagreed on the ground that taxpayer's filing of the Indiana Corporation Income Tax Returns (IT-20) was erroneous and that the limitations period did not begin at the time the IT-20 returns were originally submitted.

The limitations period is defined under IC 6-8.1-5-2(a) which states that, "Except as otherwise provided in this section, the department may not issue a proposed assessment under section 1 of this chapter more than three (3) years after the latest of the date the return is filed...." IC 6-8.1-5-2(e) defines certain circumstances under which three-year limitations is tolled. "If a person files a fraudulent, unsigned, or substantially blank return, of if a person does not file a return, there is no time limit within which the department must issue its proposed assessment."

There is no contention that taxpayer's IT-20 returns were "fraudulent," that the IT-20 returns were "unsigned," or that the forms were "substantially blank." Therefore – according to taxpayer – because it filed "*a* return" for each of the years at issue, the three-year limitations has elapsed for three of the tax years for which it was assessed additional taxes.

Taxpayer cites to Germantown Trust Co. v. Commissioner of Internal Revenue, 309 U.S. 304 (1940) in support of its contention, that the filing of the IT-20 returns started the three-year limitations period. In Germantown Trust, the Court held that the two-year limitations period under Rev. Act. 1932, § 275(a), precluded the Internal Revenue Service from making a deficiency assessment against the petitioner. On behalf of its trust patrons, the petitioner had originally filed a "fiduciary return" but failed to file a corporate return reporting the petitioner's own income. Four years later, the IRS prepared a substitute corporate return and gave notice of the petitioner's tax deficiency. The IRS argued that the filing of the fiduciary return was the equivalent to "no return of the tax" under Rev. Act. 1932, § 275(c) which provided an extended four-year limitations period. The Court rejected the government's contention and agreed with the petitioner because petitioner's fiduciary return "contained all of the data from which a tax could be computed and assessed [even though] it did not purport to state any amount due as tax." Id at 307.

Despite the superficial similarities, the circumstances in Germantown Trust and the taxpayer's protest are significantly different. Taxpayer filed IT-20 returns, a decision which the Department determined was entirely erroneous; in Germantown Trust, the petitioner submitted a fiduciary return which, as the Court stated, the petitioner was "bound to file." Id. at 308. In Germantown Trust, the trust return "contained all the data from a tax could be computed and assessed." Id. In contrast, taxpayer may not contend that the IT-20 forms, filed on behalf of a single entity, was sufficient to determine the FIT liability for the entire unitary group. Finally, the Court in Germantown Trust was interpreting the specific provisions contained within Rev. Act. 1932, § 275(a), (c). Taxpayer's own protest is resolved by application of IC 6-8.1-5-2 and the regulations which interpret the statutory requirements.

Those regulations include 45 IAC 15-5-7(f) which states that, "The running of the statute of limitations for purposes of assessing unpaid taxes will not start if the taxpayer fails to file a return which is required by any listed tax provision." The term "listed tax" is defined at IC 6-8.1-1-1 which specifically includes "financial institutions tax" as one of the state's "listed taxes." Under that portion of the Indiana Code outlining a taxpayer's responsibilities under the Financial Institutions Tax, IC 6-5.5-6-1 states that "[a]nnual returns with respect to the tax imposed by this article *shall* be made by every taxpayer: (1) having for the taxable year adjusted gross income or apportioned income subject to taxation under this article...." (*Emphasis added*). The filing requirement is repeated at 45 IAC 17-3-5(a) which states, "A designated taxpayer who is a member of a unitary group *shall* file a combined return covering all the operations of the unitary business and including all taxpayer member of the unitary group." (*Emphasis added*).

Therefore, because taxpayer did not file the required FIT returns and because the FIT is one of the state's "listed taxes," the three-year limitations period does not preclude the current assessment for unpaid taxes. Even assuming the taxpayer's good efforts in submitting the IT-20 forms for the years in question, the limitations period did not begin to run at the time those forms were first submitted.

FINDING

Taxpayer's protest is respectfully denied.

III. Abatement of the Ten Percent Negligence Penalty

Taxpayer protests the assessment of the ten percent negligence penalty against 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 is a substantial and sophisticated business entity fully capable of determining – with a reasonable degree of accuracy – its Indiana tax liabilities. It has failed to demonstrate that it exercised the degree of "ordinary business care" necessary for the Department to abate the penalty.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0220000419.LOF

LETTER OF FINDINGS NUMBER: 00-0419
Gross Income Tax
For Tax Periods: 1996-1997

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

ISSUE

Gross Income Tax – Gross Receipts

Authority: IC 6-2.1-2-2, IC 6-2.1-4-2, 45 IAC 45-1-1-17

The taxpayer protests the assessment of gross income tax on receipts which the taxpayer claims constitute exempt agency receipts.

STATEMENT OF FACTS

The taxpayer is an association of retailers. After a routine audit, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional income tax. The taxpayer protested the assessment and a hearing was held. Further facts will be provided as necessary.

Gross Income Tax – Gross Receipts

DISCUSSION

The taxpayer publishes two magazines. When the taxpayer agrees to sell an advertisement in a particular magazine, it sends a confirmation to the advertising agency involved. That confirmation shows the gross cost of the advertisement, the advertising agency commission of fifteen per cent (15%) and the net billing for the advertisement. Later the taxpayer sends an invoice to the advertising agency with the same information. Either the advertising agent or the advertiser pays the taxpayer by check. The advertisers pay the advertising agency's percentage of the bill directly to the advertising agency. The taxpayer never receives a check or other compensation for the advertising agency commission. Due to its accrual accounting method, the taxpayer records the total price of the advertisement in its books, with separate entries for the advertising agency commission and the actual cost for the publication of the advertisement.

The department imposed gross income tax on the advertising agency commissions. The taxpayer protested this assessment.

IC 6-2.1-2-2 imposes a gross income tax on the gross income or gross receipts of taxpayers domiciled in Indiana. The term "gross receipts" is clarified in the applicable 1988 Regulations at 45 IAC 1-1-17 as follows:

Gross Income Defined. "Gross income" and "gross receipts" mean the entire amount of gross income received by a taxpayer. This includes all income actually or constructively received, i.e., monies credited to the taxpayer by his creditors, or paid to his creditors on his behalf by a third party.

Amounts received or credited include not only cash and checks but notes or other property of any value or kind, services of any value or kind and receipts in any form received by or credited to the taxpayer in lieu of cash.

The taxpayer is required to report his entire gross income in order to determine its taxability. From this amount he may take deductions as allowed under the Act.

The taxpayer contends that it never actually or constructively receives the money or any other services, receipts in kind or any other type of credit for the advertising agency's fifteen per cent (15%) of the total billing. Therefore, the advertising agency fee does not qualify as gross receipts subject to gross income tax.

In accordance with its accrual accounting method, the taxpayer actually records the total amount as a receipt. Additionally, the recorded amounts are constructively received gross income since a third party satisfies the taxpayer's obligation to the ad agency. As such, the recorded amounts are gross income as contemplated by the law and regulation. The law provides for certain deductions from gross income for tax purposes such as a deduction for bad debts pursuant to IC 6-2.1-4-2. However, the law provides no deduction for commissions.

The department properly imposed gross income tax on the commissions.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0320010004.LOF

LETTER OF FINDINGS NUMBER: 01-0004
Withholding Tax
For Tax Periods: 1993-1996

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

ISSUES

1. Withholding Tax – Calculation

Authority: IC 6-3-4-8 (a), IC 6-8.1-5-1 (b), IC 6-2.1-6.2

The taxpayer protests the assessment of withholding tax.

2. Tax Administration – Penalty

Authority: IC 6-8.1-10-4, 45 IAC 15-11-4

The taxpayer protests the assessment of the One Hundred Percent (100%) penalty.

STATEMENT OF FACTS

The taxpayer is a full service bridal shop. After an audit, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional withholding tax, interest, and penalty. The taxpayer protested and a hearing was held on the taxpayer's contention that the department incorrectly calculated the withholding tax and incorrectly imposed the one hundred percent (100 %) penalty.

1. Withholding Tax – Calculation

DISCUSSION

Indiana requires employers to withhold adjusted gross income taxes from employees' wages and remit the taxes withheld to the state pursuant to IC 6-3-4-8 (a) in pertinent part as follows:

... every employer making payments of wages subject to tax... shall, at the time of payment of such wages, deduct and retain therefrom the amount prescribed in withholding instructions issued by the department... Such employer making payments of any wages:

(1) shall be liable to the state of Indiana for the payment of the tax required to be deducted and withheld under this section...and

(2) shall make return of and payment to the department monthly of the amount of tax which under IC 6-3 and IC 6-3.5 he is required to withhold.

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

The department totaled the wages and officers' compensation reported on year's respective Corporate Income Tax Return (Form 1120) and this amount was multiplied by the state's withholding rate of 3.4% to arrive at the proposed tax liability.

The taxpayer contends that the department should not have withheld on the first one thousand dollars ($1000) paid to each of the employees pursuant to IC 6-2.1-6.2 as follows:

(b) Except as provided in subsection (c), each calendar year each individual, firm, organization, or governmental agency of any kind who make 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...

(c) A withholding agent who withholds gross income tax pursuant to subsection (b) may not withhold any gross income tax for the first one thousand dollars ($1,000) paid to a nonresident contractor during a calendar year.

The cited statute clearly refers to withholding on the gross income tax of nonresident contracts. The taxpayer errs in its interpretation that it did not need to withhold and remit tax on the first one thousand dollars ($1000) of its employees' adjusted gross income pursuant to the cited statute. The employees were not nonresident contractors and the assessment concerns the adjusted gross income rather than gross income tax.

The taxpayer failed to sustain its burden of proving that the department incorrectly calculated the withholding tax due to the state.

FINDING

The taxpayer's protest is denied.

2. Tax Administration – Penalty

DISCUSSION

The taxpayer also protests the imposition of the one hundred percent (100%) penalty pursuant to the following provisions of IC 6-8.1-10-4:

(a) If a person fails to file a return or to make a full tax payment with that return with the fraudulent intent of evading the tax, the person is subject to a penalty.

(b) The amount of the penalty imposed for a fraudulent failure described in subsection (a) is one hundred percent (100%) multiplied by:

(1) the full amount of the tax, if the person failed to file a return

The application of this penalty is further described and clarified at 45 IAC 15-11-4 as follows:

The penalty for failure to file a return or to make full payment with that return with the fraudulent intent of evading the tax is one hundred percent (100%) of the tax owing. Fraudulent intent encompasses the making of a misrepresentation of a material fact which is known to be false, or believed not to be true, in order to evade taxes. Negligence, whether slight or great, is not equivalent to the intent required. An act is fraudulent if it is an actual, intentional wrongdoing, and the intent required is the specific purpose of evading tax believed to be owing.

The taxpayer argues that it had business problems such as publicity surrounding an irate patron's complaint with the Indiana Attorney General's office that should reduce the penalty to the negligence penalty. Business problems, however, are not a relevant factor in determining whether or not a taxpayer fraudulently failed to pay tax.

In this case the taxpayer seriously misrepresented the amount of withholding tax due to the state. Often the taxpayer filed returns stating that there was no liability at all when employees had in actuality received wages. Even when the taxpayer actually filed tax due returns, it did not remit the funds to the state. The taxpayer indicated that it knew it should remit taxes. The penalty was properly applied.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420010039.LOF

LETTER OF FINDINGS NUMBER: 01-0039
Sales and Use Tax
For Tax Periods: 1993-1999

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

ISSUES

1. Sales and Use Tax – Services

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

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

STATEMENT OF FACTS

The taxpayer is a full service bridal shop. After an audit, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional sales and use tax, interest, and penalty. The taxpayer protested and a hearing was held on the taxpayer's contention that the department incorrectly assessed sales tax on services.

1. Sales and Use Tax – Services

DISCUSSION

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

Pursuant to IC 6-8.1-5-1 (b), all tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. Taxpayers have a statutory duty to keep records as set out at IC 6-8.1-5-4 as follows:

> 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.

The taxpayer provided alterations on the wedding gowns and other items of clothing that it sold. The department assessed sales tax on these services as part of a taxable unitary transaction pursuant to IC 6-2.5-1-2. A unitary transaction is defined at IC 6-2.5-1-1 as a transaction including the transfer of tangible personal property and the provision of services for a single charge pursuant to a single agreement or order. The taxpayer contended that the alterations were actually services for which buyers contracted separately and therefore were not subject to the sales tax.

The taxpayer was given over sixty (60) days to submit documentation substantiating its contention. The taxpayer failed to provide any such documentation.

The taxpayer also argued that a portion of its receipts were for alteration services performed for clothing manufacturers and other retail establishments. The taxpayer also failed to provide any documentation supporting this claim.

The taxpayer failed to sustain its burden of proving that the department incorrectly assessed sales tax on services.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420010040.LOF

LETTER OF FINDINGS NUMBER: 01-0040
Use Tax – Employee Purchases
Gross Retail and Use Tax – Duplicate Assessments
Use Tax – Inventory Items
Tax Administration – Penalty
For Tax Years 1997-1999

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. Use Tax – Employee Purchases

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-1; 45 IAC 2.2-2-1; IC § 6-2.5-3-2; 45 IAC 2.2-2-2; IC § 6-2.5-3-4; 45 IAC 2.2-3-4; IC § 6-2.5-4-1; 45 IAC 2.2-3-14; IC § 6-2.5-6-7; 45 IAC 2.2-3-18; IC § 6-2.5-9-3; 45 IAC 2.2-3-19; IC § 6-8.1-5-1

Taxpayer protests the proposed assessment of Indiana's use tax on employee purchases, arguing that the employees are liable for the tax.

II. Gross Retail and Use Tax – Duplicate Assessments

Taxpayer protests the proposed assessments of Indiana's gross retail and use taxes, arguing that some of the assessments are duplicates.

III. Use Tax – Items Held in Inventory

Authority: IC § 6-2.5-3-1; IC § 6-2.5-3-2

Taxpayer protests the proposed assessment of Indiana's use tax on manufactured items held in inventory before being sold or used.

IV. Tax Administration – Penalty

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

Taxpayer protests the proposed assessment of the negligence penalty.

STATEMENT OF FACTS

Taxpayer is a pipeline contractor engaged in the installation, trenchless rehabilitation, lining, replacement and upgrading of gas mains and/or deteriorating pipelines carrying water, wastewater, or natural gas. Taxpayer performs some time/material contracts where the state's gross retail tax is properly collected and remitted to the Department. The majority of taxpayer's work is for labor only. According to the audit, "[t]he taxpayer consistently indicates on purchase invoices when materials, tools, equipment, or supplies are purchased for resale or used/consumed in the performance of [taxpayer's] construction contracts "by stating **resale** on the actual purchase invoice, use tax accrual on sales reports, and/or placing the item in a taxable general ledger account or in inventory."" However, there were a number of items purchased without sales tax being paid; therefore, the audit assessed use tax on those items, and assessed a 10% negligence penalty. Taxpayer paid the assessments, but only after subtracting figures taxpayer alleged represented duplicate assessments. The protest was forwarded to the Legal Division for resolution by way of a protest hearing. Taxpayer's representative sent documents in advance of the telephone conference hearing. Further facts will be added as necessary.

I. Use Tax – Employee Purchases

DISCUSSION

Taxpayer protests the proposed assessments of Indiana's use tax based on the best information available to the Department at the time of the audit. Because of taxpayer's and his representative's inability to timely provide the proper documents to the auditor, a hearing was set before one of the Legal Division's Hearing Officers. Taxpayer's representative provided sufficient documentation, and explanations of how differing accounts worked in taxpayer's accounting methods, that the Department can now determine taxpayer's proper tax liability. Taxpayer has also withdrawn part of the use tax protest, acknowledging that additional use tax is owed.

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 tax retail merchants are required to collect and remit:

> (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
>
> (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. **The retail merchant shall collect the tax as agent for the state.**
>
> (Emphasis added). *See also*, 45 IAC 2.2-2-1 and 45 IAC 2.2-2-2.

IC § 6-2.5-3-1 defines "use," for purposes of Indiana's use tax statute and regulations, as the "exercise of any right or power of ownership over tangible personal property. IC § 6-2.5-3-2 imposes the use tax:

> (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.
>
> *See also*, 45 IAC 2.2-3-4.

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." IC § 6-2.5-3-4; 45 IAC 2.2-3-14. Taxpayers who use, store, or consume tangible personal property acquired in a retail transaction are "personally liable for the use tax." *See also*, 45 IAC 2.2-3-18 and 45 IAC 2.2-3-19.

One of the areas where the Audit Division assessed use tax owed to the Department concerns an account taxpayer has set up to handle employee purchases of items taxpayer obtains from its vendors and offers as a benefit to its employees. If taxpayer is acting as a retail merchant in these kinds of transactions, then taxpayer should have collected and remitted retail tax.

Taxpayer argued at the hearing that if any retail tax was owed, the employees purchasing these items owed the tax. Taxpayer is correct. However, taxpayer should have collected and remitted the tax pursuant to IC § 6-2.5-2-1(b). Since taxpayer did not collect and remit the gross retail tax, and since taxpayer cannot prove the items at issue were purchased for resale, taxpayer is liable for use tax under IC § 6-2.5-3-1, IC § 6-2.5-3-2, IC § 6-2.5-6-7 and IC § 6-2.5-9-3.

Two areas where the Audit Division assessed Indiana's use tax involve a mistake on taxpayer's part where taxpayer mistakenly placed helmets taxpayer uses into a nontaxable inventory account rather than into the proper, use taxable account. Taxpayer has withdrawn that part of its protest over the following use tax assessments:

1997:	$313.69
1998:	$647.82
1999:	$1,133.62

FINDING

Taxpayer's protest concerning the proposed assessment of use tax on employee purchases is denied.

II. Gross Retail and Use Tax – Duplicate Assessments

The second issue concerns one of taxpayer's capital accounts. Taxpayer presented sufficient evidence to show that the

projection method the auditor relied on was unnecessary in that all invoices for the tax years at issue were examined. Moreover, neither taxpayer, nor an authorized representative signed the Agreement to the Projection Method. Such a signature would have bound taxpayer to the projection method. Several items were taxed twice, once as a purchase, once as a capital asset. These doubly taxed items should have only been taxed once. They include two items purchased at auction. Page 33 of the Audit Summary shows the items taxed as capital assets. Both items also show up on page 15 as purchases. *See*, yellow highlighted areas in taxpayer's materials faxed in advance of the hearing, tabs labeled A and B.

FINDING

Taxpayer's protest concerning duplicate assessments is sustained.

III. Use Tax – Items Held in Inventory

The third issue concerns another one of taxpayer's capital accounts. Taxpayer makes tangible personal property in its fabrication shop, such as special equipment, trucks, engines, etc. For example, at any given time, taxpayer may make three pieces of equipment at a time, producing one or two for resale, its own use, or just to exist until a decision is made concerning what to do with it. If taxpayer decides to capitalize it, taxpayer pays use tax; if taxpayer decides to sell it, taxpayer collects and remits gross retail tax. However, use tax is also owed for the time items are stored before taxpayer decides what to do with them. *See*, IC § 6-2.5-3(1)(a) and (b); IC § 6-2.5-3-2 (a).

FINDING

Taxpayer's protest concerning the proposed assessments of use tax on items held in inventory is denied.

IV. 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 review of its records compared to the figures in the Audit Summary.

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 not set forth a basis whereby the Department could conclude taxpayer exercised the degree of care statutorily imposed upon an ordinarily reasonable taxpayer. Some of the questions raised by taxpayer involved technical issues of interpretation and applicability, such as the capital accounts and double taxation of items. However, taxpayer was negligent in not properly assessing and remitting all use tax owed to the Department.

FINDING

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

DEPARTMENT OF STATE REVENUE

0420010065.LOF

LETTER OF FINDINGS NUMBER: 01-0065
Responsible Officer
Sales Tax and Withholding Tax
For Tax Periods: 1993-1999

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

ISSUES

Sales and Withholding Tax – Responsible Officer Liability

Authority: IC 6-2.5-9-3, IC 6-3-4-8 (f), IC 6-8.1-5-1 (b), Indiana Department of Revenue v. Safayan 654 N.E. 2nd 270 (Ind.1995) at page 273

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

STATEMENT OF FACTS

The taxpayer was a shareholder and secretary-treasurer of a corporation that did not remit the proper amount of sales and withholding taxes to Indiana for the period December, 1993 through November 30, 1999. The taxpayer was personally assessed for the taxes. The taxpayer protested these assessments and a hearing was held. More facts will be provided as necessary.

Sales and Withholding Tax – Responsible Officer Liability

DISCUSSION

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

An individual who:

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

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

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

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

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

The seminal case concerning the personal liability of officers for corporate withholding and sales taxes is Indiana Department of Revenue v. Safayan 654 N.E. 2nd 270 (Ind.1995). In that case, four investors started a restaurant. One couple, the Safayans, provided most of the capital for the restaurant. The other couple provided the knowledge and experience in the restaurant business. The Safayans delegated the day to day operations of the restaurant to the second couple. After withholding and sales taxes were not properly remitted to the state of Indiana, the Indiana Department of Revenue assessed those taxes, penalty and interest against Mrs. Safayan in her capacity as president of the corporation. The Court found at page 273 that "The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that they are paid."

From the date of incorporation until January 28, 1994, the taxpayer was the secretary-treasurer of the corporation. As such, the taxpayer had control of all of the corporation's financial records and final authority concerning the payment of any liability. Therefore, he had the statutory duty to see that all trust taxes were paid. All sales and withholding taxes due to the state while the taxpayer was actively the secretary-treasurer have been paid.

The taxpayer contends and has provided sufficient documentation that on January 28, 1994, the president of the corporation forcibly evicted the taxpayer from the corporate offices. At that time the president took over all responsibility for the operations of the corporation including all responsibility for the corporate finances. The taxpayer was no longer able to take any part in the corporate affairs. Since the taxpayer was unable to exercise any authority over the corporate operations, he sustained his burden in proving that he did not have the statutory duty to remit trust taxes due to the state after January 28, 1994.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0420020014.LOF

LETTER OF FINDINGS NUMBER: 02-0014
Indiana Sales and Use Tax
For the Tax Years 1996 through 2000

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

ISSUES

I. Equipment Use in "Field Filtering" Waste Oil – Sales and Use Tax Production Exemption

Authority: IC 6-2.5-1-1 et seq.; IC 6-2.5-5-3(b); General Motors v. Dept. of State Revenue, 578 N.E.2d 399 (Ind. Tax Ct. 1991); Indiana Dept. of State Revenue v. Cave Stone, Inc., 457 N.E.2d 520 (Ind. 1983); 45 IAC 2.2-5-8(f)(3)

Taxpayer argues that the equipment used in "field filtering" oil – both at the time the oil is retrieved from the original supplier and at the time the treated oil is delivered to the ultimate consumer – is entitled to the sales and use tax production exemption.

II. Sales and Use Tax Claim for Taxes by Taxpayer's Predecessor Company

Authority: IC 6-8.1-9-1(a); 45 IAC 15-9-2(d); Tax Policy Directive 4, 1992; Commissioner's Directive 13, 1989

Taxpayer maintains that it is entitled to present a refund claim for sales and use taxes paid both by itself and by its predecessor company.

III. Abatement of the Ten Percent Negligence Claim

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 asserts that it is entitled to abatement of the ten percent negligence penalty assessed at the time of the audit.

STATEMENT OF FACTS

Taxpayer is in the business of buying, processing, and reselling waste petroleum products. Taxpayer acquires the waste oil from various sources, picks up the oil, brings the oil to its on-site facility, and then resells the treated oil to companies which are equipped to burn the treated oil for heating purposes. The sources for the oil include; oil change businesses, equipment repair facilities, and service stations. These sources pay a fee in order to have taxpayer pick up their waste oil. Taxpayer's customers – specially equipped to burn the treated oil – include; asphalt companies, steel mills, paper mills, and electric utilities.

Taxpayer is also engaged in cleaning up, treating, and appropriately disposing of contaminated water and contaminated solids.

In those instances in which the waste oil can eventually be processed and resold, the processing takes place at three different stages. At the point where the waste oil is first picked up, the waste oil is filtered as it is being pumped into taxpayer's transport truck. The partially treated oil is then brought to the taxpayer's facility where it is chemically or heat treated. Taxpayer then transports this treated product to one of its customers where, at the point of delivery, the product is once again filtered.

The audit determined that the activities, occurring immediately before the oil was brought to the on-site facility, were "preproduction" activities. The audit determined that the activities which occurred after the treated oil left the taxpayer's on-site facility were "post-production" activities. Accordingly, the audit concluded that the filtering equipment involved in these "preproduction" and "post-production" activities did not warrant exemption from the sales and use tax. The taxpayer disagreed with that conclusion and filed a protest with the Department of Revenue (Department). An administrative hearing was held, and this Letter of Findings followed.

DISCUSSION

I. Equipment Use in "Field Filtering" Waste Oil – Sales and Use Tax Production Exemption

Essentially, the audit and the taxpayer disagreed as to the scope of taxpayer's production process. The audit determined that taxpayer's production process began and ended at the taxpayer's on-site facility. Taxpayer maintains that its production activities began with the initial filtering performed at the point where the waste oil is obtained from its suppliers; taxpayer further maintains that the its production activities did not conclude until the treated oil was delivered – and filtered – at the site of one of its customers. Accepting for the moment taxpayer's assertions, the field filtering equipment used at the point where the waste oil is picked up and the equipment used at the point where the processed oil is finally delivered to one of its customers, was entitled to the manufacturing exemption.

In Indiana, a sales tax is imposed on retail transactions and a complementary use tax is imposed on tangible personal property that is stored, used, or consumed in the state. IC 6-2.5-1-1 et seq. In this instance, taxpayer invokes one of the exemptions found at IC 6-2.5-5-3(b). The exemption statute 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, mining, processing, refining, or finishing of other tangible personal property. (*Emphasis added*).

As used in the exemption statute, the courts have defined the term "processing" to mean, "[A]n operation which places the product in a different, form, composition or character." Indiana Dept. of State Revenue v. Cave Stone, Inc., 457 N.E.2d 520, 524 (Ind. 1983). The statutory exemption is applicable to those particular items of processing equipment which constitute "an essential and integral part of an integrated production process." General Motors v. Dept. of State Revenue, 578 N.E.2d 399, 401 (Ind. Tax Ct. 1991). The particular manufacturer's "production process" is not boundless having a particular point at which the process begins and a particular point at which the process terminates. The tax court has held that, "An integrated production process terminates upon the production of the most marketable finished product, e.g., the product actually marketed." Id. at 404.

The audit agreed with the taxpayer – and it is not disputed here – that taxpayer is engaged in the "processing" of waste petroleum materials into a product which can be used as heating fuel by its customers.

At the time that taxpayer collects the waste oil from one of its suppliers, the waste oil is filtered using an 800-micron filter. This initial filtering process removes large solids and particulate matter from the used motor oil. This partially treated motor oil is then brought to the taxpayer's on-site facility where it is treated with heat and/or chemicals for a controlled period of time. Water, which has been separated out of the oil, is then drained away. The partially treated oil is then filtered through a 400-micron filter which eliminates intermediate solids and particulate matter. At this point, the oil is ready for loading into taxpayer's trucks for delivery to the individual customer's location. After being transported to the customer's location and upon final delivery, the oil is then filtered through a 200-micron filter which again reduces the amount of residual solids and particulate matter. At each of the three stages of processing, the oil's viscosity, water volume, and sediment volume is altered to a measurable and quantifiable degree. All of the processed oil sold by taxpayer undergoes the identical three stages of processing.

The Indiana courts have recognized that exemption statutes, such as IC 6-2.5-5-3(b), are "strictly construed because an exemption releases property from the obligation of bearing its fair share of the cost of government." General Motors, 578 N.E.2d

at 404. Nonetheless, the exemption should not be construed so narrowly as to defeat the legislative intent expressed within that statute. Id.

The audit erred in concluding that the "field filtering" was not an integral part of the taxpayer's integrated production process on the ground that these activities were pre-processing or post-processing activities. Without undergoing the initial 800-micron filtering stage, the oil would not be ready for introduction into and processing at the taxpayer's on-site facility. Not until the final "field filtering" through the 200-micron filter occurs, is taxpayer's actual end product produced. Absent that final filtering process, the taxpayer has not produced its actual end product. If the taxpayer would attempt to sell semi-treated oil to one of its customers, which had not undergone the final stage of filtering, the oil would not be suitable because it could not be burned. Any attempt to burn the partially treated oil would clog the customer's fuel burning equipment. However, it should be noted that this determination does not permit a conclusion that filtering activities – standing alone – constitute an exempt activity IC 6-2.5-5-3(b).

In addition, any determination as to the taxability of the field filtering equipment, is entirely unrelated to the taxability of the transport trucks on which this equipment is installed. There is no indication that the transport trucks are directly used in the processing of the waste oil; there is no indication that taxpayer's recycling operation constitutes "one continuous integrated production process;" there is no indication that the waste oil constitutes a "work-in-process;" and there is no indication that the transport trucks are in any way exempt from the gross retail and use tax. *See* General Motors, 578 N.E.2d at 404; 45 IAC 2.2-5-8(f)(3).

Accordingly, the Department finds that the taxpayer's field-filtering equipment is entitled to the processing exemption under IC 6-2.5-5-3(b) because the field-filtering equipment is an integral part of the taxpayer's continuous integrated production process during which the form, composition, and character of the waste oil is changed.

FINDING

Taxpayer's protest is sustained.

II. Sales and Use Tax Claim for Taxes by Taxpayer's Predecessor Company

At the time of the original audit, taxpayer submitted a request for refund of 1996-1999 sales and use taxes paid in error. The audit, and the subsequent investigation, evaluated the claim for refund, and declined to consider the request for refund for failure to meet the proper filing requirements. The audit concluded that the claim for refund lacked documentation necessary to support the dollar amounts claimed.

In its protest, taxpayer now argues that it is entitled to make the claim for refund on behalf of its predecessor company. However, taxpayer oversimplifies the issues surrounding the unresolved refund claim. The audit declined to consider the refund claim for those purchases made during 1996 and 1997 on the ground that the taxpayer could not assert a claim for refund on behalf of another entity. The claim for refund for purchases, made during 1998 and 1999, was denied on entirely separate grounds.

As to taxpayer's first argument, the relevant statute is found at IC 6-8.1-9-1(a) which states as follows: "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 refund with the department." The issue, relevant only to the 1996 and 1997 refund claim, was whether taxpayer, as the predecessor company, was the same "person" as the predecessor company.

Information contained within the audit investigation indicates that taxpayer was incorporated in August of 1997 and became an Indiana "Registered Retail Merchant" in that same month. The investigation concluded that, in reference to taxpayer's 1996 and 1997 refund claim, the 1996 and 1997 taxes were paid on purchases "made by another taxpayer entity."

Under IC 6-8.1-9-1(a), if taxpayer is the same "person" as the predecessor company which originally paid the 1996 and 1997 taxes, it is clearly entitled to present the claim for refund. If, on the other hand, taxpayer simply acquired the physical assets or the trade name of the predecessor company, it is not the same "person" and is not entitled to assert the claim. From the available information, the only thing which is certain, is that taxpayer sprang into corporate existence on August 4, 1997, and that taxpayer and the predecessor share similar names.

However, the issue is not resolved simply on a determination of corporate identity. The Department requires that any entity making a claim for refund, supply information adequate to assess the validity of the claim. 45 IAC 15-9-2(d) requires as follows:

> When filing a claim for refund with the Department the taxpayer's claim shall set forth: (1) the amount of refund claimed; (2) *a sufficiently detailed explanation of the basis of the claim such that the department may determine its correctness*; (3) the tax period for which the overpayment is claimed; and (4) the year and date the overpayment was made. (*Emphasis added*). *See also* Tax Policy Directive 4, 1992; Commissioner's Directive 13, 1989.

The Department's initial response to the taxpayer's claim for refund was that there was "insufficient detail... to accurately review and evaluate the taxpayer's basis upon which the refund amounts per vendor were claimed." Requests to the taxpayer for further information resulted in "the auditor being furnished with an incomplete listing of the invoices upon which the claim was based." According to the audit report, the taxpayer was able to supply information substantiating 49 percent of the amount claimed for 1996, 11 percent of the amount claimed for 1997, 29 percent of the amount claimed for 1998, and 0 percent of the amount claimed for 1999. In addition, the audit reported difficulties in reconciling the amounts contained within the information supplied by the taxpayer with the amount presented on the claim for refund form.

During the administrative protest hearing, taxpayer resubmitted the refund claim for 1996 through 1999 taxes along with an explanation for the basis of the claim. At that time, taxpayer requested that the refund claim be considered as part of its protest "because the issues involved in the refund claim [were] identical to those in the protest." To a limited extent, taxpayer is correct; the *basis* for the refund claim apparently raises issues similar to those addressed within part I of this Letter of Findings. However, there is simply no basis for the Department, at this time, to ignore the conclusions reached by the audit investigation and to unilaterally "grant" taxpayer's request for refund. Under IC 6-8.1-9-1(a), taxpayer is required to demonstrate that it is the same "person" as the predecessor corporation which paid the 1996 and 1997 taxes. Under 45 IAC 15-9-2(d), taxpayer is required to submit "a sufficiently detailed explanation of the basis of the claim such that the department may determine its correctness."

FINDING

Taxpayer protest is respectfully denied.

III. Abatement of the Ten Percent Negligence Claim

Taxpayer asks that the Department exercise its discretion to abate the ten percent negligence penalty imposed 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...."

Besides the filtering equipment addressed in Part I of this Letter of Findings, the audit determined that taxpayer – inter alia – failed to pay sales and use tax for non-exempt leases, machinery, tools, equipment, fuel, chemicals, containers, and clothing. Taxpayer's bare assertion that it "demonstrated reasonable cause for the Department to waive the negligence penalty" is insufficient to establish that it exercised the "ordinary business care and prudence" required of an "ordinary reasonable taxpayer."

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0220020026.LOF

LETTER OF FINDINGS NUMBER: 02-0026
Indiana Corporate Income Tax
For the Tax Years 1997, 1998, and 1999

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

ISSUES

I. Disallowance of Claimed Business Expenses – Adjusted Gross Income Tax

Authority: IC 6-3-2-2; IC 6-3-2-2(l); IC 6-3-2-2(m); Gregory v. Helvering 293 U.S. 465 (1935); Lee v. Commissioner of Internal Revenue, 155 F.2d 584 (2d Cir. 1998); Horn v. Commissioner of Internal Revenue, 968 F.2d 1229 (D.C. Cir. 1992); Commissioner v. Transp. Trading and Terminal Corp., 176 F.2d 570 (2nd Cir. 1949); Bethlehem Steel Corp. v. Ind. Dept. of State Revenue, 597 N.E.2d 1327 (Ind. Tax Ct. 1992); 45 IAC 3.1-1-55

Taxpayer argues that the audit, in calculating its adjusted gross income for 1998 and 1999, erroneously disallowed – as business expenses – royalty payments paid to a related entity for the right to use certain intellectual property.

II. Abatement of the Ten Percent Negligence Penalty

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

Taxpayer urges the Department to exercise its discretion and abate the ten percent negligence penalty assessed at the time of the original audit. Taxpayer argues that any tax deficiencies were not attributable to its negligence.

STATEMENT OF FACTS

Taxpayer is an out-of-state entity in the business of providing computer services. Taxpayer provides those services to customers inside the state, outside the state, and at locations throughout the world. Taxpayer's services include: client/server design and development; conversion/migration services; and applications maintenance outsourcing.

The Department conducted an audit of taxpayer's financial records spanning the 1997, 1998, and 1999 tax years. As a result of that audit examination, a number of adjustments were made which served to increase taxpayer's tax liabilities. Taxpayer disagreed with certain of those adjustments and submitted a protest to the Department of Revenue (Department). Pursuant to that protest, an administrative hearing was conducted during which taxpayer was provided an opportunity to substantiate the basis for its protest. As a result of that hearing, this Letter of Findings was prepared.

DISCUSSION

I. Disallowance of Claimed Business Expenses – Adjusted Gross Income Tax

In 1998, taxpayer formed a Delaware holding company. The Delaware entity was created in order to hold certain items of taxpayer's intellectual property. The intellectual property consisted of a registered service mark and certain specialized methodologies collectively identified under a particular trade name. Before the intellectual property was transferred to the Delaware holding company, taxpayer hired an outside consultant to evaluate the intellectual property. The consultant assessed the relative value of the intellectual property and determined a method by which the affiliated companies would pay for the right to make continued use of the intellectual property. The consultant concluded that the affiliated companies should pay a royalty fee of four percent of their net income in order to employ the registered service mark. In addition, the consultant determined that the affiliated companies should pay for the continued use of the "specialized methodologies" based upon the amount of the customer's computer code processed using those methodologies. Taxpayer agreed with the consultant's conclusions and apparently adopted the suggested payment scheme.

Thereafter, taxpayer transferred ownership of the intellectual property to the Delaware holding company in exchange for a 100 percent ownership in that holding company. Taxpayer proceeded to make royalty payments to the Delaware holding company and – in calculating its own adjusted gross income derived from providing services within the state – claimed those payments as deductible business expenses. After receiving the royalty payments, the Delaware holding company retained a portion of the payments to cover its own operating costs. Thereafter, the Delaware holding company contributed the remaining funds to a wholly owned subsidiary which acted as an "investment vehicle" for the company. This wholly owned subsidiary used the royalty payments to maintain a portfolio of investments including commercial paper and municipal bonds. According to taxpayer, this arrangement "served to segregate the company's intellectual property from the investment capital and other intangible assets.

The audit disallowed the royalty payments as business expenses. It did so on the ground that the Delaware holding company was "not a viable business enterprise" and that the royalty payments constituted an "arbitrary shift of income." In support of its decision, the audit found that the Delaware holding company had no business activity, had no employees, had no assets, performed no function, assumed no risk, did nothing to earn the income, and that the "valuable" service mark was discarded less than two years after the holding company was first formed.

Taxpayer does not contest the factual basis for the audit's conclusions; it does contest the conclusions. Taxpayer does so on two grounds. Taxpayer maintains that the audit, under IC 6-3-2-2, did not have a legal or factual basis for forcing a combination of taxpayer and the Delaware holding company. In addition, taxpayer argues that the transfer of the intellectual property – and the consequent royalty payments – served a legitimate business purpose thereby transforming the royalty payments into deductible business expenses.

Taxpayer argues that the audit did not have the statutory authority to disallow the royalty payments because the Delaware holding company's royalty income was not Indiana source income. To that end, taxpayer cites to IC 6-3-2-2(m) which reads as follows:

> 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. (*Emphasis added*).

In order for Indiana to tax the income derived from an intangible, the intangible – such as taxpayer's intellectual property – must have acquired a "business situs" within the state. 45 IAC 3.1-1-55 reads in part as follows:

> The situs of intangible personal property is the commercial domicile of the taxpayer... unless the property has acquired a "business situs" elsewhere. "Business situs" is the place at which intangible personal property is employed as capital; or the place where the property is located if possession and control of the property is localized in connection with a trade or business so that substantial use or value attaches to the property.

It is apparent that the Delaware holding company's intellectual property acquired a "business situs" within Indiana. The Delaware holding company licensed the taxpayer to use and exploit the intellectual property; the taxpayer obtained Indiana source income by providing its services within the state; the value obtained from possessing and exploiting the intellectual property was inextricably linked with the provision of taxpayer's services within the state. The value the Delaware holding company obtained from the intellectual property was – in relevant part – its ability to license taxpayer to use and exploit the property within Indiana. The value of the intellectual property to the Delaware holding company consisted solely of the ability to "place" that intellectual property within the state and to derive the consequent economic benefits attributable entirely to the taxpayer's Indiana business

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

So far as relevant, IC 6-3-2-2(l), reads as follows:

If the allocation and apportionment provisions of this article do not fairly reflect 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.

The audit disallowed the royalty payments because it determined that the payments were not "business expenses" but arbitrary shifts of income lacking any economic substance. It is not disputed that the Delaware holding company has done nothing substantive to "earn" these royalty payments. It has performed no activities which protect or enhance the value of the intellectual property. Indeed, because the Delaware holding company apparently has no employees or physical location, it does not seem capable of performing any such activity. The record does not reveal how much of the $25,000,000 in royalty payments the Delaware holding company retained to pay its own expenses. The record does not reveal how the amount of royalty payments was transferred to the wholly owned "investment vehicle." However, the record *does* reveal that the Delaware holding company "has no assets." Therefore, because taxpayer acquired 100 percent ownership of the Delaware holding company, it would appear that taxpayer retained the right to control the ultimate disposition of those substantial assets. Plainly speaking, it would appear that the royalty payments were simply the transfer of assets from one corporate pocket into another. Simply labeling the transfer as "royalty payments" and "business expenses," does not – in fact or law – make them so.

The audit was clearly justified in determining that permitting the taxpayer to classify the royalty payments as business expenses artificially distorted taxpayer's Indiana income. The plain language of IC 6-3-2-2(l) states that "[i]f the allocation and apportionment provisions of this article do not fairly represent that taxpayer's income derived from sources within the state of Indiana... the department may require, in respect *to all or any part of the taxpayer's business activity*... the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income." (*Emphasis added*).

In addition, the audit is justified in disallowing the royalty and interest deductions on the ground that the expenses were incurred as a result of a "sham transaction."

The "sham transaction" doctrine is well established both in state and federal tax jurisprudence dating back to Gregory v. Helvering 293 U.S. 465 (1935). In that case, the Court held that in order to qualify for a favorable tax treatment, a corporate reorganization must be motivated by the furtherance of a legitimate corporate business purpose. Id at 469. A corporate business activity undertaken merely for the purpose of avoiding taxes was without substance and "[t]o hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose." Id at 470. The courts have subsequently held that "in construing words of a tax statute which describe [any] commercial transactions [the court is] to understand them to refer to transactions entered upon for commercial or industrial purposes and not to include transactions entered upon for no other motive but to escape taxation." Commissioner v. Transp. Trading and Terminal Corp., 176 F.2d 570, 572 (2nd Cir. 1949), *cert denied*, 338 U.S. 955 (1950). "[t]ransactions that are invalidated by the [sham transaction] doctrine are those motivated by nothing other than the taxpayer's desire to secure the attached tax benefit" but are devoid of any economic substance. Horn v. Commissioner of Internal Revenue, 968 F.2d 1229, 1236-37 (D.C. Cir. 1992). In determining whether a business transaction was an economic sham, two factors can be considered; "(1) did the transaction have a reasonable prospect, ex ante, for economic gain (profit), and (2) was the transaction undertaken for a business purpose other than the tax benefits?" Id. at 1337.

Taxpayer maintains that the transfer of its intellectual property to the Delaware holding company was made for a legitimate business purpose. Taxpayer argues that the royalty payments were made in furtherance of that business purpose, that the payments were made at arms length, and that the value of the intellectual property – and the consequent payments to the Delaware holding company – was determined by an independent third-party.

There is no evidence that taxpayer's business operations changed after the intellectual property was transferred to the Delaware holding company. There is no evidence that the Delaware holding company performed any of the work necessary to preserve or enhance the value of the intellectual property. There is no evidence that the Delaware holding company incurred any independent expenses to manage, preserve, or enhance the value of the intellectual property. There is no evidence that the Delaware holding company ever exercised any independent authority over "its" intellectual property or that it ever had the actual authority to do so. There is no evidence that the Delaware holding company exercised any independent business judgment in an effort to more fully exploit the value of the intellectual property. There is no evidence that the transactions entered into between taxpayer and the Delaware holding company in any way added to the value of the intellectual property.

The question of whether or not a transaction is a sham, for purposes of the doctrine, is primarily a factual one. Lee v.

Commissioner of Internal Revenue, 155 F.2d 584, 586 (2d Cir. 1998). The taxpayer has the burden of demonstrating that the subject transaction was entered into for a legitimate business purpose. IC 6-8.1-5-1(b).

The taxpayer has failed to meet its burden of demonstrating that the transfer of the intellectual property to the Delaware holding company or that the royalty payments subsequently made were supported by any business purpose other than tax avoidance. Taxpayer's tender of royalty payments was entirely illusory; any value the Delaware holding company received from the royalty payments accrued exclusively to the benefit of taxpayer because the Delaware holding company was entirely owned by taxpayer.

Taxpayer is, of course, entitled to structure its business affairs in any manner it deems appropriate and to vigorously pursue any tax advantage attendant upon the management of those affairs. However, in determining the nature of a business transaction and the resultant tax consequences, the Department is required to look at "the substance rather than the form of the transaction." Bethlehem Steel Corp. v. Ind. Dept. of State Revenue, 597 N.E.2d 1327, 1331 (Ind. Tax Ct. 1992).

FINDING

Taxpayer's protest is respectfully denied.

II. Abatement of the Ten Percent Negligence Penalty

Taxpayer maintains that its tax deficiencies were not due to negligence and that it exercised reasonable care in respect to the duties placed upon it by the Indiana code and Department regulations.

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..."

The audit assessed the negligence penalty on the ground that taxpayer had substantially underreported its tax liability for 1997, 1998, and 1999. Nearly all of the additional assessments for 1997 and 1998 arose from taxpayer's failure to report Indiana income for gross income tax purposes. The audit found that, for gross income tax purposes, the income "[was] clearly reportable."

Even setting aside the validity of the adjusted gross income tax argument raised in part I of this Letter of Findings, taxpayer has failed to demonstrate that the underreporting of its gross income tax liability – almost 70 percent for 1997 – was a justifiable exercise in "ordinary business care and prudence." 45 IAC 15-11-2(c). To the contrary, taxpayer's underreporting clearly seems to be a "failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." 45 IAC 15-11-2(b).

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0420020028.LOF

LETTER OF FINDINGS NUMBER: 02-0028
For the Period: 2000

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

ISSUES

I. Sales/Use Tax – Conversion Vehicle

Authority: IC 6-2.5-3-1; IC 6-2.5-3-2; 45 IAC 2.2-3-5; Tax Policy Directive #8; IC 6-8.1-10-1(e); IC 6-8.1-5-1(b); IC 6-8.1-10-2.1

The taxpayer protests the assessment of tax on a conversion vehicle.

STATEMENT OF FACTS

The taxpayer is in the vehicle (e.g., vans) conversion business. In 2000 the taxpayer purchased a vehicle [hereinafter referred to as "C"] exempt from tax. The taxpayer capitalized the "C" as a capital asset. Taxpayer argues that it sold the "C" in the early months of 2001, and that it was held as inventory.

I. Sales/Use Tax – Conversion Vehicle

DISCUSSION

As background information about its business, the taxpayer states it does not normally purchase vehicles:

Most of the chassis we convert are not purchased, but assigned from the manufacturer's pool to the [sales] dealer who purchases the vehicle.

The taxpayer explains that the "C" was not available from a manufacturer's pool and therefore the taxpayer "had to purchase the chassis to convert it."

The taxpayer also notes that the vehicle at issue in the protest was, at the time, a new product for the taxpayer:

We are in the vehicle conversion business and have been in the research & development stage of converting [C's]. This specific car was our first demo vehicle. It did go through a conversion process and was sold in February 2001.

The taxpayer protests that although the "C" was capitalized, the "C" was actually purchased for resale, and thus should not be subject to tax:

Obviously, there was an internal communication error that caused this vehicle to be capitalized. But, we do not feel that the misclassification of this vehicle should make it taxable.

At the hearing, the taxpayer stated that part of the mistake in capitalizing the "C" was that they normally do not buy the vehicle chassis and that this was first such "C" that the taxpayer converted.

The auditor argues that use tax is in fact due on the "C," not only because of the capitalization by the taxpayer, but also because the taxpayer's employees put the vehicle to personal use. Indiana Code 6-2.5-3-1defines "use" as:

(a) "Use" means the exercise of any right or power of ownership over tangible personal property.

And in pertinent part IC 6-2.5-3-2 states:

(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.

(b) The use tax is also imposed on the storage, use, or consumption of a vehicle, aircraft, or a watercraft, if the vehicle, aircraft, or watercraft:

(1) is acquired in a transaction that is an isolated or occasional sale; and

(2) is required to be titled, licensed, or registered by this state for use in Indiana. …

Also, Indiana Administrative Code deals with "use tax" and motor vehicles (*See* 45 IAC 2.2-3-5). The personal use of the "C" by various employees also runs afoul of Tax Policy Directive #8, which states that vehicles provided to anyone other than a full-time salesperson (examples provided by the Tax Policy Directive include part-time salespersons, mechanics, and managers) are subject to use tax.

In conclusion, the taxpayer capitalized the "C", thus taking it out of inventory. And, *arguendo*, even if the taxpayer had not capitalized the vehicle, allowing the personal use of the vehicle by anyone other than a full-time salesperson subjects the vehicle to use tax.

The taxpayer also mentions in a parenthetical that it is also protesting the penalty and interest. Interest cannot be waived by statute (IC 6-8.1-10-1(e)), and the taxpayer, who bears the burden of "proving the proposed assessment is wrong" under IC 6-8.1-5-1(b) has not developed any arguments on the penalty assessed per IC 6-8.1-10-2.1.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020082.LOF

LETTER OF FINDINGS NUMBER: 02-0082
Gross Income Tax
For the 1998 Tax Year

NOTICE: Under IC 5-22-7-7, 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. Non-Profit Water & Sewer Utility Cooperative – Gross Income Tax

Authority: IC 6-2.1-1-2(a); IC 6-2.1-1-16(17); IC 6-2.1-3-19; IC 6-2.1-3-19(b); IC 6-2.1-3-20; IC 6-2.1-3-21; IC 6-2.1-3-22; IC 6-2.1-3-33; IC 6-8.1-3-3; Department of Revenue Information Bulletin 73 (1988, 2001)

Taxpayer argues that, because it is a not-for-profit utility cooperative, it was not responsible for paying the state's gross income tax. Further, taxpayer maintains that it was not required to file for a not-for profit exemption certificate with the state in order to qualify for that exemption.

II. Prospective Treatment of Taxpayer's Gross Income Tax Liability

Authority: IC 6-8.1-3-3; IC 6-8.1-3-3(b); City Securities Corp. v. Dept. of State Revenue, 704 N.E.2d 1122 (Ind. Tax Ct. 1998); West Publishing Co. v. Indiana Dept. of Revenue, 524 N.E.2d 1329 (Ind. Tax Ct. 1988); Black's Law Dictionary (7th ed. 1999)

Taxpayer is requesting that any determination as to its gross income tax liability be applied on a prospective basis. Taxpayer maintains that it is entitled to this treatment because its past failure to pay gross income tax was based on excusable neglect and that the Department is estopped from, at this late date, assessing gross income tax liability.

III. Abatement of the Ten Percent Negligence Penalty

Authority: IC 6-2.1-3-19(b); 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; taxpayer maintains that failure to pay the tax was due to "excusable neglect" and was not due to the taxpayer's negligence.

STATEMENT OF FACTS

Taxpayer was formed in 1991 as a water and sewer utility cooperative. Currently, taxpayer serves about 800 customers and has two part-time employees. From the date of its formation until 1993, the taxpayer filed Indiana Corporation Income Tax returns. The taxpayer continued to file a federal not-for-profit return until 1998. However, taxpayer never filed for or received a "not-for-profit" designation from the Department.

Because the taxpayer sold a portion of its business in 1998, taxpayer filed a federal 1120 return for that year. Taxpayer filed the 1120 return because – having sold a portion of its business – taxpayer received a sufficient amount of unrelated business income to disqualify it from filing a 1998 federal not-for-profit return.

The Department of Revenue conducted an audit of taxpayer's 1998 business records. This audit resulted in the assessment of gross income taxes. In the belief that it was entitled to an exemption from those taxes, taxpayer submitted a protest. An administrative hearing was held, and this Letter of Findings was prepared.

I. Non-Profit Water & Sewer Utility Cooperative – Gross Income Tax

In 1993, IC 6-2.1-3-33 was amended to read, in part as follows: "Gross income received by... (5) A not-for-profit corporation formed for the purpose of providing a combination of; (A) Water; and (B) Sewer and sewage service; to the public; is exempt from gross income tax." In the apparent belief that it qualified as a "not-for-profit corporation," taxpayer stopped filing Indiana income tax returns.

The audit disagreed with taxpayer's conclusion and – despite the plain language of IC 6-2.1-3-33 – assessed taxpayer for gross income taxes on the ground that taxpayer had failed to receive from the Department a formal designation as a "not-for-profit corporation."

The taxpayer argues that the Department is exceeding its authority in requiring that it file for and receive such a designation. Taxpayer bases its argument on an interpretative application of the language of IC 6-2.1-3-19, IC 6-2.1-3-20, IC 6-2.1-3-21, and IC 6-2.1-3-22, which each grant a similar exemption to various other qualifying organizations such as fraternities, churches, social organizations, and hospitals. Taxpayer points out that, in each of those four statutory exemption statutes, there is found explicit language requiring that the putative exempt organization to file for and receive a not-for-profit exemption. *See* IC 6-2.1-3-19(b).

In the taxpayer's view, because there is no such explicit requirement found within IC 6-2.1-3-33, it was simply – on the basis of its own say-so – entitled to designate itself as a qualifying not-for-profit organization. In the Department's view, the taxpayer is required to be "registered as a not-for-profit corporation with the Indiana Department of Revenue." Department of Revenue Information Bulletin 73, September 2001.

The legislature has vested the Department with broad authority to implement and interpret the state's tax laws. IC 6-8.1-3-3 requires that the Department adopt regulations "governing; (1) the administration, collection, and enforcement of the listed taxes; (2) the interpretation of the statutes governing the listed taxes; (3) the procedures relating to the listed taxes...."

Clearly, IC 6-2.1-3-33 grants not-for-profit water and sewer companies an exemption from the gross income tax. However, just as plainly, the tax is imposed on "all the 'gross receipts' a taxpayer receives... from trades, business or commerce" (IC 6-2.1-1-2(a)) and that a "cooperative association," such as the taxpayer, qualifies as a "taxpayer." IC 6-2.1-1-16(17). It follows then, that there are water and sewer cooperatives which are subject to the gross income tax and that there are also water and sewer cooperatives that are not-for-profit ventures qualifying for the exemption provided under IC 6-2.1-3-33. The Department, in attempting to distinguish between the two, has adopted certain procedures which require that the entity "submit an application to file as a not-for-profit organization, Form IT-35A." Department of Revenue Information Bulletin 73, September 2001. *See also* Information Bulletin 73, 1988.

There is no indication that the Department exceeded its authority in requiring that the taxpayer apply for and actually receive a designation as a not-for-profit organization. Given that certain water and sewer cooperatives would not qualify for the designation; that certain water and sewer cooperatives would apply for and be denied the designation; and that a limited number of water and sewer cooperatives would qualify to receive the exemption, taxpayer's argument – that it was entitled to self-designate itself as a qualifying organization – fails.

However, even if the taxpayer had filed for and received a designation as a not-for-profit Indiana corporation, that designation would not have precluded the Department from assessing the 1998 income taxes. In order to qualify as a not-for-profit corporation, the state requires that "[t]he corporation... qualify for exemption under Section 501 of the Internal Revenue Code...." Department of Revenue Information Bulletin 73, September 2001. *See also* Information Bulletin 73, 1988. From the available information, it is apparent that taxpayer – having sold a portion of its business and realized substantial income as a result of that sale – no longer

qualified as a not-for-profit organization under the Internal Revenue Code. Because taxpayer no longer qualified as a federal not-for-profit organization, it would not have qualified under the state's own rules.

In addition, even if the taxpayer would have qualified for the exemption provided under IC 6-2.1-3-33, there is no indication that it filed the requisite "Annual Gross Income Tax Exemption Report" (IT-35AR) necessary for a qualifying taxpayer to retain its exempt status. There is no indication that taxpayer, having realized "unrelated business income" from the sale of a portion of its business, reported that income on a "Not-For-Profit Organization Income Tax Return." (IT-20NP).

FINDING

Taxpayer's protest is respectfully denied.

II. Prospective Treatment of Taxpayer's Gross Income Tax Liability

Alternatively, taxpayer argues that it is entitled to prospective treatment of the Department's determination that it is subject to the gross income tax.

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

In City Securities Corp. v. Dept. of State Revenue, 704 N.E.2d 1122 (Ind. Tax Ct. 1998), the tax court found that – despite the adoption of intervening regulations to the contrary – the Department could not impose additional gross income tax on the gain realized from the sale of tax-exempt bonds because the Department had allowed the plaintiff taxpayer to continue claiming an exemption subsequent to the adoption of the regulations disallowing the exemption. Id. at 1129. Having permitted the plaintiff taxpayer to treat the income as exempt for approximately 42 years, the Department was estopped from reaching back to the time the intervening regulations were adopted and assess an additional gross income tax liability against the plaintiff taxpayer. Id. at 1128-29.

However, unlike the plaintiff taxpayer in City Securities, taxpayer has failed to provide a critical element necessary to establish the estoppel defense. In order to establish that defense, taxpayer must demonstrate that "the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way." Black's Law Dictionary 571 (7th ed. 1999). The taxpayer has failed to establish that the Department – by word, deed, or writing – in any way induced the taxpayer into believing that the taxpayer could unilaterally grant itself not-for-profit status or that the taxpayer was not required to apply for and receive a not-for-profit designation as a qualified water and sewer cooperative. "The state will not be estopped in the absence of clear evidence that its agents *made* representations upon which the party asserting estoppel relied." West Publishing Co. v. Indiana Dept. of Revenue, 524 N.E.2d 1329, 1333 (Ind. Tax Ct. 1988) (*Emphasis added*).

The taxpayer's current quandary appears to be entirely of its own making, and was arrived at without any assistance from the Department.

FINDING

Taxpayer's protest is respectfully denied.

III. Abatement of the Ten Percent Negligence Penalty

Taxpayer argues that its failure to pay the gross income tax deficiency was not due to its own neglect and that it is justified in requesting that the Department exercise its discretion to abate the 10 percent negligence penalty. Further, taxpayer maintains that the negligence penalty should be abated under the "excusable neglect" defense found under IC 6-2.1-3-19(b).

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 failed to demonstrate that its initial decisions – concerning its not-for-profit status and the resultant gross income tax consequences – were arrived at through the exercise of "ordinary business care and prudence." In addition, the taxpayer is not entitled to invoke the "excusable neglect" defense under IC 6-2.1-3-19(b) That particular defense is available to those not-for-profit taxpayers who fail to submit the mandatory annual report by May 15 and who, as a result, have their tax exempt status cancelled. When the otherwise qualifying taxpayer has failed to file the annual report due to "excusable neglect," the Department is required to reinstate the exemption. The "excusable neglect" defense has no relevance to the 10 percent negligence penalty imposed under IC 6-8.1-10-2.1.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0220020345P.LOF

LETTER OF FINDINGS NUMBER: 02-0345P
Adjusted Gross and Supplemental Net Income Tax
For Calendar Year 1998

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

II. Tax Administration – Interest

Authority: IC 6-8.1-10.1

Taxpayer protests the interest assessed.

STATEMENT OF FACTS

Taxpayer protests the penalty and interest assessment for the late payment of its income tax. The due date of the return was April 15, 1999. Taxpayer filed its return late on October 14, 1999 with payment of approximately seventy percent (70%) of its tax liability. Taxpayer made no payment at the time of filing its extension request.

Taxpayer filed a penalty and interest protest letter dated June 20, 2002 and a FAX on July 18, 2002 requesting a hearing. On September 18, 2002, taxpayer stated that an amended return had been filed for the year at issue that results in a refund. A copy was faxed to the hearing officer prior to hearing.

At issue is the original return filed on October 14, 1999 that carries a late payment penalty.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it inadvertently under projected estimated tax payments and it regrets the oversight that has occurred. Taxpayer states that it had expanded warehousing operations, overpaid taxes in prior years, had problems with its systems, and is not a problem taxpayer.

Taxpayer did not make full payment by the original due date of the return. Approximately seventy percent of the tax due was paid on October 14, 1999 or 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.

II. Tax Administration – Interest

DISCUSSION

Taxpayer protests the interest assessed from April 15, 1999 to the current date. Taxpayer states that it paid its taxes in full by October 15, 1999 and calculated interest from the period of April 15, 1999 to October 15, 1999 for a total of $ 5,623.80 which it remitted with its protest letter.

Under current law, the Department has three years from the due date of the return or three years after the filing of the return to make additional assessments. Payments are applied to Penalty, Interest, and Tax, in that order and interest continues to accrue until final payment is made. The Department has no statutory authority to waive interest.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020353P.LOF

LETTER OF FINDINGS NUMBER: 02-0353P
Use Tax
For Calendar Years 1991 through 2000

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

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 Indiana corporation, was assessed a ten percent (10%) penalty for negligent failure to report use tax due to the State of Indiana. Taxpayer failed to register for sales and use tax; therefore a ten- (10) year audit was conducted. Taxpayer filed a BT-1 in March 2002 to become registered.

Taxpayer's representative, at hearing requests that the department waive the non-filing penalties because the taxpayer was ninety-one percent (91%) compliant in paying its sales and use taxes. Further, the parent corporation is on the East Coast and this was a first time audit.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer was assessed a penalty because it was not registered, failed to remit its use tax, and failed to file returns.

Taxpayer states it was ninety-one percent compliant and was audited for the first time. It has registered with the Indiana Department of Revenue and is filing returns currently.

Taxpayer was negligent in failing to register with the Indiana Department of Revenue and has not provided reasonable cause to allow a waiver of the penalty assessed.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020413P.LOF

LETTER OF FINDINGS NUMBER: 02-0413P
Use Tax
For Calendar Years 1999 and 2000

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer was audited for calendar years 1999 and 2000. Upon audit it was discovered that the taxpayer failed to remit use tax and had no use tax accrual system in place.

Taxpayer requests abatement of the penalty because a shareholder purchased multiple capital assets on his personal credit card. His monthly credit card bills submitted for reimbursement did not illustrate sales tax paid, but only the total amount paid. Taxpayer states it was unable to obtain the original sales invoices in order to demonstrate that sales tax was paid at the time of sale.

I. Tax Administration – Penalty

DISCUSSION

The audit indicates the taxpayer failed to remit use tax on clearly taxable items such as the rental of a video game machine, magazine subscriptions, and capital assets. Taxpayer had no use tax accrual system in place.

Taxpayer protests the penalty assessed and merely states that it was unable to prove that sales tax was paid.

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 have a use tax accrual system in place and has not provided reasonable cause to allow a penalty waiver.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020446P.L0F

LETTER OF FINDINGS NUMBER: 02-0446P
Adjusted Gross Income Tax
Calendar Years ended 12/31/97, 12/31/98, and 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(d); 45 IAC 15-11-2

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

The Department issued Liability Number 1999-01828234 for an underpayment penalty to which the taxpayer merely states that it has paid all penalties and interest pertaining to an audit that covers the year at issue.

Audits, however, do not cover the timing or amounts of estimated tax paid but the application of tax law. The company had missed adding back required taxes that resulted in penalties for additional tax due.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer merely states that all penalties and interest had been assessed and paid and since it paid estimates, it feels the assessment unfair and unjust.

Taxpayer failed to pay one hundred percent (100%) of the prior year's tax in estimated tax payments for 1999 that resulted in an underpayment penalty.

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

The taxpayer has not provided reasonable cause or viable arguments to allow a penalty waiver.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020448P.LOF

LETTER OF FINDINGS NUMBER: 02-0448P
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 portion of its furniture, storage building, truck cleaning equipment, building maintenance materials, maintenance tools, petroleum products, lawn products, and other miscellaneous items.

Taxpayer requests abatement of the penalty due to reasonable cause.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it experienced tremendous growth during the audit period, that its

underpayment represented an error of 7.9% of its total tax liability, that it had a self-assessment procedure in place, the liability was minimal, and that it had always filed its returns on a timely basis with no intent to defraud the state.

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

Taxpayer failed to remit use tax on clearly taxable items. Taxpayer also had exempt sales to customers for whom no valid exemption certificate was obtained. Fuel sales were both over and under stated resulting in an assessment. These were sales of diesel fuel through metered pumps. As a result, the taxpayer collected the sales tax on the underreported sales, which was not remitted to the Department as required under 45 IAC 2.2-7-3.

Although the total error is under ten percent (10%), the taxpayer was negligent in its duties to remit sales and use taxes.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0320020464P.LOF

LETTER OF FINDINGS NUMBER: 02-0464P
Withholding Tax
January through December 2001

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

II. Tax Administration – Interest

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

Taxpayer protests the interest assessed.

STATEMENT OF FACTS

Taxpayer was assessed late filing penalties. Taxpayer's CPA protested the penalties and states that a former employee of the company, with controller authority and responsibility, did not make the withholding payments but falsely created accounting records. The company owners were therefore misled and unaware that a liability for payment existed. It instituted the aid of a CPA, who requested that the Department waive the penalties and interest assessed against the taxpayer.

Taxpayer states its non-payment of withholding taxes arose from a controller that did not fulfill the responsibilities of the job. The taxpayer states it was unaware that the WH-1 returns had not been filed and tax had not been paid. Upon discovery, they immediately took steps to determine which periods needed returns and payments.

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 controller 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.

FINDING

Taxpayer's protest is denied.

II. Tax Administration – Interest

DISCUSSION

Taxpayer requests that the department waive the interest assessed.

The Indiana statute does not allow a waiver of interest.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020466P.LOF

LETTER OF FINDINGS NUMBER: 02-0466P
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 11, 2001 with payment of Forty-three percent (43%) of its tax liability. The Department issued its late payment assessment on July 30, 2002.

Taxpayer filed a penalty protest letter dated September 18, 2002 and states that it paid the same penalty amount with the tax return. The underpayment penalty was applied as the taxpayer failed to pay the required amount of estimated taxes. The taxpayer was also issued a late payment penalty because it did not pay at least ninety percent (90%) of the tax due by the due date of the return.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it paid the underpayment penalty and requests the department waive the remaining penalty and update its records accordingly.

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

0220020467P.LOF

LETTER OF FINDINGS NUMBER: 02-0467P
S-Corporation Income Tax
For Calendar Year 1999

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer failed to timely file its Indiana income tax returns for tax years ending December 31, 1998, 1999, 2000 and 2001. At issue in this protest are the penalty billings issued for 1999 and 2001.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer states that it attached a federal extension for the 2001 return. As a result, the penalty has been cancelled. The second is for the 1999 year. Taxpayer's protest is confusing as he merely states that the Department "didn't enforce this rule during 1999 and you shouldn't be allowed to do such in 2002 if you didn't do it in 2000".

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

Taxpayer failed to timely file its IT20-S returns for calendar years 1998, 1999, and 2000.

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

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

Taxpayer failed to file its returns timely. Two of those returns have already been billed with one being cancelled because a federal extension was attached to the return when filed. The Department has three years from the due date or date of filing to assess additional tax, penalties and interest. The department finds that a negligence penalty is proper.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020468P.LOF

LETTER OF FINDINGS NUMBER: 02-0468P
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 September 14, 2001 with payment of thirty-one percent (31%) of its tax liability. The Department issued its late payment assessment on August 26, 2002.

Taxpayer filed a penalty protest letter dated September 16, 2002 and states that its accounting firm prepared the IT-20 and self assessed an underpayment penalty on the return in addition to interest, which it paid. The underpayment penalty was applied as the taxpayer failed to pay the required amount of estimated taxes. The taxpayer was also issued a late payment penalty because it did not pay at least ninety percent (90%) of the tax due by the due date of the return.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it paid the underpayment penalty plus interest and requests the department waive the remaining penalty and update its records accordingly.

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

0420020469P.LOF

LETTER OF FINDINGS NUMBER: 02-0469P
Use Tax
For Calendar Year 1998

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

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer was audited for calendar year 1998. Upon audit it was discovered that the taxpayer failed to remit use tax on approximately eighty percent (80%) of its non-taxed taxable purchases.

Taxpayer requests abatement of the penalty because it did not purposely avoid paying tax on the invoices shown in the audit.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it is a growing company that has had considerable changes to its Indiana operations over the past few years. In addition, these changes as well as the tax law changes have made if difficult to determine with complete accuracy the taxability of each transaction.

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

Taxpayer failed to remit use tax due on clearly taxable items, was previously audited, has not installed a use tax system, made estimated use tax payments, and has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020470P.LOF

LETTER OF FINDINGS NUMBER: 02-0470P
Adjusted 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

At audit it was determined that the taxpayer failed to calculate and pay adjusted gross income tax. Taxpayer filed a consolidated return that included three entities doing business in Indiana or that were registered to do business in Indiana. Taxpayer merged into an acquiring corporation on December 4, 1998. Upon audit, it was determined that two of the included entities had no Indiana situs or income received from sources within the state of Indiana. Neither of these corporations may be included in an Indiana return for adjusted gross income. The auditor made those adjustments.

Non-Business Income was determined to be business income for the remaining location. The auditor made an adjustment and the audit excluded the two entities from the apportionment factor.

Taxpayer filed a penalty protest letter dated September 6, 2002 stating that it did not intentionally under report its income.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states it did not intentionally under report its income, that it merely erred in its application of the Indiana law associated with the treatment of installment sales, which was a unique situation. Taxpayer requests a penalty waiver primarily "to assess a penalty upon the corporation would result in an assessment to the taxpayer's acquiring

company for a return it did not participate in preparing" and it acquired all the stock in August 1998, a year subsequent to the year under audit. Taxpayer's acquiring company further states it had no knowledge of taxpayer's filing error and merely facilitated the audit. Taxpayer requests a penalty waiver for the unintentional errors in the application of the Indiana tax law by a corporation that was acquired.

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 correctly report its adjusted gross income that amounted to eighty-four percent (84%) of its tax and has not provided reasonable cause. Taxpayer did not make itself aware of the Indiana tax laws when doing business in this state and has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020480P.LOF

LETTER OF FINDINGS NUMBER: 02-0480P
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 underpayment of estimated tax. The taxpayer states it was acquired in January 1999 and was one of several acquisitions. Tax matters are handled in New York and the tax department had an extremely heavy tax compliance calendar and estimated payments were calculated using the best data available.

The Department issued its underpayment penalty liability on July 29, 2002.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it did not intentionally underpay taxes that were due.

To avoid the penalty, the quarterly estimate must equal at least twenty percent (20%) of the total income tax liability for the current taxable year or twenty-five percent (25%) of the final income tax liability for the prior taxable year.

The prior year's tax was $53,437. The taxpayer remitted $10,350 in estimated taxes with the balance in the amount of $30,658 being paid after the original due date of the return. Taxpayer has not provided reasonable cause to allow a penalty waiver.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020481P.LOF

LETTER OF FINDINGS NUMBER: 02-0481P
Sales and Use Taxes
Months Ending January 2001 through September 2001

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

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer was assessed late filing penalties for several months in the year 2001. In a letter dated October 30, 2001, taxpayer requests the department waive the penalties assessed against it.

Taxpayer states it had filed annually with its last remittance mailed on January 31, 2001 for a payment of $91,640.40 for the calendar year 2000. Recently the Department requested that the taxpayer file monthly. Because the Accounting Department had gone through some reorganization it requests a penalty waiver.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer states the failure to file monthly was not intentional and requests a penalty waiver.

The Department finds the penalty appropriate. Taxpayer's failure to remit the tax was not the result of reasonable cause. Taxpayer was aware of the monthly remittance requirements and has not provided reasonable cause to allow a penalty waiver.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020483P.LOF

LETTER OF FINDINGS NUMBER: 02-0483P
Adjusted Gross and Supplemental Net Income Tax
For Fiscal Year Ended September 30, 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 penalty assessed for the late payment of its income tax. The due date of the return was January 15, 2002. Taxpayer filed its return late on July 12, 2002 with payment of approximately thirty-seven percent (37%) of its tax liability.

Taxpayer filed a penalty protest letter dated September 9, 2002.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that its Indiana gross income tax increased by $10,697 from the prior year due to an increase in sales. Taxpayer further states that its office (out of state) processes estimated tax payments for approximately 400 returns, and at the time extension requests were made, it did not have all necessary accounting data available for the current year. It uses the prior year's information as its estimate because of the volume of returns being processed. The Indiana sales nearly doubled from the prior year, which is the direct cause for the additional tax due at the time the returns were filed.

Taxpayer did not make full payment by the original due date of the return. Approximately thirty-seven percent of the tax due was paid on July 12, 2002 or 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

0420020485P.LOF

LETTER OF FINDINGS NUMBER: 02-0485P
Sales Tax
For July 2002

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer paid its July 2002 sales taxes late and was assessed a late payment penalty.

Taxpayer, in a letter dated September 20, 2002 requests that the department waive the late payment penalty due to an oversight which was not intentional and it has always made its payment on time.

I. Tax Administration – Penalty

DISCUSSION

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

Taxpayer, in a letter dated September 20, 2002 protests the penalty assessed and states it did not make the late payment intentionally but was due to an oversight. It requests a penalty waiver due to its past history of paying its taxes promptly and accurately.

Taxpayer has not provided reasonable cause to allow a penalty waiver. An oversight is not reasonable cause.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0320020486P.LOF

LETTER OF FINDINGS NUMBER: 02-0486P
Withholding Tax
For July 2002

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer paid its July 2002 withholding taxes late and was assessed a late payment penalty.

Taxpayer, in a letter dated September 20, 2002 requests that the department waive the late payment penalty due to an oversight which was not intentional and it has always made its payment on time.

I. Tax Administration – Penalty

DISCUSSION

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

Taxpayer, in a letter dated September 20, 2002 protests the penalty assessed and states it did not make the late payment intentionally but was due to an oversight. It requests a penalty waiver due to its past history of paying its taxes promptly and accurately.

Taxpayer has not provided reasonable cause to allow a penalty waiver. An oversight is not reasonable cause.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020487P.LOF

LETTER OF FINDINGS NUMBER: 02-0487P
Sales Tax
For July 2002

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer paid its July 2002 sales tax late and was assessed a late payment penalty.

Taxpayer, in a letter dated September 9, 2002 requests that the department waive the late payment penalty due to an oversight which was not intentional and it has always made its payment on time.

I. Tax Administration – Penalty

DISCUSSION

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

Taxpayer, in a letter dated September 9, 2002 protested the penalty assessed and stated it did not make the late payment intentionally but was due to an oversight.

Taxpayer has not provided reasonable cause to allow a waiver of the penalty assessed.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020490P.LOF

LETTER OF FINDINGS NUMBER: 02-0490P
Gross Income Tax
For Calendar Year 1999

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer protests the proposed penalty assessment for the late payment of its income tax. The due date of the return was April 15, 2000. Taxpayer filed its return late on September 15, 2000 with payment of fifty-six percent (56%) of its tax liability. The Department issued its late payment assessment.

Taxpayer filed a penalty protest letter dated August 20, 2002. Taxpayer requests penalty abatement because it was unaware of the final tax impact until September 2000 at which time it found that the Indiana Gross Receipts doubled. Taxpayer states that the information available to them did not indicate this increase.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it was not aware of the increase of its gross income until after the due date. 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 original 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

0120020491.LOF

LETTER OF FINDINGS NUMBER: 02-0491
Individual Income Tax
For the Year ended December 31, 1999

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

ISSUE(S)

I. Tax Administration – Interest

Authority: IC 6-8.1-10.1

Taxpayer protests the interest assessed.

STATEMENT OF FACTS

Taxpayer filed its return with a refund due in the amount of $564.46 that was refunded on April 26, 2000 as shown on its return. On July 30, 2002, the Indiana Department of Revenue issued its Proposed Assessment after it compared the Federal Return to the Indiana Return that resulted in additional tax due. Taxpayer had inadvertently used the Federal Taxable Income amount instead of the Federal Adjusted Gross Income reported on the Federal Return.

Taxpayer filed an interest protest dated September 4, 2002 stating that it the State could not charge interest on a refund it gave the taxpayer.

I. Tax Administration – Interest

DISCUSSION

Taxpayer protests the interest assessed and states it did not intend to file an erroneous return which was due to human error.

Taxpayer, however, filed IT-40 in error requesting a refund that the Department honored. During its review, the Department found that the Taxpayer had erred in the preparation of its return. The Department refunded the taxpayer the amount of tax shown overpaid. Due to a crosscheck with the Federal Return, it was determined that the taxpayer underreported its income. The Department has no statutory authority to waive interest.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020493P.LOF

LETTER OF FINDINGS NUMBER: 02-0493P
Use Tax
For Calendar Years 1999, 2000, and 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 audited for calendar years 1999, 2000, and 2001. Upon audit it was discovered that the taxpayer failed to remit use tax on approximately twenty nine percent (29%) of its non-taxed taxable purchases.

Taxpayer requests abatement of the penalty and states the auditor was going to recommenced a penalty waiver because it was trying to do its job correctly.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it has tried to comply with the Indiana use tax laws. In addition, taxpayer alleges the auditor was going to recommend a penalty waiver.

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

Taxpayer failed to remit use tax due on twenty-nine percent (29%) of its clearly taxable items such as business cards, office supplies, golf shirts, cleaning supplies, janitorial and maintenance supplies, parts for automobiles, and other miscellaneous items. Furthermore, there is nothing in the file record to substantiate the taxpayer's allegation that the auditor would recommend a penalty waiver. Taxpayer has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020494P.LOF

LETTER OF FINDINGS NUMBER: 02-0494P
Sales Tax
For August 2000

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

II. Tax Administration – Interest

Authority: IC 6-8.1-10-1

Taxpayer protests the interest assessed

STATEMENT OF FACTS

Taxpayer was assessed a penalty for failing to file its ST-103 for August 2001 and to make payment. A Best Information billing was issued on June 4, 2002 that the taxpayer paid on July 30, 2002 with check number 5065. A field audit investigation determined that the taxpayer owed $665.25 in sales taxes for August 2001. The $396.10 Best Information payment was applied to the investigated amount.

Taxpayer, in a letter dated September 23, 2002 requests that the department waive the penalty and interest because it had paid the tax timely.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer was assessed a ten percent (10%) penalty because it failed to file its return and pay the tax collected.

Taxpayer states its CPA handled its tax for August 2001 that was mailed on September 20, 2001.

Department records indicate neither tax return filed nor payment received. Taxpayer states that the check had not cleared its account and it was unaware that the tax had not been paid until the auditor notified her.

Taxpayer submitted a payment of $396.10 on July 30, 2002 for a BIA billing and taxpayer believed this took care of the problem. On September 9, 2002 another billing for $790.68 was received with a portion being penalty and interest. Taxpayer states it is unjust to be assessed penalty and interest when the Department lost its check, report, and tax number.

The Department has credited the taxpayer with the $396.10 BIA payment (Liability Number 2001-01714352) and has applied it to Liability Number 2001-02004869 which has a current balance of $388.99 at October 21, 2002 with a per diem of $0.08.

Taxpayer has not provided reasonable cause to allow the penalty to be waived.

FINDING

Taxpayer's protest is denied.

II. Tax Administration – Interest

DISCUSSION

Taxpayer protests the interest assessed.

FINDING

The Department has no authority to waive interest.

DEPARTMENT OF STATE REVENUE

0220020505P.LOF

LETTER OF FINDINGS NUMBER: 02-0505P
Adjusted Gross Income Tax
For Calendar Years 1997, 1998, and 1999

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

ISSUE(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 nonfiler that elected to file S Corporation returns. It does refinishing services under hotel contracts, apartment contracts, and individual homeowners. The department issued a penalty billings for failure to file IT-20 S returns.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer's letter states that the company was audited and no liability was found to be due.

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

Taxpayer failed to file its IT20-S returns for calendar years 1997, 1998, and 1999.

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

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

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

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020520P.LOF

LETTER OF FINDINGS NUMBER: 02-0520P
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 with payment of fifty-one percent (51%) of its tax liability. The Department issued its late payment assessment on July 8, 2002.

Taxpayer filed a penalty protest letter dated July 31, 2002 that states that it had a change in ownership in 1999 and the year 2000 was the first full-year tax return that it prepared. At the time the 2000 Indiana returns were due, the 1999 returns were not yet finalized. Taxpayer avers that it believed it would have a substantial net operating loss in 2000 and fully expected the $29,000 to cover its liability.

The taxpayer was also issued an underpayment penalty on July 29, 2002 but failed to respond to the assessment timely.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it had not finalized the 2000 return because the 1999 return had not been finalized. It requests a penalty waiver.

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.

Taxpayer, on October 28, 2002 requests a penalty waiver because it had not received a response to its previous notice dated July 31, 20002. The Notice Number 02004864081 dated July 29, 2002, however, is the underpayment of estimated income taxes in the amount of $2,989.98. Taxpayer did not protest the penalty timely and has provided no reasons why it failed to pay estimated taxes.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

02960635.SLOF

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

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

ISSUE

Adjusted Gross Income Tax – Business Income

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

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

STATEMENT OF FACTS

The taxpayer is primarily engaged in developing, manufacturing, and marketing consumer, professional, health, and other imaging products and services. After an audit, the Indiana Department of Revenue (department) assessed additional corporate income tax. The taxpayer protested the assessment. A hearing was held and a Letter of Findings was issued on May 30, 2002. The taxpayer requested and was granted a rehearing on the issue of the classification of income from the sale of a division as business rather than non business income.

Adjusted Gross Income Tax – Business Income

DISCUSSION

The taxpayer protests the classification of the income from the 1994 sale of the division that supplied diagnostic products for use in clinical chemistry analysis and immunodiagnostitcs. The taxpayer reported this income as non-business income that is not subject to Indiana adjusted gross income tax. The department reclassified this income as business income. As business income, the department apportioned part of it to Indiana and subjected that portion to adjusted gross income tax.

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

The Court looks to 45 IAC 3.1-1-20 and 30 for guidance in determining whether income is business or non-business income under the transactional test. These regulations state "... the critical element in determining whether income is 'business income' or 'non-business income' is the identification of the transactions and activity which are the elements of a particular trade or business." Id. at 664. 45 IAC 3.1-1-30 lists several factors in making this determination. These include the nature of the taxpayer's trade or business; substantiality of the income derived from activities and relationship of income derived from activities to overall activities; frequency, number or continuity of the activities and transactions; length of time income producing property was owned; and taxpayer's purpose in acquiring and holding the property producing income. In May, the Court found that the transactional test was not met when a retailer sold a retailing division to a competitor because the taxpayer was not in the business of selling entire divisions. Id. at 664.

The nature of this taxpayer's business included the development, production and sale of imaging products and services. Almost all of the taxpayer's income derived from transactions associated with these activities. The division that the taxpayer sold was accounted for and run as a separate business unit for the ten-year period prior to its sale. The sale of the medical imaging division was an unusual and out of the ordinary transaction for the taxpayer. The sale of this division did not meet the transactional test for classification as business income.

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

In the original Letter of Findings, the department found that the taxpayer's proceeds from the sale of the health imaging business were business income because the payment of the long term debts allowed the taxpayer to focus more funds to the development and management of its consumer photography business. The taxpayer argued at the rehearing that the proceeds from the sale were not business income because the taxpayer did not use the proceeds in the working capital of its primary function.

In 1988, the taxpayer financed the acquisition of its health imaging business with long-term debt contracts. Management subsequently decided to terminate its involvement in the health imaging business and divested its interests in 1994 and 1995. The taxpayer contended that it put the proceeds from the sale into an irrevocable trust to satisfy the long-term debt originally incurred as part of the acquisition of the health imaging business, the proceeds from the sale did not qualify as business income to the taxpayer.

The taxpayer presented a copy of the Irrevocable Trust Agreement dated December 19, 1994. The taxpayer was not able, however, to produce any evidence that the monies received from the sale were actually the same monies deposited into the trust. In fact, the taxpayer explained that no "paper trail" existed to substantiate that the proceeds of the sale went directly into the trust. The monies deposited into the trust could have been monies raised from another source. The proceeds from the sale made more funds available for the taxpayer's working capital.

The taxpayer had the same long term debt before and after the sale. The taxpayer needed working capital after the sale and had more funds available for working capital because of the sale. These funds were used to support the taxpayer's business function. The repayment of these debts was essential to the continuation and completion of the whole of the taxpayer's business selling imaging products and services.

The taxpayer did not sustain its burden of proving that the tax assessment was incorrect.

FINDING

The taxpayer's protest is denied.